

# Three Ideas of Self-Determination in International Law and the Reunification of Crimea with Russia

*Vladislav Tolstykh\**

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## Abstract

This article examines the content of the principle of self-determination in the context of three ideas that define the essence of the state: sovereignty, general will and human rights. The author concludes that the idea of the general will should not be ignored in determining the content of this principle; some arguments in support of this conclusion are presented. He argues that the general will should not be influenced by third states which are not involved in the common good which constitutes an ontological basis of the general will. The problem of illegal interference in the will formation is con-

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\* The author holds the Chair of International Law at the Novosibirsk State University (Russia). This paper was completed on October 5<sup>th</sup>, 2014 and the websites cited were current as of this date. The paper contains fragments of the following articles: *V. Л. Толстых*, События в Украине и реакция западных государств: попытка международно-правового анализа, *Российский юридический журнал* (2014) 1; *V. Л. Толстых*, Воссоединение Крыма с Россией: правовые квалификации, *Евразийский юридический журнал* (2014) 5; *V. Л. Толстых*, Право на самоопределение как юридическое основание воссоединения Крыма с Россией, *Сравнительное конституционное обозрение* (2014) 102; *V. Л. Толстых*, Три идеи самоопределения в международном праве, *Евразийский юридический журнал* (2014) 9. The author is grateful to *A. Belyaeva* for help with translation.

sidered. The author points out that the formation of the general will is excluded from international legal regulation; at the same time he states that third states have an interest in ascertaining its formation and expression. In this context, international standards of referendums are considered to contain evidence for the blamelessness of the general will. In the last part of the article the author examines the secession of Crimea and its reunification with Russia with reference to these general theoretical assumptions.

## I. The Genesis of the Principle of Self-Determination

The content of the principle of self-determination is one of the most controversial issues of international law. References to this principle were made in different, sometimes conflicting contexts: decolonization (starting with the fight for the independence of the United States); revolutions and coups (starting with the French Revolution); irredentism (starting with the process of unification of Italy and Germany); secessionism and autonomism (starting with the division of the Ottoman and Austro-Hungarian empires).

The principle entered contemporary international law after World War I; a significant role was played by *Vladimir Lenin* and *Woodrow Wilson* and the corresponding policy pursued by the Soviet Union and the United States. *Lenin's* rhetoric is quite interesting. He writes that the victory of capitalism over feudalism goes hand in hand with the national movements. The victory of commodity production requires the consolidation of territories with a population speaking the same language. Unity of language is an essential condition for wide trade and close relations between the owner, the buyer and the seller. Self-determination is defined as “a public separation from alien national bodies”. Hereafter there is a fork: as the bourgeoisie of the oppressed nation fights the oppressor, the proletariat must support its fight (because the oppressing nation does not provide freedom). As the oppressing nation stands for its own bourgeois nationalism, the proletariat must be against it.<sup>1</sup>

*Woodrow Wilson's* central thesis lies in the necessity to take into account the desire of a nation “to live its own life, determine its own institutions”;<sup>2</sup> “peoples and provinces are not to be bartered about from sovereignty to

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<sup>1</sup> *В. И. Ленин*, О праве наций на самоопределение, Полное собрание сочинений, Издание пятое (25), 1969, 255 et seq.

<sup>2</sup> *Woodrow Wilson's* “Fourteen Points” Speech, 8.1.1918, <<http://www.firstworldwar.com/source/fourteenpoints.htm>>.

sovereignty as if they were mere chattels and pawns in a game”<sup>3</sup>. After World War I the principle of self-determination affected the resolution of the *Åland Islands* case by the League of Nations, the system of mandates, international guarantees of minorities, plebiscites on territorial jurisdiction (in Warmia and Mazury in 1920, in Upper Silesia in 1921, in Saar in 1935, etc.). After the Second World War the principle was manifested in the operation of the trusteeship system and in the process of decolonization. In addition, two more general aspects of the principle became apparent: the protection of human rights and democracy. The principle was enshrined in a number of significant instruments (the UN Charter, covenants on Human Rights, the Declaration on Friendly Relations and others) and was repeatedly mentioned by the International Court of Justice (ICJ) and other international bodies. Official texts on the issue, however, are too general or, vice versa, too fragmented and specific. In these circumstances, doctrine plays an important role in clarifying the principle.

## II. Self-Determination as an Expression of Sovereignty

The doctrinal debate on the content of the principle of self-determination affects one of the main questions of international law: the definition of the state. As rightly pointed out by *J. Crawford*: “... Self-determination is, at the most basic level, a principle concerned with the right to be a State.”<sup>4</sup> For the first and main direction the essence of the state is expressed in sovereignty, i.e. in absolute and unconditional territorial authority, “la puissance absolue et perpétuelle”.<sup>5</sup> Historical predecessors of sovereignty were Roman *majestas* and *imperium* (“the highest and indivisible administrative authority”<sup>6</sup>). The theoretical development of this idea owes much to *Machiavelli* and *Bodin*, while its development in practice is the result of absolutism, which was the cradle of modern statehood. The concept of sovereignty ensures a legal identity of the state; sovereignty is the criterion by virtue of which the state separates from society and becomes an independent legal entity capable of rulemaking and rule-enforcement. That, in turn, makes the positive law possible. Consequently, the state manifests itself in individuals

<sup>3</sup> President *Wilson's* Addendum to the Fourteen Points, 11.2.1918, <[http://www.firstworldwar.com/source/fourteenpoints\\_wilson2.htm](http://www.firstworldwar.com/source/fourteenpoints_wilson2.htm)>.

<sup>4</sup> *J. Crawford*, The Creation of States in International Law, Oxford Scholarship Online, January 2010, 106.

<sup>5</sup> *J. Bodin*, Les six livres de la République, un abrégé du texte de l'édition de Paris de 1583, 1993, 74.

<sup>6</sup> *М. Бартошек*, Римское право: (Понятия, термины, определения), 1989, 147.

who have power.<sup>7</sup> In contemporary international law, the idea of sovereignty is reflected in the concepts of jurisdiction and effectiveness.

Self-determination, considered in the light of sovereignty, is the self-determination of government. The principle of self-determination has therefore two important implications: firstly, it creates conditions for the emergence of sovereignty in a society not yet organized in the state and in this sense provides the basis for the process of decolonization; secondly, it ensures the sovereignty of existing states, and in this sense overlaps with the principle of non-intervention. Accordingly, the principle does not provide a right to secession, though it does not prevent the recognition of new states; essential conditions for such recognition are the lack of foreign intervention and the effectiveness of the new government. A prominent representative of this direction is *J. Crawford*. In his view, the principle of self-determination has the following characteristics: 1) International law recognizes the principle; 2) It is, however, not a right applicable just to any group of people desiring political independence or self-government; it applies as a matter of right only after the unit of self-determination has been determined; 3) The units to which the principle applies are in general those territories established and recognized as separate political units; 4) Where a self-determination unit is not already a state, it has a right of self-determination: that is, a right to choose its own political organization; 5) Self-determination can result either in the independence of the self-determining unit as a separate state, or in its incorporation into or association with another state; 6) Matters of self-determination are not within the domestic jurisdiction of the metropolitan state; 7) Where a self-determination unit is a state, the principle of self-determination is represented by the rule against intervention in the internal affairs of that state.<sup>8</sup>

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<sup>7</sup> *J.-F. Spitz* writes: “The concept of sovereignty has taken the form of focusing policy on the notions of authority, potency and power, thereby opposing the earlier theories, all centered on the substantive concepts of law and legitimacy. Its introduction in political philosophy at the beginning of the modern era seems to have resulted in a definitive shift from considering these pertinent questions: the point at issue is no longer whether somebody’s power is right (which subordinates the existence of the power to its morality and the political rule to the non-political one), but who owns the power to order and how that power has been conferred.” (*John Locke et les fondements de la liberté moderne*, 2001, <<http://www.agora.qc.ca/dossiers/Souverainete>>).

<sup>8</sup> *J. Crawford* (note 4), 127 et seq.

### III. Self-Determination as an Expression of General Will

The second direction of the essence of the state is expressed in the general will as determined by the general interest (the common good). The concept of the common good was formulated by *Plato*:

“... Not private but public interests must necessarily be the object of the true science of politics – for a common interest binds states, but a private one tears them asunder – and that it conduces to both public and private interests, when the public are well established rather than when the private are so.”<sup>9</sup>

However, the concept of the general will and the notion of the social contract derived from it arise not before the writings of the Enlightenment, especially in *Rousseau*'s: “the general will alone can direct the State according to the object for which it was instituted, i.e., the common good”; “what makes the will general is less the number of voters than the common interest uniting them”.<sup>10</sup> The concept of the general will transforms the idea of sovereignty: as was noted by *Habermas*, for *Rousseau* and *Kant*, “the sovereignty of people means rather a transformation of power as a domination into a state where the people gives laws to itself (Selbstgesetzgebung)”.<sup>11</sup> The concept of procedural democracy (*John Hart Ely*<sup>12</sup>) and the concept of communicative action (*Habermas*<sup>13</sup>), developing the *Aristotelian* idea of communication, are quite close to the concept of the social contract. *Hegel* and the *Historical school* (*von Hugo*, *von Savigny* and *Puchta*) embraced the idea of the general will, but their interpretation of it was completely different, more profound and transcendent: “The state is the realized ethical idea or ethical spirit. It is the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks and knows itself, and carries out what it knows, and in so far as it knows”.<sup>14</sup> The concept of the general will had a significant impact on constitutional law; its manifestation in international law is much less noticeable and largely limited to the European continent.

<sup>9</sup> *Plato*, *The Laws*, B. IX, Ch. 13, in: *The Works of Plato* V, 1859, 390.

<sup>10</sup> *J. J. Rousseau*, *The Social Contract or Principles of Political Right*, B. II, Ch. 1, Ch. IV, <<http://www.constitution.org/jjr/socon.htm>>.

<sup>11</sup> *Ю. Хабермас*, *Гражданство и национальная идентичность*, *Российский бюллетень по правам человека*, 1995, 7.

<sup>12</sup> *J. H. Ely*, *Democracy and Distrust*, 1980.

<sup>13</sup> *J. Habermas*, *Theorie des kommunikativen Handelns*, 1981.

<sup>14</sup> *G. W. F. Hegel*, *Philosophy of Right*, translated from the German by *S.W. Dyde*, 2001, 194 et seq.

Self-determination considered in the light of general will is the self-determination of the people (nation). The people can be understood as an ethnic group, i.e. as “a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life and psychological make-up manifested in a common culture”<sup>15</sup> (in the historical school – as an “intellectual communion which reveals as well as establishes and develops itself by the use of speech” and “runs through generations constantly replacing one another and thus it unites the present with the past and the future”<sup>16</sup>), and as a political union. The first approach provides objective criteria, but due to the mismatch of their spheres makes the identification of the entity of self-determination a difficult, almost impossible task and is often perceived as carrying a threat of chaos. The second is largely devoid of these shortcomings and more in line with modern Western statehood, but prefers the form (policy) to the substance (culture). A condition of an effective political union is a unifying ideology or an ethnicism; neglect of ethnic characteristics makes political communication difficult and at worst impossible; therefore these characteristics still have their place as a subject of political communication and/or its motive.<sup>17</sup>

The understanding of the people as a political union has an important consequence: the right to self-determination, including in the form of secession, can be used by the groups excluded from political communication (excluded from the people) who, as a result, find themselves in a state of nature. *Rousseau* precisely notes: When the government ceases to obey the laws, the state undergoes contraction:

“... The great State is dissolved, and another is formed within it, composed solely of the members of the government, which becomes for the rest of the people merely master and tyrant. So that the moment the government usurps the Sovereignty, the social compact is broken, and all private citizens recover by right their natural liberty, and are forced, but not bound, to obey.”<sup>18</sup>

This idea is enshrined in the safeguard-clause of the Declaration on Friendly Relations, according to which the right of secession may be realized by those nations which are not under the authority of “a government representing the whole people belonging to the territory without distinction as to race, creed or colour”.<sup>19</sup>

<sup>15</sup> *И. В. Сталин*, Марксизм и национальный вопрос, Сочинения (2), 1946, 296.

<sup>16</sup> *F. K. von Savigny*, System of the Modern Roman Law, translated from the German by *William Holloway*, (I), 1867, 15-16.

<sup>17</sup> *Ю. Хабермас* (note 11), 7.

<sup>18</sup> *J. J. Rousseau* (note 10), B. III, Ch. X.

<sup>19</sup> UN General Assembly, A/Res/25/2625, 24.10.1970.

The idea of the general will, in spite of the almost complete dominance in the field of constitutional law and a prominent place in the international political rhetoric has few consistent supporters in the international legal doctrine. One of them is a Canadian scientist and supporter of Quebec secession: *D. Turp*. In his opinion, since 1945 public international law has recognized the right of peoples to self-determination. Only one condition is required: being a people. A people is a group of persons that chooses to determine its own future. A common language, culture and religion play a determining role in such a process of self-definition, but the collective desire to live together is an important indicative factor as well. Restrictive interpretations of the right to self-determination are contrary to the people's freedom to choose its political status and to the universality of this right as established by the UN Charter and International Human Rights Covenants. The legal validity of the safeguard-clause of the Declaration on Friendly Relations may be doubted and its customary character contested since the accession to sovereignty by the Baltic peoples, by the peoples of the former Soviet and Yugoslavian republics and by the peoples of Slovakia and Eritrea.<sup>20</sup>

The concept of internal self-determination represents an attempt to reach a compromise between the idea of sovereignty and the idea of general will; in accordance with this concept the principle can create rights only "within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states".<sup>21</sup>

#### IV. Self-Determination as an Expression of Human Rights

The third direction of the essence of the state is expressed in human rights: an individual with his natural rights is regarded as the centre of the social structure and the state – an institution whose primary function is to

<sup>20</sup> *D. Turp*, Remarks, in: Contemporary International Law Issues: Opportunities at a Time of Momentous Change: Proceedings of the Second Joint Conference Held in The Hague, The Netherlands, 22.-24.7.1993, 1994, 63 et seq.

<sup>21</sup> The Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 122; *J. Klabbers* writes: "... Self-determination is best understood as a procedural right: entities have a right to see their position taken into account whenever their future is being decided. That may not amount to a right to secede, nor even to a right to autonomy or self-government, but it does amount to a right to be taken seriously." In his opinion this approach has following advantages: "it places less of a premium on the disputed but inherently limited notion of peoples"; "it would not engender any false hopes" "it honours the importance of the political process" (*J. Klabbers*, The Right to be Taken Seriously: Self-Determination in International Law, HRQ 28 (2006)).

ensure these rights. The idea of human rights is based on the sacred character of every human being possessing an “inherent dignity”.<sup>22</sup> In *S. Rosen*’s opinion the basis of the idea of the equality of all human beings is the Biblical statement that God created man in His own image (Gen. I:27). Prerequisites of this idea can be found in *Protagoras* (“Man is the measure of all things”), and *Epicurus*; its theoretical foundation was provided by Enlighteners (including *Rousseau*, who was criticized by *Hegel* for this reason); its modern and the most consistent and complete expression is liberalism, whose theoretical base was formed in the 19<sup>th</sup> century by *A. de Tocqueville*,<sup>23</sup> *B. Constant*<sup>24</sup> and others: “The aim of the moderns is the enjoyment of security in private pleasures; and they call liberty the guarantees accorded by institutions to these pleasures.”<sup>25</sup> *A. de Benoist* enumerates the Christian tradition, the medieval nominalism and the rationalism of the New Age as the philosophical foundations of the human rights concept.<sup>26</sup> Today, the idea of human rights is enhanced by the phenomenon of globalism, which attenuates the idea of the general will, and by the phenomenon of supranational which attenuates the idea of sovereignty. The concept of human rights entered international law in the 19<sup>th</sup> century (protection of ethnic minorities); in the second half of the 20<sup>th</sup> century its influence was extended to all branches and institutions of international law.

Self-determination, considered in the light of human rights, is the self-determination of an individual. Thus the principle of self-determination acts as an additional basis of individual rights, separate from the “inherent dignity” and stems from the ethnic, religious, or other identity (list of individual rights includes a paradoxical right to “choose to belong to whatever ethnic, religious or language community he or she wishes”<sup>27</sup>). Implementation of the principle is “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”.<sup>28</sup> Therefore the principle creates obligations that are

<sup>22</sup> *M. J. Perry*, *The Idea of Human Rights: Four Inquiries*, 1998, 4 et seq., 14 et seq.

<sup>23</sup> *A. de Tocqueville*, *De la démocratie en Amérique*, 1831.

<sup>24</sup> *B. Constant*, *De la liberté des Anciens comparée à celle des Modernes*, 1819.

<sup>25</sup> *B. Constant*, *The Liberty of the Ancients Compared with that of the Moderns* (1819), in: *The Political Writings of Benjamin Constant*, 1988, 309 et seq., <<http://www.uark.edu/depts/cominfo/cambridge/ancients.html>>.

<sup>26</sup> *A. de Benoist*. *Au-delà de droit de l’homme. Défendre les libertés*. Editions Krisis, 2004, 6 et seq.

<sup>27</sup> Arbitration Commission of the Peace Conference on Yugoslavia, No. 2 (Self-determination), 11.1.1992, in: *S. Trifunovska* (ed.), *Yugoslavia Through Documents: From Its Creation to Its Dissolution*, 1994, 474 et seq.

<sup>28</sup> The Human Rights Committee, General Comment No. 12: Article 1 (Right to self-determination), 1984, para. 1, <<http://www.ohchr.org>>.

realized mainly in the domestic legal order and in many respects identical to the obligations created by the human rights principle. In this context, secession is permitted in the case of systemic violations of human rights; two judges of the ECHR participating in the decision of the *Loizidou v. Turkey* case have formulated this idea as follows:

“Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonization. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.”<sup>29</sup>

Prominent representatives of this trend in contemporary legal doctrine are *R. McCorquodale* and *A. Peters*. *R. McCorquodale* affirms: “... The human rights approach to the right of self-determination creates a framework to balance competing rights and interests and seeks to provide legal rules to deal with disputes.” He lists three reasons for considering self-determination in the light of human rights concept. First, the purpose of the right of self-determination – to protect communities and groups from oppression – is similar to that of the international human rights law framework. Second, the right of self-determination is an essential condition for the protection of individual rights because without freedom from oppression, individual rights cannot be effectively guaranteed. Third, international human rights law has proved able to adjudicate group rights in the economic, social and cultural context.<sup>30</sup> *A. Peters* writes:

“The old concept of sovereignty has been thoroughly transformed by the much more recent concept of human rights ... The claim that state sovereignty has its source and *telos* in humanity, understood as the principle that the state must protect human rights, interests, needs, and security, eliminates the basic antinomy between human rights and state sovereignty ... The humanized concept of sovereignty leads to a reassessment of humanitarian intervention ... The rule must stay in order to protect the self-determination and human rights of persons in a threatened state ... The admission of a temporary defeasibility of state sover-

<sup>29</sup> Concurring opinion of Judge Wildhaber, joined by Judge Ryssdal in *Loizidou v. Turkey* (Merits), 18.12.1996, ECHR, <<http://www.hudoc.echr.coe.int>>.

<sup>30</sup> *R. McCorquodale*, Self-Determination: A Human Rights Approach, ICLQ 43 (1994), 857 et seq. Quoted from: *M. Dixon/R. McCorquodale/S. Williams*, Cases and Materials on International Law, 2011, 227 et seq.; *K. Knop*, Diversity and Self-Determination in International Law, 2004, 81 et seq.

eignty, conceived as responsibility for humans, leads, in a system of multi-level governance and under the principle of solidarity, to a fall-back responsibility of the international community, acting through the Security Council.<sup>31</sup>

## V. The Interaction of Ideas of Sovereignty, General Will and Human Rights

These three ideas interact on several levels. Firstly, they interact on the theoretical level. Here they can complete and justify each other: for example, human rights can be seen as a goal of politic union; the general will as the basis for sovereignty; sovereignty as a protection of human rights or an objectification of the idea of the common good. On the other hand, they may collide: the general will protects the general interest, which does not always include a private interest; a private interest tends to overcome the limitations imposed by sovereignty; sovereignty may neglect the general will, etc. In this case, there is a question of the hierarchy of values which is not only a rational question, but also a matter of faith, intuition and psychology.

Secondly, these ideas interact on the political level, i.e. are taken or not taken into account by political actors and reflected or not reflected in their decisions. Such political interaction is dynamic – the proportion of each idea is not constant and depends on a variety of social, cultural, economic, ideological, and other factors. Contemporary political rhetoric is largely based on the idea of human rights. However, this does not mean that this idea will be reflected in the rhetoric of tomorrow.

Third, being embodied in the specific rules, these ideas interact on the legal level, in accordance with the rules and principles of the construction and operation of a particular legal system. All three ideas are enshrined in international law: all three are reflected in the wording of the principle of self-determination; the idea of sovereignty is also reflected in the principle of sovereign equality and in the principle of non-interference, the idea of human rights in the principle of protection of human rights. Interpretation of the principle of self-determination in the context of two different ideas can give conflicting results. Thus, in contrast to the idea of human rights and the idea of the general will, the idea of sovereignty in fact denies the right to secession. The idea of the general will is under continuous pressure from the

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<sup>31</sup> A. Peters, *Humanity as the A and Ω of Sovereignty*, EJIL 20 (2009), 514 et seq.

ideas of sovereignty and human rights; this pressure results in the interpretations limiting the scope of the principle of self-determination.<sup>32</sup>

A. Cassese describes the evolution of the principle of self-determination as follows:

“... Self-determination was intended to brush aside the old, State-oriented approach prevailing in international dealings. Under this approach, the world community consisted of potentates: the sovereign States, each of them primarily concerned with the interests of its political elites ... By contrast, self-determination meant that peoples and nations were to have a say in international dealings: sovereign Powers could no longer freely dispose of them ... Clearly, this set of principles was directed toward undermining the very core of the traditional principles on which international society had rested since its inception: dynastic legitimation of power, despotism (albeit in increasingly attenuated forms), and international dealings based on agreement between rulers only ... Self-determination also eroded one of the basic postulates of the traditional international community: territorial sovereignty ... By promoting the formation of international entities based on the free wishes of the populations concerned, self-determination delivered a lethal blow to multinational empires ... As one would have expected, the dogma of State sovereignty has constituted a powerful bulwark against the full acceptance of the principle into the body of international legal rules ... The acceptance of the principle into the realm of law has therefore been *selective* and *limited* in many respects.”<sup>33</sup>

<sup>32</sup> Thus, for R. S. Bhalla self-determination is the restoration of the control over political, social and economic structures: “Colonisation is an exercise of brute force. Its illegality lies in the very denial of civilised behaviour which both socially and morally implies that people are left to exercise their own free will in their own affairs. Therefore, colonisation is a trespass ... Until the trespass is vacated, it continues by analogy with the very simple principle of the tort of trespass.” If we see the right of self-determination as corrective justice, we discover a defensible line between colonial populations, which have a right to independence, and national groups in established states, which do not (The Right of Self-Determination in International Law, in: W. L. Twining (ed.), *Issues of Self-Determination*, 1991, 91 et seq. Quoted from: K. Knop (note 30), 71 et seq.). L. Brilmayer considers that territorial rights are an important part of the claim to the secession and their significance should be recognized by international law. At least two territorial arguments can be put forward. The first proposes that the land was acquired through conquest by the state from which the ethnic group wishes to secede. A second argument concentrates on a wrongdoing committed by a third party. At some previous point in history, a state with no current stake in the dispute improperly joined the territories of the currently dominant state and the separatist group. In addition, it is necessary to consider a number of additional factors: the immediacy of the historical grievance, the extent to which the separatist group has kept the claim alive, the extent to which the territory has now been settled by members of the dominant group, the nature of the historical grievance (L. Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, Yale J. Int’l L. 16 (1991), 177 et seq.).

<sup>33</sup> A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 1995, 315 et seq.

## VI. Reasons for Applying the Idea of General Will

However, there are a number of legal arguments, by virtue of which the idea of the general will should not be ignored when determining the content of the principle of self-determination. First, the very idiom “self-determination of peoples” embedded in international instruments contains a clear and unambiguous reference to the people, as the subject of self-determination – to the people, and not to a government, individuals or a minority. Second, consideration of the principle of self-determination as a principle associated exclusively with the ideas of sovereignty and human rights, is contrary to the principle of legal economy and more general *Occam’s Razor* in the situation where these ideas are embodied in separate principles. Third, the safeguard-clause of the Declaration on Friendly Relations is a direct expression of the idea of the general will. Fourth, since the idea of the general will is reflected in practically all domestic legal systems, its international status can be defined as the status of a general principle of law recognized by civilized nations. Fifth, being excluded from the content of the principle of self-determination, the idea of the general will is excluded from international law in general, because no other general rule enshrines it. That, in turn, calls into question a number of special rules that use this idea as an ontological basis (norms related to the protection of national minorities, inter-parliamentary cooperation, sustainable development, etc.). Sixth, the use of this idea as the basis of settlement led to positive results in some cases, although on the other hand, its non-usage led to disastrous consequences in other cases. *A. Carty* writes in this regard:

“The principle of effectiveness, linked to order and security, dominates, above all, the system and technique of international law. However, the doctrines of the failed state, the experience of contemporary Africa, and numerous other acutely unresolved conflicts (e.g. Chechnya, Kashmir, Palestine, Tibet, etc.) show that while international law provides a *legal* answer, it does so by relying upon historical legal traditions that have become anachronistic and incomplete.”<sup>34</sup>

This, of course, does not mean that the idea of the general will should be considered as the foundation of international law. It rather means that its legal status must be explicitly recognized, which would result in taking this idea into account in international legal qualifications, along with other considerations and norms. For example, this idea can be used in determining the legal consequences of a coup, not supported by a part of the population, or a radical change in national and linguistic policy: the parts of the state

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<sup>34</sup> *A. Carty*, *Philosophy of International Law*, 2007, 92.

that had not supported the coup, may be regarded as having acquired a right to secede. Quite possibly, the idea of the general will can be used as a sensitive tool to correct the action of *uti possidetis juris*, given that its application was unsatisfactory in a number of situations. It is obvious that it should affect (and is already affecting) recognition and succession. Finally, this idea can extend the principle of non-interference to situations in which a foreign country impedes the formation of the general will or tries to undermine “the intellectual communion” of the people. This latter case should be considered separately.

## VII. The Idea of General Will and the Principle of Non-Interference

The Declaration on Friendly Relations prohibits “the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination”.<sup>35</sup> Coercion involves an impact on the will; “a voluntary behavior consists of the decision and its implementation”.<sup>36</sup> Intervention in this regard takes place when one entity prevents another entity from making a decision (forming a will), and/or from carrying it out (implementing the will). In international relations there are two situations of preventing the formation of the will: when a foreign country prevents the formation of the government’s will and when it prevents the formation of the general will. The formation of the general will is a complex political process; its participants are the government, political parties, religious organizations and other elements of the political organism. As well as the formation of the individual’s will, the formation of the general will is an internal process, i.e. a process, limited by the borders of the political organism, which excludes external subjects and impacts. The presence of external actors and their behavior is certainly taken into account by internal actors,

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<sup>35</sup> In the *Nicaragua* case the ICJ pointed out: “A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force ...” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment, I.C.J. Reports 1986, 14, para. 205).

<sup>36</sup> *Философский энциклопедический словарь*, Под ред. Л. Ф. Ильичева, П. Н. Федосеева, С. М. Ковалева, В. Г. Панова, 1983, 90.

but such account does not mean their incorporation, – external factors remain dynamic sources of information. Internal actors have a monopoly on the interaction with the nation. Intervention in the formation of the general will is an overcoming of the boundaries of the political organism and a penetration into it. Such penetration occurs when a foreign state interacts with some elements of the political organism and interferes with the functioning of other elements (the interaction with the state as a whole, of course, is legitimate, being the interaction of two autonomous organisms). Such penetration is a violation of natural laws of the political organism; it inevitably causes imbalance, division, separation of the political organism, distancing of its elements from each other, and, in extreme cases, the decay of the organism or the atrophy of its elements. This is the mechanistic effect of penetration. Changing the nature of the interaction of the elements of the political organism, such penetration inevitably affects the results of the interaction, including policy decisions. This is the intellectual effect of penetration. Thus, the interaction of a foreign state with the elements of the political organism is an unlawful interference; the general will (its formation and implementation) cannot be influenced by third states not involved in the common good (which forms the ontological basis of the general will). Any intervention not only harms, but also demonstrates that the subject of intervention is a failed state. In olden times this assumption provided a basis for the colonization of inhabited areas; the establishment of capitulatory regimes; the extension of the living space (*Lebensraum*); at the present time it has provided a basis for the intervention in the internal affairs of Yugoslavia, Iraq, Libya and Ukraine. Quite often, an external impact on the general will is justified by reference to a legitimate aim (for example, relating to the protection of human rights); in this case the problem of qualification can be solved by using the principle of proportionality.<sup>37</sup> The principle of self-determination is a norm of *jus cogens*;<sup>38</sup> in this regard, undue impact of third states on the general will can be sanctioned by other third states. The question of content and boundaries of such sanctions, however, remains open.

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<sup>37</sup> This principle, which was created by German doctrine and became a part of the law applicable by ECHR and DSB WTO, is considered as a principle of law of civilized nations (*E. Cannizzaro, Diritto Internazionale, 2012, 128-131; A. В. Должиков. Применение принципа соразмерности ограничения основных прав Европейским Судом по правам человека при рассмотрении “российских дел”, в “Практика Европейского суда по правам человека и российская правовая система”, под ред. Д. В. Красикова, 2006, 47 et seq.*

<sup>38</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, 136, para. 88, 155, 156.*

## VIII. The General Will and International Regulation

The immunity of the process of general will formation implies its exclusion from international regulation. The Advisory Opinion of the ICJ in the *Kosovo* case supports this reasoning. The Court noted:

“During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence.”<sup>39</sup>

It is logical to assume that if international law does not regulate a declaration of independence, which is an indirect expression of the general will, then it does not regulate a referendum which is a direct expression of the will. Despite the prohibition of external impact on the general will, the very fact of its formation interests third states, who face the problem of recognition as well as formulation of foreign policy. This fact can be ascertained only when the general will has been formed and expressed with full consciousness of all relevant circumstances and in the absence of fraud, error or external coercion (i.e. if it corresponds to the actual interest of the nation). In this sense, an expression of the general will can be considered as a public deal falling within the scope of the general principles of Roman law. Ascertaining the general will and its blamelessness require evidence. This reasoning creates a framework for the consideration of so-called “international standards of referendums” (Council of Europe, Parliamentary Assembly Recommendation 1704 (2005), “Referendums: Towards Good Practices in Europe”) of 29.4.2005; Venice Commission, Code of Good Practice on Referendums (CDL-AD(2007)008rev) of 20.1.2009 which contains “Guidelines on the Holding of Referendums”<sup>40</sup>). These standards, regardless of their legal force, should not be considered as addressed to the nation; rather they are addressed to third States ascertaining the fact of formation of the general will. The circumstances enumerated in the standards (peacefulness; univer-

<sup>39</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 79.

<sup>40</sup> See: 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, 16.4.2014, <<http://www.ejiltalk.org>>.

sal, equal, free and secret voting; freedom of the media and the neutrality of the government; international supervision; exhaustion of negotiations and others) should be treated as convincing evidence of the general will's blamelessness. The absence of some of them, however, should not automatically entail the conclusion that the general will was vicious. Such a conclusion can only be made on the basis of an examination of the particular situation and in the presence of strong evidence of fraud, error or external coercion. Thus, the military presence of a third state may be considered as a coercion only if it was accompanied by an impact on the general will; in other cases (for example, when it was intended to protect the free formation of the general will) it does not disqualify a referendum. One may recall that a number of referendums on self-determination were carried out in the context of military presence of the interested party: the referendum in Puerto Rico (2012), the referendum on the Northern Mariana Islands (1975), referendums on Niue (1974), etc. In the same way violations of freedom of speech and freedom of assembly may be considered as a fraud only if the implementation of these freedoms was necessary to determine the position on the issue put to a referendum. Of course, the above considerations do not exclude a qualification of military presence as contrary to the international security law, and a qualification of violations of freedoms of speech and assembly as contrary to human rights law.

## IX. The Ukrainian Crisis in the Context of the Idea of General Will

It is difficult to justify the secession of Crimea by the idea of sovereignty. *A. Pellet* writes that a Declaration of independence, even if it is based on a referendum, does not create a state; only effectiveness matters. Crimea could be considered as a State only if it had succeeded in effectively defending its independence in relation to the central Ukrainian government (“imposer effectivement son indépendance face au pouvoir central ukrainien”). However, this requires that the independence arises without any intervention.<sup>41</sup> Similarly it is difficult to justify the secession of Crimea by the idea of human rights. *R. McCorquodale* writes:

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<sup>41</sup> *A. Pellet*, *Crimée: une invasion, un référendum, une sécession?*, *Le Monde.fr*, 14.3.2014, <<http://www.lemonde.fr>>.

“The situation in Ukraine is such that the new government is just starting to be in a position to govern. It is trying to restore law and order. It has taken no major military or other oppressive actions against the people of Crimea ... There are at this time no clear actions by it that would be sufficient to justify under international law any independence or merger with another state by the people of Crimea.”<sup>42</sup>

For C. *Marxsen*, “The right to self-determination requires states to respect minority rights, but does not grant a sub-entity of states the right to freely chose to which state a territory shall belong.”<sup>43</sup>

By contrast, consideration of the Crimean situation in the context of the general will leads to different conclusions, according to which the winter coup in Kiev resulted in the breaking of the social contract and the exclusion of the Crimean population from political communication.<sup>44</sup> Indeed, a number of pieces of evidence suggest that after the coup d'état at the end of February 2014 in Ukraine, the Crimean population found itself in that position. For example, the coup removed from power the president who had been elected in 2010 by 78.24 % of voters in Crimea and 84.35 % in Sevastopol (Ukraine in total – 48.95 %).<sup>45</sup> Secondly, after the coup a campaign directed against two parliamentary parties was started: the Party of Regions, which in 2012 was supported by 52.26 % of voters in Crimea and 46.90 % in Sevastopol (Ukraine in total – 30 %) and the Communist party of Ukraine (19.41 %, 29.46 % and 13.18 %, respectively).<sup>46</sup> At the official level these parties have been declared anti-national, certain functionaries have been harassed, party offices and party members have been attacked, including during parliamentary sessions; about 80 of 180 deputies left the Party of Regions faction in Parliament. Thirdly, after the coup the transitional government was formed, representing only two of the five parliamentary par-

<sup>42</sup> R. *McCorquodale*, Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law, 10.3.2014, <<http://www.opiniojuris.org>>.

<sup>43</sup> C. *Marxsen*, Crimea's Declaration of Independence, 18.03.2014, <<http://www.ejiltalk.org>>.

<sup>44</sup> As already noted, the safeguard-clause of the Declaration on Friendly Relations can be used as a legal basis for the application of the concept of the general will. The general consensus about such application to the Ukrainian events, however, is unlikely to be possible. Firstly, the leading states involved in the Ukrainian events are not interested in it; secondly, it runs counter to the important political trend of our time, consisting in the substitution of the general will by the supranational will, whose source is often anonymous. But this is a question that needs to be considered separately.

<sup>45</sup> Результаты выборов 2010. Второй тур, Украинская правда, 7 февраля 2010, <<http://www.pravda.com>>.

<sup>46</sup> СМИ: как голосовали регионы на выборах в Раду, 1 ноября 2012 г., <<http://www.rusnewsru.ua/arch/ukraine/01nov2012/vibopooblast.html>>.

ties: “Batkivshchyna” and “Svoboda”, which collectively received 36 % of votes in the parliamentary elections of 2012 (the transitional government includes 7 members of the “Batkivshchyna”, 4 members of the “Svoboda” and 9 non-party members).<sup>47</sup> Fourthly, almost all branches and levels of government were subject to lustration; the key positions were occupied by the representatives of the political forces that came to power. Fifthly, the new government refused to carry out measures aimed at restoring the social consensus (referendum, parliamentary elections, and negotiations with other stakeholders).

Being excluded from the political communication, the population of Crimea found itself in natural state, and formed its own general will, aiming at reunifying with Russia. In the broader socio-cultural context, emphasized by the *Historical school*, the Ukrainian crisis can be seen as the result of a gross impact on the intellectual communion of the Ukrainian people. Eventually, this led to the destruction of this communion, as the society turned out to be unable to withstand such challenges. This impact was manifested in the initiation of the repeal of the law on regional languages,<sup>48</sup> many cases of demolition of *Lenin* monuments (which are rather national than political symbols), anti-Russian proclamations and speeches as well as forced spreading of the ideas of European integration and European identity. This impact was carried out not only by the internal forces, but also by external actors (the Western states and international organizations), which may be qualified as aggressors in the coordinate system of the Historical school.

## X. The Behavior of Western States in Ukraine in the Context of the Idea of the General Will

Indeed, the behavior of the Western states in Ukraine in the winter 2013/2014 may be considered as interference in the formation of the general will and thus – as a violation of the principle of non-intervention. Manifestations of the interference involved commenting on the actions and positions of the internal subjects; solidarity with Ukrainian opposition and participation in its actions; holding meetings with representatives of the opposition and conclusion of political arrangements with them; appeals to the Ukrainian nation in the absence of permission from the Ukrainian government; usage of the media to support the opposition and discredit the gov-

<sup>47</sup> Кто есть кто в новом правительстве, 28 Февраля 2014, <<http://www.forbes.ua/nation/1366192-kto-est-kto-v-novom-pravitelstve>>.

<sup>48</sup> Thanks to the president’s veto this repeal was not realized.

ernment. The intervention was one of the main factors that led to the coup, the revision of the decision on the signing of the Association Agreement, the separation of the Crimea, the civil war in the South-East of Ukraine, the confrontation between Ukraine and Russia.

Consideration of this intervention through the prism of the four conditions of proportionality leads to the following conclusions. The first condition of proportionality (legitimate purposes) can be regarded as fulfilled. Western countries justified their actions by a concern for human rights that allowed them to refer to the contractual obligations of Ukraine (European Convention 1950 and Covenants 1966), regional customs and general custom *in stato nascendi*, reflecting the concept of responsibility to protect. Some actions suggested that the main objectives of the intervention were the conclusion of the Association Agreement and the severance of links between Ukraine and Russia; direct evidence of the primacy of these goals, however, are not available. The second condition of proportionality (adequacy) was not fulfilled: some actions of Western countries did not have a direct connection with declared humanitarian purposes (visits to the Maidan, contacts with the opposition, commenting on the general policy of the authorities, offers to mediate, etc.). These actions lost any sense after the authorities provided guarantees of non-use of force and launched an investigation into violations committed on 30.11.2013. The third condition of proportionality (necessity) was not fulfilled. Western reaction to the violations was not limited to the requirements of the investigation and respect for civil liberties; along with this, the West required a re-election, large-scale political and economic reforms and the reorientation of foreign policy. Actions of the Western countries were systemic and consistent, a factor that significantly strengthened their effect. Finally, the fourth condition of proportionality (proportionality *stricto sensu*) was not fulfilled: the West's interest was protected at the cost of diminishing the dignity of a sovereign state and the creation of obstacles to the free determination of the whole spectrum of its domestic and foreign policy.

## XI. The Crimean Referendum in the Context of the Idea of the General Will

With reference to the Crimean referendum, the Russian presence and failure to comply with freedom of speech and assembly are considered as disqualifying factors. Russian presence, however, was not designed to intervene in the process of formation of the will of Crimean population and

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therefore cannot be considered as violence (although, of course, this presence was an obstacle for jurisdiction of the Kiev authorities). Failure to observe the freedoms of expression and assembly, even if this was the case, can hardly be regarded as fraud. Finally, the question of secession of Crimea from Ukraine and of its unification with Russia is clear (unlike the question of the association of Ukraine and the European Union); in this context it is difficult to assume that the population of Crimea made its choice under error. The referendum results were determined by other factors, much more stable, powerful and obvious – notably the historical and cultural links between Crimea and Russia, which came to the fore as a result of the coup. In this context, the question of the timing of the referendum loses its importance; it is natural to assume that, considering themselves as a part of the Russian world, the residents of Crimea were initially predisposed in favour of political union with Russia.

## XII. Prospects of Settlement of the Ukrainian Crisis

A consensus on the legal qualification of the Ukrainian crisis is difficult to achieve. The main reason is that the main stakeholders construct their legal positions on the different political foundations, embedded in international law. Thus the West uses the idea of human rights and the idea of sovereignty; meanwhile Russia uses the idea of the general will. If Russia's position is not more convincing, then it is more consistent. Indeed, justifying the coup d'état in Kiev and its support for the Ukrainian opposition in winter 2013/2014, the West relied on the idea of human rights and disregarded the idea of sovereignty. Protesting against the secession of Crimea and justifying the actions of the Kiev authorities in the south-east of the country in spring 2014, the West relied on the idea of sovereignty and disregarded the idea of human rights. Moreover, the West denies its own cultural heritage by ignoring the idea of the general will and the related political concepts. The submission of the Crimean issue to the ICJ does not provide great prospects: the decision is most likely to be made in favour of the West, whose members constitute the majority in the Court; the Kosovo precedent indicates that it will not create an obstacle to rendering an opposite opinion in a similar case in the future. Russia, of course, will refuse to execute such a decision. Moreover, as it was rightly pointed out by *J. Klabbers*:

“... It would also be problematic to argue that decisions on statehood should be taken by courts, not so much because courts are not to be trusted, but rather because the responsibility is simply too heavy: disrupting and even ending the

very existence of a political community (possibly, if not invariably, one with a lengthy history) is not something that should be left to courts.”<sup>49</sup>

Legal lessons of the Ukrainian crisis, nevertheless, are obvious. The first lesson is that the understanding of the state in international law should be deeper and take into account not only the ideas of sovereignty and human rights but also the idea of the general will. The second lesson is that the duty of non-intervention should include not only the duty to refrain from any action aimed at weakening the sovereignty, but also the duty to refrain from actions that could jeopardize the intellectual communion of the nation and its political unity.

The political settlement of the Ukrainian crisis seems to be possible under two scenarios: the restoration of the *status quo ante* or the fixation of the existing *status quo*. The former looks utopian: neither the West, which took active part in organizing the coup and achieved political and economic subordination of Ukraine, nor Russia, which incorporated Crimea, are interested in its implementation and do not trust each other sufficiently; the deeply divided Ukraine does not have the necessary power. The latter, which in the case of Ukraine, may be made tacitly, through “inaction and silence”,<sup>50</sup> is more realistic, although does not provide a panacea: the frozen conflict may well manifest itself in the future. Unfortunately, the Ukrainian crisis moved Russia and Europe “in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another”.<sup>51</sup> The action of international law and the achievement of a lasting political consensus, which is a prerequisite for this action, are very problematic in these conditions.

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<sup>49</sup> J. Klabbers (note 21), 190.

<sup>50</sup> M. Baros, Response to Jure Vidmar’s Blog, 20.3.2014, <<http://www.ejiltalk.org>>.

<sup>51</sup> T. Hobbes, Leviathan, Part I, Ch. XIII, <<http://www.gutenberg.org>>.

