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THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 68/262 IN THE CONTEXT OF GENERAL INTERNATIONAL LAW*

On 27 March 2014, the United Nations General Assembly adopted resolution 68/262, entitled "Territorial integrity of Ukraine". Concise and carefully phrased as it is, the resolution may be used as a basis for Ukraine's legal action for the restoration and protection of its territorial integrity, whereby the resolution's operational provisions are to be interpreted in the context of general international law, which provides remedies to States victimised by unlawful threats or uses of force. This article offers a detailed analysis of resolution 68/262 and makes practical recommendations, in particular, from the perspective of the responsibility of States for internationally wrongful acts. It also uses the example of the situation in Ukraine to introduce the novel notion of "patriocide". It is suggested in conclusion that the adoption of resolution 68/262 may give rise to the emergence of new rules of international law.

Key words: United Nations, UN General Assembly Resolution, General International Law, annexation of Crimea

1. Introduction

For sure, the annexation of Crimea by the Russian Federation in March 2014 is among the gravest challenges to contemporary international law. While working on my recent monograph on the crime of aggression¹, I – as many others – could not imagine that a permanent Member of the UN Security Council, which had been consistently opposing, for example, the US-led invasions in Iraq and Libya, would soon itself commit an act of aggression against a friendly and ostensibly "brotherly" nation. Now that this has happened, a number of issues arise for the theory and practice of international law, which – regrettably, once more – manifested its weakness in the face of a use of force by a great power. Challenging as it was, this use of force calls for suitable remedies – and for a strengthening of international law, so that this law might, in the future, more adequately protect nations against similar abuses.

On 27 March 2014, the UN General Assembly adopted resolution 68/262, entitled "Territorial integrity of Ukraine"², which, *inter alia*, calls upon "all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means" (cf. para 1 and *infra* 3.3). It appears useful to analyse this resolution – paragraph by paragraph – in the context of general international law, with a view to "deciphering" relevant binding rules of international law, which are "hidden" behind the resolution's subtly phrased paragraphs, and to suggesting substantive measures, which could be used by Ukraine in pursuance of its legitimate interests – above all, for the restoration and protection of its territorial integrity.

2. The Status of Resolution 68/262 under International Law

According to a general view, acts issued by the General Assembly are not legally binding, subject to provisions of the UN Charter governing the Assembly's "internal" relations with other main organs of the United Nations³. Under Article 10, the General Assembly is entitled to "discuss any questions or any

* The author is grateful to Prof. Dr. Zhenis Kembayev, Dean of the KIMEP School of Law for useful comments on an early draft of this article.

¹ See generally Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer.

² For a full text of the resolution, see: *Territorial integrity of Ukraine* (Resolution adopted by the General Assembly on 27 March 2014). <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262>. (2014, December, 1).

³ See Bleicher, S. (1969). The Legal Significance of Re-Citation of General Assembly Resolutions. 63 *AJIL*, 444 – 478, at 445. See also Liang, Y.-L. (1946) The General Assembly and the Progressive Development and Codification of International Law. 42 *AJIL*, 66 – 97.

matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and [...] *make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters" (emphasis added). However, it would be too simplistic to conclude that the General Assembly resolutions have no legal force whatsoever. They *may* reflect specific rules of pre-existing customary or treaty-based international law, or may themselves give rise to subsequent developments in "hard" international law¹. In the first case, the resolutions do not purport to alter the mandatory rules of international law they reproduce but simply serve the purpose of applying the existing rules to a specific situation². According to S. Bleicher, such resolutions "settle legal disputes" and "have a legal significance independent of any formal lawmaking power given by the Charter"³. In the second case, the provisions of a given resolution constitute an "intermediate" condition in the crystallisation of relevant rules of international law and point to a likely direction in the development of such rules⁴. Obviously, resolution 68/262 belongs to the first group, for it restates well-established binding rules of international law – such as those embodied in Article 2 of the UN Charter (cf. *infra* 3.2). It is therefore submitted that, by virtue of the binding legal force of pre-existing rules of international law embodied or referred to in resolution 68/262, the resolution itself should be regarded – at least, in a considerable part – as having a binding legal force.

Notably, by having adopted resolution 68/262, the General Assembly continued its earlier progressive practice of challenging the Security Council where the latter was unable or unwilling to maintain international peace and security⁵. In accordance with Article 24(1) of the UN Charter, the Security Council bears the "primary responsibility for the maintenance of international peace and security". Yet, the Council's competence in the area, although "primary", is by no means "exclusive", and among the main bodies of the United Nations, especially the General Assembly and the International Court of Justice have been increasingly active in considering matters related to the use of force⁶. Since February 2014, the Security Council proved to be – as it was, more than once, in the past⁷ – utterly unable to perform its key function with respect to the Ukraine crisis⁸, because one of the Council's permanent Members had a direct interest in the outcome of the dispute in question. Hence, the General Assembly was fully entitled to consider the situation in Ukraine in accordance with the first sentence of Article 11(2) of the UN Charter,

¹ See Malanczuk, P. (1997). *Akehurst's Modern Introduction to International Law*. 7th revised edition, 54 – 55; Shaw, M. (2008). *International Law*, 6th edition. Cambridge University Press, 115.

² See Bleicher, S. (1969). The Legal Significance of Re-Citation of General Assembly Resolutions. 63 *AJIL*, 447: "If [...] a resolution declares a rule to be pre-existing law and attributes it to a recognized source of international law, a foundation has been established for reliance upon that resolution as a limitation on the freedom of action of at least those who voted for it. A nation's vote for such a resolution is in effect a public statement of adherence to the legal principles embodied in the resolution". On the other hand, if a provision in a General Assembly resolution indeed reproduces a binding rule of (conventional or customary) international law, it is up to States voting against a given resolution or abstaining from voting to justify their negative or neutral attitude with respect to a valid rule of "pre-existing law [contained in] a recognized source of international law". Whereas States' evolving attitudes with respect to customary rules of international law may indeed change those rules over time, non-compliance with conventional rules – especially, with provisions of the UN Charter – must be more difficult to justify.

³ See Bleicher, S. (1969). The Legal Significance of Re-Citation of General Assembly Resolutions. 63 *AJIL*, 445.

⁴ See Malanczuk, P. (1997). *Akehurst's Modern Introduction to International Law*. 7th revised edition, 54 – 55; Shaw, M. (2008). *International Law*, 6th edition. Cambridge University Press, 115.

⁵ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 122 – 124.

⁶ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 49 – 53. See also Gray, C. (2003). The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua. 14 *EJIL*, 867 – 905; Gross, L. (1972). Review of the Role of the International Court of Justice. 66 *AJIL*, 479 – 490.

⁷ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 48 – 49. See also Falk, R. (2003). What Future for the UN System of War Prevention. 97 *AJIL*, 590 – 598; Shaw, M. (2008). *International Law*, 6th edition. Cambridge University Press, 1209.

⁸ See Reisman, W.M. (1980). The Legal Effect of Vetoed Resolutions. 74 *AJIL*, 904 – 907.

and the adoption of resolution 68/262 in no way contravened the Charter's rules delimitating the respective powers of the General Assembly and the Security Council.

Now, in order to enforce resolution 68/262, Ukraine should take measures offered by international law with respect to each preambular and operative paragraph of the resolution, unilaterally or in cooperation with friendly States. As will be shown below, these measures will chiefly derive from rules governing compliance with treaties, the responsibility of States for internationally wrongful acts and respect for human rights. It will be shown, on the other hand, that international – and national – criminal law governing individual criminal responsibility for the crime of aggression shall not be applicable, for technical reasons, and Ukraine might consider introducing according amendments in its Criminal Code and other relevant legislative acts, with a view to ensuring a better protection in the future. More detailed recommendations regarding the implementation of the resolution's specific provisions are offered below.

3. The Legal Significance of the Preambular Provisions of Resolution 68/262

The preambular provisions of resolution 68/262 have quite solid implications in terms of binding international law, because they refer to a number of pre-existing conventional sources, including several provisions of the Charter of the United Nations, which have been breached in the course of the crisis. Also, the preambular paragraphs serve as a basis for the resolution's operative paragraphs, and the latter should be interpreted in their context¹.

3.1. *1st preambular paragraph: "Reaffirming the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations"*

All Members of the United Nations are bound by its Charter as a matter of superior conventional law². According to some authors, the United Nations law binds even upon a few States, which are not Members of the United Nations, due to its virtual universality³. Thus, in any interpretation of either Ukraine's or the Russian Federation's respective obligations under the UN Charter and other conventional source of international law, precedence must consistently be accorded to the Charter. We shall follow this approach throughout this article, and it is advisable that Ukraine, in taking any legal action on the basis of resolution 68/262, rely consistently upon relevant provisions of the UN Charter and its status as a founding Member of the United Nations.

3.2. *2nd preambular paragraph: "Recalling the obligations of all States under Article 2 of the Charter to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means"*

The rules referred to here are two of the Principles of the United Nations reflected, respectively, in Articles 2(4) and 2(3) of the Charter. In addition to their superior status as conventional international law (cf. *supra* 3.1), in particular, the prohibition of the threat or use of force was also recognised to constitute a customary rule⁴ and even a peremptory norm of general international law⁵. The International Law Commission's Commentary on the 2001 Articles on Responsibility of States for Internationally Wrongful

¹ For reasons of space, this article considers only the first five preambular paragraphs of the resolution, because the subject matter of the sixth and seventh preambular paragraphs overlap, to a large extent, with the content of the fourth and fifth preambular paragraphs as well as with the fifth operative paragraph of the resolution.

² See UN Charter, Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

³ See Malanczuk, P. (1997). *Akehurst's Modern Introduction to International Law*. 7th revised edition, 309; Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 84 – 90.

⁴ See Malanczuk, P. (1997). *Akehurst's Modern Introduction to International Law*. 7th revised edition, 309; Shaw, M. (2008). *International Law*, 6th edition. Cambridge University Press, 1123; Franck, T.M. (1970). Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States. *64 AJIL*, 809 – 837; Henkin, L. (1971). The Reports of the Death of Article 2(4) Are Greatly Exaggerated. *65 AJIL*, 544 – 548; Kunz, J.L. (1953). "The Nature of Customary International Law. *47 AJIL*, 662 – 669.

⁵ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 91 – 104. See also Schwelb, E. (1967). Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission. *61 AJIL*, 946 – 975; Scobbie, I. (2002). The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law. *13 EJIL*, 1201 – 1220; Verdross, A. (1966). *Jus Dispositivum and Jus Cogens in International Law*. *60 AJIL*, 55 – 63.

Acts defines peremptory norms of general international law (*jus cogens*), by reference to Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, as "substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty"¹, and mentions the prohibition of aggression – that is, of the use of force by a State against another State in manifest violation of international law – as the foremost example of such norms². Naturally, serious breaches of obligations under peremptory norms of general international law entail graver consequences than "ordinary" internationally wrongful acts³. Under Article 41 of the 2001 Articles, such consequences include, in particular, the following:

- States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 (Article 41(1))⁴;
- No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation (Article 41(2))⁵.

With respect to Article 41(1), the International Law Commission commented as follows (emphasis added)⁶:

[...] *States are under a positive duty to cooperate* in order to bring to an end serious breaches [...] Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

[Paragraph 1 does not] prescribe what measures States should take in order to bring to an end serious breaches [...] *Such cooperation must be through lawful means*, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the *obligation to cooperate applies to States whether or not they are individually affected by the serious breach* [...]

In turn, with respect to Article 41(2), the International Law Commission explained that the obligation not to recognise as lawful a situation created by a serious breach of a peremptory norm of general international law had a collective and an individual dimension⁷. In turn, the obligation not to render aid or assist in maintaining an unlawful situation

[...] goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act [...] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one [...]⁸.

As follows from a careful reading of resolution 68/262, an overwhelming majority of the UN Members was of the view that both consequences provided for in Article 41 of the 2001 Articles on State Responsibility were applicable to the situation in Crimea. More precisely, paragraphs 1 – 4 of resolution 68/262 encompass various aspects of cooperation among the UN Members, with a view to maintaining the national unity and territorial integrity of Ukraine, whereas paragraphs 5 and 6 pertain to the non-recognition of any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol. Although resolution 68/262 does not mention the 2001 Articles on State Responsibility, a systemic analysis of the former's provisions allows relating them to Article 41 of the 2001 Articles and suggesting that Ukraine should indeed rely upon resolution 68/262 in conjunction with the 2001 Articles.

¹ See generally Crawford, J. (1999). Revisiting the Draft Articles on State Responsibility. *10 EJIL*, 435 – 460.

See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two), 112.

² See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two), 127.

³ See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two), Chapter III ("Serious breaches of obligations under peremptory norms of general international law"). See also Tams, C.J. (2002). Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State. *13 EJIL*, 1161 – 1180.

⁴ See Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two), 113.

⁵ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two), 114.

⁶ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two).

⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two).

⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries. *Yearbook of the International Law Commission* (2001), volume II (Part Two), 115.

3.3. 3rd preambular paragraph: "Recalling also its resolution 2625 (XXV) of 24 October 1970 [...] and reaffirming the principles contained therein that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter"

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which was annexed to the General Assembly resolution 2625 (XXV) of 24 October 1970¹, is widely recognised as a key source of international law codifying this law's principles with a view to "secure[ing] their more effective application within the international community" (cf. the penultimate preambular paragraph of the Declaration). In a sense, the Declaration is the General Assembly's official interpretation of Article 2 of the UN Charter. In particular, the Russian Federation was consistent in relying upon this resolution in various fora, and direct references thereto in resolution 68/262 are useful.

The first part of the 3rd preambular paragraph of resolution 68/262 ("[...] the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force [...]") is a verbatim quote from the second sentence of the 10th paragraph of the 1970 Declaration's section on the Principle of the prohibition of the threat or use of force. The very fact that this principle was placed in the Declaration before all others – in contrast to Article 2 of the UN Charter where the principle is dealt with in the fourth paragraph – testifies to an increased recognition of its paramount importance within the international community by 1970. It was noted above (at 3.2) that this principle had acquired the character of *jus cogens*, and serious breaches thereof entail implications not only for violator States but also for States that are not individually affected by such breaches.

In turn, the second part of the 3rd preambular paragraph of resolution 68/262 ("[...] any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter") was "borrowed" from the 16th preambular paragraph of the 1970 Declaration. This provision does not, technically, interpret any of the principles of international law dealt with in the Declaration but, as one of the Preamble, relates to those principles as a whole. Yet again, this provision mentions explicitly two of the core values protected by the UN Charter – the territorial integrity and political independence of a State². These values are expressly protected by the Charter's Article 2(4), along with those associated with the Purposes of the United Nations (cf. Article 1 of the UN Charter), – and thus, another essential link between resolution 68/262 and Article 2(4) of the Charter is established. Hence, whenever referring to the 3rd preambular paragraph of resolution 68/262, Ukraine would technically rely, through the intermediary of the 1970 Declaration, on Articles 1 and 2(4) of the UN Charter.

3.4. 4th preambular paragraph: "Recalling further the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on 1 August 1975, the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) of 5 December 1994, the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 31 May 1997 and the Alma-Ata Declaration of 21 December 1991"

Notably, unlike the second and third preambular paragraphs of resolution 86/262, which refer to selected provisions of applicable treaties and other sources of international law, the 4th preambular paragraph refers to the full texts of four international law documents, which apply in bilateral relations between Ukraine and the Russian Federation and in multilateral relations between them and a number of other States. It will be useful to look at those documents' key provisions, in order to single out more specific rules of international law implied in resolution 86/262.

¹ For an overview of the resolution, see Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 49 – 50, 80 – 81, 83, 89, 125, 131, 239, 269. See also Houben, P.-H. (1967). Principles of International Law Concerning Friendly Relations and Co-Operation Among States. *61 AJIL*, 703 – 736.

² See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 79 – 80.

3.4.1. The Helsinki Final Act

The Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act) of 1 August 1975¹ is a founding document of the modern-day Organisation for Security and Cooperation in Europe (OSCE), which, as of June 2014, has 57 Member States in Europe, Central Asia and North America² – including Ukraine and the Russian Federation. Importantly, with due regard to Articles 41(1) and 41(2) of the 2001 Articles on State Responsibility (cf. *supra* 3.2), the OSCE Member States are required to cooperate – on the one hand, with both Ukraine and the Russian Federation and, on the other hand, among themselves – with a view to bringing to an end, through lawful means, the serious breach in question. From the point of view of the UN law, the reference to the Helsinki Final Act in the 4th preambular paragraph of resolution 86/262 fully conforms to Chapter VIII of the UN Charter ("Regional Arrangements"). It appears that of particular relevance for the purpose of this article are the Final Act's Declaration on Principles Guiding Relations between Participating States and Questions relating to Security and Co-operation in the Mediterranean.

Notably, the Helsinki Final Act's Declaration of Principles did not reproduce the 1970 Friendly Relations Declaration but restated the substance of pre-existing principles of international law in its own right, and added three further principles, which had not been included in Article 2 of the UN Charter (respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief; equal rights and self-determination of peoples³; fulfilment in good faith of obligations under international law). Most of these principles have been referred to, by Ukraine and the Russian Federation alike and by their respective mass media, in the context of the Crimean crisis. For the purpose of this article, a number of selected provisions interpreting the principles of international law in the Helsinki Final Act are worth recalling.

3.4.1.1. Sovereign equality, respect for the rights inherent in sovereignty

The very first operative paragraph in the Declaration of Principles states that "[t]he participating States will respect each other's sovereign equality and *individuality* [...] They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations" (emphasis added). In this light, the Russian Federation's efforts aimed at influencing current constitutional developments within Ukraine – in particular, with respect to its "decentralisation" and "federalisation", or the recognition of Russian as a second State language – have no foundation in international law. All these issues are essentially within Ukraine's domestic jurisdiction⁴. The second paragraph states that "[the participating States'] frontiers can be changed, in accordance with international law, by peaceful means *and by agreement*. They also have the right to belong or not to belong to international organizations [...]" (emphasis added). Hence, the annexation of Crimea, which occurred as a result of a use of Russia's armed forces previously stationed in Crimea in accordance with a treaty and without Ukraine's agreement, was in manifest violation of the principle of respect for the rights inherent in sovereignty, and should be remedied in accordance with applicable OSCE procedures. Besides, Ukraine is fully entitled to decide, with due regard to its national interests, with respect to the continuation of its membership, *inter alia*, in the Commonwealth of Independent States (CIS). This author is personally of the view that Ukraine *could* continue benefiting from its membership in the CIS, given that an overwhelming majority of the CIS Member States did not support the Russian Federation in the UN General Assembly on 27 March 2014, but Ukraine is solely entitled to decide upon this matter.

As regards Ukraine's current and prospective relations with NATO⁵, their evolution too is essentially a part of Ukraine's sovereign rights, and no external interference in this matter may be regarded as lawful.

¹ For the text of the Helsinki Final Act, see: <<http://www.osce.org/mc/39501?download=true>> (2014, December, 1).

² For the OSCE membership, see: <<http://www.osce.org/who/108218>> (2014, December, 1).

³ Boven, Cf. T van (1995). Human Rights and Rights of Peoples. 6 *EJIL*, 461 – 476; Weller, M. (2009). Settling Self-Determination Conflicts: Recent Developments. 20 *EJIL*, 111 – 165.

⁴ In this respect, Principle VI ("Non-intervention in internal affairs") in the Helsinki Final Act's Declaration of Principles also begs recalling.

⁵ This issue is highly important, as Russia's President V. Putin mentioned Russia's concern about the possible arrival of NATO troops in Crimea as one of the chief reasons for the peninsula's annexation, see: <http://ru.tsn.ua/politika/rossiya-anneksirowala-krym-potomu-chto-putin-boitsya-prihoda-nato-na-poluostrov-374527.html> (2014, December, 1).

3.4.1.2. *Refraining from the threat or use of force*

As this principle has been dealt with at some length above at 3.2 – 3.3, it will suffice to comment here on the concluding sentence in the first interpretive paragraph: "*No consideration* may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle" (emphasis added). Obviously, the Russian Federation's claims of its "historic affiliation with Crimea"¹, of a majority of Crimea's population being Russian-speaking, of the validity of the Crimean referendum of 16 March 2014, and other similar arguments are legally unsound, since under the Helsinki Final Act the prohibition of the threat or use of force is absolute and allows for no derogation. It probably is phrased even stronger than in Article 2(4) of the UN Charter: "[T]he participating States will refrain from *any acts* constituting a threat of force or *direct or indirect* use of force against another participating State" (emphasis added). The employment of the Russian Federation's armed forces in support of the Crimean referendum – a fact acknowledged by Russia's President Vladimir Putin² – obviously violated the OSCE principle of refraining from the threat or use of force, whether it be regarded as a direct or indirect use of force, and should be dealt with in accordance with applicable OSCE law. In particular, following the adoption of resolution 68/262 by the General Assembly, the Crimean question was put on the OSCE agenda, and on 1 July 2014 the OSCE Parliamentary Assembly adopted an according resolution to enable this organisation's institutional response to the breach³.

3.4.1.3. *Inviolability of frontiers*

The principle of the inviolability of frontiers for the purpose of the OSCE – as concise as it is – is worth quoting in full:

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

In the light of this principle, Article 3 of the Federal Constitutional Law of the Russian Federation № 6-FKZ of 21 March 2014 "On the Acceptance of the Republic of Crimea in the Russian Federation and the Establishment of New Subjects – the Republic of Crimea and the Federal Significance City of Sevastopol – in the Composition of the Russian Federation"⁴ constitutes a manifest violation of a fundamental principle of international law. In accordance with this Law, the Russian Federation transformed the administrative border between the Autonomous Republic of Crimea and Ukraine's Kherson region into the Russian Federation's State border and, as a result, a considerable part of Ukraine's territory was seized by Russia, in the sense of the second interpretive paragraph of the principle under consideration. The referendum of 16 March 2014 had no legal validity either under international law or under Ukrainian law (see *infra* 4.5) and may therefore not legitimately be invoked as a justification for the transfer of the territory under Russia's jurisdiction. Hence, Ukraine is entitled to take all lawful measures – in cooperation with all like-minded States – in order to restore its jurisdiction over the Crimean peninsula within Ukraine's internationally recognised borders (cf. *infra* 4.1).

3.4.1.4. *Territorial integrity of States*

The principle of the territorial integrity of States means that all OSCE participating States "will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, *and in particular from any such action constituting a threat or use of force*" (second interpretive paragraph, emphasis added). It also implies that "[t]he participating States will [...] refrain from making each other's territory the object of *military occupation* or other direct or indirect measures of force in contravention of international law, or the object of *acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal*" (third interpretive paragraph, emphasis added). Similar provisions are contained in the 1994 Budapest Memorandum, the 1997 Treaty on Friendship, cooperation and partnership between Ukraine and the Russian Federation, and in the 1991 Alma-Ata Declaration. Notably, many circumstances listed in these interpretive paragraphs as examples of the use of

¹ See: <http://censor.net.ua/news/288574/putin_zayavil_chno_rossiya_okkupirovala_krym_ispugavshis_nato> (2014, December, 1).

² See: <http://www.bbc.co.uk/russian/russia/2014/04/140417_putin_phone_line.shtml> (2014, December, 1).

³ See: <<http://www.osce.org/pa/120666>> (2014, December, 1).

⁴ See the full text of the Law at: <<http://www.rg.ru/2014/03/22/krym-dok.html>> (2014, December, 1).

force in contravention of international law – *inter alia*, military occupation¹ or forcible acquisition of territory² – are widely recognised as acts of aggression, and therefore, as serious breaches of a peremptory norm of general international law (cf. *supra* 3.2). Whereas military occupation is not prohibited as such under international humanitarian law (IHL), it certainly is under general international law and international criminal law (ICL)³, and Ukraine is entitled to arguing so in all relevant proceedings.

3.5. 5th preambular paragraph: “*Stressing the importance of maintaining the inclusive political dialogue in Ukraine that reflects the diversity of its society and includes representation from all parts of Ukraine*”

This paragraph is important insofar as it reflects the principle of non-intervention in affairs, which are essentially within a State’s domestic jurisdiction⁴, and emphasises that the ongoing political crisis in Ukraine must be settled through pacific means. The provision contains three key elements addressed to Ukraine’s political authorities: (1) the need to settle the crisis through a political dialogue; (2) the diversity of Ukraine’s society; and (3) the need to ensure the participation of representatives from all parts of Ukraine in the dialogue to a mutually beneficial effect. Unlike most of the preceding preambular paragraphs, which are addressed predominantly to external actors, this one appeals to political authorities *within* Ukraine, and the authorities’ conduct would be measured against this provision. It is thus critical that dialogue be maintained with all moderate and law-abiding political forces within the country, and a stable political settlement reflecting the interests of all segments of Ukraine’s society be sought, without any external interference. The success of the impending political settlement would obviously affect Ukraine’s immediate and mid-term future and lay a foundation for its prospective development in the European family of nations.

4. The Legal Significance of the Operative Provisions of Resolution 68/262

The operative provisions of resolution 68/262 are substantively related to the preambular ones and should be read in conjunction with them. Unlike the preambular provisions whose function consists in setting a general context, the resolution’s operative provisions apply relevant rules of international law specifically with respect to the situation in Ukraine, as of 27 March 2014 and prospectively. Being more specific than the preambular provisions, the operative paragraphs are addressed to distinct national and international actors and require them to perform specific actions, or to refrain from doing so, in order to stabilise the situation with respect to Ukraine and to restore the *status quo* as a matter of law and fact.

4.1. 1st operative paragraph: “*Affirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders*”

The first operative paragraph restates the fundamental values protected by the UN Charter and other relevant sources of international law. Sovereignty, political independence (as a constituent element of the former), and territorial integrity are inherent in the phenomenon of statehood, and aggressive encroaching upon either of these fundamental elements would, in this author’s opinion, indeed be tantamount to *patriacide*, i.e. the destruction of a State’s constitutional, political, economic, or technical organisation inherent to its statehood⁵.

Under Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, a State’s qualifications include its permanent population, defined territory, government, and capacity to enter into relations with the other States⁶. Forcibly depriving a State of either of these key attributes – or of a significant part thereof, to the extent that the new organisation of the State in question would considerably differ from the lawful *status quo* that existed before the breach – does, as a matter of fact, constitute an

¹ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 237 – 239.

² Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 239.

³ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 237 – 239.

⁴ Cf. the UN Charter, Article 2(7): “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter [...]”

⁵ For the concept of patriacide, see: Саяпин С. «Патрицид. Преступление против Украины». <<http://glavcom.ua/articles/22090.html>> (2014, December, 1).

⁶ For text, see: <<http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>> (2014, December, 1).

attempt to destroy the State's very statehood, that is, its pre-existing organisation as a State. It is submitted that the annexation of the Autonomous Republic of Crimea with its population, and the establishment of a competing public authority in the territory represent an attempted *patriacide* with respect to Ukraine, and parallel to seeking remedies to the breach in question, Ukraine might take the occasion to initiate the drafting and promotion of an international instrument (e.g. treaty) against *patriacide* as an internationally wrongful act and an individual crime. It is suggested that such an international instrument should seek to lay down the international responsibility of States and individual criminal liability for forcible attacks against other countries' statehood. It must provide for a mandatory jurisdiction of the International Court of Justice with respect to its application and interpretation, and stipulate that its application should be relatively autonomous from the UN Security Council. Certainly, the new treaty would have to be reconciled with the ICC mechanism for the prosecution of the crime of aggression, which, probably, may be enacted after 1 January 2017. The weakness of the ICC mechanism in this respect should be emphasised: even if Article 8 bis of the Rome Statute, which was adopted in Kampala in 2010, enters into force, the ICC would have jurisdiction only with respect to acts listed in that Article – and, in that sense, the ICC subject matter jurisdiction would be limited. In turn, the international legal instrument on the crime of patriacide should provide for a mandatory – and thereby, less bureaucratic and more dynamic – mechanism of cooperation between States Parties in situations where their statehood would be threatened, and contain special guarantees for smaller nations¹.

4.2. 2nd operative paragraph: *“Calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means”*

The second operative paragraph is essentially related to the first one in that it calls upon all States to desist and refrain from all internationally wrongful means of disrupting Ukraine's national unity and territorial integrity, including through the threat or use of force. It follows from the text that the range of such unlawful means could go beyond the threat or use of force in contravention of international law. Such means of exercising unlawful pressure upon Ukraine could consist, for example, in violations of treaties dealing, *inter alia*, with territorial matters or strategic cooperation, in unilateral or multilateral sanctions not grounded in international law, violations of immunities or privileges of Ukraine's diplomatic or consular missions or agents, unwarranted economic pressure, etc. It is not excluded that Ukraine might be subjected to such manifestations, especially in States that voted against the adoption of resolution 68/262 and, in doing so, supported the Russian Federation's conduct with respect to the situation in Ukraine. Hence, the Ministry of Foreign Affairs of Ukraine may find it useful to think of developing, in coordination with partners within and outside the country, possible countermeasures for risky future scenarios.

4.3. 3rd operative paragraph: *“Urges all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine through direct political dialogue, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions and to engage fully with international mediation efforts”*

In this author's view, the vaguest and, at the same time, most comprehensive of all operative paragraphs in the resolution, the third paragraph urges “all parties” (without naming them) to “pursue immediately” (that is, with no delay but without indicating any timeframe) the “peaceful resolution of the situation with respect to Ukraine” (without qualifying the situation in question as “aggression”, though) through “direct political dialogue” (that is, without the involvement of military means). Ukraine did not (yet) use any military means in order to regain Crimea (and the question of the legality of such an action is beyond the scope of this article) but there is little doubt that the Russian Federation and its allies would use this operative provision in resolution 68/262 to continue condemning Ukraine's counter-terrorism operation in Ukraine's eastern regions, questioning both its legality as such and the modalities of its conduct. Thus, it is imperative that Ukraine's armed forces comply fully, in conducting the counter-terrorism operation, with IHL, in terms of employing only lawful means and methods of warfare and sparing and protecting persons and objects protected under IHL. Alleged violations of IHL and international human rights law (IHRL) must be investigated objectively and with no delay, and individuals responsible for proven violations of humanitarian norms must be held accountable in accordance with Ukraine's applicable law and with due

¹ Саяпин С. «Патриацид. Преступление против Украины». <<http://glavcom.ua/articles/22090.html>> (2014, December, 1).

regard to its obligations under international law. This would testify to Ukraine's commitment to the rule of law and measure its post-revolutionary standards of justice¹.

4.4. 4th operative paragraph: *“Welcomes the efforts of the United Nations, the Organization for Security and Cooperation in Europe and other international and regional organizations to assist Ukraine in protecting the rights of all persons in Ukraine, including the rights of persons belonging to minorities”*

The fourth operative paragraph directly relates to IHRL in that the General Assembly welcomes various international actors' efforts “to assist Ukraine in protecting the rights of all persons in Ukraine, including the rights of persons belonging to minorities”. Obviously, the key issue at stake in this paragraph is non-discrimination on the grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (“the rights of *all persons* in Ukraine”, emphasis added), in accordance with international law². It was precisely the principle of non-discrimination of whose alleged violations (specifically, with respect to Russian-speaking “compatriots” in Crimea) the Russian Federation had accused Ukraine as a “justification” for the annexation of the peninsula³. It is in Ukraine's best interest – as a victim of such allegations and a State, which is increasingly positioning itself as a member of the European family of nations – to take all measures to ensure an equal enjoyment of civil, social and cultural rights⁴ by all persons within its jurisdiction, irrespective of their nationality, ethnic background and other relevant factors. Hence, Ukraine's authorities are encouraged to act towards the principle of non-discrimination as a system-building basis for the implementation of other relevant human rights, and to increasingly integrate it in all legislative, executive and judicial practices.

4.5. 5th operative paragraph: *“Underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol”*

As the legal invalidity of the referendum of 16 March 2014 has already been extensively criticised⁵, this author should like to focus on one specific substantive aspect, which is often overlooked in scholarly analysis. It is an established principle that the issue at stake at a referendum must be perceived clearly and equally by all voters⁶. However, in the Crimean referendum bulletins, the first question to be voted upon was formulated essentially differently in three languages – Russian, Ukrainian and Crimean Tatar⁷. If the question in Russian (“Are you in favour of the reunification of Crimea with Russia in the status of a subject of the Russian Federation?”) is taken as a basis, an inquisitive researcher should see that its Ukrainian equivalent does fairly match the Russian original but the Crimean Tatar translation contains a fundamental semantic fault, which must be taken as a sufficient ground for recognising the outcome of the referendum as illegitimate, for members of Crimea's three linguistic communities were voting for essentially different consequences of the referendum. Observably, the words “reunification” (in the Russian and Ukrainian texts) and “unification” (in the Crimean Tatar text) do not obviously convey the same ordinary and juridical meanings. In the perception of voters whose mother tongue is either Russian or Ukrainian, Crimea “was” a part of Russia sometime in the past, and the question at stake on 16 March 2014 was about “reuniting” them as a result of the referendum. However, in the perception of individuals whose voting behaviour was guided by the Crimean Tatar version of the referendum question, Crimea was *not* a part of Russia's territory before, and the referendum question was *not* about “re-establishing a situation” that existed sometime ago in a historical past but about creating a *new* legally significant situation – one of “uniting” Crimea with the

¹ Likewise, the shooting down of a civilian airplane on 17 July 2014 calls for a thorough and objective investigation and prosecution of responsible individuals.

² Cf. Article 2(1) of the International Covenant on Civil and Political Rights.

³ See: <http://censor.net.ua/news/288574/putin_zayavil_chno_rossiya_okkupirovala_krym_ispugavshis_nato> (2014, December, 1).

⁴ Whereas the enjoyment of political and economic rights is subject to certain lawful restrictions, on the basis of the citizenship of individuals, such restrictions may not encroach upon an individual's human dignity or interfere with her enjoyment of civil, social and cultural rights.

⁵ See, for example: Задорожний, О. (ред.) (2014). *Українська революція гідності, агресія РФ і міжнародне право*. Київ, 515 – 549.

⁶ Cf. *Election Observation Handbook* (2010.). 6th edition (OSCE / ODIHR), 55.

⁷ A photo of the bulletin is available, for example, at: <<http://slon.ru/images2/2014/03-16/bul-1.jpg>> (2014, December, 1).

Russian Federation as a currently existing subject of international law. In other words, the Russian and Ukrainian language versions of the referendum questions were designed to appeal to the “patriotic feelings” of the respective communities, whereas the Crimean Tatar language version of the question pertained strictly to voters’ will to change Crimea’s territorial status as a part of, respectively, Ukraine or Russia – in a near future. With due regard to Crimean Tatars’ negative “historical memory” with respect to the USSR, the Crimean Tatar language version of the referendum question carefully avoided the “patriotic feelings” element that was present in the Russian and Ukrainian language versions. As a result, the voting perceptions – and, consequently, behaviours – of eligible members of Crimea’s three language communities were fundamentally distorted, to the extent that *they were voting for essentially different things*. In addition to numerous other reasons for the referendum’s legal invalidity, this ground alone is sufficient for recognising the outcome of the referendum as legally invalid.

4.6. 6th operative paragraph: “Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status”

The concluding operative paragraph is equally addressed to all States, international organisations (presumably, within and outside the UN system) and specialised agencies (presumably, first and foremost, within the UN system), and calls upon them not to perform any acts, which might be interpreted as explicit or implicit recognitions of any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol. Consequently, should such recognitions occur, Ukraine should be enabled, through diplomatic and other lawful channels, to protest against them, and to request that such recognitions be formally withdrawn at the earliest convenience.

5. Conclusion

Resolution 68/262 provides Ukraine and like-minded States with a range of tools for bringing to an end, through lawful means, serious breaches of obligations under a peremptory norm of general international law brought about by the Russian Federation, especially, in connection with the annexation of the Autonomous Republic of Crimea. Under applicable international law, these breaches constitute aggression and should entail Russia’s responsibility. In this author’s opinion, the Russian Federation’s aggression against Ukraine constitutes an extreme form of aggression – provisionally termed *patriacide* – and the prospective integration of this notion in international law could be envisaged.

In turn, it seems that the situation in question is not subject to international or national criminal law governing individual criminal responsibility for the crime of aggression. The amendments to the Rome Statute of the International Criminal Court pertaining to the crime of aggression did not yet enter into force¹, and Article 437 of Ukraine’s Criminal Code appears not to be applicable, because it follows the so-called “Nuremberg and Tokyo model” of the criminalisation of aggression², which subjects an alleged war of aggression to a number of conditions³. These conditions – such as the duration or intensity of an alleged war of aggression – are not (yet) met. It is therefore recommended that Ukraine amend its legislation with respect to the individual crime of aggression – ideally, following Romania’s comprehensive model⁴ – with a view to reinforcing the legal dimension of protecting itself against possible future aggressions.

¹ For a detailed analysis of these provisions, see Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 253 – 320.

² See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 202 – 207.

³ See Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 41 – 43, 202 – 203.

⁴ Cf. the Criminal Code of Romania, Article 279 (“Hostile acts against a foreign State”): “1. The commission on Romanian territory of hostile acts against one of the Member States of the North Atlantic Treaty Organisation, or of the European Union or of the Council of Europe shall be punished by strict imprisonment from 7 to 10 years and the prohibition of certain rights. 2. The same penalty shall also sanction hostile acts against the security of States, others than those in paragraph 1, and which are not at war with Romania. 3. Penal action is initiated upon request expressed by the foreign State”. See also Sayapin, S. (2014). *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T. M. C. Asser Press / Springer, 214.

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