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Inherited National Questions: The Soviet Legacy in Russia's International Law Doctrine on Self-determination

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Abstract

All 15 former Soviet Republics share a unique federal history with a particular understanding of the right to self-determination. Moreover, seven of them were federalised during the Soviet era, amounting to a major challenge to their territorial integrity after independence. While these states confronted their minorities in different ways, the Russian solution to its inherited national question has been the most comprehensive. This has made Russian understanding on self-determination essentially different from the mainstream of the international community, which in turn explains Russian persistent objections over the Kosovo independence (2008) and partly clarifies the events in Georgia (2008) and Crimea (2014). This article analyses how the former Soviet Republics coped with the transformation from the ethnofederal state to independence. The focus will be on Russia as the most affected of them and on the persistent Soviet legacy in its interpretations of self-determination and, consequently, its policies towards its post-Soviet neighbours.

Keywords

self-determination – secession – federalism – Kosovo – Crimea

1 Introduction: The National Question in the Soviet Context

The people's right to self-determination – i.e. to determine their political future freely, without outside interference – took a notorious 'false start' at the

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end of the First World War, lacking a concrete legal base and applied only on the expense of the vanquished states in Europe.[1] This original principle of self-determination had two great ideologues: Woodrow Wilson and Vladimir Lenin. The latter seems especially strange advocate for this seemingly nationalist cause, given that Marxism – the ideological basis for the socialist national policy – had always difficulties in coping with nationalism. Marx had proclaimed that the working men had no country, and the topic was very controversial in Russia with its numerous peoples and history of Russian chauvinism towards them. However, Lenin saw the national awakening of oppressed peoples and their right to self-determine their fate as both theoretically progressive as well as politically instrumental. By proclaiming in 1916 imperialism as the 'highest form of capitalism', he was able to simultaneously weaken the Western colonial powers and gain political capital among the oppressed masses, including the non-Russian populations of the Tsarist Empire.[2] After becoming the first leader of the Union of the Soviet Socialist Republics (USSR), Lenin recognised that Russia had a particular 'national question' that required a socialist solution. This solution was one of the key tenets of an ideological variant later known as Marxism-Leninism.

In 1917, Lenin actualised his socialist solution by proclaiming the right to self-determination up to secession to all the peoples of Russia[3] via constitutionally guaranteed territorial autonomy.[4] This was essentially different from the Western version of self-determination as it was applicable to all peoples, contained a right to secession and recognised different levels of national sovereignty. Therefore, the 1924 Constitution of the USSR established a unique asymmetrical federation, based on the Marxist-Leninist national ideology called *ethnofederalism*.[5] Under ethnofederalism, the USSR consisted of different levels of self-determining units for the national groups, based on their size and socio-economic 'progression' towards socialism. The demarcation of these units was based on ethnicity, religion or language. According to the Soviet constitutional theory, the highest two levels were usually referred to as 'states',

1 J. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, Cambridge, 1996) pp. 7–27.

2 V. Lenin, *Collected Works, Vol. 19* (Progress Publishers, Moscow, 1942) p. 47.

3 *Declaration of the Rights of the Peoples of Russia*, 15 November 1917.

4 *See* T. Lundstedt, 'The Changing Nature of the Contemporary Russian Interpretation of the Right to Self-Determination under International Law', in S. Morris (ed.), *Russian Discourses on International Law: Sociological and Philosophical Phenomenon* (Routledge, New York, 2018) 197–219, pp. 200–201.

5 The term was first used in P. Roeder, 'Soviet Federalism and Ethnic Mobilization', 43:2 *World Politics* (1991) pp. 196–232).

whereas the lower units were designated as 'ethnoterritorial self-administrative units'.[6] The most autonomous units were the *Soviet Socialist Republics* (SSRs), such as Georgia and Ukraine. To achieve this level, the territory had to have sufficiently numerous population of which the main ethnicity would constitute the majority and either a border with foreign country or an outlet to the sea.[7] The ethnicities lacking one or more of these conditions were given the second highest status as *Autonomous Soviet Socialist Republics* (ASSRs), such as Abkhazia (in Georgian SSR) and Crimea (in Ukrainian SSR). On the third level with minor autonomy were the *Autonomous Oblasts* (AOs), such as South Ossetia (in Georgian SSR) and Nagorno-Karabakh (in Azerbaijani SSR).[8] Promotion and demotion were possible within the system.[9]

As the USSR felt that ethnofederalism had 'solved' the national question, it began to promote the right universally and became the main proponent of decolonisation in the 1950–1960s.[10] As a result, colonialism was declared illegal in 1960 and peoples under colonialism or other foreign occupation had now a right to independence. Notwithstanding, in any other circumstances the right to territorial integrity of existing states was seen to deny the possibility of independence.

Eventually, the problem with ethnofederalism was that it was intrinsically linked to Marxism-Leninism. It proved successful in containing nationalism throughout the Soviet era, but in 1991 the Soviet successor states inherited the socialist solution to the national question, with major ramifications.

This article analyses the continuing impact of the Soviet legacy to the Russian international law doctrine on self-determination. It argues that this doctrine is highly important for three reasons. First, as the USSR contributed greatly to the evolution of self-determination, Russian views are in some ways rather unique and have an enhanced weight in international community. Second, as a constitutionally multinational federation, it is especially important for Russia to find a consistent balance between the right to self-determination of peoples and territorial integrity of states. Third, Russian doctrine affects its foreign policy and this resonates directly in the other former SSRs that have

6 G. Ubiria, *Soviet Nation-Building in Central Asia: The Making of the Kazakh and Uzbek Nations* (Routledge, New York, 2016) pp. 96–97.

7 F. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (Martinus Nijhoff Publishers, Dordrecht, 1993) pp. 97–98.

8 *1936 Constitution of the USSR*, Articles 22–29. The lowest units, *Autonomous Okrugs*, had only limited cultural rights.

9 For example, the Karelo-Finnish SSR and the Abkhazian SSR were demoted to ASSRs.

10 As the socialist bloc did not have colonies, the USSR reasoned that it could weaken the West by promoting decolonisation.

experienced territorial conflicts since the dissolution of the USSR. Indeed, Russia has promoted its federal structure as a more general model for internal self-determination on several occasions.[11] This aspect makes Russian interpretation on the right to self-determination notably different from most other states, who usually consider these questions to be internal affairs and, consequently, have not advanced the right to internal self-determination as vigorously as Russia.

The article contributes to the understanding of the persistence of Soviet legal legacy in the contemporary Russian foreign policy. It focuses on the two major shifts in the Russian doctrine on self-determination – in 2008 in Georgia and in 2014 in Crimea, where the doctrine hit an impasse that it has been unable to escape since. These new interpretations are irreconcilable with public international law, and, subsequently, Russia has not received international support for them. Moreover, the controversial positions promoted by the country's legal scholars have separated them from the broader international academic community. In sum, the previously progressive doctrine on self-determination has given way to equally radical but plainly politically motivated interpretations that have left Russia isolated in this regard.

1.1 *Right to Self-determination in the Post-Soviet Context*

When the USSR dissolved in December 1991, all 15 SSRs agreed that Russia would continue its legal existence,[12] and formally declared that all their border adjustments would be settled by the *uti possidetis* (*juris*) principle, if not agreed otherwise by the parties in question.[13] According to this international law principle, the former administrative borders of a unit become international borders at the moment of independence.[14] It had been utilised previously in decolonisation context in the Spanish America in the early 1800s, and in Africa

11 Examples include the 'Kozak Memorandum' in 2003, the Russian Written Statement in the Kosovo hearings at the International Court of Justice in 2009, and in the federalisation plans for Ukraine in the Minsk Agreements (2014–2015).

12 *Decision by the Council of Heads of State of the Commonwealth of Independent States*, ILM 31 (1992), para. 1.

13 *Agreement on the Establishment of the Commonwealth of Independent States*, *supra* note 31, art. 5.

14 *Uti possidetis juris* is originally based on a Roman civil law principle, according to which when there was a completing claim on a property, an official edict would grant provisional possession over it during litigation to the person who already was physically possessing it. For a good overview, *see* M. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67:1 *British Yearbook of International Law* (1997) pp. 75–154.

and South-East Asia in 1960s. In both cases, the successor states of the colonial empires agreed to honour the former colonial administrative borders.[15]

With the dissolution of the USSR, the highest level of self-determination units, the SSRs, were able to secure international recognition and all of them, *e.g.* Estonia, Georgia and Ukraine, became independent states. However, altogether seven of them had been federalised by the Soviet authorities and contained ASSRs and AOs. Moreover, in the early 1990s the ASSRs had gained a close to equivalent autonomy to that of the SSRs. The dissolution of the USSR resulted in the SSRs being recognised territorially fully sovereign, terminating all guarantees for the ASSRs of any meaningful autonomous status. Therewith, the USSR bequeathed to the SSRs both the ethnofederal system and the national question that it was supposed to answer.

2 The Former Soviet Republics' Solution to the National Question

The response of the newly independent states to the automatic challenge to their central authority would chart their future course as nations for years to come. While the former SSRs confronted their ASSRs in different ways, many of them chose a revocation or a substantial diminishing of their autonomies. Usually this ignited ethnic violence and made the SSRs highly vulnerable to claims of self-determination.

Georgia became independent with three ethnofederal units, the ASSRs of Abkhazia and Adjara and the AO of South Ossetia. While Adjara remained peaceful, the nationalistic policies of Georgia and the expressed will of Abkhazia and South Ossetia to remain in the USSR led to territorial conflicts in the early 1990s, with Russia intervening on the behalf of the subunits. This intervention led to ceasefires[16] and produced 'frozen conflicts'[17] that remain to be solved.

Azerbaijan inherited a predominantly Azeri ASSR of Nakhichevan and a predominantly Armenian AO of Nagorno-Karabakh. The latter held an independence referendum on 10 December 1991, boycotted by the Azeri population.

15 Most Latin American states agreed to apply *uti possidetis* in Treaty of Confederation (8 February 1848), and the African states in the 1963 *Charter of the Organization of African Unity*, Article III.3.

16 On 24 June 1992 with South Ossetia and on 27 July 1993 with Abkhazia.

17 Frozen conflict is a legal situation in international relations where there exists a ceasefire, but no formal peace treaty between the parties.

A full-scale war ensued, with Armenia intervening on behalf of Nagorno-Karabakh. A cease-fire was reached on 12 May 1994. The ensuing frozen conflict has lasted to this day with periodical bursts of violence, latest in 2016.

Moldova became independent with one former ASSR of Transnistria,[18] which had declared its independence on 2 September 1990. Fighting between the central authorities and the self-proclaimed entity backed by Russia intensified in March 1992. A ceasefire was signed in July 1992, creating another enduring frozen conflict.

There were two federalised SSRs in Central Asia. Uzbekistan inherited the ASSR of Karakalpakstan of which's autonomy it had already enhanced in the final days of the USSR. After independence, Uzbekistan continued Karakalpakstan's meaningful autonomy, ensuring peaceful national relations. Karakalpakstan holds a veto power over any decision concerning its rights and has a constitutional right to secede from Uzbekistan, over which however Uzbekistan holds a veto right.[19] Tajikistan inherited one AO, Gorno-Badakhshan. It declared independence in the early 1990s, but retracted this after negotiations that gave it substantial autonomy. The former AO has remained peaceful since.

Finally, Ukraine inherited the ASSR of Crimea with a predominantly Russian population. Ukraine gave Crimea a meaningful autonomous status, which it enjoyed until the Russian occupation in 2014.[20]

To conclude, all the federalised former SSRs inherited two things from the USSR: the Soviet understanding of the right to self-determination and assertive minorities with histories of self-governing 'their' titular territories with constituently guaranteed autonomy. Consequently, the SSRs faced a choice: either to continue the Soviet-era autonomy in some form or to risk the outbreak of minority separatism. The ones that chose the continuation – Tajikistan, Ukraine and Uzbekistan – were able to secure a balance between the right to internal self-determination and territorial integrity. The ones who chose the revocation were succumbed with separatist violence and lost the ensuing conflicts because of foreign intervention. However, the separatists have lost the peace, as they remain unrecognised and so heavily dependent on their patron state that their independence is mostly illusory.

18 However, Transnistria had not been an ASSR since 1940. According to 2015 census, Russians, Ukrainians and Moldovans all constituted around one third of the population.

19 *See* more in P. Roeder, *Where Nation-States Come From: Institutional Change in the Age of Nationalism* (Princeton University Press, Princeton, 2007) p. 67.

20 However, there were ominous statements before 2014. In 2009, the deputy speaker of the Crimean parliament stated a wish that Russia would treat Crimea the same way than Abkhazia and South Ossetia C. Levy, 'Russia and Ukraine in Intensifying Standoff', *The New York Times*, 27 August 2009.

3 Russian Solution to the National Question

Out of the former SSRs, Russia was most affected by ethnofederalism and its interpretations of the right to self-determination continue to resonate outside its borders. When the USSR was created, many formerly Russian territories gained autonomy as SSRs, along with clearly demarcated borders that became internationalised in 1991. This greatly diminished Russian territory and has been deplored by many Russians, including famously President Putin in 2005.[21] During the Soviet era, Russia itself was federalised under the Soviet designation of Russian Soviet Federative Socialist Republic (RSFSR) and consisted of 20 ASSRs and one AO in the late 1991. Russian federalism became unique, as unlike most of the other federalised SSRs it accepted the ethnofederal model as a legitimate way to handle the national question. This has greatly affected Russian understanding of the notions of internal and external self-determination. The contemporary Russia continues to be an ethnofederal state with the proclaimed right to self-determination for its numerous minorities. However, an important limitation is that, unlike in the Soviet era, this does not include the right to secession as long as the minorities can achieve self-determination via autonomy within the state.

Finally, Russia has a very different attitude towards its Soviet past, as it sought and accomplished the international acknowledgment as the legal 'continuation state' of the USSR.[22] Whereas most of the former SSRs with ASSRs and AOs discredited the Soviet past, Russia embraced and retained the Soviet ethnofederal system.[23] This decision may have well saved the country from disintegration during the chaotic 1990s.[24] The restoration of ethnofederalism was done in phases, culminating in the process of drafting individual power-sharing treaties with the federal units in 1992–1998.

3.1 *The Final Ethnofederal Developments in the Soviet Union*

In the spring of 1990, as a part of the USSR President Mikhail Gorbachev's attempts to save the fragmenting Union via a renewed federal structure, a series

21 Putin has called the dissolution "the greatest geopolitical catastrophe" of the 20th Century. *Reuters*, 25 April 2005.

22 Russia accepted responsibility for the USSRs treaty obligations and most of its foreign debt in exchange for retaining its seat in many organisations, including the United Nations Security Council.

23 Census in 1989 identified 101 ethnic groups within Russia, with 39 numbering more than 100,000.

24 *See* more in H. Hale, 'The Makeup and Breakup of Ethnofederal States: Why Russia Survives Where the USSR Fell', 3(1) *Perspectives on Politics* (2005) pp. 55–70.

of constitutional changes promoted the ASSRs close-to-equals with the SSRs.[25] At this point, President of the RSFSR Boris Yeltsin decided to use the national question against the federal centre. He urged the subunits to demand more autonomy, which amounted to all of the SSRs, many of the ASSRs and even some of the AOs declaring their sovereignty. However, an important distinction to make here is that in Russia the ASSRs proclaimed sovereignty *within the framework of the RSFSR*, in contrast with the SSRs who declared full independence from the USSR. Thus, the goal for most of the lower ethnofederal units was not independence but the continuation of their autonomy.

After a Union-wide referendum on the preservation of the USSR,[26] Gorbachev continued reforms while Yeltsin was preparing Russia for independence. In May 1991, a constitutional amendment upgraded the ASSRs of Russia into 'Republics'.[27] In July 1991, four of the five ethnic AOs of RSFSR received the same status promotion.[28]

After a coup attempt against Gorbachev in August 1991, Yeltsin became *de facto* ruler of the USSR. On 8 December 1991, he met with the heads of state of Ukraine and Belarus and signed an *Agreement Establishing the Commonwealth of Independent States* (CIS), which proclaimed that the USSR "no longer exists".[29] On 21 December 1991, eight more SSRs joined the CIS.[30] Gorbachev resigned on 25 December and the next day the Supreme Soviet dissolved itself and the USSR.

Before and after the dissolution, the RSFSR parliament produced draft constitutions to settle the national question of independent Russia – whether to retain the federal system and in what form. The first draft by the Rumiantsev Constitutional Commission proposed to abolish the ethnofederal framework by erasing the distinction between Republics and the lower units and creating

25 *E.g.*, *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR*, 3 April 1990; *Law on the Principles of Economic Relations between the USSR, the Union and Autonomous Republics*, 10 April 1990; and *Law on the Division of Powers between the USSR and the Subjects of the Federation*, 26 April 1990.

26 *Referendum on the Future of the Soviet Union*, 17 March 1991. 'Yes' vote won by 77.85 per cent, with over 80 per cent turnout.

27 *On Amendments and Additions to the Constitution* (*Basic Law*) *of the RSFSR*, 24 May 1991.

28 *On Amendments and Amendments to the Constitution* (*Basic Law*) *of the RSFSR in Connection with the Transformation of Autonomous Regions into Soviet Socialist Republics within the RSFSR*, 3 July 1991. *See* more on J. Hughes, 'Managing Secession Potential in the Russian Federation', in J. Hughes and G. Sasse (eds.), *Ethnicity and Territory in the Former Soviet Union: Regions in Conflict* (Routledge, New York, 2014) 36–68 p. 47.

29 *Agreement on the Establishment of the Commonwealth of Independent States*, 8 December 1991, 31 ILM 138.

30 *Alma-Ata Declaration*, 21 December 1991, 31 ILM 148.

about 50 new *zemli* (lands) with equal status and without ethnic labels.[31] However, after vigorous protests Yeltsin started to negotiate with the Republics on the continuation of the asymmetric ethnofederal structure.

3.2 *The 1992 Federal Treaty*

The 1992 Federal Treaty was signed between the Russian government and 18 of the 20 Republics of the RSFSR.[32] It cemented the asymmetry by providing the Republics with extensive autonomy. The Treaty proclaimed them "sovereign republics within the Russian Federation", with the right to their own constitutions, wide autonomy over their internal budgets and foreign trade, and the right to use their natural resources and land.[33]

In April 1992, a constitutional amendment made the Treaty a part of the existing Russian Constitution and declared federalism to be one of the foundations of the constitutional system.[34] However, national tensions continued. On 3 July 1992, a law froze the existing internal borders of the RSFSR and demanded that any outstanding territorial disputes had to be solved by 1 July 1995.[35]

3.3 *The 1993 Constitution of the Russian Federation*

After Yeltsin's draft Constitution was approved in a nation-wide referendum,[36] it became effective on December 1993. The Constitution took back some of the powers of the Republics by endorsing partially the Rumiantsev draft's suggestions on the equalisation of status of the subunits. The references to the sovereignty of the Republics were dropped and all the subunits were given equal status as "subjects of the federation".[37]

The Soviet asymmetrical federal system was reproduced, with autonomous ethnofederal units – Republics (former ASSRs) and AOs – and predominantly Russian administrative units.[38] However, the Constitution failed to solve the inherit inconsistency with the equality of the federal units. Under the Constitution, every federal subject has its own head, a parliament, a constitutional

31 Hughes, *supra* note 30 p. 46.

32 *Treaty of Federation*, 31 March 1992. Tatarstan and Chechnya refused to sign.

33 Hughes, *supra* note 30 p. 47.

34 *On Amendments and Additions to the Constitution* (*Basic Law*) *of the Russian Soviet Federative Socialist Republic*, 21 April 1992.

35 Feldbrugge, *supra* note 7, p. 188.

36 *Referendum on the Draft Constitution of the Russian Federation*, 12 December 1993. Seven Republics voted against the Constitution while Tatarstan boycotted.

37 *The Constitution of the Russian Federation*, 25 December 1993, Articles 5 and 65.

38 Krais (territories), oblasts (areas) and federal cities. *Ibid*. Article 65(1). In sum, Republics, AOs and the lowest level *Autonomous Okrugs* are primarily ethnic designations, whereas oblasts and krais are generic administrative divisions.

court and equal rights in relations with federal government bodies, with two delegates each in the Federation Council, the upper house of the Federal Assembly. However, the actual asymmetry between the Republics and the other subjects was visible in several articles. For example, the Republics have a right to have their own state language (Article 68) and their own constitution, whereas the other subjects have only a charter (Article 5).

Some authorities were jubilant about the 1993 Constitution having solved the national question. For instance, Yeltsin's nationalities adviser Emil Paen proclaimed that "[f]ederalism [is] no longer an issue" in Russia.[39] However, ambiguities remained. While Article 72 of the Constitution broadly delimited powers in favour of the federal government, Article 11 stated that the division of powers between the federal government and the subjects may be regulated by 'treaties', although no mechanism for this treaty-making was specified. The Republics insisted on signing these treaties. As commented by the President of Bashkorstan Muraza Rakhimov in 1994:

> I feel that if we actually want to have a truly federative state, Russia must sign bilateral treaties with all the republics forming the Federation … There are those among us who want to make the republics, oblasts and krais completely equal political. That cannot be allowed … In Sverdlovks oblast, for example, the nationality question does not arise.[40]

3.4 *The Power Sharing Treaties*

Thus, after having given the Republics extensive autonomy in 1990–1992, and then scaling this back somewhat in the 1993 Constitution, Russia planned to settle the issue with individual treaties that would take into account the unique circumstances of each case.

While most treaties limited the Republics' autonomy, some actually amplified it. For example, Tatarstan's treaty established a co-sovereignty with Russia, declaring it a state "united with the Russian Federation" based on both the Russian and Tatarstan Constitutions and the treaty itself. The Constitution of Tatarstan (November 1992) declared its laws to be "supreme" (Article 59), proclaimed it to be "a sovereign state, a subject of international law associated to

39 Quoted in R. Ahdied, *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985–1996* (Pennsylvania University Press, Philadelphia, 2010) p. 133.

40 Quoted in S. Solnick, 'Will Russia Survive? Center and Periphery in the Russian Federation', in B. Rubin and J. Snyder (eds.), *Post-Soviet Political Order: Conflict and State Building* (Routledge, New York, 2005) 54–74 p. 66.

the Russian Federation" (Article 61), with the right to conduct foreign relations and exclusive ownership over natural resources.[41]

These provisions were not easily reconcilable with the 1993 Constitution and the sovereignty of the Russian Federation over its whole territory. With the exception of Bashkortostan and Yakutia due to their economic leverage, treaties became less generous after Tatarstan.[42]

3.5 *The Chechnya Debacle*

While the power-sharing treaties kept Russia otherwise intact, a major mistake was made in relation to the Chechen-Ingush ASSR. Chechnya was together with Tatarstan the only ASSR that declared an outright independence from Russia (2 November 1991) and refused to sign the 1992 Federal Treaty. Fearing Chechnyan secession, the Ingush minority declared independence as Republic of Ingushetia and willingness to stay in the RSFSR on 4 June 1991, which was codified into the RSFSR Constitution in December 1992.[43]

Yeltsin's refusal to allow an outright independence to an ASSR is understandable, as it could have broken the Russian Federation. However, his failure to negotiate with the Chechen leadership led to the First Chechen War (December 1994 to August 1996), after which Russia had to sign a ceasefire. The unilaterally declared 'Chechen Republic of Ichkeria' remained unrecognised and suffered from economic chaos, instability and religious extremism. In August 1999, an Islamist insurgency movement from Chechnya attacked the Russian Republic of Dagestan, igniting the Second Chechen War. The Chechen regime fell apart in February 2000, although low-level insurgency movement has continued. In 2003, a referendum was held on a new Constitution that reintegrated Chechnya to the Russian Federation with limited autonomy.[44]

3.6 *Dismantling Russian Federalism*

In July 1996, the future President Vladimir Putin got his first experiences dealing with the Republics as the Head of the Presidential Administration Anatoly Chubais recruited him to run the Control Division, which handled Moscow's relations with the subunits and ensured their compliance. From the Kremlin's perspective, the most important issue settled by the power-sharing treaties

41 Hughes, *supra* note 30 p. 52.

42 Bashkortostan is described as "a sovereign state within the Russian Federation" (Article 1) with its Constitution having an "equal status" with the Russian Constitution in regulating joint relations (Article 2).

43 *On Amendments to Article 71 of the Constitution* (*Basic Law*) *of the Russian Federation*, 10 December 1992.

44 *Constitution of the Chechen Republic*, adopted on 27 March 2003.

was the supremacy of federal law over regional law. In 1997, it was reported that many regional laws conflicted with federal laws and the Constitution, a phenomenon that Chubais termed "legal separatism".[45] The peak came in the summer of 1998, when 46 of the 89 subjects of the federation had concluded power-sharing treaties. In January 1999, Prime Minister Primakov called for the reforming of the federal system and the bilateral treaties.[46]

As summarised by Allen Lynch, the 'Russian Federation' that Putin took over in 1999 resembled at best a confederation rather than a unitary state or even a federation.[47] However, this began to change in June 1999, as the Duma passed a law stipulating that all the power-sharing treaties must be revised to comply with the Constitution by 2002. In May 2000, a territorial-administrative reconfiguration divided the subjects into seven new federal districts, each headed by a presidential plenipotentiary representative. In June 2000, the Russian Constitutional Court struck down Bashkortostan's electoral law, establishing an important *de jure* precedent that the Republic constitutions must comply with the federal Constitution. After that, the dismantling of the power-sharing treaties began. This did not take place at the constitutional level – as the power-sharing system was treaty based and mostly outside the constitutional framework, it could be reversed by abolishing the treaties.

In the summer of 2001, a commission headed by Dmitri Kozak began to formulate a basic framework to centralise control. After the commission's report on 20 May 2002, Putin adopted the report's findings as the basic policy for the division of power between the centre and the regions.[48] With the combined pressure from the Duma, the Russian Constitutional Court and Putin's new policy line, the power-sharing treaties began to unravel. From July 2001 until May 2003, 34 regions abolished their treaties. On July 2003, a new federal law stipulated that bilateral treaties should be revised under a new procedure or be abolished.[49] By July 2005, all bilateral treaties became invalid.[50]

45 T. Frommeyer, 'Power Sharing Treaties in Russia's Federal System', 21:1 *Loyola of Los Angeles International and Comparative Law Review* (1999) pp. 1–53 p. 48.

46 M. Chuman, 'The Rise and Fall of Power-Sharing Treaties Between Center and Regions in Post-Soviet Russia', 19:2 *Demokratizatsiye* (2011) pp. 133–150, p. 134.

47 A. Lynch, 'What Russia Will Be?', Eurasian Futures, *The American Interest*, 25 October 2018.

48 Chuman, *supra* note 46, pp. 144–145.

49 *On Amendments and Supplements to the Federal Law about General Principles for the Organization of Legislative and Executive Power Organs*, 4 July 2003. It was based on the basic concept of the Kozak commission.

50 Tatarstan was able to set forth a new treaty in 2007, which was renewed for five years in 2012 but not in 2017.

To summarise, having transplanted the Soviet ethnofederal model, Russia felt that it had again solved its national question with federal right to internal self-determination. However, this federal right was restricted from the outset. While the Constitution declared the right to self-determination to all peoples of Russia, unlike in the Soviet constitutional theory this right did not entail a right to secession. In the 1990s, the Russian Constitutional Court re-affirmed the interpretation that territorial integrity overrules a right to secession in the Russian Federation in *Tatarstan* (1992) and *Chechnya* (1995) cases.[51] It reasoned that according to the Constitution and Russian international law doctrine, the whole people of a state alone had the full right to self-determination. A minority inhabiting a province did not have a right for external self-determination in a form of an independent state but a right to *internal self-determination* within the Russian Federation.

Finally, the first contradiction within the Russian international law doctrine on self-determination became apparent in the early 2000s with the re-centralisation of the state. Russian promotion of its federal structure as a model for internal self-determination is made less plausible with the *de facto* dismemberment of the autonomies, apart from the limited ones of Chechnya and Tatarstan.

3.7 *Russian Policy towards the Former Soviet Republics*

The Russian decision to retain the Soviet asymmetric ethnofederal model after a popular referendum is in stark contrast with the decisions made by some of the other former SSRs. This decision and the process of negotiations and treaties with the subunits has had a lasting impact on the Russian understanding of the right to self-determination, especially the content of internal self-determination. The former SSRs of Azerbaijan, Georgia and Moldova had chosen differently, generating ethnic conflicts with their subunits that Russia could exploit for its own political purposes.

The minorities in the former ASSRs and AOs had been used to Moscow acting as the guarantor of their autonomous statuses during the Soviet era. Therefore, they were often inclined towards Russia and again pleaded Moscow for assistance in their early 1990s conflicts. Russia helped to create and to maintain the ensuing frozen conflicts in Abkhazia, Nagorno-Karabakh,[52] South Ossetia and Transnistria, but, notably, refused to recognise any of these units as

51 J. Summers, 'Russia and Competing Spheres of Influence: The Case of Georgia, Abkhazia and South Ossetia', in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, New York, 2011) 91–113 pp. 109.

52 Armenia was the intervening party, but with Russian military aid.

independent. This remained the case even in relation to Crimea. In 1992, the Duma had declared its transfer to Ukraine back in 1954 having been unconstitutional and void, but added that the issue should be resolved through negotiations.[53] In sum, prior to 2008 Russia consistently advocated against any right to unilateral secession.

In addition to the former autonomous units, the other 14 SSRs inherited a diaspora of 25.2 million Russians, who were transformed from a majority to a minority and ranged from 2 to 38 per cent of the population.[54] While they lacked their own ethnofederal units apart from Crimea, Russians usually resided in greater numbers within the ASSRs and AOs, which already had typically more pro-Russian political elites than the SSRs. The Russian diaspora became a controversial political issue with a new Russian Law on Nationality from the late 1990s, which gave the former citizens of the USSR the right to apply for Russian citizenship, and many minorities of the ASSRs and AOs have been eager to use this opportunity. As a result, there has been a fierce opposition in many of the former SSRs to the passportisation policy of Moscow, and only Tajikistan has a formal agreement with Russia on dual citizenship,[55] whereas *e.g.* Ukraine's, Georgia's and Moldova's laws reject it.[56] While international law on nationality poses few restrictions on states to confer citizenship, Russia's policy of conferring its citizenship *en-masse* on the citizens of another country seems arbitrary and abusive,[57] and the Independent International Fact-Finding Mission has condemned the Russian passportisation policy in South Ossetia and Abkhazia.[58]

To summarise, Russian policies towards the other Soviet successor states was based on its conception of the right to self-determination. Just like in the early Soviet period in relation to colonialism, self-determination was seen as an instrument to weaken other states that were breaching the old Soviet national equilibrium by denying the rights of their minorities. In contrast, Russia felt that by continuing the constitutionally guaranteed autonomies for its former ethnofederal units, it was above any criticism and could legitimately

53 *The New York Times*, 22 May 1992.

54 T. Heleniak, 'Migration of the Russian Diaspora after the Breakup of the Soviet Union', 57:2 *Journal of International Affairs* (2004) 99–117 pp. 99.

55 A. Grigas, *Beyond Crimea: The New Russian Empire* (Yale University Press, Danbury, 2016) p. 41.

56 Ukrainian *Law on Citizenship* rejects it outright, and in Georgia and Moldova it is only possible by Presidential decree.

57 *See* K. Natoli, 'Weaponizing Nationality: An Analysis of Russia's Passport Policy in Georgia', 28 *Boston International Law Journal* (2010) 389–417 pp. 416–417.

58 *Independent International Fact-Finding Mission on the Conflict in Georgia* (IIFFMCG), *Report* (*II*), September 2009, p. 183.

support the realisation of the right to self-determination in the other former SSRs. However, prior to 2008 Russia insisted on the realisation of the right to self-determination within the inherited *uti possidetis* borders. Even though several former ASSRs had voted in favour of the continuation of the USSR,[59] and had voiced their willingness to become part of the Russian Federation after the dissolution,[60] Russia refused to recognise any territorial changes in the post-Soviet area. For a state that had inherited most ethnofederal units, this strict stance is understandable. Russian scholarly circles concurred with this policy line, as most academic writing on the right to self-determination prior to 2007–2008 held a consistent view that self-determination does not justify breaching territorial integrity of an existing state.[61]

4 The Independence of an ASSR – The Case of Kosovo

The legal landscape of the post-Soviet space was profoundly altered with Kosovo's unilateral independence from Serbia in February of 2008. Secession is such a controversial legal topic that the international community has been consistently careful not to recognise any independencies without the consent of the legal parent state. Notably, while the dissolutions of the USSR and the Socialist Federal Republic of Yugoslavia (SFRY) had produced new states, these were not cases of secession but of dissolution. The legal distinction is crucial. Dissolution produces successor states without breaching territorial integrity as the dissolving entity disappears. However, Kosovo became independent from Serbia, which continues to exist. Thus, when the Western states recognised Kosovo, Serbian territorial integrity was breached. The rationale was that Kosovo was such a unique, *sui generis* case that it could not be used as a precedent for any other secessions. However, they failed to understand the similarities between Kosovo and the former ASSRs, and the fragile frozen conflict equilibrium that had been achieved in places like Georgia.

59 *E.g.*, Abkhazia voted to preserve the USSR by 98.5 per cent in favour, and in the RSFSR all its ASSRs were higher in favour than in the Russia proper.

60 A referendum in South Ossetia on 19 January 1992 registered 99.9 per cent vote for reunion with Russia with 96.9 per cent turnout. In Transnistria, a referendum in 2006 gave a 98 per cent support in favour of 'free association with the Russian Federation' with 78.6 per cent turnout.

61 For example, O.I. Tiunov (right to self-determination is limited by the principle of territorial integrity); and S.V. Chernichenko (the legality of secession depends on the consent of the parent state). Quoted in O. Merezhko, 'Crimea's Annexation by Russia – Contradictions of the New Russian Doctrine of International Law', 75:1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2015) 167–194 p. 178.

The SFRY had copied the Soviet ethnofederal model into its Constitution. The six Socialist Republics were equivalent to the SSRs and the two Autonomous Provinces located within Serbian Socialist Republic were equivalent to the ASSRs. While the SFRY dissolution was tragically violent, it otherwise followed the Soviet trajectory: most of the ethnofederal units sought independence and only the first level was recognised as such.[62] Thus, like its counterparts in Georgia, Ukraine and elsewhere, Kosovo had to remain within Serbia, which seized the opportunity and abolished the province's autonomy in the early 1990s.

The relations between Serbia and Kosovo became increasingly confrontational, escalating into full-scale war in 1998–1999. After a controversial North Atlantic Treaty Organization (NATO) intervention, the United Nations (UN) Security Council resolution 1244 established an UN administration over Kosovo and obligated conflicting parties to negotiate over the province's future status. The negotiations hit an impasse in early 2007.[63] As Kosovo's declaration of independence started to seem imminent, the rhetoric of Russia and of the former ASSR separatists started to change.

Despite the Western assurances that Kosovo could not legitimise any other secessions, Russia recognised Kosovo's obvious parallel with the former ASSRs. Therefore, it rejected the posited *sui generis* formula[64] and warned that Kosovo's independence would have major implications for the post-Soviet area. President Putin insisted that the principle of self-determination should be equally applicable to the former peoples of Yugoslavia and the USSR,[65] and Foreign Minister Lavrov called Kosovo a precedent for an estimated '200 territories' around the world.[66]

Thus, in a major doctrinal shift Russia began to argue that the ASSRs of the post-Soviet area could have a right to unilateral secession based on the Kosovo precedent. Russia argued that the West, not Russia, had created this unfortunate

62 The other Autonomous Province, Vojvodina, had Serbian majority and did not seek independence.

63 *Comprehensive Proposal for the Kosovo Status Settlement* by the UN Special Envoy Ahtisaari, 2 February 2007, concluded further negotiations being futile and recommended a supervised independence.

64 Scholars often question the *sui generis* role of Kosovo. *See, e.g.*, C. Rossi, 'Impaled on Morton's Fork: Kosovo, Crimea, and the *Sui Generis* Circumstance', 30:3 *Emory International Law Review* (2016) pp. 353–390.

65 V. Pacer, *Russian Foreign Policy under Dmitry Medvedev, 2008–2012* (Routledge, New York, 2016) pp. 30–31.

66 'Russia says Kosovo creates precedent for separatists', *Reuters*, 23 January 2008.

precedent. After it had been created, Russia has to uphold this new development in international law and to recognise the former ASSRs independent when there are grounds for it. However, in reality this seems to be inseparably linked to the target county's NATO aspirations. For example – and in retrospect ominously – in March 2008 the Russian Envoy to NATO explicitly threatened that if they were to try and join NATO, Georgia would lose Abkhazia and South Ossetia,[67] and Ukraine would not be able to maintain its current borders.[68]

Naturally, this was a dangerous interpretational road for Russia to take with its asymmetric federal structure. However, the Russian argumentation has always been careful to highlight that they believe that secession can only be possible if the right to self-determination is not otherwise observed. This interpretation gives Russia an upper hand to the other ethnofederalised SSRs that have deprived their subjects of this right. As officially summarised in 2009:

> The peoples of the Russian Federation have chosen to exercise their right to self-determination through constituent entities, such as republics and autonomous regions, as well as through local national/cultural autonomous entities. Russia is a vivid example of a country where diverse peoples and ethnic groups peacefully co-exist within a single united State. The Russian Federation believes that the same principles may and should be applied (and indeed are often applied) in other countries where various peoples or ethnic communities live together.[69]

To conclude, as Kosovo was quickly recognised by the West and, ultimately, by 114 (59 per cent) UN member states,[70] the Russian doctrine of the right to self-determination was altered accordingly.[71] This development has been reflected

67 'Russia Warns Against Georgia NATO Membership', *Reuters*, 11 March 2008.

68 *Russian Newsweek*, 25 February-2 March 2008, p. 23. In September 2013, Putin's adviser Glasjev threatened to support the division of Ukraine if it signed the Association Agreement with the EU. K. Böttger, 'Interdependence as a Leitmotif in the EU's Russia Policy: A Failure to Live Up to Expectations', in K. Raik & A. Rácz (Eds.) *Post-Crimea Shift in EU-Russia Relations: From Fostering Interdependence to Managing Vulnerabilities* (ICDS, Tallinn, 2018) 45–57 pp. 53.

69 *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Written Statement by the Russia Federation, 16 April 2009, para. 5.

70 Situation on 10 July 2019.

71 The 'traumatic' nature of Kosovo independence for Russia is well summarised in C. Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea', 91 *International Law Studies* 216 (2015) 216–280 pp. 234–236.

in Russian rhetoric,[72] foreign policy,[73] scholarly publications[74] and official legal positions.[75] The previous consistency in the Russian dual stance on self-determination – simultaneously supporting separatism in the former SSRs and the territorial integrity of these SSRs – gave away to a more politically instrumental interpretation. Less than six months later, Russia used this new interpretation to justify the dismantling of the former SSR of Georgia.

4.1 *The Georgian War and the Changes in the Doctrine of Self-Determination after Kosovo*

After a Georgian attack against South Ossetia on 7 August 2008,[76] a brief war between Georgia and Russia followed, after which Russia broke the taboo of territorial changes to the *uti possidetis* borders that it had promised to honour in several international agreements. When President Medvedev recognised the independencies of Abkhazia (former ASSR) and South Ossetia (former AO), he based this on three factors: the Georgian decision to opt for a 'genocide' that dashed all hopes for peaceful coexistence (remedial secession); the freely expressed will of Abkhazians and Ossetians; and the right to self-determination.[77] He accused the West of ignoring Russian warnings over Kosovo and that now it would be impossible to deny Abkhazians and Ossetians of the same right.

Thus, three contentious aspects of Russian interpretation of self-determination emerged: the will of the people can be determined by the people of the

72 On 13 March, the chairman of the lower house's committee on former Soviet affairs commented that "[t]he world community should understand that from now on the resolution of conflicts in the ex-Soviet area cannot be seen in any other context from that of Kosovo". *Javno* (Zagreb), 13 March 2008.

73 *E.g.*, *Statement by President of Russia*, 26 August 2008.

74 In 2007, an influential Russian international law textbook was published by the Diplomatic Academy of the Ministry of Foreign Affairs. It concurred with the findings of the Canadian Supreme Court's 1998 *Quebec* case, which affirmed that self-determination, even if confirmed by a clear free vote in favour of secession, was expected to be exercised within the framework of existing states. However, it could be exercised unilaterally under certain, limited circumstances. V.I Kuznetsov and G.V. Ivanenko, 'Principles of International Law', in V.I Kuznetsov and B.R. Tuzmukhamedov, *International Law – A Russian Introduction* (trans. and ed. by W.E. Butler, Eleven International Publishing, Utrecht, 2009), pp. 149–150. After Kosovo's independence, remedial secession continued to be promoted, for example in a 2009 book by Ostoukhov (secession can only be legal when authorities of a state make internal self-determination impossible). Merezhko, *supra* note 63 p. 180.

75 *Russian Written Statement, supra* note 71, para. 88.

76 According to IIFFMCG, Georgian attack began the large-scale hostilities, but was only the culminating point of a long period of increasing tensions. *Report* (*I*) (2009) p. 11.

77 *President's Statement*, *supra* note 75.

province, irrespective of the will of the population as a whole; human rights violations of the host-state may justify territorial changes via remedial secession; and Kosovo is a legal precedent for these new interpretations.[78] The doctrine of 'remedial secession'[79] argues that a legal secession breaching the territorial integrity of a state is possible as an ultimate remedy in case of serious injustices suffered by a people. The doctrine has some state and scholarly support, but has not been universally accepted. While Russia started to support the doctrine in 2008, it has done so carefully and exclusively in relation to the Kosovo precedent.[80]

However, despite its legal argumentation for the Kosovo precedent and remedial secession, and its persistent campaign to gain international recognition for the independencies of Abkhazia and South Ossetia, Russia failed to gain any significant support for its actions.[81] The comparison with Kosovo is implausible, as there the Serb forces attempted ethnic cleansing, whereas in Abkhazia and South Ossetia the titular minorities dispelled the Georgian population. No other state advances the right of any minority group to have a right to independence merely based on their expressed will,[82] as this could lead to the fragmentation of many UN member states. Additionally, the 'will of the people' is especially controversial in Abkhazia, where Georgians made up an overwhelming majority before they were expatriated. Finally, the independencies of these provinces were accomplished due to the illegal use of force by Russia,[83] which qualifies as the basis for collective non-recognition.

78 However, the academic community still held that territorial integrity takes priority over self-determination, and remedial secession should be seen as rarity.

79 The alleged right is usually derived from an interpretation of the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance With the Charter of the United Nations*, UNGA res. 2625 (XXV), 24 October 1970.

80 For a precedent to produce binding international customary law, it needs to have both state practice and *opinio juris* (a belief that such practice is legally allowed). Russia has referred to this precedent for instance in the 18 March 2014 Presidential Address, and in the open letter written on behalf of the Executive Board of the Russian Association of International Law (*Circular Letter to the Executive Council of the International Law Association*, 6 June 2014). Russia always underlines the fact that its own Constitution explicitly denies such a possibility. *Russian Constitution, supra* note 39, Articles 4–5.

81 By 26 June 2019, the independencies have been recognised by Russia, Nauru, Nicaragua, Syria and Venezuela.

82 "Holding a free and fair referendum is only a necessary, but not a sufficient condition for a territorial realignment to be accepted as lawful by international law." A. Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law', EJIL Analysis, 16 April 2014.

83 *IIFFMCG Report, supra note 60.*

In October 2008, Russia supported a Serbian draft for a resolution in the UN General Assembly that took the case of Kosovo independence to the International Court of Justice (ICJ). In its Written Statement, Russia gave a comprehensive overview on its stance of the right to self-determination. Russia interpretation was that according to international law, Kosovo had, at most, the right to *internal* self-determination within Serbia, similarly to the recognised minorities in the Russian Federation and that "Russia has always addressed the Kosovo issue from that perspective, firmly believing that its approach is well-founded in the applicable principles and rules of international law".[84] This is another reference to the Russian ethnofederal system, which it has tried to impose in Moldova in 2003[85] and in Ukraine in 2014.[86] Russia set the bar for remedial secession high, the condition of which "should be limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question".[87] Outside this threshold, any disputes should be settled within the framework of the existing state. In its 2010 Advisory Opinion, the ICJ concluded that a unilateral declaration of independence is not prohibited under international law. However, if a peremptory norm such as use of force is breached, the independence is illegal.[88]

The Russian Foreign Policy Concept was updated in 2013. It contained a new statement that Russia "will maintain its active role in the political and diplomatic conflict settlement in the CIS space". However, it then proceeded to address the conflict settlement under special conditions for each of the disputes: Russia will participate in the settlement of the Transnistria problem on the "basis of respect for the sovereignty, territorial integrity and neutral status of the Republic of Moldova" with a special status for Transnistria, and in the settlement of Nagorno-Karabakh conflict on the basis of territorial integrity and

84 *Russian Written Statement, supra* note 71, para. 5.

85 *Russian Draft Memorandum on the Basic Principles of the State Structure of a United State in Moldova* (Kozak Memorandum), 17 November 2003.

86 *Protocol on the Results of Consultations of the Trilateral Contact Group*, signed in Minsk, 5 September 2014.

87 *Russian Written Statement, supra* note 71, para. 88. References are made to the *Quebec* case (*supra* note 76), and to international law scholars favouring the right, such as C. Tomuchat, 'Secession and Self-Determination', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, Cambridge, 2006) 23–45 p. 41; and A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge 1995) p. 119).

88 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, the ICJ, 22 July 2010, para. 81.

self-determination of peoples, with "future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will".[89]

Therewith, the inconsistencies in Russian views on self-determination are observable already before the Ukraine crisis. The former ASSRs are treated differently based on policy goals, as the settlement in Transnistria is conditioned on Moldova remaining neutral, the settlement in Nagorno-Karabakh on having a referendum, whereas Abkhazia and South Ossetia are not categorised as diplomatic conflicts. One should note here the impact of Kosovo to the Russian interpretation of the right to self-determination. Prior to 2008, separatism could be supported and the ASSRs could be turned into frozen conflicts, but Russia categorically did not recognise any territorial changes. After Kosovo, the minorities in the former Soviet ethnofederal units could be recognised independent. Moreover, according to its Foreign Policy Concept, Russia seems to interpret itself as the main arbiter for the remaining frozen conflicts in the post-Soviet space, giving it the maximum ability to influence the target state's foreign policy.[90]

5 The Right to Self-Determination of Crimea

Russia refrained from recognising other territorial changes in the post-Soviet area until 2014, when it felt its core national interest was at stake. It then again used a former ASSR to achieve territorial dismemberment of a former SSR. After this, the events in Georgia should no longer be seen as one-off instance, but rather as a continuum derived from the combination of evolutionary changes in the Russian doctrine on self-determination and its policy goals in the post-Soviet space.[91]

In brief, after a popular uprising in Kiev, the fleeing of President Yanukovych and his dismissal by the Ukrainian Parliament, the Russian Special Forces took over the Crimean Peninsula on 27–28 February 2014.[92] A hastily organised and

89 *Concept of the Foreign Policy of the Russian Federation*, 12 February 2013, art. 49. The reference to Nagorno-Karabakh is a quote from the Statement by the *OSCE Minsk Group Co-Chair Countries*, 10 July 2009.

90 *See, e.g.*, B. Beary, 'Russia Plays Leading Role in Separatist Conflicts', 24:6 *CQ Researcher* (2014) pp. 132–133.

91 NATO's Supreme Allied Commander in Europe has argued that Russia uses the frozen conflicts as leverage to block the target state's Western alignments. *Reuters*, 23 March 2014.

92 First denied by officials, but admitted by Putin in a documentary 'Crimea: The Road to Motherland', *Rossiya-1*, 15 March 2015.

internationally condemned referendum was held on 16 March,[93] and Crimea was incorporated two days later into the Russian Federation as a Republic. At first, Russian scholars remained silent, while officials were giving their international law interpretations "to the point of redesigning it".[94] Next, in April a series of pro-Russian protests in the Donbass area of Ukraine escalated into armed conflicts between the Russia-backed rebel forces and Ukrainian authorities, producing yet another frozen conflict that remains unsolved to this day.

This time the Russian actions were so controversial that the Kremlin had to come up with a series of different justifications. In relation to the arguments supporting the right to self-determination of Crimea, Russia argued that Crimea was using the same general right to self-determination that Ukraine itself had used to become independent from the USSR in 1991;[95] that the will of the Crimean people had been clearly expressed in the 16 March 2016 referendum;[96] that there were again grounds for remedial secession based on Kosovo precedent as Russians in Crimea were under attack;[97] and that the ICJ's Advisory Opinion on Kosovo Independence in 2009 had ruled that the general international law does not prohibit declaration of independence.[98]

These legal arguments are rather easy to counter by general international law and by Russia's own international law doctrine, reflecting its disarray. First, in 1991 Ukraine had, as a SSR, a constitutional right to secession.[99] As an ASSR, Crimea did not have this right. Moreover, unlike Ukraine in 2014, the USSR had

93 In addition to almost unanimous condemnation by scholars, the Council of Europe described the referendum as a violation of both Ukrainian law and general democratic rules on referenda (*Opinion*, *supra* note 103).

94 A. Moiseienko, 'Guest Post: What do Russian Lawyers Say about Crimea', *Opinio Juris*, 24 September 2014.

95 According to Putin, as Crimea "declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to UN Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing." Address by President of the Russian Federation, 18 March 2014.

96 "A referendum was held in Crimea in full compliance with democratic procedures and international norms." *Ibid*.

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

98 "[A]nd I quote: 'No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence', and 'General international law contains no prohibition on declarations of independence'. *Ibid*.

99 *Constitution and Fundamental Law of the* USSR, 7 October 1977, art. 72.

dissolved and Russia had recognised Ukraine independent within borders including Crimea in several bilateral and multilateral treaties.[100] Finally, the Russian approach is contradictory, as it highlights how its Constitution precludes a possibility of secession for its subunits, but ignores the Ukrainian Constitution's similar provision on Crimea.

Second, the Venice Commission, Council of Europe's advisory body on constitutional matters, has criticised the referendum on multiple grounds and proclaimed it invalid.[101] Third, the facts do not support the analogy to Kosovo. The UN Security Council had confirmed the existence of serious threats to Albanians in Kosovo and placed it under the UN administration for eight years while negotiating with Serbia on the future status. In 2014, Russia intervened militarily in Crimea based on a plan made beforehand,[102] without any evidence of a threat to the population, and helped a previously marginal party into power, which then organised an illegal referendum in just two weeks' time under extraordinary circumstances and foreign occupation. Fourth, remedial secession is an alleged right to external self-determination as a last resort remedy to *serious injustices*. Four different human rights groups – from the Council of Europe, the UN and the Organization for Security and Co-operation in Europe – had visited Ukraine and had all affirmed that the Russian minority was in no kind of danger.[103] Finally, the ICJ's Advisory Opinion actually stated that while there is no general prohibition, a declaration of independence is deemed illegal if it results from a use of force by an outside state.[104]

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100 These include the *Helsinki Final Act* (1975), *Agreement on the Establishment of the CIS* (*supra* note 31), and the *Memorandum on Security Assurances*, 5 December 1994. Moreover, the *Vienna Convention on the Law of Treaties*, Article 62 excludes a possibility to unilaterally abolish a border treaty.

101 *Opinion on Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea´s 1992 Constitution is Compatible with Constitutional Principles*, Venice Commission, 98th Plenary Session (March, 2014).

102 *Rossiya-1, supra* note 94.

103 *The Advisory Committee's Ad hoc Report on the Situation of National Minorities in Ukraine*, adopted on 1 April 2014, Council of Europe Doc. ACFC(2014)001, para. 15; Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine*, 15 June 2014; Council of Europe Commissioner for Human Rights, 'Human Rights Abuses in Crimea Need to Be Addressed', 12 September 2014; and *Statement by the OSCE High Commissioner on National Minorities on Her Recent Visit to Ukraine*, 4 April 2014.

104 *Advisory Opinion, supra* note 90, para. 81.

Other official Russian justifications included correcting historical wrongs;[105] a view that the state of Ukraine had ceased to exist;[106] the requests by President Yanukovych and the Crimean Parliament to restore order;[107] and the rejection of illegal use of force as "no shots were fired".[108] These legal arguments again fail to convince. There is no 'correcting historical wrongs' under international law, and, in any case, Russia had recognised Ukraine's borders in several multilateral and reciprocal international treaties.[109] The 'disappearance' of the state of Ukraine because of a coup confuses recognition of states and recognition of governments, and, again, would not affect multilateral treaties.[110] According to the Ukrainian Constitution Article 85(23), only the Parliament can ask for foreign intervention, not the President, who, at any rate, did not have an effective control over the country when making this request. The Crimean Parliament had a limited territorial autonomy, and not a right to ask for foreign intervention. Finally, on 1 March 2014 Putin had asked and received authorisation for use of force in Ukraine by the Council of the Russian Federation,[111] clearly in violation of the prohibition of the *threat* of use of force under the UN Charter Article 2(4).

5.1 *Changes in the Russian Doctrine of Self-determination after Crimea*

The Russian actions in Ukraine are irreconcilable with its international law doctrine. Those arguments that were if not convincing at least arguable in 2008 Georgia – freely expressed will of the people and the right to remedial secession for serious injustices – are not plausible in Crimea. Moreover, the previous Russian position linked the right to self-determination to pre-existing ethnofederal units, whereas the Donbass rebels that Russia is supporting lack any prior autonomous status as well as mistreatment. The new Russian

105 *President's Address, supra* note 97.

106 *Ibid.*; P. Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History', 14 *Chinese Journal of International Law* (2015), 237–270 pp. 256–258; a Merezhko, *supra* note 63 pp. 186–189.

107 UN Security Council, 3 March 2014 (S/PV.7125); and 'Crimea Crisis: Pro-Russian Leader Appeals to Putin for Help', *Guardian*, 28 February 2014.

108 *President's Address*, *supra* note 97.

109 The 1954 transfer of Crimea was done according to the constitutional order and was codified in the USSR and RSFSR Constitutions. Moreover, Russia has explicitly demanded that its borders with Estonia should be based on the former SSR borders.

110 Usually legal theory on 'failed states' is used in reference to Somalia and does not imply that it has disappeared legally.

111 <tass.com/russia/721589>, visited on 19 December 2019.

interpretations in Ukraine seem to suggest that now the ASSRs can be remedially annexed[112] and any minority areas can be turned into frozen conflicts.

These are deeply troubling developments. In 2008, Russia could partially justify its actions in Georgia by the Western precedent set in Kosovo and by the remedial secession doctrine. In 2014, these arguments lack any credibility, and Russian actions seem geopolitically motivated, contrary to international law and, most seriously, a part of a pattern. As I noted earlier, Russian interpretation on self-determination resonates directly beyond its borders in the post-Soviet space. Before 2014, those former SSRs that had not oppressed their former autonomous units could feel secure that the national question no longer affected them. However, the Russian actions in Ukraine seem clearly geopolitically motivated as there were no mistreated minorities. Ukraine had continued Crimea's meaningful autonomy, whereas the Donbass had never held or had advocated for any self-governing status for themselves. Moreover, Ukraine was not oppressing the residents of either of these areas. Especially the Donbass case – appearing abruptly and outside an ethnofederal framework – is an unsettling development for those nine former SSRs with notable Russian minorities.[113]

Crimea is a clear case of breaching fundamental rules of international law. In general, Russia has utilised two types of legal argumentation. With the fundamental rules – such as the prohibition of the use of force – it has predominantly tried to obscure facts.[114] With the more ambiguous rules – the right to self-determination and remedial secession – Russia has advanced clumsy legal interpretations contradicting its own previous positions in several ways. Indisputably, the situation in Crimea in 2014 was not that of "threatening the very existence of the people in question", excluding the possibility of remedial secession under the Russian interpretation of the doctrine.[115] As Russia refuses to recognise Kosovo independent, it is lacking *opinio juris*[116] to justify other secessions based on this precedent. The latest Foreign Policy Concepts place the ASSRs in different positions, substantiating both the continuing relevance of ethnofederal hierarchy theory and Russia's instrumentalisation of these units to advance its policy goals. Then there is Chechnya, a remedial secession

112 *See* T. Lundstedt, '"Peaceful" and "Remedial" Annexations of Crimea', *Völkerrechtsblog, Russian Perspectives on International Law*, 19 January 2018.

113 Especially for Kazakhstan. See E. Holmquist, 'Kazakhstan after Crimea: "You Cannot Choose Your Neighbors"', *RUFS Briefing No. 26*, January 2015.

114 Russia first denied the presence of its forces in Crimea, and continues to deny involvement in the Donbass.

115 *Russian Written Statement, supra* note 71, para 88.

116 *Supra* note 82.

case if there ever was one. Finally, the only argument that could have been more favourable to Russia, the freely expressed will of the inhabitants of Crimea, has been heavily discredited by the illegalities surrounding the March 2014 referendum.[117]

For these reasons, and just like in 2008, Russia has not received much international support, as the international community simply cannot legitimise this kind of action. The current legal interpretations of such concepts as remedial secession, the will of the people to justify unilateral independence, and Russia's proclaimed right to use force to protect its citizens and other minorities in the post-Soviet space stand in a stark contrast with the majority view among states, international legal scholars and the case law of the ICJ.[118] The international condemnation of Russia's actions in Crimea is reflected in the UN votes in 2014. After Russia had used a veto to block the UN Security Council resolution addressing Crimea,[119] the UN General Assembly voted 100 for and 11 against (with 58 abstentions) not to recognise changes in the status of Crimea.[120]

Many Russian scholars have chosen to follow the government's reinterpretations of the right to self-determination, although this often contradicts with what they have written on the subject for the past 20 years.[121] One reason for this is the post-Crimean federal law against secession.[122] Nevertheless, there are few noteworthy exceptions.[123] The scholars arguing in favour of Russian actions in Crimea mostly focus on the Ukrainian internal situation in February–March 2014. These positions include a joint statement by the Association of Lawyers of the Russian Federation;[124] an article by the Foreign Ministry's Head

117 *Opinion, supra* note 103.

118 *E.g.*, military protection of citizens abroad has not been accepted in the state practice. See N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, Dordrecht, 1985). In any case, rescuing nationals abroad could amount to a limited rescue operation, not annexing territory.

119 The UN Security Council vote was 13 for the resolution, Russia against and China abstaining.

120 UNGA res. 68/262, 27 March 2014.

121 L. Mälksoo, 'Crimea and (the Lack of) Continuity in Russian Approaches to International Law', *EJIL: Talk*!, 28 March 2014.

122 In May 2014, Article 280.1 was added to the Criminal Code, making arguments against the annexation of Crimea illegal.

123 E. Lukyanova, 'On the Rule of Law in the Context of Russian Foreign Policy', 3:2 *Russian Law Journal* (2015), 10–36; and M. Issaeva, 'Quarter of a Century on from the Soviet Era: Reflections on Russian Doctrinal Responses to the Annexation of Crimea', 5:3 *Russian Law Journal* (2017) pp. 86–112.

124 *Statement of the Association of Lawyers of Russian Federation Concerning the Situation in Ukraine and Legitimacy of Conducting the All-Crimean Referendum on the Status of Crimea on 16.3.2014*, 18 March 2014.

of International Law Department;[125] and a collective opinion by a group of Russian legal scholars.[126] These statements argue mainly that there was no existing legal order at the time in Ukraine and thus the Crimean secession could not have been illegal. Finally, there was an open letter written on behalf of the Executive Board of the Russian Association of International Law,[127] which argued for the Russian 'historical rights' over Crimea and highlighted the freely expressed will of the Crimean people to join Russia.

The disarray of the Russian international law doctrine has continued in official policy documents, including the 2016 Foreign Policy Concept. It reproduced the 2013 'ranking' of the frozen conflicts,[128] and accuses in Article 26 that other states have arbitrarily interpreted fundamental international legal principles such as territorial integrity and rights of peoples to self-determination. Finally, according to one unsettling addition, Russia intends:

> to step up efforts to finalise international legal procedures to delimitate the state boundary of the Russian Federation as well as its maritime boundaries, within which Russia exercises its sovereign rights and jurisdiction, in unconditional support of its national interests, primarily security and economic interests, while taking into consideration the importance of strengthening trust and cooperation with neighbouring States.[129]

According to W.E. Butler, the boundaries between the former Soviet Republics "were supposedly fixed by the Almaty Agreements of December 21/22, 1991. To suggest they are not, as this provision may, reopens doors long believed to have been closed. The Almaty Agreements, it should be observed, reiterated the position on boundaries of the 1975 Helsinki Final Act."[130] The Almaty Agreements (or Belavezha Accords) refer to the decision to internationalise the SSR borders of 1991 and to exclude any territorial claims on each other. Any questioning of these borders would put the post-Soviet space in an unsustainable situation. Another example of this was made by a group of leading Russian defense analysts at the 2012 Valdai Club, who stated that the "entire Belavezha Accords system of State and territorial structure, which took shape as a result of the

125 A. Moiseev, 'Some international legal positions on the Ukrainian question', 60:4 *International Affairs* (2014) pp. 84–95.

126 'Concerning Legitimacy of the Crimean Referendum, 2014', Government of Crimea, *Official Portal*, 21 June 2017.

127 *Circular Letter*, *supra* note 82.

128 Appears as Article 49 in both the 2013 and the 2016 Foreign Policy Concepts.

129 *Ibid*., Article 26(f),

130 W.E. Butler, 'Foreign Policy Discourses as Part of Understanding Russia and International Law', in Morris (ed.), *supra* note 4, 177–196 pp. 187

1991 national disaster, is illegitimate, random, unstable and therefore fraught with conflict".[131]

6 Conclusions

Being originally based on revolutionary national ideology, Russian international law doctrine on self-determination has always been unique. Throughout most of its history, it has been rather progressive force, producing independence for some peoples of Russia while a limited autonomy for the rest in 1917–1924, contributing to the decolonisation in the 1950s–1960s, and producing the mostly peaceful dissolution of the USSR into its 15 SSRs in 1991. Prior to 2008, Russia was acknowledged as a promoter of self-determination, and, apart from Chechnya, it handled its inherited national question more successfully than most of the other federalised Soviet successor states. However, Russia promoted the right to self-determination only in its *internal form* within existing states and rejected the right to secession without consent.

The major policy shifts of the last ten years have unavoidably been reflected in Russian doctrine, most importantly in relation to the balance between territorial integrity of states and the people's right to self-determination in the form of secession. After the Georgian war, Russia began to support remedial secession based on the Kosovo precedent and the expressed will of the people. This change was problematic, as Russia does not recognise Kosovo and thus lacks *opinio juris* to use it as a precedent. Additionally, the analogy between the events in Kosovo and in Georgia is not credible. That being said, given the fragile legal justifications advanced by the West in the case of Kosovo and the fact that several states do support the remedial secession doctrine,[132] Russia was not overtly condemned over its actions in Georgia, although it failed to gain international recognition for Abkhazia and South Ossetia.[133]

After 2014, the post-Crimean stance advanced by Russia relies even more on the expressed will of the people, and seems to imply a right to remedial secession based on any kind of perceived mistreatment, including breaches in language rights. These development have set the Russian international law

131 M. Barabanov, K. Makienko and R. Pukhov, 'Military Reform: Toward the New Look of the Russian Army', *Valdai Discussion Club Analytical Report* (Moscow, 2012) pp. 9–10. Valdai Club is an influential annual forum where Russian officials meet with experts.

132 In the Kosovo Advisory Opinion's Written Proceedings in 2009, many states supported remedial secession, the strongest advocates being the Netherlands and Germany.

133 Russian recognition decisions were again termed illegal by the OSCE Parliamentary Assembly on 8 July 2019.

doctrine clearly apart from any other state and displays overtly instrumental interpretation of self-determination. One manifestation of this is the alleged right to protect its citizens and even mistreated minorities abroad. Russian is alleging that the other former SSRs have failed to guarantee their minorities' rightful internal autonomy. Thus, if the neglected minorities display freely their desire for independence or for joining Russia, this should be respected. However, international law does not allow breaching territorial integrity simply on the basis of a referendum, which in any case has only been made possible through Russian illegal use of force. The remedial secession argument is likewise legally weak, and the new scope of mistreatment is so encompassing that it discredits even Russia's own federal structure. In 2014, secession was seen as a correct remedy for breaching language rights, whereas in 2018 Russia passed a bill that restricted language rights of its autonomous subjects.[134]

In conclusion, Russian policy goals have started to override any possible sincere motivations in the background. This process began in 2008, became more pronounced in the 2013 Foreign Policy Concept, and culminated in the 2014 decision to invade Crimea, triggered not by worries over the human rights situation but by geopolitical calculations. Moreover, the Kremlin and the Russian scholarly circles have had the unenviable task to try to come up with some kind of set of arguments afterwards. Predictably, this has proven to be impossible, as they are unable to gain support from the Russian doctrine and previous positions. The result is that the so-called justifications end up mainly analysing internal affairs of Ukraine, as they are unable defend the Russian actions using international law.

134 A new language law approved on 25 July 2018 cancels the mandatory teaching of indigenous languages in regions and republics.