

OPEN LETTER TO MY RUSSIAN FRIENDS
UKRAINE IS NOT CRIMEA

In reaction to the incorporation of Crimea into the Russian Federation, I had written that the use of Russian armed force against Ukraine is contrary to one of the most fundamental principles of contemporary international law and can be qualified as an “aggression” (*Le Monde*, 14 March 2014). This applies all the more to the use of of armed force against Ukraine as a whole (and not only against the separatist regions of Lugansk and Donetsk. Despite the positions I had publicly taken, I was approached by the Russian authorities to participate in Russia’s defence before the International Court of Justice (ICJ) and two arbitral tribunals that Ukraine had seized concerning certain consequences of the Russian takeover of Crimea.

After careful consideration, I accepted this offer, while recalling the position I had publicly taken and that I was maintaining it, without objection from my interlocutors. It is true that I had also written that the Russian invasion was not enough to disqualify the ‘referendum’ organised in the wake of the invasion to confirm the attachment of the very short-lived ‘independent’ Republic of Crimea to the Russian Federation because I was (and still am) convinced that a large majority of the population of the peninsula were in favour of this reunification. However, while international law protects the territorial integrity of States, it does not prohibit secessions if they meet the aspirations of the population concerned and can be established in practice. In Crimea, Mr Putin’s sin against international law is not that he has pushed the region to separate from Ukraine and join Russia – from which, after all, it had only been detached in 1954 – from which, after all, it had only been detached in 1954, even though it was then the USSR. Rather, it was to have interfered crudely in the process that would, in all likelihood, have led to the same result, if the consultation of the population had taken place without this intervention. It is true that this would have required confidence in democratic principles and a sincere belief in the right of peoples to self-determination. Mr Putin’s Russia, which muzzles all opposition and bans demonstrations against the war, does not bother too much with these principles.

At least the ‘recuperation’ of Crimea was achieved without bloodshed and if it provokes reactions from certain fringes of the Ukrainian or Tatar population these remain marginal. And I do not believe in the Ukrainian accusations of racial discrimination before the ICJ – a pretext too often seized by States to try to circumvent the lack of jurisdiction of the World Court.

Perhaps a comparable solution should have been encouraged through the free consultation of the concerned population in the Donbass – which the Minsk Accords do not address head-on?

In any case, Ukraine is not Crimea and there is no justification for the use of war to impose a political regime change in Kiev or a territorial dismemberment of Ukraine – probably both. To state the obvious, international law recognises the legality of the use of armed force only in self-defence in response to an armed attack (Article 51 of the United Nations Charter), or by virtue of a resolution of the Council under Chapter VII of the Charter. Despite Mr Putin's verbal contortions, Russia was clearly not in a position self-defence, even if it was preventive – which would not have been enough to justify it. And, of course, there was no Security Council decision authorising such action.

Did Ukraine violate the ‘Minsk Agreements’, the first of which was signed on 5 September 2014 by its representative, and those of Russia and of the two separatist regions, and the second on 12 February 2015 in the ‘Normandy format’ by the representatives of the same entities as well as the German Chancellor and the French President? This is arguably true, but Russia has hardly fulfilled its own commitments. Moreover, apart from the fact that these agreements are of an uncertain legal nature, their violations cannot justify actions in flagrant violation of peremptory norms of general international law (*ius cogens*): countermeasures may be lawful in respect of such breaches, provided that they are not themselves contrary to obligations arising from the same rules. And indeed, there was no Security Council decision authorising such action.

As much as the – timid – Western ‘sanctions’ respect this requirement, they are not, which responds to elementary considerations of humanity, as well as, perhaps excessively, the principle of proportionality, which is equally important in this matter; as much the massive and deadly Russian armed attack cannot in any way be considered to be based on these principles of moderation.

Dear Russian friends, what a disappointment and sadness it is that your country, so endearing in so many ways, is calling into question those principles that we wanted to believe were recognised by all ‘civilised nations’, i.e. by the international community of community of States as a whole. And I am all the more saddened by this because Russia has played a major role in the tremendous movement that led to this achievement. It was Russia that convened the

two great Peace Conferences of 1899 and 1907 which gave a decisive impetus to the process of elaborating the humanitarian law of war. It was the USSR which paid the highest price for the capitulation of Nazi barbarism, in Leningrad, Stalingrad, or Kursk. It was also the USSR that led the fight for the effective recognition of the right of peoples to self-determination at the United Nations, and sometimes in the field. And now Russia is trampling on these principles, which have been so difficult to impose in positive law – the law that we would like to see actually in force.

I have enjoyed working with you to defend the interests of your country, which I love dearly. I appreciated that while defending them together, we could exchange freely on the limits not to be crossed. I have seen the scruples of some of you and understood the unwavering commitment of others. But enough is enough. Yesterday I sent my letter of resignation to the competent authorities: lawyers can defend more or less questionable causes. But it has become impossible to represent in forums dedicated to the application of the law a country that so cynically despises it.

Alain PELLET,

Counsel for Russia before the ICJ and other
international tribunals until 23 February 2022.