

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

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

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

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

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

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

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

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

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

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<sup>1</sup> I thank Elena S. Aleksandrova, PhD candidate and researcher of the secession issue in public international law, for collecting and reviewing publications and the principal approaches to Crimea’s secession.

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>4</sup> See, Issaeva, *supra* note 2.

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

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

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

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

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

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