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# The Annexation of Crimea and Balance of Power in International Law

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Władysław Czapliński, Sławomir Dębski, Rafał Tarnogórski and Karolina Wierczyńska (eds). **The Case of Crimea's Annexation under International Law**. Warsaw: Scholar Publishing House and Centre for Polish-Russian Dialogue and Understanding, 2017. Pp. 355. ISBN: 978-83-7383-901-4.

Rein Müllerson. **Dawn of a New Order: Geopolitics and the Clash of Ideologies**. London: I.B. Tauris, 2017. Pp. 277. ISBN 978-1-78453-972-6.

## Abstract

*In this review essay, two recent books, one analysing the question of the Russian annexation of Crimea in 2014 directly and the other in the context of changing geopolitics and world order, are discussed. Parallels with war pamphlets in the 18th century, authored by Olaus Hermelin and Petr Shafirov in the context of the Great Nordic War, are drawn. Rein Müllerson's suggestion that the world should return to balance-of-power politics in the context of international law is rejected.*

## 1 Introduction

In March 2019, it was five years since the annexation of Crimea by the Russian Federation, probably the most challenging event for the foundations of international law in the last decade. On some level, the legal position is relatively simple and straightforward: the majority of the international community has called upon states not to recognize changes in the status of the Crimea region. In United Nations

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General Assembly (UNGA) resolution of 27 March 2014, 100 states out of the United Nations' (UN) 193 member states (including all Western states) affirmed the territorial integrity of Ukraine, including Crimea.<sup>1</sup> While resolutions of the UNGA are legally non-binding, this majority expressed the predominant opinion of the international community. Nevertheless, while only 11 states voted against the resolution, 58 abstained and 24 remained absent when the voting took place. Thus, a considerable number of UN member states – including China, a permanent member of the United Nations Security Council (UNSC) – avoided a direct answer regarding the question of illegality. Therefore, the UNGA vote also demonstrates a certain fragmentation of the international community along geopolitical lines and alliances.

In any event, declaring a territorial situation illegal does not in itself offer detailed guidance for how to practically deal with it, beyond formal non-recognition, especially when there appears to be no end in sight. While formal non-recognition of the illegal situation in the narrower sense has not been controversial, additional sanctions against Russia adopted by Western states have sometimes been just that. After the election of Donald Trump as president of the USA, Washington has sent out contradictory messages (and tweets) not only about Russia and Ukraine but also about the North Atlantic Treaty Organization (NATO). The typical pattern has been that sanctions against Russia once adopted by US Congress would then be undermined by presidential statements that were broadly understood as supportive of Russian claims regarding Crimea. A similar contradictory approach can also be observed in the practices of some European Union (EU) countries, wherein the biannual ritual of prolonging sanctions against Russia is also invariably accompanied by the sceptical voices of influential politicians.

In his Kremlin speech of March 2014, President Vladimir Putin made Russia's legal-political case to justify the incorporation of Crimea into Russian territory.<sup>2</sup> Based on the subsequent Western reactions and sanctions, Moscow's justifications have not been successful internationally, at least not in the short term.<sup>3</sup> Among international lawyers in the West, Thomas D. Grant expressed the representative view well when emphasizing the illegality of the annexation.<sup>4</sup> In contrast, in Russia, lawyers have offered legal-political justifications of the annexation that were primarily made to reassure domestic audiences.<sup>5</sup> Nevertheless, a constitutional law professor from the Higher School of Economics in Moscow, Elena A. Lukyanova, also raised a dissenting voice in Russia and publicly expressed doubts about the legality of the annexation of Crimea.<sup>6</sup> Her analysis triggered a rapid and equally spirited rebuttal by Valery Zorkin,

<sup>1</sup> UNGA Res. 68/262, 27 March 2014.

<sup>2</sup> 'Address by President of the Russian Federation', 18 March 2014, available at <http://en.kremlin.ru/events/president/news/20603>.

<sup>3</sup> See also Allison, 'Russia and the Post-2014 International Legal Order: Revisionism and Realpolitik', 93 *International Affairs* (2017) 519, at 520.

<sup>4</sup> T. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (2015).

<sup>5</sup> See, e.g., V.A. Tomsinov, 'Krymskoe pravo' ili iuridicheskie osnovania vossoedinenia Kryma s Rossiei ['Crimean Law' or Legal Bases for Reunification of Crimea with Russia] (2015).

<sup>6</sup> E.A. Lukyanova, 'O prave nalevo' ['Of the Law Gone Wrong'], *Novaya Gazeta* (19 March 2015), available at [www.novayagazeta.ru/articles/2015/03/19/63473-o-prave-nalevo](http://www.novayagazeta.ru/articles/2015/03/19/63473-o-prave-nalevo).

chair of Russia's Constitutional Court, which, in March 2014, had speedily approved of the incorporation of Crimea.<sup>7</sup>

The popular approval, in Russia, of Crimea's annexation has apparently been so overwhelming that even pro-Western opposition politicians have been confused about how to proceed. For example, Ksenia Sobchak, a presidential candidate in the March 2018 elections, admitted that the 2014 annexation was illegal but that, in order to now solve the conundrum, one would need a new and proper referendum on the issue – in Crimea, (the rest of) Ukraine, as well as in Russia itself.<sup>8</sup> We can assume that, in 2001, the drafters of the ILC's draft Articles on State Responsibility did not think of this possibility when discussing consequences of illegal annexations.<sup>9</sup> For international lawyers, probably the most interesting question is whether Moscow has any serious legal-political arguments for the annexation that would at least deserve our attention from an intellectual or moral standpoint. Put differently, if the annexation of Crimea was illegal, was it at least legitimate in some ways, which is to repeat the distinction that some Western lawyers started to make, perhaps unfortunately, in the case of the Kosovo intervention in 1999? What are Russia's main arguments, and do they make any sense in light of the overwhelming arguments pointing at illegality?

As is well known, the main argument supporting the illegality thesis in the context of Crimea is that the deployment of Russian special forces ('little green men') during the takeover of power in Crimea violated Article 2, paragraph 4 of the UN Charter. In addition, Russia's annexation also violated the border treaty concluded by Russia and Ukraine in 2003, in which Russia had recognized Crimea as part of Ukraine. Yet, beyond the immediate normative arguments, the current debate about the (il)legality of Russia's actions in Crimea can also be seen from a historical perspective. Here, I refer to an old genre in international law writings justifying or condemning war and territorial conquest – what used to be called 'war manifestos'. Quite symbolically, Russia's accession to the *jus publicum europaeum* in the early 18th century coincided with the publication of such war manifestos and pamphlets.<sup>10</sup> In 1700, Muscovy's Tsar Peter the Great attacked the Kingdom of Sweden in the province of Estonia at the town of Narva, and the Great Nordic War (1700–1721) broke out. In response, the Swedish state historiographer, diplomat and former Dorpat (Tartu) University professor of law and rhetoric, Olaus (Olof) Hermelin (1658–1709), authored a pamphlet in which he accused Muscovy of breaking previous treaties and pledges given to the

<sup>7</sup> V. Zorkin, 'Pravo – i tol'ko pravo' ['Law – and Only Law'], *Rossiiskaya Gazeta* (23 March 2015), available at <https://rg.ru/2015/03/23/zorkin-site.html>.

<sup>8</sup> 'Russia's Post-Authoritarian Future: A Conversation with Russian Presidential Candidate Ksenia Sobchak', Center for Strategic and International Studies, 6 February 2018, available at [www.csis.org/events/russias-post-authoritarian-future-conversation-russian-presidential-candidate-ksenia-sobchak](http://www.csis.org/events/russias-post-authoritarian-future-conversation-russian-presidential-candidate-ksenia-sobchak).

<sup>9</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001.

<sup>10</sup> See also Piirimäe, 'Russia, the Turks and Europe: Legitimations of War and the Formation of European Identity in the Early Modern Period', 11 *Journal of Early Modern History* (2007) 63.

Swedish Crown.<sup>11</sup> It then became a task of the Russian diplomat Petr Shafirov (1670–1739) to respond with Russian arguments, mostly offering quite a different perspective (today, we might also say, ‘alternative facts’) on what had happened historically and on what had been agreed in the earlier treaties.<sup>12</sup> Shafirov’s pamphlet became Russia’s first publication related to the tradition of (European) international law. In the absence of international courts, the debate on the justness of the Great Nordic War was ultimately decided on the battlefield – to the triumph of Russia. Nevertheless, the Swedish and Russian war pamphlets were meant to influence the European public opinion, at least before the peace treaty of Nystad finally recognized the territorial changes in 1721.

In their recent account of plans to outlaw war, Oona Hathaway and Scott Shapiro write that, since at that time starting a war was not prohibited in international law, war manifestos were first of all a means of propaganda.<sup>13</sup> Interestingly, about one-third of the historical war manifestos that those authors collected and examined charged their enemies for the disruption of the balance of power.<sup>14</sup> This demonstrates that, at least historically in Europe, balance-of-power arguments have played a certain role in legal-moral-political justifications of war. Hathaway and Shapiro further explain: ‘The best strategy to bear in mind when reading manifestos is the old lawyerly adage: “When the law is on your side, pound the law; when the facts are on your side, pound the facts; when neither is on your side, pound the table.” ... But what *all* the manifestos did – regardless of merit – was to defend their actions as justified responses to wrongs.’<sup>15</sup>

The main difference between *jus ad bellum* in the early 18th century and now is obvious; unlike then, we have lived since 1928 and 1945 in an era when threat or use of military force, aggression and annexation are illegal. Balance-of-power considerations have been typically considered irrelevant for post-1945 discussions of *jus ad bellum* in international law. At the same time, the idea of balance of power has lived on in post-1945 international relations literature, especially among historically oriented realists, perhaps most notably among them the former US chief diplomat and foreign policy theorist Henry Kissinger.<sup>16</sup> An interesting question emerges of whether realist

<sup>11</sup> O. Hermelin, *Gerechte Ablehnung derer lasterhaften Beschuldigungen, womit der Moscovitische Czar Seinen Krieg, damit Er Schweden, wieder Eyd, und noch neulich versicherte Treu und Glauben, angegriffen, zu beschönigen gesucht hat: nach dem Lateinischen Original übersetzt* (1701). The Latin original was entitled *Discussio criminonum, quibus usu est Moscorum czarus, cum bello Svecis, contra jusjurandum, et nuperrime datam fidem, illato praetextum quaereret* (1700). On Hermelin, see S. Olsson, *Olof Hermelin: en karolinsk kulturpersonlighet och statsman* (1953); G. von Rauch, *Die Universität Dorpat und das Eindringen der frühen Aufklärung in Livland 1690–1710* (1943), at 269ff.

<sup>12</sup> P.P. Shafirov, *A Discourse Concerning the Just Causes of the War between Sweden and Russia: 1700–1721*, edited by W.E. Butler (1973).

<sup>13</sup> O.A. Hathaway and S.J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017). For a detailed engagement, see Peevers, ‘Liberal Internationalism, Radical Transformation and the Making of World Orders’, 29 *European Journal of International Law* (2018) 303.

<sup>14</sup> Hathaway and Shapiro, *supra* note 13, at 42.

<sup>15</sup> *Ibid.*, at 44 (emphasis in original).

<sup>16</sup> See further on this H. Kissinger, *Diplomacy* (1995); see, e.g., J.J. Mearsheimer, *The Tragedy of Great Power Politics* (2001).

ideas concerning the balance of power could still be relevant in considerations of the prohibition of the threat and use of force in international law, even after the 1945 paradigmatic shift. Given the emphasis in much of the international law scholarship on the idealist and pacifist features of the settlement reached in 1945, this question may sound provocative, and, yet, as discussed below, the Crimea crisis has perhaps resulted in a renaissance of balance-of-power thinking.

## 2 Annexation of Crimea: The Traditional View Emphasizing Illegality

The first book reviewed here, entitled *The Case of Crimea's Annexation under International Law*, is the outcome of an international conference that the Polish Academy of Sciences and the Centre for Polish-Russian Dialogue and Understanding organized in Warsaw in March 2015, one year after the annexation.<sup>17</sup> This came after the initial lively encounter of some leading Russian and Ukrainian international law scholars at the meeting of the European Society of International Law's international legal theory interest group in Tallinn in June 2014.<sup>18</sup> The Warsaw conference became one of the two prominent European conferences that at the time focused specifically on the study of the annexation of Crimea from an international legal viewpoint. (The other one took place in Heidelberg's Max Planck Institute, and its papers have been published as well.<sup>19</sup> Even so, the topic is far from exhausted, and further publications on the topic have continued to emerge.)<sup>20</sup>

Inevitably, the book published in Warsaw and organized around conference papers is a document of its time, wherein also lies part of its charm. The Polish editors have aimed at a diversity of viewpoints so that the (pro-)Russian perspective would also be represented. Thus, metaphorically speaking, the successors of both Hermelin and Shafirov, as well as, of course, observers emphasizing their scholarly neutrality, have been given an opportunity to make their respective cases in this book. Nevertheless, the representation of the Russian official perspective has remained weaker, and most authors of chapters either proceed from the assumption, or come to the conclusion, that Russia's annexation was illegal.

One of the editors, Sławomir Dębski, who is currently director of the Polish Institute of International Affairs, argues that Moscow has engaged in "international law trolling", seeking to undermine, relativise and destroy the international legal order, *inter alia* by using "statements that are evidently untrue".<sup>21</sup> Władysław Czapliński, in

<sup>17</sup> W. Czapliński et al. (eds), *The Case of Crimea's Annexation under International Law* (2017), available at [http://cprdipl.pl/assets/media/Wydawnictwa/Inne/The\\_Case\\_of\\_Crimeas\\_Annexation\\_under\\_International\\_Law\\_contents.pdf](http://cprdipl.pl/assets/media/Wydawnictwa/Inne/The_Case_of_Crimeas_Annexation_under_International_Law_contents.pdf).

<sup>18</sup> See 15 *Baltic Yearbook of International Law* (2015).

<sup>19</sup> See 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* (2015).

<sup>20</sup> See, e.g., S. Sayapin and E. Tsybulenko (eds), *The Use of Force against Ukraine and International Law* (2018).

<sup>21</sup> Czapliński et al., *supra* note 17, at 14–15.

turn, writes about the speed of steps leading to the annexation of Crimea that ‘will be quoted in all annals of diplomatic history, to say nothing of the *Guinness Book of Records*’.<sup>22</sup> By comparison, for example, in the summer of 1940, it took the Soviet Union in the Baltic States longer – almost two months – to move from the initial occupation to annexation.

The chapters in the book are organized around four thematic parts: self-determination, use of force, international responsibility and the follow-up to the conflict. In the self-determination section, the aim of the chapter of Vladislav Tolstykh of Novosibirsk State University in Russia is to challenge the predominant doctrinal understandings of the principle of self-determination in international law.<sup>23</sup> However, unfortunately, Tolstykh fails to lay out explicitly what consequences his thoughts would have in the context of Crimea. Furthermore, Daniele Amoroso of the University of Cagliari in Italy highlights the arguably predominantly pro-Russian sentiment of the Crimean population and concludes that ‘the Western strategy of non-recognition appears unable, alone, to generate satisfactory outcomes, at least from the perspective of the Crimean people’.<sup>24</sup> Amoroso further concludes that the Crimean self-determination claim should be at least partially upheld since it would ‘contribute to a de-escalation of the crisis, while giving due weight to the aspirations of the people concerned’.<sup>25</sup>

In contrast, the late Oleksandr Zadorozhnii of the Institute of International Relations in Kyiv, Ukraine, argues that when one applies existing international legal norms and doctrines to the Crimean situation, then the Russian use of force that preceded the referendum and the annexation trumps in its legal consequences any self-determination claims that there may have been. Besides that, Zadorozhnii does not think that the Crimean people met the criteria for a claim to self-determination in international law.<sup>26</sup> In addition, Oleksandr Moskalenko of the V.N. Karazin Kharkiv National University in Ukraine argues that the Crimean referendum did not comply with most basic international minimum standards.<sup>27</sup> Zadorozhnii also echoes Dębski’s argument of Russia’s ‘international legal trolling’ by making the point that ‘there is an impression that Russians do not really care about what their arguments actually mean’.<sup>28</sup>

In the use-of-force section of the book, Patrycja Grzebyk of the University of Warsaw asks whether the prohibition of aggression actually applies to Russia.<sup>29</sup> This is not an absurd question since Russia (along with some other permanent members of the UNSC) has insisted that only the UNSC can determine the existence of aggression, and, in this organ, it also famously has veto power.<sup>30</sup> In another chapter, Maria

<sup>22</sup> *Ibid.*, at 38.

<sup>23</sup> *Ibid.*, at 99–107.

<sup>24</sup> *Ibid.*, at 132.

<sup>25</sup> *Ibid.*, at 134.

<sup>26</sup> *Ibid.*, at 56.

<sup>27</sup> *Ibid.*, at 97.

<sup>28</sup> *Ibid.*, at 68.

<sup>29</sup> *Ibid.*, at 137–153.

<sup>30</sup> See, e.g., Kuzmin and Panin, ‘Russia’, in C. Kress and S. Barriga, *The Crime of Aggression: A Commentary* (2017), vol. 2, 1264, at 1266–1267.

Issaeva, part of Threefold Legal Advisers in Moscow, blames the ongoing Soviet legacy for the intellectually unimpressive responses among Russian international lawyers to the annexation of Crimea.<sup>31</sup> She writes that the ‘literature written by Soviet and Russian scholars on the prohibition of aggression and unauthorized use of force has been intended to address the behavior of States other than Russia’.<sup>32</sup> Moreover, Issaeva is concerned that the situation ‘results in a growing public perception of international law in Russia as either a meaningless “fig leaf” used exceptionally to cover State self-interest, or as “idle talk” between politicians’.<sup>33</sup> On the other hand, if the overwhelming majority of Russians support the incorporation of Crimea and do not see any major problem with it from the viewpoint of international law, then Russian scholars and politicians also just echo what people want to hear. What Issaeva seems to suggest is that international law experts should lead the way and seek to tell even uncomfortable truths. However, not all international lawyers are courageous enough to take on the prevailing public opinion.

In another chapter, Mindia Vashakmadze of the Max Planck Foundation for International Peace and the Rule of Law in Heidelberg, who is originally from Georgia, analyses the Russian practice of the forcible protection of nationals abroad. The previous precedents in the post-Soviet region, not the least in Caucasus, indicate that Moscow’s current interpretation of what it is entitled to do in the pursuit of the protection of its nationals (or using it as a pretext) did not newly emerge in 2014 but was much earlier established. In the responsibility section, Alena F. Douhan of the International University in Minsk, Belarus, asks whether the international community may have had ‘wrong responses’ in the Ukrainian crisis.<sup>34</sup> She concludes that ‘no actor demonstrated its true adherence to the maintenance of international peace and security, and all of them applied and unfortunately still apply double standards’.<sup>35</sup> Although Douhan does not consider Russia’s actions in Crimea legal, she rejects the Western portrayal of Moscow as ‘the only guilty party’ and thinks that the illegality of Russia’s behaviour did not justify the introduction of sanctions.<sup>36</sup> Douhan’s argument echoes the interpretation that is popular in Russia (compare it to the previously mentioned question of the definition of aggression) that sanctions, in order to be legal under international law, must be imposed by the UNSC and only by the UNSC.<sup>37</sup> In other words, *de facto*, at least there cannot be legally sound sanctions against

<sup>31</sup> Czapliński *et al.*, *supra* note 17, at 155–179.

<sup>32</sup> *Ibid.*, at 171.

<sup>33</sup> *Ibid.*, at 174.

<sup>34</sup> *Ibid.*, at 259–277.

<sup>35</sup> *Ibid.*, at 275.

<sup>36</sup> *Ibid.*, at 276.

<sup>37</sup> See, e.g., V.A. Chizhov, in Federal’noe Sobranie Rossiiskoi Federatsii (ed.), *Aktualnye mezhdunarodno-pravovye problemy XXI veka: materialy mezhdunarodnogo ‘kruglogo stola’* (2015), at 54; Bakhin, ‘Odnostoronnie ekonomicheskie prinuditel’nye mery (tak nazyvaemye “ekonomicheskie sanktsii”) s točki zrenia deistvuiushhego mezhdunarodnogo prava [‘Unilateral Economic Forcible Measures (So-Called “Economic Sanctions”) from the Viewpoint of Contemporary International Law’], *Russian Year Book of International Law* (2016) 66; Maleev, Rachkov and Iaryshev, ‘Sanktsii v mezhdunarodnom prave: tochka ne postavlena’ [‘Sanctions in International Law: No Final Word Issued Yet’], 2 *Moscow Journal of International Law* (2016) 81.

permanent members of the UNSC because of their veto power. Inevitably, Douhan's argument also reflects her country's difficult position as Russia's close ally, which, at the same time – and this is a noteworthy fact – has not recognized the annexation of Crimea by Russia.

Enrico Milano, Maurizio Arcari, Łukasz Gruszczyński and Marcin Menkes, Beatrice Bonafe, Bartłomiej Krzan, Matthew Kane and Sigmar Stadlmeier discuss further responsibility issues related to the annexation of Crimea as well as the follow-up of the still ongoing military conflict in southeastern Ukraine. Problems of state responsibility, individual criminal responsibility under international law as well as the legality of the EU trade sanctions under World Trade Organization law are discussed. Kane examines the 'prudence, propriety and potential ramifications' of the Ukrainian use of language – namely, that it is fighting (Russian-supported) 'terrorism' in southeastern Ukraine.<sup>38</sup> (Instead, Moscow argues that the situation in Donbass is just a Ukrainian 'civil war'.) This is highly relevant in the ongoing International Court of Justice case between Ukraine and Russia.<sup>39</sup> Stadlmeier looks in a definitive manner at the shooting down of Malaysia Airlines Flight MH 17 – an incident for which the Netherlands and Australia have held the Russian Federation accountable.<sup>40</sup>

Altogether, this stimulating collection of articles represents the mainstream viewpoint in the sense that the reader inevitably puts the book aside with the knowledge that, in Crimea, Russia has acted illegally and that, from the initial violation of international law, there has emerged a myriad of other violations. The confirmation of this mainstream view is helpful, but, of course, it does have limits. Despite the editors' attempts at diversity, there is, in the book, no convincing legal-political argument for the 'Russian case', not just in the narrow sense of a legal argument justifying the annexation undertaken by Russia but also in terms of us being able to understand the normative thinking behind Russia's actions better. For example, Amoroso's argument that Crimean people also deserve a form of self-determination or Douhan's criticism that the West has used double standards does not go deep enough in opening up reasons for and consequences of the annexation of Crimea.

All this may be understandable. The argument for legality is a very tough one to make in the framework of existing international law, after all. Before 2014, the Russian government (as well as Russian scholars) vocally favoured the territorial integrity of states over claims to self-determination or demands made as a consequence of serious human rights violations (for example, in Chechnya or Kosovo).<sup>41</sup> While states, of course, are not prohibited from making U-turns in their international

<sup>38</sup> Czaplinski *et al.*, *supra* note 17, at 311–337.

<sup>39</sup> *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)* (pending).

<sup>40</sup> Cowell, 'Russia "Accountable" for Downed Airliner. Australia and Netherlands Say', *New York Times* (25 May 2018), available at [www.nytimes.com/2018/05/25/world/europe/netherlands-australia-russia-mh17.html](http://www.nytimes.com/2018/05/25/world/europe/netherlands-australia-russia-mh17.html).

<sup>41</sup> See, e.g., Putin, 'A Plea for Caution from Russia', *New York Times* (11 September 2013), available at [www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html](http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html).



legal argumentation, they will naturally face stronger scepticism when they make such U-turns so obviously in their own geopolitical interest. The result is the current standoff in which the majority of the world's states consider the annexation of Crimea illegal, but Russia affirms that, from 2014 on, Crimea will always remain Russian. Realizing this conundrum, some Russian international lawyers (for example, Stanislav Chernichenko of the Diplomatic Academy in Moscow) have suggested to search for a justification of Russia's incorporation of Crimea outside the framework of existing international law, especially in the logic of historical (restorative) justice. Essentially, this is the Russian version of the 'illegal but legitimate' argument.

### 3 Return of Balance-of-Power Thinking and *Jus ad Bellum*

If a certain line of argumentation does not convince its target audiences, it may become necessary to change the perspective altogether, if this is possible. Thus, if contemporary international law does not offer convincing legal justifications for Russia's annexation of Crimea, the prospective Shafirovs of today need to perhaps say something more general about international law in the contemporary world that would change our normative outlook and make Russia's actions in Ukraine more palatable. This is the ambitious project which Rein Müllerson undertakes in his book *Dawn of a New World Order*.<sup>42</sup>

Rein Müllerson has a distinct career as an international law scholar. He is professor emeritus of international law at the University of Tallinn in Estonia and at King's College in London in the United Kingdom (UK) as well as former president of the Institut de Droit International. Also relevant in the context of this text is that he had risen to be among the leading international law experts in Moscow during Mikhail Gorbachev's perestroika period, having previously been one of the favourite disciples of Grigory Tunkin at Moscow State University. Recently, Müllerson has also been active in the Valdai Discussion Club, which has privileged access to Russia's President Putin.

Müllerson's book is not only about international law but also about international politics and current affairs. In this review, I will omit the discussion of these non-legal parts concerning the world order more generally and just focus on Müllerson's international legal analysis, especially the part that concerns the foundational principles of international law and what might follow from it for *jus ad bellum*. In his book, Müllerson does not explicitly admit that he is going to make the pro-Russian argument about the state of international law. To the contrary, he starts his book by criticizing the prevalence of 'advocacy research' in international law. He demands that 'one should attempt to get as far away as possible from the viewpoint of an activist and as close as possible to the viewpoint of that of an impartial researcher'.<sup>43</sup> Müllerson then goes on to say: 'Therefore, in my research, I try, as much as possible, to approach all

<sup>42</sup> R. Müllerson, *Dawn of a New Order: Geopolitics and the Clash of Ideologies* (2017).

<sup>43</sup> *Ibid.*, at 13.

actors involved in different crises and conflicts as molecules, with roles, interests and versions that do not influence me emotionally.’<sup>44</sup>

However, the ‘molecule’ called Russia gets a quite sympathetic coverage in his analysis. Müllerson emphasizes that, when discussing Crimea, we should not start with Crimea and 2014 but, instead, with Kosovo in 1999. In this context, Müllerson writes that, in 1999, the acts of Kosovar Albanians ‘mirrored and often exceeded the atrocities of the Serbian side’.<sup>45</sup> This is a controversial interpretation of historical facts that, were they true, would indeed challenge the very rationale of the NATO intervention (indeed, to do this is exactly Müllerson’s point). Furthermore, Müllerson considers the recognition of Kosovo by more than 110 UN member states ‘unlawful’.<sup>46</sup> It could certainly be argued that the idea that the normative position of the majority of the UN members is ‘unlawful’ is highly controversial. In any case, it is Müllerson’s view that if Russia’s annexation of Crimea was illegal then, on the same terms, so too was NATO’s bombing of Yugoslavia and the later recognition by many states of Kosovo as an independent state.<sup>47</sup> Thus, there is a certain relativity of violations of international law; a certain ‘balance’ of violations emerges. Russia violated international law against Ukraine, but Müllerson suggests that, before that, the West, led by the USA, had had its own share of major violations. This is the classical Russian reproach of Kosovo 1999, Iraq 2003 and Libya 2011 as US (or NATO countries’) violations of international law, which has recently even made it into Western popular culture.<sup>48</sup>

Müllerson also attempts to diminish what actually happened in Crimea in 2014 and challenge the previously mentioned majority view that Russia violated Article 2, paragraph 4 of the UN Charter, and even committed aggression against Ukraine. In 2014, according to Müllerson, Russian troops in Crimea merely ‘threatened to use force in case the Ukrainian military were to prevent the population of the peninsula from voting’.<sup>49</sup> He elaborates further: ‘Yes, this was interference in the internal affairs of Ukraine, but not an act of aggression, and the fact that the United States and other NATO countries had earlier blatantly interfered in the affairs of Ukraine by supporting both covertly and overtly the opponents of the government of President Yanukovich may serve as a mitigating circumstance for the Russian interference.’<sup>50</sup>

Müllerson’s overall narrative prepares the reader to understand, from Russia’s viewpoint, why it did what it did in 2014 – in the way that Shafirov explained Peter’s actions at the beginning of the Great Nordic War. Müllerson refers euphemistically to the ‘tragedy of Ukraine’, seeming to evoke the classical tradition wherein a ‘tragedy’

<sup>44</sup> *Ibid.*, at 21.

<sup>45</sup> *Ibid.*, at 19.

<sup>46</sup> *Ibid.*, at 117.

<sup>47</sup> *Ibid.*, at 170.

<sup>48</sup> In the eighth and last season of the US television series *Homeland*, released in 2018, the Russian secret service agent gives a speech in Moscow to his American counterparts in which he accuses the Americans of the use of force in Kosovo, Iraq and Libya.

<sup>49</sup> Müllerson, *supra* note 42, at 128.

<sup>50</sup> *Ibid.*, at 128.

is not necessarily the fault of anybody in particular, and yet points out that Russia has been 'taking revenge for recent humiliations'.<sup>51</sup> Today's Russia is 'more democratic than many in the West assume'; it is just that Russia is not a 'Western-style liberal democracy'.<sup>52</sup> The shock therapy of the 1990s, Müllerson's argument goes, was imposed on Russia by the Americans and was conducted in their geopolitical interest: 'Russia's assertiveness in its foreign policy and increasing authoritarianism at home are, to a great extent, conditioned by and are responses to Western, particularly American, attempts to coerce Russia to follow the line drawn in Washington.'<sup>53</sup> The conditions of Russia's integration with the West after 1991 should have been negotiated as being between equal partners, but they were not.<sup>54</sup> When President Boris Yeltsin chose Vladimir Putin as his successor, he 'behaved as a statesman, and even visionary'.<sup>55</sup> Western propaganda, compared to Russian propaganda, is 'much more sophisticated, experienced and widespread and therefore it may even not look like propaganda at all'.<sup>56</sup> The core problem with many experts in the West (and, especially, an aspiring West such as the Central and East European countries, former dependents of Moscow) is their Russophobia.<sup>57</sup> However, such voices should be tamed because 'now is not the time to let phobias to triumph over reason'.<sup>58</sup> Recently, Russia has simply responded to attempts of containment in their various forms.<sup>59</sup> NATO is a 'relic of the Cold War'<sup>60</sup> and 'the greatest geopolitical nonsense of the twenty-first century'.<sup>61</sup> Müllerson also hopes that God would 'help us avoiding revolutions, whatever be their colour'.<sup>62</sup>

If international law is, among other things, 'people with projects' (as David Kennedy has suggested<sup>63</sup>), then Müllerson's project in this book seems to be that of normatively supporting great powers outside the West, especially Russia. Citizen of a small 'border' state himself (Estonia), Müllerson, intriguingly, critically comments on international law's 'anarchophilia', which he sees reflected in the principle of self-determination.<sup>64</sup> His view echoes the opinion of another Baltic international lawyer who made international legal arguments for Russia, Friedrich Martens (1845–1909), who in the 1880s opined that the emerging principle of self-determination of peoples was 'capable of destroying a lot' (as it did, from the Russian imperial perspective, in 1918 and later

<sup>51</sup> *Ibid.*, at 3, 38.

<sup>52</sup> *Ibid.*, at 45.

<sup>53</sup> *Ibid.*, at 62, 63.

<sup>54</sup> *Ibid.*, at 70.

<sup>55</sup> *Ibid.*, at 74.

<sup>56</sup> *Ibid.*, at 96.

<sup>57</sup> *Ibid.*, at 101–107.

<sup>58</sup> *Ibid.*, at 107.

<sup>59</sup> *Ibid.*, at 111.

<sup>60</sup> *Ibid.*, at 119.

<sup>61</sup> *Ibid.*, at 127.

<sup>62</sup> *Ibid.*, at 63.

<sup>63</sup> Kennedy, 'My Talk at the ASIL: What Is New Thinking in International Law?', American Society of Law Proceedings of the 94th Annual Meeting, 2000, at 104–125.

<sup>64</sup> Müllerson, *supra* note 42, at 151.

in 1991).<sup>65</sup> According to Müllerson, smaller countries may be ‘instinctively, though sometimes counter-productively, more anarchophilic than powerful states’.<sup>66</sup>

This, in turn, leads up to Müllerson’s main, and original, argument, which links his *Dawn of a New Order* to the (otherwise very different) *Case of Crimea’s Annexation under International Law*. According to Müllerson, Russia annexed Crimea for the sake of the balance of power: ‘Russia’s annexation of the Crimea, beside the various historical, ethnic and even religious explanations and justifications, was intended to counter the unfavourable change to the balance of power which had already become threatening for Russia.’<sup>67</sup> As he explains, until the beginning of the 1990s, international law had evolved as a balance-of-power system, but the hegemony of the USA since then has created unipolarity and destroyed the balance, which is detrimental to international law.<sup>68</sup> The Russian annexation of Crimea was carried out ‘to a great extent because of the foreseeable risk of having American or NATO forces in the peninsula’.<sup>69</sup> Although Moscow mentioned ‘historical, ethnical and religious reasons as real justifications’, the real explanation for annexation, in Müllerson’s view, was Moscow’s justified fear of having NATO marines in Sebastopol.<sup>70</sup> Thus, Müllerson puts aside references to the self-determination of peoples and the suggested discrimination of ethnic Russians in Ukraine as sort of plausible pretexts and a rhetorical smokescreen that Moscow used in 2014. Altogether, for Müllerson, the main problem for international law (and the world order) is not Russia but the USA: ‘Today, for the first time in the history of humankind, a single power intends to dominate the planet.’<sup>71</sup>

While referring to balance-of-power thinking as the actual motive behind Russia’s annexation of Crimea, Müllerson goes a major step further and argues normatively that international law also needs the revival of balance-of-power thinking. He refers to the famous British international lawyer Lassa Oppenheim (1858–1919), who maintained before World War I that ‘a Law of Nations can exist only if there is equilibrium, a balance of power, between the members of the Family of Nations’.<sup>72</sup> This reflected Britain’s foreign policy tradition at the time to support on the European continent the alliance against any hegemonic aspirations (for a long time against France and, after Otto von Bismarck, against Germany).

Müllerson writes that effective international law can be based on three interrelated phenomena: multipolarity, balance of power and concert of powers.<sup>73</sup> However, it seems to me that ‘multipolarity’ is anyway mostly a modern synonym for the concept of ‘balance of power’; whoever in today’s world invokes (the need for) ‘multipolarity’,

<sup>65</sup> F.F. Martens, *Sovremennoe mezhdunarodnoe pravo tsivilizovannykh narodov* [Contemporary International Law of Civilized Nations] (1996 [1882]), vol. 1, at 121.

<sup>66</sup> Müllerson, *supra* note 42, at 159.

<sup>67</sup> *Ibid.*, at 154.

<sup>68</sup> *Ibid.*, at 5.

<sup>69</sup> *Ibid.*, at 30.

<sup>70</sup> *Ibid.*, at 113.

<sup>71</sup> *Ibid.*, at 66.

<sup>72</sup> L. Oppenheim, *International Law: A Treatise*, vol. 1: *Peace* (2nd edn, 1912), at 80.

<sup>73</sup> Müllerson, *supra* note 42, at 158.

usually criticizes things from the viewpoint of balance of power. Müllerson continues by saying that ‘such a system is urgently needed at global level, and today we do not have, primarily due to NATO expansion, such an agreed-upon balance, even in Europe’.<sup>74</sup>

Are there any potential downsides to accepting the balance-of-power thinking though? Müllerson admits that there might be, at least for small nations who, although not treated as fully equal, might be protected by balance-of-power arrangements: ‘The principle of the sovereign equality of states may suffer, though this principle may also benefit particularly small nations, which usually do not have much say at the table of power balancing.’<sup>75</sup> For Müllerson, balance of power is foremost a political principle, but it can have legal implications and become a political underpinning of international law, as was also the case, he argues, with the UN Charter of 1945.<sup>76</sup> Müllerson concludes by calling on the ‘international community, and especially the most powerful and responsible states’ to ‘take various steps to consolidate and legitimise a worldwide multipolar balance-of-power world’.<sup>77</sup>

Thus, following Müllerson, Russia’s annexation of Crimea may have violated a central norm of international law in a narrow technical sense (although, as shown above, he relativizes what, in terms of threat and use of force, happened on the ground in Crimea and presents it as a response to earlier Western violations of international law). However, in the end, for Müllerson, Moscow has almost done international law a favour in a deeper historical sense. With the annexation, Russia dared to resist the would-be global hegemon – the USA – and made a bold step towards the restoration of the balance of power as the underlying socio-political meta-principle, actually enabling an international law worthy of its name.

That the current Russian leadership thinks about Crimea and security matters in Europe, *inter alia*, in balance-of-power terms becomes apparent from other contemporary sources – for example, President Putin’s lengthy interview with the American filmmaker Oliver Stone.<sup>78</sup> However, contemporary international lawyers have started to forget what role balance-of-power arguments have played in the considerations of war and peace in classical international law.<sup>79</sup> The main question in the era of the UN Charter is how any balance-of-power claim relates to the prohibition of the threat and use of force against other sovereign states enshrined in Article 2, paragraph 4. The context of Müllerson’s main example – Crimea – is revealing; the reintroduction of balance-of-power thinking in the context of international legal theory would undermine Article 2, paragraph 4 of the UN Charter, as it was already violated in Crimea and Donbass.

<sup>74</sup> *Ibid.*, at 158.

<sup>75</sup> *Ibid.*, at 159.

<sup>76</sup> *Ibid.*, at 161.

<sup>77</sup> *Ibid.*, at 163.

<sup>78</sup> O. Stone, *The Putin Interviews* (2017), part 2, 05:15–05:30 (referring to the balance of power).

<sup>79</sup> See further Vagts and Vagts, ‘The Balance of Power in International Law: A History of an Idea’, 73 *American Journal of International Law (AJIL)* (1979) 555.

Historically too, for example, partitions of Poland in the late 18th century and secret protocols of the Hitler-Stalin Pact of 23 August 1939 were, *inter alia*, justified by reference to balance-of-power arguments. ‘The weak suffer what they must’, as the Greek writer Thucydides famously wrote. One can never be sure whether a balance has been restored or not since any such thinking on balance would be subjective and might be challenged by other powers. Acknowledging balance of power as the meta-principle preceding international law of the UN Charter would mean that the principle of the sovereign equality of states enshrined in the UN Charter would definitely suffer, as Müllerson himself partly admits.<sup>80</sup>

Might balance-of-power solutions nevertheless ‘benefit’ smaller states as well as Müllerson suggests? They would only in the sense that, when great powers do reach a consensus about their respective spheres of influence, an open military conflict over their territory would for that moment be unlikely. In this way, balance-of-power solutions (in reality, the delimitation of spheres of influence) would indeed bring perhaps some sort of peace to smaller (dependent) states but no justice in the sense of their free choice (in the way that life under Soviet control in Eastern Europe, for example, was relatively ‘peaceful’ in 1945–1989/1991).

The New York University international law professor Tom Franck once famously asked during the Cold War who had ‘killed’ UN Charter’s Article 2, paragraph 4,<sup>81</sup> to which his Columbia University colleague Louis Henkin responded that reports of the death of Article 2, paragraph 4 had been ‘greatly exaggerated’.<sup>82</sup> At that time, Soviet international law scholars, of course, would have suggested that if anyone had ‘killed’ Article 2, paragraph 4, it was the USA itself. In retrospect, major ideas such as the one behind Article 2, paragraph 4 of the UN Charter cannot be killed simply by single attacks of major powers; they can be killed primarily by other, competing ideas. In this sense, balance of power as additional justification in *jus ad bellum* matters is clearly detrimental to the restrictive *jus ad bellum* settlement as it was agreed upon in 1928 and 1945.

## 4 Conclusion

In its predominant legal, as well as moral, criticism of Russia’s actions, *The Case of Crimea’s Annexation under International Law* follows in the footsteps of the Swedish 18th-century author Olaus Hermelin; like Hermelin, the Polish-edited collection criticizes ‘Muscovy’/‘Moscow’ of breaking internationally agreed rules. At the same time, in its exposition and defence of Russia’s normative viewpoint, Müllerson’s monograph follows in the tradition of Shafirov’s war pamphlet (ironically though, the Russian diplomat Shafirov originated from Poland). We know that in the 18th century, irrespective

<sup>80</sup> Müllerson, *supra* note 42, at 159.

<sup>81</sup> Franck, ‘Who Killed Article 2(4)? or: Changing Norms Governing Use of Force by States’, 64 *AJIL* (1970) 809.

<sup>82</sup> Henkin, ‘The Reports of the Death of Article 2(4) Are Greatly Exaggerated’, 65 *AJIL* (1971) 544.

of who possessed the 'better' facts, legal arguments and rhetoric, the Russian Empire as the stronger power could keep the Baltic provinces for itself. Will the same happen now with Crimea when its annexation has been widely condemned as illegal, but it is still somewhat difficult to formulate effective long-term policies against the *fait accompli*?

In any case, participating in direct warfare come with risks and, in fact, used to be outright dangerous. Olaus Hermelin became a Russian prisoner of war at the battle of Poltava in 1709 (carried out on Ukrainian soil) and died in Russian captivity. Luckily, nowadays, personal consequences related to warfare have become less severe. That said, Sławomir Dębski, the co-editor of the book published in Warsaw, was declined a Russian visa in 2018 and could not attend the games of the Polish team at the football World Cup. Müllerson spoke at a conference in Crimea at Simferopol in 2017 and was criticized for it by the Estonian Internal Security Service.<sup>83</sup>

Müllerson's book raises the question of assumptions underlying the international legal order since 1945. It reveals how former Soviet international legal thinking has transformed into an ultra-realist analysis of the place of international law in the world order and also of how the (pro-) Russian attitudes towards Article 2, paragraph 4 of the UN Charter have changed considerably. The reading of Müllerson's book also fits well in the context of the recent historical rediscovery by Western international lawyers of the history of Article 2, paragraph 4 of the UN Charter and its 1928 predecessor, the Kellogg-Briand Pact.<sup>84</sup> Typically for our profession of international lawyers, Hathaway and Shapiro present these treaties and norms as historically progressive and revolutionary achievements that divide the history of international law into the regressive past and more humanistic and peaceful thereafter.

Yet, one of the mild criticisms of the book by Hathaway and Shapiro has been that they do not sufficiently take into account Soviet perspectives of the world's ordering act of 1945.<sup>85</sup> How the international community has come to accept the UN Charter's Article 2, paragraph 4 is too much presented as a Western (and, in particular, a US) affair and contribution. In this sense, it is useful that Müllerson now tells us that in his (or, by extension, the Russian) view the UN Charter was, among other things, also a balance-of-power arrangement. As Hathaway and Shapiro write already in the context of the Kellogg-Briand Pact in 1928, the point was that past conquests would be protected, but future conquests would not.<sup>86</sup> Of course, this suited states that had already conquered successfully – and the Soviet Union was territorially rewarded, even saturated in 1945. Joseph Stalin had earlier made a pact with Adolf Hitler on 23 August 1939 in order to achieve territorial changes in Eastern Europe, and the Soviet

<sup>83</sup> Estonian Internal Security Service, *Annual Review 2017*, at 9, available at [www.kapo.ee/en/content/annual-reviews.html](http://www.kapo.ee/en/content/annual-reviews.html).

<sup>84</sup> Hathaway and Shapiro, *supra* note 13. Kellogg-Briand Pact 1928, 94 LNTS 57.

<sup>85</sup> Hathaway and Shapiro, *supra* note 13; M. Mazover, 'The Internationalists by Oona Hathaway and Scott Shapiro Review: The Plan to Outlaw War, Review', *The Guardian* (16 December 2017), available at [www.theguardian.com/books/2017/dec/16/the-internationalists-review-plan-outlaw-war](http://www.theguardian.com/books/2017/dec/16/the-internationalists-review-plan-outlaw-war).

<sup>86</sup> Hathaway and Shapiro, *supra* note 13, at 159.

troops had then entered Poland on 17 September 1939 and occupied and annexed the Baltic states in 1940.

In diplomatic records, there are indications that in 1945 the Soviets led by Stalin approached the prohibition of the use of force also in terms of *realpolitik* and balance of power, not just for idealistic reasons of conducting a pacifist normative revolution in international law. For example, US President Franklin D. Roosevelt demanded that the Yalta conference spell the end of the ‘system of unilateral action, the exclusive alliances, the spheres of influence, the balances of power, and all the other expedients that have been tried for centuries – and have always failed’.<sup>87</sup> At the same time, Stalin emphasized the prerogatives of the victorious great powers in the world order and, *inter alia*, made the point that it was ridiculous to believe that countries like ‘Albania would have an equal voice with the three great powers that had won the war’.<sup>88</sup> Today’s Russian doctrine of international law is still inspired by this great power way of thinking, which distinguishes between great powers (*velikie derzhavy*) with historical spheres of influence and other, lesser states.

The main principles of international law were agreed upon in 1945 when the Soviet Union had a different territorial composition from today’s Russian Federation, its state continuator in international relations. Post-Soviet Russia’s *jus ad bellum* doctrine has changed quite drastically compared to the Soviet approach. The Soviet Union preached full adherence to Article 2, paragraph 4, and heavily criticized powers like the USA, the UK and Israel for their too liberal interpretations of humanitarian intervention, anticipatory self-defence, protection of citizens abroad and so on. However, post-Soviet Russia’s *jus ad bellum* doctrine started to emphasize that military force could be used in defence of Russian-speaking minorities abroad.<sup>89</sup> The only way to explain this is through realism – in 1945, the Soviet Union was territorially oversaturated, and, after 1991, Russia was territorially diminished and felt an existential threat. The text of the UN Charter remained exactly the same; yet from one of the ‘conservative’ pillars of the UN (Charter) came the challenger of the territorial order in Eastern Europe.

Whatever was in Stalin’s mind back in 1945, the UN Charter does not speak of first- and second-degree sovereignty; it speaks of the sovereign equality of all member states of the UN. This also applies to Ukraine, which is why the international community should not currently even discuss the possibility of recognizing Crimea as part of Russia. Changes in territorial status to that effect can take place only in the agreement of Kiev and Moscow, and any foreign direct pressure on Kiev would not just be immoral but also probably illegal. Today’s international law is not just what

<sup>87</sup> Cited in S.M. Plokhii, *Yalta: The Price of Peace* (2010), at 117.

<sup>88</sup> *Ibid.*, at 121.

<sup>89</sup> See ‘Military Doctrine of the Russian Federation’, No. Pr.-2976, 25 December 2014, at 22, <https://theatrum-belli.com/the-military-doctrine-of-the-russian-federation/>: ‘The Russian Federation has the legitimate right to employ the Armed Forces, other troops and bodies ... to protect its citizens abroad in accordance with generally recognized principles and norms of international law and International treaties of the Russian Federation.’



the Soviet approach was in 1945 but also what was agreed upon when and after the Soviet Union disintegrated in 1991. Former Soviet republics gained full sovereignty in 1991, and any attempts to undo this – for example, with balance-of-power arguments – run contrary to their rights as sovereign states under the UN Charter. Therefore, balance of power as a historical meta-principle related to international law can only be reintroduced at the cost of relativizing the prohibition of threat and the use of military force. It is a dangerous idea and should be rejected lest the international community risk losing the constraining effects of Article 2, paragraph 4 of the UN Charter.