

**BETWEEN ILLEGAL RUSSIAN OCCUPATION
AND WESTERN ECONOMIC SANCTIONS,
IS IT AT ALL RELEVANT (AND EVEN POSSIBLE TO DETERMINE)
WHAT THE CRIMEAN PEOPLE WANT?**

di

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Abstract

This paper retraces the events surrounding the 2014 illegal occupation of Crimea, addressing the difficult political question of whether manifestations of the will of Crimean people in recent years can have relevance for the status of Crimea. So far, any attempts to frame the Crimean events and discern the possible will of the Crimean people to obtain independence is derailed by the illegal infiltration of the Crimean territory by Russian operatives without insignia, and by the final outcome of this move: the annexation. While legally it is very clear that international law cannot recognize the transfer of a territory through an illegal occupation, several facts, including the history of Crimea, the absence of bloodshed during the occupation, the relative stability of Crimea, and the manifestations of democratic will since 2014, indicate that the Crimean situation is unique. The purpose of this paper is to ask what we can make of popular manifestations of political will in a context where the use of force and the violation of legal obligations are in play.

Summary:

I. Introduction. – II. Although Lawyers would Prefer the Opposite, History Matters. - III. 1954 and 1991: an authoritative transfer, and a democratic vote for independence. - IV. The 2014 events. – V. History returns, and the forgotten challenge of annexation makes a comeback.

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I. Introduction

Five years ago, back in 2014, in the months surrounding the protests in Kiev and the change of the Ukrainian Government, Russian forces without insignia entered Crimea. Eventually, the peninsula on the Black Sea became a part of Russia. While a great deal of analysis has been dedicated to the (il)legal issues pertaining to Russia's occupation of the region, less attention has been dedicated to considering the will of the Crimean elected representatives and of the Crimean people. Squeezed between the legal arguments of the Ukrainian State and the Western States on one side, and Russian overreaching on the other, the facts of 2014 tend to be framed without an assessment, or any consideration, of what Crimean people want – and of whether their will is of any relevance, in any case. The whole Crimean crisis is far from clear; it has more than one contradictory element. For example: it is not contested that Russia interfered in Crimean affairs, and that this interference involved the illegal use of force, but it is also not contested that this happened without bloodshed. While the Crimean occupation played out in violation of one of the most important – if not, *the* most important – rules of international law, the *prohibition of the use of force for conquering a territory*, still, Crimea became Russian without a single shot being fired – and with a relatively stability following the annexation. Moreover, because Crimea was illegally occupied, the positions of the Crimean elected assembly and of the Crimean people in the 2014 referendum are not considered legally relevant; however, these expressed a clear position, and it is worthy of note that, in recent times, occupations elsewhere have not been considered as undermining all authenticity in the expression of political will. The purpose of this paper is to ask what we can make of popular manifestations of political will in a context where the use of force and legal obligations are in play.

In order to do so, this paper will first go through the particular history of the Crimean peninsula (Sect. 2). Then it will consider some recent events that are often invoked in the narrative in favor of the Russian annexation (Sect. 3). Sect. 4 will highlight the events surrounding the 2014 occupation and annexation (or reunification, depending on the narrative) of Crimea. Sect. 5 will highlight the importance of the prohibition of annexation in contemporary international law. Finally, Sect. 6 and Sect. 7 will reflect on the reactions of the international community and whether it is possible to separate the democratic processes from Russian occupation.

II. Although Lawyers would Prefer the Opposite, History Matters

When the Golden Horde captained by Genghis Khan withdrew, back from the borders of Europe towards Asia, many Tatar principalities emerged on the drying sands. Among these was the Khanate of Crimea, which occupied an area more or less covering the Crimean Peninsula and the lands surrounding the Azov Sea, corresponding to what today are the territory of Southern Ukraine and the Russian region along the Black sea.

Two centuries later, in 1475, the Khanate was militarily defeated by the Ottomans, and became a vassal of the Sublime Porte.¹ Then, in 1783, when the tide of the Ottoman Empire receded and set off the 'Eastern Question',² Crimea was annexed for the first time by the Czarist Empire. Those were the early days of what Arthur Conolly was calling 'the Great Game', the confrontation between the British and

¹ Mikhail Kizilov, 'Administrative Structure of the Crimea before and after the Russian Annexation of 1783' (2016) 5 *Vostok (Oriens)* 2016 53. Further historical references can be found in Neil Kent, *Crimea: A History* (Hurst, 2016).

² Alexander Lyon Macfie, *The Eastern Question, 1774-1923. Revised Edition* (Routledge, 1996).

Russian empires on the control of Asia;³ the roots of multi-cultural Crimea can be found in this age, when layers of different ethnicities, cultures, and rulers overlapped in the region – and they have continued to do so until now, notwithstanding the occasional repression of the region.

In 1853, this small, jagged, and often troubled peninsula reluctantly stepped to the center of European history. For three years, Ottoman, French, Savoy, and UK troops, driven by a dispute over who held the rights to manage sites in the Holy Land, fought against Russia, and obtained a victory which would have many historical consequences.⁴ It was an extremely bloody war, the same that was witnessed and narrated by a young Lev Tolstoy, and it fueled strong anti-Russian sentiment in Europe.⁵

Once again, in the last years, history knocked at the Crimea's door, and, like in the 19th Century, put strain on the relationship between Europe and Russia. The confrontation between Russia and Ukraine, and between the two souls of Ukraine, brings to mind one of the opening pages of Samuel Huntington's *The Clash of Civilizations*. The book became well known and widely celebrated in the wake of the 2001 attack on the World Trade Center in New York, because of the 'fault lines' between Islam and the rest,⁶ but the example he chose to illustrate his international relations theory in the first pages of the book had to do with Ukraine.

'A statist paradigm, for instance, leads John Mearsheimer to predict that "the

³ Peter Hopkirk, *The Great Game: On Secret Service in High Asia* (John Murray, 1992).

⁴ For the first time since the Napoleonic conflicts, Russia lost a war; and for the first time, Savoy was admitted to a peace conference, where arguments in support of unifying the Italian peninsula could be exposed; Orlando Figes, *Crimea. The Last Crusade* (Penguin, 2011).

⁵ Leo Tolstoy, *The Sebastopol Sketches* (1855) (Penguin, 1986). Tatiana Polomochnykh, 'La Crimea di Tolstoj', Limes Online, 20 November 2014, at <http://www.limesonline.com/la-crimea-di-tolstoj/67500>, describes the enthusiasm of a young person for the war, and then his dismay before the extremely violent conflict, which he witnessed, eventually developing into the pacifism that permeates his masterpiece *War and Peace*.

⁶ Samuel P Huntington, *The Clash of Civilization and the Remaking of World Order* (Simon & Schuster, New York, 1996) 28: 'In this new world the most pervasive, important, and dangerous conflicts will [be] between peoples belonging to different cultural entities'.

situation between Ukraine and Russia is ripe for the outbreak of security competition between them." A civilizational approach, on the other hand, emphasizes the close cultural, personal, and historical links between Russia and Ukraine and the intermingling of Russians and Ukrainians in both countries... [...] While a statist approach highlights the possibility of a Russian-Ukrainian war, a civilizational approach minimizes that and instead highlights the possibility of Ukraine splitting in half...'.⁷

This was both prophetic and wrong, given that Ukraine faces both internal strife and a conflict with Russia, which has already occupied and annexed a piece of Ukraine and is still involved in its civil war. We can say today that Huntington had a point – and Mearsheimer did too.

Law usually tries to step back from history and concepts such ‘civilization’ in order to affirm principles and legality. Especially when historical facts are complicated and tend to heat up the emotional intensity of a situation, law tends to step in as a cooling factor, detached from the tensions in play. However, in dealing with the Crimean issue, history cannot be entirely ignored – it is not ignored by those who live in the territories touched by it, and should also be considered in trying to get a complete picture of the events of the last five years.

III. 1954 and 1991: an authoritative transfer, and a democratic vote for independence.

A century after the bloody Crimean war, in 1954, the histories of Russia and Crimea diverged. The Soviet Union Supreme Soviet, under the leadership of Nikita Khrushchev, decided to transfer Crimea from the Russian Soviet Federative Socialist Republic to the Ukrainian Soviet Socialist Republic on 19 February 1954.

⁷ Huntington (6) 28 and 37.

This operation was far from democratic: Gwendolyn Sasse, in particular, stresses both the lack of legal legitimacy of this transfer and the poor (totally absent) democratic process it involved.⁸ Concerning the first point, she observes that '[t]he formality of the transfer is underscored by a lack of details on the motives', and that there were 'slight inconsistencies' between legal decisions regarding that relocation.⁹ The process of transferring Crimea from Russia to Ukraine in 1954 was, therefore, opaque, and seems to have been enacted by following the rule of authority, rather than the rule of law.

Not only was the legal framework of the transfer weak, there was also a notable lack of democratic involvement. Sasse points out that the Supreme Soviet implemented its decision 'from above', while making it seem to happen 'from below':

*'representatives of both the Crimean oblast and its city councils (including the head of the Sevastopol city council) did not speak to the motion. Even if they had spoken, it is unlikely that they would have diverged from the official line. Their presence may be seen as part of the stage managing of a demand "from below" for the transfer. [...] The ultimate decision to transfer Crimea was made in Moscow and formally approved in Kyiv.'*¹⁰

Taking a formalistic approach to these past events, the legal title at the basis of the transfer of Crimea from Moscow to Kiev is far from clear. It is true that it happened within, and with the approval, of the interested central authorities (the Russian and Ukrainian Governments), and that, therefore, it did not, and does not, trigger any suspicion of a change in the territory of a State *against* the will of the Government. It may be questionable, however, whether transfer process was carried out in

⁸ Gwendolyn Sasse, *The Crimea Question: Identity, Transition, and Conflict* (HURI Harvard, 2007) 107-126. On this see also Mark Kramer, 'Why Did Russia Give Away Crimea Sixty Years Ago?', Mar 19, 2014, at <https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago>.

⁹ Ibid. 107 ff.

¹⁰ Sasse (8) 110.

conformity with the constitutional legal order of the interested state, and, above all, whether the opinion of the people interested by such a change was duly taken into account.¹¹

More recent events surrounding the dissolution of the Soviet Union are, likewise, not entirely clear. In the new course of the Ukrainian history of Crimea, issues about its special status emerged before the collapse of the Soviet Union and during the negotiations on the separation between Ukraine and Russia, and saw the emergence of the Crimean autonomy movement. In January 1991 a referendum on the creation of an autonomous Soviet of Crimea obtained an overwhelming majority, *making it the last born Soviet before the collapse of the Soviet Union*, in late 1991. It was also the only one that was established through a democratic process.¹² However, Crimea did not become a new, independent State, like the other Soviet regions. During the years in which the border between Russia and Ukraine was drawn, with difficulty, and the constitutional legal order of Ukraine was designed, Crimea became an autonomous province of the Ukrainian State.¹³ It should not come as a total surprise, therefore, that the former leader of the Soviet Union, Michail Gorbaciov, reacting to the 2014 Russian occupation and annexation of Crimea, remarked: 'the people decided to correct a mistake'.¹⁴

The last seventy years of Crimean history are far from being easy to legally frame. The importance of the 1954 transfer, together with the subsequent, fraught

¹¹ Giuseppe Martinico, *Constitutionalists' guide to the populist challenge*, Carlos Closa, Costanza Margiotta, and Giuseppe Martinico (eds.), *Between Democracy and Law. The Amoralism of Secession* (Routledge, 2020) 87-101; European Commission for Democracy through Law (Venice Commission), doc. doc. CDL-INF (2000), Self-Determination and Secession in Constitutional Law [2000], Report adopted by the Commission at its 41th meeting (Venice, 10-11 December 1999), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)002-e).

¹² Sasse (8) 135-140.

¹³ Sasse (8) 142-173.

¹⁴ *Gorbaciov: Crimea ha corretto errore*, ANSA (17 March 2014), at http://www.ansa.it/web/notizie/rubriche/mondo/2014/03/17/Gorbaciov-Crimea-ha-corretto-errore_10244937.html.

relationship between Russia and Ukraine in the aftermath of the Soviet Union over the status of Crimea, show, at the very least, that Crimea cannot be taken for granted as a solely Ukrainian entity, and suggest that the people living there may have varied views on the matter.

IV. The 2014 events.

The facts surrounding the 2014 occupation and annexation are recent, well-known, and subject to extensive speculation,¹⁵ but repeating them briefly here is useful for understanding the positions of the key players today and their legal grounds.

After a decade of political movement toward the European Union, the North Atlantic Treaty Organization, and the West, marked by internal cyclical political struggles, on November 21st 2013 the Ukrainian Government, under the leadership of President Viktor Janukovyč, suspended the process of concluding the Deep and Comprehensive Free Trade Area with the European Union, which should have been signed in Vilnius, instead proposing a closer relationship with Russia.¹⁶ Several protests brought hundreds of thousands of people to Maidan Square in Kiev, which became the physical and symbolic center of protest. After three months of protests,

¹⁵ The bibliography is extended. The on line *Map Debate* on Crimea published by Oxford and updated at 3 august 2014 has 98 blog posts and articles, 'Debate Map: Ukraine Use of Force', at <http://opil.ouplaw.com/page/ukraine-use-of-force-debate-map>. After this first wave of opinions, many articles and books have been published: the on line catalogue of the Peace Palace in The Hague counts 95 journal articles, monographic studies and chapters in books, between 2015 and 2018. Among the many publications, a full spectrum of legal and political analysis can be read in the special issue 'Crisis in Crimea' of the 16 *German Law Journal* (2015) 351 (in particular Outi Korhonen, 'Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and War', at 451, gives a fresh look to the motives and the forces behind the conflict between Ukraine and Russia), and in the book edited by Władysław Czapliński, Sławomir Dębski, Rafał Tarnogórski, and Karolina Wierczyńska (eds.), *The case of Crimea's annexation under international law* (Scholar Publishing, 2017)

¹⁶ In 2014 the EU and Ukraine started a broad Association Agreement (Brussels on 21 March 2014h, at http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf), and on the 1 January 2016 they started the provisional application of Deep and Comprehensive Free Trade Area (at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/>)

with the western part of Ukraine protesting in favor of a closer partnership with the European Union, the Ukrainian Parliament voted, on 14 February 2014, to remove President Janukovyč.

Two weeks later, Russian military forces without insignia began entering Crimea: at first, about 2,000 soldiers parachuted in,¹⁷ and then the Russian military presence in the peninsula and in the waters along the Crimean coast was increased, in an intimidating display of power. Irregular militias, including Crimean people and officers, spread through the cities and seized the local Parliament. The Russian presence was real, as the Russian President explicitly acknowledged. The Crimean involvement was also a real factor: the tension never resulted in bloodshed.¹⁸

Eventually the Crimean Parliament, on March 6, 2014, declared the removal of the Ukrainian president in Kiev unconstitutional, and asserted its independence from Ukraine, together with its decision to accede to Russia. A referendum on this decision was scheduled for March 16 in Crimea. On March 15, the Security Council drafted a resolution to proclaim the referendum invalid,¹⁹ but it could not be passed with thirteen votes in favor, the abstention of China, and Russia's veto.²⁰

In the meantime the Crimean Parliament also passed a law establishing that, in case of independence, Crimea would be annexed to Russia.²¹ As a result, the referendum was not on the independence of Crimea, but rather on its belonging to Ukraine or

¹⁷ https://www.repubblica.it/esteri/2014/02/28/news/ucraina_crimea_uomini_armati_prendono_il_controllo_dell_aeroporto_di_simferopol-79832862/

¹⁸ In an interview on April 16, Russian President Vladimir Putin admitted to the presence of Russian forces in Crimea, 'Putin Admits Russian Forces Were Deployed to Crimea', Reuters (17 April 2014), at <http://uk.reuters.com/article/russia-putin-crimea-idUKL6N0N921H20140417>

¹⁹ S.C. Draft Res. 2014/189 (15 March 2014)

²⁰ 'Security Council Fails to Adopt Text Urging Member States not to Recognize Planned 16 March Referendum in Ukraine's Crimea Region', U.N. Press Release SC/11319 (15 March 2014); Mikulas Fabry, 'How to Uphold the Territorial Integrity of Ukraine', 16 *German Law Journal* 416, 418

²¹ Juergen Bering, 'The Prohibition on Annexation: Lessons from Crimea' (2017) 49 *NYU Journal of International Law & Politics* 747, 776-757

Russia. The two options on the ballot, written in the three official languages of Crimea (Crimean Tatar, Russian, and Ukrainian) did not mention independence, but asked:

Do you support reunifying Crimea with Russia as a subject of the Russian Federation?

Do you support the restoration of the 1992 Crimean constitution and the status of Crimea as a part of Ukraine?’

The ballot concluded with a warning in all three languages that choosing both options would render the vote invalid.²² The final result of the referendum was an overwhelming majority for Crimean secession from Ukraine and transfer to Russia: with 83% voter turnout, 95% voted for the reunification with Russia.²³ If we follow the call for clarity in referendums on the mutation of a territory, in the wake of the Supreme Court of Canada’s *reference re Quebec* of 1998 and of the Venice Commission²⁴ (requiring clarity of the question of the referendum, clear participation, and a clear majority), the intention of the Crimean people to secede from Ukraine was manifest.

It was right after this chain of events, on 18 March 2014, that Russia proclaimed the

²² For a picture of the ballot and for its translation see <https://www.bbc.com/news/world-europe-26514797>. On the Crimean referendum and the need for ‘clarity’ in a democratic process of secession see Stéphane Beaulac, *Sovereignty Referendums: A Question of Majority? Or how “Majority” actually Begs Numerous Questions* in Carlos Closa, Costanza Margiotta, and Giuseppe Martinico (eds), *Between Democracy and Law. The Amoralism of Secession* (Routledge, 2020) 105. The Venice Commission contested the transparency of the referendum held in Crimea, and objected to the lack of clarity of the question on the ballot, see European Commission for Democracy through Law (Venice Commission), Opinion No. 762/2014, *Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea’s 1992 Constitution Is Compatible with Constitutional Principles* [2014] at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e).

On the rhetorical, political use of referendums in contemporary struggles for secession see Stephen Tierney, ‘Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies’ (2015) 16 *German Law Journal* 523.

²³ The figures are taken from Jure Vidmar, ‘The Annexation of Crimea and the Boundaries of the Will of the People’ (2015) 16 *German Law Journal* 365, at 365, with further references.

²⁴ Beaulac (22) 116-125.

incorporation of the Crimean territory, as the result of an agreement between the nascent independent Crimean State and Russia.²⁵ As Juergen Bering observed, 'From a Russian perspective, this means that Crimea first seceded from Ukraine to form its own independent state. This State then concluded a treaty with Russia that led to the incorporation into Russian territory'.²⁶

The issue was eventually brought up at the UN General Assembly, which adopted Resolution 262, on 27 March 2014, proclaiming the legal invalidity of the Referendum,²⁷ and triggering a series of General Assembly initiatives on the Crimean situation (most recently in December 2018), all characterized by more abstentions than votes in favor.²⁸

V. History returns, and the forgotten challenge of annexation makes a comeback.

Of all the problematic factors in this complex political and factual landscape, each of them contested by one side or the other, perhaps *the most problematic of all is the outcome*: that is, the annexation itself. At the end of this long struggle, Crimea did not

²⁵ Bering (21) 756.

²⁶ Ibid. at 756, fn. 37; Anatoliy V. Pronin, 'Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on Creation of New Federative Entities within the Russian Federation' (unofficial translation), 18 March 2014, at https://www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sebastopol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary.

²⁷ UN GA Res 262, 27 March 2014, calling all states 'to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means'. For a complete analysis of the UN debates in 2014, both at the Security Council and at the General Assembly, see Fabry (n 20) 418-422.

²⁸ UN GA Res 205, 19 December 2016, 70 in favor, 26 contraries, 77 abstentions; UN GA Res 190, 19 December 2017, 70 in favor, 26 contraries, 76 abstentions; UN GA Res 194, 17 December 2018, 66 in favor, 19 contraries, 72 abstentions; UN GA Res 263, 22 December 2018, in favor 65, 27 contraries, and 70 abstentions.

become an independent territory – a solution that, for example, was deemed tolerable in the cases of South Sudan and Kosovo. Instead, Crimea became a territory occupied and *annexed* by a powerful neighboring state. Annexation is a move that harkens back to the 19th Century and violates one of the fundamental principles underlying international relations, the prohibition to disrupt the national unity of another State.²⁹

Every attempt to frame the Crimean events legally, and discern the possible will of the Crimean people to obtain independence is derailed by two facts: *i*) the infiltration of the Crimean territory by Russian operatives without insignia, amounting to the beginning of an illegal occupation of Crimea, and *ii*) the final annexation itself.

This is not to say that conducting a legal analysis of the 2014 facts is a pointless effort. On the contrary, all these events have been described with careful references to international law, which Western countries use to allege violations, and Russia points to to justify its actions. Studies attempting to analyze the Crimean Parliament's decision to reject the Ukrainian change of government, the decision to ask for help from the powerful close neighbor,³⁰ the decision to proclaim Crimean independence, the decision to hold a referendum, and the purity of the referendum itself³¹ are all important. Even Russia's President, Vladimir Putin, used the language of remedial secession to justify Russia's intervention in Crimea,³² although his claims

²⁹ Sharon Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* (Clarendon, 1996) 199-218.

³⁰ The possibility to frame Russia's intervention as legitimized by the Crimean authorities and by the 'ousted' Ukrainian President Yanukovich, is convincingly rejected by Antonello Tancredi, 'The Russian annexation of the Crimea: questions relating to the use of force' (2014) 1 *Questions of International Law* 5, at 13-18.

³¹ See above (XX).

³² *Address by President of the Russian Federation* (18 March 2014), at <http://eng.kremlin.ru/news/6889>: 'I understand those who came out on Maidan... [...] However, those who stood behind the latest events in Ukraine had a different agenda: they were preparing yet another government takeover; they wanted to seize power and would stop short of nothing. [...] The new so-called authorities began by introducing a draft law to revise the language

can be easily dismissed as hypocritical (there was no Ukrainian oppression of Crimean populations).³³

However, the *i*) silent and non-bloody occupation, and *ii*) the final annexation, together, build a solid wall preventing any possible legal analysis of the *other events*, such as the popular will, surrounding the Crimean issue. In this context, one can say, the political will of a local community is not relevant, and it must be put in a second place after having considered more relevant rules and principles of international law, which need to be re-affirmed by the international community for ensuring the integrity of the international legal system.

It is likely that one of the two illegal acts, alone, could be tolerated. The international community could tolerate an illegal use of force provoking independence. The international community could tolerate a troubled referendum – but of an independent State – asking for unification with a neighboring State. But the two events together, the occupation and the annexation, cannot be tolerated as such. Together, they make possible an intolerable risk – the annexation of a portion

policy, which was a direct infringement on the rights of ethnic minorities. [...] Nevertheless, we can all clearly see the intentions of these ideological heirs of Bandera, Hitler's accomplice during World War II. [...] Naturally, we could not leave this plea unheeded; we could not abandon Crimea and its residents in distress. This would have been betrayal on our part. First, we had to help create conditions so that the residents of Crimea for the first time in history were able to peacefully express their free will regarding their own future.'

³³ It is interesting to note that they are claims intended to legitimize Russian intervention in Crimea. They do not go to the question of whether Crimea was entitled to legally secede from Ukraine and then to decide to be reincorporated into another, neighboring State, through an act that international law *neither authorizes nor encourages*, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion [2010] ICJ Reports, 403, at 438-439, para 84; Antonello Tancredi (2008) 'Neither Authorized Nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia' (2008) 18 *Italian Yearbook of International Law* 37; Vidmar (23) 367-374. The dangerous indifference proclaimed by the ICJ in its Advisory Opinion on Kosovo becomes central in the narrative of the above mentioned speech (31): '[T]he Crimean authorities referred to the well-known Kosovo precedent... [...] Pursuant to Article 2, Chapter 1 of the United Nations Charter, the UN International Court agreed with this approach and made the following comment in its ruling of July 22, 2010, and I quote: "No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence," and "General international law contains no prohibition on declarations of independence."'

of one country by another – in light of which the international community is unconcerned about whether the Crimean requests for independence were genuine or not, because of the supervening importance of demonstrating that annexation is not permissible, in this or future cases.

Let's take the problem of occupation and the display of force alone. This problem generally causes some issues to fade away in the legal analysis, for example: the overwhelming majority vote against the Ukrainian change of government, and the overwhelming turnout for and majority vote on the referendum (one may well wonder why the turnout was so high – it would be difficult to argue that these numbers could result purely from Russian intimidation in the absence of violence). However, if we compare Crimea with similar scenarios elsewhere, we can see that, elsewhere, occupation has not been an ultimately determinative factor dictating our reservations concerning the authenticity of the process on the whole. Surely external involvement in local dynamics was a factor in Kosovo, where independence would have been unthinkable without the intervention of a coalition of western states.³⁴ It must also be at play in the acts of the Iraqi government after the American invasion (e.g. its repeated requests for the Americans to maintain a presence in Iraq). Despite this, today the recognition of independent Kosovo is not universal, but at least is

³⁴ Pasquale De Sena and Lorenzo Gradoni, 'Crimea: le ragioni del torto (russo) e il torto delle ragioni (occidentali)' (2014) 1 *I quaderni di SIDI Blog* 5, at 11: 'The Supreme council of Crimea, composed of 100 representatives, expressed a favourable vote of 78 members out of the 81 present; the Assembly of Kosovo unanimously approved the unilateral declaration of independence, with only 11 representatives missing out of the 120, among them the 10 representatives of the Serbian minority. [...] It is often stressed that the genuine Crimean hope for independence, contrary to that of Kosovo, was undermined by the presence of the armed forces of a foreign Country. Here, too, however, there are more similarities than differences. Kosovo proclaimed its independence when (and, certainly, thanks to) foreign forces granted internal and external security to the former Serbian province (NATO), the presence of which was authorized by the Security Council, and after that, several States belonging to that very same international organization [NATO] conducted a series of illegal (according to many) bombings. If, moreover, Russian interference is at the origin of the Crimean Assembly's initiative, then the intervention of the Western Countries in the constitutive process of contemporary Kosovo, in particular that of the United States, is intrusive as well'. Translation mine.

not as fraught as the recognition of Crimea as a part of Russia.³⁵ And no one questions the independence of Iraq as a state with regard to the choices it has made in recent years.

What makes Crimea different? Because of the second problematic factor in Crimea: annexation.

This whole affair is teaching us that the *prohibition of annexation* is one of the last absolute rules that we have in the international landscape. While the prohibition of the use force has emerged in international law more recently, after World War II,³⁶ the prohibition of wars of conquest and annexations can be traced back to the end of World War I and the *moral turning point* of international law towards self-determination,³⁷ and is proclaimed by the *magna carta* of the law governing contemporary international relations, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* adopted by the United Nations General Assembly.³⁸ The whole decolonization phase is the latest development of this turn, and a step backward toward annexation is simply unconceivable, in contemporary international law.

Indeed, recent violations of other rules, even fundamental rules, of international law, have proven to be less problematic. For example, the use of force to regulate international disputes is prohibited, but diplomacy has proven capable of brushing off the consequences of many such violations more successfully than Russia has been able to do with the sanctions imposed by many States after the annexation of

³⁵ On non-recognition in theory and in practice in the Crimean affair see Enrico Milano, 'Reactions to Russia's annexation of Crimea and the legal consequences deriving from grave breaches of peremptory norms', in Czapliński and Oth. (15) at 203-215.

³⁶ Christine Gray, *International law and the use of force*, 4th ed. (OUP, 2018) 30-33.

³⁷ Korman (XX) 135-178.

³⁸ UN GA Res 2625 of 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, in particular Principle 5, *Principle of equal rights and self-determination of peoples* where it says: 'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country'.

Crimea (the comparatively soft reactions of the international community to the recent wars in Iraq, Libya, and Yemen are striking).³⁹

However, the Crimean transfer was not *just* a military annexation, but was also characterized by several procedures involving the people of Crimea and their representatives. International law proclaims the unity of the state, but then it exhibits a certain degree of tolerance toward independence movements, as the 2010 Advisory Opinion on Kosovo clarified, even outside the decolonization context.⁴⁰

The problem with this move towards independence is not just Russia's military intervention prior to Crimea's proclamation of independence, but also Russia's later move to incorporate Crimea. A shady process of Crimean independence could potentially be tolerated; the existence of a small new State might be acceptable. But it becomes unacceptable when independence becomes unification. Kosovo can be acknowledged, at least for many states, as long as it does not become a part of Albania. What the Crimean events make clear is that it is the narrative of expansion, conquest, and seizing new territory that, more than anything else, clashes with the grammar of contemporary international coexistence.

Without entering into the debate on the legitimacy of sanctions against Russia concerning Crimea, or considering whether their effectiveness or ineffectiveness renders them illegitimate,⁴¹ we may certainly say that the exceptional circumstance of annexing a territory following a murky process full of entanglements generates a broad reaction of condemnation.

³⁹ Luca Ferro and Tom Ruys, *The Saudi-Led Military Intervention in Yemen's Civil War* in Tom Ruys and Olivier Corten (eds.), *The Use of Force in International Law: a Case-Based Approach* (OUP, 2018) 899

⁴⁰ See above (20)

⁴¹ In particular see Maurizio Arcari, 'International reactions to the Crimea annexation under the law of state responsibility: "collective countermeasures" and beyond?' in Czapliński and Oth. (15) at 223, and Milano (35) at 201

1. Annexation is prohibited – but are the reactions of the international community a defense of the law or a containment strategy?

Given that the process regarding Crimea's secession was contaminated, that the imposition of UN sanctions is not possible because of the Russian veto at the Security Council, and that the unilateral measures adopted by EU members and the US are very strong but so far unable to mobilize any change in Crimean territorial status, we are left with two unanswered questions. The first is whether it is possible that Crimea really did wish to secede from Ukraine and become a part of Russia. The second is whether the international reaction can be entirely explained by the heinousness of annexation, or if it also has to do with a political strategy of containment of Russia.

Customary international law prescribes that, 'No State shall recognize as lawful a situation created by a serious breach [of a fundamental rule of international law], nor render aid or assistance in maintaining that situation'.⁴² The non-recognition of the Crimean shift, therefore, is absolutely legitimate, and keeps on being repeated when new events occur that mark the Russification of Crimea. For example, after the recent construction of the so-called Crimean Bridge connecting Crimea to Russia through the Strait of Kerch (a bridge blatantly built too low to allow free naval traffic towards the important Ukrainian harbor of Mariupol), Canada issued a very clear statement condemning the move and reaffirming the immovable, adamant, constant position of western States.⁴³

⁴² Article 41.2 of the ILC Draft Articles on International State Responsibility for Wrongful Acts.

⁴³ *Annexation of Crimea breaches international law*, Global Affairs Canada, Statement of 28 July 2018, at <https://www.canada.ca/en/global-affairs/news/2018/07/annexation-of-crimea-breaches-international-law.html>: 'Through its illegal invasion and annexation of Crimea, Russia has violated the international rules-based order and the vital international norm that no country can change another country's borders by force. Canada reaffirms its enduring commitment to the territorial integrity of Ukraine and condemns actions taken by Russia towards the forcible integration of the Crimean peninsula into Russia, including through the opening of the Kerch Strait Bridge in May 2018'. The issue has also come up in international arbitration: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), PCA Case 2017-06, application filed on Sept 16, 2016.

However, international law also prescribes that countermeasures (and, therefore, all the more so, unilateral measures) should aim to restore the legality of a given situation, and should not become a retorsion.⁴⁴ Such continuous and strong opposition to the violating State, Russia, does have a strong legal basis, but also begs the question of whether this attitude to some degree reflects a political strategy.

The current evolution of the Crimean issue seems to suggest that, for the West, the points about Crimean purported secession and occupation are not relevant, because they pale in comparison to the containment of Vladimir Putin. This is a political decision (and an understandable one – many voices have asked which Baltic Republics will be next, and have evoked the specters of the Sudeten and of Munich), and not one that derives entirely from the facts of the Crimean case. In a different context, the above-mentioned facts could perhaps fit into a scenario of accepting the unilateral desire to secede and become annexed to another state. If Northern Ireland, in the absence of bloodshed, were to assert its independence through its elected Parliament, and then through a referendum in which the vast majority of voters both turned out and voted for unification with Ireland rather than the UK, would the analysis stop with the non-violent, but intimidating infiltration (imagine this scenario) of republican Irish forces on the ground? It is possible that the contaminating factor of Irish meddling would be considered less troubling and, ultimately, less determinative of the legal status of Northern Ireland than the meddling of Putin's Russian in Crimea has been.

This is a paradoxical example used just push the argument that the Crimean issue deals with two problems: one is the powerful presence and influence of Russia in the region, which has already, in Georgia and other parts of Ukraine, proven to resort quickly to acts of military intimidation. The other is the legitimacy of a secession affected by the infiltration of foreign forces and the possibility for voters

⁴⁴ Article 22 and 49 of the ILC Draft Articles on International State Responsibility for Wrongful Acts.

to express themselves notwithstanding anti-democratic factors. The issue we are addressing here is the second: a process that had democratic steps, but was also contaminated and opaque.

2. Doubts about a democratic process

The process which led Crimea to become part of Russia was marked by both intolerable interference by a powerful neighboring State and overwhelming numbers of democratic consultations. Any reasoning based completely on only one of these two elements is incomplete. To accept the 2014 Crimean Assembly vote and referendum as fully legitimizing the incorporation of Crimea into Russia seems shallow, prone to the influences of power; but, to reject them completely on the basis of the Russian interference seems unrealistic – and perhaps unfair to the Crimean people. After five years of the current status quo, are we content to throw up our hands and stop at the impasse created by the contamination and complexity of the independence process?

Four factors can be useful for clarifying whether something is a blatant situation of annexation with rhetorical manipulation of the annexed persons, or whether the final outcome is not opposed by the annexed territory, making for a more workable scenario. These factors are: the will of the people, the presence or absence of bloodshed or violent conflict, the effectiveness of the new governance, and the historical context.

In terms of the will of the Crimean people, in the last election under the Ukrainian government, in 2012, Crimeans had the lowest voter turnout in Ukraine (under 50%), and the pro-Russia parties took the vast majority of the local parliament.⁴⁵ Then, in 2014, the local Parliament openly challenged the legitimacy of the

⁴⁵ CEC: *Turnout in Ukraine's parliamentary elections 57.99%*, Kyiv Post, 29 October 2012, at <https://www.kyivpost.com/article/content/oct-28-parliamentary-election/cec-turnout-in-ukraines-parliamentary-elections-5799-315149.html>

government in Kiev, prior to any known issues of infiltration and the Russian push to take over the peninsula. After that, the local Parliament, with extremely high member participation, and an overwhelming majority vote (78 favorable votes out of a total of 100), proclaimed separation from Kiev and established the referendum. This happened after Russian intimidation began, but in the absence of violence and with no apparent resistance among the members of the local Parliament. Then, the referendum itself had a very high turnout among Crimeans, and resulted in a striking majority vote for unification with Russia. The Russian presidential elections followed in 2016, and also provide telling information. Here, Crimean turnout was very similar to the 2012 Ukrainian Presidential elections, but the outcome dramatically favored Vladimir Putin's Party (United Russia, 72.80% of the Crimean votes). All these figures clash with a narrative that sees Crimean as opposed to Russia and manipulated into serving Russian goals.

It is, of course, debatable whether the more recent votes were authentic,⁴⁶ but the figures are impressive, and the lack of any kind of visible resistance by the Crimeans against the new Russian ruler makes it very different from other controversial regions in Russia.

Third, the new Russian government has very effective control over the Crimean territory, and shows no sign of any intent to relinquish it. Thus, not only is it unforeseeable at this time that Crimea would return to Ukraine, but Russia is also acting in a way typical of statehood in Crimea, and treating it as an integrated part of its territory. Compared with the situations in Afghanistan and Iraq, where state control is absent in many regions, and resistance to governing forces erupt in the form of daily bombings and violence, and yet the political status is considered legitimate, Crimea stands out for the absence of conflict. Stability in the Crimean Peninsula is a value to be preserved: compared to other areas (including some in

⁴⁶ Kirill Kalinin and Walter R. Mebane, Jr. When the Russians fake their election results, they may be giving us the statistical finger', *The Washington Post*, 11 January 2017

Ukraine) that are divided by open conflict between factions, Crimea is marked by the absence of any para-military group attempting to oppose the new status quo.

Fourth, as for the historical context, the unclear and undemocratic way in which Crimea was transferred from the Russian Soviet to the Ukrainian Soviet not long ago (1954) raises legitimate questions about whether the 2014 decisions of the Crimean Assembly to secede from Ukraine and the results of the referendum can really be brushed off as the result of Russian manipulation, or whether some strong ties remain between Crimea and its Russian neighbor.

The situation between Russia and Ukraine, and between Russia and the West, is far from settled. The four factors suggested here are not intended to accommodate an illegitimate *status quo* and encourage blindness towards Russian moves in East Europe: international law is very clear in condemning the occupation and annexation of territories, and political strategies to contain Russian expansion are a legitimate political move. The point of this paper is to ask whether, even when military forces are in play, it is possible to determine that there has been a genuine expression of political will by voters. After five years in which Crimea has made no move to challenge the new *status quo*, it is an important question to ask.