doi: 10.1093/chinesejil/jmv011; Advance Access publication 2 June 2015

Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History

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Abstract

The Ukrainian crisis poses a new challenge of an extraordinary dimension to traditional international law. Many well-established concepts of international law have been put to the test. For some, in the wake of the *Kosovo* advisory opinion a new international law is in the making and the Ukrainian crisis is only a further episode in a longer lasting process pointing in the same direction. For others, the Ukraine case is absolutely particular and in this context historical considerations should prevail over legal dogmatism. It is argued here that traditional international law is very well suited to deal with the Ukraine case. It is further submitted that international law as it stands is flexible enough to cater to the needs of all parties involved. While the concept of territorial sovereignty is not negotiable, there are plenty of instruments and procedures available that should not only guarantee full protection of the Russian speaking groups within the Ukrainian State but also the actual promotion of their rights.

I. Introduction

1. In an interview with the German weekly "Die Zeit" former German Chancellor Helmut Schmidt argued that in judging the present Ukraine crisis, the history of Crimea is more important than International Law.[1] This statement may ring alarmingly to traditional international lawyers but it should nevertheless not be easily dismissed

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1 Wichtiger als die Berufung auf das Völkerrecht ist die geschichtliche Entwicklung der Krim. ZeitOnline, 27 March 2014, Putins Vorgehen ist verständlich (www.zeit.de/2014/14/helmut-schmidt-russland).

as an isolated private opinion by a long retired politician detached from political reality and in search for public attention. Opinions like the one cited are rather very common both among present and former statesmen as well as in academic literature even though they may be expressed in different words and may be presented in a far more sophisticated manner. In their essence, they boil down to the conviction that the Ukraine crisis cannot be solved by recourse to traditional categories of International Law or what has been characterized as such in the past.

2. For many, the Ukraine crisis epitomizes a paradigmatic change in international law and it lays open a deep rift in this area of law, a rift whose origins can be traced back to the end of the Cold War. In fact, as is known, the year 1989 was seen as the end of an epoch and the beginning of a new one in which, according to a famous hypothesis, the lack of the previous ideological dialectic should lead to an "end of history". The Western victory in this struggle should lead to a triumph of Western values, especially in the fields of human rights and democratic values.[2] Considering the necessary impreciseness of political predictions, this theory about the end of history was revealed to be, in contrast, remarkably fitting, at least for the first years after it had been conceived. Now, however, we seem to be witnessing a U-turn in this development and the old East-West conflict is coming back, even though it now unfolds in a radically changed ideological setting and along a divide whose borders have been removed far to the East. No longer do we have to fear a uniform international order[3] deprived of antagonist elements that are needed as driving forces for the further development of the system as a whole. We are faced with quite the opposite: The basic consensus as to pivotal concepts of international law such as the prohibition of the use of force, the meaning of the right to self-determination or of territorial integrity appears to be endangered, and we are at risk of falling behind even the very limited consensus that upheld the law of coexistence[4] of the Cold War's heydays. In the following an attempt will be made to portray the key points of the divide separating East and West in the context of the Ukrainian crisis. After that will come an examination of whether we are really witnessing a fundamental trend towards fragmentation, as some observers argue, or whether the divide which has opened recently is rather to be seen as a violation of an international legal order that continues to be substantially uniform, at least in its core elements. In this, the element of

2 See Francis Fukuyama, The End of History and the Last Man (1992). On the new East-West conflict as a driving force for the further development of present-day international law see Rein Müllerson, Ukraine: Victim of Geopolitics, 13 Chinese JIL (2014), 133–145.

3 See Michael Trebilcock/Robert Howse, The Regulation of International Trade (2005), 10 referring to (and contradicting) Thomas Friedman, The Lexus and the Olive Tree (2000).

4 This is to borrow the felicitous image created by Wolfgang Friedmann. For a new perspective on this subject see Sienho Yee, Towards an International Law of Co-Progressiveness (2004).

history plays an important role. To begin this endeavour, first an overview of the Ukraine crisis shall be given.

3. This analysis concentrates on international law. The factual causes that brought us to the situation we are now confronted with might be interpreted differently.[5] What matters here is whether this extraordinary challenge should prompt the State Community to re-define some basic rules of International Law. Such a proposition is rejected here.

II. The basis of the Crimean question

4. It is interesting to note how much attention legal analysts are devoting to the historical vicissitudes of Crimea when analysing the present legal status of this peninsula, thereby paying tribute, at least indirectly, to Helmut Schmidt's remarks cited above. It seems that history becomes more preponderant the weaker the legal arguments are.

5. Due to its privileged, sub-Mediterranean climate, its lush vegetation and its easy accessibility from the South by the Black Sea and from the North by the Isthmus of Perekop, Crimea over centuries has attracted the most diverse populations and has become a melting pot of different cultures and ethnic and religious groups. New settlers came both peacefully and by force. If legal title is to be attributed on the basis of historic title the outcome will much depend upon the period chosen as a starting point.[6] Greeks, Romans, Persians, Byzantines, Gothics, Huns, Armenians, Genoese, Tatars, Germans and Ottomans colonized the peninsula. Dominant influence, in political, ethnic and cultural terms, was gained by the Tatars that invaded the peninsula as part of the "Golden Horde" in the 1230s, so that in the aftermath, when political control over this territory again changed hands, the Tatars came to be retained as the "indigenous population".[7] In parallel to ethnicity, religion became the decisive factor for identity building and group formation. Thus, Ottoman rule, starting in 1475, probably meant a lesser caesura than the Russian conquest by Katharina the Great in 1783, which wound up in a sustained Russification process. Considerable parts of the Tatar population left Crimea for the Ottoman Empire as a consequence of economic, cultural and religious discrimination by the Russian authorities. If the term "Russification" is used, care must be taken to note the changing meaning of this concept over time. In the 18th century it had as yet no nationalist underpinning and was surely not to be seen as being in any way juxtaposed to "Ukrainization". In fact, at that time Russification was, first of all, a process steered by the Czar in St. Petersburg and

5 For a recent view giving particular attention to the Russian perspective see Richard Sakwa, Frontline Ukraine—Crisis in the Borderlands (2015).

6 For a profound historic analysis see Andrew Wilson, The Ukrainians: Unexpected Nation (2002) and Bill Bowring, The Crimean autonomy, in: Marc Weller/Stefan Wolff (eds.), Autonomy, Self-Governance and Conflict Resolution (2005), 75–97.

7 See B. Bowring, above n.6, 81.

directed at the political, economic, cultural and religious conquest of the peninsula—and in this context, the gates were opened for a broad immigration from various Russian provinces and other European countries. In this way, on the one hand, a particular Crimean cultural reality was formed. On the other, however, there could be no doubt that Crimea remained economically and culturally attached primarily to the geographic region that much later would make part of the State of Ukraine. More than the result of a precise political design this was the consequence of geographic proximity. After the demise of the empire of the Czars, the overall perspective and the rhetoric changed dramatically. The tumultuous events of these years sewed the seeds for deeply rooted nationalistic movements that still permeate any discussion about the Ukraine and Crimea. It is interesting to note that the main impulses for these developments came from Western Europe. First it was the Treaty of Brest-Litowsk of 1918 that assigned Crimea to the newly created, but short-lived People's Republic of Ukraine, igniting thereby the idea of a Ukrainian nation of which Crimea should necessarily make part.[8] The second impulse came from the Russian revolution leader Wladimir Iljitisch Lenin who intended, at least in the first years of his reign, to implement an idea of national self-determination that was very much inspired by Western European (and in particular, Austrian and German) thought.[9]

6. As a consequence, in October 1921 a Crimean Autonomous Soviet Socialist Republic was created. This ASSR was integrated, however, in the Russian Socialist Federation of Soviet Republics (RSFSR), as neither Lenin nor his successor Stalin intended to strengthen the Ukraine. Now a "Golden Age" for the local Tatar community began. The 1920s brought about an extensive political and cultural empowerment of this people on the basis of a largely territorial autonomy.[10] The late 1920s saw a radical reversal of this policy at the hands of Joseph Stalin, who pursued a policy of pan-Soviet nationalism. Under this policy there was no place for positive measures for single

8 Although this experience was a very short-lived one it lasted long enough to enroot the idea of Ukrainian nationalism also in the minds of parts of the Crimean population. A similar phenomenon had taken place in Italy more than a hundred years before: The Cisalpine Republic created in Italy by Napoleon Bonaparte in 1797 was also very short-lived, even if also the years of its successor regime's (the Kingdom of Italy) existence are added to its lifespan (French domination in Italy ended in 1814), but nonetheless this experience of national unity is considered to be of decisive importance for the birth of the Italian national idea and, eventually, for the creation of the Italian nation.

9 On Lenin's nationality policy see Kurt Rabl, Das Selbstbestimmungsrecht der Völker (1973), 64 and Antonio Cassese, Self-determination of peoples (1995), 14.

10 Susan Stewart speaks about a "policy of nativization" resulting "in the assignment of an over-proportional number of government posts to Crimean Tatars and the intensive development of their language and culture". See Susan Stewart, Autonomy as a Mechanism for Conflict Regulation? The Case of Crimea, 7 Nationalism and Ethnic Politics (2001), 113–141, 117.

nationalities. Peoples that were considered to be disloyal were subjected to outright discrimination and persecution, as was the case with the agrarian population of the Ukraine.[11] Therefore, at the beginning of the 1930s, an unending spiral of discrimination, perceived or actual disloyalty and enhanced discrimination against a series of nationalities set in. Tatars and other minorities living on the Crimean peninsula (such as Greeks, Armenians, Germans and Bulgarians) were caught in the middle of the storm when they greeted Nazi invaders as liberators in 1942 only to become accused of treason when Sovjet troops returned in 1944. These groups had to pay a heavy price for their collaboration, as Stalin ordered their deportation to Central Asia (in particular Uzbekistan), a measure that caused the death of nearly half of the over 200.000 people deported. Only towards the end of the 1980s, when the Soviet Union was already in the process of disintegrating, were the Tatars allowed to return to their ancestral homeland.[12] In the meantime, however, the situation in Crimea had profoundly changed. Stalin abolished Crimean autonomy in 1945 and the peninsula became a mere "oblast", i.e. an administrative subdivision of the RFSFR. The widely emptied peninsula now attracted settlers from inner Russia and Ukraine who again, over the years, developed a partly separate Crimean identity.

7. As will be seen in more detail below, this unique ethnographic history of Crimea[13] explains well why it is difficult or next to impossible to approach the Crimean question with a concept of self-determination based on an ethnic or national perspective. In fact, the brutal resettlements by Josef Stalin had massively uprooted the peninsula's ethnic landscape, depriving many minorities of their home. While being largely decimated, these groups maintained, at least in part, their attachment to their former homeland so that overlapping, competing claims for this territory came up.

8. Inner-Soviet politics added further complexity, at least if seen from hindsight, to the Crimean question. Only 14 years after having been spoiled of its autonomy, in 1954 the Crimea was attributed by Nikita Krushtchev to Ukraine. At that time this was little more than a symbolic political gesture and not a transfer of sovereignty whatsoever. Nonetheless, these measures would have far-reaching consequences four decades later when the Soviet Union dissolved. In 1954 nobody could have expected that

11 For some analysts the persecution of Ukrainian Kulaks resulted in a real genocide with more than 4 million victims. See Mark Levene, The Crisis of Genocide, vol. I (2013), 320.

12 As a consequence of this return, the Tatars reached 12 per cent of the whole Crimean population.

13 It is only a historical anecdote that the Crimean peninsula should play also an important role in Adolf Hitler's resettlement plans based on absurd historic assumptions when he had in mind to resettle the South Tyrolians on the Crimea in order to re-establish a Germanic (Gothic) population that had purportedly existed during the great migrations.

such a dissolution could take place and even less that it could be administered on the basis of a strict application of the *uti possidetis* principle.

9. As will be examined more closely below, the legal consequences of these events were far-reaching, even though their implications remain strongly contested. At this point it suffices to note that the 1954 measure contributed to re-moulding the identity of the Crimean people (but, and surely to a lesser extent, it also affected the Ukrainian identity in a broader sense).

10. This brief historical account evidences that the concepts of identity and nationality have to be handled with great care in the context of Crimea, as the 20th century, the century in which the present meaning of these criteria was largely formed, brought about continuous and radical transformations of the Crimean society,[14] prompting a use of these terms with different, and in part contrasting, meanings. Confusing as this situation may be when confronted from the viewpoint of the social sciences, it leads to outright contradictory results when these concepts are taken as a basis for legal analysis and corresponding claims. The result of any such analysis will much depend on the starting point taken and on the question whether one is prepared to follow a "mainstream approach" based on the international law of cooperation as it developed with particular force after 1989. In the case of the contrary, different answers to the problems portrayed are possible. Such an approach may cater to an array of interests but at the same time the question may arise what is left of international law as an overarching, commonly agreed upon international legal order.

III. The unfolding of the present Crimean crisis

11. The disintegration of the USSR re-awakened ethnic nationalism that was supposed to have been overcome by socialist fraternity between all members of the class-free society. The nationalist movements that sprung up all over the territory of the USSR were of different intensity and aim, as on one side they were associated with requests for autonomy and on the other with the demand for more far-reaching forms of self-determination. They were of particular strength and authority if reference could be made to a pre-Soviet historical autonomy. In the case of Crimea it was surprising to see how the historical experience of the inter-war ASSR, created, as has been shown, primarily for the purpose of the empowerment of Crimean Tatarians, was now referred to, first of all, by the Russian majority that has been the major beneficiary of the Tatarians' repression.[15] While up to 1991 the Russian community had gained a dominant

14 As to the general problem with nationalism with regard to Ukraine see Taras Kuzio, Nationalism in Ukraine: towards a new theoretical and comparative framework, 7 Journal of Political Ideologies (2002), 133–161.

15 B. Bowring, above n.6, 82, referring to Natalya Belitser, Crimean Autonomy: Positive and Negative Aspects in Terms of Ethnic conflict (2003), 3.

position in Crimea not only with regard to the Tatars but also in respect to the Ukrainians, the splitting up of the USSR risked reducing them to a minority within the Ukraine and so they were strongly motivated to fight for a strong autonomy. Interestingly, in the independence referendum of 1 December 1990, which resulted in a resounding vote of 90% in favour of independence, in Crimea 56% of the voters opted for independence from the Soviet Union. Partially in contrast to this result, in a referendum of 20 January 1991 the Crimean population asked for the status of an Autonomous Republic within the Soviet Union while Kiev was prepared to grant autonomy within the Ukrainian Republic. In the following years, both parties stuck more or less to this position with some variations depending on the broader political developments. On 12 February 1991 Ukraine granted Crimea autonomous status and on 29 April 1992 this autonomy was further upgraded. The Russian majority in Crimea, however, insisted on a more prominent status and required a partnership of equals that could translate, for example, into a confederation. The assertive attitude by the Crimean Russians was comforted by their Russian neighbour. In this context, the most striding act was a resolution of May 1992 by the Russian Duma declaring that the transfer of Crimea to Ukraine of 1954 had been illegal. This declaration as well as the Duma's statement of the following year according to which Crimea was still part of Russia[16] were legally irrelevant, but they mirrored a tense relationship between Ukraine and Russia where no party intended to enter into a meaningful dialogue with the other. Such a dialogue about Crimea could start only when the overall climate between Kiev and Moscow improved, and this was the case when Russophile Leonid Kuchma was elected President of Ukraine in 1994.[17]

12. For her renouncement of nuclear weapons (and their parallel accession to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear State) specific guarantees were given to Ukraine by Russia, Great Britain and the United States. In the Tripartite Agreement of 5 December 1994 (Budapest Memorandum) respect of Ukraine's independence, her sovereignty and her existing borders was guaranteed.

13. Respect for territorial integrity and the inviolability of borders as well as assurances as to the non-use of force and the prohibition of the threat of force were further confirmed by the 1997 Treaty on Friendship, Cooperation and Partnership between Russia and Ukraine. This treaty, for which Ukraine had strongly aspired because of an urgent need for economic stabilization, was made possible by a series of concessions by Ukraine in the years before. A first ground-breaking arrangement was reached in 1994 when Russia and Ukraine concluded a preliminary agreement

16 This statement was issued in July 1993. For a detailed account of these developments see B. Bowring, above n.6, 82.

17 Ibid., 83.

on the division of the Black Sea fleet by which most of the naval units were attributed to Russia.[18] On 28 June 1996, the Ukrainian parliament passed a new constitution which qualified Ukraine as a unitary State but provided nonetheless for broad autonomous rights for Crimea. This peninsula should have its own government, a parliament and a constitution, although the Ukrainian Constitutional court reserved the power of ultimate control over Crimean legislation.[19] The Russian-Ukrainian relationship soured, however, over economic issues. While Russian president Vladimir Putin sought to integrate Ukraine in a Eurasian free trade agreement, the Ukrainian government had approached the European Union for closer economic cooperation. In 2013 Viktor Janukowytsch began to shy away from the conclusion of an economic association agreement with the EU which was longed for by considerable parts of the Ukrainian population. This led to protest at the Maidan place in Kiev and violent counteraction by the Ukrainian government, with nearly 100 deaths. At the end, Janukowytsch's government was brought down by a revolutionary movement in spring 2014, and he had to flee to Russia. Meanwhile a pro-Western government was established in Eastern Ukraine and in Crimea secessionist movements strongly supported by Russia led to a de facto break-away of these regions from Ukraine.

14. After a declaration of independence by the Crimean Parliament on 11 March 2014 and a highly contested referendum held only five days later on 16 March 2014, in which a vast majority of the Crimean population seemed to vote for an accession of Crimea to Russia,[20] the Supreme Council of Crimea declared definitely the independence of Crimea on 17 March 2014. Only one day later, on 18 March 2014, Crimea acceded to Russia by the conclusion of a treaty. The tightly planned procedure made sure that the Russian constitution was respected[21] while, at the same time, the Ukrainian constitution was blatantly violated.

18 Russia obtained 80 per cent of the vessels, Ukraine 20 per cent. By the Black Sea Fleet Status of Forces Agreement (SOFA) of 1997 Russia leased naval facilities in Crimean ports where she was also permitted to deploy up to 25,000 troops. In 2010 the pro-Russian Ukrainian president Viktor Janukowytsch agreed by the so-called Kharkiv Accords to prolong this agreement until 2042, obtaining in return by Russia the promise for the supply of discounted gas. See Ch. Marxen, The Crimea Crisis, 74 ZaöRV (2014), 367–391, 371.

19 S. Stewart, above n.10, 123.

20 According to official data, 85 per cent of the eligible voters participated in this referendum and 97 per cent voted in favour of accession.

21 According to the Russian constitution only an independent territory could join the country; therefore Crimea had to be independent for at least one day.

IV. Russian military intervention—its legal qualification and possible justifications

IV.A. The intervention as a fact

15. The way Crimea's accession to Ukraine happened suggests not only the presence of tight administrative and logistical planning by Russia but also the presence of strong military support by this country. Russia's military intervention offers a complex picture with many grey areas, but on the whole neither a direct nor an indirect military intervention can be denied. Unrest in Eastern Ukraine and in Crimea started soon after the end of the Sochi Winter Olympic games (lasting from 7 to 23 February 2014). First, primarily logistical and material support was provided. In the days following, paramilitary forces poured in whose degree of organization, equipment and military discipline clearly revealed their backing and provenience from a strong military power, even though these units bore no signs of recognition. In the last stage, at least in Crimea, any attempt to hide Russian sponsorship and direct attributability of these acts was abandoned. Troops stationed in the Russian bases in Crimea actively supported the secessionist attempts, beleaguered Ukrainian military bases and compelled Ukrainian soldiers to leave Crimea. Accordingly, the rhetoric by the Russian government, and in particular by Russian president Vladimir Putin, also changed. While Putin in his first statements strongly denied any Russian involvement in this conflict, subsequently he concentrated on providing justifications for involvement, thereby implicitly acknowledging its occurrence.[22] In academic literature no doubt is left on this fact.[23] As a consequence, it can be stated that the intervention as such is no longer subject to discussion. The discussion has rather to concentrate on the qualification of this intervention and on the question whether there are legal justifications for such an intervention. In the following, a series of justifications brought forward by the Russian government and academic writers shall be examined as to their persuasiveness and the consequences of the definition of the intervention shall be drawn.

22 See for more detail William W. Burke-White, Crimea and the International Legal Order, 56 Survival (2014), 65–80.

23 See i.a. Jerzy Kranz, Imperialism, the Highest Stage of Sovereign Democracy: Some Remarks on the Annexation of Crimea by Russia, 52 AVR (2014), 205–221, 213: "The involvement of the Russian army […] and that of Russian special troops (disguised as irregular groups) is undeniable." Even authors prepared to accept justifications for such an intervention do not deny the intervention as a fact. See Michael Geistlinger, Der Beitritt der Republik Krim zur Russländischen Förderation aus der Warte des Selbstbestimmungsrechts der Völker, 52 AVR (2014), 175–204, 198 who speaks of "events in Crimea accorded between Moscow and Crimea and re-accorded time and again on the basis of changing situations". He further says that he favours the thesis that the intervening troops bearing no recognition signs and qualifying themselves as "Crimean territorial self-defence units" were in reality Russian elite troops.

IV.B. Does Russian intervention meet the "Nicaragua test"?

16. There is broad agreement that acts of persons or groups of persons in secessionist entities can be attributed to an outside power if the respective subjects are in fact acting on the instructions of, or under the direction or control of, that power in carrying out the conduct. Diffuse uncertainty exists as to when such control by an external power is given.[24]

17. It has been suggested that it is impossible to attribute responsibility to Russia for the intervention in Ukraine due to the "Nicaragua test" developed by the ICJ in 1986.[25]

18. As is well known, on that occasion the ICJ declined to hold the United States responsible for the acts committed by the Contras in Nicaragua although it was uncontested that the Contras had received extensive military assistance by the US. According to the ICJ "the United States' participation, even if preponderant or decisive, in the financing, organizing, training, supplying, and equipping of the contras […] and the planning of its operation" was insufficient for such an attribution.[26] For direct attribution to the US of the acts committed by the Contras effective control over the military or paramilitary operations in Nicaragua was required by the ICJ.[27] This test—while seemingly put into question by the more lenient "overall control test" in the Tadic case[28]—was afterwards confirmed in the Genocide case of 2007[29]. As is well known, the Nicaragua test has been harshly criticized in practice and literature for being too restrictive, but within the present case it can be argued that Russian intervention easily meets the criteria devised by the ICJ.

19. As explained above, the troops acting in Eastern Ukraine and in Crimea can hardly be qualified as local insurgents obtaining assistance from Russia; there are rather good reasons to assume that the bulk of these troops acted under "strict control"[30] by Russia and therefore their acts can be directly attributed to this power. This is in particular the case for the troops referred to by locals as "little green men",

24 See Stefan Talmon, The Responsibility of Outside Powers for Acts of Secessionist Entities, 58 ICLQ (2009), 593–617.

25 See W.W. Burke-White, above n.22, 77.

26 ICJ, Military and Paramilitary Activities in and against Nicaragua, 1986, para. 115.

27 Ibid.

28 ITCY, Prosecutor v. Dusko Tadic (15 July 1999), IT94-1-A.

29 ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 26 February 2007.

30 For such control to be given, according to Stefan Talmon, the ICJ in Nicaragua elaborated the following criteria:

(1) The secessionist entity must be completely dependent on the outside power.
(2) This complete dependence must extend to all fields of activity of the secessionist entity.
(3) The outside power must actually have made use of the potential for control inherent in that complete dependence, i.e. it must have actually exercised a particularly high degree of control.

Talmon, above n.24, 498.

thereby making fun of the fact that these troops pretended to come from nowhere. No doubt can exist that the acts of the Russian troops stationed in Crimean ports, which also participated in the fights on the peninsula, can be attributed directly to Russia. In 2014 Russia's military engagement was probably more pronounced in Crimea than in Eastern Ukraine, but in the early 2015 fights in Eastern Ukraine, direct involvement of Russian troops was proved also for this region.[31] Even if the involvement of Russian soldiers is left aside, the strong support given by Russia to the secessionist forces can be qualified at least as a violation of Ukrainian sovereignty, if the demanding Nicaragua test is applied.

20. In sum, whatever "control test" we take recourse to, Russian support for secessionist tendencies in Ukraine on the factual level constituted a violation of international law whereby both the provision on the prohibition of the use of force according to Article 2 para. 4 of the UN Charter as well as customary law provisions on the prohibition of intervention have been violated. As a next step it has to be examined, however, whether justifications excluding the illegality of this intervention are given.

IV.C. Intervention by invitation

21. According to the Russian government, interventions both in Eastern Ukraine and in Crimea came as a response to legitimate invitations.

22. On 1 March 2014, the Russian ambassador to the United Nations presented a letter by Viktor Yanukovych asking for Russian military intervention to restore order and peace.[32] At that time, Yanukovych had already flown to Russia and been replaced by a new President by a large majority of the Ukrainian Parliament. Was he nonetheless legitimized to ask for intervention? It is generally recognized that international law provides for such an exception to Article 2 para. 4 of the UN Charter, although a series of limitations—admittedly of unclear contours—have to be obeyed. Traditionally, it is the legitimate government that is allowed to ask for such an intervention. The ICJ

31 See also the appeal by the Ukrainian Association of International Law, published on 5 March 2014: "On 1 March 2014 at 17.21 (Kyiv time), the Council of the Federation of the Federal Assembly of the Russian Federation (the Council of the Federation) unanimously supported the appeal of the President of the Russian Federation, Mr. Vladimir Putin, on sending a "limited contingent of military troops" of the armed forces of the Russian Federation into the territory of Ukraine […]" (www.cjicl.org.uk/2014/03/05/appeal-ukrainian-association-international-law) (accessed on 11 January 2015). Of the 25,000 Russian troops stationed in Crimea at least 6,000 were involved in the occupation of Crimea. See James A. Green, The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited, 1 Journal on the Use of Force and International Law (2014), 3–10, 6. For more details about form and extent of Russian intervention in Ukraine see the briefing before the UN Security Council on 1 March 2014, UN Doc. S/PV.7124 and on 3 March 2014, UN Doc. S/PV.7125.

32 See Security Council, 7125th meeting (3 March 2014), UN Doc S/PV.7125, 3–4.

has given best expression to this position in the Nicaragua case, where the right to intervention was portrayed in black and white: The government should have an unconditional right to ask for such an intervention while any such option was ruled out for the opposition: "Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition."[33]

23. This statement leaves open essential elements of the whole question. In fact, a government will usually issue such a plea only as a measure of last resort, if its survival is in immediate danger. In such a situation it must always be examined whether the government is still effectively in power, as the intervener otherwise risks acting against the new effective government, which is, according to a traditional position, also the only legitimate one. Classical international law distinguished, therefore, between three forms of uprisings representing situations characterized by growing power of the opposition forces: rebellion, insurgency and belligerency (civil war).[34] As soon as the status of belligerency is reached, the power of the insurgents equals or even surpasses that of the government and considerations of neutrality command external powers to refrain from unilaterally supporting the government.[35] The overall academic debate remained inconclusive, however,[36] and in practice it was primarily the incumbent government that could hope for external help.[37] In the course of the struggle for decolonization the overall picture somewhat changed as in this context the insurgents were considered to be the legitimate and universally recognized actors that should bring the decolonization process to an end. Nonetheless, the State community stopped short of recognizing a right to military intervention in favour of the insurgents. Thus, an agnostic attitude came to prevail according to which it was not possible to identify the legitimate addressee of support and therefore external powers should, also in view of Article 2 para. 4 of the UN Charter and of the obligation of non-intervention, generally refrain from any

33 ICJ, Military and Paramilitary Actitivites in and Against Nicaragua, 27 June 1986, para. 246. Article 20 of the ILC Draft Articles on State Responsibility seems to confirm this position when it states that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent". Confirming, ICJ, Armed Activities on the Territory of Congo, 2005, para. 42–54. See also G. Nolte, Intervention by Invitation, MPEPIL (2010) online ed., para. 4.

34 See Gregory H. Fox, Intervention by Invitation, Wayne State University Law School Legal Studies Research Paper Series No. 2014–04, 9.

35 Ibid.

36 See Christine Gray, International Law and the Use of Force (2008), 99.

37 See Brad R. Roth, Governmental Illegitimacy in International Law (1999), 181: "[…] although aid to either faction in an internal armed conflict is illegal in principle, unlimited aid to the recognized government is almost always lawful in practice".

military interference.[38] Practice, again, took only limited regard of this academic discussion and the Cold War was characterized by broad interventions by Eastern and Western countries on both sides, occurring in a penumbra of legality. It was only with the end of the Cold War and the ensuing triumphal march of the principle of democracy[39] that a new age in this field seemed to have begun: From now on criteria of legitimacy (or popular sovereignty), and in particular the question which party really represented the people, should become important factors for the decision who could enjoy external help. For some, the criterion of effectivity has now become superseded by that of legitimacy. A look at international practice does not warrant such a sweeping assumption. The cases that may be adduced as proof for a change of paradigm from effectivity to legitimacy are essentially three: the intervention by a multilateral force in Haiti in 1994, ECOWAS intervention in Sierra Leone in 1998 and the intervention of UN and French forces in Cote D'Ivoire in 2011.[40] These cases presented very specific characteristics and they can therefore hardly be taken as a demonstration that State practice now generally permits military intervention upon invitation by a government previously legitimated by elections but now no longer effectively in power. In fact, in all the cases cited what was at issue was a fully-fledged coup d'etat or something of the sort, and not a mere dispute about the full legitimacy of a president effectively in power.[41] Furthermore, in these cases the UN had monitored the elections and the UN Security Council had authorized the use of force after having recognized the inviting party as the

38 See in this vein the statement by the Institut de Droit International (IDI) which in 1975 issued a resolution according to which "third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State". IDI, The Principle of Non-Intervention in Civil Wars (1975). For some, as a consequence of the practice during the Cold War, the reciprocity principle applies also in this field: once one party of a civil war has requested and obtained foreign military assistance, the other is also allowed to ask for such aid. See L. Doswald-Beck, The Legal Validity of Military Intervention by Invitation of the Government, 85 BYIL (1985), 189–252, 251. Even leaving aside the question whether this thesis is legally sound, reliance on it by the Russian side appears to be inappropriate as there has been no military intervention in the Ukraine conflict by Western States. See H. Krieger, Ungebetene Gäste—Zum Eingreifen auf Einladung in der Ukraine 2014, 89 Die Friedenwarte (2014), 125–151, 141.

39 See Thomas M. Franck, The emerging right to democratic governance, 86 AJIL (1992), 46–91 and Gregory H. Fox (ed.), Democratic governance and international law (2004).

40 For these cases see G. Fox, Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation, Opinio Juris, 10 March 2014 (www.opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation (last visited on 12 January 2015)).

41 See G. Vaypan, (Un)invited Guests: The Validity of Russia's Argument on Intervention by Invitation (www.cjicl.org.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation (last visited on 12 January 2015)).

legitimate government.[42] A coup d'etat is one of the most serious attacks on popular sovereignty and it cannot be equalled with bringing down an elected president by a popular protest movement, however problematic such a regime change may be from the viewpoint of constitutional rules and democratic principles. This was exactly the case in Ukraine: After popular unrest over the President's economic politics and treatment of the opposition that started in autumn 2013 and brought the country close to a civil war, President Yanukovych fled Kiev on 21 February 2014, first for Crimea and then for Russia. The day after, Yanukovych was removed from office by the Ukrainian Parliament. His removal was approved by an unanimous vote of all 328 representatives present in the Ukrainian Parliament, although the three-quarters majority (338 out of 450) required by the Ukrainian constitution for such a measure was not reached. As a consequence, it can be said that President Yanukovych's ousting from office may not have been legally correct according to the Ukrainian constitution but it was surely not a coup d'etat or a violation of popular sovereignty. To expect that international order would provide for sanctions in case of such a formal constitutional violation would mean to largely overstate the possibilities of international law.[43] But what is more, neither would it be justified on the material level as on 22 February 2014 it had become evident that Yanukovych no longer enjoyed majoritarian popular support. In such a case a military intervention by an outside power constitutes a clear violation of Article 2 para. 4 of the UN Charter and no recourse to an alleged justification by an invitation of the ousted President can be brought forward.[44] Even if recourse were taken to a purely formalistic notion of "effective government" (or "established government"), a military intervention on the request of the (illegally) ousted President would be itself illegal. In fact, as was recently stated by the Institut de Droit International, "[m]ilitary assistance is prohibited when […] its object is to support an established government against its own population".[45]

24. On the same day as Vladimir Yanukovych—1 March 2014—the new Prime Minister of Crimea, Sergiy Aksyonow, who had come to power with the help of Russian troops only a few days before, also asked for Russian military intervention. Here again, and perhaps even more clearly than with regard to Eastern Ukraine, the

42 See G. Fox, Ukraine Insta-Symposium, above n.40.

43 Article 46 of the Vienna Convention on the Law of Treaties offers a glimpse on how high the hurdles are set in international law when it comes to take into consideration conflicts with national law.

44 It should be added that some authors assert that valid invitation to intervene can be extended only by the internationally recognized government of the receiving party. This position further corroborates the finding that Yanukovych's invitation was illegal. See Christopher J. Lemon, Unilateral Intervention by invitation in civil war: The effective control test tested, 35 International Law and Practice (2003), 741–793, 791.

45 IDI, Military assistance on request (8 September 2011), Article 3, para. 1.

conditions for an intervention by invitation were not given. Only to summarize, for the most evident circumstances that preclude a legal appeal for intervention by the revolutionary Crimean government reference has to be made to the fact that the bulk of the intervening troops was already present in Crimea when the invitation was issued and to the further fact that a seceding entity is not entitled to ask for foreign military intervention in order to effectively implement its claim.[46] Outside the colonial context a right to secession does not exist.[47]

25. Finally, the abusiveness of any reference to the concept of intervention by invitation becomes apparent by the subsequent behaviour of the intervener. Russia did not intervene to take sides with one of the parties of a dispute but advanced territorial claims that have led to the annexation of Crimea and are at least latently visible with regard to Eastern Ukraine.[48]

IV.D. Intervention as a protective measure ("protection of nationals abroad", "kin State" theory; R2P)

26. It is interesting to note that with regard to the Ukraine intervention Russia offered several justifications that were in part mutually exclusive. The absence of a Russian involvement, as it was initially asserted, would make any legal justification superfluous; the extension of a (valid) invitation would make the parallel recourse to the concept of rescuing foreigners abroad appear ludicrous. Nonetheless, these justifications were presented more or less simultaneously.[49] The concept of rescuing nationals

46 J.A. Green, above n.31 made the colourful comparison that otherwise France could invade Canada at the request of Quebec. Ibid., 7. This point was made also by the US representative in the SC. See UN Doc. S/PV.715, 5.

47 See P. Hilpold, Self-Determination in the 21th Century—Modern Perspectives for an Old Concept, 36 Israel Yearbook of Human Rights (2006), 247–288 and ibid., The Kosovo Case and International Law: Looking for Applicable Theories", 8 Chinese JIL (2009), 47–61.
See also the Independent International Fact-Finding Mission on the Conflict in Georgia:
"Military force is never admissible as a means to carry out a claim to self-determination, including internal self-determination. There is no support in state practice for the right to use force to attain self-determination outside the context of decolonization or legal occupation [...] This also means that a secessionist party cannot validly invite a foreign state to use force against the army of the metropolitan state." (www.rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf (last visited 12 January 2015)). See also G. Fox, Ukraine Insta-Symposium, above n.40, 2.

48 See also Ch. Marxen, above n.18, 379 who rightly writes that "it is hardly imaginable that the disaggregation of Ukraine's territory would have been covered by [Yanukovych's] invitation and, even if, the respective invitation would constitute treason and would arguably therefore be illegal anyway".

49 See Russian President Vladimir Putin on March 1, 2014 (www.rt.com/news/russia-troops-ukraine-possible-359 (last visited 16 January 2015)).

abroad[50] is in itself of doubtful legal credential. Admittedly, after WWII, several military interventions were carried out by States such as Great Britain (Suez Canal 1956), Belgium (Congo 1960 and 1964), USA (Dominican Republic 1965, Grenada 1983 and Panama 1989), Israel (Entebbe 1976) and Russia (Georgia 2008) that had been justified at least in part by the recourse to this concept. On a whole, practice and doctrinal discussion on this subject are inconclusive. With regard to practice there had been some expressions of understanding for rescue operations in cases where nationals were faced with life-threatening situations abroad if the intervenient did not pursue further interests. In other cases (such as the US intervention in Grenada in 1983), such interventions met with criticism while it was often not clear whether this criticism referred to the lack of the conditions for such an intervention to be permissible or whether the criticism was intended to altogether rule out the legality of such interventions.[51] Earlier confirmatory practice tried to identify the legal basis for this practice in the assumption that an attack on nationals abroad would be tantamount to an attack on the home State and thereby unleash a right to self-defense. Such an assumption is, however, hardly reconcilable with Article 51 of the UN Charter[52] and therefore, later on, an attempt was made to assert the existence of an autonomous exemption to the prohibition of the use of force in this regard.[53] In view of the lack of sufficient State practice and *opinio juris* accepting such an exemption based on consuetudinary law it is probably preferable to speak in this regard of a violation of international law that meets with some degree of tolerance as far as abusive recourse to this concept can be excluded. The conditions the advocates of such a right to intervention have devised as a requisite for its legality,

50 See for this concept Claude H.M. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 RdC (1952-II); Richard B. Lillich, Forcible Self-help to Protect Human Rights, 53 Iowa L Rev (1967), 336–337. Natalino Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (1985) and T. Ruys, The "Protection of Nationals" Doctrine Revisited, 13 J Conflict & Security L (2008), 233–271.

51 For a recent and thorough account of the respective State practice see T. Ruys, above n.49.

52 Only under very circumscribed conditions this position appears to merit some plausibility. Such is the case if nationals are attacked abroad, systematically and in larger number, to target primarily the respective home State. In substance, statehood must be endangered as a consequence of the attack. This threshold will be rarely met but such a situation remains nonetheless thinkable. For the "normal" case, when nationals are endangered abroad, recourse to Article 51 of the Charter by analogy is, instead, to be excluded as has been rightly stated by the Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. II (September 2009), 286: "This analogy is not convincing because putting in danger or even killing a limited number of persons is not comparable in intensity to an attack on the other State's territory. Unlike an attack on territory, attacking members of the nation is not apt to jeopardize the independence or existence of the State."

53 See, in particular, N. Ronzitti, above n.50.

can therefore serve, at the utmost, as an argument for tolerance. These conditions are the following:

- an imminent threat of injury to nationals;
- a failure or inability on the part of territorial sovereign to protect them and
- the action of the intervening State must be strictly confined to the object of protecting its nationals against injury.[54]

27. With regard to the Russian intervention in Ukraine these pre-requisites were in no sense given, so that the intervention cannot be condoned, not even politically. In fact, first of all, there was no "imminent threat of injury to nationals" and, as a consequence, no obligation to protect by Ukraine could arise. The Kiev revolution of 22 February 2014 had no immediate repercussions on Crimea, at least not in the sense that there would have been an immediate threat for the life and the security of the (Russian-speaking) Crimean population.[55] It was, on the contrary, the case that the Maidan protest movement, its oppression and its final victory left Crimea widely unscathed.[56] The fear of an anti-Russian campaign as a consequence of the victory of the pro-Western Ukraine nationalist groups can hardly be seen as sufficient to fulfil the condition mentioned.[57]

28. Furthermore, at least if a traditional viewpoint is taken, it is highly dubious whether the conditions for such an intervention were given on the subjective level, i.e. whether the subjects Russia claimed to intervene for were really Russian nationals. Crimea and Eastern Ukraine may have a Russian-speaking majority which has also strong cultural ties with the Eastern neighbour. Nonetheless, as to their passport, they were, at least in their overwhelming majority, Ukrainian citizens. To argue that the Russian troops were under threat by the Ukrainian army, as was also sustained, was hardly credible. True, there had been a policy of "passportization" by Russia also in Crimea (following the example of Georgia of 2008[58]) well before the military

54 See H. Waldock, above n.50, 467, referring to Caroline formula.

55 See Otto Luchterhandt, Der Anschluss der Krim an Rußland aus völkerrechtlicher Sicht, 52 AVR (2014), 137–174, 155.

56 Ibid.

57 For an extensive exposition of the elements that could hint at such a danger see M. Geistlinger, above n.23, 198. Should the prospected fears of a nationalist, anti-Russian campaign in Crimea have become reality this would have created a conflict not only with the Ukrainian legal order but also with Ukrainian human rights obligations. Such a human rights violation would not, however, have generated a right to intervene.

58 For a contribution clearly anticipating the further trajectory of this Russian policy started in 2008 see Kristopher Natoli, Weaponizing Nationality: An Analysis of Russia's Passport Policy in Georgia, 28 Boston Univ. Int. LJ (2010), 389–417.

intervention of 2014[59] but this unilateral policy could not lead to results that were opposable to Ukraine. In fact, as it is well known, nationality is a very specific relationship tying the individual to his home country[60] and it is the sovereign right of each State to consider this relationship an exclusive one, as the Ukraine did. In fact, Ukraine does not accept dual citizenship and is not prepared to renounce its citizens only because they are wooed by other countries. For Ukraine and for the effects of international law an additional citizenship granted by another State is therefore null and void.

29. Nonetheless, such an international law textbook solution appears to be too simple to fully do justice both to the Russian-Ukrainian relationship and, more in general, to the specific relationship Russia has developed with its nationals abroad. This starts with the definition of "national". Russia had adopted a very broad notion of the concept of the "national", comprising also so-called "co-nationals" and in general the broad Russian diaspora. The sudden breakdown of the Soviet Union has created an enormous Russian diaspora whose lot has stood since then on the top of the national political agenda.[61] The Russian federal law "On Russia's State policy with regard to her co-nationals abroad" of 1999 (the so-called "Law on the diaspora") qualifies as "co-nationals abroad" not only Russian citizens living abroad but also citizens of the former USSR and their descendants with the exception of the descendants of the members of the respective titular nation.[62] As have many other Eastern European countries, Russia has developed a series of policies to sustain and foster their kin people abroad. These policies raised general fear and suspicion by neighbouring countries and the Venice Commission, in 2001, issued a clear warning against any such policy that would impinge on the neighbouring States' sovereignty or even merely hurt friendly relations.[63] This was the case, even though the Hungarian government had renounced

59 See Paul A.Goble, Russian "Passportization", The NY Times, Times Topics (9 September 2008) www.topics.blogs.nytimes.com/2008/09/09/russian-passportization/?_r=0) (last visited on 18 January 2014)).

60 As the ICJ stated in the Nottebohm case (ICJ Reports 1955), nationality is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties". Ibid., 4, 23.

61 See Paul Kolstoe et al., Russianin the Former Soviet Republics (1995), 9.

62 See Michael Geistlinger, Der Schutz ihrer Landsleute im Ausland durch die Russländische Förderation unter besonderer Berücksichtigung der Ukraine, 89 Friedenwarte (2014), 181–210, 184.

63 As is well known, the broadest notoriety was gained by the Hungarian Status Law of 19 June 2001 which entered into force on 1 January 2002. This law met with fierce opposition by the neighbouring countries for its extraterritorial elements allegedly disrupting good neighbourly relations. On 20 October 2001 the Venice Commission issued a "Report on the Preferential Treatment of National Minorities by their kin-State" (CDL-INF (2001) 19) which turned out to be highly critical towards these measures. In the end, the Hungarian Status Law had to be repealed in its main

its original plans to confer Hungarian citizenship to its kin minorities abroad. On the highly delicate question of conferral of a dual citizenship the OSCE High Commissioner on National Minorities took position in its "Recommendations on National Minorities in Inter-State Relations" of October 2008 ("Bolzano/Bozen Recommendations"). Recommendation no. 11 goes as follows:

> States may take preferred linguistic competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad. States should, however, ensure that such a conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring citizenship *en masse*, even if dual citizenship is allowed by the State of residence. If a State does accept dual citizenship as part of its legal system, it should not discriminate against dual nationals.

30. The conferral of citizenship *en masse*, as it was done by Russia, clearly contradicts this command. If this act constitutes a prelude to territorial annexations its contrast with international law is even more pronounced.[64] Apart from the fact that such an initiative clearly violates State sovereignty and the principle of good neighbourly relations there is the presumption that an initiative of this kind never had in mind the protection of individual rights, but such considerations were rather pretextual. An annexation can never be justified by a preceding unilateral conferral of citizenship *en masse* but it is rather the case that the annexation constitutes an aggravating circumstance for the previous measures.

31. Neither is it possible in this regard to take recourse to the concept of the Responsibility to Protect (R2P). As is well known, to the surprise of many, this concept was adopted at the World Summit of 2005[65], although the notion of R2P accepted was far more restrictive than that conceived in 2001 by the International Commission on Intervention and State Sovereignty (ICISS).[66] In particular, the GA left no doubt as to the fact that the concept of R2P should not undermine the prohibition of the use of force. Collective action, including Chapter VII measures, could be taken, even though this was possible only after authorization by the Security Council. There can be no doubt that no such authorization was given with regard to an intervention in Ukraine. Furthermore, it is a basic tenet of R2P that the primary responsibility for

elements. For a detailed analysis of the Hungarian status law and the reactions by neighbours and international institutions see P. Hilpold/Ch. Perathoner, Die Schutzfunktion des Mutterstaates im Minderheitenrecht (2006).

64 See Enrico Milano, The Conferral of Citizenship en masse by Kin-States: Creeping Annexation or Responsibility to Protect?, in: Francesco Palermo/Natalie Sabanadze (eds.), National Minorities in Inter-State Relations (2011), 145–163.

65 World Summit, Outcome Document, A/Res/60/1, para. 138 and 139.

66 See P. Hilpold, From Humanitarian Intervention to Responsibility to Protect, in: P. Hilpold (ed.), Responsibility to Protect (R2P) (2014), 1–37.

protection lies with the State of residence of the people concerned, i.e., in this case, with Ukraine. The concept of R2P provides no basis whatsoever for unilateral acts of intervention in neighbouring countries to protect co-nationals allegedly subject to discrimination. Finally, R2P applies only in the face of the most serious crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. Not even the fiercest critics that want at the same time to be taken seriously have accused Ukraine of such crimes.[67] In sum, in the case of Ukraine, recourse to the concept of R2P would only be possible in an a-technical way. Such an approach is, however, strictly to be rejected as it would consist of a misuse of a concept that was intentionally strictly restricted in its portent.[68]

IV.E. Intervention and treaty obligations – did the Ukraine Republic change legal personality?

32. By its intervention in Crimea and in Eastern Ukraine, Russia not only violated the prohibition of the use of force enshrined in the UN Charter and additionally guaranteed by customary international law, but these measures also stood in blatant contrast to a series of bilateral and multilateral agreements (the Budapest Memorandum of 1994, the Treaty of Friendship and Cooperation of 1997 and the Status of forces agreement on the Black Sea Fleet, also of 1997) by which Russia confirmed the inviolability of the Ukrainian borders. The contorted attempts to provide arguments for exceptions to Article 2 para. 4 of the UN Charter, unconvincing as they were, could claim even less credibility when applied to these specific treaty obligations. As a consequence, as to these legal hurdles, Putin resorted to a totally different strategy when he maintained that these obligations were no longer in force as a consequence of Ukraine's change of identity.[69] In substance, President Putin argued that post-revolutionary Ukraine was no longer the identical subject to pre-revolutionary Ukraine, to which Russia was treaty-bound to respect the Ukrainian borders. As there was no identity between the "two Ukrainian States", the "new Ukraine" could not succeed in the treaty positions of the "old Ukraine". This discussion refers to a complex question of international law that had been further confused by the adoption of a Roman law terminology

67 R2P is not an instrument for the enforcement of human rights in neighboring countries. As is reported by Roy Allison, the US government ridiculed Russian allegations of human rights violations in Ukraine by stating "that Moscow had just become the rapid response arm of the Office of the High Commissioner for Human Rights". See Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules, 90 International Affairs (2014), 1255–1297, 1262.

68 See Alex J. Bellamy, The Responsibility to Protect—A Wide or a Narrow Conception?, in: P. Hilpold (ed.), above n.66, 38–59. For a different, however unconvincing, view see Th.H. Lee, The Law of War and the Responsibility to Protect Civilians: A Reinterpretation, 55 Harv.Intern.LJ (2014), 251–321.

69 See R. Allison, above n.67, 1265.

("succession") that is not suited to effectively address this issue.[70] In fact, it is inappropriate to equal the succession of States with that of natural persons. State succession has been defined, not fully unambiguously, as the replacement of one State by another in the responsibility for the international relations of territory.[71] State succession, to take place, requires a major rupture in the sovereign powers over a certain territory. If no succession takes place, we speak of identity,[72] and there is a strong presumption for identity. In fact, territorial modifications, constitutional changes and even a revolution have no impact on the identity of a State.[73] The denouncement of any identity by the Soviet Union in respect to Czarist Russia in 1918 was therefore in clear contrast to State practice and was accordingly rejected by the overwhelming majority of the State community.[74] The strong presumption for identity remained therefore in force but continued to be contested in socialist international law doctrine.[75] Seen from this angle, Putin's assertion as to the change of Ukraine's identity and the subsequent termination of her treaty obligations appears to have a long historic tradition, though it remains an isolated view.[76] Of decisive importance for the distinction between succession and continuation is the reaction by the State Community. In fact, a State that intends to continue its obligations cannot do so without the consent of the other parties of the

70 See Malcolm Shaw, International Law (2014), 693.

71 See Article 2 of the Vienna Convention on Succession of States in Respect of Treaties 1978 and Article 2 of the Vienna Convention on Succession to State Property, Archives and Debts 1983.

72 According to Krystyna Marek (Identity and Continuity of States in Public International Law, 1968), "[t]he identity of a State is the identity of its international rights and obligations, as before and after the event which called such identity in question, and solely on the basis of the customary norm 'pacta sunt servanda". Ibid., 14.

73 See, in particular, the London Protocol of 1831 concluded by the major European powers, according to which "les Traités ne perdent pas leur puissance, quel que soient les changements qui interviennent dans l'organisation intérieure des peoples". See Wilfried Fiedler, Das Kontinuitätsproblem im Völkerrecht (1978), 8, with further references.

74 Ibid.

75 See Volker Epping, in: Knut Ipsen (ed.), Völkerrecht (2014), 148.

76 As is well known, in 1991, in the declaration of Alma Ata, Russia successfully asserted her claim to become the "continuator State" of the Soviet Union. This is, however, not the same as claiming identity. Russia became rather sort of an heir to the Soviet Union. See Ulrich Fastenrath, Das Recht der Staatensukzession, in: U. Fastenrath et al. (eds.), Das Recht der Staatensukzession, Berichte der Deutschen Gesellschaft für Völkerrecht, vol. 35 (1996), 9–48, 10. It shall, however, not go unmentioned that also among Western internationalists there are some authors that favour Putin's view of discontinuity between pre- and post-revolutionary Ukraine. See i.a. Aldo Bernardini, Considerazioni giuridiche sulla situazione dell'Ucraina, 48 Rivista della Cooperazione Giuridica Internazionale (2014), 9–10, calling the Ukraine government an "illegittimate regime that never gained full control of the whole Ukraine".

obligation.[77] With regard to Ukraine, the governments coming to power subsequently to the ousting of President Yanukovych never left any doubt that they considered the identity of their country unscathed, and the preponderance of the State community weighed in with a tacit consent. Therefore it can be stated that there cannot be the slightest doubt as to pre- and post-revolutionary Ukrainian identity, and Russia's treaty obligations requesting respect of Ukrainian borders are fully intact. Their violation added further weight to Russia's State responsibility.

IV.F. The question of the Crimea referendum

33. The major Russian trump card in the territorial conflict with Ukraine are the referendums held in several seceding parts of Ukraine, first of all Crimean status referendum held on 16 March 2014 by the legislature of the Autonomous Republic of Crimea as well as by the local government of Sevastopol.[78] By reference to these referendums Russia tries to legitimize its territorial pretensions with regard to Ukraine. Such an attempt is, however, doomed to fail for several reasons. In this discussion, often several elements got mixed up so that the overall result of this discussion remained inconclusive.

34. A first essential misunderstanding concerns the legal value of a referendum. While it is unclear whether territorial changes have generally to be legitimized by a referendum,[79] it is surely incorrect to maintain that a referendum with a majority in favour

77 State practice as to identity and succession may appear to be arbitrary but this is the result of the fact that acceptance or denial of continuation is the outflow of the sovereign political will of the individual States. This becomes particularly clear in regard to the break-down of Yugoslavia and the unwillingness to accept Serbia and Montenegro's claim for the name of Yugoslavia, as well as its rights and international status, including membership in the United Nations. For a critical assessment of these events see Y.Z. Blum, UN Membership of the "New" Yugoslavia: Continuity or Break?, 86 AJIL (1992), 831–833.

78 Further referendums were held in Eastern Ukraine, in Donetsk and Luhansk, on 11 May 2014. These referendums so evidently missed any international standard that they were mostly ignored internationally. The OSCE Parliamentary Assembly President called for the cancellation of "absurd referendums"; (www.oscepa.org/news-a-media/press-releases?layout=blog&start=72 (last retrieved on 8 February 2015)).

79 Opinions as to this point diverge in literature. According to a traditional viewpoint, a referendum is mostly an optional instrument providing definite legitimacy to changes in State sovereignty over a certain territory. Thus, for Henn-Jüri Uibopuu (Plebiscites, 3 EPIL (1997), 1049, 1053), contemporary international law does not demand the consent of the population to every territorial change. According to James Crawford (Brownlie's Principles of Public International Law (2012), 243) "there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants" (referring to Ratner, 100 AJIL (2006), 808, 811). Similarly, according to Peter Radan (Secessionist Referenda in International and Domestic Law, 18 Nationalism and Ethic Politics (2012), 18–

of a territorial change would as such also create the legal title for such a change. In other words: It would be illusionary to think that a referendum would be an instrument legitimizing secession or border changes. A referendum is only suited to provide for an additional democratic legitimization of changes in sovereign title over territory but the basic justification for these changes has to be found elsewhere. After the entry into force of the UN Charter with its strict prohibition of the use of force and after the end of the decolonization process,[80] borders can be moved and sovereign title over territory can be changed only within very limited circumstances, i.e. as a consequence of a free agreement[81] or following a factual event leading to independence.[82] In these cases a referendum can provide definite legitimacy to thorny status processes that are usually looked at with wariness and suspicion, although it is probably still too early to state that a referendum is an absolute pre-condition for any territorial change.[83]

21) there is no general and autonomous legal requirement in international law to hold referenda in the context of secessionist claims. Conversely, for Anne Peters (Das Völkerrecht der Gebietsreferenden, 64 Osteuropa (2014), 101–133, 113) an international customary law principle exists according to which each territorial change has to be democratically legitimized, typically via a referendum.

80 As is well known, the choice of status as a consequence of the decolonization process was explicitly regulated by Res. 1541 (XV), "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter", 15 December 1960. While this resolution offered, in principle, three alternatives (emergence as a sovereign State, free association with an independent State or integration with an independent State) any other decision short of independence was looked at with suspicion and for such a choice a series of procedural conditions, making sure that this decision was free and informed, had to be fulfilled. If the decision was for integration with an independent State "universal adult suffrage" was explicitly required (principle IX of Res. 1541/1960).

81 Such an agreement can be of an interstate nature (with one State ceding a territory to another State) or have a purely internal character and run between the central government and a seceding province (see i.a. the Nairobi Comprehensive Peace Agreement of 9 January 2005 between the Sudanese Khartoum government and the Sudan People's Liberation Movement (SPLM) ending the Second Sudanese Civil War and leading up to the 2011 referendum bringing about the independence of Southern Sudan.

82 According to the ICI Opinion of 20 July 2010 Kosovo's declaration of independence was just such a factual event that resulted in a change of sovereign title. As is well known, however, this assumption was highly problematic as it neglected the existing obligations imposed by UNGA Res. 1244/1999 requiring all sides involved to look for a consensual solution. See P. Hilpold, The ICJ's Advisory Opinion on Kosovo: Perspectives of a delicate question, in: 14 Austrian Review of International and European Law 2009 (2013), 259–310, available also at www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1734443 (last retrieved on 8 February 2015).

83 The reasons for this are twofold. First of all, the procedural and material preconditions for a valid territorial referendum have probably still not been sufficiently specified,

35. If, however, a referendum is held, a series of procedural and material requisites have to be obeyed[84] that have emerged from recent referendum practice. In the last decade the Parliamentary Assembly of the Council of Europe together with the Venice Commission have compiled a series of norms and principles that should be respected when referendums are held.[85]

36. The Ukrainian referendum held in 2014 did not respect these conditions and this was also unequivocally pointed out by the Venice Commission in the immediate aftermath of the Crimea referendum,[86] in its opinion of 21 March 2014.

37. There, the Venice Commission paid, first of all, much attention to the question whether the referendum of 16 March 2014 was compatible with the Ukrainian constitution. This requirement should implement the rule of law imposed already in 2007 by the Venice Commission as a basic pre-condition for holding a referendum: "[…] referendums cannot be held if the Constitution or a statute in conformity with the

although, as will be seen in the following, much progress in this sense had been made in the last years. Secondly, State practice in this field remains inconclusive. Although there may be an emerging trend for such a requirement, the Kosovo case and the status process that received most attention in the last years bear witness to a conclusion to the contrary, as independence was achieved without a referendum. At the same time, the Kosovo case also evidences that referendums are no panacea. The clear-cut ethnic and political division between Albanians and Serbs would have made a majority decision about the future status of Kosovo predictable in its results.

84 For a view to the contrary see, however, Carlo Santulli, La Crise Ukrainienne: Position du Probleme, RGDIP (2014), 799–820, 808.

85 The fact that most of them are best-practice rules that stem more from considerations of reasonableness and fairness than from hard treaty provisions does not diminish their actual value and authority. See, i.a. Venice Commission, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, 5–6 June and 18–19 October 2002, CDL-AD(2002)023-e; Council of Europe, Parliamentary Assembly Recommendation 1704 (2005), Referendums: towards good practices in Europe, 29 April 2005 and Venice Commission, Code of Good Practices on Referendums, Code of Good Practice on Referendums (CDL-AD(2007)008, 19 March 2007). Some of the statements by the Council of Europe or by the Venice Commission are case-specific (such as Venice Commission, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organization of Referendums with Applicable International Standards (CDL-AD(2005)041 of 19 December 2005) but nonetheless some of these principles identified in these cases seem to be suitable for generalization.

86 Venice Commission, Opinion on "Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize 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, Opinion 762/2014, CDL-AD(2014)0002.

Constitution does not provide for them […]".[87] The Commission came to the correct conclusion that this referendum had stood in contrast with the Ukrainian constitution as according to Article 73 of the Ukrainian constitution a local referendum is not suited to decide on issues of altering the territory of this country.[88] Even ignoring this fact, the referendum of March 16 remained faulty for several reasons. In fact, the question must not be "obscure, misleading or suggestive".[89] As the Venice Commission demonstrated, the referendum provides two alternatives: independence or return to the 1992 Constitution. One logical option was missing: keeping the current Constitution in place.[90] As the Ukrainian constitution underwent major changes in September 1992, reference to the 1992 Constitution was ambiguous.[91] Finally, the referendum took place in a highly tense situation. The region was controlled by pro-Russian military and paramilitary troops. There were reports of widespread electoral fraud; neutral campaigning was not possible and the period of only 10 days between the decision to call the referendum (March, 6) and the referendum itself (March, 16) was generally considered to be excessively short.[92] No neutral international observation was possible and therefore a further negative light was cast on this referendum.[93]

38. Probably the most visible and absolutely undeniable shortcoming of this referendum was to be found in the fact that it took place in a territory that was not pacified[94] and in a context of a flagrant violation of the prohibition of the use of force.[95] To hold a

87 CDL-AD(2007)008, 11. It would be wrong to state that such a condition, as it refers merely to internal law, is irrelevant for international law legitimacy of a referendum. In fact, here international law strongly relies on national procedures and respect of them becomes of immediate relevance for international law.

88 Ibid., para. 14. Article 73 of the Ukrainian constitution goes as follows: "Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum."

89 CDL-AD(2007)008, 12.

90 Ibid., 5.

91 Ibid.

92 So CDL-AD (2007)008, 5.

93 The OSCE was invited to observe this referendum but rightly rejected this invitation as it was not extended by the competent authorities in Kiev but from the secessionists in Crimea. See OSCE, newsroom, 11 March 2014, "OSCE Chair says Crimean referendum in its current form is illegal and calls for alternative ways to address the Crimean issue" (www.osce.org/cio/116313).

94 See Anne Peters, The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum, in: Christian Calliess (ed.), Liber Amicorum Torsten Stein (2015), 255–280, 274.

95 It can generally be said that a cession of territory imposed by the use of force is a nullity. See James Crawford, Brownlie's Principles of Public International Law (2012), 242, referring to Article 2(4) of the UN Charter as well as to Art. 3 and 4 of the Helsinki Final Act (1 August 1975).

referendum in such a context[96] is immediately conducive to fraud and abuse and the function of this instrument to let a territorial status decision depend on a democratic decision is perverted to its contrary. The referendum becomes itself an instrument for abuse.[97] The outcome of the referendum with a participation of 84% of the population voting nearly unanimously in favour of integration with Russia gives further proof to the faultiness of this referendum.[98]

39. As a result it can be said the referendums held on Ukrainian territory under direct or indirect Russian control provides no justification for status modification with regard to these territories, but they rather constitute themselves violations of international law or at least of international good practice rules as they were held in a blatantly abusive manner and are therefore suited to discredit instruments of ever-growing importance and international acceptance.

IV.G. The right to self-determination

40. A different conclusion could be reached if it were possible to state that Russian minorities in Ukraine had exercised their right to (external) self-determination and

96 According to C. Santulli, above n.84, there was no aggression as the de facto regime, as Santulli calls the government in Kiev, has not been able to oppose any resistance to Russian force. However, it is difficult to qualify Ukraine as a "de facto regime" and even if it were it would nonetheless be protected by the rules on the prohibition of the use of force. See Jochen A. Frowein, De facto Regime, MPEPIL online ed. (2013), para. 4. As Hans-Jochim Heintze correctly states, for the qualification of the situation as an aggression it is irrelevant whether the aggressors meet with resistance or not. See H.-J. Heintze, Völkerrecht und Sezession – Ist die Annexion der Krim eine zulässige Wiedergutmachung sowjetischen Unrechts?, Humanitäres Völkerrecht (2014), 129–138, 132.

97 This insight has a long history and can be traced back to the referendums of the post-WW I plebiscites. On this occasion Sarah Wambaugh wrote that "a plebiscite in a country not effectively neutralised is a crime against the inhabitants of the area". See S. Wambaugh, Plebiscites Since the World War, 1 Washington Carnegie Endowment of Peace (1933), 507, cited according to A. Peters, above n.94, 274. See also the case of the Comoro Islands which opted in 1974 for independence. On one of these islands, Mayotte, no majority for independence was reached, and so France organized in 1976 a special referendum on this island. The majority of the inhabitants voted for France but the President of the Comoros called this referendum a "flagrant aggression". See Antonello Tancredi, Crisi in Crimea, referendum ed autodeterminazione dei popoli, 8 Diritti umani e diritto internazionale (2014), 480–490, 484, referring to UN Doc. S/11953 of 30.1.1976. More generally Yves Beigbeder (Referendum, MPEPILonline ed. (2011), 46) states that " [f]ree voting without coercion or intimidation of the voters and secret ballot must be guaranteed and enforced." He further emphasizes the importance of independent electoral monitoring.

98 Cfr. O. Luchterhandt, above n.55, 158.

thereby a legal basis for the secession of Crimea and other parts of Ukraine were created. And in fact, Russia took (and takes) recourse to exactly this argument: For Russia the Russian population on Crimea and in Eastern Ukraine exercised their right to self-determination and the Kosovo case constituted the pertinent precedent.

41. As is well-known, the right to self-determination developed in the 20th century from a mere political principle of unclear contours to a right in the proper sense. When US President Woodrow Wilson made reference to self-determination as a basic criterion for devising the post-war order, it was not fully clear whether he referred to a principle or to a right.[99] In any case it seemed that he had peoples in a national or an ethnical sense in mind that should be the bearer of a right to their own State.[100] Such an approach seemed absolutely to make sense in a situation like that unfolding after the Great War when two multi-national States (the Austrian-Hungarian Empire and the Ottoman Empire) unravelled and a rule had to be found to carve up these territories into new States,[101] but for the subsequent period the meaning of self-determination had to be fully re-defined. The UN Charter of 1945 seemed to understand self-determination as an auxiliary instrument for the protection of the external sovereignty of States,[102] but the concept remained vague enough to foster further hopes and aspirations and it became in particular the most prominent legal basis for the decolonization process. Some saw in the decolonization sort of a secession but any attempt to derive

99 In his so-called "Fourteen points" which President Wilson directed to the American Congress on 8 January 1918 the right to self-determination is not explicitly mentioned but it results indirectly from various points, for example point IX ("A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality").

100 Taking up the international reaction to his 14 points in his speech to the US Congress of 11 February 1918, President Wilson made a series of clarifications among which also the question of self-determination was addressed: "'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril […]"; "[…] peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game […]".

101 As it turned out, the Wilsonian concept of self-determination could not even be implemented for the period it was immediately conceived for. Often the "clearly recognizable lines of nationality" did simply not exist and when they existed the victorious powers were not prepared to respect them. Minority protection should be the second-best solution, but at the end also this system failed. See P. Hilpold, The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment, 17 Max Planck Yearbook of United Nations Law (2013), 87–124.

102 See the provisions in Article 1(2) and in Article 55 of the Charter.

from UN law a general right to secession, applicable also outside the colonial context, was bound to fail.[103]

42. In general, it can be stated that the right to self-determination might be a peremptory norm, but States are not permitted to implement this norm by breaking another peremptory norm regarding the prohibition of the use of force which is evoked by the UN Charter in a most explicit and uncompromising manner.[104]

43. The Kosovo case did not substantially change this situation although the advisory proceeding before the ICJ had offered an unique opportunity to address this question. Some governments tried to do so,[105] others strictly refused. The ICJ, pretending not to understand properly the question proposed by the UNGA,[106] limited itself to stating the obvious: that a declaration of independence is generally not prohibited by International Law.[107] This narrow-sighted approach was, from a legal perspective, highly problematic as it ignored UNGA Res. 1244/1999 foreseeing at para. 11(f) a "political settlement" and therefore a consensual solution integrating all parties involved.[108]

103 See P. Hilpold, Self-determination in the 21th century – Modern Perspectives for an old Concept, 36 Israel Yearbook on Human Rights (2006), 247–288. For a sharp critic as to the incoherence of UN law on self-determination see M. Pomerance, Self-determination in Law and Practice (1982). Some referred to a "remedial right to secession" in cases of most serious human rights violations (a concept famously conceived by Lee C. Buchheit in 1978 in his book "Secession") but such a purported right remains without convincing legal basis. See P. Hilpold, Secession in International Law: Does the Kosovo Opinion Require a Re-Assessment of this Concept?, in: P. Hilpold (ed.), Kosovo and International Law (2012), 47–78 and S. Oeter, Secession, Territorial Integrity and the Role of the Security Council, in: P. Hilpold (ed.), Kosovo and International Law (2012), 109–138. For some authors the inconsistent attitude of the State community towards self-determination claims after the end of the decolonization process gives prove to the lack of a proper theory of self-determination in present days. See M. Sterio, The Right to Self-determination Under International Law: "Selfistans", secession and the rule of great powers (2013) who argues that the support of the most powerful great powers has been decisive for peoples fighting for self-determination to obtain independence.

104 See A. Tancredi, above n.97, 489. See also the statement by the Independent International Fact-Finding Mission on the Conflict in Georgia, above n.52.

105 See, e.g. the government of the Federal Republic of Germany in its written statement no. 54 of 15 April 2009, 33, cited in : P. Hilpold, above n.103, 66.

106 "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law", A/RES/63/3 of 8 October 2008. See P. Hilpold, The ICJ's Advisory Opinion on Kosovo: Perspectives of a delicate question, 14 Austrian Review of International and European Law 2009 (2013), 259–310.

107 See AO on Kosovo of 22 July 2010, para. 81.

108 See P. Hilpold, The ICJ's Advisory Opinion on Kosovo: Perspectives of a delicate question, 14 Austrian Review of International and European Law 2009 (2013), 259–310.

44. The ICJ mentioned only *en passant* the subject of a remedial right of secession without, however, properly addressing the relating questions. Nonetheless, it made clear that the State community was highly sceptical towards this concept, a scepticism shared by the ICJ.[109]

45. Russia made somewhat of a U-turn in this discussion: During the advisory proceeding Russia accepted the concept of a remedial right to secession only as an ultima ratio.[110] When the Kosovo opinion was issued, this document first met with strong disapproval by the Russian government.[111] Soon after, however, Russia changed strategy and tried to avail herself of the main outcomes of this proceeding for its own interest. The Kosovo independence precedent was born. In what followed, Russia strengthened the international visibility of its relations with the break-away republics of Abchasia, South Ossetia and Transnistria and at the same time took politically a more positive stance towards world-wide secessionist movements. The last step in this development was the recognition of Crimea as an independent republic on 17 March 2014[112] and its subsequent integration into Russia on 18 March 2014, i.a. by reference to the Kosovo precedent. As has been demonstrated extensively in literature, however, any justification of Crimea's integration into Russia by reference to this Kosovo precedent is highly misleading.[113] Even if one were to accept Russia's position that a right to remedial secession would be granted in extreme circumstances, such circumstances were surely not given on Crimea. The "very existence of the [Russian] people"[114] was surely not at issue,[115] and this discussion should concentrate on internal self-determination, i.e. autonomy, if anything at all. What to do, then, of the Kosovo case? According to one widely held opinion (especially among "Western States"), this is a "sui generis" case not suited for generalization. Though several governments are opposing this perspective there are many elements that let it appear convincing. It is hard to image that a comparable

109 See AO on Kosovo of 22 July 2010, para. 82, referring to "radically different views" within the State community. See also Sienho Yee, Notes on the International Court of Justice (Part 4): The *Kosovo* Advisory Opinion, 9 Chinese JIL (2010), 763–782 who rightly notes that no *opinio juris* as to the existence of such a right exists. Ibid., 780, para. 44.

110 See Written Statement by the Russian Federation (16 April 2009), 31 (Gevorgian).

111 See Sydney Morning Herald (23 February 2008), "Putin calls Kosovo independence 'terrible precedent'".

112 Kremlin/ru/acts/20596.

113 See only J. Kranz, above n.23, 211 and O. Luchterhandt, above n.55, 152.

114 Written Statement by the Russian Federation (16 April 2009), 32.

115 See the "Report on the human rights situation in Ukraine" by the Office of the United Nations High Commissioner for Human Rights (15 April 2014), para. 89: "It is widely assessed that Russian-speakers have not been subject to threats in Crimea". Report available at www.ohchr.org/Documents/Countries/UA/Ukraine_Report_15April2014.doc.

situation could come into being in the near future. Furthermore, the State community had no practical alternative than to accept Kosovo's independence, as the Report by UN Special Envoy Martti Athisaari had already acknowledged.[116]

46. The real problem with the Kosovo case lies in the fact that the ultimate source of this country's independence springs from the use of (prohibited) force by 17 NATO countries in 1999.

47. Any attempt to justify this form of humanitarian intervention by reference to international law is unconvincing: In the end there was a broad consensus to consider the respective events as "illegal but legitimate".[117] Not even the NATO States intervening in 1999 seriously attempted to present this intervention as legal. As a consequence, no basis for a customary law development of a right to unilateral humanitarian intervention was given.[118] In the end, the NATO intervention in Kosovo of 1999 was not as revolutionary as it was often portrayed. In fact, after 1945 several (unilateral) humanitarian interventions had taken place and many of them were more or less excused by the State Community,[119] without, however, creating an *opinio juris* as to the legality of these interventions. Nor was the recognition of Kosovo after the ICJ opinion of 22 July 2010 by over 100 States a sort of precedent of any kind: Recognition happened in an unique situation, characterized by many preceding violations of international law which could not, however, render the acts of recognition as such illegal.[120] Furthermore, the acts of discrimination, actual or purported, happening on Crimea and in Eastern Ukraine amidst a situation of post-revolutionary turmoil were not comparable to the genocidal situation preceding NATO intervention in Kosovo in 1999.[121] Finally, the intervening NATO States had no territorial pretensions in Kosovo, which Russia

116 UN Security Council, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, UN Doc.S/2007/168/Add.1.

117 Independent International Commission on Kosovo, The Kosovo Report (2000); B. Simma, NATO, the UN and the use of force: Legal aspects, 10 EJIL (1999), 1–31 and P. Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, 12 EJIL (2001), 437–467.

118 Antonio Cassese, Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?, 10 EJIL (1999), 23–30; contra: P. Hilpold, above n.117.

119 See P. Hilpold, above n.117.

120 The acts of recognition stood surely in contrast to UNGA Res. 1244/1999 but the relevant provisions of this Resolution could hardly be qualified as of a strictly prohibitive nature provoking the nullity of a recognition extended before a consensual settlement of the Kosovo case was reached.

121 See House of Commons, Foreign Affairs—Fourth Report (www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm).

undoubtedly had in Ukraine.[122] As a consequence it can be stated that the acts of intervention and annexation by Russia in Ukraine cannot be justified by reference to a purported right to self-determination by Russian groups in Ukraine, and that the Kosovo case cannot be considered as a precedent for a development that could lead to a different conclusion. The UN General Assembly has clearly given expression to this prevailing view within the State Community. It affirmed "its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders" and it underscored "that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol".[123]

V. Conclusions

48. Europe and the State Community as a whole are now faced with an extraordinary situation: Basic achievements of International Law dating in part even back to the period before 1945[124] seem to be under threat. "Understanding Putin" has become an often-heard dictum when comprehension is demanded for the Russian position.[125] How far may this comprehension, dictated by political and economic motives, go without irreversibly damaging some cardinal elements of the existing international legal order? As evidenced, Russia's arguments are hardly reconcilable with international law as a legal order based on consent,[126] but they mainly relate to alleged or actual international law violations, primarily by Western countries, to past injustices suffered in particular by Russia and her allies, and in general to history. It shall not be denied that Russia perceives the extension of the Western sphere of influence as an existential threat and that the Russian government does not see itself as a perpetrator of

122 Neither on the factual level can the "Kosovo precedent" therefore constitute a precedent for Russian territorial annexations in Ukraine.

123 The approval rate was impressive: 100 voted for, 11 against, 58 abstained and 24 UN Member States were absent. A/RES/68/262, Territorial integrity of Ukraine (1 April 2014).

124 This holds in particular true for the Briand Kellog Pact of 1928, condemning the recourse to the use of war for the solution of international controversies and the Stimson doctrine of 1932, proclaiming the non-recognition of any territorial acquisition by force.

125 In the German-speaking area the term "Putin-Versteher" was coined. This term denotes, with an element of sarcasm, leading political figures in the West who show much—and perhaps too much—comprehension for Putin's politics.

126 According to the prevailing international law doctrine consent stands at the very roots of this legal order. See, for example, S. Blay, The Nature of International Law, in: S. Blay et al. (eds.), Public International Law (2005), 1–13.

international law violations but rather as acting in defense of legitimate interests.[127] The fundamental question is rather: Are these acts reconcilable with traditional international law? And if the answer is, as here, in the negative, could the Ukraine crisis lead to a "New International Law" in the making? Are we here assisting the dawn of an international legal system where grievances over past injustice would be given more attention and where existing rights and obligations would be balanced according to principles of intertemporal justice? There are indeed elements hinting at such a development,[128] but on the whole the respective picture remains patchy. In some specific areas the State Community displays an honest commitment to redress such past injustices but up to now these areas are strictly circumscribed. It is foreseeable that International Law will never become a general instrument to correct historic fault: First of all, because such an endeavour would have extremely far-reaching consequences and possibly create further injustice.[129] Secondly, and perhaps even more importantly, it is well-known that there is not only one tale of history but there are many, often even countless in number. Who should decide which is the correct one?[130]

49. Faced with such a situation, with Russia advancing pretensions that stand in flagrant conflict with existing International Law while neither Ukraine, nor her allies, nor the State Community seem to be prepared—let alone in the position—to counter immediately and effectively this offence by force, the instruments at hand to oppose the international law violations perpetrated in Ukraine consist mainly, in the short term, of sanctions, while, in the longer run, hope is to be pinned on the principle of non-recognition. Since 1932, when it was first coined in the ambit of the Stimson doctrine,[131] this principle ruling out recognition of forceful acquisition of territory has become a powerful deterrent against wars of annexation. Step by step, this principle has

127 For a recent, extensive analysis in this sense see Richard Sakwa, Frontline Ukraine—Crisis in the Borderlands (2015).

128 Elazar Barkan, The Guilt of Nations: Restitution and Negotiating Historical Injustices (2002); M. Du Plessis, Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery, 25 Human Rights Quarterly (2003), 624–659 and Roman Kwiecién, Overcoming the Past by International Law, XXIX Pol.Yb.Int.L (2009), 15–50.

129 One has only to think about the consequences of land restitution in redress for former violent conquest.

130 In this context it may even be admitted there is some truth in the accusation by political scientists that the European Union contributed to the further precipitation of the Ukrainian crisis as it engendered hopes that it could not fulfil. See again R. Sakwa, Frontline Ukraine (2015). The focus chosen here is, however, a different one. It is laid on international law and on the question whether this order should be changed with regard to the specific fields treated here. Such a proposition is clearly denied.

131 But see August Wilhelm Heffter, anticipating this principle to a certain extent in: Das Europäische Völkerrecht der Gegenwart (1846), by stating at p. 30: "hundert Jahre Unrecht ist noch kein Tag Recht".

transmuted from a unilateral political pledge into a principle of international law prohibiting any such recognition.[132] Non-recognition might not immediately change the situation on the ground: it impedes a legal consolidation of the territorial annexation, it constitutes a continuous reminder of the need for a political solution,[133] and in this context it opens the floor for a discussion that might also allow for the consideration of some historical elements in the problem solution process. It can be presumed that in general Russia also fares well with the rules of "traditional", stability-oriented international law which was co-drafted by this country to a considerable extent. In the long run it would probably be very counterproductive for Russia to dump these rules only to legitimize territorial conquest in Ukraine or in Georgia. The Ukrainian crisis is a totally unsuited justification for letting the international order to further fragment and even less for it to unravel.[134]

50. If a face-saving solution for all parties involved is found (such as the concession of extensive autonomous rights to areas in Ukraine predominantly inhabited by a Russian-speaking population, the granting of a protective role to Russia for her co-nationals abroad, or even the establishment of some sort of condominal rights[135] over certain areas), historical elements, so dear to the Russian side, could be brought to bear to a

132 See UNGA Res. 2625 (XXV) of 24 October 1970, first principle ("No territorial acquistion resulting from the threat or use of force shall be recognized as legal" (at 123)); Article 5 (3) of the definition of aggression adopted by Rs. 3314 (XXIX) of 14 December 1974 (according to which "[n]o territorial acquisition or special advantages resulting from aggression is or shall be recognized as lawful"); the fourth principle of the CSCE Helsinki Final Act of 1975 and Article 41 (2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."). According to Judge Skubiszewski in the Case concerning East Timor, Portugal v. Australia, 1995, the principle of non-recognition now constitutes part of general international law. Ibid., at 262. Furthermore, this principle was recognized directly by the ICJ in 1986, Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 100, para. 188. See also Thomas D. Grant, Doctrines (Monroe, Hallstein, Breznev, Stimson), MPEPIL online edition, 2013, para. 8 and H.-J. Heintze, Der völkerrechtliche Status der Krim und ihrer Bewohner, 89 Die Friedens-Warte (2014), 153–179, 172.

133 See lately the decision by the OSCE Parliamentary Assembly to reject Russia's proposal to sign up a person from Crimea that should represent the annexed peninsula within a Russian delegation to the Assembly. (www.uk.reuters.com/article/2015/02/18/ukraine-crisis-osce-delegate-idUKL5N0VS4EK20150218).

134 Maybe for Russia now the time has come to learn a similar lesson as was the case for the US after her disastrous Iraq intervention of 2003, which took place in clear violation of international law. In the aftermath the US had to recognize that any bypassing of the UN in subjects concerning the use of force would fight back in manifold ways.

135 With regard to this concept see Peter Schneider, Condominium, 1 EPIL (1992), 732–735.

considerable extent, an extent that could possibly be covered by an (extensive) interpretation of existing, traditional international law rules. There is, therefore, no necessary trade-off between rules of international law and historical arguments: Within the broad framework of international law a plethora of solutions becomes possible that would also take into account legitimate Russian interests and sorrows. The legal framework as such, however, should not be negotiable—no historic facts or titles are discernible that would warrant Russian claims for Ukrainian territory.[136] To denounce other States' violations of international law, as Russia did in regard to international law violations by Western States since 1999, might be useful in order to defend the rules as such. To refer to these violations as a basis for a claim that a new international law system has come into being is a totally different thing. It is neither in the interest of the State community as a whole nor in that of any single State forming this community to abandon the rule prohibiting the unilateral recourse to force, the most basic rule on which UN law is premised.

136 An example in kind is the set of Baltic States which were illegally annexed in 1940 by the Soviet Union and could regain their independence half a century later. See Lea Brilmayer, Why the Crimean referendum is illegal (www.theguardian.com/commentisfree/2014/mar/14/crimean-referendum-illegal-international-law), arguing that there are no historical grievances over Ukrainian territory and therefore, according to the author, these are illegal: "If people living in Crimea want to be Russian citizens, they can move to Russia—and that's the right recourse. By voting for annexation to Russia, these would-be Russians are actually trying to take the territory away from Ukraine to give it to Russia."