NATIONAL UNIVERSITY OF
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DOMESTIC LEGISLATION AND INTERNATIONAL LAW AS TOOLS OF RUSSIA'S LAWFARE AGAINST UKRAINE AND THE WEST

International Law Clinic

Department of International and European Law

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ABSTRACT

In 2014, the Russian Federation, acting in violation of the fundamental principles of international law, annexed the territory of Crimea, intervened and established its proxy regimes in Eastern Ukraine. Russia has waged this war against Ukraine not only by use of military force. Law was and continues to be employed by Russia in an attempt to legitimize its unlawful actions, garner support at the domestic level and hinder future resolution of the conflict in Ukraine's favour. At the start of the conflict, Russia advanced – to be sure weak and untenable – claims under international law trying to cast a veneer of legality over its unlawful actions. The focus has subsequently shifted to the use of domestic legislation adopted to maintain, at least at the national level, a façade of legitimacy of what in effect was Russia's disregard for sovereignty and territorial integrity of other states, its growing imperialistic ambitions and desire to isolate its population from Western influence.

This research paper examines Russia's use of domestic and international law as a means of waging war and advancing its geopolitical interests. The paper first analyzes amendments introduced recently into the Russian Constitution and other domestic legislation, investigating the motives behind these legislative changes and their potential role in lawfare. It then looks into the exploitation by Russia of certain international law norms in the process of annexation of Crimea. Finally, it explores the increasing use of lawfare in Russia's strategy of maintaining a low-intensity conflict in Eastern Ukraine.

Authors

The research paper was authored by students of the Faculty of Law of the National University of Kyiv Mohyla Academy Volodymyr Hryshko, Arina Kolesnyk, Zhanna Levkovska, Anna Tymoshenko and Oleksandr Vasylenko under the supervision of Dr Gaiane Nuridzhanian.[1]

[1] Authors are listed in alphabetical order. The following students also contributed to research and drafting of various sections of the paper: Anastasiya Batoh, Viktoriya Bilenko, Vladyslava Zayets, Oleksandr Zub, Olha Kaduk, Nelli Kichihina, Anastasiya Marushchak, Halyna Matsera, Maksym Mykolyuk, Mariya Ovsyannikova, Kateryna Pedchenko, Mykhailo Plachkov, Yuriy Khalaim.

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LIST OF ABBREVIATIONS

'DPR'/ 'LPR'	'Donetsk / Luhansk People's Republic'
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
FSB	Federal Security Service (of the Russian Federation) (ФСБ)
HI	Humanitarian intervention
ICC	The International Criminal Court
ICISS	The International Commission on Intervention and State Sovereignty
ICJ	The International Court of Justice
NATO	The North Atlantic Treaty Organisation
OHCHR	The United Nations Office of the High Commissioner for Human Rights
OSCE	The Organization for Security and Co-operation in Europe
R2P	Responsibility to protect
UHI	Unilateral humanitarian intervention
Ukrainian SSR	The Ukrainian Soviet Socialist Republic
UN GA	The United Nations General Assembly
UN SC	The United Nations Security Council
USSR	The Union of Soviet Socialist Republics
VCLT	The Vienna Convention on the Law of Treaties of 1969

INTRODUCTION

As a nuclear state, one of the world's biggest energy suppliers, and a permanent member of the UN Security Council with the veto power, Russia is an important global player. Following the collapse of the USSR, Russia has been struggling to preserve its dominance in the region. In pursuit of its quasi-imperial geopolitical goals, Russia tends to use law as a weapon. Lawfare has become one of the major tools used by Russia in its conflict with Ukraine which began in earnest in the wake of the Euromaidan Revolution of 2013-2014. Understanding Russia's lawfare strategy can help to devise appropriate responses and reduce geopolitical risks. For this reason, the research paper focuses on Russia's use of domestic legislation as well as international law as a lawfare instrument in its relations with Ukraine. It also explores the potential use of Russia's domestic legislation introduced since 2020 in its relations with the West.

The paper begins, in Chapter 1, by briefly looking at the evolution of and different approaches to the term 'lawfare.' No single definition of the term exists in scholarly literature. In this paper, 'lawfare' is defined as deliberate exploitation of domestic or international law in order to achieve goals other than those for which they were created such as to obtain a certain geopolitical or military advantage. In the same chapter, the paper touches on the historical origins of Russian lawfare and understanding of the concept in Russia's political discourse. Although no equivalent of the term 'lawfare' exists in Russian language, Russia views law as one of the major tools of hybrid warfare strategy. Examples of Russia's lawfare date to the times of the Russian Empire when the Treaty of Kuchuk Kainardji between the Russian Empire and the Ottoman Empire was concluded in 1774. It entitled the Russian Empire to act as the sole protector of Ottoman Christians and to intervene diplomatically and militarily in the Balkans, a cause that could easily be used to disguise territorial expansionist ambitions of the Russian Empire. Later on, the Soviet Union signed non-aggression treaties to buy time to build its military force. Modern Russia continues to use lawfare to supplement its military and political efforts.

The study proceeds, in Chapter 2, with the analysis of the 2020 amendments to the Constitution of the Russian Federation and the relevant domestic legislation. It examines in detail the new and amended provisions, explores motives for their adoption, investigates their compatibility with relevant international law norms and assesses their potential role in Russia's lawfare against Ukraine and the West. The Constitutional amendments introduced in 2020 were adopted in a rather hasty process without a clear basis in domestic law. Certain amendments were adopted to suppress separatist tendencies within Russia and to prevent any future attempts to return Crimea to Ukraine. Certain other amendments are directed at constructing Russian national identity and embody rhetoric of protecting Russians and Russian-speaking population abroad often voiced by Russia during its annexation of Crimea and interference in Eastern Ukraine. Yet another significant Constitutional amendment introduces a power of domestic veto on enforcement of judgments of international courts and tribunals in Russia. These Constitutional amendments furnish Russia with a supposed justification for interference with the sovereignty of other states and disregard for international law. Other legislative changes discussed in Chapter 3 are essentially aimed at isolating Russian population from and limiting its exposure to the influence of the West.

Chapter 3 turns to Russia's weaponisation of international law in the process of annexation of Crimea. It discusses claims raised by Russia under international law norms concerning use of force and right to self-determination to legitimize its annexation of Crimea. The narrative constructed by Russia around the idea of military intervention for the protection of Russians and Russian-speaking population during the annexation of Crimea was subsequently reflected in the 2020 Constitutional amendments discussed in Chapter 2. The research paper demonstrates lack of factual basis for and incorrectness under international law of the Russia's claims regarding the

need for humanitarian intervention in Ukraine, regarding the Crimea's right to self-determination by means of secession and Russia's compliance with the Budapest Memorandum. By closely engaging with these claims, the paper shows that careful analysis of the relevant norms of international law can assist in exposing the meritless nature of the legal claims exploited in lawfare, and that the law itself can become a powerful instrument of countering lawfare.

While lawfare played an important part in Russia's annexation of Crimea, its strategy in Donbas has mainly been focused on maintaining a low-intensity conflict between the Ukrainian government and the rebel groups. Chapter 4 demonstrates that lawfare – by use of international as well as domestic law – is increasingly becoming part of Russia's strategy in Donbas. Most recently, Russia introduced a simplified procedure for the acquisition of Russian citizenship for the residents of two separatist regions in Eastern Ukraine. Albeit portrayed by Russia as a humanitarian measure, experts note that the real motive behind Russia's passportisation is consolidating its control over the separatist regions, without actually annexing them, and frustrating any future effort to settle the conflict in Ukraine's favour.

Finally, the study concludes, in Chapter 5, by providing an overview of the current state and future prospects of Russia's lawfare in its relations with Ukraine and the West. Exploiting ambiguities of certain international law norms and adopting 'convenient' domestic legislation, Russia is trying to introduce its own definitions of important legal categories such as right to self-determination, humanitarian intervention, responsibility to protect and use of force. By doing so Russia is seeking to create an alternative legal framework. The revisionist rhetoric, coming from a permanent UN SC member and a nuclear state, is dangerous. It uses the pluralistic nature of international law in bad faith and sets a dangerous precedent: it encourages separatism, re-introduces the notion of spheres of influence into international law, resurrects the idea of 'righting historical wrongs,' which compromise the existing 'Western' world order.

1. LAWFARE: INTRODUCTORY REMARKS

The focus of the study is the notion of lawfare. Unlike the phenomenon itself, the term 'lawfare' is a rather recent invention. In its most general sense, it refers to 'the waging of war by law.'[2] Various definitions have been given to the term by scholars and practitioners. This chapter traces the evolution of the term, examines lawfare techniques and suggests a definition of the term 'lawfare' as it is understood in the context of this study.

1.1. Definition of the term

The term 'lawfare' was first used in 1975 by John Carlson and Neville Yeomans in 'Whither Goeth the Law – Humanity or Barbarity.'[3] The authors wrote that in lawfare unlike in warfare 'the duel is with words rather than swords,'[4] which can be understood as using law in order to reach military objectives.

In 1999 the concept of lawfare was discussed in the book called 'Unrestricted Warfare' written by Chinese officers, two colonels in the People's Liberation Army. They defined 'lawfare' as 'the use of international law, as well as other measures, to effect a strategic shift without resorting to direct military action.'[5] The authors concluded that modern warfare will no longer be characterized by military means, or even include military tools at all – instead, society will become the battleground.[6]

However, the phenomenon of lawfare appeared long before the term itself was coined.[7] Scholars suggest that one of the first documented examples of lawfare dates back to the seventeenth century when Hugo Grotius was asked to write a treatise justifying as lawful the war of Dutch against Portugal.[8] According to Mark Voyger, a scholar of Russian lawfare, Russian lawfare was born in 1774, when Catherine the Great attempted to use the Treaty of Kuchuk Kainardji to grant Russia the power of military intervention in the Balkans to support Orthodox Christians in the Ottoman Empire.[9]

The term gained broader meaning and became the focus of scientific interest at the beginning of the 21st century, in particular following the bombings of Kosovo and Serbia in 1999. In 2001, Major General Charles J. Dunlap claimed that events in 'Kosovo and Serbia were distinguished

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[2]David Kennedy, Of War and Law (Princeton University Press, Princeton, 2006), p. 12, <www.jstor.org/stable/j.ctt7rqc9.4.> accessed 17 July 2021.

[3]Christi Scott Bartman, Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us (2010) 43 Case W. Res. J. Int'l L; p.427. <https://scholarlycommons.law.case.edu/jil/vol43/iss1/24> accessed 17 July 2021

[4]John Carlson & Neville Yeomans, Whither Goeth the Law - Humanity or Barbarity (1975) The Way Out - Radical Alternatives in Australia; par. 7. <http://www.laceweb.org.au/whi.htm> accessed 17 July 2021.

[5]Logan, Trevor Michael Alfred, International Law and the Use of Lawfare: An Argument for the U.S. To Adopt a Lawfare Doctrine (MSU Graduate Theses. 3146, 2017); p.4 <https://bearworks.missouristate.edu/theses/3146> accessed 17 July 2021.

[6]Jill I. Goldenziel, Law as a battlefield: The US, China and the Global escalation of lawfare (Goldenziel Formatted), p. 108 <https://ssrn.com/abstract=3525442> accessed 17 July 2021.

[7]Brad Fisher, The Kremlin's Malign Legal Operations on the Black Sea: Analyzing the Exploitation of Public International Law Against Ukraine (Kyiv-Mohyla Law and Politics Journal, 2019); p.195 <http://kmlpj.ukma.edu.ua/article/view/190000 > accessed 17 July 2021.

[8]Ibid, p. 195

[9]Mark Voyger, Russian Lawfare – Russia's Weaponization of International Law and Domestic Law: Implications for the Region and Policy Recommendations (4 J. Baltic Security 35, 37, 2018), p. 36 <https://doi.org/10.2478/jobs-2018-0011> accessed 17 July 2021.

by lawfare because, in his view, the Serbs, the media and the international community strategically used the language of law to delegitimize the military campaign.'[10] Dunlap defined lawfare as 'using, or misusing, law as a substitute for traditional military means to achieve an operational objective.'[11] In Dunlap's opinion, lawfare can be defined as a negative concept of misusing law as well as positive concept of use of law in a legitimate cause.[12] In 2017, Charles Dunlap expanded his original definition to include 'using law as a form of asymmetrical warfare.'[13]

A rather neutral definition of the concept was given by Joel Trachtman, who writes that lawfare is a 'legal activity that supports, undermines, or substitutes for other types of warfare.'[14] However, some scholars did not subscribe to such understanding of the term, claiming that lawfare manifests in 'wrongful uses of the law to achieve political or military ends.'[15] Indeed, the term 'lawfare' is often used in its negative meaning to refer to 'abuse of laws and judicial systems' and 'manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted.'[16] For instance, John Comaroff wrote that 'lawfare' is 'the effort to conquer and control indigenous peoples by the coercive use of legal means.'[17]

Alana Tiemessen described the notion of lawfare, speaking of it in the context of the International Criminal Court (ICC), as 'the coercive and strategic element of international criminal justice in which the ICC's judicial interventions are used as a tool of lawfare for States Parties and the UN SC to pursue political ends.'[18] David B. Rivkin Jr. and Lee A. Casey state: 'the term 'lawfare' describes the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals.'[19]

There are, nonetheless, examples where lawfare is still understood in a neutral or positive, rather than negative sense, in particular as using law in order to reach a legitimate objective. For instance, Ukraine's bringing claims against Russia concerning various aspects of the inter-state conflict over

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[10]Craig A. Jones, Lawfare and the juridification of late modern war (2015); p.2. <https://doi.org/10.1177/0309132515572270> accessed 17 July 2021.

[11]Charles R. Dunlap, Lawfare Today: A Perspective (Yale Journal of International Affairs, 2008); p.146. < https://scholarship.law.duke.edu/faculty_scholarship/3154/> accessed 17 July 2021.

[12]Michael P. Scharf and Elizabeth Andersen, Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010, 43 Case W. Res. J. Int'l L. 11 (2010); p.12. <https://scholarlycommons.law.case.edu/jil/vol43/iss1/2> accessed 17 July 2021.

[13]Mark Voyger, Russian Lawfare – Russia's Weaponization of International Law and Domestic Law: Implications for the Region and Policy Recommendations, 4 J. Baltic Security 35, 37 (2018), p. 36 <https://doi.org/10.2478/jobs-2018-0011> accessed 17 July 2021.

[14]Joel P. Trachtman, Integrating Lawfare and Warfare, (39 B.C. Int'l & Comp. L. Rev. 267 2016); p.268 <http://lawdigitalcommons.bc.edu/iclr/vol39/iss2/3> accessed 17 July 2021.

[15]Michael P. Scharf and Elizabeth Andersen, Is Lawfare Worth Defining – Report of the Cleveland Experts Meeting - September 11, 2010, 43 Case W. Res. J. Int'l L. 11 (2010); p.13. <https://scholarlycommons.law.case.edu/jil/vol43/iss1/2> accessed 17 July 2021.

[16]Manusama, Kenneth, Lawfare' in the Conflict between Israel and Palestine? (Amsterdam Law Forum, 2019 Vol. 5, No. 1), p. 121; <https://ssrn.com/abstract=2246715> accessed 17 July 2021.

[17] John L Comaroff, Colonialism, Culture and the Law: A Foreword (Law and Social Inquiry, 2001); p.306 < https://www.cambridge.org/core/journals/law-and-social-inquiry/article/colonialism-culture-and-the-law-a-foreword/127843DF67C63ADF9098CD2AFC8F34B4> accessed 17 July 2021.

[18]Fisher, KJ and Stefan, The Ethics of International Criminal 'Lawfare.' International Criminal Law Review; p.8. <https://doi.org/10.1163/15718123-01602009> accessed 17 July 2021.

[19]David B. Rivkin Jr. & Lee A. Casey, Opinion, Lawfare, (Wall Street Journal, Feb. 23, 2007), at A11.

Crimea and Donbas before international courts and tribunals has been described as 'lawfare'[20] and a 'legitimate use of the variety of available dispute resolution mechanisms.'[21]

In summary, the emergence of the term 'lawfare' reflects developments at the international arena consisting in shift to hybrid means of warfare. No single definition of the term exists and opinions on its content differ. In this study, 'lawfare' is defined as deliberate exploitation of domestic or international law in order to achieve goals other than those for which they were created such as to obtain a certain geopolitical or military advantage.

1.2. Types and methods of lawfare

Lawfare is a complex phenomenon which can be a threat to international, regional, and national security.[22] Identifying and defining various types of lawfare helps to understand better its true cause, nature, and purpose.

Orde Kittrie suggests that there are two different types of lawfare: instrumental lawfare and compliance-leverage disparity lawfare.[23] Instrumental lawfare is defined as 'the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action.' Compliance-leverage disparity lawfare is understood as 'lawfare, typically on the kinetic battlefield, which is designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary.'[24]

Somewhat similarly, Cadet Jessica Williams notes that instrumental lawfare is the use of legal tools as a substitute for conventional military action. For instance, creating or reinterpreting international law to disadvantage an adversary can be interpreted as instrumental lawfare.[25] From William's point of view, the imposing sanctions on the Iraqi Air Force in 2003 to the point where fewer than one-third of its aircraft were flyable is an example of instrumental lawfare used by the United States. Moreover, by using financial lawfare against Iran, the US resorted to instrumental lawfare as well. In this case, the president utilized executive orders and Congress passed legislation to identify and sanction financial entities that assist nuclear weapons proliferation, forcing Iran to negotiate about its nuclear weapons development.[26]

Nations employ compliance-leverage disparity lawfare, which is distinct from instrumental lawfare, to obtain advantages 'from the stronger impact that law and its processes have over an adversary.' To illustrate, China uses compliance-leverage lawfare by formally signing nuclear non-proliferation treaties while not committing completely to them, utilizing private-sector proxies to bolster Iran's nuclear program.[27]

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[20]Wayne Jordash QC, Webinar: Crimea – Ukraine's Lawfare vs Russia's Warfare (Chatham House, 2020) <https://www.chathamhouse.org/events/all/members-event/webinar-crimea-ukraines-lawfare-vs-russias-warfare> accessed 17 July 2021.
[21]Katia Fach Gómez, International Investment Law and the Law of Armed Conflict (Springer 2019); p. 196
[22]Raychev, Y, Lawfare as a Form of Hybrid War: the case of Bulgaria; an Empirical View. (Studia Politica: Romanian Political Science Review, 20(2), p. 250; <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-69929-9> accessed 23 July 2021.
[23]Orde F. Kittrie, Lawfare: Law as a Weapon of War, (Oxford University Press, 2016); p. 11.
[24]Ibid, p.11
[25]Cadet Jessica Williams, Legitimizing and Operationalizing US Lawfare: The Successful Pursuit of Decisive Legal Combat in the South China Sea, (Journal of Indo-Pacific Affairs, Spring 2021), p.1, <https://www.airuniversity.af.edu/JIPA/Display/Article/2452650/legitimizing-and-operationalizing-us-lawfare-the-successful-pursuit-of-decisive/> accessed 23 July 2021.
[26]Ibid, p. 1-2
[27]Ibid, p. 2

David Hughes highlights that modern lawfare is used among three main 'broad camps': those who understand lawfare as the use and abuse of international law to threaten state interests; those who view it as a rhetorical device intended to discredit parties who attempt to engage with international law as a means to ensure accountability and compliance; and those who describe lawfare as a weapon, the legitimacy of which is defined by its user's intentions.[28]

Lawfare can manifest itself in deliberate misinterpreting or misapplying the law, especially where the legal norms are ambiguous, allow for multiple interpretations or where there is a loophole in the law.

Zakhar Tropin opines that in contemporary international relations, lawfare is an integral part of hybrid warfare.[29] According to NATO, such activities as disinformation, cyber-attacks, economic pressure, the deployment of irregular armed groups, and the employment of regular forces are all examples of hybrid threats that mix military and non-military as well as covert and overt techniques. To blur the lines between war and peace, hybrid approaches are utilized to generate uncertainty in the minds of target populations.[30]

Lawfare can take place on different levels: legal actions on the interstate level; legal actions on the level of state enterprises; and legal actions among private persons. National legal systems as well as international dispute-settlement institutions can be resorted to in lawfare.[31] Similar to Zakhar Tropin, Dr Sascha-Dominik Bachmann considers that lawfare is a component of hybrid warfare which aims to manipulate the law by changing legal paradigm.[32]

According to Kittrie an act amounts to lawfare if: '(1) the actor uses law to create the same or similar effects as those traditionally sought from convention kinetic military action – including impacting the key armed force decision-making and capabilities of the target; (2) one of the actor's motivations is to weaken or destroy an adversary against which the lawfare is being deployed.'[33] These criteria demonstrate the lawfare is a narrow sense – as the usage of law in order to achieve military domination.

Nowadays, the term has a broader meaning and could be defined according to the following criteria: (1) the main aim of the legal action is to manipulate the opponent's side or to demonstrate the legal power and superiority; (2) the legal action represents the misuse of the purpose for which the law was originally created; (3) the legal action is not limited only by the international humanitarian law but can influence other spheres of international and social relations.

1.3. Russia's perspective on lawfare and its historical origins

To understand the behaviour of the Russian Federation and its lawfare methods against Ukraine, it is useful to explore Russia's own understanding of lawfare and historical origins of its lawfare.

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[28]David Hughes, What does lawfare mean? (Fordham International Law Journal vol. 40, 2016); p 5.
[29]Zakhar Tropin, Lawfare as part of hybrid wars: The experience of Ukraine in conflict with Russian Federation, (War Studies University, Poland, 2020); p. 17 <http://doi.org/10.35467/sdq/132025> accessed 23 July 2021
[30]NATO's response to hybrid threats, 2021 <https://www.nato.int/cps/en/natohq/topics_156338.htm#:~:text=Hybrid%20threats%20combine%20military%20and,and%20use%20of%20regular%20forces.> accessed 23 July 2021
[31]Zakhar Tropin, Lawfare as part of hybrid wars: The experience of Ukraine in conflict with Russian Federation, (War Studies University, Poland, 2020); p. 18 <http://doi.org/10.35467/sdq/132025> accessed 23 July 2021
[32]Dr Sascha-Dominik Oliver Vladimir Bachmann, Lawfare and hybrid warfare - how Russia is using the law as a weapon, (2017); p. 26 < DOI: 10.14296/ac.v2015i102.2433> accessed 23 July 2021.
[33]Orde F. Kittrie, Lawfare: Law as a Weapon of War, (Oxford University Press, 2016); p. 8

Zakhar Tropin argues that the Russian Federation (being aware of the illegality of its acts) is always attempting to give legal justifications in support of its conduct to prove or at the very least to argue that its actions do not violate international law.[34] As showed in this study, Russia resorted to domestic legislation as one of the means to provide basis for its use of force and annexation of Crimea. More recent legislative changes, including at constitutional level, are utilised by Russia as a basis for its refusal to comply with its international law obligation to enforce binding judgments of the European Court of Human Rights. Before proceedings to detailed examination of these and other instances lawfare, Russia's own views and understanding of the notion of lawfare is discussed.

No equivalent of the term 'lawfare' exists in the Russian language. However, Russia does utilise lawfare as part of its strategy of hybrid warfare. The Gerasimov Doctrine, first espoused in 2013, embodies Russia's strategy of hybrid warfare.[35] In 2013, prior to the annexation of Crimea, Valerii Gerasimov, Russian Chief of the General Staff very clearly pointed out[36] 'the importance of non-military tools in conflicts.'[37] This doctrine views law as one of the major tools of hybrid warfare.[38] Another non-military tool which goes hand in hand with lawfare is informational warfare.[39] Russia's understanding of lawfare reflects its attitude to international law as a threat to its interests. As Chairman of Russia's Investigative Committee, Aleksander Bastrykin, stated: 'international law is a Western hybrid warfare tool that must be fought through social, informational, and financial means.'[40]

Victor Morris believes that the Gerasimov Doctrine has a lot in common with the Chinese concept of 'Three Warfares,'[41] described in 2003 and 2010 Political Work Regulations.[42] This concept is designed to prioritise China's interests and to protect it from potential threats. It includes the notions of public opinion warfare, psychological warfare, and legal warfare. The principles of lawfare include: 'protecting national interests as the highest standard,' 'respect for the basic principles of the law,' 'carrying out lawfare that centres upon military operations,' and 'seizing standards and flexibly using them.'[43]

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[34]Zakhar Tropin, Lawfare as part of hybrid wars: The experience of Ukraine in conflict with Russian Federation, (War Studies University, Poland, 2020); p. 19 <http://doi.org/10.35467/sdq/132025> accessed 23 July 2021

[35]Jilli Goldenziel, Law as a battlefield: the US, China, and the global escalation of lawfare (Cornell Law Review, 2020); p.158. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525442> accessed 23 July 2021

[36]Valerij Gerasimov Cennost nauki v predvidenii: Novye vyzovy trebuyut pereosmyslit formy i sposoby vedeniya boevyh dejstvij (The Validity of Science is in Prediction: New Challenges Require Rethinking of Forms and Methods of Armed Activities Conduction) (Voenno-promyshlennyj kurer, 2013) <https://vpk-news.ru/articles/14632> accessed 23 July 2021

[37]Bettina Renz, Russia and hybrid warfare (Contemporary Politics, 2016); p.286 <https://ir101.co.uk/wp-content/uploads/2018/05/renz-2016-russia-and-hybrid-warfare.pdf> accessed 23 July 2021

[38]René Värk, Legal Complexities in the Service of Hybrid Warfare (Kyiv-Mohyla Law and Politics Journal, 2020); p. 27-43

[39]Mark Voyger, Russian Lawfare – Russia's Weaponization of International Law and Domestic Law: Implications for the Region and Policy Recommendations, (4 J. Baltic Security 35, 37, 2018); p. 36 <https://doi.org/10.2478/jobs-2018-0011> accessed 17 July 2021.

[40]Ibid, p.6

[41]Victor Morris, Grading Gerasimov: Evaluating Russian Nonlinear War Through Modern Chinese Doctrine (Small Wars Journal, 2015) <https://smallwarsjournal.com/jrnl/art/grading-gerasimov-evaluating-russian-nonlinear-war-through-modern-chinese-doctrine> accessed 23 July 2021

[42]Elsa Kania, China Brief the PLA's Latest Strategic Thinking on the Three Warfares' (The Jamestown foundation Global Research's Analysis, 2016) <https://jamestown.org/program/the-plas-latest-strategic-thinking-on-the-three-warfares/> accessed 23 July 2021

[43]Ibid.

Doctor Christi Bartman points out that 'lawfare, as used by the Soviet Union and Russian Federation, is the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda.'[44] Indeed, throughout its history the Soviet Union has been signing non-aggression treaties with neighbouring countries, but the only objective of such agreements was to 'allow itself time to build its military forces.'[45] These treaties were also used as an ostensible legal basis of intervention into the neighbouring countries for the real purpose of protecting the Soviet-friendly political regimes.[46] In 1956, the Soviet Union invaded Hungary to keep the political regime of Hungarian People's Republic in place. It justified these actions with the Warsaw Pact, a collective defence treaty signed between the Soviet Union and seven other socialist republics. Czechoslovakia saw the same reaction from the Soviet Union on 20 August 1968 when it attempted to implement a series of democratic reforms during the Prague Spring. In violation of the non-aggression pact between the Soviet Union and Czechoslovakia signed on 4 July 1933 and the Warsaw Pact, the Soviet Union tried to couch the invasion in terms of an invitation by the Czech Government.[47] Thus, Dr. Bartman believes that this is an example of a strategic intent and political motivation to manipulate the legal system, international bodies, and other states[48].

Mark Voyager claims that following the fall of the Soviet Union, Russia used lawfare to explain its engagement in Moldova, which resulted in the formation of Transnistria in 1992; the 2008 and 2014 invasions of Georgia and Ukraine; and the 2014 annexation of Crimea as well as Russia's 2016 involvement in Syria.[49] In all these examples Russia claims that its involvement was justified by a call for help from ordinary people, so Russia's government was bound to take these people under their protection. As a result, these cases have developed an obvious similarity – Russia uses law as a manipulative act to control more territories and gain more influence.

Examples of use of lawfare by Russia can be traced to even earlier period in Russia's history – the times of the Russian Empire which had a dominant position in the world in the 18th and 19th centuries. Mark Voyager names 1774 as the year of birth of Russian lawfare.[50] The Treaty of Kuchuk Kainardji which put an end to the big war between the Russian Empire and the Ottoman Empire (the First Russo-Turkish War) was concluded in 1774. It entitled the Russian Empire to act as the sole protector of Ottoman Christians and to intervene diplomatically and militarily in the Balkans, a cause that could easily be used as a disguise for territorial expansionist ambitions of the Russian Empire. [51] Indeed, as soon as 1783 lawfare was employed by the Russian Empire in the annexation of Crimea. Voyager explains that Empress Catherine the Great made use of military as well as non-military tools, nowadays referred to as 'hybrid warfare,' to justify annexation of Crimea as a move to protect the local population of Crimea.[52] The domination over Crimea was

[44]Christi Scott Bartman Dr., Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us, (43 Case W. Res. J. Int'l L. 423, 2010); p.428. <https://scholarlycommons.law.case.edu/jil/vol43/iss1/24> accessed 23 July 2021.
[45]Ibid, p.431
[46]Ibid, p.432-433
[47]Ibid, p.437
[48]Ibid, p.428
[49]Mark Voyger, Russian Lawfare – Russia's Weaponization of International Law and Domestic Law: Implications for the Region and Policy Recommendations, (Baltic Security 35, 37, 2018); p. 37 <https://doi.org/10.2478/jobs-2018-0011> accessed 17 July 2021.
[50]Ibid, p. 36
[51]Ibid, p. 36
[52]Ibid, p. 36-37

eventually consolidated by military victory of the Russian Empire in the Second Turkish War and signing of the Treaty of Jassy in 1792.

The events taking place in Ukraine since 2014 evidence Russia continued resort to the method of hybrid warfare to satisfy its imperialist ambitions. Yavor Raychev believes that the use of lawfare is extremely important for such countries as Russian Federation. According to him, when great powers compete, they do not want to have smaller countries near them which are tightly integrated with their opponents. In the case of Ukraine lawfare was used to accompany annexation part of and invasion into the territory of Ukraine.[53] The law, as will be showed in the following chapters, has become an important instrument in Russia's attempts to justify its unlawful military actions and to achieve geopolitical advantages.

[53]Raychev, Y., Lawfare as a Form of Hybrid War: the case of Bulgaria; an Empirical View (Studia Politica: Romanian Political Science Review, 20(2); p. 254; <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-69929-9> accessed 23 July 2021.

2. LEGISLATIVE CHANGES OF 2020 AND THEIR ROLE IN RUSSIA'S LAWFARE AGAINST UKRAINE AND THE WEST

2.1. Introduction: Constitutional amendments without a clear legal basis

On 15 January 2020, Vladimir Putin in his message to the Federal Assembly (the legislature of the Russian Federation) proposed to discuss the amendments to the Constitution and to vote on them.[54] On the same day, a working group was set up to prepare the amendments. It consisted not only of lawyers and political figures, but also of professional athletes, doctors, actors, and other notable people never previously engaged in law-making. One more task of this group was to decide on the voting format of the proposed nationwide vote concerning the amendments because conducting a referendum on this matter was out of question from the very start. Putin noted that 'the amendments submitted for discussion do not affect the fundamental foundations of the Constitution, which means they can be approved by the parliament within the framework of the current procedure through the adoption of appropriate constitutional laws.'[55]

Even though the Federal Law on the Referendum of Russian Federation provides that a referendum shall be held on 'issues of national importance' (Art. 6),[56] Ella Pamfilova, the Chair of the Central Election Commission, said that there were no grounds for a referendum on the Constitution amendments proposed by the President. Moreover, she distinguished terms 'voter' in a referendum and 'participant' of a voting. Given the absence of legal framework on holding votes, no regulation existed in regards of their format, participation, manipulation with results, breaches of law and punishment for them. Nor is there any legislative ground for conducting a non-referendum all-Russian voting, especially financed from the state budget (a total of 14,553,520,000 rubles were spent on the preparation and conduct of the voting).[57] The vote on amendments was envisaged by the amendments themselves. The procedure for voting date determination (by a presidential decree) was also provided by the bill.

A member of the Moscow Precinct Election Commission submitted a claim to the Supreme Court of the Russian Federation, where he argued that the election commissions are engaged in organizing and conducting only elections and referendums, and therefore, imposing on them the obligation to conduct an all-Russian vote is illegal. The Court refused the claim, stating that 'the order of the President of the Russian Federation is of an organizational and administrative nature,' while 'the decree does not impose any duties directly on the members of precinct election commissions' and therefore does not violate any rights, freedoms and legitimate interests of the claimant.[58]

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[54] Presidential Address to the Federal Assembly, 15 January 2020, <http://en.kremlin.ru/events/president/news/62582> accessed 16 September 2021

[55] Putin predlozhil provesti 'vsenarodnoye golosovaniye' po paketu popravok v Konstitutsiyu, [Putin proposed to hold a 'popular vote' on the package of amendments to the Constitution] (Interfax.ru, 15 January 2020) https://www.interfax.ru/russia/691265 accessed 16 September 2021

[56] Federal'nyy Konstitutsionnyy Zakon O Referendume Rossiyskoy Federatsii [Federal Constitutional Law from 28.06.2004 No. 5-Fkz On the referendum of the Russian Federation] http://pravo.gov.ru/proxy/ips/?docbody=&nd=102087594 accessed 16 September 2021

[57] Tsentrizbirkom sekonomil 262,8 mln rubley na golosovanii po Konstitutsii [The Central Election Commission saved 262.8 million rubles on voting on the Constitution] (Interfax.ru, 30 September 2020) https://www.interfax.ru/russia/729311 accessed 16 September 2021

[58] Opredeleniye Verkhovnogo Suda Rossiyskoy Federatsii v dele №AKPI20-156 ot 2 marta 2020 [Ruling of the Supreme Court of the Russian Federation in Case No. AKPI20-156 from 2 March 2020] <https://st.golosinfo.org/store/upload/doc/151243/151243_%D0%90%D0%9A%D0%9F%D0%9820-156.pdf> accessed 16 September 2021

Meanwhile, President Putin sent a request to the Constitutional Court to establish whether both the provisions of the bill and the procedure (the vote) on amendments are consistent with the Constitution. The Court did not find any inconsistencies: the new provisions on the ban on the alienation of part of the Russian territory, on the historically established state unity of the country, on honouring the memory of the defenders of the Fatherland, on the protection of historical truth, on the Russian language as the language of the state-forming people were found to be 'of a non-political, non-party and non-religious nature. They cannot be regarded and applied as establishing a state or mandatory ideology.' As for the non-existent legal procedure for voting, the Court stated that even though it was not directly provided for by the law, it could be used due to 'a special legal nature' for the purposes of constitutional legitimation of the decision of the constitutional legislator.[59]

The acts of Putin were followed by a 3,000 people rally in Moscow demanding 'a full-fledged referendum on amendments to the Constitution, instead of an incomprehensible nationwide vote (...); voting on amendments separately, and not as a whole package,'[60] but yielded no results. Public figures, lawyers, as well as scientists and cultural figures also expressed opposition towards some of the amendments of the Constitution.[61]

Eventually, the bill of amendments was adopted on 11 March 2020 and signed by V. Putin on 14 March 2020. It is noteworthy that the bill of amendments was planned to be submitted for signature to Vladimir Putin by 18 March 2020, the so-called day of the 'reunification of Crimea with Russia.'[62] Such claims (even though expressed anonymously to the media by an informed insider) show a clear presence of a political subtext to some of the amendments and were in reality directed towards Crimea-Ukraine situation.

The vote took place on 1 July 2020. Residents of the self-proclaimed Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) with Russian passports were allowed to enter Russia through closed borders and vote on constitutional amendments, according to Dmitry Peskov.[63]

The results showed the approval of amendments by 77,92% of voters,[64] and the updated Constitution came into effect on 4 July 2020, the day after the results were made public, following

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[59] Zaklyucheniye Konstitutsionnogo suda Rossiyskoy Federatsii ot 20 marta 2020 goda [Opinion of the Constitutional Court of the Russian Federation from 20 March 2020] <http://doc.ksrf.ru/decision/KSRFDecision459904.pdf> accessed 16 September 2021

[60] V Moskve proshel miting s trebovaniyem referenduma po popravkam v Konstitutsiyu [A rally was held in Moscow demanding a referendum on amendments to the Constitution] (Interfax.ru, 15 February 2020) <https://www.interfax.ru/moscow/695488> accessed 16 September 2021

[61] Ne dopustit' konstitutsionnyy krizis i antikonstitutsionnyy perevorot. Obrashcheniye uchenykh, pisateley i zhurnalistov k grazhdanam Rossii [Avoid a constitutional crisis and an unconstitutional coup. Appeal of scientists, writers and journalists to the citizens of Russia] (EchoMSK, 15 March 2020) <https://echo.msk.ru/blog/echomsk/2606224-echo/> accessed 16 September 2021; Akademiki i pisateli podpisali obrashcheniye protiv popravok v Konstitutsiyu [Academicians and writers signed an appeal against the amendments to the Constitution] (RBK, 16 March 2020) <https://www.rbc.ru/society/16/03/2020/5e6f16889a7947513d0df46c> accessed 16 September 2021

[62] Popravki v Konstitutsiyu peredadut na podpis' Putinu ko dnyu vossoyedineniya RF s Krymom [Amendments to the Constitution will be submitted for signature to Putin on the day of reunification of the Russian Federation with Crimea] (Interfax.ru, 4 March 2020) <https://www.interfax.ru/russia/697692> accessed 16 September 2021

[63] Peskov podtverdil pravo zhiteley Donbassa s pasportami RF golosovat' po popravkam [Peskov confirmed the right of residents of Donbass with passports of the Russian Federation to vote on the amendments] (Interfax.ru, 26 June 2020) <https://www.interfax.ru/russia/714801> accessed 16 September 2021

[64] Popravki v Konstitutsiyu Rossii podderzhali 77,92% golosovavshikh. Kreml' nazval eto triumfom [Amendments to the Constitution of Russia were supported by 77.92% of voters. The Kremlin called it a triumph] (BBC News, 2 July 2020) <https://www.bbc.com/russian/news-53261250> accessed 16 September 2021

which protests and arrests of activists took place. Later in the year, the package of legislative changes and federal laws complementing the Constitutional amendments was adopted.

Overall, the process of amending the Constitution is evidence of well wrapped political games in Russia. Even though, it took only a few months to legitimize amendments to almost 60% of the Constitution provisions, transformation of narrative and their substance is tremendous.

William Partlett states that despite Putin's narrative of improving the quality of state governance, most of the amendments were intended to centralize and personalize power – just as it has already been done in various parts of the world.[65] Indeed, at first the amendments were seen as preparing for the governing without Putin due to his last term,[66] however now, he can legitimately hold the post of President until 2036. Political scientist Alexei Makarkin shares a similar view: initially amendments were proposed in the context of adjusting the balance of powers within the government, but in the end, they turned into an ideological and political revision of the constitutional norms.[67]

Ekaterina Mishina, an expert in constitutional law, believes that such a rapid procedure of introducing the amendments (e.g., the working group had held only two meetings of a few hours before suggesting them to Duma) and the decision of the Constitutional Court were only needed to give a veneer of legality.[68] Other scholars point out that rapid changes were needed for the new election cycle of 2021-2024.[69]

The European Commission for Democracy through Law (Venice Commission) found such a speedy procedure was inappropriate in view of the intended impact of the changes, noting that 'this speed resulted in a lack of time for a proper period of consultation with civil society prior to the adoption of the amendments by parliament.' The Venice Commission raised two concerns as to the procedure of ad hoc voting: 1) it led to 'a substantial reduction of procedural guarantees'; 2) 'it is inappropriate to introduce a new type of referendum for one particular revision of the Constitution.'[70]

Despite the claims that the 2020 amendments were directed exclusively towards internal establishment of values, this process is difficult to dismiss as unrelated to international affairs.

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[65]Partlett, William, Russia's 2020 Constitutional Amendments: A Comparative Perspective (June 12, 2020). Cambridge Yearbook of European Legal Studies (forthcoming 2021), Available at SSRN: https://ssrn.com/abstract=3625390 or http://dx.doi.org/10.2139/ssrn.3625390

[66]Alexander Baunov, 'Putin Is Planning a Partial Retirement' (Carnegie, 1 January 2017) <https://carnegie.ru/2020/01/17/putin-is-planning-partial-retirement-pub-80840> accessed 15 July 2021

[67]Trekhsloynaya Konstitutsiya: kak Kreml' ispol'zoval popravki 2020 goda dlya ukrepleniya svoyey vlasti [The Three-Layer Constitution: How The Kremlin Used The 2020 Amendments To Strengthen Its Power] (Forbes, 1 July 2020) <https://www.forbes.ru/obshchestvo/433725-trehsloynaya-konstituciya-kak-kreml-ispolzoval-popravki-2020-goda-dlya> accessed 15 July 2021

[68]Otnosheniye k Konstitutsii v Rossii i v Amerike: v chem raznitsa? — ekspert po konstitutsionnomu pravu [Attitude to the Constitution in Russia and in America: What's the Difference? - expert on constitutional law] (Zakon I Normativ, 5 July 2021) <https://www.zakon-i-normativ.info/index.php/2012-05-25-22-59-57/2012-05-28-10-58-08/novini-rosiji-2017-r/218532-otnoshenie-k-konstitycii-v-rossii-i-v-amerike-v-chem-raznica-ekspert-po-konstitycionnomy-pravy> accessed 15 July 2021

[69]Pomeranz, W. E., & Smyth, R. (2021). Russia's 2020 Constitutional Reform: The Politics of Institutionalizing the Status-Quo, Russian Politics, 6(1), 1-5. doi: https://doi.org/10.30965/24518921-00601001

[70]The Venice Commission's Interim Opinion on Constitutional Amendments And The Procedure For Their Adoption (2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)005-e> accessed 15 July 2021

Some of the concepts reflected in the changes have already been used to justify Russia's actions in conflicts involving Crimea and Eastern Ukraine. Some provisions identify and demonstrate Russia's view of its own role on the international political stage, its political intentions, and ideological views, whereas others are particularly suited for use in lawfare against Ukraine and the West.

2.2. Constitutional Amendments

2.2.1. Article 67 of the Constitution: Prohibition of alienation of territory

Prior to the amendments of 2020, Article 67 of the Constitution of the Russian Federation consisted of three points. The first paragraph stated that the territory of the Russian Federation includes the territories of its constituent entities, internal waters and the territorial sea and the airspace above them. The second paragraph of the article stated that the Russian Federation possesses sovereign rights and exercises jurisdiction on the continental shelf and in the exclusive economic zone of the Russian Federation in the manner determined by federal law and international law. The third paragraph proclaimed that borders between the subjects of the Russian Federation can be altered by their mutual agreement.

Amendments of 2020

Two amendments were introduced into Article 67 in 2020. The first one concerns the creation of federal units within the Russian Federation. The second amendment, reflected in paragraph 2.1 of Article 67 provides that the Russian Federation ensures protection of its sovereignty and territorial integrity and that any actions directed at alienation of a part of its territory (except the delimitation, demarcation, re-demarcation of the state border of the Russian Federation with neighbouring states), or any calls to do so, are prohibited. In 2014, the Russian Criminal Code already criminalized calls for action to undermine territorial integrity of the Russian Federation.[71] Following the amendments of 2020, the actions constituting violation of territorial integrity of the Russian Federation were criminalized too.[72]

Vladimir Mashkov, who was one of the initiators of the amendment prohibiting alienation of Russian territories stated: 'You must not give up land. And you must not even think that you can give up land in favour of something else.'[73] Mashkov explained that, having travelled across the country from Kaliningrad to Vladivostok, he realised that people in Russia were 'afraid' because '[i]n the foreign press, especially near the border areas, some foreign political scientists say that after the presidency passes [from Putin] to another person, there will be a possibility of alienation of the Kuril Islands, Crimea and even Kaliningrad.'[74]

[71] Article 280.1 of the Criminal Code of the Russian Federation
[72] Article 280.2 of the Criminal Code of the Russian Federation
[73] Irina Korneeva, Granitsa Mashkova [Mashkov's border] <https://rg.ru/2020/03/31/vladimir-mashkov-territorialnaia-celostnost-dlia-menia-eto-ne-popravka-a-aksioma.html> accessed 15 September 2021
[74] Elizaveta Antonova, Evgeniya Kuznetsova, V Konstitutsiyuv pishut Kurilyi i zarplatyi. Kak Vladimir Putin golosovalza 'narodnyie' popravki k Konstitutsii [Kuriles and salaries will be written into the Constitution. How Vladimir Putin voted 'people's' amendments to the Constitution] <https://www.rbc.ru/politics/13/02/2020/5e457afa9a79476830f8b951> accessed 15 September 2021

Vladimir Putin supported Mashkov's idea to introduce an amendment 'on the prohibition of the alienation of Russia's territory.' This amendment, according to Putin, was aimed not only at the annexed Crimea but also at the Kuril Islands.[75]

Potential use in lawfare

While Russia tends to foster and exploit separatist tendencies in other countries, Russia's own ethnic heterogeneity has for a long-time given rise to separatism within the country itself. The reforms carried out by Vladimir Putin in the 2000s were aimed at harmonising local legislation and building a single vertical of power, but the problem of separatism remained. Protests held in 2018 – 2020 in the constituent entities of the Russian Federation demonstrated the growing popularity of the idea of regional separatism.[76] Yelena Savva, in her article 'Ethnic Separatism in The Russian Federation: Classification and Level of Activity,' stated that the separation from Russia is considered as a tool of achieving economic growth and preservation of culture.[77]

The amended Article 67 allows Russian government to brand any calls for separatism within the country as unconstitutional. In contrast to what Russia has been preaching in Crimea and Donbas, Article 67 stifles any attempt to exercise self-determination by means of secession. It is also a means for the Russian Federation to preserve and entrench its control over the territories it has acquired unlawfully, primarily Crimea. For instance, a member of the Federation Council Committee on Defence and Security Franz Klintsevich claimed that after the amendments' entry into force Russia will never hand over the Kuril Islands to Japan.[78] Putin also called the amendment an ironclad guarantee on Kurils in reference to a symbolic monument – a plate with the text of the amendment which was installed in Yuzhno-Kurilsk by the locals after the bill came into force.[79] Andriy Klishas, a Russian senator and co-chair of the working group on the constitutional amendments, openly stated that the provision aims to prevent any attempts to return or even negotiate the return of Crimea to Ukraine.[80]

After the amendments had been introduced, Ukraine developed a 'strategy of de-occupation of Crimea' consisting in consolidating efforts of Ukraine and its Western partners in countering Russia's claims over Crimea and insisting on Russia's compliance with international law.[81] In response to this, Russian senator and the head of the Federation Council Foreign Affairs Committee Konstantin Kosachev commented that Ukraine's attempts to return Crimea would be a violation of international law, although he did not specify which norms of international law

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[75] Popravki v Konstituciyu Rossii ne predotvratyatde okkupaciyu Kryma – eksperty [Amendments to the Russian Constitution will not prevent the de-occupation of Crimea – experts] (Krym.Realii., 8 March 2021) <https://ru.krymr.com/a/popravki-v-konstituciyu-rossii-ne-ostanovyat-deokkupaciyu-kryma/30476171.html> accessed 10 September 2021

[76] Yelena Savva, Etnicheskiy separatism v rossiyskoy federatsii: klassifikatsiya i urovenaktivnosti [Ethnic separatism in the Russian Federation: classification and level of activity] <http://dom-hors.ru/rus/files/arhiv_zhurnala/pep/2020/8/politics/savva.pdf> accessed 10 September 2021, p.5

[77] Ibid., p.3

[78] Klintsevich o Kurilakh: Rossiya nikogda ne peredast ostrova Yaponii [Klintsevich about the Kuriles: Russia will never hand over the islands to Japan] (News.ru, 2 July 2020) <https://news.ru/politics/klincevich-o-kurilah-rossiya-nikogda-ne-peredast-ostrova-yaponii/> accessed 10 September 2021

[79] Putin otmetil 'zhelezobetonnuyu popravku' o neotchuzhdenii territoriy [Putin noted the 'reinforced concrete amendment' on the non-alienation of territories] (Interfax.ru, 3 July 2020) <https://www.interfax.ru/russia/715823> accessed 10 September 2021

[80] Halya Coynash, Russia admits its constitutional changes are aimed at making return of Crimea to Ukraine 'impossible' <http://khpg.org/en/1593031626> accessed 10 September 2021

[81] Ukraina prinyala strategiyu deokkupatsii Kryma. V chem ona sostoit? [Ukraine has adopted a strategy for the de-occupation of Crimea. What does it consist of?] (DW, 26 March 2021) <https://www.dw.com/ru/kiev-prinjal-strategiju-deokkupacii-kryma-v-chem-ona-sostoit/a-57019702> accessed 1 September 2021

would be violated.[82] The thought voiced by Kosachev reflects the general Russian discourse of recent years. In fact, the amendment to the Russian Constitution is only the tip of the iceberg. Since 2014, Russia has been increasingly active in the search for legal grounds for the annexation of Crimea, which in the future can be used both as the basis of legal arguments in litigation and as means of international legitimisation of an act of aggression against Ukraine.

However, lawyers Oliver Loode and Boris Babin state that this amendment will not make any difference for the process of de-occupation of Crimea. 'It only shows the absence of any strategic softening of Russia's position on Crimea, which they probably want to demonstrate to internal and external audiences,' – says Loode.[83]

The annexation of Crimea by Russia violates fundamental international law norms concerning Ukraine's sovereignty and territorial integrity, as well as the prohibition on the use of force. Russia is well aware of this fact. The new domestic legislation aims to prevent any future attempts to return Crimea to Ukraine, as well as to stifle any calls of that kind by opposition forces within Russia itself.

Such perception has been amply illustrated by the Russian authorities' reaction to the recent international summit 'The Crimea Platform': they claimed that the event itself was a violation of its territorial integrity. Even though at first Moscow declared its readiness to discuss urgent problems of the peninsula within the framework of Kyiv's new initiative, the rhetoric of the Russian authorities changed radically to threats to put the forum participants on the 'black list' of unfriendly states.[84] A representative of Russia Ministry of International Affairs, Maria Zakharova, warned that 'all Kyiv's efforts to return Crimea are illegitimate and cannot be perceived in any other way than a threat of aggression against two constituent entities of the Russian Federation.' She emphasized that even participation of other countries and organizations in the Crimea Platform would be considered as a step against Russia, as 'a direct encroachment on its territorial integrity.'[85]

Despite the relatively standard and general wording of Article 67, its purposeful application in relation to specific political tensions is critical. Apart from defending Russia's sovereignty, it is also aimed at suppressing dissent and opposition, as well as fighting international pressure over Russia's wrongful actions by presenting Russia itself as a victim. Manipulation of such a norm, particularly in the context of subsequent legislative novelties, can result in irreversible violations of human rights.

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[82]Kosachev: Nichto ne pomozhet Ukraine narushit territorialnuiu celostnost RF [Kosachev: Nothing will help Ukraine violate the territorial integrity of the Russian Federation] (Rossiiskaia gazeta, 12 March 2021) <https://rg.ru/2021/03/12/reg-ufo/kosachev-nichto-ne-pomozhet-ukraine-narushit-territorialnuiu-celostnost-rf.html> accessed 25 April 2021

[83]Popravki v Konstitutsiyu Rossii ne predotvratyat deokkupatsiyu Kryma – eksperty [Amendments to the Russian Constitution will not prevent the de-occupation of Crimea – said experts] (Krym.Realii. 8 March 2020) <https://ru.krymr.com/a/popravki-v-konstituciyu-rossii-ne-ostanovyat-deokkupaciyu-kryma/30476171.html> accessed 10 September 2021

[84]Podgotovka k peremenam vnutri Rossii. Zachem nuzhna 'Krymskaya platforma' [Preparing for changes within Russia. Why do we need the 'Crimean Platform'] (RadioSvoboda, 22 August 2021) < https://www.svoboda.org/a/podgotovka-k-peremenam-vnutri-rossii-zachem-nuzhna-krymskaya-platforma/31422838.html> accessed 17 September 2021

[85]'Krymskaya platforma': chego khochet Zelenskiy i pochemu na sammit ne priglasili Rossiyu? ['Crimea Platform': what does Zelensky want and why was not Russia invited to the summit?] (BBC News, 20 August 2021) < https://www.bbc.com/russian/features-58274518> accessed 16 September 2021

Other legislative changes supplementary to Article 67 amendments

Following the adoption of amendments to Article 67, the Russian Parliament introduced other changes to the existing administrative and criminal legislation such as the Code of Administrative Offences, the Criminal Code, and the Criminal Procedure Code. The main aim of these changes is to strengthen the constitutional amendments. For example, any individual who openly questions the legality of the annexation of Crimea bears the risk of criminal liability. Most importantly, these legislative changes, added to the existing free-speech limitations and steady censorship of telecommunications services, emphasise the rising tensions between the Russian authorities and the citizens of the Russian Federation. Even though major international focus was put onto the provisions of Article 67, criminal and administrative changes should also be covered, as they turn out to be the crucial repressive instruments that supplement Russia's 'political appetites' in the newly acquired territories.

Regarding the administrative sphere, several major changes came into force with the adoption of the Federal Law no. 420-FZ of 8 December 2020.[86] A major amendment is reflected in the introduction of Article 20.3^2 on 'Public incitements to fulfilment of actions, aimed at violation of Russian Federation's territorial integrity.' This article fails to provide definition of or explain the notion of such incitements. Consequently, it creates a vast space for governmental discretion and abuse in its application. Despite the absence of a clear definition, the penalty is clearly stipulated, ranging from 30,000 to 300,000 Russian rubles (347 and 3,473 Euro respectively) depending on the status of the person, committing the offence (usual citizens, officials or legal entities).This sum of punishment can be exorbitant compared to the average monthly salary in Russia, which is 35,361 rubles (409 Euro).[87] Therefore, an average person can be charged with a fine ranging from its monthly to almost annual income, which can be considered a heavy penalty for such misconduct.

Moreover, the second part of Article 20.3 provides that the same offence committed by means of mass media, electronic or telecommunication networks (including Internet) shall be punished by a higher fine ranging from 70,000 to 500,000 rubles (811 and 5,795 Euro respectively). This fine is disproportionate, particularly in view of the unclear definition of the nature of incitement. It is therefore possible, that an average Russian citizen may be fined several monthly salaries for a Facebook post on illegality of the annexation of Crimea or returning the Kuril Islands to Japan. The ambiguity of the article allows broad definitions of 'incitement' and 'mass media,' which will significantly limit freedom of thought and speech on Russia's foreign policy within the country.

The amendments to criminal law were adopted on the same day as administrative law changes. The Federal Law no. 425-FZ was adopted on 8 December 2020.[88] In addition to harsher fines, this law proposed a brand-new Article 280^2 to the Criminal Code, which envisages criminal liability for the acts of alienation of Russian Federation's territory, or any other actions aimed at violation

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[86]Federal'nyy zakon 'O vnesenii izmeneniy v Kodeks Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh' [Federal Law from 08 December 2020 no. 420-FZ 'On changes to the Code of Administrative Offences of Russian Federation'], <http://publication.pravo.gov.ru/Document/View/0001202012080078?index=4&rangeSize=1> accessed 10 September 2021

[87]Socio-Economical Situation in Russia, Federal Service of Governmental Statistics, January 2021 <https://rosstat.gov.ru/storage/mediabank/fU7e3uMD/osn-01-2021.pdf> accessed 10 September 2021, p. 352

[88]Federal'nyy zakon 'O vnesenii izmeneniy v Ugolovnyy kodeks Rossiyskoy Federatsii i stat'i 30 i 31 Ugolovno-protsessual'nogo kodeksa Rossiyskoy Federatsii' [Federal Law from 8 December 2020 no. 425-FZ 'On changes to the Criminal Code of Russian Federation and Articles 30 and 31 of the Criminal Procedure Code of Russian Federation'] <http://publication.pravo.gov.ru/Document/View/0001202012080068?index=1&rangeSize=1> accessed 10 September 2021

of Russian Federation's territorial integrity. This provision envisages the punishment in the form of 6-10 years imprisonment. The negative aspect of this Article is that it, similarly to the ones implemented in the Code of Administrative Offences, it fails to introduce a definite list of 'other actions' or criteria for which one can held liable, which creates a serious risk of prosecution, in particular to those who disagree with the annexation of Crimea.

Judging from the political and constitutional context in which these articles were adopted, their prime aim is to support the amendments to Article 67 of the Constitution. These articles operate as a repressive instrument against opposition, first and foremost against Crimean activists seeking reunification with Ukraine. Duma's chairman Viacheslav Volodin, went as far as saying that claims 'Crimea – is Ukraine' will not only be punished according to the laws of the Russian Federation, but that Russia may even demand to extradite Ukrainian politicians for saying that.'[89]

2.2.2. Articles 67.1 and 68 of the Constitution: Constructing national identity

Another amendment to the Russian Constitution that has the potential of becoming a tool of lawfare is reflected in paragraph 1 of Article 67.1. It reads as follows: 'The Russian Federation is the legal successor of the USSR on its territory, as well as the state successor (continuator)[90] of the USSR with regard to its membership in international organizations, their bodies, participation in international treaties, and international contracts of obligations and assets of the USSR outside the territory of the Russian Federation.' Paragraph 2 of this article proclaims that 'the Russian Federation, being united by millennial history and preserving the memory of ancestors who have transferred to us ideals and belief in God as well as continuity in the development in Russian state, recognises the historical state unity.' Paragraph 3 of Article 67.1 speaks about commemorating the defenders of the Fatherland and protecting historical truth. Paragraph 4 deals with protection of children who are proclaimed to be the highest priority of the Russian state policy.

Paragraphs 2-4 of Article 67.1 are worded rather vaguely. They refer to abstract non-legal notions and values. Scholars believe that the purpose of references to ancestors, God, defenders of Fatherland, historical truth and heritage in Article 67.1 is an attempt at construction of a unified national identity and strengthening the connection between the Russia of today and its imperial past.[91]

In comparison with the remainder of its provisions, paragraph 1 of Article 67.1 comes across as a more technical stipulation. It speaks in legal terms about state succession and continuity between Russia and the Soviet Union. The reason behind asserting at the constitutional level Russia's succession thirty years after the collapse of the Soviet Union is not immediately clear. However, when read as whole, Article 67.1 could serve as a basis, at least on domestic level, for Russia's attempt to lay territorial and other claims to the territories of its historical predecessors – the Russian Empire and Soviet Union. It is in these terms that annexation of Crimea was conceptualised in Russia – Crimea was described as 'Russian land' and its annexation in 2014 merely 'returned it home.'

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[89] Rossiya grozit otvetstvennost'yu za prizyvy 'Krym - eto Ukraina' [Russia threatens with liability for the calls 'Crimea is Ukraine'] (Voice of America, 15 July 2020) <https://www.golosameriki.com/a/ukraine-duma-crimea-law/5504134.html> accessed 10 September 2021

[90] The provision uses terms 'правопреемник' and 'правопродолжатель' respectively.

[91] Partlett, William, Russia's 2020 Constitutional Amendments: A Comparative Perspective (U of Melbourne Legal Studies Research Paper No. 887, 2020) <https://ssrn.com/abstract=3625390> accessed 16 September 2021, p. 13

Lauri Mälksoo notes that Article 67.1 refers to two distinct, and even in certain respect opposite, notions of 'state succession' and 'state continuity.'[92] In case of succession, a new state replaces and inherits the rights and obligations of a former state that ceases to exist. State continuity describes the situation where the state continues to exist regardless of internal turmoil such as revolutions, unconstitutional change of government, loss of territory or occupation. Despite this difference, Article 67.1 appears to use these notions of 'state succession' and 'state continuity' synonymously. Mälksoo suggests that the distinction between these concepts is familiar to the Russian legal scholarship and their inclusion in Article 67.1 was a pragmatic decision which would allow Russia to use them interchangeably, depending on which concept serves its interest best in a particular context.[93]

The attempt at constructing a national identity was also reflected in the addition to the provisions concerning the status of the Russian language. Amendments to Article 68 stipulate that Russian, as the official language of the Russian Federation, is 'the language of the state-forming people in a multinational union of equal peoples of the Russian Federation' and that culture in the Russian Federation is a unique heritage of its multinational peoples which is supported and protected by the state. Scholars suggest that this amendment is contradictory because it proclaims the equality of peoples of the Russian Federation, while it also singles out ethnic Russians as the leading – 'state-forming' – nation of the union.[94]

Thus, the texts of both articles play on 'national identity card' to popular effect. Given the variety of nations that make up Russia's population, language has taken on the role of a unifying symbol. Moreover, with separatism on several non-Russian territories on the rise, Russian authorities need a link between the Russian-speaking population and the occupying power. Language, as a concept of 'state-forming' factor, can provide such a service, allowing different nationalities or ethnic groups to become one nation led by Moscow. The interconnection of Articles 67 and 68 appeals to the feelings of people from former Soviet territories while also attempting to impose the values and orders of modern Russia by referencing to ethnic roots, historical and legal heritage.

2.2.3. Article 69 of the Constitution: Support and protection of Russian compatriots abroad

Article 69 of the Constitution of the Russian Federation guarantees protection of the rights of ethnic minorities and indigenous peoples in Russia. In 2020 Article 69 was amended to include paragraph 3 which reads as follows: 'The Russian Federation provides support to compatriots living abroad in exercise of their rights, ensuring the protection of their interests, and preserving the shared Russian cultural identity.'

The use of the term 'compatriot' instead of 'citizen' in paragraph 3 of Article 69 is deliberate. The term 'compatriot' is broader and can be interpreted to cover any representative of Russian-speaking nationality regardless of whether the person is a Russian citizen or lives in Russia. This follows from the broad definition of the term 'compatriot' contained in the Law of the Russian Federation on 'On State Policy of the Russian Federation Regarding Compatriots Abroad.'

In addition to defining 'compatriots living abroad' as Russian citizens who live outside the territory Russian Federation, Article 1(3) of the Federal Law 'On the state policy of the Russian Federation in relation to compatriots abroad' provides that compatriots also include 'persons and their descendants living outside the territory of the Russian Federation and, as a rule, belonging to

[92]Ibid.
[93]Ibid.
[94]Mälksoo, L. International Law and the 2020 Amendments to the Russian Constitution (American Journal of International Law, 115(1), 2021) <doi:10.1017/ajil.2020.87> accessed 15 September 2021, p. 84

peoples historically living in the territory of the Russian Federation, as well as those who have made a free choice in favour of spiritual, cultural and legal connection with the Russian Federation, whose relatives in direct ascending lines previously lived in the territory of the Russian Federation.'[95] The provision then specifies that the following groups are covered by the term 'compatriot': (i) persons who had been citizens of the USSR and currently live in states that were part of the USSR and have received the citizenship of these states or have become stateless, and (ii) descendants (emigrants) of the Russian State, the Russian republic, the Russian Soviet Federative Socialist Republic, the USSR and the Russian Federation, who had the corresponding citizenship and became citizens of a foreign State or stateless persons.[96]

This definition is so extensive that any person in the former USSR states above the age of 30 years falls within the notion of 'compatriot' as it is understood in the Russian legislation. In addition, Article 14 of this Law provides that Russian Federation can review its policies towards those states who engage in discrimination of Russian compatriots living on their territories. It also stipulates that failure of foreign states to guarantee rights and freedoms of Russian compatriots is a basis for Russia to take measures envisaged by international law to protect the interests of its compatriots.

The 'protection of Russian compatriots' is the essence of Russian narrative on Crimea. As Putin stated back in 2014, 'the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives' as they were allegedly 'threatened with repression.' Therefore, Russia has been actively using its self-produced mechanism of 'protection' of those who have no legal bond with it.

The amendment to Article 69, providing for support and protection of compatriots by Russia, creates a constitutional basis for expansion of Russia, for its interference with sovereignty and independence of other states, especially Ukraine and other former Soviet states.[97]

Russia's broad conception of 'compatriots' and the idea of their extra-territorial support and protection as reflected in the amendments to Article 69 has long been part of Russian foreign policy and political rhetoric. It is exactly in terms of protection of compatriots that Russia presented to the world its use of force and occupation in Crimea in 2014.[98] The newly amended Article 69 is an attempt to legitimize its actions at least on domestic level. By imposing Russian citizenship on residents of Crimea and issuing Russian passports to the residents of Donbas, Russia seeks to strengthen its claims of intervention in Ukraine by portraying it not only as protection of compatriots in the widest sense, but also of its own, Russian, citizens.

2.2.4. Articles 79 and 125 of the Constitution: The power to declare decisions of international courts non-enforceable

[95]Federal'nyy zakon 'O gosudarstvennoy politike Rossiyskoy Federatsii v otnoshenii sootechestvennikov za rubezhom' [Federal law from 24 May 1999 No. 99-FZ 'On the state policy of the Russian Federation in relation to compatriots abroad' <https://docs.cntd.ru/document/901734721> accessed 15 July 2021

[96]Ibid.

[97]Klimkin P., Ivanov V, Umland A. Putin's new constitution spells out modern Russia's imperial ambitions (Atlantic Council,10 September 2020) <https://www.atlanticcouncil.org/blogs/ukrainealert/putins-new-constitution-spells-out-modern-russias-imperial-ambitions/> accessed 26 April 2021

[98]Vystupleniye Vitaliya Churkina na Sovbeze OON 4 marta [Speech by Vitaly Churkin at the UN Security Council on March 4] (RT na russkom, 4 March 2014) <https://www.youtube.com/watch?v=o-jmtLgH2bs> accessed 16 September 2021

Some of the most important amendments that could be used by Russia in its lawfare against international community were introduced into Articles 79 and 125 of the Constitution of the Russian Federation.

Amendments of 2020 and related legislation

Prior to the amendments, Article 79 stated that the Russian Federation could participate in international bodies and delegate to them part of its powers in accordance with relevant treaties, provided this did not limit individual rights and freedoms and did not contradict the fundamentals of the constitutional system of the Russian Federation. In 2020, Article 79 was supplemented with a clause, which reads as follows: 'Decisions of interstate bodies, adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner contrary to the Constitution of the Russian Federation, shall not be subject to enforcement in the Russian Federation.'[99]

Some scholars believe that this provision manifestly contradicts Article 15(4) of the Russian Constitution, which remains in force and states that, '[i]f an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall apply.'[100] Elizabeth Teague notes that this provision proclaiming supremacy of international law was criticized as such that 'works against Russian interests' by Russian officials after Russia's annexation of Crimea had been condemned by international community.[101]

The newly amended Article 79 is closely connected with the new version of Article 125 of the Constitution which, in paragraph 5.1(b), empowers the Constitutional Court of the Russian Federation to rule on enforcement of those decisions of interstate bodies which interpret the provisions of international treaties to which Russia is a party in a manner that contradicts the Constitution of the Russian Federation. The Constitutional Court can also rule on enforcement of the decisions of foreign or international (interstate) courts that contradict the foundations of public order of the Russian Federation.

It is important to note that the Constitutional Court of the Russian Federation was empowered to decide on enforceability of decisions of international human rights bodies as early as December 2015.[102] The 2020 amendments consolidated this change at the constitutional level, while extending the power to decide on enforceability of the decisions delivered by any international court on the grounds of incompatibility with the public order of the Russian Federation.[103]

The amendments required introducing several changes into other laws. First, Federal Constitutional Law 'On amendments to the Federal Constitutional Law 'On the Constitutional

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[99]Konstitutsiya Rossiyskoy Federatsii ot 1993 [Constitution of the Russian Federation, 1993] <http://publication.pravo.gov.ru/Document/View/0001202007040001> accessed 12 April 2021

[100]Anna Zotééva, From the Russian Constitution to Putin's Constitution: Legal and Political Implications of the 2020 Constitutional Reform (UI Brief, 25 October 2020) <https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2020/ui-brief-no.-5-2020.pdf > accessed 12 April 2021, p.5

[101]Teague, E. (2020). Russia's Constitutional Reforms of 2020, Russian Politics, 5(3), 301-328. doi: https://doi.org/10.30965/24518921-00503003, p. 312

[102]Federal'nyj konstitucionnyj zakon 'O vnesenii izmenenij v Federal'nyj konstitucionnyj zakon 'O Konstitucionnom Sude Rossijskoj Federacii' [Federal Law No. 7-FKZ 'On amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation''] <http://docs.cntd.ru/document/420322320> accessed 15 July 2021

[103]Mälksoo, L. International Law and the 2020 Amendments to the Russian Constitution (American Journal of International Law, 115(1), 2020) <doi:10.1017/ajil.2020.87> accessed 16 September 2021, p. 84.

Court of the Russian Federation' was adopted.[104] It reflected the establishment of the supremacy of the Constitution Court embodied in the power of the Constitutional Court to decide on the enforceability of the decisions of interstate bodies, where their interpretation of Russia's international obligations is considered to contradict the Constitution of the Russian Federation or the foundations of law and order of the Russian Federation. In addition, it provided that the President, the Government, the Supreme Court, as well as the authorized federal executive body shall have the right to request the opinion of the Constitutional Court on the enforceability of an international court's judgment.[105]

Changes were also introduced in various law codes. Four bills introduced by Putin, proposed the same amendment which read as follows: 'The rules of international treaties of the Russian Federation which in their interpretation contradict the Constitution of the Russian Federation shall not be applied.' The State Duma supported introducing this amendment into the Civil Code[106] and Criminal Procedure Code[107]. Among other amended laws are the Arbitration Procedure Code, the Civil Procedure Code, and the Administrative Procedure Code.[108] Finally, more than a hundred federal laws on a broad spectrum of issues, ranging from consumer protection, export controls and blood donation to viticulture, fish farming and investment protection were similarly amended.[109]

Most importantly, the amended Family Code now forbids the application of international treaties not only in their interpretation contradicts the Constitution of the Russian order, but also the foundations of law and order and of morality.[110] As stated in the explanatory note to the document, 'mention of the foundations of law and order and of morality is dictated by the fact that family

[104]Federal'nyj konstitucionnyj zakon 'O vnesenii izmenenij v Federal'nyj konstitucionnyj zakon 'O Konstitucionnom Sude Rossijskoj Federacii' [On amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation'] 2020, No. 5-FKZ <https://docs.cntd.ru/document/566219315> accessed 15 July 2021

[105]Articles 3_2-3_3 of the Federal'nyj konstitucionnyj zakon 'O vnesenii izmenenij v Federal'nyj konstitucionnyj zakon 'O Konstitucionnom Sude Rossijskoj Federacii' [On amendments to the Federal Constitutional Law No. 5-FKZ 'On the Constitutional Court of the Russian Federation'] <https://docs.cntd.ru/document/566219315> accessed 15 July 2021

[106]Federal'nyy zakon 'O vnesenii izmeneniya v stat'yu 7 chasti pervoy Grazhdanskogo kodeksa Rossiyskoy Federatsii' [Federal Law from 08.12.2020 No. 427-FZ 'On Amendments to Article 7 of Part One of the Civil Code of the Russian Federation'] <http://publication.pravo.gov.ru/Document/View/0001202012080083?index=0&rangeSize=1> accessed 15 July 2021

[107]Federal'nyy zakon 'O vneseniizmeneniya v stat'yu 1 Ugolovno-protsessual'nogokodeksaRossiyskoyFederatsii' [Federal Law from 08.12.2020 No. 419-FZ 'On Amendments to Article 1 of the Criminal Procedure Code of the Russian Federation'] <http://publication.pravo.gov.ru/Document/View/0001202012080086> accessed 15 July 2021

[108]Federal'nyy zakon 'O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii v chasti nedopushcheniya primeneniya pravil mezhdunarodnykh dogovorov Rossiyskoy Federatsii v istolkovanii, protivorechashchem Konstitutsii Rossiyskoy Federatsii' [Federal Law No. 428-FZ of 08.12.2020 'On Amendments to Certain Legislative Acts of the Russian Federation in Part to Prevent the Application of the Rules of International Treaties of the Russian Federation in an Interpretation That Contradicts the Constitution of the Russian Federation'] <http://publication.pravo.gov.ru/Document/View/0001202012080062?index=3&rangeSize=1> accessed 15 July 2021

[109]Federal'nyy zakon 'O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii' [Federal Law of 08.12.2020 No. 429-FZ 'On Amendments to Certain Legislative Acts of the Russian Federation'] <http://publication.pravo.gov.ru/Document/View/0001202012080096?index=1&rangeSize=1> accessed 15 July 2021

[110]Federal'nyy zakon 'O vnesenii izmeneniy v stat'i 6 i 165 Semeynogo kodeksa Rossiyskoy Federatsii' [Federal Law of 04.02.2021 No. 5-FZ 'On Amendments to Articles 6 and 165 of the Family Code of the Russian Federation'] < http://publication.pravo.gov.ru/Document/View/0001202102040007?index=0&rangeSize=1> accessed 15 July 2021

relations are a special sphere of legal regulation, where moral and ethical values are of dominant importance.'[111]

Compliance of the amendments with international law

As may be expected, the legislative and constitutional amendments empowering the Constitutional Court of the Russian Federation to decide on enforceability of judgments delivered by international courts drew attention of the international community. The issue was most extensively discussed in the context of the execution of the judgments of the European Court of Human Rights (ECtHR) since these constitutional amendments seem to have originated in Russia's opposition to what it considers judicial activism and far-reaching interpretation of the European Convention on Human Rights by the ECtHR in cases against Russia.[112]

The Venice Commission expressed serious concerns as regards the compatibility of the 2015 amendments, which paved the way for the constitutional amendments of 2020, with the obligations of the Russian Federation under international law.[113] The Commission emphasised the respondent state's obligation under Article 46 of the European Convention on Human Rights to enforce the ECtHR judgments. The Venice Commission opined that Articles 104-4 (2) and 106(2) of the Federal law on the Constitutional Court were unacceptable. These provisions provide that following a decision by the Constitutional Court that a judgment of the ECtHR is non-enforceable, the Russian Federation must not execute them. The Venice Commission is of the opinion, that non-execution of the ECtHR judgments would contravene Article 46 of the ECHR as well as Article 27 of the Vienna Convention on the Law of Treaties, according to which no party may invoke the provisions of its internal law as justification for its failure to perform a treaty.[114]

In its more recent Opinion on the draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights, the Venice Commission again emphasized that execution of the ECtHR judgments is not a choice but an obligation of the respondent state. Consequently, the entrenchment of the Constitutional Court's power to declare ECtHR judgments non-enforceable raises an alarming concern. The Venice Commission also criticised the broad basis for potential non-execution of the judgments provided in the amendments to Article 79 of the Constitution. However, it emphasized that a solution that would ensure enforcement of the judgments must be found through dialogue and cooperation with the relevant international institutions.[115]

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[111]Explanatory note to the Federal'nyy zakon 'O vneseni iizmeneniy v stat'i 6 i 165 Semeynogo kodeksa Rossiyskoy Federatsii' [Federal Law of 04.02.2021 No. 5-FZ 'On Amendments to Articles 6 and 165 of the Family Code of the Russian Federation'] < https://sozd.duma.gov.ru/download/CC848415-418D-4CEC-9921-522E48723F04> accessed 15 July 2021

[112]Mälksoo, L. International Law and the 2020 Amendments to the Russian Constitution (American Journal of International Law, 115(1), 2020) <doi:10.1017/ajil.2020.87> accessed 16 September 2021, p. 84.

[113]The Venice Commission's Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court (2016) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e > accessed 12 April 2021

[114]Vienna Convention on the Law of Treaties Done at Vienna (1969) <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf > accessed 12 April 2021

[115]The Venice Commission's Opinion on the Draft Amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights (2020) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)009-e> accessed 12 April 2021

Potential use in lawfare

By introducing a mechanism of a constitutional veto on enforcement of judgments delivered by international courts and tribunals, Russia seeks to assert primacy of its national interests and the supremacy of its own constitutional and public order over the international legal system. It is likely to be used by Russia to resist progressive interpretation of the ECHR, for instance, by refusing to enforce those judgments which declare domestic legislation incompatible with the ECHR, or which would require introducing changes into the domestic legal order. But it could also be used as a pretext for refusal to enforce cases in which the Russian government would have preferred to see a different outcome. Lauri Mälksoo argues that this is exactly what happened in the prominent Yukos case, where the ECtHR ordered Russia to pay the company's shareholders approximately two billion Euro.[116] Mälksoo notes that the Constitutional Court's reasoning on non-enforceability of the judgment was 'artificially constructed' since the case did not involve any real conflict between the ECHR and the Russian Constitution.[117]

In a similar manner, the mechanism can be used to deny enforcement of judgments in highly political cases, especially those arising from the conflict between Ukraine and Russia in the ECtHR and other judicial forums. For instance, Russia may refuse to enforce any judgments finding that it exercises effective control over Donbas since Russia has consistently been denying its involvement in the armed conflict in Eastern Ukraine. Acceptance and execution of a judgment pronouncing, either directly or indirectly, on Russia's responsibility to ensure its international obligations in Donbas may be seen as undermining this position. It is arguably for similar reasons that Russia has failed to execute the ECtHR judgments finding its responsible for breach of the ECHR on the territory of Transnistria.[118] In reality, Russia disagrees with the ECtHR findings that it exercises effective control and decisive influence over Transnistria but refers to practical difficulties in enforcing a judgment on a territory of another state as an ostensible reason for its non-enforcement.[119]

The same scenario is very likely to play out in Russia's conflict with Ukraine. In the decision from 16 December 2020, the ECtHR found that Russia exercises effective control over the territory of Crimea,[120] which will have a significant impact on future judgments regarding Russia's violations of human rights on that territory. Currently, Russia has not taken any legal action to discredit this decision within its domestic system. However, as the narrative about Ukraine as a transgressor of Russian integrity and the rights of the Russian-speaking population grows more aggressive, the use of newly introduced tools of non-enforcement of decisions may be just around the corner.

The constitutional veto mechanism introduced by the amended Articles 79 and 125 of the Constitution could even be viewed as a measure adopted to counter Ukraine's legal action against Russia in the form of litigation of international law matters stemming from the conflict before international courts and tribunals. These constitutional changes will certainly have ramifications for the effectiveness of international law in the inter-state relationship. They may also deprive individuals of an effective means of protecting their rights and freedoms from state interference.

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[116]Mälksoo, L. International Law and the 2020 Amendments to the Russian Constitution (American Journal of International Law, 115(1), 2020) <doi:10.1017/ajil.2020.87> accessed 16 September 2021, p. 84.
[117]Ibid.
[118]Linda Hamid, The right to education in Transdniestria seven years after Catan and Others v. Moldova and Russia: are we there yet? (Strasbourg Observers, 20 April 2020) <https://strasbourgobservers.com/2020/04/20/the-right-to-education-in-transdniestria-seven-years-after-catan-and-others-v-moldova-and-russia-are-we-there-yet/> accessed 16 September 2021
[119]Ibid.
[120]Ukraine v. Russia (Re Crimea) Apps no. 20958/14 and 38334/18 (ECtHR [GC], 16 December 2020)

Kerttu Mäger notes that the constitutional amendments in Articles 79 and 125 may harm the very Russian citizens who supported them, by rendering the protection through the ECHR system ineffective.[121]

2.2.5. Article 79.1 of the Constitution: a self-proclaimed peacekeeper

Article 79.1 is another amendment that was introduced into the Constitution with a declarative and ideological purposes rather than for practical application. This new provision reads: 'The Russian Federation shall take measures to preserve and strengthen international peace and security, ensure the peaceful coexistence of states and peoples, and prevent interference into the internal affairs of the State.'

This amendment reflects Russia's desire to portray itself as a peacekeeper in the international arena. In 2013, Russian narrative was consistent with international law and practice: the Concept of the Foreign Policy of the Russian Federation stated that the UN Security Council bears the primary responsibility for the maintenance of international peace and security, meanwhile attempts to manage crises through unilateral sanctions and other coercive measures, including armed aggression, outside the framework of the UN Security Council were declared a risk to world peace and stability.[122] However, in 2016 a new Concept of the Foreign Policy was released, where the focus of the means of international interactions shifted.[123] For example, in 2013, Russia saw strengthening international security through 'reducing the role of the use of force,' but three years later it only 'advocates strengthening international security and enhancing strategic and regional stability.' Moreover, in this document, the Russian Federation proclaims itself as somewhat superior to other states in regard to peacekeeping: 'In the context of efforts to strengthen regional stability in Europe, the Russian Federation seeks to bring the conventional arms control regime in Europe in line with current realities, as well as to ensure unconditional compliance by all States with the agreed confidence and security-building measures.'

It is also interesting that back in 2013, Russia saw itself as 'one of the influential and competitive poles of the modern world,' while in 2016, its self-proclaimed position upgraded to the 'centre of influence in today's world.' Another note-worthy provision is para 31, which reflects Russia's intention to participate in international peacekeeping efforts. Even though the document states that it will be done under the UN leadership and with no 'arbitrary interpretations [of peacekeeping mandates], especially those related to the use of force' will be tolerated, the subsequent actions on different territories, and the Constitutional amendments of 2020 indicate that Russia seeks to take over the peacekeeper role.

In its assessment of the new Article 79.1 of the Constitution, the Venice Commission accepted the explanation of the Russia's authorities that 'this provision does not and cannot imply a waiver by the Russian Federation of its international obligations.' At the same time, it noted that 'the Russian

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[121]Mäger, Kerttu, Enforcing the Judgments of the ECtHR in Russia in Light of the Amendments to the Law on the Constitutional Court (Juridica International, 24 (October 2016), 14-22) https://doi.org/10.12697/JI.2016.24.02., p. 22

[122]Concept of the Foreign Policy of the Russian Federation from 12 February 2013 <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/122186> accessed 15 July 2021

[123]Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30, 2016) <https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/2542248> accessed 15 July 2021

authorities cannot avail themselves of the principle of non-interference in internal affairs to reject criticism of the alleged non-observance of its international obligations.'[124]

While the Venice Commission found no flaws in the provision, the phrase 'measures to preserve and strengthen international peace and security' is so vague and open to interpretation that it can be used to justify any Russian action, even outside its borders.

First and foremost, Russia can justify its support and military presence on the territories of other countries, especially in unrecognized 'republics' like DPR and LPR, as 'measures' to maintain peace and security. Despite the fact that there were no official Russian peacekeeping missions on Ukrainian territory, the 15th separate motorized rifle brigade of 'peacekeeping forces' took part in the occupation of Crimea and was later spotted in military action in Donbas.[125] There have been several provocative mentions of peacekeeping missions since then. In September 2017, after categorically rejecting Ukraine's proposal to send UN peacekeepers to Donbass, Putin unexpectedly proposed a similar scenario involving the presence of 'those people who ensure the security of the OSCE mission.'[126] According to media reports in March 2021, Ukraine's National Security and Defence Council was aware of shooting in the DPR/LPR as a preparation for the deployment of Russian peacekeepers,[127] so Ukraine allegedly warned the OSCE Special Monitoring Mission of possible provocations by Russia with the intention of legitimizing the involvement of the Russian 'peacekeepers.'[128]

Second, the vague wording of the newly introduced Article 79.1 of the Constitution opens up a wide range of opportunities to violate the internal order of procedures – as was done with the procedure of all-Russian voting for amendments – and justify any decisions of the legislating President. For example, the decision to send Russian peacekeepers to Nagorno-Karabakh was only submitted to the Federation Council for approval after the forces had already been dispatched.[129]

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[124]The Venice Commission's Interim Opinion on Constitutional Amendments And The Procedure For Their Adoption (2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)005-e> accessed 15 July 2021

[125] Irakliy Komakhidze, 15-ya OMSBr 'mirotvorcheskikh sil' na granitse s Ukrainoy [15th Separate Motorized Rifle Brigade of 'peacekeeping forces' on the border with Ukraine] (Inform Napalm, 10 September 2014) <https://informnapalm.org/1028-15-ya-omsbr-myrotvorcheskyh-syl-na-granytse-s-ukraynoj/?fbclid=IwAR3KUnOzT-J6fCDi2SJcdS889hRdGlbnzAiqFRXXy-JgllpsgrqqkHGRbhk> accessed 15 September 2021

[126] Mirotvortsy na Donbasse - mertvorozhdennaya missiya? [Peacekeepers in Donbass - a stillborn mission?] (BBC News, 6 September 2017) <https://www.bbc.com/ukrainian/features-russian-41178707> accessed 15 September 2021

[127] Tat'yana Ivzhenko, V Kiyeve opasayutsya vvoda v Donbass rossiyskikh mirotvortsev [Kyiv fears entry of Russian peacekeepers into Donbass] (Nezavisimaya, 1 March 2021) <https://www.ng.ru/cis/2021-03-01/5_8092_ukraine.html> accessed 16 September 2021; Ukraina obvinila Rossiyu v podgotovke vvoda mirotvortsev v Donbass [Ukraine accused Russia of preparing the entry of peacekeepers into Donbass] (RIA Novosti, 9 March 2021) <https://ria.ru/20210309/mirotvortsy-1600536360.html> accessed 15 September 2021

[128] Ukraina – missii OBSE: Rossiya snimayet roliki v podderzhku idei svoikh 'mirotvortsev' na Donbasse [Ukraine - OSCE missions: Russia is filming videos in support of the idea of its 'peacekeepers' in Donbass] (Ukrayins'ka Pravda, 1 March 2021) <https://www.pravda.com.ua/rus/news/2021/03/1/7285085/> accessed 15 September 2021

[129]Andrei Pozniakov, 'Sovet Federatsii postfaktum soglasoval vvod rossiiskikh mirotvortsev v Nagornyi Karabakh' [The Federation Assembly agreed on the entry of Russian peacekeepers into Nagorno-Karabakh after the entry] (Euronews, 18 November 2020) <https://ru.euronews.com/2020/11/18/putin-federation-council-peacekeepers-sanction> accessed 10 September 2021

This situation was once again justified by its 'uniqueness,' despite the lack of a proper legal basis.[130]

Historically, Russian peacekeeping missions are notorious for their support of separatist movements and fostering frozen conflicts. In Transnistria, Russia has been keeping its armed forces for over 25 years, even though initially it was a party to the conflict. This contradicts fundamental principles of peacekeeping: consent from the host-state and impartiality. [131] With the election of a new president in Moldova, some attempts were made to remove Russian peacekeepers: President Sandu asked Russian troops to withdraw so that civilian monitors from the OSCE could replace them.[132] The consent from the host-state to accept a peacekeeping mission and to further cooperate with it is essentially a manifestation of its sovereignty, and an element that puts the peacekeeping mission in opposition to the occupation,[133] if it is missing, forcible peacekeeping turns into *de facto* occupation.

Instead, Russian authorities twisted President Sandu's statement to indicate that she wishes to get rid of any international observers. Furthermore, the usual Russian narrative was used, claiming that without Russian soldiers, firstly, the Russian-speaking population of Transnistria will be discriminated, and secondly, the withdrawal of Russian troops threatens a resumption of the conflict in the region.[134] As a result, this peacekeeping mission is still at place with no legal instruments for Moldova to forfeit it.

In Georgia, Russia covered its actual intentions with 'peacekeeping missions' at first, while building military bases in Abkhazia and South Ossetia and giving Russian passports to the population of those regions. Even though, concerns about Russia's lack of impartiality were raised by Georgian authorities long before, no actions of prevention were undertaken, and in 2008 Russia openly occupied disputed territories, turned them into *de facto* Russian dependencies and froze a conflict up until now.[135] According Anatol Shalaru, former Moldovan minister of defence, now that Russian troops are on their territories, neither Moldova, nor Georgia or Ukraine can solve the frozen conflicts without international help.[136]

Emmanuel Tronc and Anaïde Nahikian note that Donbas situation fits into pattern that Russia has been using since 1990-s and, therefore, stands in one line with conflicts in Abkhazia, Nagorno-Karabakh, South Ossetia, and Transnistria. Scholars point out that Russia uses a strategy of

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[130]Georgiy Tadtayev, Rossiya vvedet mirotvortsev v Nagornyy Karabakh [Russia will introduce peacekeepers to Nagorno-Karabakh] (RBK, 10 November 2020) <https://www.rbc.ru/politics/10/11/2020/5fa9c2049a7947189bd3d191> accessed 10 September 2021

[131]United Nations Peacekeeping Operations: Principles and Guidelines (the Capstone Doctrine) (U.N. Department of Peacekeeping Operations and U.N. Department of Field Support, 2008) <http://www.un.org/en/peacekeeping/documents/capstone_eng. pdf> accessed 10 September 2021, p. 31-32

[132] Moldova's new president calls for Russian troops to withdraw from territory (BBC News, 30 November 2020) <https://www.bbc.com/news/world-europe-55135213> accessed 10 September 2021

[133]Adam Roberts, 'What is Military Occupation' [1984] 55 British Yearbook of International Law, p. 291

[134]Nino Dzhgarkava, Aleksey Poplavskiy, 'My na eto ne poydem': pochemu Moskva ne vyvedet voyska iz Pridnestrov'ya ['We will not agree to this': why Moscow will not withdraw its troops from Transnistria] (Gazeta.ru, 2 December 2020) <https://www.gazeta.ru/politics/2020/12/01_a_13382551.shtml> accessed 15 September 2021

[135]Roy Allison, 'Russia resurgent? Moscow's campaign to 'coerce Georgia to peace'' [2008] 84(6) International Affairs <https://doi.org/10.1111/j.1468-2346.2008.00762.x> accessed 10 September 2021, p. 1156

[136]Irina Romaliyskaya , 'Ni odna strana, na ch'yey territorii nakhodyatsya rossiyskiye voyska, ne mozhet reshit' etot vopros. Vyydet li rossiyskaya armiya iz Pridnestrov'ya?' [Not a single country on whose territory Russian troops are located can resolve this issue. Will the Russian army leave Transnistria?] (Nastoiashchee vremia, 2 December 2020) <https://www.currenttime.tv/a/pridnestrovje-rossia/30978959.html> accessed 10 September 2021

‘controlled destabilization’ by offering a peacekeeping force, sending volunteer paramilitaries and then proceeds to ‘freeze’ the conflict to the point of becoming politically intractable.[137]

Therefore, despite its ideological and political character, the newly introduced Article 79.1 of the Constitution can be used in Russia’s lawfare against Ukraine to justify any actions as peacekeeping measures and only strengthens Russia’s self-view of superiority towards other international actors. Meanwhile, instead of ‘preserving peace and security,’ Russian propaganda kindles the fire of war, directs its manipulation of legal instruments and information towards separation of regions and occupation of territories; and instead of ‘peaceful coexistence of states and peoples’ tries to single out Russian-speaking population as the one ‘to be protected’ by all means.

2.3. Other relevant legislative changes: resurrecting the Iron Curtain

Apart from major constitutional changes, lawfare instruments can be put into power even with ordinary laws and amendments to them. Consequently, it is necessary to analyse properly the whole body of laws with the potential to be used against the interest of the Western world and inalienable human rights and freedoms.

The four legal acts, explored in this chapter, serve as subtle examples of lawfare that can greatly affect citizens of Russia, its neighbouring countries, the West, and the overall situation concerning respect for human rights. These laws clearly show that Russia intends to continue its hostile attitude towards the dissenting voices and minorities. In this respect, information is the vital construct in the field of dominance over the minds of the population. With all these measures, Russia tries to constraint the flow of independent information and to isolate its citizens in the vacuum of censored and mutilated ‘truths’. For this reason, there is a great need for informational resistance to the accumulating power of the Russian propaganda that fills in the gaps in the major informational channels. It is indeed a challenge to combat the system, which is based on constant oppression and imitation of freedom of speech; however, the proper analysis of the system’s instrumental basis may serve as a pivotal point in the strategy of counterchecks.

2.3.1. ‘Foreign agents’ and ‘unfavourable organizations’

Federal Law no. 481-FZ

On 30 December 2020 the Federal Law no. 481-FZ ‘On alterations to certain Russian Federation’s laws with regards to additional measures of counteractions to the threats to national security.’ The main aim of this law was to introduce the precise definition of a ‘foreign agent.’

The notion of ‘foreign agent’ has existed in Russian legislation since 2012. At the time, it was used to define non-commercial organizations that are financed by foreign sources and participate in Russian politics. After the legislative changes of 2020, an individual could be also qualified as a ‘foreign agent’ in situations when this person ‘acts in the interests’ of the foreign mass media, receives support from abroad, and creates and distributes textual, audio, or video material.[138] Recalling the words of Vasiliy Piskarev, there was a need for modification, and for this exact

[137]Emmanuel Tronc and Anaïde Nahikian, Ukraine: Conflict In The Donbas Civilians Hostage To Adversarial Geopolitics (Humanitarian Action at the Frontlines: Field Analysis Series, July 2020), p. 24

[138]Federal'nyj zakon ot 30.12.2020 № 481-FZ ‘O vnesenii izmenenij v otdel'nye zakonodatel'nye akty Rossijskoj Federacii v chasti ustanovleniya dopolnitel'nyh mer protivodejstviya ugrozam nacional'noj bezopasnosti’ [Federal Law no. 481-FZ ‘On alterations to certain Russian Federation’s laws with regards to additional measures of counteractions to the threats to national security’], adopted on 30 August 2020, <http://publication.pravo.gov.ru/Document/View/0001202012300001> accessed 16 September 2021.

reason, the notion of 'foreign agent' was broadened to include 'citizens and foreigners who conduct political activity in favour of other states, collect intelligence in military and military-technical spheres, which can be used against Russian interests.'[139]

Moreover, these changes impose certain obligations and limitations on both individuals and legal entities, who are recognized as 'foreign agents.' As for the regular persons, they must introduce the reports with precise information regarding their activities and spending of foreign financial support. They also cannot come into any governmental or municipal post and have access to classified information. All the information, distributed by them to the media should be appropriately marked.

Turning to the legal entities, they shall be registered and obliged to provide the Russian government with quarterly reports highlighting the amount and aim of foreign financial support and its factual spending. Furthermore, they cannot be members of public councils or federal executive bodies. Like individuals, legal entities should mark the distributed content.

Although the recently amended law imposed wide-ranging limitations, it does not contain any definition of political activity, which is the central constituent element of a 'foreign agent.' Despite the declamations by Vasiliy Piskarev about the need for clarification of this term, none was made yet and the notion of political activity remains uncertain.

The adoption of such a law might have considerable implications for Russia's relations with its Western partners. Acknowledging the six-years period of constant sanctions, Russian officials looked for counteractions in economic and political spheres.[140] Some of those claims even came into action.[141] The negative power of this law is embodied in the ability to impose limitations on NGOs, the least favourable actors according to the Russian government. As actors striving to ensure respect of human rights and exposing instances of their violations, NGOs have been on the Russian repressive radar for a long time now. The same is true for the independent media outlets. Furthermore, with the help of the Federal Law no. 481-FZ, such well-known media outlets, as Dozhd, Meduza, The Insider, and VTimes were held to be 'carrying out the functions of a foreign agent.'[142]

With this law in action, Russia has a more elaborate instrument with the potential of sudden actions against unfavourable entities, foreign media in particular. For example, this may result in actions, similar to those of China in relation to Uyghurs, when several international companies suffered

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[139]Gosudarstvennaya Duma Federal'nogo Sobraniya Rossijskoj Federacii, 'Chto menyaetsya v zakonodatel'stve ob inoagentah?' [The State Duma of the Federal Assembly of Russia, 'What changes in legislature concerning the foreign agents?'] (The State Duma, 23 December 2020) <http://duma.gov.ru/news/50387/> accessed 16 September 2021.

[140] Scott Neuman, 'Russia Threatens To Cut Ties With EU If Sanctions Are Imposed Over Jailing Of Navalny'Russia Threatens To Cut Ties With EU If Sanctions Are Imposed Over Jailing Of Navalny' (NPR, 12 February 2021) <https://www.npr.org/2021/02/12/967344804/russia-warns-eu-against-imposing-sanctions-over-jailing-of-opposition-leader?t=1631806312587> accessed 16 September 2021

[141]Xinhua News Agency, 'Russia sanctions Britons in retaliation against sanctions' (CGTN, 10 August 2021) <https://newsaf.cgtn.com/news/2021-08-10/Russia-sanctions-Britons-in-retaliation-against-sanctions-12B9tUFsoG4/index.html> accessed 16 September 2021; Ilya Arkhipov, Henry Meyer, 'Russia Will Expel BBC Reporter Amid Simmering Tensions' (Bloomberg, 13 August 2021) <https://www.bloomberg.com/news/articles/2021-08-13/russia-to-expel-bbc-journalist-this-month-in-retaliatory-move> accessed 16 September 2021

[142]EURACTIV.com with AFP, 'Russia brands independent TV channel 'foreign agent'' (EURACTIV, 23 August 2021) <https://www.euractiv.com/section/global-europe/news/russia-brands-independent-tv-channel-foreign-agent/> accessed 16 September 2021

considerable losses in Chinese market for claims regarding violation of human rights in China.[143] Analysing Russia's modus operandi, the active imposition of similar measures is just a question of time, soon more companies and organisations may be barnded 'foreign agents' for the condemnation of Russia's measures towards opposition.

Federal Law no. 230-FZ

Following the established agenda towards so-called 'foreign agents,' the Russian Parliament introduced yet another piece of legislation aimed at limitation of economic and political relations with other countries. The introduction of the Federal Law no. 230-FZ on 28 June 2021 limited the rights of individuals and legal persons to participate in 'undesirable' organizations abroad.[144]

As to the range of subjects, to which these limitations may be applied, the law lists citizens of the Russian Federation, stateless persons with residence in Russia, and Russian legal entities.[145] In order to be considered as an 'undesirable' organization, the foreign or international entity should be a proxy in transfers of monetary funds or property with other organizations, already established to be 'undesirable.' Another criterion is the commission of actions that may endanger the 'constitutionalism' in Russia, its defence capabilities, and overall security.

With regards to the genuine reasons for the adoption of such a law, one of the law's co-authors, Vasiliy Piskarev, claimed that numerous foreign organizations train Russian citizens, and, as a result, 'after homecoming, the graduates try to organize illegal protests and turmoil, propagate drugs, and incite teenagers to participate in this course of perturbations.'[146]

Similar to the law on 'foreign agents,' this legal novella can be viewed from a perspective of lawfare, as it becomes extremely easy to turn any organisation 'undesirable.' It is generally accepted, that these laws were designed to limit the freedom of speech and put pressure on NGOs and independent media.[147] Roughly half of Russian citizens support this view.[148] As Russian military analyst Yury Fyodorov pointed out in his interview to Radio Liberty, 'the whole point of

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[143]The Global Herald, 'Adidas CEO: We are in the Chinese market for the long term' (The Global Herald, 6 August 2021) <https://theglobalherald.com/news/adidas-ceo-we-are-in-the-chinese-market-for-the-long-term/> accessed 16 September 2021; France 24, 'China's anti-sanctions law a new headache for banks in Hong Kong' (France 24, 12 August 2021) <https://www.france24.com/en/live-news/20210812-china-s-anti-sanctions-law-a-new-headache-for-banks-in-hong-kong> accessed 16 September 2021

[144]Gosudarstvennaya Duma Federal'nogo Sobraniya Rossijskoj Federacii, 'Vstupaet v silu zapret na uchastie v rabote nezhelatel'nyh NPO za predelami RF' [The State Duma of the Federal Assembly of Russia , 'The prohibition on work in non-favorable NGOs out of Russia comes into force'] (The State Duma, 9 July 2021) <http://duma.gov.ru/news/51The state duma of the federal assembly of russia, 'The prohibition on work in non-favorable NGOs out of Russia comes into force' (The State Duma, 9 July 2021) <http://duma.gov.ru/news/51983/> accessed 16 September 2021983/> accessed 16 September 2021

[145]Federal'nyj zakon ot 28.06.2021 № 230-FZ [Federal Law no. 230-FZ] <http://publication.pravo.gov.ru/Document/View/0001202106280031?index=3&rangeSize=1> accessed 16 September 2021

[146]Gosudarstvennaya Duma Federal'nogo Sobraniya Rossijskoj Federacii, 'The prohibition on work in non-favorable NGOs out of Russia comes into force' [The State Duma of the Federal Assembly of Russia, 'The prohibition on work in non-favorable NGOs out of Russia comes into force'] (The State Duma, 9 July 2021) <http://duma.gov.ru/news/51983/> accessed 16 September 2021

[147]Lucian Kim, 'Russia's 'Foreign Agent' Law Targets Journalists, Activists, Even Ordinary Citizens' (NPR, 31 July 2021) <https://www.npr.org/2021/07/31/1021804569/russias-foreign-agent-law-targets-journalists-activists-even-ordinary-citizens?t=1631807708931> accessed 16 September 2021; US Embassy Tbilisi, 'How Russia's 'foreign agents' law silences dissent' (US Embassy in Georgia, 10 August 2021) <https://ge.usembassy.gov/how-russias-foreign-agents-law-silences-dissent/> accessed 16 September 2021.

[148]RFE/RL, 'Poll Says Nearly Half of Russians See 'Foreign Agent' Law As Pressure Tool' (Radio Liberty, 3 August 2021) <https://www.rferl.org/a/russia-foreign-agents-poll/31391213.html> accessed 16 September 2021.

these actions is to expand as much as possible the range of instruments and legal grounds in the event that it is necessary to imprison someone or just to ruin their life.'[149] Indeed, Russian government has already started to use this law in order to limit the freedoms of persons considered 'undesirable,' opening the door for the forthcoming repressions.[150] Currently there is a Register of foreign mass media, functioning as foreign agents, and among them there are ordinary people, who participated in politics, namely in those, devoted to the rights of women and anti-militarism.[151] The last addition to registry was made on 3 September 2021, only 19 positions in the list are legal entities.[152]

2.3.2. 'Fake news' and limiting access to information

Federal Law no. 80-FZ

On 1 May 2019, the Federal Law no. 80-FZ 'On information, information technologies, and protection of information' was passed, enforcing the procedure of governmental fight against fake news. Despite the desire to put limitations on the spread of fake news, the process proposed by the law risks endangering freedom of speech.

The notion of 'fake news' is defined by the threats that this information creates to 'the general public, health and well-being of Russian citizens, property, civil order, and safety.'[153] Similar to calls to extremism and civil disobedience, 'fake news' shall not be spread through telecommunication services, including Internet.[154]

As to the body competent to decide on the truthfulness of the news, it is the Prosecutor General and his deputy. These officials are authorised to evaluate the news through the prism of social agenda and events that can lead to the creation of 'fake news'. After establishing that a piece of information constitutes 'fake news,' the Prosecutor General or his deputy should ask the Federal Service for Supervision of Communications, Information Technology, and Mass Media (further – 'Roskomnadzor') to limit access to the media platforms that spread such information. The Roskomnadzor itself has a broad authority to order the reporting agencies to delete infringing content, or even temporarily shut down the website of the agency.

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[149] Robert Coalson, Yelena Rykovtseva , 'The Russian State Takes Ominous Steps To Bolster 'Foreign Agents' Law' (Radio Liberty, 28 July 2021) <https://www.rferl.org/a/russian-foreign-agents-law/31382204.html> accessed 16 September 2021.

[150]Robyn Dixon, 'Russia tells veteran BBC correspondent to leave as relations with West deteriorate' (The Washington Post, 13 August 2021) <https://www.washingtonpost.com/world/europe/russia-bbc-journalist-expelled/2021/08/13/b28ad56c-fc2d-11eb-911c-524bc8b68f17_story.html> accessed 16 September 2021.

[151]Lucian Kim, 'Russia's 'Foreign Agent' Law Targets Journalists, Activists, Even Ordinary Citizens' (NPR, 31 July 2021) <https://www.npr.org/2021/07/31/1021804569/russias-foreign-agent-law-targets-journalists-activists-even-ordinary-citizens?t=1631807708931> accessed 16 September 2021; Ministerstvo yusticii Rossijskoj Federacii, Reestr inostrannyh sredstv massovoj informacii, vypolnyayushchih funkcii inostrannogo agenta, [Ministry of justice of russian federation, 'Register of foreign mass media, functioning as foreign agents'] (Ministry of Justice of Russian Federation, 3 September 2021) <https://minjust.gov.ru/ru/documents/7755/> accessed 16 September 2021.

[152]Ibid.

[153]Federal'nyj zakon ot 01.05.2019 № 90-FZ 'O vnesenii izmenenij v Federal'nyj zakon 'O svyazi' i Federal'nyj zakon 'Ob informacii, informacionnyh tekhnologiyah i o zashchite informacii' [Federal Law no. 80-FZ 'On information, information technologies, and protection of information'] <http://publication.pravo.gov.ru/Document/View/0001201905010025> accessed 16 September 2021.

[154]Gosudarstvennaya Duma Federal'nogo Sobraniya Rossijskoj Federacii, 'Chto takoe fejkovye novosti i kak za nih budut nakazyvat' [The State Duma of the Federal Assembly of Russia, 'What is fake news and how the punishment for it would be imposed?'] (The State Duma, 21 August 2020) <http://duma.gov.ru/news/49341/> accessed 16 September 2021.

In addition, this law adopts administrative punishments in form of a fines for citizens, officials, and legal persons, ranging from 30 thousand to 1.5 million rubles (348 and 17,415 Euro respectively)[155] depending on the presence or absence of qualified circumstances, such as 'the harm to life or well-being of a human being.'

The fact that the Prosecutor General has unlimited discretion to decide whether certain news is 'fake,' can lead to significant repressions against independent mass media and considerably limit the population's access to information.

Most recently, Russian Federation refused to renew visa for BBC's correspondent Sarah Rainsford and labelled such well-known independent media resources as 'Voice of America,' 'Radio Liberty,' and 'The Insider' as 'foreign agents.' Taking into account the aforementioned facts, Russia will definitely take further steps towards limitations of broadcasting of western news and the ability of Russian citizens to get another perspective on both local and international events. The outcomes of the described measures can range from the rise of anti-western mood in Russia to the actual sanctions and limitations both in Russia and in its ally-countries, who tend to mimic the Russian course in international relations.

2.3.3. State secrets and limitation on freedom of movement

Federal Law no. 433-FZ

The Federal Law no. 433-FZ 'On amending Articles 15 and 18 of the Federal Law 'On the rules of entering and exiting the Russian Federation' was adopted on 16 December 2019. The amendment concerned the inclusion of retired workers of the Federal Security Service of the Russian Federation (further – 'FSB') into the category, whose freedom of movement can be limited.

The prohibition of leaving the Russian territory can be imposed on ex-members of FSB, who were fired from this body, for a period of up to 5 years.[156] This decision is mainly dependent on the FSB itself. Moreover, this prohibition can be imposed only on workers, who have knowledge of especially important or strictly confidential matters.

As for the official reasons for this law's adoption, Vasiliy Piskarev names 'the repetitive occasions of overtly hostile actions and provocations against Russian citizens on behalf of certain foreign countries.'[157] The co-author of this law and member of the Parliament expressed the desire that such legislative modification can secure the lives of Russian people and save them from 'criminal punishments due to the relation to the Russian intelligence services.'

Despite the declared intention to protect lives, the Russian government is probably afraid of the risks of classified information leaks, which had occurred in the past. In addition to the 'Cold War'

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[155]As for 16.09.2021.

[156]Federal'nyj zakon ot 16.12.2019 № 433-FZ 'O vnesenii izmenenij v stat'i 15 i 18 Federal'nogo zakona 'O poryadke vyezda iz Rossijskoj Federacii i v'ezda v Rossijskuyu Federaciyu' [Federal Law no. 433-FZ 'On alterations to Articles 15 and 18 of the Federal Law 'On the rules of coming in and out of the Russian Federation'] <http://publication.pravo.gov.ru/Document/View/0001201912160063?index=1&rangeSize=1> accessed 16 September 2021

[157]Gosudarstvennaya Duma Federal'nogo Sobraniya Rossijskoj Federacii, 'Kak zakon otreguliruet vyezd eks-sotrudnikov FSB za rubezh?' [The State Duma of the Federal Assembly of Russia,'How the law will regulate the departure of the FSB'sex-workers abroad?'] (The State Duma, 5 December 2019) <http://duma.gov.ru/news/47178/> accessed 16 September 2021.

atmosphere that surrounds this decision, it can also be considered as a limitation to the freedom of movement.

While the concerns regarding potential leaks are understandable and are shared by many countries,[158] the adopted measures should not intersect with limitations of basic human rights and freedoms. It should be mentioned that ex-members of intelligence agencies from numerous countries do not face any obstacles on working for foreign governments and are not subjected to any travel limitations. For this reason, the restrictions imposed on freedom of movement by Federal Law no. 433-FZ cannot be viewed as humane regarding the rights of ex-members of intelligence. Furthermore, the blurry wording of the law extends its influence not only to present intelligence workers but also to the former ones.

Analysing the prospects of this law's usage in the field of lawfare, the limitations on ex-members of FSB clearly show the intent of Russia to keep its secret to itself and do whatever it takes, when it comes to their preservation. It is not a mystery, that ex-workers of Russian intelligence can serve as valuable sources of information regarding its anti-western operations. The limitations on freedom of movement will hinder obtaining this knowledge in the future.

[158]Maggie Haberman, Julian E. Barnes, 'CIA Warns Former Officers About Working for Foreign Governments' (The New York Times, 26 January 2021) <https://www.nytimes.com/2021/01/26/us/politics/intelligence-officers-foreign-governments.html> accessed 16 September 2021.

3. RUSSIA'S STANCE ON CRIMEA: REWRITING THE RULES?

As discussed in chapter 2, the so-called 'Crimean Spring' of 2014 was not the first instance where Russia induced a separatist crisis and used force allegedly to protect its 'compatriots.' Crimea had several forerunners: South Ossetia in 1990, Transnistria and Abkhazia in 1992, and Georgia in 2008. It was, however, the first one that ended in annexation. Crimea therefore represents a clear shift in Russia's previous stance on secession.

Unlike other Russia-backed separatist enclaves, which have little practical value for Russia, and whose main purpose was to destabilise the parent state by creating a 'frozen conflict,' Crimea hosts a military base, which gives Russia control over the entire Black Sea region. It is estimated that up to 80,000 Russia's military personnel are currently stationed in Crimea.[159] For reference, a total of 50,000 servicemen are stationed across all US bases in Japan.[160]

Crimea's strategic value prompted Russia to adopt a legalistic approach to the annexation. Vladimir Putin famously sought Russia's parliament's authorisation for the use of force in Ukraine,[161] which is a clear violation of the non-intervention principle of international law but gives it a vague air of legitimacy in laymen's eyes.

Russia also tried to ground the annexation in international law indirectly referring to humanitarian intervention and citing the right to self-determination. However, as we will show in this chapter, these arguments are weak from the legal standpoint. Russia almost entirely abandoned them after the formal incorporation of Crimea and switched to the grandiose non-legal rhetoric of righting historical wrongs, Crimea's 'sacredness' and its 'special spiritual connection' to Russia. The 2020 amendments to the Russian Constitution were not only drawn up in light of this quasi-imperial rhetoric but were designed specifically to entrench it. To illustrate, Article 67.1, in paragraph 3, provides that the Russian Federation 'defends historical truth,' no less.

Despite its isolationist policy and economic insignificance compared to the US, EU or China, Russia remains an important international player as a nuclear state and a permanent member of the UN Security Council. As pointed out by Christopher J. Borgen, the idea that some states are 'special' and have broader sovereignty than others, coming from a big international player, is potentially detrimental to the existing world order and should not be ignored.[162]

To quote Roy Allison, 'the annexation of Crimea represents such an affront to core principles of contemporary interstate conduct that it raises the question whether Putin is mounting a wider challenge to what he regards as a western-dominated international system and legal order.'[163]

This chapter will analyse how Russia's stance on Crimea shifted from humanitarian intervention to ensuring self-determination, the concepts grounded in international law, to the non-legal rhetoric of 'righting historical wrongs' and restoring the 'natural state of affairs' subsequently reflected in

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[159]Alexandra Odynova, 'Ukraine says Russia has moved 80,000 troops to border and Crimea, and Putin won't talk' (CBS News, 12 April 2021) <https://www.cbsnews.com/news/russia-ukraine-news-putin-moves-russian-troops-to-border-and-crimea/> accessed 16 June 2021

[160]Andrii Klymenko and Tetyana Guchakova, 'The Militarization of Crimea as a Pan-European Threat and NATO Response Third Edition' (The Black Sea Institute of Strategic Studies and BlackSeaNews, 21 August 2021) <https://www.blackseanews.net/en/read/179147> accessed 16 June 2021

[161]'Russian parliament approves troop deployment in Ukraine' (BBC News, 1 March 2014) <https://www.bbc.com/news/world-europe-26400035> accessed 16 July 2021

[162]Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' [2015] 91(216) International Law Studies, p. 260-261

[163]Roy Allison, 'Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules' [2014] 90(6) International Affairs 1267

the 2020 constitution. We will also look at how Russia uses Kosovo to justify the annexation and 'get back' at the West. Finally, we will explore how Russia tried to weaponise the Budapest Memorandum against Ukraine.

3.1. Claim №1: 'Protecting Russian Compatriots in Crimea by Means of Humanitarian Intervention'

As was previously explored in chapter 2.2.3, the law 'On Compatriots Abroad,'[164] covers anyone born in the USSR before 1991, if they made 'a choice in favour of spiritual, cultural and legal connection' with the Russian Federation, while the newly amended article 69(3) of the Russian Constitution allows Russia to 'support' such compatriots abroad 'in fulfilling their rights, ensuring their interests and protecting the common Russian cultural identity.' The 2020 amendments to the Constitution were designed to fit Russia's narrative, which accompanied the annexation of Crimea, like a glove.

The Council of the Duma claimed that the rights of Russian speakers of Crimea were being restricted[165] and asked President Putin to authorise the use of force on the peninsula to avoid 'humanitarian catastrophe.'[166] This statement had nothing to do with the truth but served as a basis for the decision of the Federation Council to send troops to the territory of Ukraine. In fact, the right to use military force outside the territory of the Russian Federation was directly envisaged by Article 102(1)(d) of its Constitution.[167]

At the extraordinary meeting of the UN Security Council held on 4 March 2014, Russia explained its decision to send military forces to Crimea by the need to protect lives of Russian 'citizens and compatriots' in Crimea and to safeguard rights of 'persecuted' Russian speakers and minorities, which roughly falls under the notion of humanitarian intervention.[168] Another argument invoked by the Russian Federation as a basis for its use of force in Crimea was the letter of 1 March 2014 by the ex-president of Ukraine Victor Yanukovych addressed to Vladimir Putin asking for assistance in 'restoring peace and legal order in Ukraine' and protecting its population from 'violence, terror and political persecution,' the so-called 'intervention by invitation.'[169] We will explore these two lines of arguments below.

3.1.1. The Definition of Humanitarian Intervention

As defined by Prof. Adam Roberts of Oxford, in its classical sense, 'humanitarian intervention' (HI) is a 'coercive action by one or more states involving the use of armed force in another state

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[164]Federal'nyy zakon O gosudarstvennoy politike Rossiyskoy Federatsii v otnoshenii sootechestvennikov za rubezhom [Federal law from 24 May 1999 No. 99-FZ On the state policy of the Russian Federation in relation to compatriots abroad) <https://docs.cntd.ru/document/901734721> accessed 15 July

[165]Vladimir Fedorenko, 'Sovet Gosdumy prosit Putina zashhitit' zhitelej Kryma [Duma's Council Asks to Protect the people of Crimea]' (Intwrfax, 1 March 2014) https://www.interfax.ru/russia/362032 accessed 15 July

[166]Aleksej Nikol'skij, 'Sovet Federacii razreshil Putinu vvesti vojska na Ukrainu'(интерфакс, 1 марта 2014) <https://www.interfax.ru/russia/362043>

[167]Constitution of the Russian Federation <http://www.constitution.ru/10003000/10003000-4.htm>

[168]RT in Russian, 'Speech by Vitaly Churkin at the UN Security Council on March 4'(YouTube) <https://www.youtube.com/watch?v=o-jmtLgH2bs>

[169]'Pojavilsja polnyj tekst obrashhenija Janukovicha k Putinu o vvedenii vojsk v Ukrainu' (УНІАН, 2 марта 2018) <https://www.unian.net/politics/10028060-poyavilsya-polnyy-tekst-obrashcheniya-yanukovicha-k-putinu-o-vvedenii-voysk-v-ukrainu.html>

without the consent of its authorities,[170] and with the purpose of preventing widespread suffering or death among the inhabitants.' It may be 'with or without the authorization of the UN Security Council and has the purpose of preventing or putting a halt to gross and massive violations of human rights or international humanitarian law.'[171]

Humanitarian intervention therefore provides a legal basis for the use of force when there is a strong moral obligation to protect victims of war crimes, genocide, or other crimes against humanity.[172] In the 1990s, the so-called 'decade of humanitarian interventions,' two such interventions were authorised by the UN Security Council (Somalia and Haiti) and two more were performed without authorisation (Northern Iraq and Kosovo). However, later on, UN-authorized forces were established and deployed, benefiting from the consent of the host state.[173]

3.1.2. The issue of (il)legality of unilateral interventions

The legality of interventions by use of force without UN SC authorisation or consent of the host state, often referred to as 'unilateral humanitarian intervention' (UHI), is questionable. Daphne Richemond defined UHI as a 'military intervention undertaken by a state (or a group of states) outside the umbrella of the United Nations in order to secure human rights in another country.' She points out that it was originally intended as means to protect one's own nationals abroad, when Security Council authorisation could not be obtained, but states began using humanitarian intervention as a way to protect other states' nationals and have increasingly relied on Chapter VII of the UN Charter, significantly broadening the scope of the doctrine of humanitarian intervention:[174] the operations in northern Iraq and Kosovo were spearheaded by the United States and NATO on humanitarian grounds unrelated to wellbeing of their citizens.

A. Roberts recognised that there is a 'powerful logic' to the idea that humanitarian intervention does not necessarily require UN SC authorisation. 'If crimes against humanity justify intervention,' he says, 'can it be right that such intervention is subject to a veto from any one of five states, some of which have a record of scepticism or even opposition to humanitarian intervention?'[175]

At the same time, unilateral (or unauthorised) humanitarian interventions are particularly contentious. As pointed out by S. Reeves, if we remove the authorisation by the UN as a necessary condition, which signifies support and control of the international community, it then becomes unclear what keeps an 'aggressive state from invading another nation under the pretext of stopping a 'humanitarian crisis''? As illustrated by the annexation of the Crimean Peninsula by Russia, the

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[170]Later on in the article, prof. Roberts points out that in many cases (Northern Iraq, Kosovo, Indonesia and Bosnia) some form of consent was given by the government.

[171]Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' [2000] 3(13) Yearbook of International Humanitarian Law <https://www.trinity.unimelb.edu.au/getmedia/93b6f7c8-5ecc-412a-a225-a835de997d1c/TrinityPaper13.aspx> accessed 23 June 2021

[172]Shane Reeves, 'to Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened The Door for an Invasion of the Ukraine' [2014] 23(1) Michigan State International Law Review, 199 <https://core.ac.uk/download/pdf/228471289.pdf> accessed 16 July 2021

[173]Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' [2000] 3(13) Yearbook of International Humanitarian Law, p. 8 <https://www.trinity.unimelb.edu.au/getmedia/93b6f7c8-5ecc-412a-a225-a835de997d1c/TrinityPaper13.aspx> accessed 23 June 2021

[174]Daphne Richemond, 'Normativity in International Law: The Case of Unilateral Humanitarian Intervention' [2003]6(1) Yale Human Rights and Development Law Journal, p. 47

[175]Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' [2000] 3(13) Yearbook of International Humanitarian Law, p. 14 <https://www.trinity.unimelb.edu.au/getmedia/93b6f7c8-5ecc-412a-a225-a835de997d1c/TrinityPaper13.aspx> accessed 23 June 2021

morality and urgency of such 'intervention' becomes a subjective political decision of the intervening state, which in its turn dramatically increases the potential for a 'new age of nation-state warfare.'[176]

This dangerous level of subjectivity is reflected in the amended Art. 63(9) of the 2020 Russian Constitution, which effectively allows Russia to intervene into any post-Soviet state, if a group of people, regardless of its size, asks Russia to defend their interests. This directly contradicts one of the most fundamental principles of international law – the non-intervention rule. And while it is true that Russia cannot invoke domestic law as a reason for non-compliance with its duties under international law,[177] the very nature of international law is fluid and dependant on state practice and violation of the fundamental non-intervention principle by a permanent UN SC member sets a dangerous precedent.

3.1.3. The 'non-intervention rule' vs 'right to humanitarian intervention'

The non-intervention rule is a well-established principle of international law, which forbids military incursions into states without the consent of the host government. It creates a solid foundation for 'sovereign equality'[178] of all States by unambiguously limiting the use of armed force and reducing the risk of war between states. It makes peaceful co-existence of societies with different cultures, religions, economic and political systems possible.[179]

Article 2(4) of the UN Charter clearly forbids the use of force against other nations: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

Humanitarian intervention, on the other hand, is in essence a violation of the non-intervention principle on moral grounds, which threatens the stability created by the non-intervention rule due to the subjective nature of morality. On the other hand, in the 2000 Millennium Report, Kofi Annan famously said: 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?'[180]

Nevertheless, despite the powerful calls for entrenchment of the doctrine of humanitarian intervention in international law made in the late 1990s – early 2000s at the highest level,[181] to this day humanitarian intervention has no solid treaty basis. In stark contrast to the non-intervention

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[176]Shane Reeves, 'to Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened The Door for an Invasion of the Ukraine' [2014] 23(1) Michigan State International Law Review, 200 <https://core.ac.uk/download/pdf/228471289.pdf> accessed 16 July 2021

[177]Vienna Convention on the Law of Treaties 1969, art. 27

[178]United Nations Charter, Art. 2(1) <https://www.un.org/en/about-us/un-charter/chapter-1> accessed 16 July 2021

[179]Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' [2000] 3(13) Yearbook of International Humanitarian Law, p. 6 <https://www.trinity.unimelb.edu.au/getmedia/93b6f7c8-5ecc-412a-a225-a835de997d1c/TrinityPaper13.aspx> accessed 23 June 2021

[180]Kofi A. Annan, 'WE the Peoples. The Role of the United Nations in the 21st Century.' Published by the United Nations Department of Public Information (2000), p. 48 <https://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf> accessed 23 June 2021

[181]Following the Rwandan genocide of 1994 and ethnical cleansings in Kosovo in 1998, in the 1999 report to the General Assembly, the then General-Secretary of the UN Kofi Annan famously said that 'the world cannot stand aside when gross and systematic violations of human rights are taking place,' and that 'intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples.'

rule, no international treaty or any other legal document explicitly recognises a right of humanitarian intervention.

While Chapter VII of the UN Charter recognizes the Security Council's right to take various actions, including use of military force, in cases where there is a threat to international peace and security,[182] there is nothing in the Charter that gives support to unilateral humanitarian interventions not authorized by the UN Security Council. Only individual or collective self-defence against an armed attack do not require prior authorisation.[183]

It is therefore clear that international law does not provide for the so-called 'right to humanitarian intervention,' especially a unilateral one. As pointed out by A. Roberts, the language of rights is strong, meaning that rights trump lesser considerations and rules, which cannot be the case for humanitarian intervention. As is evident from Chapter VII of the UN Charter and state practice, each proposal for a humanitarian intervention must be balanced against a wide range of other considerations so as not to disrupt international peace and security.

It is also unclear which actors have this right. Are these regional or international organisations? Or individual states? Interventions are usually large-scale military operations, which require substantial resources. Which means that granting such a right to individual actors will open the door for abuse by more powerful and militarily more advanced states, who will claim humanitarian reasons to disguise their geo-political motives.[184]

As an argument against the legality of unilateral interventions on humanitarian grounds, S. Reeves contends that it may allow 'for an opportunist state, such as Russia, to exploit the amorphous nature of morality to justify an intervention into a coveted territory, such as the Ukraine, for geographic or political purposes.'[185]

A. Roberts concludes that humanitarian intervention should not be thought of as a right but as an 'occasional and exceptional necessity,' deriving from the duty to uphold human rights and humanitarian law.[186] Russia's legislation, on the contrary, allows and even encourages its arbitrary unilateral interventions into almost all neighbouring states as a self-proclaimed 'protector of Russian compatriots,' gatekeeper of 'the common Russian identity' and 'defender of the historical truth.'[187] This grandiose, non-legal language is worthy of Daenerys Targaryen, Breaker of Chains and Mother of Dragons, from Game of Thrones but is highly unusual for a Constitution in the 21st century. Introducing it into diplomacy and international law by way of Constitution is even more dangerous. As pointed out by Christopher J. Borgen, 'using legalistic rhetoric can muddy the waters, even when the legal argument is doctrinally weak' as it can give policymakers in other States an excuse not to become involved if they do not want to.'[188] Ignoring it will lead to corruption of the international law system built on principles of state equality, sovereignty and

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[182]United Nations Charter, Arts. 42-48 <https://www.un.org/en/about-us/un-charter/chapter-7> accessed 16 July 2021

[183]United Nations Charter, Art. 51 <https://www.un.org/en/about-us/un-charter/chapter-7> accessed 16 July 2021

[184]Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' [2000] 3(13) Yearbook of International Humanitarian Law, p. 19 <https://www.trinity.unimelb.edu.au/getmedia/93b6f7c8-5ecc-412a-a225-a835de997d1c/TrinityPaper13.aspx> accessed 23 June 2021

[185]Shane Reeves, 'to Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened The Door for an Invasion of the Ukraine' [2014] 23(1) Michigan State International Law Review, pp. 212-13 <https://core.ac.uk/download/pdf/228471289.pdf> accessed 16 July 2021

[186]Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' [2000] 3(13) Yearbook of International Humanitarian Law, p. 19 <https://www.trinity.unimelb.edu.au/getmedia/93b6f7c8-5ecc-412a-a225-a835de997d1c/TrinityPaper13.aspx> accessed 23 June 2021

[187]See more on article 69 of the Russian Constitution in chapter 2.2.3

[188]Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' [2015] 91(216) International Law Studies, p. 277

inviolability of borders, which have kept the world from plunging into another major war for the last 75 years.

3.1.4. Responsibility to Protect (R2P)

The doctrine of Responsibility to Protect (R2P) developed in 2001 was designed to supplant the contentious notion of humanitarian intervention and clarify all uncertainties. Once again, it was Kofi Annan who introduced the concept of individual sovereignty which limits the sovereignty of the state:

> The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty – and by this, I mean the human rights and fundamental freedoms of each, and every individual as enshrined in our Charter – has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.[189]

The following year, the concept of 'State sovereignty as a responsibility' was adopted by the International Commission on Intervention and State Sovereignty (ICISS), an ad hoc commission set up by the Canadian Government that consisted of members of the UN General Assembly, including Russia's Vladimir Lukin.

In its 2001 report, the Commission acknowledged the ambiguity of the term 'humanitarian intervention' and dismissed the existence of the 'right to intervene.' To replace it, the ICISS coined and defined the term 'responsibility to protect' which forms the legal basis for military intervention for human protection.[190]

The new approach to intervention on human protection grounds intended to resolve the main uncertainties surrounding humanitarian interventions, namely:

- to establish clearer rules, procedures and criteria for determining whether, when and how to intervene;
- to establish the legitimacy of military intervention when necessary and after all other approaches have failed;
- to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result; and
- to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.[191]

Obviously, the Report itself has no binding power. However, the concept of responsibility to protect was recognised by the 2005 World Summit,[192] which in turn was reaffirmed in the SC

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[189]Secretary-General Presents His Annual Report to General Assembly. Press Release SG/SM/7136 GA/9596 20 September 1999 < https://www.un.org/press/en/1999/19990920.sgsm7136.html> accessed 23 June 2021

[190]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. p. 11 <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[191]Ibid.

[192]G.A. Res. 60/1 (24 October 2005). 2005 World Summit Outcome. Paras 138-139 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf >accessed 23 July 2021

resolution 1674.[193] As of today, it is the most comprehensive document issued by a reputable international body, which provides rules and criteria for military intervention. Next, we will establish whether the Russia's use of force in Crimea in 2014 was legitimate according to these criteria.

Did Russia have a responsibility to protect the people of Crimea in 2014?

The ICISS resolved the conflict between sovereignty of a state and the individual sovereignty to enjoy human rights as follows:

1) State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
2) Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect. [194]

Which means that R2P first and foremost lies with the host state itself, not the international community. Military intervention of another state may only be justified if the host state had failed to prevent or put an end to 'serious harm' to the population. In all other cases the principle of non-intervention in internal affairs remains overriding.

Despite Russia's claims of protecting Russian speakers and compatriots in Crimea from Ukrainian 'ultra-right Nazis,' aside from several anecdotes, Russia did not provide any substantial evidence that the people of Crimea were suffering from large-scale atrocities or would imminently require protection from large scale loss of life, or that Ukrainian government would inevitably fail to provide such protection.

Was the 'just cause threshold' for intervention met?

The report also clearly establishes the 'just cause threshold,' which is reached in two cases only:

1) large scale loss of life**,** actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
2) large scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape. [195]

The ICISS therefore set the bar for intervention incredibly high. Not only loss of life (genocidal or not), ethnic cleansing, rape and forced migration must take place or be imminent, but they must be 'large scale,' 'wholesale slaughter' as Kofi Annan previously put it.

The Commission did not quantify 'large scale,' but pointed out that it means that in practice, the scale of atrocity will 'not generate major disagreement.'[196]

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[193]S.C. Res. 1674, 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006), para 4 (reaffirming paragraphs 138 and 139 of the 2005 World Summit Outcome Document) <https://www.un.org/ruleoflaw/files/S-Res-1674%20on%20protection%20civilians%20in%20armed%20conflict%20(28Apr06).pdf> accessed 23 July 2021

[194]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. p. XI <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[195]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. p. XII Available at: <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[196]Thomas G. Weiss, Humanitarian Intervention (3rd edn, Polity Press (Cambridge) 2016), p. 33

The following examples of ethnic cleansing were given: the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group). Aside from genocide, and violations of the laws of war, as defined in the Geneva Conventions and Additional Protocols, which involve large scale killing or ethnic cleansing, the Commission also noted that mass starvation or civil war resulting from state collapse or overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened may constitute just cause for intervention.[197]

As pointed out by G. Weiss, the Commission clearly intended to justify military intervention only when the most heinous of crimes against humanity are taking place. It therefore intentionally did not include the overthrow of a democratically elected government or an environmental disaster or even widespread abuses of human rights – unless they result in large-scale loss of life.[198]

The intergovernmental resolution by the UN General Assembly at the September 2005 World Summit seconded the ICISS approach: only 'genocide, war crimes, ethnic cleansing and crimes against humanity' warrant military intervention 'should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'[199]

Again, there is no evidence, that such atrocities were taking place (or were about to take place) in Crimea in early 2014. Neither human rights organisations, nor the Kremlin itself reported any large-scale (or even somewhat significant) human rights abuse or loss of life in Crimea. On 4 March 2014, exactly 2 weeks prior to the so-called 'referendum,' Vladimir Putin notoriously said:

> If we make that decision [using Russian troops in Crimea], it will only be to protect Ukrainian citizens. And let's see how those [Ukrainian] troops try to shoot their own people, with us behind them [the people] – not in the front, but behind. Let them just try to shoot at women and children! I would like to see those who would give that order in Ukraine.[200]

Two conclusions may be drawn from this brief answer. First, at the time, there was no urgent need to protect the people of Crimea even according to Putin himself, and second, that Russia never intended to protect the Crimeans even if Ukrainian armed forces 'shot at women and children.' Instead, Russia's Commander in Chief intended to use the locals as a 'human shield' for the Russian troops.

Setting aside the cynicism and brutality of this statement, it also directly contradicts the 'right intention' principle of intervention, according to which 'the primary purpose of the intervention,

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[197]Thomas G. Weiss, Humanitarian Intervention (3rd edn, Polity Press (Cambridge) 2016), p. 33

[198]Thomas G. Weiss, Humanitarian Intervention (3rd edn, Polity Press (Cambridge) 2016), p. 34

[199]G.A. Res. 60/1 (24 October 2005). 2005 World Summit Outcome. Para 139 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf > accessed 23 July 2021

[200]'Vladimir Putin answered journalists' questions on the situation in Ukraine' (President of Russia Website, 4 March 2014) <http://en.kremlin.ru/events/president/news/20366> accessed 16 July 2021

whatever other motives intervening states may have, must be to halt or avert human suffering.' Clearly, hiding behind women and children could only create human suffering, not halt it.[201]

The next day after the so-called 'referendum' in Crimea, Russia's representative in the UN V. Churkin said that a 'truly historic event took place – the reunification of Russia and Crimea, which our peoples have awaited for six decades.' He claimed that the people of Crimea have finally realised their right to self-determination.[202]

Meanwhile, the R2P doctrine emphasizes that any use of military force that aims from the outset, for the alteration of borders or the advancement of a particular group's claim to self-determination, cannot be justified. Occupation of territory should not be an objective as such, and there should be a clear commitment from the outset to returning the territory to its sovereign owner at the conclusion of the operation.[203] Russia's operation concluded in the annexation which has been the primary (if not the only) goal. It therefore cannot rely on R2P to justify the intervention in Crimea.

Did Russia prove just cause for intervention?

The ICISS Report on R2P emphasises the importance of concrete evidence of large-scale atrocities provided by a 'universally respected and impartial non-government source' like the International Committee for the Red Cross or UN organs and agencies.[204] The Red Cross actively worked in Ukraine in 2013-2014 but did not report on any human rights violations in Crimea prior to the annexation. In April 2014 the OHCHR released its report on Human rights situation in Ukraine and found no evidence of human rights violations committed by Ukrainian authorities prior to the annexation. They did, however, express concerns about such violations following the occupation of the peninsula by the Russian troops, including 'a number of cases of abduction, unlawful arrest and detention by unidentified armed groups, harassment, and violence against peaceful demonstrators.'[205]

That same month, the Ministry of Foreign Affairs of the Russian Federation published a 'White Book on Violations of Human Rights and the Rule of Law in Ukraine (November 2013 – March 2014),' which was distributed to the members of the General Assembly and Security Council.[206] The 80-page report was supposed to list 'the most flagrant violations of fundamental international norms of human rights and the rule of law committed in this country [Ukraine], by ultranationalist, neo-Nazi, and extremist forces which have monopolized the Euromaidan protests.'[207] In

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[201]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. p. XI Available at: <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[202]S/PV.7144 (19 March 2014), p. 8/20 <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7144.pdf> accessed 23 July 2021

[203]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. p. 35 Available at: <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[204]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. p. 35 Available at: <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[205]Office of the United Nations High Commissioner for Human Rights. Report on the human rights situation in Ukraine (15 May 2014), paras 84-86 <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf> accessed 23 July 2021

[206]Letter dated 12 May 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General. United Nations Digital Library <https://digitallibrary.un.org/record/774660?ln=en> accessed 23 July 2021

[207]Ministry of Foreign Affairs of the Russian Federation, White Book on Violations of Human Rights and the Rule of Law in Ukraine (November 2013 — March 2014) (Moscow, April 2014) p. 5

international law, this type of language is reserved for the most heinous of crimes like genocide, war crimes, ethnic cleansing, and crimes against humanity.[208] And yet, the authors for some reason were heavily preoccupied with a wave of vandalism of soviet monuments (Lenin's in particular), commonly referred to as 'Leninfall.'[209] The report does not specify how exactly taking down several monuments to Lenin violates any fundamental human right.

The White Book also dedicated several paragraphs to the fact that Victoria Nuland, the then-Assistant Secretary of State for European and Eurasian Affairs, visited Maidan and 'exercised public gestures like the distribution of cookies among the activists,' which was classified as 'interference in the internal affairs of a sovereign state.'[210] Presumably, as opposed to deploying troops into the territory of another state and annexing it, which according to the Russian officials was done 'in strict compliance with international law.'[211]

The White Book mentions Crimea only a handful of times. The 'reports' mostly list cases where 'Right Sector,' described as a 'right-wing militant national-radicals,' allegedly intimidated Crimean activists or 'carried out a series of arson attacks on non-residential premises and private vehicles of Crimean residents.'[212] OHCHR, on the other hand, reached a conclusion that 'the fear against the 'Right Sector' is disproportionate.'[213]

Aside from the photo of Ms. Nuland 'interfering' in Ukraine's internal affairs with cookies,[214] and several generic pictures of the protests, the White Book does not provide any evidence of gross human rights violations or cite any credible sources.[215]

The fact that none of the reputable international organisations participated in the White Book, makes its contents highly questionable. But even assuming that all reported cases were true, they still cannot amount to large-scale loss of life or ethnic cleansing required for justifiable intervention under R2P.

Was Russia's intervention properly authorized?

Russia's intervention in Crimea was never authorised by the UN Security Council, which places it in the category of unilateral interventions. As was established earlier, unilateral interventions are not considered legal under Chapter VII of the UN Charter.

<https://www.mid.ru/documents/10180/698385/White+Book.pdf/d806eb55-5a78-459b-950c-2072ebbcf7fe> accessed 23 July 2021

[208]See for example, S.C. Res. 1674, 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006), para 4 (reaffirming paragraphs 138 and 139 of the 2005 World Summit Outcome Document) <https://www.un.org/ruleoflaw/files/S-Res-1674%20on%20protection%20civilians%20in%20armed%20conflict%20(28Apr06).pdf> accessed 23 July 2021

[209]Ibid., p. 14

[210]Ibid., p. 31

[211]UN Security Council, UN Doc. S/PV.7144, 19 March 2014, p. 8/20 < https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7144.pdf> accessed 23 July 2021

[212]Ibid., p. 19

[213]Office of the United Nations High Commissioner for Human Rights. Report on the human rights situation in Ukraine (15 May 2014), paras 76 <https://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf> accessed 23 July 2021

[214]Ministry of Foreign Affairs of the Russian Federation, White Book on Violations of Human Rights and the Rule of Law in Ukraine (November 2013 — March 2014) (Moscow, April 2014) p. 67 <https://www.mid.ru/documents/10180/698385/White+Book.pdf/d806eb55-5a78-459b-950c-2072ebbcf7fe> accessed 23 July 2021

[215]Ibid., p. 31

The R2P doctrine also requires authorisation by a competent body. First of all, by the United Nations Security Council, whose authorisation should be sought prior to any military intervention. If SC refuses the proposal, the alternatives are authorisation by the General Assembly under the 'Uniting for Peace' procedure or an action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.[216]

Russia never sought authorisation neither from the UN (SC or GA), nor from any regional body. It acted completely unilaterally and therefore cannot rely on Chapter VIII of the UN Charter or R2P.

Remarkably, lack of UN SC authorisation was the reason why Russia tried to block the NATO intervention in Kosovo.[217] Even more remarkably, in September 2013, following the use of chemical weapons against the civilians in Syria and only six months prior to the annexation of Crimea, Russia blocked any possible action in the Security Council. US ambassador in the UN, Samantha Power, said on the matter: 'Even in the wake of the flagrant shattering of the international norm against chemical weapons use, Russia continues to hold the Council hostage and shirk its international responsibilities, including as a party to the Chemical Weapons Convention.'[218]

Overall, Russia's 'humanitarian' arguments are a classic example of a 'Potemkin village.' In 1783, following the first annexation of Crimea, Grigory Potemkin, the favourite of Catherine the Great, was tasked with rebuilding the region devasted by the war and bringing in the new Russian settlers to replace Crimean Tatars, seen as the 'fifth column' of the Ottoman Empire. Indeed, history repeats itself.

Potemkin failed, but to gain favour with the empress, he ordered to build phony villages along the Dnipro River, which looked great from afar but were completely fake and unliveable. Following this ancient tradition, in 2014 Russia made loud statements about 'protecting civilians from the Nazi junta,' which sound justifiable until one looks at the facts. To support those claims, Russia published the White Book on 'flagrant human rights violations' by the Ukrainian government, which also sounds impressive until one reads it.

Russia's position in terms of humanitarian intervention or R2P has been incredibly weak from the get-go. Not a single criterion for legal intervention was satisfied. Hence, the immediate switch to the self-determination argument right after the 'referendum.' The problem is that, despite being indefensible in terms of international law, the humanitarian narrative was successfully used by the Russian propaganda to set the stage for the annexation and rally popular support.

Six years later, this narrative was codified in the Russian Constitution,[219] which effectively redefined Russia's 'responsibility to protect.' Unlike international law and practice, which have rigid criteria of legality for interventions on humanitarian grounds, Russian legalisation allows

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[216]International Commission on Intervention and State Sovereignty (ICISS), 2001. The Responsibility to Protect. [online] IDRC. pp. XII-XIII <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> accessed 23 July 2021

[217]Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia. Press Release SC/6659 (26 March 1999) < https://www.un.org/press/en/1999/19990326.sc6659.html> accessed 23 July 2021

[218]'Ambassador Power at U.N. on Syria, Russia' (Us Mission To International Organizations In Geneva, 6 September 2013) <https://geneva.usmission.gov/2013/09/06/ambassador-power-at-u-n-on-syria-russia/> accessed 16 July 2021

[219]See ch. 2.2.3

them without setting any thresholds or boundaries, which, coming from a nuclear sate and a permanent SC member, sets a dangerous precedent in state practice.

3.2. Claim №2: 'Russia's armed forces were invited by the exiled president Yanukovych'

On 4 March 2014[220] during the emergency session of the UN Security Council, Russia's UN ambassador, Vitaly Churkin, stated that Russia's actions were justified claiming, that lives of Russian speakers in Ukraine as well as Russian citizens in Crimea were threatened by 'national radicals backed up by the West.' Mr. Churkin did not provide any proof of the alleged threat except for a fax copy of a letter allegedly written by the ousted president Yanukovych, who fled to Russia when sniper shootings of the Maidan protesters led to an even greater surge in protests and demands for his immediate resignation. The letter read:

> The country has plunged into chaos and anarchy. The country is in the grip of outright terror and violence driven by the West. People are persecuted on political and language grounds. In this context, I appeal to the President of Russia Vladimir V. Putin to use the armed forces of the Russian Federation to re-establish the rule of law, peace, order, stability and to protect the people of Ukraine.[221]

This letter is one of Russia's main legal justifications for use of force in Ukraine. It is presented as an invitation by the government of Ukraine, represented by Viktor Yanukovych, who, according to Vladimir Putin, was 'the only undoubtedly legitimate President'[222] despite being *de facto* ousted from the country.

It is generally accepted that the use of force upon request from the host country's government is lawful.[223] Such invitation requires 'demonstrable consent by the highest available governmental authority.'[224] However, when applied to the present case, this argument cannot stand neither from the point of view of the 'effective control' theory, nor the 'popular sovereignty' theory.

3.2.1. Viktor Yanukovych had no effective control over Ukraine to invite Russian armed forces

On 20 February 2014, Yanukovych made a final attempt to suppress the protests. Law enforcement was given firearms and ammunition and was authorised to shoot at the unarmed protesters. 98 of them, known as 'the Heaven's Hundred,' were killed.

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[220]By then, Russian armed forces already ceased numerous Ukrainian military bases, airports, and administrative buildings in Crimea.

[221]Louis Charbonneau, 'Russia: Yanukovich asked Putin to use force to save Ukraine' (Reuters, 4 March 2014) <https://www.reuters.com/article/us-ukraine-crisis-un-idUSBREA2224720140304> accessed 16 July 2021

[222]'Vladimir Putin answered journalists' questions on the situation in Ukraine' (President of Russia Website, 4 March 2014) <http://en.kremlin.ru/events/president/news/20366> accessed 16 July 2021

[223]'Valid 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.' See United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 20; 'intervention […] is already allowable at the request of the government of a State,' see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, para 246; see also Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' [2019] 66(1) Netherlands International Law Review, p. 22;

[224]Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' [2019] 66(1) Netherlands International Law Review, p. 29;

On 21 February, after the suppression attempt failed, the then-president Yanukovych signed an agreement with the opposition leaders, consenting to return to the 2004 version of the Constitution, which limited presidential powers and to schedule early presidential elections in 2014.

Grieving the dead, and enraged by the brutality of law enforcement, authorised by the president, Maidan protesters demanded his immediate resignation. That night, Victor Yanukovych fled to Russia via Crimea, effectively removing himself from performing his constitutional duties as the president of Ukraine, and by doing so, created a constitutional crisis.

Grigory Vaypan notes that under the effective control theory, 'the sole authority entitled to speak on behalf of a State is the one which has permanent *de facto* control over that State's territory and population.' That clearly was not the case for Yanukovych, hence the hasty and clandestine escape to Russia in the middle of the night.[225] Furthermore, according to Doswald-Beck, once effective control is compromised ('particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime'), the incumbent government loses its right to request foreign military intervention.[226] Therefore, G. Vaypan concludes, even if the anti-Maidan demonstrators in the South and East of Ukraine were loyal to Yanukovych, this left the country split between the two governments neither of which could invite foreign troops lacking effective control.[227]

3.2.2. Viktor Yanukovych had no authority to invite Russian armed forces under the 'popular sovereignty' theory

During his press-conference, Vladimir Putin agreed that Viktor Yanukovych had no effective control over the country. He said: 'there is only one legitimate President, from a legal standpoint. Clearly, he has no power. However, as I have already said, and will repeat: Yanukovych is the only undoubtedly legitimate President.' Therefore, indirectly referring to the 'popular sovereignty' theory, according to which the loss of effective control does not affect the continued legitimacy of a democratically elected (and unconstitutionally overthrown) government.

However, as pointed out by G. Vaypan,[228] it has only been applied to military *coups d'état* and not to widespread social protests against the previously popular government like Maidan.[229] Only in Kyiv, during the first Maidan wave, between 400,000 and 800,000 people participated in the protests. Tens of thousands of people also protested in various cities all over Ukraine.[230]

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[225]Grigory Vaypan, '(Un)Invited Guests: The Validity of Russia's Argument on Intervention by Invitation' (Cambridge International Law Journal, 5 March) <http://cilj.co.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/> accessed 17 July 2021

[226]Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government,' (1985) 56 BYBIL, p. 189

[227]Grigory Vaypan, '(Un)Invited Guests: The Validity of Russia's Argument on Intervention by Invitation' (Cambridge International Law Journal, 5 March) <http://cilj.co.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/> accessed 17 July 2021

[228]Grigory Vaypan, '(Un)Invited Guests: The Validity of Russia's Argument on Intervention by Invitation' (Cambridge International Law Journal, 5 March) <http://cilj.co.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/> accessed 17 July 2021

[229]see for example, UN General Assembly Resolution 63/301 (2009) on a coup d'etat in Honduras: 'The General Assembly […] condemns the coup d'état in the Republic of Honduras that has interrupted the democratic and constitutional order and the legitimate exercise of power in Honduras, and resulted in the removal of the democratically elected President of that country; [and] decides to call firmly and unequivocally upon States to recognize no Government other than that of the Constitutional President'

[230]Brian Whitmore, 'Ukraine's Threat to Putin' (The Atlantic, 6 December 2013) <https://www.theatlantic.com/international/archive/2013/12/ukraines-threat-to-putin/282103/> accessed 16 July 2021

According to art. 3(1) of the 'Military Assistance on Request' resolution by the Institut de Droit International, 'military assistance is prohibited when […] its object is to support an established government against its own population.'[231] In reality, Yanukovych was trying to remain in office by means of Russian armed forces despite the overwhelming loss of popular support.

It is sometimes argued that the removal of Victor Yanukovych was unlawful because he was not properly impeached and therefore remained president.

While it is true, that article 108 of the Constitution of Ukraine lists only four cases when presidential powers are terminated: 1) resignation; 2) inability to exercise his or her powers for reasons of health; 3) removal from office by the procedure of impeachment; and 4) death, A. Zaiets (one of the framers of the Ukrainian Constitution) [232] points out that this list should not be read as exhaustive. According to him, the scenario when the president of Ukraine abandons his duties was discussed when the Constitution was drawn up. However, the framers decided not to include it in the list as it is a matter of common sense, that president by definition is under an obligation to fulfil his duties.[233]

A. Zaiets and M. Buromensky, therefore contend that in those extreme circumstances, only Verkhovna Rada, a democratically elected Parliament representing the will of the people, was vested with enough authority to resolve the constitutional crisis.[234] Which it did by passing the resolution 'On self-withdrawal of the President of Ukraine from performing his constitutional duties and setting early elections of the President of Ukraine,'[235] conferring presidential powers on the Chairman of Verkhovna Rada of Ukraine Oleksandr Turchynov according to article 112 of the Constitution,[236] appointing the Prime Minister and forming the Cabinet.[237] By doing so, Rada restored order, continuity and prevented power vacuum, crated by the former president, who lost his legitimacy the moment he fled the country and removed himself from presidential duties.[238]

Therefore, contrary to Putin's claims, following his escape to Russia, V. Yanukovych could no longer be considered a legitimate president of Ukraine vested with authority to invite foreign armed forces.

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[231]Institut de Droit International, Present Problems of the Use of Force in International Law. Sub-Group C – Military assistance on request. Resolution (8 September 2011) <https://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf> accessed 16 July 2021

[232]Mr. Zaiets was a member of the Working Group of the Constitutional Commission that drafted the original Ukrainian Constitution of 1996

[233]Anatolii Zaiets and Mykhailo Buromenskyi, 'Shchodo lehitymnosti diiuchoi sohodni vlady v Ukraini [On Legitimacy of the Acting State Authorities]' [2014] 5(-) Bulletin of the Ministry of Justice, p. 8

[234]Anatolii Zaiets and Mykhailo Buromenskyi, 'Shchodo lehitymnosti diiuchoi sohodni vlady v Ukraini [On Legitimacy of the Acting State Authorities]' [2014] 5 Bulletin of the Ministry of Justice, p. 6

[235]Resolution of the Verkhovna Rada Of Ukraine 'On self-withdrawal of the President of Ukraine from performing his constitutional duties and setting early elections of the President of Ukraine' (22 FEBRUARY 2014) < https://iportal.rada.gov.ua/en/news/News/News/88138.html> accessed 16 June 2021

[236]The Verkhovna Rada of Ukraine adopted the Resolution 'On conferring powers of the President of Ukraine on the Chairman of the Verkhovna Rada according to article 112 of the Constitution of Ukraine' (23 February 2014). Verkhovna Rada of Ukraine <https://www.rada.gov.ua/en/news/News/News%202/88111.html> accessed 16 June 2021

[237]'The Verkhovna Rada of Ukraine appointed Yatseniuk Arsenii Petrovych as the Prime Minister of Ukraine' (27 November 2014). Verkhovna Rada of Ukraine <https://www.rada.gov.ua/en/news/News/News%202/99111.html> accessed 16 June 2021

[238]Anatolii Zaiets and Mykhailo Buromenskyi, 'Shchodo lehitymnosti diiuchoi sohodni vlady v Ukraini [On Legitimacy of the Acting State Authorities]' [2014] 5 Bulletin of the Ministry of Justice, pp. 7-8

3.3. Claim №3: 'the people of Crimea exercised their right to self-determination'

As discussed above, Russia used the humanitarian argument to 'muddle the waters' around the legality of deploying its armed forces in Crimea. Following the illegal 'referendum,' it was abandoned almost entirely, while the right to self-determination entered the stage.

On 11 March 2014, five days before the so-called 'referendum' took place in Crimea, controlled by the Russian troops, the Parliament of Crimea declared its independence from Ukraine and proclaimed its intention to join Russia based on the future results of the said 'referendum.'

The Declaration stated that the decision to secede from Ukraine was made 'with regard to the charter of the United Nations and a whole range of other international documents and taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on 22 July 2010, which says that unilateral declaration of independence by a part of the country does not violate any international norms.'[239]

Although the Crimean parliament did not explicitly refer to the self-determination right in its declaration, it was cited by Vladimir Putin on 18 March 2014, the day when Russia formally incorporated Crimea:

> As it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing, almost word for word. Ukraine used this right, yet the residents of Crimea are denied it. Why is that? [240]

Mr. Putin also elaborated on the 'Kosovo precedent' argument:

> Moreover, the Crimean authorities referred to the well-known Kosovo precedent – a precedent our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities.[241]

The right to self-determination was also cited by V. Churkin in the UN SC.[242]

Therefore, Russia's justification for the annexation of Crimea is built around three main claims: 1) the population of Crimea is a distinct people entitled to self-determination; 2) the right to self-determination automatically grants a right to unilateral secession; and 3) Kosovo established a precedent for unilateral secession, and the circumstances in Crimea were similar enough to apply it.

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[239]Deklaraciya o Nezavisimosti Avtonomnoj Respubliki Krym i Goroda Sevastopolya [The Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol]. Verkhovna Rada of Crimea and the Sevastopol City Council (11 March 2014) <https://web.archive.org/web/20140312060543/http://www.rada.crimea.ua/app/2988> accessed 16 June 2021

[240]'Address by President of the Russian Federation' (President of Russia Official Website, 18 March 2014) <http://en.kremlin.ru/events/president/news/20603> accessed 16 June 2021

[241]'Address by President of the Russian Federation' (President of Russia Official Website, 18 March 2014) <http://en.kremlin.ru/events/president/news/20603> accessed 16 June 2021

[242]UN Security Council, UN Doc. S/PV.7144, 19 March 2014, p. 8/20 < https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7144.pdf> accessed 23 July 2021

This chapter will address these claims by exploring the (il)legality of Crimea's unilateral secession from Ukraine. We contend that, under international law, the population of Crimea, dominated by the Russians, cannot be considered a people entitled to self-determination, and that treating it as one discriminates against the indigenous people of the peninsula, who have experienced repressions and are severely outnumbered.

We will also argue that beyond the decolonisation context, the right to self-determination does not automatically trigger the right to unilateral secession. In fact, we found that international law does not recognise the positive right to remedial secession. Remedial secession is merely tolerated by the international community in the most extreme cases of large-scale abuse of fundamental human rights. Finally, we contend that the circumstances in Kosovo and Crimea were drastically different, and that the threshold for remedial secession was not met in Crimea, which makes its secession illegal.

3.3.1. The population of Crimea as a whole does not constitute a people under international law

Under international law, the right to self-determination is reserved for 'peoples,' not any other groups or territories. At the same time, neither the UN Charter, nor any other document of the highest power, offer a concrete definition of the term 'people.' However, some general features may be distinguished from credible academic sources. According to the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples (1990), a 'people' is a group of individuals, enjoying some or all of the following characteristics: '(a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life.'[243] A. Cristescu in his study for the UN also pointed out that the relationship of the group with a particular territory is an essential precondition.[244]

Next, we will discuss why the population of Crimea, including the Russian majority, does not possess sufficient uniformity and connection to the territory of the peninsula to be considered a self-determination unit. We will also explain why treating all inhabitants of Crimea as a people discriminates against its indigenous people – Crimean Tatars.

Crimea is not a 'historically Russian land'

The Russian propaganda has been aggressively exploiting the idea of 'historically Russian Crimea' for years. Vladimir Putin called it a 'primordially Russian land,' which 'has always been an integral part of Russia in people's hearts and minds.'[245] Russia's UN representative, Vitaly Churkin, said that Crimea 'had been part of the Russian Federation, sharing a common history,

[243] UNESCO, 'International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Final Report and Recommendations' (1989), para 22(1) <https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/819-UNESCO_-_Rights_of_Peoples_Official_Report.pdf> accessed 23 July 2021

[244] UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments. Study Prepared by A. Cristescu, UN Doc. E/CN.4/Sub.2/404/Rev.1 (1981), para. 279

[245] Björn Alexander Düben, 'He Legitimacy of Russia's Actions in Ukraine' (LSE International History Blog, 3 March 2015) <https://blogs.lse.ac.uk/lseih/2015/03/04/does-russia-have-a-legitimate-claim-to-parts-of-ukraine/> accessed 17 July 2021

culture and people,' which was transferred to Ukraine (USSR at the time) in 1954 as a result of an 'arbitrary decision,' which upset 'the natural state of affairs and cutting Crimea off from Russia.'[246]

Historically speaking, these statements are inaccurate. Crimea had nothing to do with Russia for most of its history. It was a part of the Ottoman Empire for over 300 years. Over the centuries, various ethnicities living on the peninsula merged into a single Crimean Tatar people, united by the common territory, Muslim religion, and their own Turkic language, which they managed to preserve to this day.[247]

Crimean Tatars accounted for over 90% of the population, until in 1783 the peninsula was ceased by the Russian Empire. Its 'russification' began another hundred years later, in late XIX – early XX centuries, when the number Russians started growing rapidly. However, even then, Crimean Tatars made up a considerable share of the Crimean population.[248]

Russian expansion of the peninsula soared after the forced mass deportation of Crimean Tatars in 1944. Following Stalin's order, the entire population of Crimean Tatas (approximately 200 000 people, over 30% of the population of the peninsula at the time) were declared 'traitors' and were forced to leave their ancestral homes within three days and relocate to Uzbekistan. Between 20% and 46% of all deportees died of starvation, exhaustion, and diseases in the first three years after resettlement. That same year, their homes and property were given to the new settlers, who were predominantly ethnic Russians.[249]

Those who call Crimea a 'Russian land,' tend to omit the fact that it became overwhelmingly Russian only 75 years ago as a result of ruthless ethnic cleansing. Which means that, unlike Crimean Tatars, the Russians have a dubious and recent connection to the territory and therefore cannot be considered Crimean people.

It must be said that the decision to transfer the peninsula from Russia was not a 'gift from the generous Russian people' or an 'arbitrary decision' by a half-Ukrainian Khrushchev. It was a practical one. First of all, the Crimean Peninsula juts out into the Black Sea from mainland Ukraine and has no geographic connection to Russia. Crimea was dependent on water supply from Dnipro, was already heavily relying on Ukrainian infrastructure and had strong economic ties with the Ukrainian SSR. The 1954 decree, which finalised the transfer says the following:

> The Crimean Oblast', as is well-known, occupies the entire Crimean Peninsula, territorially adjoins the Ukrainian Republic, and is a sort of natural continuation of the southern steppes of Ukraine. The economy of the Crimean Oblast' is closely tied to the economy of the Ukrainian SSR. The transfer of the Crimean Oblast' to the fraternal Ukrainian Republic is

[246]GA Res. /11493 Calling upon States Not to Recognize Changes in Status of Crimea Region (27 March 2014) < https://www.un.org/press/en/2014/ga11493.doc.htm> accessed 17 July 2021

[247]Maksym Mazypchuk and Anzhelika Klayzner, 'Chlen Medzhlisu: Prahnemo vidnovlennia derzhavnosti krymskotatarskoho narodu v skladi Ukrainy [Mejlis Member: We Want Determination within Ukraine'] (16 March 2014) <https://gurt.org.ua/articles/21872/> accessed 17 July 2021

[248]In the XIX century Crimean Tatars made over 90% of the population of Crimea, see Alya Shandra, 'Deportation, genocide, and Russia's war against Crimean Tatars' (Euromaidan Press, 19 May 2016) <http://euromaidanpress.com/2016/05/19/deportation-genocide-and-russias-war-against-crimean-tatars/> accessed 16 June 2021

[249]Mykola Matviichuk, 'Deportation of the Crimean Tatar people History of genocide' (Suspilne Crimea, 18 May 2021) <https://crimea.suspilne.media/en/articles/71> accessed 16 July 2021

> advisable and meets the common interests of the Soviet state for geographic and economic considerations.[250]

Secondly, following the mass deportation of Crimean Tatars, they were replaced by Russian peasants, who were not accustomed to Crimea's steppe climate and soil. As a result, by 1950 Crimean agriculture was in dire state: grain production fell almost fivefold, tobacco – threefold, and vegetables – twofold. During his 1953 visit to Crimea, Khrushchev evaluated the situation and resolved that the peninsula 'needs southerners,'[251] who know how to work its land, i.e. Ukrainians.

However, these historic facts become irrelevant for Russia in view of its amended Constitution, which proclaims in its Article 67.1, paragraph 3, that Russian Federation 'defends the historic truth.' Attributing some form of legality to this revisionist narrative is Russia's way of introducing it into international law 'up to the point of redesigning it.'[252]

Crimean population is not sufficiently homogenous and unified

In terms of the 'uniformity' requirement, before the annexation, Crimea was hardly ethnically or ideologically homogenous. While it is true that the Russians made up most of the population of Crimea at 58,5% (1,18 mln.), Ukrainians and Crimean Tatars, who began to return to Crimea from the 1944 exile after Ukraine became independent, still made up a considerable share of the population at 24,4% (492 thsd.) and 12,1% (243 thsd.) respectively.[253]

Crimean Tatars themselves deny that 'Crimean people' which includes the Russian settlers exists. Nadir Bekirov, a former head of the political-legal department of Mejlis argued the following:

> Russian and pro-Russian Crimean politicians declare that some mythical 'Crimean nation' exists ... which is supposedly a subject for self-determination in Crimea. ... And Crimean Tatars are allocated the role of extras against the background of 1.5 million Russian speakers, who now constitute an absolute majority in Crimea and therefore do not have to pay any regard to anyone when voting on any issue. ... In Crimea political questions cannot be solved by simple majority vote — it inevitably results in ethnic discrimination.[254]

Despite numerous unresolved issues Crimean Tatars faced in independent Ukraine, they sought self-determination exclusively within Ukraine and supported its territorial integrity.[255] Ukrainian government facilitated the return of deported Crimean Tatars to their ancestral land in the 90s – early 2000s. In 1999, all 33 members of Mejlis of the Crimean Tatar People, an elected representative body for the Crimean Tatars, were included in the Presidential Council of

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[250]'Meeting of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics,' February 19, 1954, History and Public Policy Program Digital Archive, GARF, f.7523 op.57, d.963, ll. 1-10. Published in 'Istoricheskii arkhiv,' issue 1, vol. 1 (1992). Translated by Gary Goldberg <https://digitalarchive.wilsoncenter.org/document/119638>accessed 16 June 2021

[251]Artem Krechetnikov, "Carskij podarok': 60 let peredache Kryma Ukraine [A Tsar-Worthy Gift: 60 Years Since Crimea Was Transferred to Ukraine]' (BBC Russia, 17 February 2014) <https://www.bbc.com/russian/international/2014/02/140217_crimea_ukraine_transfer> accessed 16 August 2021

[252]Anton Moiseienko, 'Guest Post: What do Russian Lawyers Say about Crimea?' (Opinio Juris, 29 September) <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/> accessed 17 August 2021

[253]About number and composition population of Autonomous Republic of Crimea by data All-Ukrainian population census" (State Statistics Committee of Ukraine, 2001) <http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea/> accessed 16 July 2021

[254]Oxana Shevel, 'Crimean Tatars and the Ukrainian state: the challenge of politics, the use of law, and the meaning of rhetoric' [2001] 1(7) Krimski Studii <https://iccrimea.org/scholarly/oshevel.html> accessed 16 July 2021

[255]Maksym Mazypchuk and Anzhelika Klayzner, 'Chlen Medzhlisu: Prahnemo vidnovlennia derzhavnosti krymskotatarskoho narodu v skladi Ukrainy [Mejlis Member: We Want Determination within Ukraine'] (16 March 2014) <https://gurt.org.ua/articles/21872/> accessed 17 July 2021

representatives of Crimean Tatar people by the presidential decree.[256] During the 1994 elections, for the first time in 50 years, Crimean Tatars elected 14 deputies in Verkhovna Rada of Crimea.[257] Members of Mejlis were also members of various Ukrainian political parties.[258] In stark contrast, in 2016 Russia outlawed Mejlis and ignored the interim order of the UN International Court of Justice prescribing to allow Mejlis activities in Crimea.[259]

In 1995, Mustafa Jemilev,[260] a recognized leader of the Crimean Tatar National Movement and a former Soviet dissident, prophetically said that '[the pro-Russian forces] are seeking to establish on the national territory of the Crimean Tatars a *de facto* Russian autonomy with wide-ranging powers, which could, depending on the circumstances, join Russia — the kin state of the majority of its post-war migrants.' Other Mejlis members also opposed the autonomous status of Crimea within Ukraine arguing that it disproportionately favours the Russians: 'Why does the autonomy in Crimea exists? Why Crimea cannot be just an oblast (region)? This autonomy was created for the Russians, since majority Russian population is the only specific feature that sets Crimea apart from other regions of Ukraine.' [261]

Therefore, historically, Crimean Tatars and the Russians in Crimea had polar views regarding the future of the peninsula. In 2014, Mejlis called upon Crimean Tatars to boycott the illegal 'referendum.'[262] Following the annexation, many Crimean Tatar organisations were forced to relocate to mainland Ukraine fearing persecution, which followed soon.

Russia replaces Crimeans with mainland Russians to make the peninsula 'Russian'

Continuous persecution of Crimean Tatars by the Russian authorities began shortly after the annexation and has been widely reported by various human rights organisations. It involves harassment, intimidation, threats, intrusive and unlawful searches, unlawful detentions, physical attacks, and enforced disappearances.[263] According to the Crimean Tatar Resource Center, 231

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[256]Presidential Decree №518/99. Pro Radu Predstavnykiv Krymskotatarskoho Narodu [On the Council of Representatives of Crimean Tatar people] (18 May 1999) <https://zakon.rada.gov.ua/laws/show/518/99/ed19990518#Text> accessed 17 July 2021

[257]Crimean Tatar Fact Sheet: Chronology <https://web.archive.org/web/20070204135457/http://www.euronet.nl/users/sota/krfacts.html> accessed 17 July 2021

[258]Oxana Shevel, 'Crimean Tatars and the Ukrainian state: the challenge of politics, the use of law, and the meaning of rhetoric' [2001] 1(7) Krimski Studii <https://iccrimea.org/scholarly/oshevel.html> accessed 16 July 2021

[259]Application of the International Convention For The Suppression of The Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (UKRAINE v. RUSSIAN FEDERATION), para 106 (a) <https://www.icj-cij.org/public/files/case-related/166/166-20170419-ORD-01-00-EN.pdf> accessed 17 July 2021

[260]also spelled 'Dzhemilev'

[261]Oxana Shevel, 'Crimean Tatars and the Ukrainian state: the challenge of politics, the use of law, and the meaning of rhetoric' [2001] 1(7) Krimski Studii <https://iccrimea.org/scholarly/oshevel.html> accessed 16 July 2021

[262]'Medzhlis prizval krymchan bojkotirovat' referendum [Mejlis Called on Crimeans to Boycot the Refeendum]'(ATR, 6 March 2014) <https://atr.ua/news/33117-glava-medzhlisa-prizval-krymchan-bojkotirovat-referendum-2014-03-06-14-36-24> accessed 16 August 2021

[263] 'Crimea: Persecution of Crimean Tatars Intensifies' (Human Rights Watch, 14 November 2017)<https://www.hrw.org/news/2017/11/14/crimea-persecution-crimean-tatars-intensifies> accessed 16 August 2021; Courtney Austrian, 'Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine' (US Mission to the OSCE, 20 May 2021) <https://osce.usmission.gov/situation-of-human-rights-in-the-temporarily-occupied-autonomous-republic-of-crimea-and-the-city-of-sevastopol-ukraine/> accessed 16 August 2021; 'PACE condemns 'grave human rights violations' committed against Crimean Tatars' (PACE, 23 June 2021) <https://pace.coe.int/en/news/8375/pace-condemns-grave-human-rights-violations-committed-against-crimean-tatars> accessed 16 August 2021; 'Russia/Ukraine: Crimean Tatar human rights defender's sentence upheld in mockery of international law'(Amnesty International, 26 May

people have been imprisoned or persecuted in Crimea for political reasons since the beginning of the Russian occupation. 158 of them are Crimean Tatars.[264] Following the launch of The Crimea Platform, the main goal of which is returning Crimea to Ukraine, the repressions against Crimean Tatars intensified. Several prominent Crimean Tatar leaders were arrested on bogus extremism charges.[265]

According to the study by the Black Sea Institute of Strategic Studies, during the first nine months of 2014, between 60 and 70 thousand people left Crimea for mainland Ukraine. According to the authors, the migration flow consisted mainly of 'active participants in the resistance to the occupation, journalists of independent media, civil activists of pro-Ukrainian organisations, including Crimean Tatar ones, and other people who could not imagine life under occupation due to their beliefs.'[266]

The Black Sea Institute of Strategic Studies also reports that, like in 1944, Russia is using migration as a weapon, and actively replaces 'undesirable' Crimean population (i.e., ethnic Ukrainians and Crimean Tatars) with the Russians from other regions. According to the recent study, in 2014-2021, over 135 000 people left Crimea (excluding Sevastopol), while 201 000 moved to the Peninsula from various regions of Russia. The city of Sevastopol, which hosts the Black Sea Fleet, had the highest population growth compared to the regions of the Russian Federation (in 2018-2020, the population of Sevastopol grew by 16.8% of Ingushetia – by 5.6%, of the Leningrad region – by 4.3%, and of Chechnya – by 4.2%). It is estimated, that in 2014-2021 45 700 people left Sevastopol, while 180 500 moved to the city from Russia.[267]

Such steep population growth cannot be due to a favourable economic climate: Crimea is under sanctions and its economy has been in steady decline ever since. The peninsula also experiences serious shortage of fresh water for commercial use after the water supply from Dnieper was cut off following the annexation.

It can, however, easily be explained by Russia's growing its military presence in Crimea and another wave of Russian colonisation of the peninsula, which was confirmed by the 2019 Report of the UN Secretary-General António Guterres.[268] According to the report, Russia deliberately implements population replacement policies explicitly prohibited by the Geneva Convention: 'the

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2021) <https://www.amnesty.org/en/latest/press-release/2021/05/russiaukraine-crimean-tatar-human-rights-defenders-sentence-upheld-in-mockery-of-international-law/> accessed 16 August 2021

[264] 'Victims of the occupation of Crimea' (Crimean Tatars Resource Center, 2021) <https://ctrcenter.org/en/zhertvy-okkupacii> accessed 16 August 2021

[265] Lubezna Kateryna, 'Ukraine at the UN calls on the world to respond to the detention of Crimean Tatars in occupied Crimea' (Suspilne Crimea, 8 September 2021) <https://crimea.suspilne.media/en/news/5449> accessed 16 September 2021

[266] Andrii Klymenko and Tetyana Guchakova, "Migration weapons': the replacement of the Crimean population with Russian' (The Black Sea Institute of Strategic Studies and BlackSeaNews, 11 July 2021) <https://www.blackseanews.net/en/read/178035> accessed 16 August 2021

[267] Andrii Klymenko and Tetyana Guchakova, "Migration weapons': the replacement of the Crimean population with Russian' (The Black Sea Institute of Strategic Studies and BlackSeaNews, 11 July 2021) <https://www.blackseanews.net/en/read/178035> accessed 16 August 2021

[268] 'Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine' Report of the Secretary-General (2 August 2019) A/74/276, paras 60-63 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/244/10/PDF/N1924410.pdf?OpenElement> accessed 16 August 2021

Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'[269]

This urge to oppress the opposition and replace the locals with mainland Russians clearly indicates that support for 'Mother Russia' in 'primordially Russian' Crimea is not as overwhelming as they claim.

S. van den Driest points out that 'peoples' should not be confused with ethnic, religious or linguistic minorities – 'numerically smaller to the rest of the population of the State, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and so, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language.'[270] Minorities are distinguished from peoples by the lack of connection with a particular territory, which means that although they have a right 'to enjoy their own culture, to profess and practice their own religion, or to use their own language' on an individual basis,[271] they are not entitled to self-determination.[272]

According to the criteria discussed above, the Crimean population is too diverse and lacking in common identity in order to constitute a people under international law as a whole.[273] What happened in Crimea in the spring of 2014 is therefore not the case of united 'Crimean people' exercising their right to self-determination. Rather, it is a case of a national minority (ethnic Russians make up approximately 17% of the entire Ukrainian population) being disproportionally overrepresented in the region due to its history of colonialism and ethnic cleansing. This artificial overrepresentation of the Russians in Crimea created a foundation for Russia's unlawful land grab and subsequent oppression of its indigenous people – Crimean Tatars. The sad irony of this situation is that the self-determination right, designed to protect indigenous peoples oppressed by colonialism is in fact being used against them by their oppressor.

Russia's imperial sentiment was reinforced by the amended Constitution which, in Article 68, paragraph 1, proclaims Russians as the 'state-forming' people, which means that in case of Crimea only the voice of the Russian majority matters. Article 67, paragraph 2.1, of the Constitution explicitly forbids alienation of its territories under any circumstances. Returning to its roots, once again Russia is becoming a 'prison of the nations.'

3.3.2. The Right to Self-Determination Does Not Grant a Right to Secession

The notion of self-determination was introduced by the UN Charter. Articles 1(2) and 55 refer to the 'principle of equal rights and self-determination of peoples' as one of the foundations of the UN.

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[269]Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War (12 August 1949), art. 49, para 6 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf> accessed 16 August 2021

[270]UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. Study Prepared by F. Capotorti, UN Doc. E/Cn.4/Sub.2/384/Add.1–7 (1991), para. 568.

[271]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 27

[272]Simone F. van den Driest, Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law (2015) 340

[273]Simone F. van den Driest, Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law (2015) 351

In the 1960s, during the decolonisation movement, it emerged as a right of colonial people to become free from alien subjugation, domination, and exploitation,[274] which constitute a denial of fundamental rights, contrary to the Charter of the United Nations according to the UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples 1960.[275]

In the context of decolonisation, the right to self-determination included a right to unilateral secession, albeit a limited one.[276] According to P. Pazartzis, the peoples entitled to self-determination were defined as the inhabitants of a colony but not as ethnically distinct groups within the colonial territory or established State.[277] For example, in Africa, where colonisation caused the greatest number of incongruities between ethnic lines and the boundaries of newly formed states, no further secessionist claims from communities divided by the new state borders were allowed by the ICJ in order to preserve peace and stability in the region.[278]

The right to self-determination was subsequently extended beyond the colonial context by the two International Covenants of 1966, where self-determination is referred toas a right of 'all peoples.' Their identical articles 1(1) read:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.[279]

Beyond colonialism, however, its scope and meaning, remain controversial. In particular with regards to the right to secession and how it can be reconciled with the principle of territorial integrity.[280] What C. Borgen called 'the Gordian knot' of self-determination, territorial integrity and secession.[281]

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[274]Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' [2011] 11(4) Human Rights Law Review 613 <https://www.corteidh.or.cr/tablas/r27634.pdf> accessed 17 August 2021; see also Thomas W. Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' [2011] 40(105) Georgia Journal of International and Comparative Law, p. 122 <https://www.academia.edu/6154641/Remedial_Secession_Kosovo_to_Katanga_What_the_Law_Should_Have_Done>accessed 7 August 2021

[275]GA Res 1514 (XV), 14 December 1960, at paras 1 and 2.

[276]Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) 1971, Para 52, p. 53 < https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>

[277]Photini Pazartzis, Secession and international law: the European dimension. In Marcelo G Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) 357; see also Christian Tomuschat, Secession and self-determination. In Marcelo G Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) 27

[278]On the Frontier Dispute between Burkina Faso and Mali. The Court held that the principle of self-determination should be interpreted in light of the agreement of the Heads of African States to remain within the colonial borders, ensuring stability and avoiding disruption. See Judgment of 22 December 1986, ICJ Reports 1986, p. 554, at p. 567 paras. 25-26 < https://www.icj-cij.org/public/files/case-related/69/069-19861222-JUD-01-00-EN.pdf> accessed 17 July 2021

[279]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

[280]Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' [2011] 11(4) Human Rights Law Review 614 <https://www.corteidh.or.cr/tablas/r27634.pdf> accessed 17 August 2021

[281] Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' [2015] 91(216) International Law Studies, 221

C. Tomuschat, argues that almost all modern states are composed of different ethnicities; if the right to self-determination, which extends to all peoples, implied an unconditional right to secession, it would 'unavoidably pave the way for chaos and anarchy.'[282]

Indeed, the right to unilateral secession directly contradicts the principle of territorial integrity, the corner stone of international law.

As illustrated by the famous Reference re Secession of Quebec case in which the Supreme Court of Canada had to answer the question whether Quebec would have a right to secede unilaterally from Canada under international law, it is generally accepted that self-determination has two dimensions: internal (within the parent state) and external (secession).[283] According to the Supreme Court, 'the recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.' The Court also emphasised that a right to external self-determination (which may potentially include unilateral secession) arises only 'in the most extreme cases and, even then, under carefully defined circumstances.'[284] It listed only two cases when the right to external self-determination may be triggered beyond decolonisation: 1) 'where a people is oppressed, as for example under foreign military occupation,' and 2) 'where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.' Therefore, the right to external self-determination is not absolute, but conditional upon realisation of the right to internal self-determination. Non-colonised peoples may gain the right to unilateral secession only when they have been 'denied the ability to exert internally their right to self-determination' within the parent state. [285]

The Court also stressed that the principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states, as confirmed by the Declaration on Friendly Relations, the Vienna Declaration, the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, and the Helsinki Final Act.[286]

While the Friendly Relations Declaration, passed by the UN General Assembly in 1970 does say that 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people,'[287] several paragraphs later the Declaration includes the so-called 'safeguard clause,' which reads as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and

[282]Christian Tomuschat, Secession and self-determination. In Marcelo G Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) 24
[283]Marc Weller, 'The Self-determination Trap' [2005] 4(1) Ethnopolitics 6
[284]Supreme Court of Canada, Reference re Secession of Quebec [1998] 2 SCR 217, para. 126 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> accessed 8 August 2021
[285]Ibid., para. 138
[286]Ibid., paras 128-129
[287]Declaration On Principles Of International Law Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations (24 October 1970) <https://www.un.org/ruleoflaw/files/3dda1f104.pdf> accessed 8 August 2021

thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

These 'safeguard clauses' directly point to the fact that the right to self-determination does not automatically include the right to unilateral secession: the exercise of the self-determination right cannot pose a threat to the territorial integrity of the parent state if the people seeking self-determination enjoy sufficiently equal rights.

It is from this 'safeguard clause' the so-called 'right to remedial secession' was derived. According to J. Vidmar, this clause is conditional, which means that a state which does not comply with the principle of equal rights of peoples and does not provide for their self-determination within the state, it loses its right to invoke the principle of territorial integrity and limit the right to external self-determination of the people it oppressed. According to this theory, any people oppressed by the state effectively have a right to secede without consent of the parent-state just like colonies.[288]

The existence of an unequivocal right to unilateral secession from an oppressive state is morally attractive and is therefore strongly supported by some academics.[289] The states, on the other hand, are reluctant to recognise the right to remedial secession as it poses a direct threat to their territorial integrity. This point of view also has strong support among the researchers.[290]

For example, M. Shaw contends that such a major change to the long-standing fundamental principle of territorial integrity cannot be deduced based on inverted reading of an 'ambiguous subordinate clause.' He argues that the clause reaffirms the primacy of the principle of territorial integrity and the content of right to internal self-determination: 'the non-discriminatory participation in government of the whole people, within the territory in question,' but does not grant a right to an external self-determination as a remedy.[291] M. Sterio also argues that international law 'merely tolerates' external self-determination, where a people is oppressed but does not grant a right to secede.[292] Finally, A. Xanthaki points out that even if such right existed in principle, on a practical level, it remains unclear who should determine whether a certain people have a right to remedial secession in the given circumstances.[293]

S. van den Driest emphasises that scholarship is 'by no means conclusive on the existence of a right to remedial secession in international law.'[294] At the same time, even the proponents of the

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[288]Jure Vidmar , 'Remedial Secession in International Law: Theory and (Lack of) Practice' [2010] 6(1) St Antony's International Review 38

[289]Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press 1995) 118; Thomas W. Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' [2011] 40(105) Georgia Journal of International and Comparative Law, p. 144 <https://www.academia.edu/6154641/Remedial_Secession_Kosovo_to_Katanga_What_the_Law_Should_Have_Done>accessed 7 August 2021

[290]See Tancredi, Corten, and Christakis in Marcelo G. Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) https://www.corteidh.or.cr/tablas/r32589.pdf accessed 8 August 2021

[291]Malcolm Shaw, ' Peoples, Territorialism and Boundaries' [1997] 8(3) European Journal of International Law, p. 483 <https://doi.org/10.1093/oxfordjournals.ejil.a01559417 > accessed 8 August 2021

[292]Milena Sterio, 'Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia' [2018] 22(1) American Society of International Law Insights <https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan> accessed 17 August 2021

[293]Xanthaki A (2007) Indigenous rights and United Nations standards. Self-determination, culture and land. Cambridge University Press, New York, p. 144 as quoted in Van den Driest Simone F, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' [2015] 62 Netherlands international Law Review, p. 341 <https://doi.org/10.1007/s40802-015-0043-9> accessed 25 July 2021

[294]Simone Van den driest , 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' [2015] 62 Netherlands international Law Review, p. 341 <https://doi.org/10.1007/s40802-015-0043-9> accessed 17 July 2021

right to remedial secession overwhelmingly agree that remedial secession is an *ultimum remedium*. As T. Simon put it: 'secession rights are remedial rights invoked by a group under limited conditions to rectify harms; they are not rights that apply to all citizens in general. The right to secession itself is not a peremptory norm but rather a remedy of last resort.'[295] While the doctrine of remedial secession continues to exist in the grey area, it seems that there is a strong consensus on two issues: 1) serious harm must be suffered by a people seeking to secede; 2) all means of peaceful resolution within the state must be exhausted.

A people seeking remedial secession must suffer serious harm

As follows from the name 'remedial secession,' people must initially suffer harm in order to seek remedy in the form of secession.

Both camps seem to agree that for the qualified right to remedial secession to arise, or for the secession to be tolerated by the international community as *fait accompli*, the threshold for the harm suffered should be very high. A. Cassese called it 'unremitting persecution.' [296]

At the same time, opinions vary as to what should be considered serious enough harm requiring secession. According to A. Trancredi, for example, the traditional conflict between self-determination of peoples and the territorial integrity of states must be resolved in favour of state sovereignty except when the state abuses its sovereign power by seriously breaching fundamental civil or human rights of a particular group (a minority or indigenous people).[297] Some other writers also believe that if either breach reoccurs the secession right may be triggered.[298]

A. Cassese, on the other hand, argues that denial of the basic right to representation does not per se give rise to the right of secession. According to him, there must be gross breeches of human rights and, most importantly, 'the exclusion of any likelihood for a possible peaceful solution within the existing State structure.'[299]

We may therefore conclude, that while serious harm is a prerequisite for remedial secession, its content is still being disputed. What seems to be the deciding factor in justifying remedial secession is the behaviour of the parent state.

The resolution of the conflict within the parent state must be impossible

As discussed above, legal researchers tend to agree that remedial secession is a measure of last resort. Therefore, for it to trump the principle of territorial integrity, internal self-determination must be 'absolutely beyond reach' and without any prospect for 'peaceful challenge.'[300] M. Shaw

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[295]Thomas W. Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' [2011] 40(105) Georgia Journal of International and Comparative Law, p. 144 <https://www.academia.edu/6154641/Remedial_Secession_Kosovo_to_Katanga_What_the_Law_Should_Have_Done>accessed 7 August 2021

[296]See Malcolm Shaw, ' Peoples, Territorialism and Boundaries' [1997] 8(3) European Journal of International Law, p. 483 <https://doi.org/10.1093/oxfordjournals.ejil.a01559417 > accessed 8 August 2021; Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press 1995), p. 120;

[297]Antonello Tancredi, A normative 'due process' in the creation of States through secession. in MarceloG Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) 176

[298]Antonello Tancredi, A normative 'due process' in the creation of States through secession. in Marcelo G Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) 176

[299]Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press 1995), pp. 119-120;

[300]Malcolm Shaw, ' Peoples, Territorialism and Boundaries' [1997] 8(3) European Journal of International Law, p. 483 <https://doi.org/10.1093/oxfordjournals.ejil.a01559417 > accessed 8 August 2021; Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press 1995), p. 120;

also points out that 'some form of external validation of the failure of the efforts to attain internal self-determination would be necessary.'[301]

The existence of such qualified right of secession has received strong support in the legal literature. It also enjoys support in judicial decisions and opinions. The Commission of Rapporteurs in the Aaland Island dispute denied the existence of any absolute entitlement to secession by a minority, but it did not rule out a right of secession under all circumstances:[302]

> The separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees [of religious, linguistic, and social freedom].[303]

This 'lack of will or power' of a host state to remedy the wrongs and ensure internal self-determination is what opens the door for remedial secession and legitimises it in the eyes of the international community.

In the next chapter we will discuss how these criteria for remedial secession apply to Kosovo and Crimea.

3.3.3. Kosovo Does Not Set Precedent for Crimea

From Russia's official rhetoric, it clearly follows that for Vladimir Putin, the annexation of Crimea has its roots in Kosovo. Commenting on Kosovo's independence in 2008, Vladimir Putin said that 'it is a two-ended stick, and the second end will come back and hit them [the West] in the face.'[304] It is fair to say, that with Crimea, he delivered on that promise. Next, we will look at how Russia used Kosovo against Ukraine and the West despite refusing to recognise its independence.

Kosovo vs. Crimea. Background

Despite Kremlin's attempts to present them as similar, the circumstances of Kosovo and Crimea are wildly different.

Unlike the population of Crimea, which is too ethnically diverse, ideologically opposing and lacking in connection to the territory (with the exception of Crimean Tatars), in 1998[305] Kosovar Albanians made up 80-85 percent of its population (90% according to some sources) while the proportion of ethnic Serbs was between 8 and 13 percent.[306] Unlike recent Russian settlers in Crimea, Albanians in Kosovo have strong historic ties to the territory, which was part of the Ottoman Empire between 1455 and 1912 until it was taken by Serbia during the Balkan Wars. They are culturally, religiously, and linguistically distinct from Serbs and therefore can be considered a people. In 1946 Kosovo was granted autonomy, which was expanded in 1974: its

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[301]Malcolm Shaw, ' Peoples, Territorialism and Boundaries' [1997] 8(3) European Journal of International Law, p. 483 <https://doi.org/10.1093/oxfordjournals.ejil.a01559417 > accessed 8 August 2021

[302]John Dugard and David Raic, The role of recognition in the law and practice of secession. in Marcelo G Kohen (ed), Secession International Law Perspectives (Cambridge University Press 2006) 107

[303]The Aaland Islands Question, LN Doc. B7.21/68/106, 1921, at p. 28.

[304]'Putin calls Kosovo independence 'terrible precedent' Kosovo independence 'terrible precedent'' (The Sydney Morning Herald, 23 February 2008) <https://www.smh.com.au/world/putin-calls-kosovo-independence-terrible-precedent-20080223-gds2d5.html> accessed 16 July 2021

[305]The year when the Kosovo conflict erupted

[306]Helge Brunborg, 'Report on the size and ethnic composition of the population of Kosovo' (The International Criminal Tribunal for the former Yugoslavia) (14 August 2002) 16 <https://www.icty.org/x/file/About/OTP/War_Demographics/en/milosevic_kosovo_020814.pdf>

government received broader powers, including presidential title and a seat in the Federal Presidency.[307]

As was established in the previous chapter, in order to be entitled to remedial secession, a people must suffer serious harm: its rights to self-determination must be substantially limited and serious human rights abuse must take place. In 1989, President Milošević withdrew Kosovo's special autonomy: Kosovo parliament was dissolved, ethnic Albanians faced serious discrimination from the Serbian government, including discriminatory removal of ethnic Albanian officials from police and judiciary, Police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations.[308] In response to the oppression, a resistance movement was created. The Serbian government responded with police and military action, resulting in 'systematic and organised' ethnic cleansing of the civilians, which caused a refugee crisis.[309]

In 1999 the Serb government turned down a self-government plan and refused to co-operate even after NATO members threatened air strikes. It withdrew its armed forces from Kosovo only following NATO bombings. Kosovo went under the UN interim administration. In 2007, Kosovo accepted the proposal for independence, supervised by the international community, which was rejected by Serbia. A year later, in 2008, Kosovo declared independence,[310] which was recognised by the US and most of the EU and NATO members.[311] Russia insisted that the Declaration was illegal and a 'blatant breach' of the principles of inviolability of frontiers and territorial integrity.[312]

In stark contrast to Kosovo, which, after its autonomy was stripped, in effect became an oppressed non-self-governing territory within Serbia, Crimea continued to enjoy autonomy within Ukraine. It had its own Constitution, a democratically elected parliament, local laws, and government. There was no sign that its autonomy would be limited in any way. Despite Russia's claims, it also failed to provide any concrete evidence that its nationals or Russian speakers were discriminated against.[313] On the contrary, the day after Viktor Yanukovych fled, the language law, limiting the status of Russian language as a regional one, was vetoed by the acting president, which was a clear sign that the government was ready to compromise. As pointed out by Roy Allison, Russia 'made no efforts to show that its military actions complied with the requirements of necessity and

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[307]'Constitutional history of Kosovo' (ConstitutionNet) <https://constitutionnet.org/country/constitutional-history-kosovo> accessed 16 August 2021

[308]UN General Assembly Resolution 48/153 (Situation of human rights in the territory of the former Yugoslavia), 20 December 1993, at paras 17-19.

[309]Human Rights Watch, 'Under Orders: War Crimes in Kosovo' (26 October 2001) 109-154 <https://www.hrw.org/report/2001/10/26/under-orders/war-crimes-kosovo> accessed 16 August 2021

[310] Kosovo Declaration of Independence, 17 February 2008 <https://www.refworld.org/docid/47d685632.html> accessed 1 September 2021

[311]Chatham House, 'Kosovo: International Law and Recognition. A Summary of the Chatham House International Law Discussion Group meeting held on 22 April 2008.' < https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il220408.pdf>

[312]SC/9252 Press Release, 'Security Council Meets in Emergency Session Following Kosovo's Declaration Of Independence, With Members Sharply Divided on Issue' (18 February 2008) <https://www.un.org/press/en/2008/sc9252.doc.htm> accessed 1 September 2021

[313]S. Power: 'Russia alleges various actions and threats to minority groups in Ukraine. We see no evidence of this.' S/PV.7124 p. 6/7 <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7124.pdf> accessed 1 September 2021

proportionality, which are essential preconditions for a justifiable intervention to protect nationals'[314] while mimicking the rhetoric used in the Kosovo case almost word for word.

Advisory opinion on Kosovo

In 2010 the ICJ delivered its advisory opinion answering the question presented by the General Assembly: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[315]

The Court concluded that 'general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.'[316]

Unlike in the Reference re Secession of Quebec, where Canada's Supreme Court evaluated whether Quebec had the right to secede from Canada in the circumstances, the ICJ interpreted the question narrowly and chose not to address whether Kosovo had a right to secede from Serbia.[317] Although the Court did say, that the illegality may be attached to the declaration of independence not due to its unilateral character, 'but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law.'[318] This would place Crimean declaration squarely into the illegal category, like the Northern Cyprus.

The Court also refused to decide whether there is a positive right to remedial secession, and in which circumstances it may arise, merely stating that there were 'sharp differences' in the Sates' opinions and therefore no opinion juris could be concluded.[319]

The Court therefore neither answered any of the pressing questions on self-determination, nor resolved the controversy around the status of Kosovo and had been criticized for it even by one of its judges:

> The declaration of independence of Kosovo is the expression of a claim to separate statehood and part of a process to create a new State. The question put to the Court by the General Assembly concerns the accordance with international law of the action undertaken by the representatives of the people of Kosovo with the aim of establishing such a new State without the consent of the parent State. In other words, the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law, or whether that process could be considered consistent with international law in view of the possible existence of a positive right of the people of Kosovo in the specific circumstances which pre- vailed in that territory. Thus, the restriction of the scope of the question to whether international law prohibited the declaration of independence as such voids it of much of its substance.[320]

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[314]Roy Allison, 'Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules' [2014] 90(6) International Affairs 1262

[315]UNGA Res. 63/3 (2008) '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' <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20A%20RES63%203.pdf> accessed 1 September 2021

[316]International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, para 84

[317]Ibid., para 56

[318]Ibid., para 81

[319]Ibid., paras 82-83

[320]Ibid., Separate Opinion Judge Yusuf, at para. 2.

The Court was clearly wary of setting a precedent for positive right for unilateral secession and opted not to look at the circumstances of the case. Russia, meanwhile, took the only concrete thing said by the court, namely that unilateral declarations of independence are not in illegal, and ran with it.

This unsophisticated formalistic approach should not be mistaken for incompetence. It is one of the tools Russia uses in its hybrid lawfare. If the Court did not bother to place its opinion in context, then Russia will use it in any context it deems fit, like it did with Crimea, where the circumstances could not be more different to Kosovo.

Rather remarkably, according to Russia's own statement in the Kosovo case, remedial secession should be 'limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existing state.'[321] None of that was applied to Crimea as we know.

As we have shown in the previous chapters, Russia's legal arguments concerning Crimea have been consistently weak. However, dismissing them out of hand is more dangerous than it seems. As pointed out by Roy Allison, the 'core issue here is not how Russia interprets international rules and law. It is whether Putin is now seeking to project a set of principles that represent a different vision of international order from that held by western liberal states.'[322] Christopher J. Borgen agrees: by making those wild quasi-legal statements, Russia is not withdrawing from legal rhetoric, it is constructing its own quasi-legal framework. And the use of legal language may deter other States who are not directly involved from intervening.[323]

C. Borgen notes, that Russia also mirrored US rhetoric that Kosovo is an exception. He quotes Condoleeza Rice:

> The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.[324]

Almost mocking this statement, Vladimir Putin and other Russian officials insist that Crimea is a special case 'historically, geopolitically, and patriotically.' Ironically, by being careful and trying not to set precedent for unilateral secession with Kosovo, the ICJ and the US created a loophole, which Russia turned against the established world order. Vladimir Putin is a fan of 'red lines.' Who knows, maybe had they been drawn in the Kosovo case, the 'Crimean Spring' would not have happened.

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[321]ICJ, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), Written Statement of the Russian Federation, 16 April 2009, para. 88.

[322]Roy Allison, 'Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules' [2014] 90(6) International Affairs 1267

[323]Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' [2015] 91(216) International Law Studies, p. 236

[324]Press Release, Secretary of State Condoleeza Rice, U.S. Recognizes Kosovo as Independent State (Feb. 18, 2008) < https://2001-2009.state.gov/secretary/rm/2008/02/100973.htm >accessed 1 September 2021; Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' [2015] 91(216) International Law Studies, p. 235

The proliferation of Russia's revisionist rhetoric, which implies that it is above rules and may 'right historical wrongs' by violating other states' sovereignty is incredibly dangerous. It goes against everything modern international law stands for and shifts international relations 'from the power of rules towards the rule of power.'[325] As pointed out by Mark Voyger, Russia may not be able to change the rules de jure, but its conduct may erode the fundamental principles of international law *de facto*. Inevitably, other powerful states may follow in Russia's steps to 'lay claims on contested areas (China) or justify their presence in volatile regions (Iran).'[326]

Next, we will look at how Russia violates one of the most fundamental principles of international law, *pacta sunt servanda*, by discrediting the Budapest Memorandum.

3.4. Weaponizing the Budapest Memorandum Against Ukraine

In response to its use of force in Crimea, the international community repeatedly reminded Russian Federation about its duties under the Budapest Memorandum. The Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons was signed on 5 December 1994 in Budapest by leaders of four states: Leonid Kuchma, the President of Ukraine, Boris Yeltsin, the President of Russia, Bill Clinton, the US President, and John Major, the Prime Minister of the United Kingdom.[327]

Clauses 1 and 2 of the Memorandum provide that the Parties (including the Russian Federation) reaffirm their commitment to 'respect the independence and sovereignty and the existing borders of Ukraine' and 'refrain from the threat or use of force against the territorial integrity or political independence of Ukraine' in exchange for Ukraine's commitment to eliminate its nuclear weapons.[328]

Following the annexation of Crimea, Russia has been persistent in denying any breaches of international law. The Budapest Memorandum in particular came under a lot of fire from the Russian Ministry of Foreign Affairs and the media. However, their reasoning was inconsistent and self-contradictory. It is simultaneously claimed that Russia did not breach its obligations under the Budapest Memorandum, and that it has no obligations whatsoever. Their strategy seemed to be to 'throw it all against the wall and see what sticks,' a typical subversion technique in lawfare.

One particularly creative argument advanced by the Russian officials was that Maidan Revolution created a new state towards which the Russian Federation had no treaty obligations. In 2014, Vladimir Putin stated the following: 'if this [Maidan Revolution] is a revolution, then it is difficult for me to disagree with some of our experts, who believe that a new state has emerged on this territory [...] and we have not signed any binding documents with this state and in relation to this state.'[329]

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[325]Roy Allison, 'Russian Revisionism, Legal Discourse and the 'Rules-Based' International Order' [2020] 72(6) Europe-Asia Studies 977

[326]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 42

[327]Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (concluded 5 December 1994) 3007 UNTS <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280401fbb&clang=_en> accessed 12 April 2021

[328]Ibid.

[329]Anna Juranec, 'Kazalos', my stroim drugoj mir: 25 let Budapeshtskomu memorandumu [It Seemed We Were Building a Different World: 25th Anniversary of the Budapest Memorandum]' (Gazeta RU, 5 December 2019) <https://www.gazeta.ru/politics/2019/12/04_a_12847988.shtml> accessed 12 April 2021;

It is well established in international law that an internal change of government does not affect existing obligations of the state.[330] According to C. Hyde, 'after a State has come into being, its obligations in relation to the outside world are not affected in consequence of internal changes which may be undergone.'[331] Furthermore, as pointed out by Ihor Lossovsky, international treaties are concluded between states, not governments. This means that a change in government does not invalidate international agreements or commitments of a state.[332]

The claim is therefore unfounded, and the Russian Federation remains to be bound by its international treaty obligations towards Ukraine in force since before the Maidan Revolution. However, the certainty with which Vladimir Putin made that statement is worth attention. As Anton Moiseienko aptly put it, Russian officials 'feel free to interpret international law up to the point of redesigning it.'[333] This lawfare technique is used to 'muddy the waters' even if the argument is glaringly weak.[334]

The Russian Federation has also claimed that its actions in Crimea did not violate the Budapest Memorandum because, first, the Budapest Memorandum is a 'mere recommendation,' not a binding international treaty as it was not ratified by Russia; second, that the only obligation under the Budapest Memorandum is not to use or threat to use nuclear weapons against Ukraine; and third, that Russia did not use force against Ukraine at all. These claims are explained and refuted below.

3.4.1. Russia's claim that the Budapest Memorandum is not a binding treaty

In 2019, on the 25th anniversary of the signing of the Budapest Memorandum, Russia Today (a major state-controlled international television network funded by the federal tax budget of the Russian government,335 also commonly referred to as 'the Kremlin's propaganda mouthpiece'),336 published an article titled 'Playing the Victim: Why Ukraine is Trying to Appeal to the Budapest Memorandum'.337 Among other things, the article says: 'the experts emphasize

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[330]A. Ross, A Textbook of International Law (1947) p. 134 quoted in 'Revolutions, Treaties, and State Succession,' The Yale Law Journal 76, no. 8 (1967): 1669-687. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5875&context=ylj> accessed 12 April 2021

[331]C. Hyde, International Law: Chiefly as Interpreted and Applied in The United States (2d Rev. Ed. 1945) pp. 158-59 quoted in 'Revolutions, Treaties, and State Succession,' The Yale Law Journal 76, no. 8 (1967): 1669-687. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5875&context=ylj> accessed 12 April 2021

[332]Ihor Lossovsky, The Status of the Budapest Memorandum under International Law: a Binding Treaty (Issue № 11, Ukrayina Dyplomatychna, 2015), p. 32 <ttp://ufpa.org.ua/sites/default/files/knyga_3_0.pdf> accessed 12 April 2021

[333]Anton Moiseienko, 'Guest Post: What do Russian Lawyers Say about Crimea?' (Opinio Juris, 29 September) <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/> accessed 17 August 2021

[334] Christopher J. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' [2015] 91(216) International Law Studies, p. 277

[335]Max Fisher, 'In case you weren't clear on Russia Today's relationship to Moscow, Putin clears it up' (The Washington Post, 13 June 2013) <https://www.washingtonpost.com/news/worldviews/wp/2013/06/13/in-case-you-werent-clear-on-russia-todays-relationship-to-moscow-putin-clears-it-up/> accessed 12 April 2021

[336]Masha Gessen, 'Mouthpieces for the Kremlin's propaganda channel aren't brave' (The Washington Post, 29 July 2014) <https://www.washingtonpost.com/opinions/masha-gessen-mouthpieces-for-the-kremlins-propaganda-channel-arent-brave/2014/07/29/83fecf2e-1449-11e4-98ee-daea85133bc9_story.html> accessed 12 April 2021; Oliver Bullough, 'Inside Russia Today: counterweight to the mainstream media, or Putin's mouthpiece?' (NewStatesman, 10 May 2013)<https://www.newstatesman.com/world-affairs/world-affairs/2013/05/inside-russia-today-counterweight-mainstream-media-or-putins-mou> accessed 12 April 2021

[337]Aleksandr Karpov, Elena Onishhuk, Aljona Medvedeva, ''Predstavit' sebja zhertvoj': pochemu Ukraina pytaetsja apellirovat' k Budapeshtskomu memorandumu ['Playing the Victim': Why Ukraine is Trying to Appeal to the Budapest Memorandum]' (Russia Today, 5 December 2019) <https://russian.rt.com/ussr/article/694192-budapeshtskii-memorandum-istoriya-zelens ii> accessed 12 April 2021

that the Memorandum is of a recommendatory nature and has not been ratified by any of the countries that signed it.' It does not name 'the experts,' but this argument keeps popping up in the Russian media and has become rather popular.[338]

We believe that the Budapest Memorandum is an international treaty that imposes binding obligations on its parties.

The Budapest Memorandum imposes binding obligations on its Parties

The text of the Budapest Memorandum reflects the intention of the Parties to incur obligations towards Ukraine. Clauses 1 and 2 read as follows: 'The Russian Federation, The United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their commitment to Ukraine in accordance with the principles of CSCE Final Act, to respect the independence and sovereignty and the exiting borders of Ukraine' and 'reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence.'[339] The wording chosen by the Parties is a clear pledge to respect Ukraine's territorial integrity and inviolability of its borders, and to refrain from the use or threat of military force.

It may be thought that the use of the term 'assurances' in the title of the instrument refers to mere political commitments rather than security guarantees. At the same time, the Russian and Ukrainian versions of the Memorandum use the term 'guarantees' ('гарантии,' 'гарантії'), while the English version uses the term 'assurances.' According to Steven Pifer, a former US ambassador in Ukraine and one of the negotiators of the Memorandum, the term 'assurances' was preferred over the term 'guarantees' because for the United States the term 'guarantees' implied military commitment that it usually provided guarantees to its military allies, such as NATO member states. According to Pifer, 'In the early 1990s, neither George H.W. Bush administration nor the Clinton administration was prepared to extend a military commitment to Ukraine— and both felt that, even if they wanted to, the Senate would not produce the needed two-thirds vote for consent to ratification of such a treaty.'

Even if the Memorandum refers to 'assurances' within the meaning of political commitment rather than military guarantees, it nonetheless imposes on the signatories clear negative obligations to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine. It is confirmed by the use of the word 'obligation,' which clearly means more than and cannot be interpreted as a mere desire or recommendation, in Clause 2 of the Memorandum.

It is also obvious from the wording of the Memorandum that the Parties, including Russia, intended to incur obligations to respect Ukraine's sovereignty and territorial integrity and not to use or threaten to use force against Ukraine on the condition of Ukraine's voluntarily surrendered of its nuclear arsenal – world's third largest – inherited from the USSR. Furthermore, Clause 6 of the Law of Ukraine on Ascension to the Treaty on the Non-Proliferation of Nuclear Weapons of 1994

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[338]Anna Juranec, 'Kazalos', my stroim drugoj mir: 25 let Budapeshtskomu memorandumu [It Seemed We Were Building a Different World: 25th Anniversary of the Budapest Memorandum]' (Gazeta RU, 5 December 2019) <https://www.gazeta.ru/politics/2019/12/04_a_12847988.shtml> accessed 12 April 2021; Ol'ga Torres, ''Popytka uvil'nut' ot vypolnenija Minskih soglashenij': Ukraina predlozhila vesti peregovory po Donbassu bez Rossii ['An Attempt to Avoid the Minsk Agreements': Ukraine Suggested to conduct the Donbass Negotiations Without Russia]' (Russia Today, 2 June 2020) <https://russian.rt.com/ussr/article/751538-ukraina-donbass-rossiya> accessed 12 April 2021;

[339]Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (concluded 5 December 1994) 3007 UNTS <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280401fbb&clang=_en> accessed 12 April 2021

specifically provides that the law comes into force only *after*[340] the nuclear states provide Ukraine with security guarantees.[341]

According to Pifer, UK and US have an obligation to respond to Russia's blatant violations of its obligation to respect Ukraine's sovereignty and territorial integrity under the Budapest Memorandum. Even if they are not under an obligation to respond with military force, they may impose political, diplomatic, and economic sanctions until Russia ceases its violation of Ukraine's sovereignty and territorial integrity.[342]

The Budapest Memorandum is a treaty according to international law

It must also be noted that despite what its name suggests, the Memorandum qualifies as an international treaty under the terms of the 1969 Vienna Convention on the Law of Treaties of 1969 (VCLT).[343]

First, the Budapest Memorandum 1994 falls under the definition of a treat provided in art 2(1)(a) of the VCLT:[344] it is a written agreement in three languages (Ukrainian, English, and Russian) concluded between four states on matters governed by international law.

Second, the Parties consented to be bound by the Memorandum by means of signature. It has been argued that the Budapest Memorandum was not a treaty because it was not ratified and did not require ratification. According to art. 11 of the Vienna Convention ratification is only one of the ways in which state's consent to become bound by a treaty may be expressed. Signature is another one. Indeed, art. 12 of the VCLT provides that consent to be bound by a treaty may be expressed by signature of a representative, when the treaty provides that signature shall have that effect, for the Memorandum that it will be applicable upon signature.[345] The Budapest Memorandum provides that it 'will be applicable upon signature,' i.e., since 5 December 1994, when it was signed by all the Parties. The wording of the document clearly indicates that no additional approval mechanism such as signature was required.

Finally, deciding recently on a similar matter,[346] the ICJ found that a memorandum of understanding (MOU) constituted an international treaty because it was a written document, in which states recorded their agreement on certain points governed by international law; it included a provision on its entry into force upon signature, indicating its binding character and the state

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[340]emphasis added

[341] Zakon Ukrayiny 'Pro pryyednannya Ukrayiny do Dohovoru pro nerozpovsyudzhennya yadernoyi zbroyi vid 1 lypnia 1968' [Law of Ukraine on Accession to the Nuclear Non-Proliferation Treaty dated 1 July 1968 from 16 November 1994] <https://zakon.rada.gov.ua/laws/show/248/94-вр#Text> accessed 12 April 2021

[342]Steven Pifer, 'Ukraine crisis' impact on nuclear weapons' (CNN, 4 March 2014) <https://edition.cnn.com/2014/03/04/opinion/pifer-ukraine-budapest-memorandum/index.html> accessed 12 April 2021

[343]Vienna Convention on the Law of Treaties (concluded 23 May 1969) <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 12 April 2021

[344]Art. 2(1)(a) VCLT reads: 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[345]Art. 12 VCLT also provides that the intention of the State to make the signature binding appears from the full powers of its representative or was expressed during the negotiation. According to art. 7(2) (a) Heads of State and Heads of Government by virtue of their functions are considered as representing the state. The Budapest Memorandum was signed by three Presidents (heads of states) and a Prime Minister (a head of government) which clearly illustrates the intention to be bound by it.

[346]Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), International Court of Justice, Judgment of 2 February 2017, paras 42-50 <https://www.icj-cij.org/public/files/case-related/161/161-20170202-JUD-01-00-EN.pdf> accessed 12 April 2021

official who signed the memorandum was duly authorised by the government to do so. It also noted that ratification was not required because both signature and ratification are recognized means by which a State may consent to be bound by a treaty.

3.4.2. Russia's claim the Budapest Memorandum only applies to nuclear threat or use of nuclear weapons

On 1 April 2014 Russia's Ministry of Foreign Affairs issued a statement claiming that the Russian Federation was strictly observing its obligations under the Budapest Memorandum to respect the sovereignty of Ukraine, emphasising, that 'only the obligation not to use and not to threaten to use nuclear weapons against non-nuclear states is the common element of the Budapest Memorandum.'[347]

This 'nuclear threat argument' was reiterated by Sergey Lavrov (Russia's Foreign Minister) on 26 January 2016: 'If you're referring to the Budapest memorandum, we have not violated it. It contains only one obligation – not to use nuclear weapons against Ukraine. No one has made any threats to use nuclear weapons against Ukraine.'[348]

While the Memorandum, in clause 5, does reaffirm the obligation of the signatories not to use nuclear weapons against non-nuclear party (i.e., Ukraine), it is not the only obligation. As already mentioned, clause 1 of the Memorandum provides that the Russian Federation and other signatories have an obligation 'to respect the independence and sovereignty and the existing borders of Ukraine,' while clause 2 provides they shall 'refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that *none* of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations'.[349]

The wording of the Memorandum is, therefore, unambiguous and makes it abundantly clear that it intends to provide Ukraine with all-encompassing security guarantees, which are not limited to the nuclear threat, but extend to all kinds of weapons and use of force in general. Once again, Russia introduces its own reading of international law as a lawfare technique. This brings us to Russia's next claim that force was not used during the annexation of Crimea.

3.4.3. Russia's claim that Russia did not use force in Crimea in 2014

In March 2015 Russia's Foreign Affairs Ministry Spokesman Alexander Lukashevich said that 'in the [Budapest] memorandum, we [Russia] also undertook to refrain from the threat or use of force against Ukraine's territorial integrity or political independence. And this provision has been fully observed. Not a single shot was fired on its territory during [the annexation]'.[350] In this instance,

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[347]'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' (Official Website of the Ministry of Foreign Affairs of the Russian Federation, 1 April 2014) <https://www.mid.ru/web/guest/maps/ua/-/asset_publisher/ktn0ZLTvbbS3/content/id/68078?p_p_id=101_INSTANCE_ktn0ZLTvbbS3&_101_INSTANCE_ktn0ZLTvbbS3_languageId=en_GB> accessed 12 April 2021

[348]'Sergey Lavrov's remarks and answers to media questions at a news conference on Russia's diplomacy performance in 2015' (Official Website of the Ministry of Foreign Affairs of the Russian Federation, 26 January 2016) <https://www.mid.ru/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/2032328?p_p_id=101_INSTANCE_xK1BhB2bUjd3&_101_INSTANCE_xK1BhB2bUjd3_languageId=en_GB> accessed 12 April 2021

[349]emphasis added

[350]'Foreign Ministry Spokesman Alexander Lukashevich answers a media question about the situation around the Budapest Memorandum' (Official Website of the Ministry of Foreign Affairs of the Russian Federation, 12 March

Russia's Foreign Affairs Ministry conveniently ignores the fact that 'the use of force' is a term that has been clearly defined under international law, and that the Russian party is not at liberty to interpret it however suits them best.

Ihor Lossovsky[351] pointed out that according to the London Convention for the Definition of Aggression 1933 (remains in force indefinitely and extends to the Russian Federation as a successor of the USSR),[352] a State, which commits 'invasion by its armed forces, with or without a declaration of war, of the territory of another State; attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State; naval blockade of the coasts or ports of another State' shall be considered the aggressor in an international conflict. 'Firing shots' is therefore not required in order to commit an act of aggression, invasion in itself already constitutes a violation.

According to the General Assembly resolution 3314 (XXIX) (1974), aggression was defined as the use of armed force by the State against the sovereignty, territorial integrity or political independence of another State (art. 1). Echoing the London Convention 1933, Article 2 provides that, the following acts qualify as aggression: (a) invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (c) the blockade of the ports or coasts of a State by the armed forces of another State; (e) the use of armed forces of one State which are within the territory of another State, in contravention of the conditions provided for in the agreement. Art. 5 specifically states that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.'[353]

In a 2015 documentary 'Crimea: The Way Home,' Vladimir Putin, Russia's Commander in Chief, confirmed that he personally authorised and supervised the military invasion in Crimea in February – March 2014: 'In order to block and disarm 20,000 well-armed people [Ukrainian armed forces], certain personnel was needed. […] I gave instructions to the Ministry of Defence, not going to hide it, under the guise of strengthening the protection of our military facilities in Crimea, to transfer the special forces of the Main Intelligence Directorate (GRU) and the Marine Corps, paratroopers.' He continued: 'The Bastion defensive complex, an effective modern high-precision weapon, was transported to Crimea. So far, no one has such a weapon. We made a fortress out of Crimea. Both from the sea and from land. There are 43 S-300 launchers, about twenty Buk launchers and other heavy weapons, including armoured vehicles. It is a serious combat 'fist'.'[354]

These quotes, coming from Putin himself, directly acknowledge that force (including Russia's military and weapons) was indeed used against the territorial integrity of Ukraine. Moreover, it was used in violation of the agreement between Ukraine and Russia as to the status of the Russian Fleet on the territory of Ukraine. Article 6.1. of which provides that Russian armed forces stationed

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2015) <https://www.mid.ru/ru/maps/ua/-/asset_publisher/ktn0ZLTvbbS3/content/id/1091054?p_p_id=101_INSTANCE_ktn0ZLTvbbS3&_101_INSTANCE_ktn0ZLTvbbS3_languageId=en_GB> accessed 12 April 2021

[351] Ihor Lossovsky, The Status of the Budapest Memorandum under International Law: a Binding Treaty (Issue № 11, Ukrayina Dyplomatychna, 2015), pp. 17-18 < http://ufpa.org.ua/sites/default/files/knyga_3_0.pdf> accessed 12 April 2021

[352] Convention for The Definition Of Aggression (concluded 3 July 1933) <https://iilj.org/wp-content/uploads/2016/08/Convention-for-the-Definition-of-Aggression-1933.pdf> accessed 12 April 2021

[353] General Assembly resolution 3314 (XXIX) 'Definition of Aggression,' 2319th plenary meeting, 14 December 1974 <https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XXIX)> accessed 12 April 2021

[354] 'Crimea: the Way Home' (Russia Television and Radio, 15 March 2015) <http://sales.vgtrk.com/en/catalog/currentaffairs/14458/> accessed 12 April 2021

in Crimea must respect Ukraine's sovereignty, abide by Ukrainian laws, and not interfere in its internal affairs.[355]

Therefore, under international law Russia qualifies as aggressor state which used forced against the territorial integrity of Ukraine in breach of its obligations under the Budapest Memorandum. Russia's rhetoric on the Memorandum clearly illustrates its subversive approach towards its international obligations in general.

[355]Uhoda mizh Ukrayinoyu i Rosijs'koyu Federaciyeyu pro status ta umovy perebuvannya Chornomors'koho flotu Rosijs'koyi Federaciyi na terytoriyi Ukrayiny vid 28.05.1997 [Partition Treaty on the Status and Conditions of the Black Sea Fleet from 28 May 1997] <https://zakon.rada.gov.ua/laws/show/643_076#Text> accessed 12 April 2021

4. LAWFARE IN RUSSIA'S ACTIONS IN EASTERN UKRAINE

In 2014-2015, following the Ukrainian revolution when a significant part of the society declared the intention to seek integration into the EU and NATO membership, Russia carried two military operations on the territory of Ukraine. The first one resulted in the annexation of the Crimean Peninsula. The second one consisted in the intervention in Donbas, in particular by using the 'proxy forces' represented by the local separatist groups of the so-called Donbas People's Republic ('DPR') and Luhansk People's Republic ('LPR').

Lawfare played a significant role in Russia's strategy in Crimea as it was one of the means to give an appearance of lawfulness to what was essentially an unlawful and aggressive act of seizing part of Ukraine's territory.

The general characteristic of Russia's strategy towards Donbas is that Moscow is focused on maintaining a low-intensity conflict while denying its direct involvement in the conflict between the rebels and the Ukrainian government. Since Russia is acting covertly, lawfare has played a somewhat less prominent part in Russia's strategy towards Donbas. Nonetheless, as shown in this chapter, Russia has recently stepped up its use of lawfare to strengthen its influence over Donbas.

The purpose of Russia's intervention in Donbas carried out either directly or through proxy forces' is still being discussed. Lauren Van Metre, Viola G. Gienger, and Kathleen Kuehnast state that the reasons for intervention relate to multiple factors, though the key one, in their opinion, is the stability of the regime in Russia and internal support for Putin, which allowed him to intervene in the conflict. The weak Western response to Russia's actions and the way it is perceived at the regional level is another driving force. Finally, Putin's goals and objectives are a critical incentive. The range of possible aims includes the change of national borders, creation of frozen conflicts to weaken one or more countries, protecting essential natural resources, expanding spheres of influence for commercial and political purposes, raising Russia's international status, and curbing Western interference.[356]

Ruth Deyermond believes Russia was motivated by the desire to prevent the irreversible loss of its most important neighbour to Western institutions. Russia appears to have convinced the Yanukovych government to abandon closer ties with the EU. This in turn provoked protests that overthrew the Ukrainian government and posed a much more immediate and severe threat to Russia's interests in Ukraine. In her opinion, Russia's actions in Ukraine remained an attempt to save its position in the crisis, which it facilitated but did not want to create.[357] It has also been suggested that Russia planned the intervention in Eastern Ukraine to oust the problem of the occupied Crimea from the international agenda in the future and shift the attention of the world community to the Donbas problem.

It would seem that Russia's initial plan was to implement the Crimean scenario in Donbas. At least, at first Russia's information campaign focused on precisely this course of events. The propaganda materials appearing in Russian media at the time kept repeating that Donbas and its population would be better off in Russia.[358] It did not move, however, to annex the territories of

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[356]Lauren Van Metre and others, 'The Ukraine-Russia Conflict Signals and Scenarios for the Broader Region' [2015] (366) US Institute of Peace Special Report 2.

[357]Ruth Deyermond, 'What are Russia's real motivations in Ukraine? We need to understand them' (The Guardian, 2014) <https://www.theguardian.com/commentisfree/2014/apr/27/russia-motivations-ukraine-crisis> accessed 18 September 2021.

[358]Denys Tymoshenko, 'U Kremlya byili realnyie rezultatyi «referenduma» v Donetske, i oni emu ne ponravilis? [Did the Kremlin have real results of the 'referendum' in Donetsk, which it did not like?]' (DonbasRealii, 12 May 2020) <https://www.radiosvoboda.org/a/30608153.html> accessed 18 September 2021.

the Donetsk and Luhansk regions or to recognize the self-proclaimed republics established by the rebels in these territories.

Another important difference of Russia's tactics in Eastern Ukraine as compared to its action in Crimea is that Russia still publicly positions itself as an observer and does not admit its involvement in the armed conflict. Although there is compelling evidence that Russia played a key role in the development of the conflict in Donbas,[359] it continues to deny its direct involvement, calling the ongoing war a popular uprising and condemning the actions of the Ukrainian forces. While Putin admitted that the referendum in Crimea was held with the Russian military's presence, he described claims about the presence of Russian units in the south and east of Ukraine as 'nonsense.'[360]

Nonetheless, seven years after the start of the conflict Russia continues to build up its military potential directly on the eastern border with Ukraine.[361] It is also stepping up the use of lawfare to frustrate Ukraine's effort to resolve the conflict.

4.1. Russia's claims concerning the 'responsibility to protect' concept and the right to self-determination in Donbas

Turning to the question of the use of lawfare in Donbas, the 'responsibility to protect' concept and the international law principle of self-determination of peoples were used by Russia to undermine the unity of Ukraine as a nation-state by emphasizing the status of ethnic Russians and Russian-speaking Ukrainian citizens, as demonstrated by the information war unleashed by Russia.[362]

To camouflage its participation in the conflict, Russia used its propaganda mechanisms to shape and qualify the crisis in Donbas as an internal inter-ethnic confrontation (between Ukrainians and Russians in Eastern Ukraine).[363] That allowed Russia to argue for (4.1.1) the support of separatists under the pretence of protection of ethnic Russians and (4.1.2) the secession of the south-eastern territories of Ukraine through the right to self-determination.[364]

4.1.1. Russia's argument on 'responsibility to protect'

Putin claimed Russia will always defend 'ethnic Russians in Ukraine and that part of the Ukrainian people who feel their inseparable not only ethnic, but also cultural, linguistic connection with

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[359]Margarita Levin Jaitner, 'Russian Information Warfare: Lessons from Ukraine' [2015] 1(1) NATO Cooperative Cyber Defence Centre of Excellence 92.

[360]BBC News Russian Service, 'Putin obeshhaet zashhishhat' russkih' na Ukraine vsegda [Putin promises to 'protect Russians' in Ukraine always]' (BBC News Russian Service, 2014) <https://www.bbc.com/russian/russia/2014/06/140624_putin_deauthorisation_ukraine_reax> accessed 18 September 2021.

[361]BBC News, 'In pictures: Russian military build-up near Ukraine' (BBC News, 2014) <https://www.bbc.com/news/world-europe-26968312> accessed 18 September 2021.

[362]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 4

[363]Serhiy Pakhomenko, 'Identychnyst' u konflikti na Donbasi [Identity in the conflict in Donbas]' (Historians, 2015) <http://www.historians.in.ua/index.php/en/dyskusiya/1556-serhii-pakhomenko-identychnist-u-konflikti-na-donbasi> accessed 18 September 2021.

[364]Serhiy Pakhomenko, 'Identychnyst' u konflikti na Donbasi [Identity in the conflict in Donbas]' (Historians, 2015) <http://www.historians.in.ua/index.php/en/dyskusiya/1556-serhii-pakhomenko-identychnist-u-konflikti-na-donbasi> accessed 18 September 2021.

Russia, feel themselves part of the wider Russian world, and [we] will not only watch closely but also react accordingly.'[365]

Such 'protection' is carried out by Russia on the legal frontier as well. The whole concept of the responsibility to protect applies to the situations of genocide, war crimes, ethnic cleansing, and crimes against humanity, contrary to when mere violations of human rights occur.[366] In 2014 the Investigative Committee of the Russian Federation commenced the investigation into 'genocide of the Russian-speaking population' in 'DPR' and 'LPR.'[367] The Committee refers to the 1948 Genocide Convention stating that unidentified persons from among the highest political and military leadership of Ukraine gave orders aimed at the complete destruction of precisely Russian-speaking citizens living in 'DPR' and 'LPR.'[368] The Investigative Committee opened another investigation into the genocide of Russian-speakers in Donbas in January 2015.[369] By September 2016 the alleged 'perpetrators' of 'genocide' were identified.[370] Scholars suggest that such prosecution is an element of 'hybrid law enforcement' and note the 'faulty interpretation of groups protected by the definition of the crime of genocide and Russia's abusive exercise of jurisdiction.'[371] It may seem that the Russian legal scholarship is aware of the precise elements of genocide and the decision to protect the 'speakers' was made intentionally, i.e., as to artificially broaden both the notion of genocide and, consequently, the concept of responsibility to protect. That may form part of the more general Kremlin's rhetoric and practice of misinterpreting and misapplying the international law to please its 'political cravings.'

Finally, Russia went on to incorporate the notion of protection of compatriots in its Constitution (discussed above, Chapter 2.2.3). Disregarding the lack of consensus on forms of reactions to the

[365]BBC News Russian Service, 'Putin obeshhaet zashhishhat' russkih' na Ukraine vsegda [Putin promises to 'protect Russians' in Ukraine always]' (BBC News Russian Service, 2014) <https://www.bbc.com/russian/russia/2014/06/140624_putin_deauthorisation_ukraine_reax> accessed 18 September 2021.

[366]UN General Assembly, A/RES/60/1 '2005 World Summit Outcome' (24 October 2005), paras 138-139 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf> accessed 18 September 2021.

[367]BBC News Ukraine, 'Rosiyski slidchi zvynuvatyly vladu Ukrainy v 'henotsydi' [Russian investigators accuse Ukrainian authorities of 'genocide'' (BBC News Ukraine, 2014) <https://www.bbc.com/ukrainian/news_in_brief/2014/09/140929_hk_russia_genocide> accessed 18 September 2021. See also, Radio Svoboda, 'U Rosii porushyly spravu pro 'henotsyd rosiiskomovnykh' v 'DPR' i 'LPR' – slidchyi komitet [In Russia the investigative committee brought a case on 'genocide of Russian-speakers' in 'DPR' and 'LPR']' (Radio Svoboda, 2014) <https://www.radiosvoboda.org/a/26612164.html> accessed 18 September 2021.

[368]V.I. Markin, 'Sledstvennyy komitet vozbudil ugolovnoye delo o genotside russkoyazychnogo naseleniya na yugo-vostoke Ukrainy [The Investigative Committee opened a criminal case on the genocide of the Russian-speaking population in the south-east of Ukraine]' (Investigative committee of Russia, 2014) <https://sledcom.ru/news/item/523738> accessed 18 September 2021.

[369]Nikolay Sergheev, Sokolovskaya Ianina, 'Kommersant: henotsyd posle mira [Kommersant: 'Genocide after Peace']' (Investigative committee of Russia, 2015) <https://sledcom.ru/press/smi/item/887822> accessed 18 September 2021. See also, Language policy info 'Slidchyi komitet Rosii porushyv shche odnu kryminalnu spravu za 'henotsyd rosiiskomovnykh' [Russia's Investigative Committee has opened another criminal case for 'genocide of Russian-speakers']' (Language policy info, 2015) <http://language-policy.info/2015/01/slidchyj-komitet-rosiji-porushyv-sche-odnu-kryminalnu-spravu-za-henotsyd-rosijskomovnyh/> accessed 18 September 2021.

[370]V.I. Markin, 'Vozbuzhdeny eshche dva ugolovnykh dela v svyazi s sobytiyami na yugo-vostoke Ukrainy [Two more criminal cases were initiated in connection with the events in the south-east of Ukraine]' (Investigative committee of Russia, 2016) <https://sledcom.ru/news/item/1065642/> accessed 18 September 2021.

[371]Sergey Sayapin and Evhen Tsybulenko, The Use of Force against Ukraine and International Law Jus Ad Bellum, Jus In Bello, Jus Post Bellum (TMC Asser Press 2018) 315, 324.

humanitarian crises, especially the controversiality of the military intervention,[372] Russia all alone introduced in its national legislation the 'responsibility to protect concept' subject to wide and discretionary interpretation. This move codified the already exploited excuse of Russia for its 'humanitarian intervention' to protect the Russian-speakers in Eastern Ukraine, which involved the usage of all possible means, including military ones.

4.1.2. Russia's argument on the right to self-determination

Moscow also promoted the idea of self-determination of residents of Donbas through both Russian propagandists and academics. For instance, the Chairman of the Supervisory Board of the Institute of Demography, Migration and Regional Development of the Russian Federation, Yuriy Krupnov stipulated: 'according to the UN Charter, the people of Novorossiya [south-eastern Ukraine] have the right to self-determination. And they courageously exercise this right and initially exercised it exclusively in a peaceful way. The Russian Federation, as a permanent member of the UN Security Council, should stand up for the UN Charter and begin to consistently pursue the policy of implementation of Novorossiya's right to self-determination.'[373]

One Russian journalist even stipulated that historically Ukraine has never been a state, so it has no right to claim the legal succession from the USSR and the loyalty of all former citizens.[374] Still, 'Novorossiya,' he says, with its struggle for self-determination operates within the Ukrainian state, which is being re-established, and serves as a prerequisite for the self-determination of Ukraine itself, if the latter intends to take place as a new state.[375] Such statements underline the essence of introducing the mutually exclusive notions of successor and continuator in Article 67-1 of Russia's Constitution (discussed above, Chapter 2.2.2). Russia may find it sometimes convenient to argue for being recognized as a sole continuator of the USSR so that all the territories of former Soviet Republics shall be 'legally' 'returned home' under the Moscow's rule.

Another example of attempts to use legal mechanisms surrounding the notion of self-determination included holding referendums in Donbas and seeking their legitimization. In these referendums, voters in Donetsk and Luhansk regions were asked whether they supported the independence of self-proclaimed republics. As Volodymyr Kipen noted, 'The 'referendum' itself is a purely fake, propaganda event tailored to the strategy of 'Novorossiya,' which was held by collaborators in Donetsk and Luhansk regions. Neither the international community, nor, of course, Ukraine, nor even Russia itself was going to take it seriously.'[376]

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[372]Jennifer M. Welsh, 'Norm Robustness and the Responsibility to Protect'[2019] 4(1) Journal of Global Security Studies 57.

[373]SvPressa, 'Podchinit Ukrainu zakonu. Yuriy Krupnov: Kreml dolzhen zashchitit Ustav OON i dat narodu Novorossii vozmozhnost realizovat pravo na samoopredeleniye [Subordinate Ukraine to the law. Yuriy Krupnov: the Kremlin must protect the UN Charter and give the people of Novorossiya the opportunity to exercise the right to self-determination]' (SvPressa, 2014) <https://svpressa.ru/politic/article/93974/> accessed 18 September 2021.

[374]Expert.ru, 'Mikhail Leontyev o Novorossii: Vossoyedineniye istoricheskoy Rossii neizbezhno [Mikhail Leontiyev on Novorossiya: The reunification of historical Russia is inevitable]' (Expert.ru, 2014) <https://expert.ru/2014/07/18/mihail-leontev-o-novorossii-vossoedinenie-istoricheskoj-rossii-neizbezhno/> accessed 18 September 2021.

[375]Expert.ru, 'Mikhail Leontyev o Novorossii: Vossoyedineniye istoricheskoy Rossii neizbezhno [Mikhail Leontiyev on Novorossiya: The reunification of historical Russia is inevitable]' (Expert.ru, 2014) <https://expert.ru/2014/07/18/mihail-leontev-o-novorossii-vossoedinenie-istoricheskoj-rossii-neizbezhno/> accessed 18 September 2021.

[376]Denys Tymoshenko, 'U Kremlya byili realnyie rezultatyi «referenduma» v Donetske, i oni emu ne ponravilis? [Did the Kremlin have real results of the 'referendum' in Donetsk, which it did not like?]' (DonbasRealii, 12 May 2020) <https://www.radiosvoboda.org/a/30608153.html> accessed 18 September 2021.

Although the head of the Central Election Commission of the self-proclaimed 'DPR' Roman Lyagin, during a press conference, said that after the 'referendum,' the Donetsk region would remain a part of Ukraine, it would seem that joining Russia was another potential outcome.[377] Indeed, the legislative proposals advanced at that time in Russia indicate that it was preparing a legal basis for potential 'admission' of the breakaway regions of Ukraine. As Mark Voyger states, one of these attempts was 'a draft amendment to the law on the admission of territories into the RF that claimed to allow Russia to legally incorporate regions of neighbouring states following […] local referenda.'[378] The author submitted the draft to Russian Duma a day before the appearance of 'green little men' in Crimea and withdrew it on 20 March 2014 following the Crimea referendum that occurred four days before. In Voyger's opinion, it indicates 'the high level of coordination between the military and non-military elements of Russian hybrid efforts, especially in the lawfare and information domains.'[379]

Presently, Russia does not recognize the independence of the self-proclaimed republics in Donbas and does not actively seek to join them to its territory, presumably because maintaining a low-scale armed conflict in the east of the country is a much more powerful tool of destabilizing and weakening Ukraine.

4.2. Russia's passportisation campaign in Donbas

In 2019 Russia introduced a simplified procedure for the acquisition of Russian citizenship for the residents of two separatist regions. The legal basis for this measure was a decree signed by President Putin on 29 April 2019. Putin described this as a 'humanitarian measure which was not intended to create problems for Ukrainian authorities.'[380] However, experts stress that Putin contradicted his own 'humanitarian' excuse on 17 July 2019, when he signed a second decree allowing all Ukrainians in Donetsk and Luhansk regions (even those who live in territories under Ukrainian government control) to receive Russian passports.[381] Apparently, the decrees were introduced because of a large number of applicants from the separatists' regions seeking to obtain Russian citizenship.[382] Ukraine decried such 'humanitarian aid' as a breach of its sovereignty[383]

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[377]BBC News Ukraine, 'V Donetske obnarodovany rezultaty 'referenduma' [Results of 'referendum' announced in Donetsk]' (BBC News Ukraine, 2014) <https://www.bbc.com/ukrainian/ukraine_in_russian/2014/05/140511_ru_s_donbass_referendum> accessed 18 September 2021.

[378]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 4.

[379]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 4.

[380]Mikhail Kirillov, 'Nazvano chislo poluchivshih rossiyskiy pasport zhiteley Donbassa [The number of residents of Donbass who received a Russian passport has been named] (Lenta.ru, 2021) < > accessed 18 September 2021.

[381]Halya Coynash, 'Putin's Russian passport aggression against Ukraine fizzles in occupied Donbas' (Kharkiv Human Rights Protection Group, 2020) <https://khpg.org/en/1601905656> accessed 18 September 2021.

[382]Mikhail Kirillov, 'Nazvano chislo poluchivshih rossiyskiy pasport zhiteley Donbassa [The number of residents of Donbass who received a Russian passport has been named] (Lenta.ru, 2021) <https://lenta.ru/news/2021/02/18/donbass_pasport/> accessed 18 September 2021.

[383]Alexandr Dmitruk, 'Glava MID Ukrainy prizval zhiteley okkupirovannogo Donbassa ne poluchat pasporta RF [Ukrainian Foreign Minister urged residents of the occupied Donbas not to receive Russian passports]' (Hromadske, 2019) <https://hromadske.ua/ru/posts/glava-mid-ukrainy-prizval-zhitelej-okkupirovannogo-donbassa-ne-poluchat-pasporta-rf> accessed 18 September 2021.

and the European Council stated that it 'runs counter to the spirit and the objectives of the Minsk agreements.'[384]

In 2020 the number of passports issued in Donbas was far lower than initially expected by Moscow.[385] Russia then proceeded with the enactment of the Law 'On Amendments to Article 333-35 of the Tax Code of the Russian Federation.'[386] On 24 April 2020 Putin signed this law, which exempted the residents of Donbas from paying the state duty for admission to Russian citizenship.[387] The move was instantly welcomed by the 'parliamentarian speaker' of the 'DPR's people's council,' who said that 'this step is not only a confirmation of the strengthening of integration processes with the RF, but also an indicator of who is really concerned about the fate of people in the international community, and who violates all norms of state and international law in favour of political games.'[388] It confirms that Russia abuses the legal mechanisms to promote anti-Ukrainian propaganda and achieve political aims, thus substantiating the very essence of the lawfare pursued by Moscow.

Recently, Russia accelerated its mass passportisation campaign in the occupied territories of Donbas.[389] In April 2021, RF voiced its intention to issue 1 million passports in Donbas by the end of the year.[390] Yet, already in July 2021, Russia declared the possibility of issuing 2 million passports, stating that 611 thousand Donbas residents received Russian citizenship as of the day.[391] Human rights activists report the residents of Donbas are forced to obtain Russian passports, while dissidents are threatened with dismissals and 'talks' in the 'Ministries of State Security' of puppet republics.[392] EU believes that the distribution of Russian passports in areas of Donbas not

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[384]European Council, 'Conclusions of the European Council meeting (20 June 2019)' EUCO 9/19 CONCL 5, para 14 <https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf> accessed 18 September 2021.

[385]Halya Coynash, 'Putin's Russian passport aggression against Ukraine fizzles in occupied Donbas' (Kharkiv Human Rights Protection Group, 2020) <https://khpg.org/en/1601905656> accessed 18 September 2021.

[386] Official Internet portal of legal information, 'Federalnyy zakon ot 24.04.2020 № 129-FZ 'O vnesenii izmeneniy v statyu 333-35 Nalogovogo kodeksa Rossiyskoy Federatsii' [Federal Law of 24.04.2020 No. 129-FZ 'On Amendments toArticle 333-35 of the Tax Code of the Russian Federation']' (2020) <http://publication.pravo.gov.ru/Document/View/0001202004240026?index=1&rangeSize=1> accessed 18 September 2021.

[387]Lug-info, 'Putin podpisal zakon ob otmene dlya zhiteley Donbassa gosposhliny za polucheniye grazhdanstva RF [Putin signed a law abolishing the state duty for citizens of Donbas for obtaining Russian citizenship]' (Lug-info, 2020) <https://lug-info.com/news/putin-podpisal-zakon-ob-otmene-gosposhliny-za-poluchenie-grazhdanstva-rf-dlya-zhitelei-donbassa-55602> accessed 18 September 2021.

[388] People's Council of the DPR official website, 'Vladimir Bidyovka: Exemption from payment of state duty for admission to Russian citizenship opens up new opportunities for Republic' (People's Council of the DPR official website, 2020) <https://DPRsovet.su/vladimir-bidyovka-exemption-from-payment-of-state-duty-for-admission-to-russian-citizenship-opens-up-new-opportunities-for-republic/> accessed 18 September 2021.

[389]Ostap Kramar, '«Ne otrymuiesh pasport — ne pratsiuiesh»: Rosiia pryskoryla vydachu svoikh dokumentiv na Donbasi — ombudsmenka [You don't get a passport - you don't work»: Russia hastened the issuance of its documents in Donbas - ombudswoman]' (Hromadske, 2021) <https://hromadske.ua/posts/ne-otrimuyesh-pasport-ne-pracyuyesh-rosiya-priskorila-vidachu-svoyih-dokumentiv-na-donbasi-ombudsmenka accessed 18 September 2021.

[390] Borys Tkachiuk 'U Rosii zaiavyly pro namiry vydaty zhyteliam Donbasu shche maizhe piv miliona svoikh pasportiv do kintsia 2021 roku [Russia has announced plans to issue almost half a million more passports to Donbas residents by the end of 2021]' (Hromadske, 2021) <https://hromadske.ua/posts/u-rosiyi-zayavili-pro-namiri-vidati-zhitelyam-donbasu-she-majzhe-piv-miljona-svoyih-pasportiv-do-kincya-2021-roku> accessed 18 September 2021.

[391] Rbc.ru, 'V Gosdume nazvali chislo vydannykh zhitelyam Donbassa rossiyskikh pasportov [The State Duma named the number of Russian passports issued to residents of Donbas]' (Rbc.ru, 2021) <https://www.rbc.ru/rbcfreenews/60eeb6b59a79472e97151a77> accessed 18 September 2021.

[392] Censor.net, 'Zhyteliv ORDLO prymushuiut otrymuvaty pasporty RF, pohrozhuiuchy zvilnenniamy i 'rozmovamy' v 'MHB,' - pravozakhysnyky [Residents of ORDLO are forced to receive passports of the Russian Federation, being threatened with dismissals and 'talks' in 'MGB,' - human rights activists]' (Censor.net, 2021)

controlled by the Ukrainian government is a step towards the integration of these territories into Russia.[393]

Moscow misused the passport imperialism in Donbas in another way. In July 2021, it allowed the residents of the Donetsk and Luhansk regions with Russian passports to vote online in the upcoming elections to State Duma (the Russian Parliament).[394] The procedure for remote voting was approved by the decree of the Central Election Commission of Russia.[395]

Several days before the elections to the State Duma, the leadership of 'DPR' and 'LPR' began a mass forced issuance of Russian passports.[396] The fact is that in such passports the residence registration is not specified, so the 'documents' do not give the right to social payments and do not confer the full-fledged citizenship of the RF to its owners.[397] Moreover, the codes affixed to such passports belong to a non-existent unit of the Migration Service of the Rostov Region,[398] underlining the fundamental falseness of those documents.

Experts note that the real motive behind Russia's passportisation of residents of separatist regions is consolidating its control of the regions, without actually annexing them, and frustrating any efforts to settle the conflict.[399] Such a lawfare technique was used in South Ossetia and Abkhazia to legitimize the forced secession through the people's will and secure the legal foothold for potential arguments on protecting own citizens abroad.[400] Even if Ukraine regains control over Donbas, its reintegration will be challenging, as so many Russian citizens will serve to destabilize and sow turmoil in the region.[401]

<https://censor.net/ua/news/3279294/jyteliv_ordlo_prymushuyut_otrymuvaty_pasporty_rf_pogrojuyuchy_zvilnennyamy_i_rozmovamy_v_mgb_pravozahysnyky> accessed 18 September 2021.

[393]Hubenko Dmytro, 'Bloomberg: ES vvazhaie, shcho Rosiia khoche intehruvaty terytorii na Donbasi [Bloomberg: The EU believes that Russia wants to integrate the territories in Donbas]' (Deutsche Welle (DW), 2021) <https://www.dw.com/uk/bloomberg-yes-vvazhaie-shcho-rosiia-khoche-intehruvaty-terytorii-na-donbasi/a-57516316> accessed 18 September 2021.

[394]Borys Tkachiuk, 'Rosiia dozvolyla zhyteliam okupovanoho Donbasu holosuvaty na svoikh vyborakh onlain [Russia has allowed residents of the occupied Donbas to vote online in their elections]' (Hromadske, 2021) <https://hromadske.ua/posts/rosiya-dozvolila-zhitelyam-okupovanogo-donbasu-golosuvati-na-svoyih-viborah-onlajn> accessed 18 September 2021.

[395]Central Election Commission of Russia, 'Resolution No. 26 / 225-8 On the Procedure for Remote Electronic Voting in Elections scheduled for 19 September 2021' (20 July 2021), para 1.3 <http://www.cikrf.ru/activity/docs/postanovleniya/49826/> accessed 18 September 2021.

[396] Kostia Andreikovets, 'SBU: Na Donbasi pered vyboramy v Derzhdumu RF masovo rozdaiut rosiiski pasporty [SBU: Mass distribution of Russian passports in Donbas before the elections to the State Duma of the Russian Federation]' (Babel, 2021) <https://babel.ua/news/69530-sbu-na-donbasi-pered-viborami-v-derzhdumu-rf-masovo-rozdayut-rosiyski-pasporti> accessed 18 September 2021.

[397]Kostia Andreikovets, 'SBU: Na Donbasi pered vyboramy v Derzhdumu RF masovo rozdaiut rosiiski pasporty [SBU: Mass distribution of Russian passports in Donbas before the elections to the State Duma of the Russian Federation]' (Babel, 2021) <https://babel.ua/news/69530-sbu-na-donbasi-pered-viborami-v-derzhdumu-rf-masovo-rozdayut-rosiyski-pasporti> accessed 18 September 2021.

[398]Kostia Andreikovets, 'SBU: Na Donbasi pered vyboramy v Derzhdumu RF masovo rozdaiut rosiiski pasporty [SBU: Mass distribution of Russian passports in Donbas before the elections to the State Duma of the Russian Federation]' (Babel, 2021) <https://babel.ua/news/69530-sbu-na-donbasi-pered-viborami-v-derzhdumu-rf-masovo-rozdayut-rosiyski-pasporti> accessed 18 September 2021.

[399]Burkhardt Fabian , 'Russia's 'Passportisation' of the Donbas' [2020] 41 SWP Comment 1.

[400]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 5.

[401]Warsaw Institute 'What Is Behind Russia's Passportization of Donbas' (Warsaw Institute, 2021) <https://warsawinstitute.org/behind-russias-passportization-donbas/> accessed 18 September 2021.

4.3. The impact of Russian legislative amendments on the situation in Donbas

Moscow has constantly sought to conceal its military presence in Eastern Ukraine and deny any direct involvement in the conflict by exploiting, inter alia, legal means. Back in 2014 independent media reported on large amounts of military equipment and soldiers sent from Russia to Donbas under the guise of 'humanitarian convoy.'[402] While the information on the first Russian military deaths in Eastern Ukraine began to appear, on 28 May 2015 Putin signed a decree on amendments to the list of information classified as state secrets.[403] By adopting the decree, the losses of personnel of the Ministry of Defence 'in peacetime during the period of special operations' [emphasis added] have also become a military secret,[404] though previously the classification of such information as a secret one was only limited to times of war.[405] Experts place emphasis on the absence of the term 'special operations' in Russian legislation[406] that leaves space for discretionary interpretation. Earlier, a deputy of the Pskov Regional Duma tried to verify the information about Russian soldiers allegedly killed in Donbas, but having sent an official request, he did not receive any response.[407]

In March 2019 Putin signed the Law 'On amendments to the Federal Law 'On the status of military personnel,' which replaced the prohibition on divulging information about 'military secrets' with the same prohibition about 'other secrets protected by law,' a broader and more ambiguous phrase.[408] Moreover, it prohibits soldiers and conscripts from using smartphones or other devices connected to the Internet, and from revealing information to the media or social media on their location and movements.[409] Experts note the law is intended to preclude the spread of information

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[402]Halya Coynash, 'Putin threatens to increase Russia's 'support' for occupied Donbas' (Kharkiv Human Rights Protection Group, 2020) <https://khpg.org/en/1608430652> accessed 18 September 2021.

[403]Official Internet portal of legal information, 'Ukaz Prezidenta Rossiyskoy Federatsii ot 28.05.2015 № 273 'O vnesenii izmeneniy v perechen svedeniy. otnesennykh k gosudarstvennoy tayne. utverzhdennyy Ukazom Prezidenta Rossiyskoy Federatsii ot 30 noyabrya 1995 g. № 1203' [Decree of the President of the Russian Federation dated 28 May 2015 No. 273 'On amendments to the list of information classified as state secrets. Approved by the Decree of the President of the Russian Federation No. 1203 dated 30 November 1995']' (2015) <http://publication.pravo.gov.ru/Document/View/0001201505280001?index=0&rangeSize=1> accessed 18 September 2021.

[404]Irina Chevtaeva, 'Putin zasekretil dannyye o pogibshikh v mirnoye vremya voyennykh [Putin classified the data on the soldiers killed in peacetime]' (Deutsche Welle (DW), 2015) <https://bit.ly/3zJDtNl> accessed 18 September 2021.

[405]Polina Khimshiashvili, Artem Filipenok 'Putin zasekretil dannyye o pogibshikh voyennykh v mirnoye vremya [Putin classified the data on the killed soldiers in peacetime]' (Rbc.ru, 2015) <https://www.rbc.ru/politics/28/05/2015/5566d8889a79477ecebe00e8> accessed 18 September 2021.

[406]Polina Khimshiashvili, Artem Filipenok 'Putin zasekretil dannyye o pogibshikh voyennykh v mirnoye vremya [Putin classified the data on the killed soldiers in peacetime]' (Rbc.ru, 2015) <https://www.rbc.ru/politics/28/05/2015/5566d8889a79477ecebe00e8> accessed 18 September 2021.

[407]Irina Chevtaeva, 'Putin zasekretil dannyye o pogibshikh v mirnoye vremya voyennykh [Putin classified the data on the soldiers killed in peacetime]' (Deutsche Welle (DW), 2015) <https://bit.ly/3zJDtNl> accessed 18 September 2021.

[408]Official Internet portal of legal information, 'Federalnyy zakon ot 06.03.2019 № 19-FZ 'O vnesenii izmeneniy v stati 7 i 28-5 Federalnogo zakona 'O statuse voyennosluzhashchikh' [Federal Law of 06.03.2019 No. 19-FZ 'On Amendments to Articles 7 and 28-5 of the Federal Law' On the Status of Servicemen']' (2019) <http://publication.pravo.gov.ru/Document/View/0001201903060013?index=0&rangeSize=1> accessed 18 September 2021.

[409]Official Internet portal of legal information, 'Federalnyy zakon ot 06.03.2019 № 19-FZ 'O vnesenii izmeneniy v stati 7 i 28-5 Federalnogo zakona 'O statuse voyennosluzhashchikh' [Federal Law of 06.03.2019 No. 19-FZ 'On Amendments to Articles 7 and 28-5 of the Federal Law' On the Status of Servicemen']' (2019) <http://publication.pravo.gov.ru/Document/View/0001201903060013?index=0&rangeSize=1> accessed 18 September 2021. See also, Halya Coynash 'Putin signs law to stop soldiers divulging proof for the Hague about Russia's war against Ukraine' (Kharkiv Human Rights Protection Group, 2019) <https://khpg.org/en/1552229738> accessed 18 September 2021.

about Russia's military engagement in the conflict, thus hiding the evidence of war crimes and other atrocities committed by the Russian side and securing continuous impunity.[410]

Recent amendments to the Constitution of Russia may have a detrimental impact upon Ukrainian struggles to revive the status quo ante bellum. If Donbas is ever to follow the fate of Crimea and to be annexed by Russia, the effects of the provisions of the amended Article 67 of RF's Constitution on the ban of alienation of its territory (discussed above, Chapter 2.2.1) will be expanded to Donbas. Any further 'alienation' of Donbas to another state, including its return to Ukraine, would be perceived by Russia as a grave breach of its Constitution, thus allowing Moscow to express its outrage and use the additional, recently created 'legal' lever of influence against Kyiv and the international community as a whole. Although no norms of similar content exist in international law, Russia's possible exploitation of this Constitutional provision would hinder the implementation and prejudice the validity of Ukrainian scenarios of de-occupation of Donbas.

4.4. Russia's exploitation of international law aimed at hindering the settlement of the conflict

Apart from waging lawfare on the national arena, Russia widely exploits international organizations and international judicial authorities.[411] In 2014 Russia attempted to use the UN Security Council to sanction the opening of 'humanitarian corridors' in Donbas,[412] and in 2015 it vetoed the UN Security Council Resolution aimed at establishing a tribunal for the prosecution of those responsible for the downing of flight MH17 in Eastern Ukraine.[413] Reportedly, through the Russian observers within the OSCE, Moscow uses the organization for intelligence gathering and reconnaissance.[414] Russia also put efforts to limit the OSCE Observer Mission at Russian Checkpoints Gukovo and [Russian] Donetsk mandate.[415] The Mission was established following the Russian official offer to host the OSCE on its border and it monitors only 40 meters as of 400 kilometres of uncontrolled Russian-Ukrainian border.[416] It is not surprising that Russia blocks all attempts to either broaden the existing mandate or establish permanent OSCE observers on the whole stretch of the border.[417]

Lately, it is individual applications to the European Court of Human Rights (ECtHR) that have become another legal tool that Russia uses to put pressure on Ukraine. Thousands of applications have been filed with the European Court of Human Rights against Ukraine on behalf of residents

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[410]Halya Coynash 'Putin signs law to stop soldiers divulging proof for the Hague about Russia's war against Ukraine' (Kharkiv Human Rights Protection Group, 2019) <https://khpg.org/en/1552229738> accessed 18 September 2021.
[411]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 5.
[412]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 5.
[413]Security council report, 'UN Documents for Ukraine: Other' (Security Council Report) <https://www.securitycouncilreport.org/un_documents_type/other-documents/?ctype=Ukraine&cbtype=ukraine> accessed 18 September 2021.
[414]Mark Voyger, 'Russian Lawfare – Russia's Weaponisation of International and Domestic Law: Implications for the Region and Policy Recommendations' [2018] 4(2) Journal on Baltic Security 5.
[415]Halya Coynash, 'Russian tanks entering Ukraine that the OSCE is mandated to miss' (Kharkiv Human Rights Protection Group, 2018) <https://khpg.org/en/1523399477> accessed 18 September 2021.
[416]Oksana Kovalenko, 'Iliuziia kontroliu: Chomu misiia OBSIe ne bachyt tankiv rosiian na kordoni [The illusion of control: Why the OSCE mission does not see Russian tanks at the border]' (Ukrainska Pravda, 2018) <https://www.pravda.com.ua/articles/2018/04/2/7176457/> accessed 18 September 2021.
[417]Halya Coynash, 'Russian tanks entering Ukraine that the OSCE is mandated to miss' (Kharkiv Human Rights Protection Group, 2018) <https://khpg.org/en/1523399477> accessed 18 September 2021.

of the occupied territories. The journalistic investigations show that among the lawyers who sent these complaints to the ECtHR are Russians from a private lawyer company partnered with the Ministry of Justice of the Russian Federation and lawyers from the occupied territories of Donbas.[418] It has been suggested that this is a planned campaign conducted to overload the ECtHR and discredit it as an international court as well as to put additional pressure on Ukraine.[419] Indeed, if these complaints are considered admissible by the ECtHR, the Ukrainian government will be required to explain their position regarding the complaints raised in the applications. Ukraine will have to use its resources to reply to the complaints and, in case of a finding of the violation of the European Convention on Human Rights, provide just satisfaction to the applicants, most likely in the form of financial compensation. The finding of the violations by the ECtHR can also be used by Russia in its anti-Ukrainian propaganda in separatist regions and as leverage in negotiations concerning the future of the regions.

On 22 July 2021 Russia filed its first inter-state claim against Ukraine to the ECtHR.[420] Moscow accuses the Ukrainian government of civilian deaths in Donbas while carrying out the anti-terrorist operation, of the policy of discrimination against the Russian-speaking population, of deaths, injuries, and destruction of property as a result of shelling the adjacent territory of Russia, and of depriving residents of certain territories of south-eastern Ukraine of the opportunity to participate in elections to central authorities.[421] Ignoring the ongoing hearings in the Netherlands[422] and irrefutable evidence of Russian involvement,[423] Moscow also accuses Kyiv of the deaths of 298 people on board Flight MH17 by Ukraine's failure to close airspace over the combat zone.[424] On

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[418]Radio Svoboda, 'Advokaty z Rosii y okupovanykh terytorii splanovano podaiut tysiachi zaiav do YeSPL proty Ukrainy dlia yii dyskredytatsii – 'Skhemy' [Lawyers from Russia and the occupied territories file thousands of applications to the ECHR against Ukraine to discredit it – 'Skhemy']' (Radio Svoboda, 2021) <https://www.radiosvoboda.org/a/news-skhemy-masovi-skarhy-proty-ukrayiny-do-yespl/31193785.html?fbclid=IwAR3rNPNcK5CamLSoTz0u4B3lYJrKl9JjdP7v7gPWiCatZcwjy0sEsKwxxhk> accessed 18 September 2021.

[419]Radio Svoboda, 'Advokaty z Rosii y okupovanykh terytorii splanovano podaiut tysiachi zaiav do YeSPL proty Ukrainy dlia yii dyskredytatsii – 'Skhemy' [Lawyers from Russia and the occupied territories file thousands of applications to the ECHR against Ukraine to discredit it – 'Skhemy']' (Radio Svoboda, 2021) <https://www.radiosvoboda.org/a/news-skhemy-masovi-skarhy-proty-ukrayiny-do-yespl/31193785.html?fbclid=IwAR3rNPNcK5CamLSoTz0u4B3lYJrKl9JjdP7v7gPWiCatZcwjy0sEsKwxxhk> accessed 18 September 2021.

[420]General Prosecutor's Office of the Russian Federation, 'Rossiyskaya Federatsiya obratilas v Evropeyskiy Sud po pravam cheloveka s mezhgosudarstvennoy zhaloboy protiv Ukrainy [The Russian Federation applied to the European Court of Human Rights with an interstate complaint against Ukraine]' (General Prosecutor's Office of the Russian Federation, 2021) <https://epp.genproc.gov.ru/web/gprf/mass-media/news?item=63838459> accessed 18 September 2021; See also, The Moscow Times, 'Russia Takes Ukraine to European Court Over Post-Annexation Grievances' (The Moscow Times, 2021) <https://www.themoscowtimes.com/2021/07/22/russia-takes-ukraine-to-european-court-over-post-annexation-grievances-a74584> accessed 18 September 2021.

[421]General Prosecutor's Office of the Russian Federation, 'Rossiyskaya Federatsiya obratilas v Evropeyskiy Sud po pravam cheloveka s mezhgosudarstvennoy zhaloboy protiv Ukrainy [The Russian Federation applied to the European Court of Human Rights with an interstate complaint against Ukraine]' (General Prosecutor's Office of the Russian Federation, 2021) <https://epp.genproc.gov.ru/web/gprf/mass-media/news?item=63838459> accessed 18 September 2021.

[422]The MH17 trial official website <https://www.courtmh17.com/en/> accessed 18 September 2021.

[423]Netherlands Public Prosecutor Service, 'Update in criminal investigation MH17 disaster' (Netherlands Public Prosecutor Service, 2018) <https://www.prosecutionservice.nl/topics/mh17-plane-crash/news/2018/05/24/update-in-criminal-investigation-mh17-disaster> accessed 18 September 2021.

[424]General Prosecutor's Office of the Russian Federation, 'Rossiyskaya Federatsiya obratilas v Evropeyskiy Sud po pravam cheloveka s mezhgosudarstvennoy zhaloboy protiv Ukrainy [The Russian Federation applied to the European Court of Human Rights with an interstate complaint against Ukraine]' (General Prosecutor's Office of the Russian

top of that, Russia requested to the Court apply Rule 39 of the Rules of the Court and oblige Ukraine to stop the blockade of the North Crimean Canal and lift the restrictions on the rights of Russian-speaking persons.[425] The ECtHR dismissed the Russian request on interim measures:[426] 'The Court decided to reject the request under Rule 39 of the Rules of Court since it did not involve a serious risk of irreparable harm of a core right under the European Convention on Human Rights.'[427] The inter-state claim does not seem to be legally sound, rather it appears to form part of Russian lawfare and its strategy to flood ECtHR with claims against Ukraine.[428]

The attacks of the ECtHR with Russia's applications would be not so hypocritical if not the amendment of Articles 79 and 125 of the Constitution of Russia, that provided Russia and its Constitutional Court with a power to declare decisions of international courts non-enforceable if such decisions contradict either the Constitution or the foundations of public order of the Russian Federation (discussed above, Chapter 2.2.4).

Finally, Russia exploits the current ambiguity in legal qualification of the armed conflict in the east of Ukraine to present itself as a peacemaker and a humanitarian aid provider, while in reality, it is an active participant in the armed conflict.[429] Wayne Jordash points out that this legal ambiguity is not only the consequence of Russian propaganda and the Kremlin's politicking. It is also the result of the lack of sustained effort on the part of Ukraine to properly demonstrate, by facts and evidence, the existence of an international armed conflict with the involvement of Russia or Russian occupation of Eastern Ukraine according to international humanitarian law.[430] The Kremlin's arguments on being a peacemaker and a humanitarian aid provider would be backed by the amended Article 79.1 of the Constitution of Russia, which entitled the latter to preserve and strengthen international peace and security (discussed above, Chapter 2.2.5).

To conclude, in its strategy towards Ukraine, Russia is focused on maintaining a low-intensity armed conflict. Lawfare played a less prominent role in Russia's strategy towards Donbas compared to the annexation of Crimea. However, recent developments indicate that Russia is not only stepping up its military effort to put pressure on Ukraine, including by amassing its military

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Federation, 2021) <https://epp.genproc.gov.ru/web/gprf/mass-media/news?item=63838459> accessed 18 September 2021.

[425]General Prosecutor's Office of the Russian Federation, 'Rossiyskaya Federatsiya obratilas v Evropeyskiy Sud po pravam cheloveka s mezhgosudarstvennoy zhaloboy protiv Ukrainy [The Russian Federation applied to the European Court of Human Rights with an interstate complaint against Ukraine]' (General Prosecutor's Office of the Russian Federation, 2021) <https://epp.genproc.gov.ru/web/gprf/mass-media/news?item=63838459> accessed 18 September 2021.

[426]Radio Svoboda, 'YeSPL vidkhylyv vymohu Rosii shchodo promizhnykh zakhodiv proty Ukrainy [The ECtHR rejected Russia's request for interim measures against Ukraine]' (Radio Svoboda, 2021) <https://www.radiosvoboda.org/a/news-espl-rosiia-pozov/31374156.html?utm_source=telegram&utm_medium=rs> accessed 18 September 2021.

[427]European Court of Human Rights, press release 'Inter-State application brought by Russia against Ukraine' (ECtHR, 2021) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7085775-9583164&filename=Inter-State%20case%20brought%20by%20Russia%20against%20Ukraine.pdf> accessed 18 September 2021.

[428]Current time, 'Russia Files Case Against Ukraine At European Court Over MH17, Alleged Rights Abuses' (Radio Free Europe/Radio Liberty, 2021) <https://www.rferl.org/a/russia-ukraine-european-court/31372057.html> accessed 18 September 2021.

[429]Wayne Jordash, 'Ukraine must address the legal ambiguity enabling Putin's not-so-secret war' (Atlantic Council, 2020) <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-must-address-the-legal-ambiguity-enabling-putins-not-so-secret-war/> accessed 18 September 2021.

[430]Wayne Jordash, 'Ukraine must address the legal ambiguity enabling Putin's not-so-secret war' (Atlantic Council, 2020) <https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-must-address-the-legal-ambiguity-enabling-putins-not-so-secret-war/> accessed 18 September 2021.

forces along the Ukrainian eastern border,[431] but also resorting to lawfare. Particularly, it exploits the mechanisms set in the national law (amending the legislation on state and military secrets, changing the provisions of its Constitution on protecting compatriots abroad) to conceal or potentially justify its presence in Donbas. Moscow also takes advantage of the loopholes in the international law by exploiting its status in the international organizations (UN, OSCE), arguing in favour and broadening the content of the vague concepts in the international law (e.g., responsibility to protect), and filing ill-founded claims to the international courts against Ukraine.

Russia resorts to such methods of lawfare to tighten its grip over the separatist territories, create preconditions for a potential overt intervention in the future and further frustrate Ukrainian efforts to settle the crisis in Donbas.

[431]Iuriy Sheiko, 'Gotovila li Rossiia nastuplenie na Ukrainu: vyvody zapadnykh analitikov [Was Russia preparing an offensive against Ukraine: conclusions of Western analysts]' (Deutsche Welle (DW), 2021) <https://www.dw.com/ru/gotovit-li-rossija-nastuplenie-na-ukrainu-na-chto-ukazyvajut-novye-dannye/a-57284735> accessed 18 September 2021.

5. CONCLUDING REMARKS

The amended Constitution of the Russian Federation resurrects imperial rhetoric. It operates in non-legal categories such as 'common Russian cultural identity,' 'special bonds' and 'historic truth,' and portrays Russia as a self-proclaimed guardian of everything Russian even in other states. This promotes the idea that Russia's sovereignty prevails over that of other countries and even above its international law obligations.

Many legislative changes introduced by Russia in 2020, in a hurried manner without a proper legal basis in domestic law, embody the supposedly law-based rhetoric that Russia employed in annexing Crimea and fuelling the armed conflict in Eastern Ukraine. These changes have been directed at suppressing any dissent or future attempts at returning Crimea to Ukraine. They have also created at the domestic level a supposed legal basis for Russia's refusal to execute any of the judgments delivered by international courts and tribunals against Russian Federation. As a matter of international law, Russia cannot rely on its internal laws to justify its failure to abide by its international law obligations. Nonetheless, Russia adopts and uses its domestic legislation to give an air of legitimacy to what in essence are violations of international law rules, not least to garner support from its own population.

Russia exploits the ambiguity of certain rules of international law in its lawfare against Ukraine. Among these rules are the norms relating to use of force, humanitarian intervention and the right to self-determination. Russia's actions suggest that lack of clear and unambiguous rules in these domains coupled with existence of *sui generis* exceptions render them more susceptible to exploitation in lawfare. However, a closer look at these norms of international law demonstrated the falseness and incorrectness of Russia's claims concerning legality of its use of force in Crimea and Crimea's secession. In our opinion, this shows that the law itself can become a powerful tool in countering lawfare.

There is more at play in Russia's exploitation of domestic and international law than to justify its unlawful actions. Russia's stance on the annexation of Crimea indicates that it seeks to revise the existing international legal framework. By attacking Ukraine, Russia violated fundamental tenets of international law and broke its obligations under several international treaties. To justify its actions, Russia is trying to introduce its own definitions of important legal categories such as right to self-determination, humanitarian intervention, responsibility to protect and use of force. Researchers agree, that by doing so Russia is seeking to create an alternative legal framework.

Upon closer look Russia's arguments concerning legality of its actions in Crimea and Donbas are untenable. However, dismissing them as mere incompetence would be a mistake. Even if weak from the legal standpoint, the revisionist rhetoric, coming from a permanent UN SC member and a nuclear state, is dangerous. It uses the pluralistic nature of international law in bad faith and sets a dangerous precedent: it encourages separatism, re-introduces the notion of spheres of influence into international law, resurrects the idea of 'righting historical wrongs,' which compromise the existing 'Western' world order. To quote Aurel Sari, Russia is trying 'to create and maintain an asymmetrical legal environment that favours their operations and disadvantages those of their opponents.'