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EXPLAINING THE MEANING OF ‘GREY ZONES’ IN PUBLIC INTERNATIONAL LAW BASED ON THE EXAMPLE OF THE CONFLICT IN UKRAINE

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ABSTRACT

The aim of this paper is to analyse four domains of ‘grey zones’ in public international law exploited by Russia’s activities during the conflict in Ukraine – acknowledgement of Russia’s involvement in the conflict; the use of force against Ukraine; the application of the right to self-determination; and passportisation carried out in Donbass. As this paper will demonstrate, legal assessment of the Russian actions is not impossible, although also not straightforward. It is only the resilience of public international law that may allow for the declaration of Russian actions as illegal, and the bringing of Russia to justice. The paper is divided into five parts: the first part defines the term ‘grey zone’ with regard to international law. The four sections following this are focused on the analysis of particular Russian actions as examples of conduct undertaken in the grey zones of international law, namely the Russian involvement in the conflict in Ukraine, the legal classification of Russian actions, the right to self-determination and passportisation.

KEYWORDS

grey zone, passportisation, public international law, responsibility, Russian Federation, self-determination, Ukraine, use of force

INTRODUCTION

In May 2019, the White Paper titled ‘Russian Strategic Intentions’ was published under the auspices of the US Department of Defense Strategic Multilayer Assessment program. The authors of the report wrote *inter alia*, that

Russian strategists are adept in selecting gray zone tools optimized to their target. [...] Russia has a propensity to act in the gray zone between peace and war, where they can deny involvement and quite often get away with actions that violate international norms, if not international law.¹

This propensity is especially visible in the example of Russian involvement in the conflict in Ukraine – the submission of facts and interpretation of international law presented by Russia are an attempt to mislead the international community as to the legality of Russian conduct, and complicate the imposition of international responsibility upon Russia.

The aim of this paper is to analyse four domains of ‘grey zones’ in public international law exploited by Russia’s activities during the conflict in Ukraine – acknowledgement of Russia’s involvement in the conflict; the use of force against Ukraine; the application of the right to self-determination; and passportisation carried out in Donbass.² As this paper will demonstrate, legal assessment of the Russian actions is not impossible, although also not straightforward. It is only the resilience of public international law that may allow for the declaration of Russian actions as illegal, and the bringing of Russia to justice.

The paper is divided into five parts: the first part defines the term ‘grey zone’ with regard to international law. The four sections following this are focused on the analysis of particular Russian actions as examples of conduct undertaken in the grey zone of international law, namely the Russian involvement in the conflict in Ukraine, the legal classification of Russian actions, the right to self-determination and passportisation.

1. THE TERM ‘GREY ZONE’

The term ‘grey zone’ has become more and more popular in recent years, although it is not a new invention.³ In general, one may conclude that it refers to any situation wherein States deliberately attempt to impede the legal assessment of their actions, referring to legal rules which are subject to divergent interpretations or using lacunae in international law; as a result, the rest of the international community may face difficulties in imposing

1 ‘Russian Strategic Intentions. A Strategic Multilayer Assessment (SMA) White Paper’ (Politico, May 2019) 21, 30 <<https://www.politico.com/f/?id=0000016b-a5a1-d241-adff-fdf908e00001>> accessed 22 Feb 2020.

2 The term Donbass refers to southeastern region of Ukraine, mostly the Donetsk and Luhansk oblasts..

3 See e.g. W Curtis, ‘Maneuvering in the Gray Zone: The Gap Between Traditional Peacekeeping and War Fighting, Peacemaking, Peace-Enforcement, and Post-Conflict Peace-Building’ in FL Mokhtari (ed), *Peacemaking, Peacekeeping, and Coalition Warfare: The Future Role of the United Nations* (National Defense University 2014) 175.

international responsibility on the wrongdoer. This overall definition prompts that ‘grey zones’ may be found within virtually any domain of public international law. To refer just to a few examples from legal scholarship, grey zones may emerge in international economic law,⁴ with regard to the protection of individuals during armed conflicts,⁵ or in situations when one State uses cyberspace to interfere into internal affairs of another.⁶ The most dangerous cases are nevertheless when a State exploits the grey zones ‘between the traditional war and peace duality’.⁷ This ambiguity raises questions *about the nature of the conflict and the status of the parties, which in turn generates uncertainty about the applicable law*.⁸ Thus, the international community, instead of being focused on solving the hostile tensions between States and preventing further aggravation of the situation, becomes entangled in debates as to the applicable law and the credibility of legal arguments presented by both sides. That is precisely the aim of exploiting the ‘grey zones’ in public international law – a State that decides to make use of a lack of clarity in legal regulations expects that before the international community can judge its actions as illegal and take action to stop them, it will gain the political, military or other goals that it hoped to achieve by using the ‘grey zones’.

The conflict in Ukraine undoubtedly contributed to the dissemination of the term ‘grey zone’, as it is used now not only by scholars,⁹ but also by the media.¹⁰ It has become so

- 4 D Drache, LA Jacobs, *Grey Zones in International Economic Law and Global Governance* (UBC Press 2018).
- 5 See in general M Lattimer, P Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart 2018).
- 6 MN Schmitt, ‘Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law’ (2018) CJIL 19(1), 30–67.
- 7 UNSOCOM, ‘White paper: Grey Zone’ (9 Sep 2015) 1, <<https://info.publicintelligence.net/USSOCOM-GrayZones.pdf>> accessed 22 Feb 2020.
- 8 A Sari, *Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats* (Exeter Centre for International Law 2019) 1, 13 <<https://dx.doi.org/10.2139/ssrn.3315682>>.
- 9 See e.g. Ibid 13; J Kraska, ‘The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?’ (EJIL: Talk! 3 Dec 2018) <<https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>> accessed 20 Feb 2020; D Carment, M Nikolko, D Belo, ‘Gray Zone Mediation in the Ukraine Crisis: Comparing Crimea and Donbas’ in J Wilkenfeld, K Beardsley, D Quinn (eds), *Research Handbook on Mediating International Crises* (Edward Elgar Publishing 2019) 124; SL Pettyjohn, B Wasser, *Competing in the Gray Zone: Russian Tactics and Western Responses* (RAND Corporation 2019) <https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2791/RAND_RR2791.pdf> accessed 20 Feb 2020; JW Matisek, ‘Shades of Gray Deterrence: Issues of Fighting in the Gray Zone’ (2017) JSS 10(3), 18–19.
- 10 ‘Russia’s Grey War in Ukraine Prompts Fatigue’ (EU Observer 6 Feb 2019) <<https://euobserver.com/foreign/144084>> accessed 20 Feb 2020; ‘Shades of Grey. Neither War Nor Peace. The Uses of Constructive Ambiguity’ (The Economist 25 Jan 2018) <<https://www.economist.com/special-report/2018/01/25/neither-war-nor-peace>> accessed 20 Feb 2020. Nevertheless, media tends to use the term ‘grey zone’ also in different context, i.e. referring literally to a certain space, that it is unclear who controls it (e.g. ‘Thousands Protest in Ukraine Against a Troop Pullback’ (France24 14 Oct 2019) <<https://www.france24.com/en/20191014-thousands-protest-in-ukraine-against-a-troop-pullback>> accessed 20 Feb 2020.

since this conflict constitutes the most striking example so far of exploiting international law grey zones: on one hand, Russia denies any involvement in the events in Ukraine, while on the other hand there are clear proofs of Russian engagement in the conflict. At the same time, Russia justifies all its actions with regard to Ukraine by international legal arguments, which nevertheless constitute abuses of international law and not proper justification for its actions. If you add that, due to the information chaos and deliberate Russian actions, it is hard to verify the credibility of information coming from the areas affected by military operations, the application of the term ‘grey zone’ to the conflict in Ukraine becomes fully justified.

The following part of this paper discusses four domains of Russian actions undertaken in Ukraine that obscure the legal assessment of the Russia’s conduct, and thus constitute acts carried out in the ‘grey zones’ of public international law.

2. RUSSIAN INVOLVEMENT IN THE EVENTS IN UKRAINE

Russia initially denied any involvement in Ukraine. Instead, Russian president Vladimir Putin claimed that it was ‘local self-defense forces’ that were acting in Crimea.¹¹ However, at the same time, Russian representatives made statements which in fact resembled the legal positions presented by States in case of the use of force. On 1 March 2014, the Russian representative in the UN Security Council (UN SC) stated that due to the tensions in Crimea Sergey Aksyonov, Prime Minister of Crimea, ‘went to the President of Russia with a request for assistance to restore peace in Crimea’.¹² As a result of that appeal, President Putin informed the Federation Council that the Autonomous Republic of Crimea ‘has requested the deployment of the armed forces of the Russian Federation on the territory of Ukraine until the civic and political situation in Ukraine can be normalized’. However, the Russian representative highlighted that the request concerned the deployment of Russian troops ‘on the territory of Ukraine’ – not ‘against Ukraine’, while the final decision about the deployment of forces had not yet been taken.¹³ Moreover, it was not only the authorities of Crimea, but also former Ukrainian president Viktor Yanukovich, recognized by Russia as the legitimate president of Ukraine, that requested president Putin ‘to use the armed forces of the Russian Federation to establish legitimacy, peace, law and order and stability in defence of the people of Ukraine’.¹⁴

On 16 March 2014 the authorities of Crimea organized a referendum on reunification with Russia. Over 90% of voters who took part in the referendum supported Crimea’s

11 ‘Putin Says Those Aren’t Russian Forces in Crimea’ (NPR 4 March 2014), <<https://www.npr.org/sections/thetwoway/2014/03/04/285653335/putin-says-those-arent-russian-forces-in-crimea>> accessed 20 Feb 2020.

12 UNSC, Provisional Records, 96th year, 7124th meeting (1 March 2014) S/PV.7124, 5.

13 Address by President of the Russian Federation, 18 March 2014, <<http://en.kremlin.ru/events/president/news/20603>> accessed 20 Feb 2020.

14 UNSC, Provisional Records, 69th year, 7125th meeting (3 March 2014) S/PV.7125, 3–4.

accession to the Russian Federation.¹⁵ As a result, the Crimean authorities issued a declaration of independence, and on 18 March 2014 the Russian Federation and the Republic of Crimea signed an Agreement on the Accession of the Republic of Crimea into the Russian Federation and on Forming New Constituent Entities within the Russian Federation.¹⁶ On the same day, president Putin made an address to State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin, where he said that ‘the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives, in preventing the events that were unfolding and are still underway in Kiev, Donetsk, Kharkov and other Ukrainian cities’.¹⁷ Thus, Russia presented itself as the defender of Russian citizens and the Russian-speaking minority in Crimea.¹⁸

Few weeks later Russia explicitly admitted engagement in the conflict – on 17 April 2014, during the annual special Direct Line with Vladimir Putin, broadcast by the Russian TV and radio stations, Russian president said that: *Of course, the Russian servicemen did back the Crimean self-defence forces. They acted in a civil but a decisive and professional manner, as I've already said.*¹⁹ However, this line of argumentation changed in January 2015, when Russia denied that there was proof that it sent its troops and weapons to Eastern Ukraine.²⁰ Then, in December 2015 President Putin stated again that *We never said there were not people there who carried out certain tasks including in the military sphere.*²¹ Thus, in the end one may conclude that Russia confirmed unspecified support for the militants operating in Ukraine but denied sending its regular armed forces. Such assurances stay at odds with the fact that, soon after the outbreak of the violence in the Crimean Peninsula and in Eastern Ukraine, the militias fighting against the government in Kiev were identified as Russian soldiers (or at least Russian backed separatists) given that their guns, uniforms, vehicles and accents were similar to those identified with Russia.²²

15 ‘Crimea Referendum: Voters «Back Russia Union»’ (BBC News 16 March 2014) <<https://www.bbc.com/news/world-europe-26606097>> accessed 20 Feb 2020.

16 ‘Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed’ (Kremlin.ru 18 March 2014) <<http://en.kremlin.ru/events/president/news/20604>> accessed 20 Feb 2020.

17 Address by President of the Russian Federation.

18 UNSC, Provisional Records, 69th year, 7125th meeting (3 March 2014) S/PV.7125, 5.

19 ‘Direct Line with Vladimir Putin’ (Kremlin 17 April 2014) <<http://en.kremlin.ru/events/president/news/20796>> accessed 20 Feb 2020.

20 ‘Russia Says No Proof It Sent Troops To Ukraine’ (Newsweek 21 Jan 2015) <<https://www.newsweek.com/russia-says-no-proof-it-sent-troops-ukraine-300987>> accessed 20 Feb 2020.

21 S Walker, ‘Putin Admits Russian Military Presence in Ukraine for First Time’ (The Guardian 17 Dec 2015) <<https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine>> accessed 20 Feb 2020.

22 V Shevchenko, ‘«Little Green Men» or «Russian Invaders»?’ (BBC News 11 March 2014) <<https://www.bbc.com/news/world-europe-26532154>> accessed 20 Feb 2020; N Buckley, R Olearchyk, A Jack, K Hille, ‘Ukraine’s ‘Little Green Men’ Carefully Mask Their Identity’ (Financial Times 16 April 2014) <<https://www.ft.com/content/05e1d8ca-c57a-11e3-a7d4-00144feabdc0>> accessed 20 Feb 2020.

Summing up, Russia tried to blur the character and scale of its involvement in Ukraine. It presented some legal arguments which could be deemed as justification of the Russian intervention in Ukraine, as they referred to such concepts as intervention by invitation and intervention to rescue nationals abroad. On the other hand, however, Russia denied both direct military involvement in Ukraine, as well as indirect engagement, and admitted only some unprecise backing of Crimean ‘self-defence’ forces. Thus, Russia portrayed the crisis in Ukraine as an internal affair of that State, prompted by the policy of the Kiev government, that Russia neither induced, controlled or fuelled. Even though many international actors immediately attributed responsibility to Russia for the events in Ukraine,²³ the Russian position as to its involvement in Ukraine and the opaque legal situation that followed may be undoubtedly determined as exploiting the grey zone of international law.

3. LEGAL CLASSIFICATION OF RUSSIAN CONDUCT IN UKRAINE

It was already mentioned in the previous section that Russia attempted to dismiss accusations of its involvement in Crimean events and the conflict in Eastern Ukraine. To put it differently, Russia denied the use of force against Ukraine.

Article 2 (4) of the UN Charter, which establishes the prohibition of the use of force, states as follows:

*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.*²⁴

To start with, one has to observe that President Putin claimed that no case of the use of force was at stake at all, since, as he put it in his address to State Duma deputies, *I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties.*²⁵ Thus, according to president Putin, to determine that the use of force took place, a certain gravity of violence and damage, measured by the number of casualties, are needed; to put it differently, what counts are the tangible effects of the alleged use of force. Since this test was not fulfilled in case of the events in Crimea, there was no breach of the prohibition of the use of force. Even though the events which took place in the Crimean Peninsula in 2014 indeed differed from other armed interventions carried out by States after 1945, both with regard to their course and employed means, the Russian involvement may still be labelled as the use of force against Ukraine. Firstly,

23 For example, UE and US immediately condemned Russia for aggression against Ukraine: ‘U.S. Condemns Russian Intervention in Ukraine’ (Radio Free Europe 1 March 2014) <<https://www.rferl.org/a/ukraine-west-concern-russian-troops/25281903.html>> accessed 20 Feb 2020; European Parliament resolution of 13 March 2014 on the invasion of Ukraine by Russia [2014/2627(RSP)], preamble (A, C), para 1, 4.

24 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS 16, 1.

25 Address by President of the Russian Federation.

*gravity does not need to be measured solely by the intensity of fighting and the number of victims. The intentions of the aggressor and the consequences that the improper use of its forces deployed in the territory of another State could have [...] are also important factors to consider.*²⁶

In this case Russia's aim was to take control over Crimea, with the result of the annexation of the Peninsula; thus, the serious gravity of intentions and consequences is undoubted. Secondly, one has to bear in mind how Russia justified its interest in Crimea – using arguments which were reminiscent of such concepts as intervention by invitation and intervention to rescue nationals abroad, which are used by States to justify the use of force.²⁷ On these grounds, a majority of scholars determined that Russia in fact used force against Ukraine.²⁸

After determining that the Russian involvement in Ukraine is a case of the use of force, two aspects of the prohibition need to be reviewed. Firstly, Russia denied sending its troops to Ukraine, neither to Crimea nor to Donbass; to put it in the language of *jus ad bellum*, Russia denied the direct use of force against Ukraine. Secondly, Russia admitted that it provided unspecified, but allegedly minor, support to militias operating against the Kiev government. Thus, Russia denied also the indirect use of force against Ukraine, which, despite not being mentioned explicitly, is also covered by the prohibition of the use of force.²⁹ In order to establish that Russia used indirect force against Ukraine, one has to prove that Russia exercised control over the militias, using the criteria such as the

26 V Bílková, 'The Use of Force by the Russian Federation in Crimea' (2015) *ZaoRV* 75, 33–34

27 A Tancredi, 'The Russian Annexation of the Crimea: Questions Relating to the Use of Force' (2014), *Questions of International Law: Zoom Out* 1, 7.

28 See e.g. C Henderson, *The Use of Force and International Law* (CUP 2018) 34, 220, 375; C Gray, *International Law and the Use of Force* (OUP 2018) 32; V Bílková 30–37; JA Green, 'The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited' (2014) *JUFIL* 1(1), 5. As some scholars mention that Russia used force against Ukraine, while others contend that Russia committed aggression against that State, one has to observe that the question of the responsibility of Russia does not concern only the violation of the prohibition of the use of force but also the prohibition of aggression, as one of the most grave forms of the use of force (see UNGA, Resolution 3314 (XXIX) of 14 December 1974. Definition of Aggression A/RES/3314).

29 The Declaration on Principles of International Law, which is considered to reflect customary international law and be the most authoritative commentary to the UN Charter, states that *No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State* (UNGA, Resolution 2625 Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations of 24 October 1970 A/RES/2625 - hereinafter: Declaration on Principles of International Law). See also *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, para 209 (hereinafter: Nicaragua judgement). This view is also supported by majority of scholars, see e.g. C Henderson 60–62; O Dörr, 'Use of Force, Prohibition of' (Max Planck Encyclopedia of Public International Law Sept 2015) <<http://opil.ouplaw.com>> accessed 20 Feb 2020; A Randelzhofer, O Dörr, 'Article 2(4)' in B Simma, D-E Khan, G Nolte, A Paulus (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 211–213.

‘effective control test’³⁰ or the ‘overall control test’.³¹ Given that Russia made efforts to conceal its links with the militias acting in Ukraine, attribution on the grounds of the effective control test may turn out to be impossible,³² while employing the ‘overall control test’ also may raise some doubts.³³ Yet despite this, while the international community is rather confident about the responsibility of Russia for sending its own troops to Ukraine, as well as responsibility for the actions of militias, the question is whether international judicial organs, like the International Court of Justice³⁴ or the International Criminal Court³⁵ will be able to determine the international legal responsibility of Russia on the grounds of the available information.

Finally, the consequence of the use of force by one State against another is the state of armed conflict. As Russia denies the use of force against Ukraine, it also has never recognized the existence of an international armed conflict between Russia and Ukraine.³⁶ During an international armed conflict, a State is obliged to apply the rules of international

30 In the Nicaragua case, the ICJ came to the conclusion that even ‘the general control by the respondent State over a force with a high degree of dependency on it’ is not sufficient to attribute the conduct of *contras* to the USA since *such acts could well be committed by members of the contras without the control of the United States*. To attribute responsibility for the *contras*’ activities to the USA, the USA would have had to exercise effective control over *contras* (Nicaragua judgement, para 115).

31 A different test was adopted by the International Criminal Tribunal for the former Yugoslavia, which in the case *Prosecutor v Dusko Tadić* decided that the overall control of a State over an armed group is sufficient to attribute the responsibility to a State, i.e. regardless of whether a State ‘imposed, requested or directed’ each of the group’s activities (Prosecutor v. Dusko Tadić, Judgement in the Appeals Chamber, IT-94-1-A, 15 July 1999, para 122).

32 S Hassler, N Quéniwet, ‘Conferral of Nationality of the Kin State – Mission Creep?’ in S Sayapin, E Tsybulenko (eds), *The Use of Force Against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (Springer 2018) 102.

33 A Tancredi 26.

34 See the case submitted by Ukraine against Russia before the ICJ ‘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*)’ (ICJ 2017-2019) <<https://www.icj-cij.org/en/case/166>> accessed 20 Feb 2020.

35 See the proceedings before the International Criminal Court concerning alleged crimes committed in the context of the ‘Maidan’ protests since 21 November and other events in Ukraine since 20 February 2014, ‘Preliminary examination’ (ICC 2014-2019) <<https://www.icc-cpi.int/Ukraine>> accessed 20 Feb 2020.

36 See e.g. the statement made by Kremlin spokesman Dmitry Peskov who said that *there is no war between Ukraine and Russia. There is a civil war in Ukraine* ‘Peskov otvetil na frazu Poroshenko o «kholodnom mire» s Rossiyey. Podrobneye na RBK» [Песков ответил на фразу Порошенко о «холодном мире» с Россией Подробное на РБК - Peskov responded to Poroshenko’s phrase about the “cold world” with Russia. More on RBC] (RBC 30 Jan 2019) <<https://www.rbc.ru/rbcfreenews/5c518ac29a7947e38183a3d9?from=newsfeed>> accessed 20 Feb 2020.

Most commentators agree that currently, in parallel to an international armed conflict, a non-international armed conflict exists between rebels and the government of Ukraine (see e.g. ‘International armed conflict in Ukraine’ (RULAC Geneva Academy 2017) <<http://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine>> accessed 20 Feb 2020.

humanitarian law, which provide special protection to certain groups, including civilians and prisoners of war. By refusing to recognise the existence of an international armed conflict with Ukraine, Russia also denies the protection to these groups.

Summing up, Russia is exploiting different aspects of *jus in bello* and *jus ad bellum* to avoid responsibility for the use of force against Ukraine and to refuse protection to the Ukrainian population during an ongoing international armed conflict. Thus, it may serve as another example of the use by Russia of grey zones in international law with regard to the conflict in Ukraine.

4. RIGHT TO SELF-DETERMINATION

Another legal concept that that is exploited by Russia is the right to self-determination. The latter may be defined in general as ‘the right of all peoples freely to determine their political, economic and social status’.³⁷ Even though the right to self-determination was mostly promulgated during the period of decolonization to support people in their struggle for independence,³⁸ it is also broadly recognized today, outside the context of colonialism. International law grants the right to self-determination to ‘peoples’ which may refer to the whole nation or to ‘only a portion of the population of an existing state’³⁹ who enjoy at least some of the following features: (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*.⁴⁰

One can distinguish between the internal self-determination, so ‘a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state’;⁴¹ and external self-determination, described in the Declaration on Principles of International Law as *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*. The realisation of the external aspect of the right to self-determination cannot amount to threats to ‘an existing state’s territorial integrity or the stability of relations between sovereign states’.⁴² However, some authors refer here to another passage from the Declaration on Principles of International Law, which states that territorial integrity or political unity of States are protected provided that States conduct themselves *in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to*

37 M Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers 2008) 23. See also UNGA, Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 A/RES/1514, para 2.

38 K Ryan, ‘Rights, Intervention, and Self-Determination’ (1991) *Denv J Int’l L & Pol’y* 20(1), 62–63.

39 Reference re Secession of Quebec [1998] 2 SCR (217), para 123–124 (hereinafter: Reference re Secession of Quebec).

40 UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Final Report and Recommendations (Paris 22 Feb 1990) SHS-89/CONF.602/7, para 22(1).

41 Reference re Secession of Quebec, para 126.

42 *Ibid* para 127.

the territory without distinction as to race, creed or color’. This provision allegedly means that ‘the protection of territorial integrity is not absolute’ and it may be ‘suspended’ when a State does not comply with the principle of self-determination of peoples.⁴³ In such case, ‘peoples’ may violate the territorial integrity of a State⁴⁴ – they may secede from the existing State. Nevertheless, one needs to highlight that the mutual relations between the right to self-determination, secession and protection of territorial integrity are not precisely defined, and one may find conflicting arguments both in the practice of States⁴⁵ and in the doctrine of law.⁴⁶

This vagueness was exploited by Russia. It was previously mentioned that Russia justified its interest in Crimean affairs using the fact that there was a substantial Russian speaking minority in the Peninsula, which was allegedly being persecuted by the Ukrainian authorities. Russia also relied on the results of the referendum held in Crimea in which the residents of the Peninsula supported accession to the Russian Federation. Thus, according to Russia, the right to self-determination is at stake here. President Putin said in his address to the Duma, that ‘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’.⁴⁷ The speaker of the Federation Council, Valentina Matviyenko, also referred to self-determination saying that ‘the right of people to self-determination has not been abolished so far. [...] why should the people of Crimea be deprived of their right to legal self-determination?’⁴⁸ Likewise, the Russian representative in the UN SC mentioned the right to self-determination during the debate within the Council.⁴⁹ Apart from the right to self-determination, president Putin also referred to the ICJ Advisory Opinion in the Kosovo case, when the Court decided that ‘international law contains no prohibition of declarations of independence’;⁵⁰ and stressed that most of

43 TD Grant, ‘Armed Force in Aid of Secession’ (2014) MLLWR 53(1), 85.

44 P Roethke, ‘The Right to Secede Under International Law: The Case of Somaliland’ (2011) Journal of International Service 20(2) 40.

45 See e.g. the statements made by Russia during the proceedings before the ICJ in the Kosovo case, when Russia claimed that self-determination justifies unilateral secession only *in truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question*. Written Statement by the Russian Federation of 16 April 2009, para 88, <<https://www.icj-cij.org/files/case-related/141/15628.pdf>> accessed 20 Feb 2020.

46 See e.g. A Kapustin, ‘Crimea’s self-determination in the light of contemporary international law’ (2015) ZaoRV 75,117 which supports the right to remedial secession of Crimean residents.

47 Address by President of the Russian Federation; see also Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol of 11 March 2014, para 1, <https://www.rada.crimea.ua/news/11_03_2014_1> accessed 20 Feb 2020.

48 JC Finley, ‘Russia supports Crimean parliament’s request to join Federation’ (UPI 7 March 2014) <https://www.upi.com/Top_News/World-News/2014/03/07/Russia-supports-Crimean-parliaments-request-to-join-Federation/8051394203191/> accessed 20 Feb 2020.

49 UNSC, Provisional Records, 69th year, 7144th meeting (19 March 2014) S/PV.7144, 8.

50 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403, para 79, 84.

the Western States agreed with this ruling.⁵¹ Since, according to Russian authorities, the situation in Crimea was similar to that of Kosovo, the international community should also recognise the declaration of independence and the annexation of Crimea as legal.

Several points of the Russian position regarding the right of self-determination of Crimean residents raise considerable doubts: whether the Russian-speaking minority was truly being persecuted by Ukrainian authorities; the problem of whether the population of Crimea ‘met the formal criteria of being a self-determination unit’;⁵² whether unilateral secession is allowed under contemporary international law, outside the context of decolonization; and what is the implication of the ICJ Advisory Opinion in the Kosovo case for the Crimea situation.⁵³ Given that varied (if not conflicting) legal argumentation may be presented with regard to these issues, one may conclude that the interpretation of the right to self-determination and its implementation are another examples of Russia exploiting the grey zones in international law.

5. PASSPORTISATION

Immediately following the annexation of Crimea, pro-Russian protests started also in three eastern Ukrainian cities – Kharkov, Luhansk and Donetsk.⁵⁴ The protests were reportedly supported by Russia, which provided uniforms and weapons for the separatist forces;⁵⁵ as was mentioned before, Russia never admitted the scale of support given to the protesters in Eastern Ukraine. On 11 May 2014 the separatists organised referenda on self-rule, in which a majority of voters supported the independence of these regions from Ukraine.⁵⁶ As a result, on the next day the leaders of the separatists declared the creation of Donetsk People’s Republic and Luhansk People’s Republic.⁵⁷

Both ‘republics’ received recognition only from each other and from another disputed entity, South Ossetia. Russia did not recognise the ‘republics’, but following the self-rule

51 Address by President of the Russian Federation.

52 CJ Borgen, ‘Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea’ (2015) ILS 91, 242; E Leonaitė, D Žalimas, ‘The Annexation of Crimea and Attempts to Justify it in the Context of International Law’ (2016) *Lith Annu Strateg Rev* 14, 23–24.

53 See SF van den Driest, ‘Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law’, (2015) *NILR* 62, 348–349, 358–359.

54 R Balmforth, N Zinets, ‘Protests in Eastern Ukraine Aimed at Bringing in Russian Troops, Warns PM’ (Reuters 7 April 2014) <<https://www.reuters.com/article/us-ukraine-crisis-storm/protests-in-eastern-ukraine-aimed-at-bringing-in-russian-troops-warnspm-idUSBREA350B420140407>> accessed 20 Feb 2020.

55 ‘Armed Pro-Russian Protesters Seize City in Eastern Ukraine’ (The Guardian 13 April 2014) <<https://www.theguardian.com/world/2014/apr/12/pro-russian-protesters-wind-up-tension-in-eastern-ukraine>> accessed 20 Feb 2020.

56 ‘Ukraine separatists declare independence’ (Al Jazeera 12 May 2014) <<https://www.aljazeera.com/news/europe/2014/05/ukraineseperatists-declare-independence-201451219375613219.html>> accessed 20 Feb 2020.

57 N Feeney, ‘Pro-Russia Insurgents Declare Independence in Eastern Ukraine’ (Time 12 May 2014) <<https://time.com/96102/ukraine-donetsk-independence-russia/>> accessed 20 Feb 2020.

referenda, the Russian minister of foreign affairs, Sergei Lavrov, said that his State will ‘respect the will’ of the people of Ukraine.⁵⁸ Moreover, although both ‘republics’ also immediately requested that Moscow consider annexing the regions,⁵⁹ officially president Putin asked the separatists to delay holding a referendum, while after the proclamation of independence he insisted that Russia did not want to annex the ‘republics’.⁶⁰

Nevertheless, Russia started to support the new ‘republics’ – since 2014, Russia has continued to send convoys with humanitarian aid to Donbass, which raises considerable concerns that Russia may be using the label of ‘humanitarian convoys’ to provide military support to the ‘republics’.⁶¹ Even more attention was attracted by president Putin’s decision in February 2017 to sign the Executive Order On Recognition in the Russian Federation of Documents and Vehicle Registration Plates Issued to Ukrainian Citizens and Stateless Persons Permanently Residing in Certain Districts of Ukraine’s Donetsk and Lugansk Regions,⁶² which in fact allows people living in those two self-proclaimed republics to travel, work and study in Russia. Kiev authorities called it ‘another proof of Russian occupation as well as Russian violation of international law’.⁶³

The biggest objection though was raised by the Executive Order identifying groups of persons entitled to a fast-track procedure when applying for Russian citizenship on humanitarian grounds, signed by president Putin on 24 April 2019.⁶⁴ Based on the Order, Donbass residents may obtain Russian passports (or, to put it differently, Russian nationality) within the fast-track procedure without taking residency in Russia. The Order was condemned not only by Ukraine, but also by the European Union and the USA as another attack against Ukrainian sovereignty.⁶⁵ On the other hand, Moscow claimed that

58 ‘Lavrov: Russia «respects results of referendum»’ (BBC News 12 May 2014) <<https://www.bbc.com/news/av/world-europe-27370038/lavrov-russia-respects-results-of-referendum>> accessed 20 Feb 2020.

59 A Marquardt, MS James, ‘Ukrainian Separatists Ask to Join Russia’ (ABC News 12 May 2014) <<https://abcnews.go.com/International/ukrainian-separatists-join-russia/story?id=23679656>> accessed 20 Feb 2020.

60 SS Nelson, ‘Many in Eastern Ukraine Want To Join Russia’ (NPR 24 June 2017) <<https://www.npr.org/2017/06/24/534207470/many-in-eastern-ukraine-want-to-join-russia>> accessed 20 Feb 2020..

61 A Luhn, ‘Russia to Send Humanitarian Convoy into Ukraine in Spite of Warnings’ (The Guardian 11 August 2014) <<https://www.theguardian.com/world/2014/aug/11/russia-humanitarian-convoy-ukraine>> accessed 20 Feb 2020.

62 ‘Executive Order on Recognising Documents Issued to Ukrainian Citizens and Stateless Persons Living in Certain Districts of Ukraine’s Donetsk and Lugansk Regions’ (Kremlin 18 Feb 2017) <<http://en.kremlin.ru/events/president/news/53895>> accessed 20 Feb 2020.

63 ‘Putin Orders Russia to Recognize Documents Issued in Rebel-Held East Ukraine’ (Reuters 18 Feb 2017) <<https://www.reuters.com/article/us-ukraine-crisis-russia-documents/putin-orders-russia-to-recognize-documents-issued-in-rebel-held-east-ukraineidUSKBN15X0KR>> accessed 20 Feb 2020.

64 ‘Executive Order Identifying Groups of Persons Entitled to a Fast-Track Procedure when Applying for Russian Citizenship on Humanitarian Grounds’ (Kremlin 24 April 2019) <<http://en.kremlin.ru/acts/news/60358>> accessed 20 Feb 2020.

65 N MacFarquhar, ‘Outrage Grows as Russia Grants Passports in Ukraine’s Breakaway Regions’ [The New York Times 25 April 2019] <<https://www.nytimes.com/2019/04/25/world/europe/russia-citizenship-ukraine.html>> accessed 20 Feb 2020.

the decision to create such procedures was made *with a view to protecting human and citizens rights and freedoms, and guided by the universally recognised principles and norms of international law*. During the UN SC meeting, the representative of Russia claimed that the Order concerned the 4 million citizens ‘outlawed’ by Ukraine, ‘whose existence has been obstinately ignored by the Western parts of the international community’.⁶⁶ Responding to the international critique, he said that the Order does not violate international law since it does not require anyone to renounce their Ukrainian citizenship in order to obtain a Russian one,⁶⁷ so it does not violate any provision of the so-called Minsk agreements.⁶⁸

The measures employed by Russia under the 2019 Order are called ‘passportisation’ which refers to ‘large-scale conferral of nationality by one state to citizens of another state that reside outside the borders of the conferring state’.⁶⁹ Passportisation is not *per se* illegal,⁷⁰ so a case-by-case assessment is always necessary. To this end, one needs to take into account several factors: every State may freely determine their rules for granting citizenship, while international law imposes only a few limits on this entitlement, including that there must be a genuine connection between a national and their State of nationality;⁷¹ there is a prohibition of forced naturalisation under international law; extraterritorial naturalisation may constitute, under some circumstances, interference into the internal affairs of a State and thus violate the principle of non-intervention, especially if a State does not allow for dual citizenship.⁷² When it comes to the latter, passportisation may affect the interest of an existing State of nationality in a broader sense: since population is one of the elements of statehood, losing citizens may ultimately lead to the failure of statehood. Moreover, passportisation undermines the personal jurisdiction of a State, which is one of the emanations of a State’s sovereignty.⁷³ One also has to bear in mind

66 UNGA, Provisional Records, 74th year, 8516th meeting (25 April 2019) S/PV.8516, 15.

67 Article 4 of the Ukrainian Constitution states that *there is single citizenship in Ukraine* (see Constitution of Ukraine adopted at the 5th session of the Verkhovna Rada of Ukraine on 28 June 1996 <<https://rm.coe.int/constitutionof-ukraine/168071f58b>> accessed 20 Feb 2020). Thus, Ukrainians who acquire Russian citizenship will not be allowed to retain their Ukrainian citizenship at the same time.

68 UNGA, Provisional Records, 74th year, 8516th meeting (25 April 2019) S/PV.8516, 15; ‘Minsk Agreements’ refers to Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of the Russian Federation, V. Putin, altogether with the Memorandum on the implementation of the provisions of the Protocol, Letter dated 24 February 2015 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council. Anex I S/2015/135 <<https://undocs.org/S/2015/135>> accessed 20 Feb 2020.

69 M Cuvelier, *Passportization in International Law: Theory and Practice of Large Scale Extraterritorial Conferrals of Nationality* (MA thesis, Universiteit Gent 2017/2018) 7 <https://lib.ugent.be/fulltxt/RUG01/002/479/381/RUG01-002479381_2018_0001_AC.pdf> accessed 20 Feb 2020.

70 A Peters, ‘Passportisation: Risks for International Law and Stability – Part I’ (EJIL: Talk! 9 May 2019) <<https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-one/>> accessed 20 Feb 2020.

71 *Nottebohm Case* (second phase), Judgement of April 6th, 1955, ICJ Reports 1955, p. 4, p. 23.

72 M Cuvelier 63–69.

73 A Peters ‘Passportisation: Risks for International Law and Stability – Part I’.

that extraterritorial naturalisation on a mass scale may ‘produce’ a national minority of a foreign State, which will subsequently invoke the protection of this minority as a reason for interference into the internal affairs of a State where this minority resides, including armed intervention to rescue nationals abroad.

Summing up, the passportisation carried out by Russia in Ukraine is another example of Russia exploiting the ‘grey zones’ of international law – while passportisation is not in principle illegal, and Russia invoked humanitarian reasons for the 2019 Order, it may turn out to be just a smokescreen for further interference by Russia into the internal affairs of Ukraine. From this perspective, the passportisation carried out by Russia in Donbass may be labelled as a violation of international law.⁷⁴

CONCLUSIONS

This paper has discussed four types of activities undertaken by Russia with regard to the conflict in Ukraine from the perspective of public international law: involvement in the conflict; the legal classification of Russian actions; the right to self-determination, as it is invoked by Russia; and the passportisation carried out in Donbass. Although Russia attempted to conceal the real character and scope of actions undertaken in Ukraine, as well as defined certain international legal norms in a very discretionary way, careful analysis of data and multilayer examination of legal rules allows for the labelling of all these actions as illegal. Thus, despite Russia’s attempt to blur the legal assessment of its actions, international law provides tools to assess Russia’s conduct, what constitutes a proof of the resilience of international law, which has to also be applicable in situations involving new threats and challenges.

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⁷⁴ A Peters, ‘Passportisation: Risks for International Law and Stability – Part II’ (EJIL: Talk! 10 May 2019) <<https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-two/>> accessed 20 Feb 2020.

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