

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

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

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

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Arguments presented by representatives of Russian international law doctrine in the course of 2014 and 2015 are typically based on a particular interpretation of facts, accompanied by a very specific choice of wording (designated in quotation marks in what follows). According to this interpretation, a “military”⁵ “unconstitutional”⁶ “coup d’état”⁷ in Kyiv in February 2014 saw a new “illegitimate government”⁸ come to power in Ukraine, and as the result of intervention by the West⁹ – “sponsors of Kyiv”¹⁰ who “handed out cookies on Maidan and exerted enormous pressure on president Yanukovich,”¹¹ thus organising¹² the Maidan revolution.¹³ This new Ukrainian

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

⁶ E.g., Anatoly Kapustin, *Is International Law Effective? The Case of Russia and Ukraine*, American Society of International Law: Proceedings of the Annual Meeting, Vol. 108 (2014) (Jun. 20, 2017), also available at <https://youtu.be/-x7EgVv5Xk?t=26m20s>; Вельяминов Г.М. и др. Круглый стол на тему: «Международно-правовые аспекты присоединения Крыма к России», Дипломатическая академия МИД России, Москва, 10 апреля 2014 г. [Georgy M. Velyaminov et al., *Round Table: International Legal Aspects of Integration of Crimea in Russia*, Diplomatic Academy of the Foreign Ministry of the Russian Federation, Moscow, 10 April 2014] (Jun. 20, 2017), available at <https://www.youtube.com/watch?v=4k620BZKyto>.

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

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

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

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

¹¹ *Id.*

¹² See, e.g., Salenko 2015.

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

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

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

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

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

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

¹⁸ E.g., Профессор С.В. Черниченко о перспективах развития ситуации на Украине, 26 июня 2014 г. [Professor S.V. Chernichenko on the Perspectives of Development of the Situation in Ukraine, 26 June 2014] (Jun. 20, 2017), available at <https://www.youtube.com/watch?v=SD2OHQRWIBg>; Zorkin, *Law – and Only Law*, *supra* note 5.

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

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

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

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

²³ *Id.*

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

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

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

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

Importantly, this method of factual interpretation by the Russian doctrine is not new: “*The international drama in the simplified Soviet arrangement is reduced to the struggle of heroes without blemish – the Soviet Union and her partners – against utterly black characters – the Western Powers with the United States as their head,*” wrote Władysław Kulski in his comments on the Soviet State and Law journal in 1952.³⁰

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

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

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

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

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

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

continuously maintained the role proclaimed by its 2013 Foreign Policy Concept³¹ – that of a defender and guardian of international law.

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

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

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

Likewise, Russia’s “failed state” rhetoric with respect to Ukraine appears to be a replica of the USSR’s behaviour during the pre-WWII time of the occupation of Poland by Germany.³⁴ Russia’s lack of involvement in the “civil war” in Eastern Ukraine brings to mind the USSR’s lack of involvement in the “civil war” in Finland in 1939–1940.³⁵

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

³¹ Concept of the Foreign Policy of the Russian Federation, approved by President of the Russian Federation V. Putin on 12 February 2013 (Jun. 20, 2017), available at http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6B6Z29/content/id/122186.

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

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

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

³⁵ *Id.* at 344.

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

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

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

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

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

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

³⁸ *Id.*

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

⁴⁰ See, e.g., Kapustin 2015.

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

⁴² *Id.*

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

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

time of secession because Ukraine had lost its statehood, and a new state emerged, to which Russia owed no obligations under international law.⁴⁵ The 1994 Budapest Memorandum and the 1975 Helsinki Final Act are political documents, which never implied any legal obligations for their parties, except for the obligation not to use nuclear weapons, which is being complied with.⁴⁶ These arguments constitute the mainstay of the Russian response. Later in the course of 2014, a new set of arguments was added, to the effect that the transfer of Crimea to Ukraine in 1954 had been unlawful, and Ukraine had been performing a peaceful annexation of Crimea since the collapse of the Soviet Union in 1991.⁴⁷

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

2.1. Issue of Ukraine's Statehood

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

it is hard not to agree with some of our experts who say that a new state is now emerging in this territory. This is just like what happened when the Russian Empire collapsed after the 1917 Revolution and a new state emerged. And this would be a new state with which we have signed no binding agreements.⁴⁸

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

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

⁴⁶ See, e.g., Chernichenko, *Unresolved Problems of International Law*, *supra* note 19; Statement by the Russian Ministry of Foreign Affairs Regarding Accusations of Russia's Violation of Its Obligations under the Budapest Memorandum of 5 December 1994, 1 April 2014 (Jun. 20, 2017), available at http://www.mid.ru/en/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNlr/content/id/68078.

⁴⁷ See, e.g., Salenko 2015.

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

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

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

However, that was entirely not the case.

At the round table on the international legal aspects of joining of Crimea to Russia professor Stanislav Chernichenko from the Diplomatic Academy of Russia – one of the most senior representatives of Russian doctrine⁵¹ – said:

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

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

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

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

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

⁵¹ “The Tunkin of the Post-Soviet Era,” according to Mälksoo 2015.

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

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

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

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

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

Furthermore, according to Tolstykh,

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

⁵³ Tolstykh 2015.

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

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

⁵⁶ Tolstykh 2009, at 374.

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

⁵⁸ Tolstykh 2009, at 375.

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

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

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

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

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

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

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

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

⁵⁹ Tolstykh 2009, at 382.

⁶⁰ Chernichenko, *International Law*, at 205.

⁶¹ *Id.*

⁶² *Id.* at 209.

2.2. Territorial Integrity vs Self-Determination

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

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

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

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

⁶⁴ Постановление Конституционного Суда РСФСР от 13 марта 1992 г. № 3-1 [Resolution of the Constitutional Court of the RSFSR No. 3-1 of 13 March 1992] (Jun. 20, 2017), available at <http://www.szrf.ru/doc.phtml?nb=edition10&issid=1992013000&docid=1430>; Постановление Конституционного Суда Российской Федерации от 31 июля 1995 г. № 10-П [Resolution of the Constitutional Court of the Russian Federation No. 10-P of 31 July 1995] (Jun. 20, 2017), available at <http://www.szrf.ru/doc.phtml?nb=edition00&issid=1995033000&docid=181>.

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

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

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

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

2.3. Shift in Approach to R2P

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

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

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

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

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

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

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

⁷⁰ Круглый стол: «Ответственность за защиту (новые тенденции в международном праве и международных отношениях)», 22 марта 2012 г. [Round Table: Responsibility to Protect (New Tendencies in International Law and International Relations), 22 March 2012] (Jun. 20, 2017), available at <https://www.youtube.com/watch?v=VEudC0lft8>.

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

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

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

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

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

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

⁷¹ Tolstykh 2009, at 626.

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

⁷³ Конференция на тему: «Суверенитет государств и концепция «ответственности по защите»: эволюция международной ситуации и интересы России, 31 октября 2013 г. [Conference: State Sovereignty and Responsibility to Protect: Evolution of the International Situation and Russian Interests, 31 October 2013] (Jun. 20, 2017), available at <https://www.youtube.com/watch?v=tFegyXT2zA>.

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

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

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

Russia's official position on its actions in Crimea was first presented by its president⁷⁶ and Ministry of Foreign Affairs,⁷⁷ including at the UN Security Council,⁷⁸ as events in Crimea were evolving in early 2014. This position was later consolidated in a document (in Russian) produced by the Ministry of Foreign Affairs and titled "The Legal Justifications of the Position of Russia on Crimea and Ukraine."⁷⁹

The Black Sea Fleet Agreements were denounced⁸⁰ by Russia on 2 April 2014.⁸¹ Russia does not appear to dispute the fact that the Black Sea Fleet Agreements had been in force in February and March 2014 when the actual events pertaining to Russian troops leaving their military bases were taking place.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁴ Direct Line with Vladimir Putin, President of Russia, 17 April 2014 (Jun. 20, 2017), available at <http://en.kremlin.ru/events/president/news/20796>.

Since then, official statements by Russia's Ministry of Foreign Affairs have further confirmed the participation of Russian troops in Crimean events.⁸⁵ Furthermore, as mentioned in the previous section, according to an interview of the Russian president in a documentary "Crimea. The Road Home," the launch of a special operation to return Crimea to Russia had been ordered by him as early as on 22 February 2014.⁸⁶

Yet in his article for the Heidelberg Journal of International Law in 2015 Kapustin completely ignored the issue of the use of force by Russia. In an open letter on behalf of the RAIL to the members of the ILA, Kapustin chose to limit his arguments on the non-use of force to the issue of the Black Sea Fleet:

contrary to false information from the leaders of the USA and EU countries Russia didn't send its military fleet into Crimea for holding a referendum. The Russian Black Sea military fleet has been staying in Crimea long ago (long before a referendum) during many centuries! And this fact is well-known.⁸⁷

Chernichenko simply continued to refer to the integration of Crimea into Russia as a "completely peaceful" process,⁸⁸ and according to Tolstykh,

Russian presence [...] was not designed to intervene in the process of formation of the will of Crimean population and therefore cannot be considered as violence (although, of course, this presence was an obstacle for jurisdiction of the Kiev authorities).⁸⁹

Here, it would seem that the enormous amount of literature written by Soviet and Russian scholars on the prohibition of aggression and unauthorized the use of force has been intended to address the behaviour of states other than Russia.

2.5. The Admitted Presence of Russian Troops and Russian Involvement Vis-à-Vis the Free Choice Made by Crimea

According to "The Legal Justifications of the Position of Russia on Crimea and Ukraine" by the Ministry of Foreign Affairs of Russia,

the proclamation of independence of the Republic of Crimea and its incorporation into the Russian Federation is a lawful form of implementation

⁸⁵ See, e.g., Legal Justifications of the Position of Russia on Crimea and Ukraine, *supra* note 68.

⁸⁶ *Crimea. The Road Home*, *supra* note 43.

⁸⁷ Kapustin, *RAIL Letter to ILA*, *supra* note 8.

⁸⁸ Chernichenko, *Unresolved Problems of International Law*, *supra* note 19.

⁸⁹ Tolstykh, *Reunification of Crimea with Russia*.

of the right of the Crimean people to self-determination in a situation of a coup d'état in Ukraine which was directed from the outside with the use of force.⁹⁰

Even assuming, for the sake of argument, that the Crimean population qualified as a people under international law, Russia's self-acknowledged commencement of a special operation on 22 February 2014⁹¹ and stationing of troops outside its military bases and in government buildings when the Crimean referendum was formulated, announced and held raises a serious question under international law.

Russia had a fundamental duty to "refrain from the... support, direct or indirect, of... secessionist activities within other States."⁹² Even taken against the right to support a people's realization of their right to self-determination,⁹³ such a right does not release a State from its obligation to act in accordance with the UN Charter.⁹⁴

The ICJ Advisory Opinion on Kosovo unequivocally precludes the legality of declarations of independence connected with "the unlawful use of force or other egregious violations of general international law in particular those of peremptory character (*jus cogens*)."⁹⁵

However, this is not even an important subject of discussion among Russian academics. Russian scholars prefer to focus their attention exclusively on the often-quoted passage of the opinion in para. 84, according to which "general international law contains no [...] prohibition of the declarations of independence," and generally tend to limit their observations on the matter to the discussion of legality of self-determination under positive international law *in abstracto*,⁹⁶ including with the use of clearly out-of-date or inapplicable arguments.⁹⁷

⁹⁰ Legal Justifications of the Position of Russia on Crimea and Ukraine, *supra* note 68.

⁹¹ *Crimea. The Road Home*, *supra* note 43.

⁹² Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res. 2131 (XX), 21 December 1965; *see also* Security Council 7176th Meeting, 15 May 2014 (Jun. 20, 2017), available at <http://www.un.org/press/en/2014/sc11398.doc.htm>.

⁹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. 136; *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain)*, Second Phase, [1970] I.C.J. 3.

⁹⁴ Declaration on Intervention; Definition of Aggression, UNGA Res. 3314 (XXIX), 14 December 1974.

⁹⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. 403, para. 165.

⁹⁶ Kapustin 2015.

⁹⁷ For example, the reunification of Northern Schleswig with Denmark in 1921 through plebiscite has been consistently referred to. Nevertheless, that situation of almost one hundred years ago involved extensive negotiations and at least a two-year preparation – a backdrop dramatically different from the Crimean referendum, which was announced and held within less than three weeks. History knows other examples of referenda which were used as a pretext for expansion of a third state territory – but those are not part of the analysis of prior state practice by Russian scholars. Cf. a comprehensive analysis of the topic

Furthermore, in the translated citation below, professor Kotlyar from the Diplomatic Academy of Russian Ministry of Foreign Affairs appears to see no problem with the Kremlin taking certain crucial decisions on secession, instead of Crimea (nor does he find problematic the solution found by Russia to the issue of a “people”):

There is a nuance – indeed international law only speaks of the right to self-determination of a “people,” not a population of a specific territory. An elegant solution in this regard was found by the lawyers and Administration of our President [*sic*], as three days before the referendum Crimea declared itself an independent State. And an independent State will always comprise a “people,” and not just a “population.”⁹⁸

It is commonplace in the Russian discourse to start arguments on the legality of self-determination with the unquestionable desire of Crimeans to join Russia.⁹⁹ Yet it is hardly a verifiable premise: a claim of external self-determination was nowhere to be found on the Crimean parliament’s agenda over the decade preceding its introduction into the parliament on 27 February 2014, that is, five days after the Russian President’s order to start a “special operation.”

In his article on the topic,¹⁰⁰ professor Kapustin addresses the past developments in Crimea very briefly, and leaves an obvious gap in describing events between 1992 and 2014. However, issues concerning use of the Russian language and the autonomy of the region, which caused notable turmoil in the 1990s, seemed to have settled down following the provision of a guaranteed number of seats for Crimea in the Ukrainian parliament and the applicable Russian language policy in the region.¹⁰¹ As such, these issues had not sparked any significant tension since around the year of 2000.¹⁰² In 2010 regional parliamentary elections saw the only pro-Russian party

by Anne Peters, *Das Gebietsreferendum im Völkerrecht. Seine Bedeutung im Licht der Staatenpraxis nach 1989* (Baden-Baden: Nomos, 1995); see also Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea’s Alteration of Territorial Status under International Law*, EJIL: Talk!, 16 April 2014 (Jun. 20, 2017), available at <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>.

⁹⁸ Kotlyar, *Round Table*, *supra* note 6.

⁹⁹ Probably the most striking verbalized quote in this regard belongs to Tolstykh: “the residents of Crimea were initially predisposed in favor of political union with Russia,” Tolstykh, *A Russian Perspective on Crimea*.

¹⁰⁰ Kapustin 2015.

¹⁰¹ See Grant 2015. For the statistical data on education in Russian, see Мазука Л. Языковая политика в Крыму: спекуляции и реалии, *Украина сегодня*, 17 марта 2010 г. [Leonid Mazuka, *Language Policy in Crimea: Speculations and Reality*, *UA Today*, 17 March 2010] (Jun. 20, 2017), available at http://old.ua-today.com/modules/myarticles/print_storyid_31245.html.

¹⁰² The issue that stayed unresolved and where the debate was ongoing was the autonomy and language rights of the Crimean tatars, however, their aspirations and claims to the central Ukrainian government never took the direction of any pro-Russian claims, rather to the contrary.

in the region secure a mere three of 100 regional parliamentary seats.¹⁰³ Russia, for its part, also never publicly raised any claims regarding “return” of Crimea before 2014.¹⁰⁴ A claim regarding alleged linguistic persecution and underrepresentation in the Ukrainian parliament after the “coup” starting 23 February 2014 which required “remedial secession”¹⁰⁵ of the region on 16 March 2014 (that is, already after it was vetoed) is completely unconvincing.

Kapustin also fails to address any of the applicable legal standards to the conduct of a referendum – the article is completely silent on applicable state practice, the existence of such standards, and whether they were or should have been complied with.

The situation on 27 February 2014, according to publicly available sources, already raises questions concerning the independence of the parliament. On that day, then unidentified armed groups – arguably those that were later admitted by Russia to have been elements of the Russian army – seized the governmental buildings in Crimea.¹⁰⁶ The number of Crimean deputies present in the parliament building on that day, including during the referendum resolution vote, remains unclear.¹⁰⁷ According to one of the eventual leaders of the self-declared Donetsk People’s Republic, Igor Strelkov, who was also present in Crimea at the end of February 2014, the military gunmen were “forcing deputies to go into the building and vote.”¹⁰⁸

Furthermore, the date of the referendum announced and scheduled by the parliament on that day later moved forward three times: it was initially scheduled for 25 May 2014, then moved to 30 March 2014, and on 6 March 2014, and was then rescheduled for and held on 16 March 2014 – just 10 days after it was finally scheduled. The questions forming the basis of the vote were also revised twice.¹⁰⁹ This

¹⁰³ For discussion of the 2010 results of the Crimean parliamentary elections, see, e.g., Денисов Д. Результаты региональных выборов на Украине: укрепление вертикали власти или тенденции федерализации страны [Denis Denisov, *Results of the Regional Elections in Ukraine: Strengthening of the Power Vertical or Tendency of the Country's Federalisation*] (Jun. 20, 2017), available at <http://www.materik.ru/problem/detail.php?ID=11544>.

¹⁰⁴ Moreover, in 1997 Russia signed and ratified the Treaty of Friendship, Cooperation, and Partnership with Ukraine without any reservations, in which both parties agreed to “respect each other’s territorial integrity, and confirm the inviolability of the borders existing between them,” Treaty between the Russian Federation and Ukraine on Friendship, Cooperation and Partnership, 31 May 1997 (Jun. 20, 2017), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/155/47/PDF/N9715547.pdf?OpenElement>.

¹⁰⁵ Kapustin 2015; Tolstykh 2015.

¹⁰⁶ See, e.g., Number of Crimean Deputies Present at Referendum Resolution Vote Unclear, Interfax-Ukraine, 27 February 2014 (Jun. 20, 2017), available at <http://en.interfax.com.ua/news/general/193292.html>.

¹⁰⁷ *Id.*

¹⁰⁸ И. Стрелков vs Н. Стариков «Центрсилы/Силацентра» [Igor Strelkov vs Nikolay Starikov “Center of Power/Power of Center”], Neyromir TV, 22 January 2015 (Jun. 20, 2017), available at <https://www.youtube.com/watch?v=G04tXnvKx8Y>.

¹⁰⁹ The wording of the question proposed for the referendum on 27 February 2014 was as follows: “The Autonomous Republic of Crimea possesses statehood and is part of Ukraine on the basis of treaties

hastiness alone raises serious questions concerning due process.¹¹⁰ The population of Crimea had only ten days to consider its destiny while being surrounded by armed forces, and, according to the final wording of the questions put to the referendum, was not even offered the option of maintaining the status quo within Ukraine. The unreasonableness of this timeline is one of the first factors playing against the Russian argument, especially when combined with statements describing the Crimean events as a “special operation.” A region with a population of two million people could not reasonably be expected to form an opinion and find a “consensual solution” for all Crimean ethnic groups on a matter of such public importance as secession from their home state in less than sixteen days, even in a situation where the freedom of expression is not impeded, which in Crimea it was.¹¹¹

None of these considerations find proper reflection and analysis in positions on the legality of the Crimean referendum and its subsequent secession espoused by Russian legal scholars.

The inconsistent and often rudimentary level of the Russian doctrinal interpretation as shown above has grave consequences.

First of all, it affects official Russian decision-making and its application of international law, at least by virtue of a lack of professional legal advice that might otherwise be provided by an independent and well-informed Russian academia to the Russian government.

Secondly, it results in a growing public perception of international law in Russia as either a meaningless “fig leaf” used exceptionally to cover State self-interest, or “idle talk” between politicians. This badly simplified misperception affects all layers of Russian society and adds to Russia’s intellectual isolation from the world, thus further entrenching the never-ending vicious cycle of the Soviet legacy.

3. The Russian Doctrinal Response to Crimea in a Broader Context of Post-Soviet International Legal Academia

The crucial general observation one might make with respect to the positions espoused by Russian academics, is that they generally reflect – occasionally with slight improvisation, but often word-for-word – the official Russian line expressed by the Russian President and Ministry of Foreign Affairs, including at the UN Security Council.

and agreements (‘in favour’ or ‘against’).“The wording was modified on 6 March 2014 to include the two following questions “Choice 1: Do you support the reunification of Crimea with Russia with all the rights of the federal subject of the Russian Federation? Choice 2: Do you support the restoration of the Constitution of the Republic of Crimea in 1992 and the status of the Crimea as part of Ukraine?”

¹¹⁰ Peters, *Sense and Nonsense*, *supra* note 97.

¹¹¹ Venice Commission, Opinion No. 762/2014 on Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea’s 1992 Constitution is Compatible with Constitutional Principles, 21 March 2014 (Jun. 20, 2017), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)002-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e).

Whatever positive developments in Russian academia since 1990, the case of Crimea has made it obvious that Russian international legal doctrine continues to speak with unity of voice, and that voice continues to purport to be that of the Russian state. The Crimean situation has conclusively revealed that the seeming most important change from a “monolithic” Soviet doctrine to pluralism of opinions¹¹² has remained mostly a declaration, at least in the minds of the leading Russian names in Russian international law.

In reflecting such official positions, the Russian academia ignores or denounces, often with extreme hostility, not only interpretations of international law by other State, but also interpretations offered by foreign academics, international organizations and even its own prior interpretations, including, as shown above, own positions earlier developed by the same doctrinal authors.

Some international scholars who study “Russian” approaches to international law or come across them as part of their research seem prepared to justify this striking unity of perspective among Russian academic international lawyers by reference to the historically authoritarian nature of the Russian state and the pressure exerted by the Russian government on NGOs and civil society in the recent years.¹¹³

Yet the proximity of these scholars to government¹¹⁴ has, since the 1990s, been mostly voluntary – such scholars have willingly sought to act as advocates of the government position in the two and a half decades since the end of the USSR, without, to the best of my knowledge, any pressure from the government itself. It also seems obvious that Russian scholars have always proudly spoken of their own “Russian approach to international law” to justify the singularity of their perspective on that law. It should also be borne in mind that the present-day autocracy characteristic of Russian universities and the lack of academic freedom among Russian international law scholars in the 1990s and early 2000s have been mutually constitutive. It was in fact the Russian international law scholars themselves and the academic system they inherited from the USSR that were responsible for most of the restrictions, self-limitations, and dehumanization in post-Soviet academia well before the conflict with Ukraine.

Eastern European mythology speaks of a very dark figure named Koschei the Deathless. Koschei was unable to die because he took his soul out of his body and hid it “inside a needle, in an egg, in a duck, in a hare, in an iron chest, buried under an oak tree, on a hidden island.” Russian international law doctrine may be regarded as one such “horcrux” wherein the soul of Russia’s totalitarian past has been in hiding for the past quarter of a century.

¹¹² Lauri Mälksoo, *International Law in Russian Textbooks: What’s in the Doctrinal Pluralism?*, 1(2) Göttingen Journal of International Law 279 (2009).

¹¹³ See, e.g., Mälksoo 2015; Tarja Langstrom, *Transformation in Russia and International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2003); Borgen 2015.

¹¹⁴ Mälksoo 2015, at 81.

The collapse of the USSR had no immediate impact on the teaching of international law in Russia. When a new edition of the most authoritative Soviet international law textbooks co-authored by Tunkin was published in 1999, most of its chapters repeated the previous 1981 version of the same textbook word-for-word, with references to “bourgeois” science of international law in the 1981 edition simply replaced by global change to “Western” science of international law in the 1999 edition. The ideological split between the “communist” and the “capitalist” systems invented by the USSR (and, therefore, the hostility underlining the ideological division between the socialist camp and the rest of the world) thus remained untouched in the Russian international law mentality despite Russia’s declared transition to democracy and free market in the 1990s. In such circumstances, the requirement to cite the Russian doctrine in every scholarly work presented for defence in Russia and lack of English language knowledge among the Russian international legal scholarly community¹¹⁵ has always added to the never-ending circle of reproducing the Soviet dogma in contemporary Russian public international law literature.

Another example of the continued totalitarian tradition in Russian public international law academia is backing of the traditional “Russian school of international law” by Soviet structures that survived the collapse of the totalitarian regime, such as, for example, the Soviet Association of International Law (simply renamed, now the RAIL, and a branch of the ILA).

In the situation with Crimea representatives of Russian international law doctrine have defaulted to taking the extreme positivist and voluntarist approach to law that characterised the perspective of the Soviet Union as a totalitarian great power.¹¹⁶ The undeniable “flashbacks” to Russia’s Soviet past as regards events in Ukraine are eliciting old “learned” reactions from members of institutions that continue to carry the Soviet legacy. Trapped in this approach, these scholars are able only to regard international law as the word spoken by their sovereign. Where a subject of international law chooses to violate that law, such lawyers are led down the path of illegality – proclaimed, however, to be the new “legality” – together with the violating State.

A word, however, should be spoken of the new generation of international lawyers in Russia.

In a heated debate on the pages of the Russian newspapers in the course of 2015, Elena Lukyanova, a professor of constitutional law at the Higher School of Economics, clashed with one of the most active proponents of the legality of Crimean annexation, Valery Zorkin, the chairman of the Russian Constitutional Court. Although her main criticism was aimed at the Constitutional Court’s attitude during the Crimean crisis, Lukyanova started the debate by noting the existence of the “two worlds” among Russian international and constitutional lawyers:

¹¹⁵ Mälksoo 2015, at 97.

¹¹⁶ Alwyn Freeman, *Some Aspects of Soviet Influence on International Law*, 62(3) *American Journal of International Law* 710 (1968). Cf. the perception of customary international law in the Soviet theory of international law, see, e.g., Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 *Yale Law Journal* 202 (2010).

[Russia] counts numerous highly professional independent experts in the field of law. However, they are usually barred from decision-making within the government [...] because, over twenty years, the state has selected the sort of legal doers it found convenient for itself. The rest, one way or another, were gradually removed beyond the bounds of the state's legal activities. As a result, two legal communities have evolved; they speak completely different languages and use different legal constructs. One community comprises officials "in the field of law," judges, parliament members, election commissioners, and law enforcement officers. The other community is made up of lawyers, human rights activists, and some of the independent scholars.¹¹⁷

In public international law, the independent thought that was forming in Russia in the course of the twenty-five years following the disintegration of the USSR has had to find its way through (or around) an extremely isolated and self-referential system of the post-Soviet international law tradition of teaching. In the attempt of self-preservation, this system strongly reacts to any critical or simply differing opinions¹¹⁸ and openly disregards a systemic study of international jurisprudence and international legal scholarship in most of the Russian textbooks and monographs. The notorious lack of English language knowledge often compounds a lack of interest in filling law libraries with legal literature of the XX century – a time when the Soviet Union was a closed territory.

Holders of dissenting opinions on any matter of importance in the post-Soviet academic international law school in Russia put themselves at risk of not being conferred their Russian degree and of ostracism within the system. Most Russian universities are apparently still quite hostile to foreign professors and disdainful of degrees obtained outside Russia, and this becomes a serious obstacle for the younger generation of Russian international law scholars whose chosen career is to teach in Russia and to improve the level of public international law at Russian universities.

In the "backstage" of Russian academic life a new trend has emerged in recent years, namely the issue of "funding" of scholars. Scholars who express an opinion critical of any actions on the part of the Russian government from the standpoint of international law are now likely to face pointed questions about the sources of funds supposedly paid to them to make such statements (it is generally presumed that the money "comes from the West"), and their works and commentaries are likely to be disparaged as "articles for pay." Strikingly, a scholar's previous reputation and integrity apparently has no bearing on these presumptions. The stance that academic affiliation with a state-

¹¹⁷ Elena Lukyanova, *On the Rule of Law in the Context of Russian Foreign Policy*, 3(2) Russian Law Journal 10 (2015).

¹¹⁸ See, e.g., *Международная и национальная уголовная юстиция: совместимость и взаимодействие*, 3 августа 2015 г. [International and National Criminal Justice: Compatibility and Interaction, 3 August 2015] (Jun. 20, 2017), available at <https://www.youtube.com/watch?v=6fq6018wLol>.

funded university should preclude “affiliated” scholars from raising arguments critical of the government is also being increasingly voiced. Importantly, such voices are heard on a “horizontal” level, that is, within the Russian legal community itself. They represent an uninterrupted continuation of the post-Soviet “horizontal” tradition in academia (at least in the area of public international law in Russia) of *ad hominem* attacks on those who express a dissenting or simply a differing opinion. The very presence of such attacks, and their recent intensification, indicates however that independently thinking scholars and practitioners of international law in Russia are very much in the picture, and suggests that their voices may be starting to be heard.

Conclusion

In the case of Crimea, representatives of Russian doctrine may have fallen victims to the State propaganda machine precisely because they never strayed beyond their dogmatic understanding of law and the role of the international lawyer as anything other than advocate of the State, which they had developed during the Soviet times. This now continues to foment their reductivist inter-State thinking whereby all those not supportive of the State’s position are viewed as agents of another State.

Building upon a legacy of strong Soviet rhetoric, guardians of the closed system of “Russian international law” continue, domestically, to view and present it as the leading “science” of international law in the world – a world that unfairly fails to likewise accord it such status. A fair question can be (and indeed has been) asked as to whether international scholars adhering to “Western” paradigms may indeed be more biased in favour of blaming Russia for violations of international law than they would be in case of international law violations committed by a “Western” state.¹¹⁹ Indeed, there does appear to be a certain distrust of the Russian positions voiced. However, I hope this article will leave the reader with the following question: is such distrust coming from “the West” and is due to Russia’s position as a country on the world stage – as some post-Soviet scholars are trying to claim,¹²⁰ – or does it come from a professional legal community and is due to logical, communicational¹²¹ and

¹¹⁹ See, e.g., Forum: The Situation in Ukraine, 15 September 2015 (Jun. 20, 2017), available at <http://www.jus.uio.no/pluricourts/english/news-and-events/events/2015/esil-2015-en/video-and-streaming/the-situation-in-ukraine.html>.

¹²⁰ See, e.g., Томсинов В.А. «Крымское право», или Юридические основания для воссоединения Крыма с Россией, 2 Вестник Московского университета. Серия 11: Право 3 (2014) [Vladimir A. Tomsinov, “Crimean Law” or a Legal Basis for the Reunification of the Crimea and Russia, 2 Moscow State University Herald. Series 11: Law 3 (2014) (Jun. 20, 2017), also available at http://tomsinov.com/russia_contemp/krymskoe_pravo.pdf; Rein Müllerson, *Ukraine: Victim of Geopolitics*, 13(1) Chinese Journal of International Law (2014); Zorkin, *Law – and Only Law*, *supra* note 5.

¹²¹ See, e.g., Alexander Gabuev, *Russia’s Performance at the Munich Security Conference: A Symptom or a Cause?*, Carnegie Moscow Center, 10 February 2015 (Jun. 20, 2017), available at <http://carnegie.ru/2015/02/10/russia-s-performance-at-munich-security-conference-symptom-or-cause>.

even linguistic fallacies in the rhetoric of Russian international legal doctrine (and of the Russian government)? In other words, can we assess if the Russian doctrinal scholars play the instrument of international law, or if they simply smash on its keys pretending that it is some form of avant-garde music?

As the voice of the international legal profession worldwide has grown to become incomparably polyphonic over the past century, a fundamental difference in understanding the nature and function of the profession may be at the very root of the inability of the two approaches – indeed, one might go so far as to say two professions – to accept each other.

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