





## Helsinki Principles

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# LASTING SECURITY IS NOT FOR “GENTLEMEN’S AGREEMENTS”

*Interview with Amb. Ihor Prokopchuk  
Permanent Representative of Ukraine to the International Organizations in Vienna*


## **How strong or how weak are international institutions today? International agreements and obligations – are they just a gentlemen’s agreement?**

It has often been maintained that international institutions are as strong as their member states wish them to be or allow them to be. The number of international bodies and their participants is constantly growing; their mandates, role, and influence in a modern world undergo regular change. To retain relevance it is necessary to find ways to increase effectiveness in addressing the most pressing challenges on the respective agenda. The OSCE, for example, which has its activities rooted in the norms and principles of the Helsinki Final Act of 1975 and the Paris Charter of 1990, has been confronted in the last four years with the worst security crisis and erosion of trust and confidence. The crisis stemmed from the blatant violation of the core OSCE principles and commitments by the Russian Federation, including those relating to the respect for sovereignty, territorial integrity, and inviolability of frontiers, non-use of force, and non-intervention in internal affairs. For the first time since the Second World War, Europe witnessed an attempted annexation of a part of a territory of a country by a neighbouring country with the use of force.

While this armed aggression has challenged the European security order, it remains essential for the international community to stay united and bring Russia to account,

using all available instruments and mechanisms to force it to return to the tenets of international law. This is where international organizations and their toolbox can play their significant role. The lessons of history and the interests of long-term peace and stability demand to make sure that the rule of force does not substitute the force of rule. Lasting security is not for “gentlemen’s agreements” and big power politics in the logic of the 19th century, which has brought so much tragedy and hardship to Europe before.

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Ukraine’s consistent position is that we need to preserve the rules-based order in Europe and to strongly and collectively resist Russia’s attempts to shatter it.

## **What are the OSCE’s strengths and weaknesses in maintaining security in Europe?**

The OSCE is the largest regional security arrangement under Chapter VIII of the UN Charter. The list of participating states comprises 57 countries with the overall population of more than a billion people. The OSCE brings together countries located

in North America, Europe, and Central Asia, as well as 11 countries – partners for cooperation – from Asia and the Mediterranean. This large geographic outreach provides unique opportunities to promote security and seek common responses to the most urgent, multifaceted, and interconnected security challenges.



***We will need to continue to aim at effective multilateralism, strengthening the respective mechanisms and instruments of international organizations, which enable the translation of the international community's commitment to the rules-based security order into collective and effective deterrence of an aggressor state***

A vehicle for promoting collective security and a strength of the OSCE is definitely the extensive normative acquis starting from the Helsinki Final Act and including the Paris Charter for New Europe. Importantly, the participating states have recognized that the agreed norms establish clear standards of behaviour of the states towards their people and towards each other. This strength rests on the OSCE's comprehensive approach to security, which relates the respect for human rights and fundamental freedoms to the maintenance of peace and security and, therefore, places a large focus in the OSCE activities on its human dimension and interaction with civil society and non-governmental organizations.

Field operations and missions are a valuable asset of the OSCE, enabling presence on the ground, facilitating resolution of crises and conflicts, as well as contributing to strengthening democratic processes and institutions in the respective host countries. The OSCE Special Monitoring Mission (SMM) to Ukraine stands out among other

field presences due to its size and difficult operational environment in the conflict area. With its budget of more than 100 million EUR and personnel of nearly 1,200 mission members, the SMM remains a unique tool for gathering information on the situation with security, human rights, and fundamental freedoms throughout Ukraine, most prominently in the conflict area in Donbas suffering from daily military activities of the Russian armed formations.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR), Representative on Freedom of the Media (RFOM), and High Commissioner on National Minorities (HCNM) – these OSCE executive structures are doing an important job in their respective fields. Their expert opinion or assistance is often requested in contentious situations.

The OSCE's greatest weakness, which at the same time is considered by many as its strength, is a consensus-based decision-making process. Not only does it significantly slow down the adoption of decisions necessary for the smooth operation of the Organization and its executive structures, like the adoption of annual budget, but it also limits the ability of the Organization to timely react to emerging crises or conflict situations. When the core OSCE principles and commitments are flagrantly breached as it happens with Russia's ongoing aggression against Ukraine, the OSCE has no other tools of bringing the violator to account, seeking compliance with agreed rules and correction of violations, except by politico-diplomatic pressure in the dialogue formats.

**Should Ukraine put more emphasis on international organizations in enhancing its security? How can the OSCE contribute to resolving the conflict in the East of Ukraine and restoring Ukraine's territorial integrity?**

There needs to be a combination and synergy of efforts directed at enhancing Ukraine's security: domestically by maintaining on track the broad-ranging reform process, strengthening Ukraine's security sector and armed forces, investing in economic growth, as well as externally by effectively pursuing the strategic objectives of membership in the EU and NATO. We will need to continue to aim at effective multilateralism, strengthening the respective mechanisms and instruments of international organizations, which enable the translation of the international community's commitment to the rules-based security order into collective and effective deterrence of an aggressor state.

Within the OSCE, the Russian aggression against Ukraine has been at the top of the agenda since February 2014, when the Russian Federation launched its illegal occupation of Crimea. During these years, Russia used the consensus rule to evade its responsibility for the conflict by blocking any decisions highlighting this fact. We continue to face the situation when the potential of the OSCE cannot be used to the full extent.

At the same time, the OSCE has produced useful tools for facilitating a peaceful resolution of the conflict started by Russia. In the Trilateral Contact Group, the OSCE representatives perform a mediation function for Ukraine and Russia, contribute to achieving concrete results in relieving security, economic, and humanitarian challenges brought by the conflict. The OSCE has deployed two field missions – the SMM to Ukraine and the Border Observer Mission at two Russian checkpoints on the Russian-Ukrainian border. Unfortunately, the Russian

Federation maintains its opposition to the expansion of the mandate of the Border Observer Mission to the entire segment of the Ukrainian-Russian state border not controlled by the Ukrainian authorities. This position serves as a litmus test for Russia's unwillingness to stop the conflict and withdraw from the territory of Ukraine.

The SMM, for its part, continues to experience significant restrictions to its monitoring in Russia-occupied parts of Donbas. Enough is to point out that in the first six months of 2018 nearly 90% of all non-mine related restrictions to the SMM happened in the territories of Ukraine controlled by Russian occupation administrations. A big challenge remains the denial by Russia of SMM's access to the Autonomous Republic of Crimea and the city of Sevastopol. These are the realities on the ground, and they are truly challenging. It is important to support the activities of the SMM and press Russia to lift the restrictions, thus enabling the SMM to implement in full its mandate agreed by all 57 OSCE participating states.

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# THE HELSINKI WORLD ORDER: WHAT'S LEFT?

Dr. Mykola Kapitonenko

UA: Ukraine Analytica

*The crisis of international security arrangements is gradually getting deeper. It generates risks on every scale: bilateral, regional, and global. Revisionism and geopolitical offensive are on the rise. Protracted conflicts all over the world are getting more dangerous. Under such downbeat conditions, discussions are underway about the contours of a possible new world order. Some of its features are well-known. They hark back to the times of the Cold War, in particular to an attempt of stabilizing the international system in the 1970s, undertaken in Helsinki with the Conference on Security and Co-operation in Europe. This article examines some of the key principles of Helsinki's Final Act and the ways they fit current international developments.*

## Introduction

The world is in turmoil. International security institutions are damaged. Basic principles are violated, and the rules of the game are no longer clear. This is what a world order in transition looks like.

With the levels of instability and uncertainty rising, many are looking for possible islands of predictability, rules and principles that are likely to survive geopolitical shifts and provide some guidance for policymaking. Attention is often paid to recent and more distant attempts to codify the rules of the game and find a consensus on what is right and wrong among many states with different geopolitical perspectives.

The Final Act of the Conference on Security and Co-operation in Europe is surely one of

them. It summed up negotiations over the most fundamental principles of international politics, such as sovereignty, non-use of force, or territorial integrity of states and alike. Some of these principles reflected the realities of the Cold War of the 1970s, with its arms races, peripheral conflicts, nuclear issues, and ideological rivalry. Others seem to be compatible with later developments as well. To some extent, the provisions of Helsinki proceeded into the next world order. But how effective are they today? Are we still living in a Helsinki world, at least to some extent?

## Sovereignty

Helsinki's principle number one is sovereignty.<sup>1</sup> It implies sovereign equality and respect for the rights inherent in sovereignty. This has been the principle

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<sup>1</sup> Conference on Security and Co-operation in Europe. Final Act, Helsinki, 1975, OSCE [<https://www.osce.org/helsinki-final-act?download=true>].



reaffirming the link between a Hobbesian style state-centered system of Westphalia and the international system of the 1970s, with its Cold War rivalry, superpowers, and gradually eroding monopoly of states on the international arena.

Hobbes's understanding of sovereignty has been associated with the power to determine what should be done to maintain peace and order. In other words, sovereignty is about making rules within a certain territory. It is about power, in particular to control military, raise money, and shape religious doctrines.<sup>2</sup> Hobbes was mostly concerned with sovereignty within a state, and specifically during civil wars. However, the external dimension of sovereignty has become as important.

A world of sovereign states means that states have the highest authority on their territories. It also implies non-interference into what others do on their territories. In the 17th century, the combination of these two principles helped to overcome the consequences of the Reformation and establish a stable order of things, where a state became the central element.

Since then sovereignty has been the foundation for the new world order and as such survived for at least three centuries. The second half of the 20th century, however, brought about considerable transformations. International organizations, both intergovernmental and non-governmental, multiplied and got stronger. Some international norms, respect for human rights, for instance, have become powerful enough to challenge sovereignty. The process of integration was launched in Western Europe and it was hardly about protecting sovereignty of nation states. Globalization



***With the levels of instability and uncertainty rising, many are looking for possible islands of predictability, rules and principles that are likely to survive geopolitical shifts and provide some guidance for policymaking***

played a role as well. In short, sovereignty of states has been challenged. Why then did the principle of sovereignty become the top one at the Helsinki conference?

When in 1975 sovereignty was once again put on the banners, it was mostly perceived through the lens of non-interference. Two superpowers were negotiating ways to cement their spheres of influence, which was especially evident in the case of the USSR, the weaker of the two. The opening principle of Helsinki's Final Act was rather about the sovereignty of superpowers than that of all states. The two of them were refraining from interfering in one another's sphere of influence, but the USSR never meant to stay out of internal affairs of other states. Sovereignty was, like many other things during the Cold War, bloc-based.

It certainly was different from Hobbes's original idea of sovereign states. The Final Act stated that:

*...The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence...*

<sup>2</sup> T. Hobbes, *Leviathan*, Digireads.com Publishing 2017.

But the reality was different. Freedom and political independence were absent within the socialist bloc. The USSR firmly controlled both internal political developments and foreign policies of its satellite states. Pro-Moscow orientation certainly could have been presented as a free choice, but was hardly so. The right of a state “to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations” looked like a mere declaration. The sovereignty principle went along with this.

*...the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.*

In other words, freedom to choose a foreign policy was formally considered a part of state sovereignty, while in fact many states had no such right. Structural limits of a bipolar system considerably narrowed foreign policy options for most European states. But Eastern European countries had been additionally limited by the Brezhnev doctrine.<sup>3</sup> The doctrine itself takes a very interesting look at the concept of sovereignty: In his speech in Warsaw on 12 November 1968, Leonid Brezhnev stated that socialist states stand for a strict respect of sovereignty and oppose interference in the affairs of any states. Here is where the dual nature of sovereignty was exploited by the USSR: It is very easy to justify interference in any state’s internal affairs on the grounds of not letting someone else do that.

Departure from Hobbes’s original concept of sovereignty was hardly successful in the end. For Hobbes, sovereignty was a necessary element of political organization of a state.

For states’ leaders in Helsinki in 1975, sovereignty was a vague notion, designed to conceal the truth: There was very little sovereignty for states under the conditions of bipolar rivalry.

As a result, everybody understood sovereignty in his/her own way. The concept was equally used to justify military invasions or heavily criticize them. The principle of sovereignty as put forward by Helsinki could hardly survive the breakup of the Soviet bloc. It was advocated by the USSR to replace rather than to strengthen sovereignty as understood by Hobbes.

But it seems today there is a growing demand for sovereignty in its Helsinki edition. With world politics getting back on the realist track, the concept of sovereignty is regaining its sounding from the times of the Cold War, i.e. very close to the notion of spheres of influence. This is the way Russia treats sovereignty and the way the USSR did. Within such an approach, real sovereignty belongs to great powers.

## **Institutions and Agreements**

Broken agreements and damaged institutions are the key features of recent developments in international politics. Suddenly it seems more attractive for some states not to follow the rules. Even high risks and price cannot stop them from breaking the rules they consider too unfavourable. This certainly can be attributed to drawbacks in a decision-making process when a political leader looks to be out of touch with reality. But a deeper insight into the existing institutions could prove to be more helpful.

Institutions work because – and until – it is a rational option to obey them. States create various formal and informal rules

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<sup>3</sup> S. Kovalev, *The International Obligations of Socialist Countries*, “Pravda,” 25 September 1968, p. 4.

because of different reasons. Some of them deal with pure pragmatism: Institutions help optimize costs, linked to uncertainty about expectations towards others. Institutions enhance trust among states. Others are linked to broadening horizons for cooperation. When states are suspicious of others, they usually limit themselves to short-term cooperation, which ends as soon as one-time profit is obtained. But setting out clear rules of interaction opens way to more cooperative approaches and possible spill-over of cooperation to other areas.<sup>4</sup> Institutions are capable of increasing effectiveness of cooperation and decreasing costs for communication and management. In a nutshell, a highly interconnected and interdependent world generates a rather high demand for rules of international conduct.


States follow good rules merely because it is more rational. Both great powers and small states find it better to comply. But what happens when the rules are being broken?

Usually it leads to weakening of institutions, regimes, and norms. The result is a growing anarchy in the international system. Anarchy generates the security dilemma, relative gains approach, zero-sum games, and mistrust. A desire to avoid all those negative implications enabled political leaders to launch a process that resulted in signing the Final Act in Helsinki in 1975. The Act was meant to be a set of international institutions, aimed at helping reduce the level of anarchy and mistrust on the international arena. Besides being a rule itself, the Final Act also called for the parties to adhere to obligations under international law – this is another key principle of the Helsinki world order.

There is also a Hobbesian influence here. Hobbes believed that *pacta sunt servanda*.

Otherwise, it would be impossible to maintain peace among egoists. But today agreements are often broken. Unlike in 1975, some leaders do not think that complying with norms is the best strategy. They are ready to exchange credibility, trust, and reputation for geopolitical advantages. This is why we are not in a Helsinki world order anymore.

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## **European Regional Security Damaged: Back to Realpolitik?**

The spirit of Helsinki is still with us. International politics is once again torn apart by adverse prescriptions to safeguard sovereignty and adhere to human rights, including that of self-determination. Once again, uncertainty about the correlation between geopolitical calculations and values opens space for opportunists and revisionists.

International security can hardly be built on such a mixture. Along with possible future implications, so actively speculated about, Russia's active revisionist policy in Europe and beyond is generating a new reality on the ground in real-time mode. It turns out that President Putin has not so much lost touch with reality, but rather his vision and perception of reality is being actively imposed on European political agenda. Politics is not only about material factors, but also ideas and perceptions. An ability to shape the agenda and reframe values is an important power asset. The way this asset is currently being used undermines European security.

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<sup>4</sup> For more theoretical details on institutions see H. Nau, *Perspectives on International Relations: Power, Institutions, and Ideas*, CQ Press: Thousand Oaks, CA, 2017.

The European security system is seriously damaged in several important ways. Each of them alone is a serious challenge. The cumulative effect goes far beyond the impact that any other crisis has had since the end of the Cold War. First of all, the fundamental principles of international law are openly violated. The annexation of Crimea from Ukraine breaches the UN Charter, Helsinki Final Act, as well as Russian-Ukrainian Treaty of 1997. As an open act of aggression, it contradicts the non-use of force principle and violates territorial integrity of a neighbouring state. To put it short, the Russian aggression calls into question almost every single legal foundation of the current world order.

Secondly, it also undermines the effectiveness of international norms, regimes, and organizations. To operate effectively, they all need stable rules and principles, which are by now under question. Helplessness of the UN, as well as limited effectiveness of regional organizations, most notably the OSCE, is the immediate result of the regional security crisis. A more long-term effect would significantly erode mutual trust among European actors.

Thirdly, revisionism carries its own alternative agenda. By undermining well-known principles and norms of European politics, Russia is putting forward its own vision, which could be shortly labelled *realpolitik*. It implies spheres of influence, balance of power, and the principle of self-help. If installed, it will take European politics back to the mechanisms and instruments of the 19th century.

There are two main problems with that. First, mismanagement of the multipolar “European concert” in the end had resulted

in degrading security and the First World War, and there is no guarantee that in the 21st century there will be a better result. Secondly, imperial politics of the 19th century may have provided Russia with additional greatness, but today’s regional system is much more complicated and cannot be managed with a Bismarckian-style toolbox.

However, revisionism is quickly bringing about perceptual changes. International actors will have to adapt their expectations, goal-setting, priorities, and general political approaches to new realities. In short, they will have to shift paradigms of security policy.

Until recently, European security has been largely operating under neoliberal and neo-functional theoretical umbrellas. They implied a high level of interdependence, long-term cooperation, and institutionalized partnership as foundations for international security. From a neoliberal point of view, complex interdependence of international actors is capable of partly overcoming international anarchy and thus ameliorating the security dilemma, a triggering mechanism of most international conflicts.<sup>5</sup> When states cooperate repeatedly, they build links of mutual dependence and institutionalize them through international norms and regimes. That means that under conditions of repeated partnership, international actors pursue absolute gains and thus can trust each other, even remaining essentially egoistic agents. Cooperation becomes a dominant interest in such a system, while international security is maintained through a network of international regimes and norms.

In some cases, as neo-functionalism argues, a deepened cooperation may result in

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<sup>5</sup> R. Axelrod, R. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, “World Politics,” Vol.38, No.1, 1985, pp. 226-254.

processes of integration.<sup>6</sup> They can spill over to various spheres and, in particular, into the political and security area. This brings about the erosion of state sovereignty and forming of supra-national institutions. The European integration process is an example of such post-Westphalian politics.

European security has been constructed mostly along these neoliberal and neo-functional lines. Mutual trust, absolute gains, repeated cooperation have been the key elements of the security environment. Use of force, arms races, intimidation, and blackmail did not pay off and have been mostly marginalized.

Now all that is changing. Direct application of military force combined with a highly revisionist political agenda transforms the very conceptual foundations of security. These transformations are best reflected by the “good old” realist paradigm.

Political realism holds that states with their egoistic national interests are key agents of international politics. They strive for security, power, and influence in a highly competitive and hostile environment. Military, strategic, and political realms are most prioritized among all other possible areas of cooperation or competition. States, according to Hans Morgenthau, are “... continuously preparing for, actively involved in, or recovering from organized violence in the form of war.”<sup>7</sup> In a world like this, cooperation becomes a tough choice. Before engaging in it, a state must define how exactly it wants mutual gains to be divided.

Since today’s partner could be tomorrow’s adversary, any state would like to get the bigger share of a mutual gain. This, in turn, would lead to states’ concentration

on relative, rather than absolute, gains. Since getting the bigger share is more important than getting any share at all, long-term cooperation under the *realpolitik* thinking becomes limited. International norms and institutions, which arise from such cooperation, also lose their power. International politics gets back to the state of anarchy. The security dilemma will re-emerge as the most powerful driving force behind security policies of states. It will make the states spend more on defence and boost containment strategies. Increase of mistrust and worst-case scenario thinking will follow. All in all, the balance of power mechanism will become the only effective one for maintaining security.

But that would be something quite opposite to what the EU has been aiming at. Instead of European security rooted in mutual benefit, common norms, and interdependence, an old-fashioned balance of power system will emerge, making current security instruments and arrangements obsolete.

## Conclusion

There is more of Helsinki in today’s international politics than it may immediately seem. The Final Act of 1975 was a compromise not only between the Soviet and American geopolitical postures, but also between *realpolitik* and international institutions. This dilemma is widely spread today.

The decisive role of sovereignty, meant to be the cornerstone of the world order in Helsinki, was undermined by the theoretical vagueness of the concept. The result was a series of contradictions and misunderstandings. Formally, sovereignty is a fundamental principle of international

<sup>6</sup> N. Lindberg, A. Stuart (eds.), *Regional Integration: Theory and Research*, Cambridge MA: Harvard University Press 1971.

<sup>7</sup> H. Morgenthau, *Politics among Nations*, New York: Alfred A. Knopf 1960, p. 38.



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***The Final Act of 1975 was a compromise not only between the Soviet and American geopolitical postures, but also between realpolitik and international institutions. This dilemma is widely spread today***

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politics, but in practice, there are too many alternative ways to treat it. This was true for the world in 1975, and it is true for the world today.

The Final Act enhanced international institutions at the right moment. Structural features of the Cold War made it dangerous to remain under the conditions of pure anarchy. Territorial integrity, sovereignty, non-use of force, peaceful settlement of disputes – all these laid a firm basis for years of stability in Europe. However, geopolitical shifts at the end of the Cold War turned out to be stronger than the norms created in Helsinki. Some of them have become outdated, some obsolete, and some quite controversial. Nevertheless, security has been maintained in Europe as long as Helsinki's principle of complying with international law was respected.

Since 2014, this has not been the case, and this is a major source of long-term challenges

and risks. Sovereignty may be vague; territorial integrity may not correspond to the right of self-determination; even force may be used eventually. But breaking the rules is a different story. It undermines international security by imposing mistrust, limiting perspectives for cooperation, and enhancing negative-scenario thinking. And this is the major point where Helsinki is no longer alive.

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# THE SPIRIT OF HELSINKI IN THE XXI CENTURY

Dr. Kira Spyrydonova  
Ukraine

*The history of the 21st century, both in Europe and globally, shows that the existent international system is getting into a deeper crisis. On the one hand, we see the erosion of the European system of cooperative security based on the CSCE Helsinki principles – non-legally binding political commitments of the states to respect each other’s sovereignty, adhere to human rights and international cooperation. On the other hand, even “hard” obligations under international law can be breached by states’ unilateral decisions. Does the spirit of Helsinki have a chance to survive under such circumstances? Is the simple political will of a group of states enough to face current challenges to the international order? Or should we frankly recognize that the principles of international law do not work, and try to elaborate a new system of rules for the modern world?*

## Changing International Order

Since the very beginning of the 21st century, we are witnessing a whole list of unordinary international events that have significantly challenged the existing world order. Let us name only few of them.

Firstly, the world was shocked by the 9/11 terrorist attack, which not only showed the real threats of the terrorism that can hurt everyone on this planet, but also brought into action Article 5 of the Washington Treaty, letting the US and its NATO allies intervene in Afghanistan under the pretext of a war against Al-Qaida, protected by the Taliban

regime. This decision is considered by many political scientists<sup>1</sup> as a de-facto recognition of non-state actors, and particularly terrorist organizations, as full-fledged participants in the current international system, on par with sovereign nation states. Then in 2003, we saw the American invasion of Iraq, which was carried out without any decision of any international organization and in violation of the very UN Charter. As the UN Secretary General Kofi Annan stated in September 2004, “I have indicated it was not in conformity with the UN Charter. From our point of view and the UN Charter point of view, it was illegal.”<sup>2</sup> This war put into question the legitimacy of the United Nations

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- <sup>1</sup> J.S. Nye, *Soft Power: The Means to Success in World Politics*, PublicAffairs: New York 2005;  
G. Sumer, *9/11 and Its Impact On Realism*, Conference Paper, January 2008  
[[https://www.researchgate.net/publication/299289914\\_911\\_and\\_Its\\_Impact\\_On\\_Realism](https://www.researchgate.net/publication/299289914_911_and_Its_Impact_On_Realism) access: 28 June 2018];  
D. Wagner, *Terrorism’s Impact on International Relations*, International Risk Management Institute, March 2003  
[<https://www.irmi.com/articles/expert-commentary/terrorism%27s-impact-on-international-relations> access: 28 June 2018], etc.
- <sup>2</sup> *Iraq War Illegal, Says Annan*, “BBC News”, 16 September 2004  
[[http://news.bbc.co.uk/1/hi/world/middle\\_east/3661134.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm) access: 28 June 2018].

as the main international body, responsible for maintaining peace and security, and safeguarding international law.

In 2008 we witnessed two events, both of which undermined heavily the concept of sovereignty and territorial integrity of states: the proclamation of independence of Kosovo in February (partly recognized by the international community, as 111 UN member-states did so) and the Russian invasion of Georgia in August, subsequently leading to the creation of quasi-independent “republics” – Abkhazia and South Ossetia – on sovereign Georgian territory (recognized only by Russia, Syria, Nicaragua, Venezuela, and Nauru).

Finally, in 2014, Russia, with the illegal occupation of Crimea and launching the war in Eastern Ukraine, let itself flagrantly violate almost all its obligations and commitments under bilateral and international treaties – those concluded with Ukraine, within regional initiatives and the UN system. And the latter fact is most frightening because it affects the credibility of the UN itself: in Ukraine, a founding member state of the United Nations, it is Russia, another UN founding member state, that violates the UN Charter, UN Convention on the Law of the Sea, International Convention for the Suppression of the Financing of Terrorism, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Racial Discrimination, and other international law documents. All this has questioned seriously the role of international agreements in the modern world and their capacity to regulate relations among states.

In Europe, the CSCE/OSCE Helsinki principles were hurt the most. They were called to regulate relations on the continent

since the Cold War, when in 1975 two military alliances – NATO and the Warsaw Pact – understood that it was impossible to live peacefully together without any guiding principles and decided to adopt them at a pan-European conference on security and co-operation in Helsinki. The spirit of Helsinki since then became a symbol for other regions of the world of a possibility to achieve a peaceful co-existence for states with different political and ideological values within one region.

However, since the end of the 1990s, particularly after the 1999 OSCE Istanbul Summit, where Russia refused to withdraw its troops from Moldova and Georgia, which resulted in a failure of the Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe (the adapted CFE treaty), we see the gradual decline of the OSCE's role on the continent in maintaining international peace and security. As Dr. Wolfgang Zellner said, it is “the Russian attitude [that] is critical for the Organisation's future, for an OSCE without active Russian participation would lose much of its *raison d'être*.”<sup>3</sup>

Russia violated almost all Helsinki commitments by launching its aggression against Ukraine in 2014, but the OSCE found in the Ukrainian-Russian conflict a new sense for existence, because some participating states were about to leave the Organization. After the illegal occupation of Crimea, the OSCE Special Monitoring Mission (SMM), operating in Ukraine for monitoring the implementation of the Minsk Agreements, was created, as was the OSCE Observer Mission (OM), operating in Russia at the checkpoints Gukovo and Donetsk, for monitoring the situation on a part of the Russian-Ukrainian border according to the

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<sup>3</sup> W. Zellner, *Russia and the OSCE: From High Hopes to Disillusionment*, “Cambridge Review of International Affairs”, Volume 18, Issue 3, 2005, p. 389.



Berlin Joint Declaration in the Normandy format. These field missions, related in many ways to peacekeeping, which were not typical for the Organization before, put new tasks on the OSCE's table. Now civil observers in both missions have to deal with military activity, verify ceasefire violations and withdrawals of different kinds of weapons (for the SMM), or monitor movements across the border (for the OM).

## Helsinki Decalogue

So, taking this into account, can we say that the OSCE and the spirit of Helsinki are not relevant for Europe and for the world anymore? The answer for the situation with the OSCE is clearer – if the Organization still exists and has even expanded its activity, it is relevant. The situation with the spirit of Helsinki is a little bit more difficult. Let us take a look at the current state of implementing the Helsinki Decalogue, ten guiding principles stated in 1975 CSCE Helsinki Final Act, called to regulate relations among all actors in Europe. Namely, they are<sup>4</sup>:

*I. Sovereign equality, respect for the rights inherent in sovereignty*

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

*III. Inviolability of frontiers*

*IV. Territorial integrity of States*

*V. Peaceful settlement of disputes*

*VI. Non-intervention in internal affairs*


*VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief*

*VIII. Equal rights and self-determination of peoples*

*IX. Co-operation among States*

*X. Fulfilment in good faith of obligations under international law*

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 **can we say that the OSCE and the spirit of Helsinki are not relevant for Europe and for the world anymore? The answer for the situation with the OSCE is clearer – if the Organization still exists and has even expanded its activity, it is relevant**

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## Sovereign Equality, Respect for the Rights Inherent in Sovereignty

As we have already mentioned, the concept of sovereignty is under a permanent challenge in the 21st century. It is enhanced by the existence of non-governmental actors, impossibility to exercise sovereignty over territory internationally recognized as “yours”, impossibility to control some parts of territory.

At the same time, states are still the main actors in international relations and there is a sovereign equality among them. For instance, even when non-governmental organizations (considered to be important actors on international stage by the neoliberalist school<sup>5</sup>) are participating in international intergovernmental organizations (where only states have full-fledged membership), it takes form of “mythic” forums that do not adopt any

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<sup>4</sup> Conference on Security and Co-operation in Europe Final Act, CSCE: Helsinki 1975 [<https://www.osce.org/helsinki-final-act?download=true> access: 28 June 2018].

<sup>5</sup> J.S. Nye, *The Rising Power of NGOs*, “Project Syndicate”, 24 June 2004 [<https://www.project-syndicate.org/commentary/the-rising-power-of-ngo-s> access: 28 June 2018].

relevant decisions. We see this happening with the OSCE Parallel Civil Society Conferences, second-track discussions such as Helsinki+40, T20 meetings in the case of G20, etc. Governments realize that such bodies are important for public opinion and use them for their own needs, mostly on the national level especially for and before the elections. Almost all non-state entities are still considered by states only as instruments.

### **Refraining from the Threat or Use of Force**

We have mentioned before two examples of Russia violating this and the next four Helsinki principles – Russian aggression against Georgia and Ukraine. In the first case, Russian troops had illicitly crossed the Russian-Georgian border and advanced into the South Ossetian conflict zone as an answer to Georgian military activity in Tskhinvali, and later started massive land, air, and sea invasion of Georgia until the Georgian defeat. In the Ukrainian case, the presence of the Russian armed forces in Crimea and the Black Sea Sevastopol Naval Base were used for preparing a special operation of the peninsula's occupation, conducted in February-March 2014. Not only were the Ukrainian military bases in Crimea blocked for more than a month by armed "little green men" without insignia, but they were also present at every "polling station" in the peninsula on the day of the so-called "referendum", threatening lives of citizens.

On the global scale, the most recent example of using the threat of force in negotiation was the US-North Korea dialogue before the Trump-Kim summit of 12 June 2018 (the USA is one of the OSCE participating states). However, in this case the exchange of threats worked well for ensuring the summit took place. When the North Korean vice-foreign minister Choe Son-hui said in May that "We can ... make the US taste an appalling tragedy it has neither experienced nor even imagined up to now"<sup>6</sup>, the answer of Donald Trump was even tougher: "You talk about your nuclear capabilities, but ours are so massive and powerful that I pray to God they will never have to be used."<sup>7</sup> And even after such threats, the summit not only took place in time, but also the presidents and states "have developed a very special bond"<sup>8</sup>, favouring the de-nuclearization process on the Korean peninsula.

### **Inviolability of Frontiers**

Eager to legitimize its domination over East European states, the Soviet Union wanted Europe's post-World War II borders to be fixed, insisting in 1975 on including this principle in the CSCE Final Act. Forty years passed, and we see the Soviet Union's successor, Russia, violating this principle. It occupied Crimea, eager to make the world recognize this annexation. Moreover, since 2014, more than 400 kilometres of Ukraine's state border are constantly violated by Russia's armed forces. Anyone who wants, not only the so-called "humanitarian convoys", can enter the territory temporarily

<sup>6</sup> M. de Haldevang, *Read the Fiery North Korea Statement That Made Trump Cancel His Summit with Kim Jong Un*, "Quartz Media LLC", 24 May 2018 [<https://qz.com/1287942/full-text-of-the-north-korean-statement-that-provoked-donald-trump-to-cancel-a-historic-summit/> access: 28 June 2018].

<sup>7</sup> D. Trump, *Letter to Chairman Kim Jong Un*, White House, 24 May 2018 [<https://www.whitehouse.gov/briefings-statements/letter-chairman-kim-jong-un/> access: 28 June 2018].

<sup>8</sup> D. Nakamura, *Trump-Kim Summit: Trump Says After Historic Meeting, 'We Have Developed a Very Special Bond'*, "The Washington Post", 12 June 2018 [[https://www.washingtonpost.com/politics/trump-kim-summit-trump-says-we-have-developed-a-very-special-bond-at-end-of-historic-meeting/2018/06/12/ff43465a-6dba-11e8-bf86-a2351b5ece99\\_story.html?noredirect=on&utm\\_term=.1a070ae3293f](https://www.washingtonpost.com/politics/trump-kim-summit-trump-says-we-have-developed-a-very-special-bond-at-end-of-historic-meeting/2018/06/12/ff43465a-6dba-11e8-bf86-a2351b5ece99_story.html?noredirect=on&utm_term=.1a070ae3293f) access: 28 June 2018].

non-controlled by the Ukrainian government. One of the consequences was the downing of the Malaysian Airlines MH17 plane in July 2014. Two hundred ninety-eight innocent victims were killed by Russia's 53rd Antiaircraft Missile Brigade, based in the southern city of Kursk<sup>9</sup>, over Ukrainian territory.

## **Territorial Integrity of States**

In the context of Ukraine's and international response to the attempted annexation of Crimea in violation of this principle, we have to mention the adoption by the UN General Assembly of the resolution titled "Territorial Integrity of Ukraine" on 27 March 2014. Even if it did not implicate any legal consequences for Russia per se, it is the basis for introduction of the sanctions regime against the Kremlin and its proxies by a number of states. There is a desire by a vast majority of states to maintain this principle at the core of international politics. Also, it is useful for Ukrainian demands against Russia in international courts. Another question is what will happen if Russia decides to not comply with the decisions of such international tribunals, as it did with the European Court of Human Rights, when it adopted the law allowing itself to ignore international human rights rulings<sup>10</sup> or threatened to withdraw from the Court<sup>11</sup>.

## **Peaceful Settlement of Disputes**

Even if there are no peaceful settlements of disputes where Russia is involved,

we still have good examples of states' good will in this sphere. For instance, we witnessed an improvement of relations between the Argentine Republic and the United Kingdom, even with the issue of the Falklands/Malvinas Islands still on the table. Thereby not only can the UN Special Decolonization Committee explain why it still exists in the 21st century but also states can go further in bilateral economic relations as well as in resolving issues "on the ground", such as identification of the remains of Argentine soldiers during the Falklands War; cooperation in the Southern Atlantic on fishery issues, etc.

Another bright example is a historical agreement between Greece and Macedonia achieved over the new name of the latter. With the new name of the Republic of North Macedonia, Skopje finally has opened doors to its membership in the EU and NATO.

## **Non-intervention in Internal Affairs**

This is another principle proposed by Moscow in 1975, when it was very sensitive to criticisms of its authoritarian political system, and later violated systematically by Russia after the end of the Cold War almost in all post-soviet countries. Not even talking about the abovementioned, let us recall the gas and trade "wars" of Russia with Ukraine and Belarus, the 2007 cyber-attacks on Estonia, and the most recent interventions in the election processes in the US and Germany, or hacking operations to support Catalan independence.

<sup>9</sup> Investigators: Buk Missile from Russian Antiaircraft Brigade Downed MH17, "Radio Free Europe", 25 May 2018 [https://www.rferl.org/a/mh17-criminal-probe-to-appeal-to-the-public-for-help/29246988.html access: 28 June 2018].

<sup>10</sup> A. Sims, Vladimir Putin Signs Law Allowing Russia to Ignore International Human Rights Rulings, "Independent", 15 December 2015 [https://www.independent.co.uk/news/world/europe/vladimir-putin-signs-law-allowing-russian-court-to-overthrow-international-human-rights-rulings-a6773581.html access: 28 June 2018].

<sup>11</sup> A. Griffin, Russia Could Withdraw from European Convention on Human Rights, State News Agency RIA Reports, "Independent", 01 March 2018 [https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html access: 28 June 2018].

## Respect for Human Rights and Fundamental Freedoms, Including the Freedom of Thought, Conscience, Religion or Belief

Another paradox: While there has been a huge leap during the last 40 years in expanding the understanding of human rights – for example, the right to same-sex marriage, in the OSCE we see a crisis of the human rights concept. On the one hand, for years it has been impossible to achieve any relevant human rights decision at the Organization’s Ministerial Meetings. On the other hand, there is an urgent need for this because of the aggravation of the situation in Russia and Ukrainian territories occupied by Russian occupational authorities. Oleg Sentsov’s case has brought enormous attention to the problem of political prisoners in Russia, among which about 70 persons are Ukrainian citizens.

## Equal Rights and Self-determination of Peoples

This Helsinki principle from the very beginning was understood differently by different CSCE participating states. If for the Western democracies it was introduced by the American President Woodrow Wilson in 1918 and played an important role at the Paris Peace Conference of 1919 for creating new nation states on the terrains of former



*the problem of the irrelevance of the Helsinki principles to the current international situation is its “gentleman” and non-obligatory status*

empires, for the USSR it was just the freedom of a people within a state to determine their own political and economic situation, as a clear refutation of the Brezhnev Doctrine, which certainly did not imply the right to secession. Although the best example of self-determination in Europe was probably the German unification of 1990, later the principle was also applied in the Balkans and in the Soviet Union to justify the breakup of existing states. Once this had happened, however, the principle of territorial integrity took over and the borders of the new states in their turn became inviolable – as in the case of Kosovo, and of Georgian or Ukrainian occupied territories.

And this goes in a sharp contrast with situations in other regions of the world, where Western states can force other actors to recognize the results of referendums if they want – as was with the South Sudan case in 2011, when independence was recognized without problems and the country became a UN member, or do not want – as was with Iraqi Kurdistan’s 2017 referendum.

## Cooperation among States

Another hot topic that shows that not everyone is interested in the relevance of this principle is the recent US withdrawal from the UN Human Rights Council. Why do states need cooperation, if they can act unilaterally? As the US State Secretary M. Pompeo declared when he announced the decision, “When they seek to infringe on our national sovereignty, we will not be silent.”<sup>12</sup> This telling remark illustrates that even the US seeks a reality where states can have greater independence from international law and multilateral diplomacy and not always need cooperation.

<sup>12</sup> M. Pompeo, *Remarks on the UN Human Rights Council*, US Department of State, 19 June 2018 [https://www.state.gov/secretary/remarks/2018/06/283341.htm access: 28 June 2018].

## Fulfilment in Good Faith of Obligations under International Law

All previous examples of the Helsinki principles' violations show that we cannot do it "in good faith". We cannot do it when we do not have an effective sanction mechanism. And we need to look for an effective one if we want the international law to work.

In this sense, the problem of the irrelevance of the Helsinki principles to the current international situation is its "gentleman" and non-obligatory status. The OSCE itself does not exist from the formal legal point of view as an international organization. It does not have a statute document, nor its decisions are obligatory. They are even called "commitments", not "obligations", while its members are not called "members" but rather "participants".

We see clear examples of the largest and the most powerful nations ignoring the spirit of Helsinki aimed at favouring international cooperation. Russia let itself flagrantly violate all ten CSCE guiding principles by its aggression against Ukraine in 2014. The USA has shown that it can withdraw without any consequences from the UN Human Rights Council, or even from the Iran Nuclear Deal, having an attitude to the international law as to presidential executive orders, which

can be cancelled by the next administration. And only Communitarian Europe, which itself is living through the Brexit crisis, has a will "to fix" everything and bring back the international law.

Finnish President Tarja Halonen said on the occasion of the 30th anniversary of the first CSCE Conference held in Finland: "The Helsinki Final Act was the real Magna Carta of détente. Not only was it a charter governing relations between States, it was also a charter of freedom for nations and individuals."<sup>13</sup> Do we live now under the conditions of détente? It is highly unlikely, so we should not be surprised that there is no more Helsinki spirit in the air. It looks more like we are witnessing a new crisis of the whole international system: Those who want may trace the tendency of the current international order to destroy its bases – multilateral diplomacy and international law.

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<sup>13</sup> Address by President Halonen at an Occasion Marking the 30th Anniversary of the Helsinki Final Act, Ministry of Foreign Affairs of Finland, 01 August 2005 [[https://um.fi/speeches/-/asset\\_publisher/up7ecZeXFRAS/content/presidentti-halosen-puhe-etykin-30-vuotisi-juhlassa?\\_com\\_liferay\\_asset\\_publisher\\_web\\_portlet\\_AssetPublisherPortlet\\_INSTANCE\\_up7ecZeXFRAS\\_redirect=https%3A%2F%2Fum.fi%2Fspeeches%3Fp\\_id%3Dcom\\_liferay\\_asset\\_publisher\\_web\\_portlet\\_AssetPublisherPortlet\\_INSTANCE\\_up7ecZeXFRAS%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26\\_com\\_liferay\\_asset\\_publisher\\_web\\_portlet\\_AssetPublisherPortlet\\_INSTANCE\\_up7ecZeXFRAS\\_cur%3D21%26\\_com\\_liferay\\_asset\\_publisher\\_web\\_portlet\\_AssetPublisherPortlet\\_INSTANCE\\_up7ecZeXFRAS\\_delta%3D50%26p\\_r\\_p\\_resetCur%3Dfalse%26\\_com\\_liferay\\_asset\\_publisher\\_web\\_portlet\\_AssetPublisherPortlet\\_INSTANCE\\_up7ecZeXFRAS\\_assetEntryId%3D494603&curAsset=0&stId=47307](https://um.fi/speeches/-/asset_publisher/up7ecZeXFRAS/content/presidentti-halosen-puhe-etykin-30-vuotisi-juhlassa?_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_up7ecZeXFRAS_redirect=https%3A%2F%2Fum.fi%2Fspeeches%3Fp_id%3Dcom_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_up7ecZeXFRAS%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_up7ecZeXFRAS_cur%3D21%26_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_up7ecZeXFRAS_delta%3D50%26p_r_p_resetCur%3Dfalse%26_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_up7ecZeXFRAS_assetEntryId%3D494603&curAsset=0&stId=47307) access: 28 June 2018].

# LITIGATING WAR: UKRAINE'S QUEST FOR JUSTICE AT THE "WORLD COURT"

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***The armed conflict between the Russian Federation and Ukraine has changed the attitude of the Ukrainians to international law and, more specifically, to international courts. While the United Nations Security Council has proved unable to provide a solution to the conflict, Ukraine's hope for justice has been vested in various international courts and tribunals. This article attempts to explain the inherent difficulties of Ukraine's quest for justice at international courts, in particular, at the International Court of Justice.***

## **Introduction**

International law does not necessarily ensure justice, but at the very least, it gives hope for justice. Less powerful actors can rely on international judicial institutions in their disputes with major powers when any direct interaction (such as, for example, bilateral negotiations) gives them little chance to defend their position.



***International law does not necessarily ensure justice, but at the very least, it gives hope for justice***

The armed conflict between the Russian Federation and Ukraine began in 2014 with Russia's occupation and proclaimed annexation of Crimea, and continued with open hostilities leading to numerous victims and hundreds of thousands of displaced persons in Donetsk and Luhansk regions of Ukraine. Unsurprisingly, this conflict

has brought about numerous changes in both countries involved. Its multiple manifestations and implications are going to be felt for many decades to come. One particular aspect of the conflict relates to the changed attitude of Ukrainians to international law and, more specifically, to international courts.

Unlike the Soviet Union and its self-appointed continuator, the Russian Federation, Ukraine has demonstrated a much more positive attitude to the idea of a third-party dispute settlement, including international courts. This could be best illustrated by Ukraine's giving consent in a 1997 bilateral treaty with Romania to the jurisdiction of the International Court of Justice on the issue of maritime delimitation in the Black Sea. Romania instituted proceedings in that case in 2004, and in 2009 the Court unanimously adopted its judgment, which was positively perceived by both parties concerned and laid a good foundation for their positive relations ever since. However, until 2014 international courts have not been seen by Ukraine as a crucial element in its policy.

In 2014, far from being able to liberate its territories and to restore constitutional order there by force, Ukraine turned for help to international institutions. It did not take long to realise that the principal political body of the United Nations charged with maintenance of international peace and security, the Security Council, was hardly capable of offering any solution to the situation, as it has almost invariably been the case when one or more of its permanent members were directly involved in a conflict. International courts, although far less promising in terms of speediness and concreteness of the solution appeared to be a worthwhile alternative.


### Legal Nature of the Issues at Stake

The taking over of Crimea by the Russian military forces (disguised as the so-called “polite [little] green men”) can only be qualified under international law as belligerent occupation (as the subsequent annexation cannot entail any legal consequences apart from the aggressor’s international legal responsibility). The Crimean situation thus signals to the existence of an international armed conflict between the Occupying Power and the state whose territory has been occupied.

The direct involvement of the Russian armed forces in the armed conflict in Donetsk and Luhansk regions of Ukraine also amounted to an international armed conflict between the two states concerned, as confirmed, in particular, by the Prosecutor of the International Criminal Court in her preliminary report on the inquiry into the situation in Ukraine.<sup>1</sup> The same report, albeit cautiously, confirms another obvious aspect of the situation:

There are reasons to believe that the anti-government armed groups in Eastern Ukraine operate under the overall control of the Russian Federation, which, if confirmed by the International Criminal Court, would confirm the existence of the inter-state armed conflict since the very beginning of the hostilities. Even if one assumes for a moment that such an overall control would not be confirmed, it would nevertheless not remove the issue of the grave interference of Russia into Ukraine’s domestic matters.

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***though international courts do not possess unproblematic enforcement machinery, the advantages of having the factual situation reviewed and retold by international judicial institutions in the language of international law should not be underestimated***

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It goes without saying, that the gravity of the international law issues raised by Russia’s aggression against Ukraine places a very high responsibility on the international courts that will deal with the related issue. Adjudging on matters of war, use of force, and severe interference in the domestic affairs by one state against another has never been an easy task for an international court. The temptation to dismiss such cases on formal grounds will always be high, and the reluctance of one respondent state to have any case decided on merits will never be too easy to overcome.

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<sup>1</sup> Cf.: *Report on Preliminary Examination Activities*, The Office of the Prosecutor, International Criminal Court, 2016, Paragraphs 155-170; *Report on Preliminary Examination Activities*, The Office of the Prosecutor, International Criminal Court, 2017, Paragraphs 86-95.

## Hope for Justice and the Challenge of Fragmentation

Even though international courts do not possess unproblematic enforcement machinery, the advantages of having the factual situation reviewed and retold by international judicial institutions in the language of international law should not be underestimated. Despite the obvious incompatibility of Russia's actions against the sovereignty, territorial integrity, and political independence of Ukraine, the former has always attempted to justify its actions by some kind of reference to international law. Clear judgments from international courts should in principle discredit such references and define the framework of the conflict in precise legal terms, which should also be helpful in inciting and shaping the political response from relevant actors, both at the level of international intergovernmental organisations and that of individual states.

It would also have positive domestic effects, clarifying many obscure and legally questionable concepts that have been widely used in Ukraine since 2014, such as the "anti-terrorist operation" (while the events on the ground left no doubts as to the existence of an armed conflict), "Russia-terrorist forces", "hybrid war", and so forth. Finally, and most importantly as regards the Autonomous Republic of Crimea and the city of Sevastopol, such judgments should further strengthen Ukraine's case for regaining its control over the illegally annexed territories.

However, achieving those results is not easy. It is worth recalling that international courts, which started emerging in the early 20th century, despite having successfully proliferated in many spheres of international life, still do not offer a systematic solution to all the grievances of the international community and its members. There are several dozens of

international courts and tribunals, but only a few of them have compulsory jurisdiction. Even if they do, it is usually coupled with a highly specialised set of issues within their purview. Thus, some of them deal exclusively with the application of WTO-sponsored treaties, while others look exclusively into issues related to the law of the sea, or human rights, or any other particular treaty regime.

Most importantly, the International Court of Justice as the principle judicial organ of the United Nations with a virtually unlimited subject-matter jurisdiction (as long as there is a legal dispute between states) is still unable to deal with contentious cases unless the respondent state has clearly consented to its jurisdiction in a given case.

The entire system can be described as extremely fragmented and creating a significant potential for conflicting judgments and forum shopping (i.e. possibilities to choose between more or less "convenient" fora). It was therefore rather surprising to hear proposals of Ukrainian politicians and even lawyers to come up with one "integrated" or "holistic" lawsuit that would deal with all grievances caused to Ukraine by the Russian aggression. Such an imaginary claim should have covered such diverse matters as the aggressive war (annexation of Crimea and armed intervention in the Donetsk and Luhansk regions), expropriated property, human rights violations, individual responsibility for war crimes and crimes against humanity, navigation in the Black Sea, and so forth. Needless to say, such proposals are completely unrealistic, as an international court capable of dealing with all such issues simply has never existed.

Unsurprisingly, Ukraine has chosen the only realistic way to reach international courts, paying full respect to their respective focuses. This meant that there are now not one but many juridical fronts



on which Ukraine is fighting the Russian aggression, with international law being its only weapon. While proceedings by Ukraine against Russia have been instituted at various international fora, including, among others, the European Court of Human Rights and the Permanent Court of Arbitration, it is the legal battle at the International Court of Justice that has so far been most noticeable.

### **“The World Court” and Armed Conflicts**

The International Court of Justice, sometimes referred to (somewhat exaggeratedly) as “the World Court”, has always appeared to be the most suitable forum to adjudicate claims of violation of the United Nations Charter and other foundational rules of international order. The Court indeed has the jurisdiction to deal with disputes between states<sup>2</sup> and it also “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”<sup>3</sup>. Both instituting proceedings in an inter-state contentious case (via, most likely, the United Nations General Assembly) should have been (and, most likely, were) seriously considered by Ukraine. These options are not mutually exclusive, and they could be used to address the issues arising from the armed conflict between the Russian Federation and Ukraine, but both are not devoid of inherent problematic aspects.

When it comes to instituting an inter-state case, the major difficulty is that no state may be compelled to accept the jurisdiction of the

Court. As Christian Tomuschat aptly remarks, “[t]he absolute freedom of States either to accept or to reject judicial settlement of their disputes may at first glance appear to be anachronistic in the world of today where so many supranational regimes have come into existence [...]. However, [...] at world level, the chances of voluntary compliance are slim. If States were forced under the jurisdiction of the Court, the record of actual compliance with judgments rendered would be abysmal”<sup>4</sup>.

Obtaining the Court’s advisory opinion is also always an option, which, however, is not very straightforward. To begin with, it requires a question on an unclear matter of international law to be asked. Formulating such a question is not always an easy task. For example, asking the Court as to the status of Crimea makes hardly any sense. As a matter of international law and from the standpoint of the United Nations, the answer to such a question is clear and obvious – Crimea is Ukraine. Illegality of Russia’s military intervention in Donetsk and Luhansk regions is also hardly a question to be asked. Whatever question might be asked, the Court’s answer does not put any international legal obligation on any state that would be separate from the obligations stemming from the applicable norms of international law. These two reasons would perhaps best explain the decision of the Ukrainian authorities to look for a possibility of starting a contentious case at this stage.

So far, the International Court of Justice has not managed to examine many cases that would resemble the situation of the

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<sup>2</sup> Article 34 of the Statute of the ICJ.

<sup>3</sup> Article 65 of the Statute of the ICJ; Article 96 of the UN Charter.

<sup>4</sup> C. Tomuschat, Article 36, [in:] A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd Edition), Oxford University Press, 2012, p. 647–648.



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***For Ukraine, finding a way to institute proceedings versus the Russian Federation in the International Court of Justice was not an easy task. It had to search for treaties to which Russia is a party and which contain a clause accepting jurisdiction of the Court***

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armed attack and other hostile actions by the Russian Federation against Ukraine. Indeed, neither option of involving the Court in considering such matters leaves the door of a judicial settlement of armed conflicts open too wide. When the nature of relations between the parties often makes any cooperation between them hardly possible, this can inevitably have implications for the Court. In fact, a certain minimum level of cooperation between the parties is indispensable just to agree to submit the dispute to an international judicial or arbitral institution. This explains why there have been only few cases that dealt with the legality of the use of force by one state (or several states) against another (most notably “Military and Paramilitary Activities in and against Nicaragua”, *Nicaragua v. United States of America*, Judgment of 1986 – subsequently discontinued at the initiative of Nicaragua at the stage of determining compensation), and even fewer (only one that has not been removed from the list of cases) that dealt with the actual conduct of an armed conflict (“Armed activities on the territory of the Congo”, *Democratic Republic of the Congo v. Rwanda*, Judgment of 2006).

### **Ukraine v. Russia at the International Court of Justice**

For Ukraine, finding a way to institute proceedings versus the Russian Federation in the International Court of Justice was not an easy task. It had to search for treaties

to which Russia is a party and which contain a clause accepting jurisdiction of the Court as regards their application and interpretation. Such treaties should have also had a link to the actual situation of an inter-state conflict. Ultimately two such treaties were identified, namely the International Convention for the Suppression of the Financing of Terrorism (CSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). As to the latter treaty, Ukraine had an opportunity to learn from the experience of Georgia, which in 2008 invoked the same Convention to institute proceedings against the Russian Federation that dealt with the events of the armed conflict between the two states in the region of South Ossetia earlier that year. In 2011, the Court dismissed the case for formal reasons (failure of the Georgian authorities genuinely to engage in negotiations with the Russian Federation on the substance of the dispute under the International CERD).

Ukraine submitted its initial application instituting the proceedings against the Russian Federation on 16 January 2017, after having taken steps to meet the jurisdictional requirements set forth by the two conventions. As Ukraine also requested provisional measures to be adopted, the Court held hearings on the subject and made its order on 19 April 2017 where it confirmed the existence of a prima facie jurisdiction under both conventions. Reminding the Russian Federation of its duty to comply with its obligations under the CERD, the Court considered that, regarding the situation in Crimea, the Russian Federation must refrain, pending the final decision in the case, from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis. In addition, the Court ordered the Russian Federation to ensure the availability of education in the Ukrainian language, and, to both parties, to refrain

from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve.

At the same time, the Court refused to indicate provisional measures under the CSFT and said that it expects the parties, through individual and joint efforts, to work for the full implementation of the Minsk “Package of Measures” of 12 February 2015, endorsed by the United Nations Security Council in its Resolution 2202 (2015) in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine.<sup>5</sup> By its order of 12 May 2017, the Court set the dates for the submission of Ukraine’s memorial (12 June 2018) and a counter-memorial of the Russian Federation (12 July 2019).

Trying to foresee the outcome of this case is not an easy task. Following the recent timely submission by Ukraine of its memorial, it could reasonably be predicted that the Russian Federation is very likely to raise its preliminary objections to the Court’s jurisdiction within the three-month time limit provided for in the Rules of Court (Article 79, paragraph 1). This would be the stage where the Georgia v. Russia case collapsed in 2011. However, it appears that Ukraine’s preparations were more thorough and did consider Georgia’s negative experience, which is why the chances of having Ukraine’s claims under the CERD examined on merits seem to be more substantial. The apparent failure of the Russian Federation to execute the provisional measures indicated by the Court should also play a role in the Court’s deliberations.

At the same time, the future of Ukraine’s claims under the CSFT is less certain, as this would be the very first time when the International Court of Justice should deal with that convention. Its initial observations contained in the order for the indication of provisional measures seem overly cautious. However, the outcome will largely depend on the persuasiveness of the factual arguments put forward by Ukraine in its June 2018 memorial. Interestingly, the main thrust of the arguments advanced by Russia’s legal team during the oral hearings on the provisional measures was that the terrorist-related issues should not be examined by the Court, as the situation in question is in fact an armed conflict, over which the Court has no jurisdiction. While there are many reasons to disagree with this logic (e.g. because terrorist activities can take – and have taken – place under the conditions of both peace and war), it clearly shows the utmost difficulty of litigating war in international courts.

## Conclusions and the Way Forward

Ukraine’s quest for justice at the International Court of Justice is only a part of its lawfare with the Russian Federation. In seeking legal redress, Ukraine’s authorities have also submitted a number of inter-state applications to the European Court of Human Rights and instituted an arbitral tribunal under the United Nations Convention on the Law of the Sea. At the private, or rather diagonal (state-investor) level, its citizens and legal entities have sued (already with some tangible success) the Russian Federation for the loss of their investments made in Russia-occupied

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<sup>5</sup> Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*), Request for the Indication of Provisional Measures, Order, 19 April 2017.

Crimea. The International Criminal Court might also have a say in the situation, although it cannot possibly deal directly with the responsibility of Russia as a state. Nevertheless, it is the “World Court” where the decisive battle will take place in the coming years. In a way, Ukraine has given the Court a chance to uphold the very basics of the international legal order. It is now for the Court and its judges to prove that they are not afraid of this tremendous task.

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# RUSSIA'S AGGRESSION AGAIST UKRAINE AS A DESTABILIZING FACTOR FOR NON-PROLIFERATION REGIMES

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***The article presents a study of legal aspects of the Budapest Memorandum, the only document that Ukraine at the outset of its independence was able to win in exchange for the voluntary abandonment of the nuclear arsenal. While Russia violated its obligations by annexing Crimea and unleashing military aggression, Western "guarantors" fail to counter Russia. An analysis of the BM gives proves that it is a full-fledged legally binding international treaty. Failure of international guarantees of territorial integrity of Ukraine is a destabilizing factor resulting in NP regimes' erosion because of formation of profound distrust of international guarantees, which in the face of aggression and disregard for international norms demonstrate their helplessness.***

## Introduction

On 05 December 1994, the leaders of the United States, the United Kingdom, Russia, and Ukraine (B. Clinton, J. Major, B. Yeltsin, and L. Kuchma respectively) concluded the Budapest Memorandum "On Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons"<sup>1</sup> (BM). Two other nuclear states and the UN Security Council permanent members – China and France – formally expressed similar assurances to Ukraine in the form of relevant statements (Statement of the Government of China of 04 December 1994 and the Declaration of France with

the accompanying letter of President F. Mitterrand of 05 December 1994), although formally they did not sign the Memorandum. The main difference between these two statements and the content of the Memorandum is the absence of the paragraph on compulsory consultation "in the event a situation arises that raises a question concerning these commitments". Ukraine, for its part, undertook to withdraw all nuclear weapons from the territory of the country, at that time the third largest nuclear arsenal in the world. Tactical nuclear weapons were withdrawn in 1992, and the entire nuclear disarmament process was completed in 1996. The last stationary silo launcher of intercontinental ballistic

<sup>1</sup> *Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons*, UN, 19 December 1994 [<http://undocs.org/S/1994/1399>].

missiles RS-22 (SS-24) was destroyed in Ukraine in 2001.<sup>2</sup>

The year 2014 – the 20th anniversary year for the Memorandum – was the year when the Russian aggression against Ukraine started<sup>3</sup>, leading to the collapse and the destruction of the international guarantees/ assurances enshrined in this international legal instrument. In recent years, we have been able to find in the international media some statements and comments from high-ranking politicians and academics from the countries that signed the Budapest Memorandum, and not only Russians, who unreasonably tried to disprove the validity of the Budapest “guarantees” and the obligation to implement them for all parties. But, the initiators of these rebuttals and falsifications were the Russian politicians and the Kremlin “lawyers”.

In this paper, we present a series of irrefutable proofs of the opposite. Namely, the Budapest Memorandum is an international legally binding treaty, valid for its signatories – guarantors of the independence, territorial integrity, and inviolability of the borders of Ukraine. First of all, it concerns the Russian Federation – the main violator of the Budapest assurances.

These commitments are as follows: to respect the independence and sovereignty and the existing borders of Ukraine; to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and a statement that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of

the United Nations; to refrain from economic coercion, and so on. Nonetheless, these were destroyed by Russia’s 2014 illegal military annexation of Crimea and the subsequent aggression in the Donbas region of Ukraine, which continues to this day. As for the other Budapest signatory states, they are formally not violating their obligations but were unable to resist or prevent the Russian aggression.

## Russian Logic

The fact that Russia was not going to comply with its obligations to respect the territorial integrity and inviolability of the borders of Ukraine became clear at the end of 2003 in connection with events around the Ukrainian sea spit Tuzla in the Kerch Strait between the Sea of Azov and the Black Sea. After those events, the proposals of some politicians about the expediency of renewal of Ukraine’s nuclear status began to sound in full, although Russia violated the Budapest Memorandum even before, when it exerted economic pressure on Ukraine, in particular, on the supply of energy to Ukraine and the introduction of unjustified restrictions on Ukrainian exports of certain types of agricultural and other products.

In 2009, on the eve of the 15th anniversary of the Memorandum, a discussion was held in the Ukrainian Parliament and the expert community on the need for its ratification, granting it the status of a “political-legal document”, or the adoption of another “binding document on guaranteeing Ukraine’s security”. In the opinion of some politicians, such a document could have removed the urgency

<sup>2</sup> І. Лоссовський, *Міжнародно-правовий статус Будапештського Меморандуму*, УАЗП: Київ (Legal Status of the Budapest Memorandum, UPPA: Kyiv) 2015, p. 124.


<sup>3</sup> І. Лоссовський, *Зовнішньополітична стратегія Росії щодо України як реалізація «нової доктрини обмеженого суверенітету» («доктрини Путіна»), “Зовнішні справи” (Russia’s Foreign Policy on Ukraine as Realization of “New Doctrine of Limited Sovereignty” [“Putin’s Doctrine”], “UA-Foreign Affairs”)*, May 2015, pp. 12-15.

of the necessity of Ukraine's integration to NATO.<sup>4</sup> Some leading security experts insisted on the need to transform the Budapest Memorandum into a multilateral legally binding international treaty, while then President V. Yushchenko considered the need for Ukraine to conclude bilateral treaties with guarantor countries, similar to the Ukraine-US Charter on Strategic Partnership of 19 December 2008, to replace the Budapest Memorandum.<sup>5</sup>

In July 2010, the appeal of the Verkhovna Rada to the nuclear states<sup>6</sup> was adopted calling to strengthen security guarantees to Ukraine, which had voluntarily abandoned nuclear weapons. In connection with the 15th anniversary of the Memorandum, official diplomatic correspondence of Ukraine with the guarantor countries took place at the top level. The guarantor countries for Ukraine, primarily Russia and the United States, expressed at that time the readiness to confirm and strengthen the assurances provided to Ukraine. However, such commitments and obligations were not implemented in practical terms and did not go further than general political statements, intentions, and theoretical discussions.

According to the Ukrainian delegates participating in the negotiations on preparation of the text of the Memorandum,

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***the strategy of the Ukrainian delegation had been that the final text would be legally binding. At the same time, the strategy of Ukraine's partners was to emphasize the political nature of the guarantees***

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the strategy of the Ukrainian delegation had been that the final text would be legally binding. At the same time, the strategy of Ukraine's partners was to emphasize the political nature of the guarantees. As a result, a compromise was reached – an international legal treaty that stipulates real political and legal assurances of Ukraine's independence, sovereignty, and territorial integrity and establishes a special mechanism for their diplomatic protection in case of their violation.

A certain weakness of the guarantees given to Ukraine by the nuclear states may be evidenced by the fact that the English text of the Memorandum (in its title) used the term “security assurances”, which is weaker than the term “security guarantees”.<sup>7</sup> It is noteworthy that in the Russian-language text of the Memorandum<sup>8</sup>, as well as in the Ukrainian-language text, the term “security guarantees” is used but not “assurances”.

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<sup>4</sup> Про «Документ із «шафи». Олександр ЧАЛИЙ: Будапештський меморандум може стати першою шаблянню у побудові якісно нової зовнішньої політики України (About the “Document from the cabinet”. Oleksandr CHALY: The Budapest Memorandum Can Become the First Step in Building a Qualitatively New Foreign Policy of Ukraine), “Day” newspaper, 04 December 2009 [https://day.kyiv.ua/uk/article/nota-bene/pro-dokument-iz-shafii].

<sup>5</sup> Ющенко вимагає переглянути угоду про без'ядерний статус України (Yushchenko Demands Revision of Ukraine's Nuclear-free Status Agreement), “Pogliad.ua”, 01 September 2009 [https://pogliad.ua/news/chernivtsi/yuschenko-vimagae-pereglyanuti-ugodu-pro-bez-yaderniy-status-ukrayini-268716].

<sup>6</sup> Постанова Верховної Ради України “Про Заяву Верховної Ради України про надання Україні реальних гарантій безпеки” (Resolution of the Verkhovna Rada of Ukraine “On the Statement of the Verkhovna Rada of Ukraine on the Provision of Real Security Guarantees to Ukraine”), Parliament of Ukraine, 06 July 2010 [http://zakon3.rada.gov.ua/laws/show/2431-17].

<sup>7</sup> І. Лоссовський, Міжнародно-правовий статус Будапештського Меморандуму, УАЗП: Київ (Legal Status of the Budapest Memorandum, UFPA: Kyiv) 2015, p. 124.

<sup>8</sup> Меморандум про гарантії безпеки у зв'язку з приєднанням України до Договору про нерозповсюдження ядерної зброї (Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons) Parliament of Ukraine, 05 December 1994, [http://zakon3.rada.gov.ua/laws/show/998\_158].

According to one of the American participants in those negotiations, former US Ambassador to Ukraine and now Senior Fellow at the Brookings Institution S. Pifer, during the talks, the discussion was about what term to use: “guarantees” or “assurances”, since the first term was used for provision of guarantees to NATO member-states, which includes military commitments. But at that time, the US administration was not ready to provide Ukraine with any military commitments; moreover, it was clear that the Senate would not provide the opportunity to ratify a treaty with such tight commitments. According to S. Pifer, the Memorandum was planned as a political agreement and provided for “specifically unspecified assurances, but not military guarantees”.<sup>9</sup> At the same time, the parties to the Memorandum have a clear commitment to respond, even if they are not required to use military force. Therefore, the lack of a rigid Western response to the Russian aggression, according to the American diplomat, discredits Western security guarantees and negatively affects the stability of non-proliferation regimes.

Starting from the spring of 2014 (the beginning of the Russian aggression<sup>10</sup> and attempted annexation of Crimea), from the Russian side, “arguments” of politicians and even some scholars have been voiced in order to “justify” Putin’s aggressive actions, in particular, to discredit the legal value of the Budapest Memorandum. In order to prove the failure of such “arguments”, we turn to provisions of the Russian

domestic law, as well as to the documents of international law.

## Legal Aspects of Memorandum Ratification

There is a view that since the Budapest Memorandum has not been ratified by any of its signatories, the document has not passed the process of giving it legal force through appropriate parliamentary procedures, which gives Russia a “real legal excuse”.<sup>11</sup> It allegedly does not have the appropriate obligations, and the Memorandum itself allegedly can be considered legally null and void.

Such “argumentation” does not withstand serious professional criticism, because, firstly, in the final provisions of the Memorandum it is stated: “This Memorandum will become applicable upon signature” and therefore does not require ratification. In accordance with part 4 of Article 15 of the Constitution of the Russian Federation of 12 December 1993<sup>12</sup>, if an international treaty, in which Russia is a party, establishes rules other than those provided by the legislation of the country, then the rules of the international treaty apply. Even more, in accordance with part 4 of Article 15 of the constitution, the generally accepted principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system.

As it is known, the procedure for the conclusion, implementation, and termination of international treaties of

<sup>9</sup> *The Role of 1994 Nuclear Agreement in Ukraine's Current State: National Public Radio Transcript of the Interview with S. Pifer*, “NPR”, 09 March 2014 [<https://www.npr.org/2014/03/09/288298641/the-role-of-1994-nuclear-agreement-in-ukraines-current-state>].

<sup>10</sup> І. Лоссовський, *Зовнішньополітична стратегія Росії щодо України як реалізація «нової доктрини обмеженого суверенітету» («доктрини Путіна»), “Зовнішні справи” (Russia's Foreign Policy on Ukraine as Realization of “New Doctrine of Limited Sovereignty” [“Putin's doctrine”], “UA-Foreign Affairs”), May 2015, pp. 12-15.*

<sup>11</sup> «Ни Крым, ни Россия не нарушали Будапештский меморандум» (*Neither Crimea, Nor Russia Violated the Budapest Memorandum*), “Gazeta.ru”, 25 October 2017, [[https://www.gazeta.ru/politics/2017/10/25\\_a\\_10957754.shtml](https://www.gazeta.ru/politics/2017/10/25_a_10957754.shtml)].

<sup>12</sup> *Конституция Российской Федерации (The Constitution of the Russian Federation)*, 12 December 1993, [<http://www.constitution.ru/>].



Russia is determined by the Federal Law on International Treaties of the Russian Federation dated 15 July 1995.<sup>13</sup> This law applies to all international treaties of the Russian Federation, regardless of their type and name: contract, agreement, convention, protocol, other types and titles of treaties (paragraph 2, Article 1). It also applies to international treaties in which Russia is a party as a country-successor of the Soviet Union (paragraph 3, Article 1). In accordance with Article 6 of the law, the consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, or by any other means if so agreed. Such a rule of the said law fully complies with the provisions of the Vienna Convention on the Law of Treaties (signed in Vienna in 1969 and entered into force in 1980). The Russian Federation is a state party to this convention as the successor of the USSR. Thus, ratification is only one of many ways to give consent to the obligation to implement an international treaty, and if the document states that it comes into force upon signature, then obviously it does not require any other agreement on its entry into force. Moreover, in accordance with paragraph 1 of Article 24 of the said law: "International treaties enter into force for the Russian Federation ... in order and terms envisaged in the treaty or agreed upon between the parties". A similar rule is defined in the Vienna Convention on the Law of Treaties. The principles upon which the relations regarding conclusion of international treaties are regulated in the said law are generally accepted and are applicable to the Budapest Memorandum.

Despite the fact that, in accordance with Article 15, subparagraph (g) of the aforementioned law, Russia's international treaties concerning disarmament or international arms control, the maintenance of international peace and security (so can be considered the Budapest Memorandum) are subject to ratification, since the latter was signed before the Federal Law on International Treaties of Russia entered into force, the said rule on the mandatory ratification has no retroactive effect in time (the general legal principle of irreversibility of the law in time is fixed, in particular, in the first part of Article 54 of the Constitution of the Russian Federation) and does not apply to the Memorandum. In addition, this law does not specifically provide for the application of its norms to relations that arose before the date of its entry into force.

In accordance with Article 2, paragraph 1 (a) of the Vienna Convention, the term "international treaty" is defined as "an international agreement concluded between States in written form and governed by international law,... and whatever its particular designation".<sup>14</sup> Thus, the Budapest Memorandum is an international treaty, and the Russian Federation is bound to its implementation.

It should also be noted that in the official electronic search systems on the legislative framework and acts of international law of Russia, the Budapest Memorandum appears as an "international treaty". Its text is contained in the official collection of documents of the Ministry of Foreign Affairs of Russia<sup>15</sup>, as well as in the manual

<sup>13</sup> *Федеральный Закон "О международных договорах Российской Федерации"*, (Federal Law on International Agreements of the Russian Federation), The Russian Federation Government, 16 July 1995, [<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102036504&rdk=&backlink=1>].

<sup>14</sup> *Vienna Convention on the Law of Treaties (with Annex), Concluded at Vienna on 23 May 1969*, UN, [<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>].

<sup>15</sup> *Российско-украинские отношения. 1990-1997 гг. Сборник документов, МИД РФ: Москва (Russian-Ukrainian Relations. 1990-1997, Collection of Documents, MFA of the RF: Moscow)* 1998, pp. 210-211.



***Statements regarding the allegedly useless legal liability of the Budapest Memorandum, if they were fair, would automatically make it absurd and discredit all the actions of the leaders at the level of the heads of states related to the conclusion of this international treaty***

on “Nuclear Non-proliferation”, officially recommended for Russia’s universities and graduate students, diplomats, as well as experts in the field.<sup>16</sup>

In addition to the above, an important international legal confirmation/proof of the binding force for the parties (including for Russia) of the Memorandum are the following two official UN documents: (1) GA and UN Security Council document A/49/765\* S/1994/1399\* dated 19 December 1994, in the form of a letter from the Permanent Representatives to the UN of Ukraine, the United Kingdom, the Russian Federation, and the US (A. Zlenko, D. Hannay, S. Lavrov, and M. Albright) to the 59th GA session with a request to distribute the text of the BM as an official document of the General Assembly and the UN Security Council<sup>17</sup>; (2) document of the United Nations Conference on Disarmament CD/1285 of 21 December 1994<sup>18</sup> in the form of a letter from the Permanent Representatives of the four

states to this conference requesting the registration of the Budapest Memorandum and the cover letter “as official documents of the Conference on Disarmament and their distribution to all participating States of the Conference”. By presenting the Memorandum as an official document of the most influential international organization in the world, which is the UN, the state parties to this international legal document thus confirm its validity and binding nature.

It is also important to note that, in accordance with Article 6 of the Law of Ukraine “On Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons of 01 July 1968”, adopted on 16 November 1994, “This Law enters into force after the providing the security guarantees by the nuclear states to Ukraine by signing of the relevant international legal document”.<sup>19</sup> Thus, if the Budapest Memorandum is not a document that provides Ukraine with security guarantees and is “legally null and void”, as some Russian politicians and experts claimed, it would mean that Ukraine is not a party to the NPT as a non-nuclear country and has the legal right to possess nuclear weapons.

Statements regarding the allegedly useless legal liability of the Budapest Memorandum, if they were fair, would automatically make it absurd and discredit all the actions of the leaders at the level of the heads of states related to the conclusion of this international

<sup>16</sup> *Ядерное нераспространение*. Т.2. (под ред. В.Орлова), ПИР-Центр: Москва (V. Orlova (ed.), Nuclear Non-proliferation, Vol. 2, PIR-Centre: Moscow) 2002, pp. 406-408.

<sup>17</sup> *Letter Dated 07 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General*, The United Nations, 19 December 1994, [<http://undocs.org/S/1994/1399>].

<sup>18</sup> *Letter Dated 94/12/19 from the Representative of the United States of America to the Conference, the Permanent Representative of the United Kingdom and Northern Ireland to the Conference, the Permanent Representative of the Russian Federation to the Conference and the Permanent Representative of Ukraine Addressed to the Secretary-General of the Conference*, CD/1285, Dag Hammarskjöld Library, 1994 [<http://dag.un.org/handle/11176/195890>].

<sup>19</sup> Закон України “Про приєднання України до Договору про нерозповсюдження ядерної зброї від 1 липня 1968 року” (Law of Ukraine “On Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons from 01 July 1968”), Parliament of Ukraine, 16 November 1994 [<http://zakon2.rada.gov.ua/laws/show/248/94-вр>].

treaty, since this would mean that the contracting parties conclude at the highest level a legally “insignificant” document, which would be contrary to the logic of those events and also would not be consistent with the fundamental and universally accepted principle of international law – the principle of conscientious fulfilment of international obligations based on the international legal practice of *pacta sunt servanda* (“agreements must be kept”).

At the official level, the Russian side nevertheless recognizes the binding nature of the Memorandum for its implementation, although partly and indirectly. In the statement of the MFA of Russia dated 01 April 2014 in connection with allegations of violation of its commitments under the Memorandum, it states, in particular, that “the Russian Federation strictly adhered to and observes the obligations stipulated in the Budapest Memorandum to respect the sovereignty of Ukraine ... which cannot be said about the policy of Western countries, which during the events on Maidan have clearly despised this sovereignty”.<sup>20</sup> It also emphasized that according to “the general element of the Budapest Memorandum and the concept of ‘negative guarantees’ in its classical sense, the only obligation is not to use and not to threaten the use of nuclear weapons against non-nuclear states. Such Russia’s commitment to Ukraine in no way was violated”. However, these statements contradict each other, because if the obligations of the signatories of the Memorandum concerned only “an obligation not to use and not to threaten the use of nuclear weapons”, this would contradict with the above-mentioned maxim in the same statement (“...what we

cannot say about the policy of Western countries, which during the events on Maidan clearly ignored this sovereignty”), since the Russian side, by claiming this, did not mean the use or threat of use by Western countries of nuclear weapons against Ukraine.

Some comments from critics, which, based on the provisions of part two of Article 7 of the Law of Ukraine “On International Treaties of Ukraine” of 22 December 1993, No. 3767-XII (which was in force on the date of signing of the Memorandum and until 03 August 2004)<sup>21</sup>, tend to consider that this international treaty is allegedly subject to ratification, may also be unequivocally and reasonably rejected, since the Memorandum by its nature does not apply to any of the types of treaties (and does not relate to relations regulated by them) that are specified in the exhaustive list in part two of Article 7 of this law as subject to ratification. In clause (g) of paragraph 2 of Article 7 of the law it is determined that only those international treaties are subject to ratification whose ratification is provided for by the law or the international treaty itself. As you know, neither by the Budapest Memorandum nor by the Ukrainian legislation in force on the date of its conclusion the ratification procedure was envisaged.

In this regard, Ukraine, considering the Budapest Memorandum as an international treaty, in full compliance with the law of Ukraine “On International Treaties of Ukraine” in force on the date of the Memorandum’s conclusion, agreed to the Memorandum’s entry into force from the moment of its signing, without specifying the conditions for the exchange of instruments of

<sup>20</sup> Website of the MFA of the Russian Federation [http://www.mid.ru].

<sup>21</sup> Закон України “Про міжнародні договори України” (Law of Ukraine “On International Agreements of Ukraine”), Parliament of Ukraine, 22 December 1993 [http://zakon2.rada.gov.ua/laws/show/3767-12].

ratification. Working out its draft, Ukraine did not insist on ratification by other participants, in particular, by the Russian Federation. The specified condition for the Memorandum's entry into force from the moment of signing ("become applicable upon signature") fully complies with both Russian law and the Vienna Convention on the Law of Treaties.

## Consequences of 2014

The aggressive actions of Russia against Ukraine in Crimea and Donbas have become a violation of not only the Budapest Memorandum, but also a number of other fundamentally important international legal acts, including: the UN Charter; Helsinki Final Act and a dozen other OSCE core documents; Agreement on the Establishment of the CIS of 08 December 1991; Declaration on the Observance of the Sovereignty, Territorial Integrity and Inviolability of the Borders of the CIS Participating States of 15 April 1994; Trilateral Statement on Security Assurances of Ukraine by the Presidents of the USA, Russia and Ukraine dated 14 January 1994; the Framework Treaty on Friendship, Cooperation and Partnership between Ukraine and the RF of 1997; other bilateral agreements; NPT, as well as other international legal instruments.

Serious guarantees are also contained in the United States-Ukraine Charter on Strategic Partnership of 19 December 2008.<sup>22</sup> On 04 December 2009, in the Joint Statement of the Presidents of Russia and the US,<sup>23</sup> the commitments were also confirmed regarding the unchanged assurances/guarantees set forth in the BM.

The flagrant mockery of international law principles and the world democratic community were the "explanations" by official Russia of its aggressive actions in Ukraine. First, on 04 March 2014, President V. Putin, in his peculiar style, said that if you agree that in February 2014 there was a revolution in Ukraine, then it should be considered that a new state arose on its territory, with which Russia did not sign any binding documents.<sup>24</sup> According to similar logic, it should be assumed that since Russia is a different state compared to the USSR (formed as a result of a no less revolutionary process of the collapse of the Soviet Union), Russia cannot in any way claim either the territory of Eastern Prussia (Kaliningrad Oblast), nor the Northern Territories of Japan (the South Kuril islands of Iturup, Kunashir, Shikotan, Habomai), nor the territory of the part of the Leningrad region and Karelia that retreated to the USSR as a result of the Soviet-Finnish Winter War of 1939-1940.

It is noteworthy that in December 1939 the General Assembly of the League of Nations, identifying acts of aggression by the Soviet Union against Finland, excluded the USSR from the League of Nations. Today we can regrettably state that due to its organizational structure and modalities as well as political will, the UN is not able to take similar actions with respect to the Russian aggression against Ukraine.

On 19 March 2014, Russia's MFA, in the same provocative and mockery form, denied its involvement in violations of the Budapest Memorandum and accused the US,

<sup>22</sup> *United States-Ukraine Charter on Strategic Partnership*, US State Department, 19 December 2008 [<https://www.state.gov/p/eur/rls/or/142231.htm>].

<sup>23</sup> *Joint Statement by the President of the United States of America and the President of the Russian Federation on the Expiration of the Strategic Arms Reduction Treaty (START)*, The White House, 04 December 2009

<sup>24</sup> Путин: если на Украине революция, то там формируется новое государство (*Putin: If There Is a Revolution in Ukraine, Then a New State Is Being Formed There*), "Ria News", 04 March 2014 [<https://ria.ru/world/20140304/998107833.html>].

the EU, and the new Ukrainian authorities, which allegedly acted “against the political independence and sovereignty of Ukraine in violation of the obligations under the Budapest Memorandum”.<sup>25</sup> In early April 2014, it was cynically declared that “Russia has not made an obligation to force part of Ukraine to remain in its composition against the will of the local population, and the provisions of the Budapest Memorandum do not apply to circumstances that have become the result of actions of domestic political or socio-economic factors”. The Russian Foreign Ministry’s statement that “Ukraine’s loss of territorial integrity has been the result of complex internal processes, to which Russia and its obligations under the Budapest Memorandum have no relation”<sup>26</sup> is absolutely hypocritical.

Some American analysts, in connection with violations of the Budapest assurances/guarantees, spoke in favour of sending NATO forces to Ukraine<sup>27</sup>, as well as of the application of Article 4 of the North Atlantic Treaty, which provides for consultations of member-states in case of a threat to their security and territorial integrity. In recent years, Ukraine at least three times, in the person of its Foreign Minister P. Klimkin, has raised the issue on the convening of such consultations, which, of course, did not find support from Russia as an aggressor country.



***Failure of the Budapest and other international guarantees for Ukraine should strengthen the confidence of the totalitarian regime of the DPRK in the faithfulness of the chosen strategy for the further development of nuclear weapons***

Important mechanisms for ensuring global international security are international legal regimes for the non-proliferation of weapons of mass destruction (nuclear, chemical, and bacteriological). The cornerstone of the international legal system for the non-proliferation of nuclear weapons is the NPT, to which most countries of the world are parties, with the exception of Israel, India, North Korea (DPRK), and Pakistan – the states that actually possess nuclear weapons, although they are not officially recognized as “nuclear states”.<sup>28</sup> The guarantees provided by the Budapest Memorandum were a prerequisite for Ukraine’s joining the NPT as a “non-nuclear” country. The failure of these safeguards has a negative impact today on negotiation processes for addressing non-proliferation issues in the world, among which, first of all, the Korean and Iranian nuclear problems are most resonant.<sup>29</sup>

The failure of the Budapest guarantees is a signal to the world that the only reliable way

<sup>25</sup> *Комментарий Департамента информации и печати МИД России по вопросу о Будапештском меморандуме 1994 года (Commentary of the Department of Information and Press of MFA of Russia on the Question of the Budapest Memorandum of 1994)*, MFA of the Russian Federation, 19 March 2014 [[http://www.mid.ru/ru/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/69938](http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/69938)].

<sup>26</sup> Website of the MFA of the Russian Federation [<http://www.mid.ru>].

<sup>27</sup> J. Jeffrey, *U.S. Should Send Troops to Quell Ukraine Crisis*, “Washington Post”, 15 April 2014 [[https://www.washingtonpost.com/opinions/us-should-send-ground-troops-to-ukraine/2014/04/15/aa40b238-c408-11e3-bcec-b71ee10e9bc3\\_story.html?noredirect=on&utm\\_term=.065ec38e5aac](https://www.washingtonpost.com/opinions/us-should-send-ground-troops-to-ukraine/2014/04/15/aa40b238-c408-11e3-bcec-b71ee10e9bc3_story.html?noredirect=on&utm_term=.065ec38e5aac)].

<sup>28</sup> *Безопасность Европы* (под ред. В.Журкина), Институт Европы РАН, (V. Zhurkin (ed.), *Security of Europe*, Institute of Europe RAS), Весь Мир: Москва 2011, p. 752.

<sup>29</sup> І. Лоссовський, *Історія, сучасний стан і перспективи корейського врегулювання*, “Зовнішні справи” (*History, Current State and Perspectives of Korean Settlement*, “UA Foreign Affairs”), April 2014, pp. 44-49.

to ensure the security of states is to develop their own nuclear weapons. Now a dozen “threshold” countries and those who had intentions and technological capabilities to create such weapons are deeply in thought on this issue, and the situation around Ukraine is a clear example for them of the fuzziness of hopes for “guarantees” from nuclear states.

North Korea was the first country to draw the appropriate conclusions, especially since among the participants in the Six-Party Talks mechanism for the Korean nuclear issue settlement are the three “nuclear” states (the US, Russia, and China) that had declared the Budapest “guarantees” to Ukraine. Thus, it is unlikely that in the medium term we should expect fundamental changes in the negotiation process to resolve the Korean nuclear issue. Without having the ability to counteract the US and its allies in the region by conventional military means and fearing US actions aimed at overthrowing the ruling regime, the DPRK will continue to develop a nuclear program as a guarantee of regime survival. Failure of the Budapest and other international guarantees for Ukraine should strengthen the confidence of the totalitarian regime of the DPRK in the faithfulness of the chosen strategy for the further development of nuclear weapons and means of its delivery as a deterrence weapon. According to some experts’ assessments, North Korea possesses between 25 and 70 nuclear weapons/ warheads, but there is a debate over whether it has the reliable technology to successfully launch one toward the mainland US. The affirmative answer to this question seems to be only a matter of fairly short time. One should not be particularly flattered by some progress in improving the rhetoric and continuing the dialogue regarding the denuclearization of the Korean peninsula, which occurred in April-May 2018. Hopes for a positive continuation, again, are based on the guarantees vital to the North Korean

regime and willingness to provide them by the USA.

Another acute problem of nuclear non-proliferation, negotiated within a multilateral format (involving the US, the UK, France, Germany, Russia, the EU, and China) were the talks on halting the Iranian uranium enrichment program. Official Tehran, in exchange for stopping the enrichment of uranium and production of plutonium, seeks to obtain US guarantees as to the absence of military plans to eliminate the Iranian regime, offering instead a commitment to mitigate and further cancel US sanctions that negatively affect the economy of the country as well as an uninterrupted supply of reactor fuel for facilities of peaceful nuclear energy. It can be predicted that, in this case, the failure of the Budapest guarantees for Ukraine will also affect the further formation of Iran’s position on nuclear non-proliferation and credibility of Western partners’ guarantees, despite some progress, which has been reached since 2015.

The logic of the leaderships of North Korea and Iran can be as follows: If the “guarantees” of the “nuclear” states do not work for Ukraine, a democratic European country and a responsible member of the world community, then they will hardly work for countries that are called the “axis of evil”, “rogue”, or “pariah” countries in the Western rhetoric. It is noteworthy that our opinion was actually supported by the main ideologist and architect of today’s Russian foreign policy, S. Karaganov, in his recent publication: “The wave of nuclear weapons proliferation is widening. After Israel, India, Pakistan, who received it with impunity and, especially after ... Iraq, Libya abandoned nuclear programs, it is senseless to expect North Korea to abandon it. The same logic fits the joining of Crimea to Russia. ... [I]t violated the promise to respect the territorial integrity of Ukraine, contained in the Budapest Memorandum. The moral

justification for the non-proliferation regime has been undermined”<sup>30</sup>

The complex set of problems regarding the non-proliferation of nuclear weapons, as well as the obvious failure of seemingly reliable international guarantees of the territorial integrity and inviolability of the borders of Ukraine in exchange for voluntary abandonment of nuclear weapons, is a serious destabilizing factor leading to erosion, if not destruction, of international legal systems for the non-proliferation of weapons of mass destruction. The main factor that triggers such tendencies is the formation of a firm distrust of the “international guarantees”, which, in the face of aggression and flagrant violation, as well as neglect of international norms and principles, show inefficiency, impotence, and helplessness.

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<sup>30</sup> С. Караганов, Мир на вырост. *Политика на пути в будущее*, “Россия в глобальной политике” (*World at the Outset: Politics on the Way to the Future*, “Russia in Global Politics”), Moscow, January 2018.

# POLICY VERSUS POLITICS WITHIN ITALY'S OSCE CHAIRMANSHIP IN 2018

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*The paper presents a study of Italy's OSCE Chairmanship in 2018, in particular how Italy is trying to navigate its OSCE priorities while complying with its own political interests. In 2018, Italy received a chance to check whether it can play the role of a mediator in the dialogue between the West and the East. The focus of the article is within a comparative analysis between the Mediterranean region and Ukraine, prioritized in Italy's agenda for 2018. What is interesting here is how much the statements about maintaining peace and security in Europe could have been and are realized given that some of the OSCE participating countries – Italy and the Russian Federation – were in preparation for elections in 2018.*

## OSCE: In Search of Arguments

In a world where growing dangers affect Europe, security is becoming the touchstone of a debate. The future of the OSCE, as a pan-European organization aiming to achieve lasting peace, prosperity, and stability in Europe, remains questionable given the new challenges.

The need to build bridges united countries in 1975, when in the format of “conference diplomacy” the countries wanted to overcome the Cold War impact and renew a peaceful coexistence of the West and the East. The Conference on Security and Cooperation in Europe proved to serve as a peaceful platform when war was a real “can-do” option, in addition to the concentration of nuclear weapons as well as other conventional arms.

Transformed into the Organization for Security and Cooperation in Europe (OSCE)

in the early 1990s, it remained unique due to the fact that prevention of conflicts remained its central component as indicated in the Helsinki Final Act. The Helsinki principles presented a certain compromise between the Western and Eastern interests at the time, having its *raison d'être* in serving as a dialogue platform between them during the Cold War. Moreover, still in 1975 the Final Act was pivotal for principles promoting security in Europe, being “motivated by the political will, in the interest of peoples, to improve and intensify their relations and to contribute in Europe to peace, security, justice and cooperation”.<sup>1</sup>

As a rule, the priorities of OSCE Chairmanship concern the dimensions or “baskets” of the Helsinki Process: political and security, economic and scientific, human dimension and environmental protection. At the same time, we have to acknowledge that the “security concept” nowadays sees a spectrum

<sup>1</sup> Helsinki Final Act, OSCE, p. 2 [<https://www.osce.org/helsinki-final-act?download=true>].



wider than an absence of military threats to states or regimes, also involving such issues as human rights, democracy, and protection of national or other minorities as contributions to human and societal security.<sup>2</sup> Therefore, through their lenses, the ten Final Act principles recognized the universal significance of human rights and fundamental freedoms as a precondition for security and peace. Moreover, they served to confirm the inviolability of borders and territorial integrity of states. Being accountable to citizens for the respect of its norms, the OSCE was proclaimed a “regional organization” in the sense of the UN Charter. In reality, it means that the OSCE has a unique mandate for numerous peace activities and security protection in Europe. In such a capacity, the OSCE is being viewed as the regional organization to be “first addressed” in order to prevent and settle the disputes in Europe as determined by Article 53 of the UN Charter.<sup>3</sup>

### Italy’s OSCE Chairmanship at a Glance

Italy was approved for the OSCE’s rotating Chairmanship in 2018, supported by the “OSCE Troika” represented by Austria (2017) and Slovakia (2019).<sup>4</sup> The functions of the OSCE chairperson-in-office are performed by the Minister of Foreign Affairs and International Cooperation, namely Angelino Alfano until 01 June 2018. However, the country had elections, which had an impact on the OSCE Chairmanship



***In 2018, Italy received a chance to check whether it can play the role of a mediator in the dialogue between the West and the East***

agenda implementation. Angelino Alfano had informed that he would not run for the cabinet and it meant in political terms that during Italy’s Chairmanship it has faced chairman-in-office rotation.

Enzo Moavero Milanesi was appointed Italy’s foreign minister after a new “yellow-green” government was formed following the 04 March elections.<sup>5</sup> However, it is still difficult to evaluate his steps as a Chairman-in-office due to the shortness of time and immense work of his ministry.

Italian slogan for the OSCE 2018 Chairmanship is three key words – “dialogue, participation, responsibility”. As Ambassador of Italy to the OSCE Alessandro Azzoni says, “The OSCE is a kind of theatre. Italy forms the stage, but the participating states [act on] it”.<sup>6</sup> It means that the priorities presented on the security scene will address numerous issues and search for solutions to various challenges and long-standing conflicts, in particular for: Nagorny Karabakh, Georgia, Transnistria, and Ukraine. However, how the OSCE various regional actors should effectively interact

<sup>2</sup> B. Moller, *European Security: The Role of the Organisation for Security and Co-operation in Europe*, Working Paper 30, Regional and Global Axes of Conflict, February 2008, p. 16 [<http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp30.2-european-security-and-the-osce.pdf>].

<sup>3</sup> B. Moller, *European Security: The Role of the Organisation for Security and Co-operation in Europe*, Working Paper 30, Regional and Global Axes of Conflict, February 2008, p. 5 [<http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp30.2-european-security-and-the-osce.pdf>].

<sup>4</sup> *Italy’s 2018 OSCE Chairmanship: Priorities and Programme*, OSCE [<https://www.osce.org/chairmanship/priorities-2018>].

<sup>5</sup> *Italy’s 2018 OSCE Chairmanship*, Ministry of Foreign Affairs and International Cooperation [[https://www.esteri.it/mae/en/politica\\_estera/osce/la-presidenza-italiana-dell-osce.html](https://www.esteri.it/mae/en/politica_estera/osce/la-presidenza-italiana-dell-osce.html)].

<sup>6</sup> M. Pugliese, *L’Italia ha assunto la presidenza di turno dell’Osce: immigrazione, sicurezza e terrorismo restino priorità (Italy Receives OSCE Chairmanship: Migration, Security and Terrorism Remain the Priority)*, “Huffington Post” [[https://www.huffingtonpost.it/matteo-pugliese/litalia-ha-assunto-la-presidenza-di-turno-dellosce-immigrazione-sicurezza-e-terrorismo-restino-priorita\\_a\\_23330903/](https://www.huffingtonpost.it/matteo-pugliese/litalia-ha-assunto-la-presidenza-di-turno-dellosce-immigrazione-sicurezza-e-terrorismo-restino-priorita_a_23330903/)].

remains a conceptual and practical dilemma especially in 2018.

In general, the issue of “protracted conflicts”, the security of the Mediterranean region, and the challenges of migration, which include the fight against human trafficking and all forms of discrimination, are all the main priorities of the Italian Chairmanship in the OSCE during 2018. This was stated by Italian Foreign Minister Angelino Alfano in Vienna on 11 January 2018 during the OSCE Permanent Council. Countering trafficking networks, supporting the protection of victims, and strengthening cooperation with the Mediterranean and Asian partners for cooperation will be at the core of Italy’s 2018 strategy.<sup>7</sup>

Moreover, Italy has already made steps to address a new rising challenge for the OSCE countries – foreign terrorist fighters (FTF) who are returning or relocating from conflict zones. Italy supported the initiative to search for legal efforts to criminalize FTF activities listed in UNSCR 2178 (2014), to address the terrorism-organized crime nexus, as well target the terrorist networks’ disruption by developing an analysis of the ICT use by terrorists.<sup>8</sup>

Within the first politico-military “basket” of the OSCE, Italy paid attention to the OSCE Structured Dialogue, which was successfully launched under the leadership of German Ambassador to the OSCE Eberhard Pohl. It is a format to search for possibilities

to overcome divergences that marked European security in the previous periods. Conventional arms control was also touched upon during the first half of the Italian Chairmanship. Entering into its second half, the responses to these issues, hopefully, will be presented at the OSCE Ministerial Council meeting in Milan at the end of 2018.

Italy continued to work on the economic and environmental dimension in line with the Austrian and German chairmanships (2016-2017). In such a way, Italy wanted to support economic progress and security advancement via human capital, innovation, and good and responsible governance.<sup>9</sup> One of the events, the 26th Economic and Environmental Forum, was conducted in Venice (24-25 May 2018) in order to become a major meeting-cycle to talk with the business and academic communities about economic and environmental issues.<sup>10</sup>

Moreover, Italy would like to prioritize the third, “human” dimension of the OSCE. In this regard, it advocates for respect of fundamental freedoms and the rule of law.<sup>11</sup> Therefore, Italy focuses on the fight against corruption in all of its forms that “undermines trust between citizens and the state”. Towards this end, Alfano announced the appointment of Paola Severino, former Italian minister of justice, as a special representative on this issue.

At the same time, Italy should think how to continue to enhance cooperation with other

<sup>7</sup> OSCE 2016-2017 Report, p. 13 [<https://www.osce.org/secretariat/360796?download=true>].

<sup>8</sup> The Reverse Flow of Foreign Terrorist Fighters (FTFs): Challenges for the OSCE Area and Beyond, OSCE-wide Counter-Terrorism Conference, 10-11 May 2018, Rome [<https://www.osce.org/chairmanship/377557?download=true>].

<sup>9</sup> Italy’s 2018 OSCE Chairmanship, Ministry of Foreign Affairs and International Cooperation [[https://www.esteri.it/mae/en/politica\\_estera/osce/la-presidenza-italiana-dell-osce.html](https://www.esteri.it/mae/en/politica_estera/osce/la-presidenza-italiana-dell-osce.html)].

<sup>10</sup> Closing Remarks of the Ambassador Vuk Žugić, Co-ordinator of OSCE Economic and Environmental Activities at the 2nd Preparatory Meeting of the 26th OSCE Economic and Environmental Forum, OSCE [<https://www.osce.org/secretariat/382495?download=true>].

<sup>11</sup> Italy’s 2018 OSCE Chairmanship, Ministry of Foreign Affairs and International Cooperation [[https://www.esteri.it/mae/en/politica\\_estera/osce/la-presidenza-italiana-dell-osce.html](https://www.esteri.it/mae/en/politica_estera/osce/la-presidenza-italiana-dell-osce.html)].

security organizations operating in Europe (the EU, NATO, and the UN) in order to be supported given the financial constraints, on the one hand, and the necessity to advocate for professional exchanges opting for synergy, on the other. In such a way, Italy could support the OSCE in its closer cooperation dynamics.

It is worth mentioning that financially, in 2018 Italy remains the third contributor to the OSCE's budget, representing a quota of 9.3% contributing to the OSCE administrative expenses and a quota of 11% for the OSCE field operations. Moreover, Italy additionally provides support for those Italians who work within the OSCE as well as in the ODIHR (Office for Democratic Institutions and Human Rights) election observation missions.

### **Mediterranean Region: Italy's Dividend First**

One of such "synergy responses" is a focus on a closer cooperation with Mediterranean partners and within the Mediterranean region. The idea of developing an ambitious strategic plan for the Mediterranean region is not new for Italy. Therefore, it is common knowledge that Italy will make more efforts to address the challenges in the Mediterranean region, which traditionally shapes its strategic interests. Thus, it will continue to play its role as the Mediterranean countries' protector within the OSCE. Italy started to chair the OSCE Contact Group on the Mediterranean in 2017 and continues to implement the elaborated Action Plan for the Mediterranean region.

Starting from January 2018, Italy continues to underline that the OSCE's original *raison d'être* was effectively broadened. According to the then OSCE chairperson-in-office, Angelino Alfano, the OSCE has to become a Mediterranean "bridge builder" and, in such a way, complement the Eurasian dimension, covering the issues of migration, extremism, and terrorism.

"Helsinki for the Mediterranean" – that is how the then Italian Prime Minister Paolo Gentiloni called the OSCE community to draw attention to the problems of illegal migration, refugee flows, and other security challenges. Consequently, Italy seeks to highlight the priority of the Mediterranean debate: from the contact group to the Permanent Council – the OSCE decision-making body. However, here we hear the undisputed criticism from the United States and Russia of such an Italian lobby.

"The Mediterranean dimension is complementary, not an alternative, to the Eurasian dimension of the OSCE," said Minister Alfano, pointing in particular to the migration crisis. "We are determined to address this challenge not only from the point of view of security but also through combating discrimination, promoting pluralism, including intercultural and inter-religious dialogue that underpins peace and security." Accordingly, such a political dimension of the dialogue with Italy encompasses the implementation of the long-term prospect of an "enhanced Mediterranean partnership" – from the Persian Gulf to the Sahel (Africa).

Italy's second ambition is to promote the appointment of the OSCE Special Representative for the Mediterranean in order to counter-balance the role of Pascal Allizard as the Parliamentary Assembly's Special Representative on Mediterranean Affairs. This new position will increase the significance of the countries of the Mediterranean partnership and at the same time make its decisions more politically influential. For this purpose, Italy's desire is seen as a way to improve trust and security in a region that is facing permanent danger and the threat of terrorism.

Due to the efforts of Italy and a number of other partners, the OSCE managed to introduce a new training project to combat human trafficking within migration routes

at the Centre of Excellence of Police Units (CoESPU) in Vicenza, Italy. The ability to effectively respond with such a practical and result-oriented initiative proved Italy's ability to introduce novelties to the OSCE.<sup>12</sup>

The period of instability, characterized by multidirectional challenges and, most notably, unpredictability, makes us think that the risk of tension in the Middle East, the Gulf, and Asia will only intensify also in the other OSCE dimensions. Therefore, Italy promotes the idea that combined efforts of policymakers and academia are needed to address current challenges facing the OSCE activities within the economic and environmental pillars. Italy advanced scientific insights to the evidence-based discussion during the meetings of the 26th OSCE Economic and Environmental Forum, conducted in Venice on 24-25 May 2018. The outcomes stipulate that human capital, as well as investment policies, should be of utmost importance for the further sustainable economic development of the MENA region.<sup>13</sup>

The Mediterranean dimension works smoothly at other dimensions' level, especially what concerns youth engagement. "Youth and the Mediterranean" conferences became a normal practice for Italy to support. Conceived as an opportunity to address a number of strategic and thematic issues from the standpoint of MENA youth,

the events engage the participation of outstanding young scholars and activists from Egypt, Jordan, Lebanon, Morocco, Palestine, and Tunisia as well as other countries<sup>14</sup> and their OSCE Youth special representatives.<sup>15</sup>

One of the innovative approaches that Italy tried to address was presented in an attempt to unite in a genuine manner all major international organizations dealing with current challenges: migration, digitalization, and language policies. It was one of the steps to present the idea of a joint work of the OSCE, Council of Europe, and the United Nations. "To respond to these new challenges is essential for effective conflict prevention," emphasized the OSCE High Commissioner Lamberto Zannier, marking the 20th anniversary of the Oslo Recommendations of the OSCE High Commissioner on National Minorities (HCNM).<sup>16</sup>

Italy's new approach to revive the OSCE talks at the level of ambassadors happened during the two-day "Ambassadorial Retreat" in Trieste (8-9 June 2018), gathering 41 OSCE participating states and four partners for cooperation. Italy welcomed these 41 ambassadors and a dozen officials who arrived from Vienna. "The meeting in Trieste is important for us to identify the areas, in which the OSCE can do something in the Mediterranean without overlapping with other international organizations, including

<sup>12</sup> *OSCE 2016-2017 Report*, p. 13  
[<https://www.osce.org/secretariat/360796?download=true>].

<sup>13</sup> *IIASA at the 2nd Preparatory Meeting of the 26th OSCE Economic and Environmental Forum*, IIASA  
[<http://www.iiasa.ac.at/web/home/about/events/180525-OSCE.html>].

<sup>14</sup> A. Dessi, *Youth and the Mediterranean: Exploring New Approaches to Dialogue and Cooperation*, IAI, February 2017  
[<http://www.iai.it/sites/default/files/iai1703.pdf>].

<sup>15</sup> "Matteo Pugliese was appointed as Special Representative of the Chairperson-in-Office on Youth and Security by Austria in 2017, and has been reappointed by Italy in 2018. Together with his colleagues, he advises the Chairperson-in-Office on youth policy issues and countering violent extremism" [in:] *Matteo Pugliese*, OSCE  
[<https://www.osce.org/node/298591>].

<sup>16</sup> *OSCE, UN, Council of Europe and Experts Explore Challenges of Digitalization, Migration and Gender for Developing Language Policies at Event in Oslo*, OSCE, 01 June 2018  
[<https://www.osce.org/hcnm/383274>].

in the management of flows and security, not just migrants,” informed Ambassador Alessandro Azzoni, vice-president of the OSCE Permanent Council.<sup>17</sup>

However, there have been a number of challenges for the Mediterranean region during Italy’s OSCE Chairmanship. One of them is connected with Italy’s new governmental leadership, which opts for opposing migration talks. The newly appointed minister of interior, Matteo Salvini, has already asked NATO to help dealing with migration flows and addressed NATO Secretary General with such a request during his official visit to Rome (09 June 2018). It is still unclear whether the new government will change Italy’s agenda within the OSCE Chairmanship.

### **Ukraine: Italy’s Hard Landing in Reality**

The results addressing the Ukrainian challenges were low within Italy’s OSCE Chairmanship. The year 2014 became the saviour for the OSCE’s need to reaffirm building bridges between the West and the Russian Federation. The Russian military intervention in Ukraine and the subsequent illegal annexation of Crimea raised concerns about violation of the OSCE’s fundamental principles: the inviolability of borders, respect for the territorial integrity of states, and refraining from threat of violence. The Crimea and Donbas crises became a litmus paper to show that hopes for Russia to be changed politically and geopolitically are simply vain, revealing that Russia’s policy is always nuanced and standing more on the hidden political actions inside the country.

These modalities became crucial for the OSCE to remain an essential vehicle in order to provide stability in the region. Its response within a new field mission marked the OSCE’s remarkable comeback. However, the Normandy Format (Germany, France, Russia, and Ukraine) was outside the OSCE but played a crucial role to manage the crisis. A special role was due to Germany being a member of the “OSCE Troika” in 2015-2017, linking the OSCE and the Normandy. As for 2018, there is no more such a link between the Normandy Format and the OSCE.<sup>18</sup> Italy reaffirmed that it would work to “intensify negotiations within the Normandy Format and the Trilateral Contact Group”; however, due to political elections in both the Russian Federation and Italy, this process could not be fully implemented.

One of the first Italy’s Chairmanship steps was to prolong the mandate of the OSCE Special Monitoring Mission in Ukraine that was to run out on 31 March 2018. As a result, the Italian Chairmanship reappointed the Special Representative in Ukraine and in the Trilateral Contact Group, Ambassador Martin Sajdik. Italy has repeatedly emphasized that the creation of the OSCE Special Monitoring Mission in Ukraine in March 2014 was an exceptional example of collective multilateral efforts to peacefully resolve conflicts.

Italy highlighted the priority of giving full political support to efforts to find a solution to the Ukrainian crisis. The Minsk agreements established an uneasy and precarious truce, which is being frequently violated. Angelino Alfano was able to witness it during his OSCE Chairmanship visit to

<sup>17</sup> *Mediterraneo e migrazioni i temi dell’Osce*, “Gelocal”, 08 June 2018 [http://ilpiccolo.gelocal.it/trieste/cronaca/2018/06/09/news/mediterraneo-e-migrazioni-i-temi-dell-osce-1.16945231].

<sup>18</sup> C. Nunlist, *Reviving Dialogue and Trust in the OSCE in 2018*, CSS Background Papers, 2018, p. 7 [http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/N%C3%BCnlist-121818-BackgroundPaperOSCEin2018.pdf].



***In the view of the OSCE's decisions spectrum, the fact remains: There is no more a common view on the evolution of Europe's security since 1990 within the OSCE***

Donbas (31 January 2018) and emphasized that “it is an unacceptable situation in the centre of Europe”.<sup>19</sup> Back in 2017, Italian Foreign Minister A. Alfano in his statement at the presentation of the program for the Italian OSCE Chairmanship for 2018 emphasized, “On the one hand, this crisis has called into question the very principles on which the OSCE is based. On the other hand, however, it has demonstrated – once and for all – how much the world needs the OSCE to solve this problem”.<sup>20</sup>

In the view of the OSCE's decisions spectrum, the fact remains: There is no more a common view on the evolution of Europe's security since 1990 within the OSCE. From one side, different perceptions within the OSCE participating states made an impact on the logic of its decision-making process. At the same time, from the other side, one of the important features to understand the nature of the OSCE decision making is that it does not result in the adoption of formal treaties or other traditional sources of international law, but elaborates political, and not legally binding, decisions and documents.<sup>21</sup> Until now, a majority of the OSCE participating states,

the US in particular, tried to maintain the OSCE's flexible and non-bureaucratic “status quo”, not transforming it into a full-fledged organization with its own charter and legal personality. Consequently, participating states make political commitments that remain just commitments. Moreover, joint OSCE efforts will be continuously hampered until the present cycle of the “cold war”-type hostility between Russia and the West continues.

Frankly speaking, neither the Italian chairmanship nor the OSCE in general are to address effectively the conflict in and around Ukraine in 2018 or to mediate efficiently in the overwhelming conflict between the West and Russia. Driven by consensus, the OSCE would need a true political will of all 57 OSCE participants.

Meanwhile, some of the OSCE instruments, such as the Informal Working Group (IWG), continue to address the Ukrainian challenges. In this regard, it is worth mentioning the EU address to the IWG in Vienna (06-07 June 2018), pointing out the importance of launching the Structural Dialogue due to Russia's aggression against Ukraine and its illegal annexation of Crimea<sup>22</sup>.

However, the general OSCE response to Ukraine's challenges can be also explained by the coincidence with the OSCE institutional crisis. According to an OSCE expert, the organization is far from certain in order to produce a “remarkable recovery” or effective responses.<sup>23</sup> At the same time, no creative

<sup>19</sup> Клімкін і новий голова ОБСЄ Альфано побували на Донбасі (Klimkin and the New Head of the OSCE Alfano Visited Donbas), “Gordon”, 31 January 2018 [<http://gordonua.com/ukr/news/war/klimkin-i-novij-glava-obsje-alfano-pobuvali-na-donbasi-229636.html>].

<sup>20</sup> Statement by the Minister for Foreign Affairs of Italy, Mr. Angelino Alfano, at the 1155th Meeting of the OSCE Permanent Council, Presentation of the Programme of the Italian OSCE Chairmanship for 2018, 20 July 2017, OSCE official website [<https://www.osce.org/permanent-council/332831?download=true>].

<sup>21</sup> O. Herman, J. Wouters, *The OSCE as a Case of Informal International Lawmaking?* Working Paper No. 192, December 2017, p. 17 [[https://ghum.kuleuven.be/ggs/publications/working\\_papers/2017/wp192hermanwouters](https://ghum.kuleuven.be/ggs/publications/working_papers/2017/wp192hermanwouters)].

<sup>22</sup> EU Statement on the Structured Dialogue, European Union on OSCE 69th Joint FSC/PC Meeting Vienna, 06 June 2018, p. 1 [[https://eeas.europa.eu/sites/eeas/files/69th\\_joint\\_osce\\_fsc\\_pc\\_eu\\_statement\\_on\\_the\\_structured\\_dialogue.pdf](https://eeas.europa.eu/sites/eeas/files/69th_joint_osce_fsc_pc_eu_statement_on_the_structured_dialogue.pdf)].

<sup>23</sup> W. Zellner, *Old and New Challenges for the OSCE*, [in:] OSCE 2016 Yearbook, p. 33.

solutions are to be expected from the OSCE due to its relatively low annual budget and subsequent decrease in political importance in the US, Russia, and the EU countries.

Ukrainian discussions remain at a level when the situation tends to be narrowed down to only “conflict, crisis, and corruption” issues, rather than a full-spectrum hybrid war. While Ukraine faces problems in these areas, such a reductive approach does not provide it with effective and sustainable security solutions. Moreover, Italy’s changing “yellow-green” government still has not presented its ideas towards how Italy within the OSCE will continue to address the issues referring to Ukraine.

At the same time, Italy has been promoting a resolution of another conflict – Transnistria. As an example, it already had a number of rounds and conferences on this issue. The latest negotiations on the Transnistrian settlement were held in Rome (29-30 May 2018). The cChairmanship continued to analyse and evaluate the progress being made within Vienna meeting protocol implementation within the 5+2 format (27-28 November 2018) and agreements signed in November 2017 and April 2018.<sup>24</sup>

## **Conclusions: Reality Checks Are Needed**

The OSCE serves as an important multilateral forum for continuous and regular dialogue on a wide range of political, economic, and security challenges. Among its 57 member states, where one can find both the EU and non-EU countries, the OSCE remains the most inclusive security format. As such,

it has opportunities for its participants to operate closer and engage more effectively with the USA, Canada, Russia, Norway, Turkey, Ukraine, and many others. Dispersed geographically, it makes a certain influence on national trajectory within the OSCE, especially during the important period of the OSCE chairmanship. In such a way, the “security-speak” is sometimes different from a real “security-do” in what concerns the OSCE participating states’ priorities.

On the one hand, Italy’s role in the OSCE is shaped by challenging environments within greater Europe, where a myriad of unsolved and emerging crises exist. Moreover, the potential to destabilize European security lies in the instability and uncertainty of current and future political regimes and political systems of a number of countries in the OSCE regions, including Eastern Europe, Central Asia, and the Middle East. Europe stands facing the challenges of a mixed internal and external nature, between which it is difficult to draw a line. On the other hand, the palette of approaches to better reform the OSCE is still not effective.

Currently, even if the OSCE entered turbulent times, there have been some positive progressive steps. For example, experts indicate that the response to the conflict in and around Ukraine made the OSCE come back to the international formats of strategic importance after a decade of silence. However, the experts insist that the “Steinmeier Initiative” and the Structured Dialogue (SD) only somewhat stopped disputes on the future of conventional arms control even though there still is an urgent need to modernize the OSCE arms control.<sup>25</sup>

<sup>24</sup> *Protocol of the Official Meeting of the Permanent Conference for Political Questions in the Framework of the Negotiating Process on the Transnistrian Settlement*, p. 1, Ministry of Foreign Affairs and International Integration [[https://delegazioneosce.esteri.it/delegazione\\_osce/resource/resource/2018/05/protocollo\\_di\\_roma\\_en.pdf](https://delegazioneosce.esteri.it/delegazione_osce/resource/resource/2018/05/protocollo_di_roma_en.pdf)].

<sup>25</sup> C. Nunlist, *Reviving Dialogue and Trust in the OSCE in 2018*, CSS Background Papers, Zurich, 2018, p. 7 [<http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pds/N%3%BCnlist-121818-BackgroundPaperOSCEin2018.pdf>].

Moreover, the challenges remain in “second basket” – economic one, which are not addressed in full manner.

The selected regional priorities for Italy’s OSCE Chairmanship, mainly the Mediterranean region and Ukraine, demonstrated a somewhat unbalanced approach in addressing security challenges there. With regards to addressing Ukraine’s challenges, the OSCE perceptions turned out to be not the same as truths. However, some of its meetings within the Informal Working Groups succeeded in demonstrating the realities Ukraine is living in 2018 to the politicians, diplomats, military, and experts from the OSCE countries.

Italy continues to advocate more for the Mediterranean region at the expense of balancing its interests with other “sensitive” security regions and conflicts. In this regard, a trajectory not to Ukraine but mostly to the Mediterranean countries was observed. Even Transnistria received much more attention than the situation in Crimea and Donbas.

Moreover, Italy’s internal challenges in the government, due to the parliamentary elections in March 2018 and subsequent long way towards building a coalition, influenced

the vision of what Italy will be within the second half of its OSCE Chairmanship. At the same time, it is quite clear even now, that it would be a mistake to pin too high hopes on the Italian Chairmanship or on the OSCE in 2018 in the mentioned conflicts’ resolution.

It is still quite a challenge to transform the OSCE’s recent achievement into long-lasting effective solutions in order for them to become a comprehensive European security pillar. In this situation, the international community can make necessary steps in order to demonstrate consolidated democratic will with further concrete actions. It should reassert its voice by developing new legal remedies for dealing with security challenges and demonstrating the value of human diversity.

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