

# Self-Determination, Territorial Integrity and *Fait Accompli* in the Case of Crimea

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## Abstract

The choice between self-determination and territorial integrity is one of the oldest false dilemmas of International Law. It sets the problem of secession under two contradictory and mutually exclusive options, neither of which is true as such under positive International Law: either a specific group within a State constitutes a "people" and has a right to "external" self-determination; or the territorial integrity of the parent State must be respected and prohibits secession by such a group. This dilemma is very convenient from a political point of view. It provides States with the opportunity to "ride two horses at the same time". States could thus embrace "self-determination" of some groups and encourage in one way or another separatist claims compatible with their interests, while proclaiming that the principle of territorial integrity prevails at home or in the territory of friends and allies. The case of Crimea highlighted these contradictions once again. Russia, which for years was a big champion of the principle of respect for territorial integrity of States (especially during the 1990s when it was

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fighting the separatist attempts in Chechnya and Tatarstan), suddenly started claiming that the principle of self-determination of Russian speaking populations in Crimea prevails over the territorial integrity of Ukraine. Western States, which have constantly backed in one way or another the Kosovo separatist movement since 1998 and which recognized Kosovo just a few hours after the declaration of independence on 17.2.2008, suddenly rediscovered, because of the crisis in Ukraine, the merits of the principle of territorial integrity and other basic principles of International Law often violated by these same Western States during these last years. In this article we focus on the relevance of the principle of self-determination in the Crimean conflict. We try to explain why the “dilemma” between self-determination and territorial integrity is a false one. On the one hand, there is no “right” to external self-determination and unilateral secession for any “people” or ethnic group outside the colonial context. But while secession is not authorized by international law, neither is it in principle prohibited by the principle of territorial integrity, save in the event of violation of a fundamental rule of international law, which raises the crucial issue of the unlawfulness of Russian military intervention in Crimea and the possible solutions to the fierce conflict between unlawful *effectivités* and the law.

## I. False Dilemmas, Double Standards and the Quest for Positive Law

The choice between self-determination and territorial integrity is one of the oldest false dilemmas of international law. It sets the problem of secession under two contradictory and mutually exclusive options, neither of which is true as such under positive international law. The story goes as follows: either a specific group within a State constitutes a “people” and has a right to “external” self-determination; or the territorial integrity of the parent State must be respected and prohibits secession by such a group.

This dilemma is very convenient from a political point of view. It provides States with the opportunity to “ride two horses at the same time” without being accused of holding a contradictory discourse. States could thus embrace “self-determination” of some groups to support in one way or another separatist claims compatible with their interests (the massive Western support for Kosovo’s independence from Serbia is a good example of this) while proclaiming that the principle of territorial integrity prevails at home or in the territory of friends and allies. In a book published several years ago I have cited several historical and contemporary examples of

States who feel no embarrassment in embracing some separatist movements in neighbouring countries, while strongly opposing secession in the name of “territorial integrity” in most other cases.<sup>1</sup>

The case of Crimea<sup>2</sup> highlighted these contradictions once again. Russia, which for years was a big champion of the principle of respect for territorial integrity of States (especially during the 1990s when it was fighting the separatist attempts in Chechnya and Tatarstan), suddenly started claiming that the principle of self-determination of Russian speaking populations in Crimea prevails over the territorial integrity of Ukraine. Western States, which constantly supported in one way or another the Kosovo separatist movement since 1998 and which recognized Kosovo just a few hours after the declaration of independence on 17.2.2008, suddenly rediscovered, because of the crisis in Ukraine, the merits of the principle of territorial integrity and other basic principles of international law often violated by these same Western States during these last years.

Indeed, before focusing in this article on Russia’s contradictions and argumentation impasses in relation to the crisis in Crimea, it is worthy to recall the inconsistencies and “double standards” policies used by some western States. As *Marcelo Kohen* put it when writing about the events in Crimea:

“Are the accusers being consistent? They are the ones who encouraged the secession of Kosovo by any means, who supported the secession of South Sudan, who used force without Security Council authorization and conducted a policy that led to the *de facto* fragmentation of Iraq, Afghanistan, and Libya. [...] When the Kosovo parliament declared independence, those same governments affirmed that the violation of the Serbian Constitution was irrelevant and that international law did not prohibit unilateral declarations of independence. [...] Vladimir Putin’s government is paying them with the same coin. [...] Contradiction in international policy and disregard for international law when it suits the interests of one side or another come at a price. Western capitals have been left helpless against Russia. Not militarily or economically. They have been morally helpless. By dint of ignoring the basic rules governing international relations and invoking spurious legal arguments or claiming that the actions in question ‘did not consti-

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<sup>1</sup> *T. Christakis*, *Le droit à l’autodétermination en dehors des situations de décolonisation*, Paris: La Documentation Française, 1999, 246 et seq.

<sup>2</sup> The facts are well known and will not be presented here in detail. Crimea’s inhabitants will go down in the record books for achieving the fastest effective secession in modern history. In just days, with the help of the Russian army, they managed to take possession of the peninsula excluding any exercise of authority by the Ukrainian Government, organizing a snap referendum on 16.3.2014 and securing their *de facto* annexation by Russia the very next day. For a timeline of events see <<http://www.bbc.com>>.

tute precedents', by dint of promoting the break-up of states, imposing a culture of force in international relations, those who claim to represent democratic values on the international stage have ended up weakening the framework of international law and the system of collective security."<sup>3</sup>

Could the Crimean crisis and the reactions it has prompted in the West with very forceful reminders of their attachment to international law signal a "change of tack"? It was a relief to hear the United States (US) representative to the United Nations (UN) Security Council so vigorously "reiterate the support of [her] Government for the principles of the United Nations Charter"<sup>4</sup> exactly eleven years after the unlawful intervention by the US and the United Kingdom (UK) in Iraq (an intervention that deeply and lastingly destabilized that country<sup>5</sup>) and barely nine months after the US stated that it was prepared, with France, to violate those same principles by attacking Syria without Security Council authorization.<sup>6</sup>

In this article we will not discuss further these contradictions of Western States which are interesting but irrelevant, in order to assess the events in Crimea from a legal point of view: Indeed, two wrongs do not make a right and the violation of international law by certain – Western countries in other cases, hardly entitles Russia to violate international law by infringing Ukraine's territorial integrity.

Furthermore, we will not examine as such the political events in Kiev that preceded the secessionist crises in Crimea and eastern Ukraine, and especially the demonstrations in Maidan Square during the winter of 2013-2014. It is well-known that Russia protested on several occasions about what it saw as "Western interventionism" in Ukraine's internal affairs which explained, Russia claimed, the reactions of the Russian-speaking populations in the country after the overthrow of *Victor Yanukovich*.<sup>7</sup> Whatever the truth in these allegations,<sup>8</sup> an eventual western interference in Ukraine's in-

<sup>3</sup> *M. Kohen*, L'Ukraine et le respect du droit international, *Le Temps*, 13.3.2014. (*our translation*).

<sup>4</sup> S/PV. 7167 of 2.5.2014, 8.

<sup>5</sup> See *P. Bergen*, Bush's Toxic Legacy in Iraq, 16.6.2014 <<http://www.edition.cnn.com>>.

<sup>6</sup> This initial intention was not pursued to its end. See *T. Christakis*, Is Military Intervention in Syria Legal?, 11.9.2013, <<http://www.euronews.com>>.

<sup>7</sup> See for example Russia's intervention in the Security Council in Report S/PV.7125 of 3.3.2014, 4: "Those who seek to interpret this situation as a form of aggression and are threatening sanctions and boycotts of all kinds are the very partners who have consistently encouraged political forces close to them to engage in ultimatums, to reject dialogue, to ignore the concerns of southern and eastern Ukraine, and ultimately to polarize Ukrainian society."

<sup>8</sup> Not forgetting that Russia itself could also be accused of a long history of interference in Ukraine's internal political affairs.

ternal affairs<sup>9</sup> cannot be corrected by an unlawful military intervention by Russia against that country.

Finally, we will not discuss here the extent to which the Crimean crisis is a form of “Russian revenge” against the West for Kosovo<sup>10</sup> for the second time since the events of August 2008 in Abkhazia and South Ossetia<sup>11</sup> and against the unfortunate western attempts to present Kosovo as a “*sui generis*” case constituting “no precedent” for international law.<sup>12</sup>

In this article we will focus, instead, on the relevance of the principle of self-determination in the Crimean conflict.<sup>13</sup> We will try to show why the

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<sup>9</sup> *Marcelo Kohen* wrote about this that “in the case of Ukraine, neither the United States of America nor the European Union have hidden their support for the Maidan demonstrators and opposition forces. This too is a violation of the principle of non-interference. The presence of anti-Russian and anti-Semitic extremist elements within the provisional government, the abolition of the Russian language as one of the country’s official languages – when it is spoken by a large proportion of the population –, the serious accusations that the victims of shots fired at Maidan – which hastened the departure of the elected president – were the work of snipers in the pay of certain opposition elements, failed to stir western capitals. While Russian interference is unacceptable, US and European interference is equally so.” *M. Kohen* (note 3), (*our translation*).

<sup>10</sup> It is noteworthy that in both instances unlawful military intervention opened the way to secession. If Russia’s military presence and action authorized the incorporation of Crimea in Russia in March 2014, we should not forget that it was NATO intervention against Serbia in 1999 which opened the way for international administration of Kosovo from 1999 to 2008, loss of control of Kosovo by Serbia and, finally, the declaration of independence of Kosovo in 2008. Nonetheless Serbia did not use the argument of illegal use of force in order to taint Kosovo’s independence in its submissions to the ICJ in 2010 over the Advisory Opinion on the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. This may indicate that for Serbia the causal link between the military intervention in 1999 and Kosovo’s declaration of independence in 2008 was too remote for the argument to be used. See *T. Christakis*, *The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?*, *LJIL* 24 (2011), 83.

<sup>11</sup> In August 2008, just a few months after recognition of Kosovo by Western States, Russia intervened in Georgia and expelled the Georgian military from the separatist territories of South Ossetia and Abkhazia. While it had helped in several ways the separatists since the outbreak of the secession conflicts in 1992, Russia had been reluctant to recognize them as independent States before August 2008. The influence of the “Kosovo precedent” in Russia’s decision to recognize seems thus evident. In an interview with BBC the then Russian President *Dmitry Medvedev* justified this recognition by saying that “If Kosovo is a special case, [Georgia] is also a special case”. See *G. Dubinsky*, *The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle*, *Yale J. Int’l L.* 34 (2009), 241.

<sup>12</sup> As we explained elsewhere, the ICJ refused to view Kosovo as a “*sui generis*” case, *T. Christakis* (note 10), 80 et seq.

<sup>13</sup> Crimea’s secession did not mark the end of attempted secessions in Ukraine. Early in April 2014 separatist agitation spread through eastern Ukraine. Despite Russia, Ukraine, the United States, and the European Union signing an agreement on 17 April for the disarming of, illegally armed groups, separatist insurgents continued to gain ground controlling a dozen or so cities in eastern Ukraine. On 11.5.2014 separatists organized a referendum in the Do-

“dilemma” between self-determination and territorial integrity is a false one. On the one hand, there is no “right” to external self-determination and unilateral secession for any “people” or ethnic group outside the colonial context (II.). But while secession is not authorized by international law neither is it, in principle, prohibited by the principle of territorial integrity, save in the event of violation of a fundamental rule of international law, which raises the crucial issue of the unlawfulness of Russian military intervention in Crimea (III.).

## II. No Right of External Self-Determination Beyond the Context of Decolonization

In its official declarations in relation with the situation in Crimea, Russia argued several times that the people of Crimea had a right to external self-determination. Russia’s representative in the Security Council thus declared that:

“through a free referendum, the people of Crimea have fulfilled what is enshrined in the Charter of the United Nations and a great number of fundamental international legal documents – their right to self-determination”.<sup>14</sup>

Similarly during the debates in the UN General Assembly Russia argued that:

“Russia could not refuse the Crimeans’ wish to support their right to self-determination in fulfilling their long-standing aspirations”.<sup>15</sup>

President *Vladimir Putin* of Russia also insisted several times that there was no “annexation” of Crimea by Russia, just a genuine exercise of the right of self-determination by the people of Crimea that Russia had to take into consideration.<sup>16</sup>

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netsk and Luhansk regions which they claimed voted by a large majority (89 %) in favour of secession. Separatist leaders then asked Russia to consider the “absorption of the Popular Republic of Donetsk within the Russian Federation”, but this time Russia did not go ahead with the annexation. At the time of writing (October 2014), the secessionist fighting is continuing in eastern Ukraine. Without ignoring the ongoing situation in the Donetsk region, this article will concentrate on the secession and annexation of Crimea.

<sup>14</sup> S/PV.7144 of 19.3.2014, 8.

<sup>15</sup> A/68/PV.80 of 27.3.2014, 3.

<sup>16</sup> In an interview given to the French television on 3.6.2014, *V. Putin* said: “It’s a delusion that Russian troops annexed Crimea. Russian troops did nothing of the kind. Russian troops were in Crimea under an international treaty on the deployment of the Russian military base. It’s true that Russian troops helped Crimeans hold a referendum on their (a) independence

A few other States like Armenia,<sup>17</sup> Nicaragua,<sup>18</sup> Afghanistan,<sup>19</sup> Kyrgyzstan<sup>20</sup> or the Democratic People's Republic of Korea<sup>21</sup> followed Russia in this same path.

However, this does not seem to be correct in positive international law. In principle there is no right to external self-determination outside of the context of decolonization (1.). The historical and moral claims raised by Russia in relation to Crimea are thus not relevant (2.). Indeed it is interesting to highlight that until recently Russia shared this view according to which there is no right to external self-determination in the post-colonial world (3.). As for the theory of "remedial secession" presented by some as an exceptional right to external self-determination, it seems controversial and in any event it is not applicable here (4.).

## 1. External Self-Determination and the Saltwater Test

Let us begin by emphasizing that obviously the question of "lawfulness" of secession does not arise when the secession is the outcome of a consensus-based process between the central government and the inhabitants of a specific region. International law has thus little to say about, for instance, the referendum that took place in Scotland on 18.9.2014 and which was organized on the basis of an agreement between Scotland and the United Kingdom.<sup>22</sup>

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and (b) desire to join the Russian Federation. No one can prevent these people from exercising a right that is stipulated in Article 1 of the UN Charter, the right of nations to self-determination. In accordance with the expression of the will of people who live there, Crimea is part of the Russian Federation and its constituent entity." See <[http://www.voiceofrussia.com/news/2014\\_06\\_05/Russia-never-annexed-Crimea-no-plans-to-intervene-Ukraine-its-Western-delusion-Putin-5970/](http://www.voiceofrussia.com/news/2014_06_05/Russia-never-annexed-Crimea-no-plans-to-intervene-Ukraine-its-Western-delusion-Putin-5970/)>.

<sup>17</sup> See for example the declaration of Armenian President *Serzh Sargsyan*, Armenia Backs Crimea's Right to Self-Determination, 21.3.2014, <<http://www.rt.com/news/armenia-supports-crimea-referendum-473/>>.

<sup>18</sup> On 27.3.2014 Nicaragua officially recognized Crimea as a part of Russia. See <[http://www.voiceofrussia.com/news/2014\\_03\\_27/Nicaragua-unconditionally-recognizes-incorporation-of-Crimea-into-Russia-7481/](http://www.voiceofrussia.com/news/2014_03_27/Nicaragua-unconditionally-recognizes-incorporation-of-Crimea-into-Russia-7481/)>.

<sup>19</sup> See <<http://www.rt.com/news/afghanistan-recognize-karzai-crimea-609/>>.

<sup>20</sup> <<http://www.sputniknews.com/world/20140320/188606372/Kyrgyzstan-Recognizes-Crimea-Referendum-Results.html>>

<sup>21</sup> According to this state "the reunification of Ukraine with Russia has been undertaken in a legitimate manner by means of a referendum based on the voluntary wishes of the people of Ukraine in line with the right to self-determination set forth in the Charter of the United Nations", in: A/68/PV.80 of 27.3.2014, 21.

<sup>22</sup> Scotland has voted to stay in the United Kingdom after voters decisively rejected independence (the "No" side won with 2,001,926 votes over 1,617,989 for "Yes").

The real question of interest to us is whether such a secession is lawful from an international law point of view when the central government is opposed to it, as in Ukraine. Is there, then, a right of unilateral secession, a right of “external self-determination”?<sup>23</sup>

Current positive law, as developed since the UN Charter was adopted, reserves the right of external self-determination to colonized peoples. This right more specifically concerns peoples living in two types of territories:

- *Trust territories* within the meaning of Chapter XII of the UN Charter<sup>24</sup> (the status has been inactive since the last trust territory, Palau, became independent in free association with the United States in 1994);<sup>25</sup>

- *Non-self-governing territories* within the meaning of UN Charter Chapter XI. The Charter offers no definition of “non-self-governing territories”. Its Article 73 stipulates simply that these are “territories whose peoples have not yet attained a full measure of self-government”. Initially these territories were identified by the relevant Member States who were supposed to spontaneously meet their obligation imposed by Article 73 by transmitting information about those territories. As some Member States declined to communicate that information,<sup>26</sup> the UN General Assembly then developed criteria for the determination of “non-self-governing territories”. On 15.12.1960 the UN General Assembly thus adopted Resolution 1541 (XV) defining these territories as “a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”, which at the time the UN Charter was drafted was “then known to be of the colonial type” and which is arbitrarily “in a position or status of subordination” in respect of the metropolitan state.<sup>27</sup>

The criterion of “geographical distinctness” meant that peoples whose territory is not geographically separated from the metropolitan state, even if they are in a “status of subordination” could not become part of the list.

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<sup>23</sup> As opposed to the various hypotheses of “internal self-determination” which do not threaten the country’s territorial integrity.

<sup>24</sup> In practice the trusteeship system primarily concerned territories formerly subject to the League of Nations mandate system, that is, territories that before the First World War belonged to Germany and the Ottoman Empire, the administration of which was conferred by the League of Nations on the victorious states. In all eleven territories were under the trusteeship system.

<sup>25</sup> R. Goy, *La fin de la dernière tutelle*, A.F.D.I., Vol. XL, 1994, 356 et seq.

<sup>26</sup> The problem became even more serious when Portugal and Spain, which only became UN members in 1955, refused to make the Chapter XI declaration for their colonial territories considering them to be “overseas provinces”.

<sup>27</sup> See Resolution 1541 (XV) of 15.12.1960, “Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter”.

These criteria sheltered a good many states, such as China, the Soviet Union, and some newly independent states.<sup>28</sup> This highly selective definition of the principle of decolonization was presented half seriously and half tongue-in-cheek as the “salt-water theory”: the principle applied “wherever the domination of one people by another crosses seas and oceans (notwithstanding the famous expression of the French delegate during the debate on Algeria that has remained in the annals of the United Nations that ‘the Mediterranean flows through France like the Seine flows through Paris’), but not where such domination crosses fresh-water only (such as the rivers of Eastern Europe)”.<sup>29</sup>

Behind this “salt-water theory” lay the General Assembly’s wish to address only a very specific historical phenomenon, that of the colonization of certain overseas territories by the Western powers. The countries held to have “non-self-governing territories” were Australia, Belgium, France, the Netherlands, New Zealand, Portugal, Spain, the United Kingdom, and the United States. With or without the consent of these countries, the General Assembly and the Decolonization Committee designated many territories as coming under Chapter XI, the most recent example being the renewed inclusion on the list of French Polynesia on 17.5.2013,<sup>30</sup> which was a remarkable event since the previous inscription dated from 1986 and concerned another French territory, New Caledonia. In any event, today there remain just 17 “non-self-governing” territories to be decolonized.<sup>31</sup>

## 2. The Irrelevance of Historical Moral Claims

The “salt-water theory” and the UN criteria for the determination of “peoples” entitled to external self-determination have, of course, been roundly criticized by all those who considered there was no reason, no moral justification, to separate “classical” colonialism from other forms of domination, economic exploitation, or cultural discrimination. Many secessionist movements have often argued that the “peoples” they represent have been “colonized”, “subjected”, “exploited”, and so on. As *M. Pomerance* observed, “every demand for self-determination is, presumably, based on a

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<sup>28</sup> Cf. *G. Simpson*, *The Diffusion of Sovereignty: Self-Determination In the Postcolonial Age*, *Stanford J. Int’l L.* 32 (1996), 272 et seq.

<sup>29</sup> *G. Abi-Saab*, *Cours général de droit international public*, RdC 207 (1987) (VII), 1996, 396.

<sup>30</sup> See <<http://www.un.org>>.

<sup>31</sup> For the list see <<http://www.un.org>>.

subjective conviction that present rule is ‘alien’ or ‘colonial’, and that its continuance cannot readily be tolerated”.<sup>32</sup> For these peoples, there is no reason to consider that “classical” European colonialism gives entitlement to create a state whereas other forms of colonialism or domination confer only limited rights, if any. Likewise some commentators underscore that what matters is to protect peoples and to give them the possibility of freely determining their internal and external political status without any discrimination. It is therefore unacceptable, they claim, to refuse non-colonial peoples a right to secession because they fail to fulfil certain artificial criteria laid down by the UN General Assembly.<sup>33</sup>

Whatever the political, historical or moral value of these arguments it has to be observed that legally, as positive law currently stands, they are not admissible. It is clearly established that, situations of decolonization aside,<sup>34</sup> no ethnic group, no “people” can claim a right of external self-determination.

It is clear that no international treaty confers a right of external self-determination on an ethnic or other group apart from in the context of decolonization. Article 1 of the two international Covenants of 1966 was never intended or construed as granting a right of secession to any ethnic group.<sup>35</sup> Besides, analysis of state practice and *opinio juris* shows that customary international law does not authorize secession.<sup>36</sup> All the hard law and soft law texts on the rights of peoples, minorities, and indigenous peoples include “safeguard clauses” firmly and clearly excluding any right of external self-determination.<sup>37</sup>

There are several reasons for states not wanting to extend the right of external self-determination beyond the colonial context. The UN urged the

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<sup>32</sup> M. Pomerance, *Self-Determination in Law and Practice – The New Doctrine in the United Nations*, 1982, 14.

<sup>33</sup> As L. Buchheit observes in *Secession: The Legitimacy of Self-Determination*, 1978, 17: “One searches in vain [...] for any principled justification of why a colonial people wishing to cast off the domination of its governors has every moral and legal right to do so, but a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of the cartographers, annexed to an independent State must forever remain without the scope of the principle of self-determination.”

<sup>34</sup> In practice the UN organs have extended this rule to cover the situation of peoples subject to foreign “occupation”. This extension of the right of self-determination to “occupied” peoples reflects a pragmatic approach – the wish to include certain exceptional cases such as Israel’s occupation of the Palestinian territories. Thus, ever since Resolution 2649 (XXV) of 30.11.1970 the UN General Assembly has annually affirmed the Palestinian people’s right to self-determination.

<sup>35</sup> T. Christakis (note 1), 145 et seq.

<sup>36</sup> T. Christakis (note 1), 183 et seq.

<sup>37</sup> For examples, see T. Christakis (note 1).

populations of non-self-governing territories to seek their independence because it held European colonialism to be a scourge of humanity; however, this attitude was not a threat for interstate society. True, decolonization was “the greatest of territorial reshuffles”,<sup>38</sup> but it was also comparatively swift and contained. Conversely, accepting to extend a right of secession to the post-colonial context would open up Pandora’s box by allowing the world’s 6000 ethnic groups to claim a right of secession.

The inhabitants of Crimea and the Donetsk Basin therefore have no “right of secession”, no more so than Quebecois, Chechens, Kurds, Catalans and dozens of other groups worldwide that have developed “self-determination” movements (peaceful or otherwise).

As for the historical arguments advanced by the authorities in Crimea and Russia,<sup>39</sup> whatever their moral or political value, they have not the least validity in legal terms. As I have shown elsewhere,<sup>40</sup> using the principle of self-determination to “undo” history and “right historical wrongs” sets us on a very slippery slope and raises the question of how far back in time we should go.<sup>41</sup> This was pointed out by France’s representative on the Security Council who observed on Crimea:

“Crimea was Russian from 1783 to 1954. What does that mean? Will we take out our history books to review our borders or challenge or defend them? What date will we go back to? After all, Crimea was Russian for 170 years but a vassal of Turkey for three centuries. We know only too well that anything can be justified by history, particularly the unjustifiable.”<sup>42</sup>

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<sup>38</sup> *M. Torrelli*, *Le printemps des peuples*, in: *Mélanges Isoart*, 1996, 346.

<sup>39</sup> The day Crimea was annexed *V. Putin* declared to the Russian Duma: “Everything in Crimea speaks of our shared history and pride [...] In people’s hearts and minds, Crimea has always been an inseparable part of Russia. [...] [I]n 1954, a decision was made to transfer Crimean Region to Ukraine, along with Sevastopol [...]. This was the personal initiative of the Communist Party head Nikita Khrushchev. [...] [T]his decision was made in clear violation of the constitutional norms. [...] Crimea is historically Russian land and Sevastopol is a Russian city.” (Transcript of President *V. Putin*’s Speech to the Duma on 17.3.2014 at <<http://www.washingtonpost.com>>. See also the Russian ambassador’s speech to the Security Council claiming “A historic injustice has been righted ...”, S/PV. 7144 of 19.3.2014, 8.

<sup>40</sup> *T. Christakis* (note 1), 61 et seq.

<sup>41</sup> *H. Nicolson* recalls for example that “during the Paris Peace Conference of 1919 when the question of the emphasis to be placed on ‘historical’ claims for self-determination was raised, the Italians showed a marked predilection for the Empire of Hadrian”. Cited by *L. Buchheit* (note 33), 229.

<sup>42</sup> S/PV.7138 of 15.3.2014, 5.

### 3. Russia's (Former) Strong Opposition to Secession

It is interesting to highlight that, until relatively recently, Russia was a strong opponent of any effort to interpret the principle of self-determination as including any “external dimension” outside the colonial context.

Russia never suggested such an interpretation in its understanding of Article 1 of the International Covenant on Civil and Political Rights (ICCPR) as presented in its periodic reports submitted to the Human Rights Committee in 1995,<sup>43</sup> 2002,<sup>44</sup> 2008<sup>45</sup> and 2013.<sup>46</sup> On the contrary, the analysis of these reports demonstrates that Russia seemed to consider that self-determination outside the colonial context only has an “internal dimension”.<sup>47</sup> The Russian delegate, *V. Kovalev*, clearly affirmed in 1995 that according to Russia it was impossible to interpret international instruments on self-determination in a way that could threaten the territorial integrity of States.<sup>48</sup>

This position was undoubtedly in accordance with the logic of the Russian Constitution of 1993 which takes a very strong stance against unilateral secession.<sup>49</sup> It was also in accordance with the position of the Russian Constitutional Court which in two major decisions concerning Tatarstan (1992) and Chechnya (1995) referred to international law, and para. 7 of the Friendly Relations Declaration, to conclude that Article 66 of the Russian Constitution, which did not recognize a right to secession, was in accord-

<sup>43</sup> Human Rights Committee, Fourth Periodic Report of Russia, CCPR/C/84/Add.2 (22.2.1995).

<sup>44</sup> Human Rights Committee, Fifth Periodic Report of Russia, CCPR/C/RUS/6 (9.12.2002).

<sup>45</sup> Human Rights Committee, Sixth Periodic Report of Russia, CCPR/C/RUS/6 (5.2.2008).

<sup>46</sup> Human Rights Committee, Seventh Periodic Report of Russia, CCPR/C/RUS/7 (29.1.2013).

<sup>47</sup> Russia explains thus in its 1995 report (p. 3) that “the way in which the right to self-determination is understood in Russia embraces various forms of national territorial and national cultural autonomy.

<sup>48</sup> See CCPR/C/SR.1427 (24.7.1995), § 54.

<sup>49</sup> See for example: Art. 4 § 3: “The Russian Federation shall ensure the integrity and inviolability of its territory”; Art. 5 § 3: “The federal structure of the Russian Federation shall be based on its State Integrity”; Art. 13 § 5: The establishment and activities of public associations whose goals and activities are aimed at the forcible changing of the basis of the constitutional order and at violating the integrity of the Russian Federation, at undermining its security, at creating armed units, and at instigating social, racial, national and religious strife shall be prohibited”. Art. 66 § 5: “The status of a subject of the Russian Federation may be changed only with mutual consent of the Russian Federation and the subject of the Russian Federation in accordance with the federal constitutional law”.

ance with universally recognized principles concerning the right of nations to self-determination.<sup>50</sup>

During the same period Russia was also acting against unilateral secession at the international level. In 1995 it took the initiative to submit to the Heads of State of the Commonwealth of Independent States (CIS) a “Memorandum on the Maintenance of Peace and Stability in the CIS” signed in Alma Ata on 10.2.1995. In this document the CIS States (including Russia and Ukraine) declare, among others, that they “shall [...] take measures to put a stop to any manifestation of separatism” and “bind themselves not to support separatist movements and separatist regimes in the territory of other States members if they arise”.<sup>51</sup>

After the recognition of Kosovo by Western States in 2008, however, Russia’s official position in relation to secession and international law seemed to change. In August 2008 Russia put forward, for the first time to our knowledge, the theory of “remedial secession” in order to justify its decision to recognize Abkhazia and South Ossetia.<sup>52</sup> The same argument of “remedial secession” was used in the April 2009 written statement submitted by Russia at the International Court of Justice (ICJ) in relation to the “Kosovo” advisory opinion proceedings. While Russia clearly explains in this statement that, normally, there is no right to “external” self-determination outside the colonial context, it submits that there is an exception “limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question”.<sup>53</sup>

As we will see immediately, the argument of “remedial secession” is irrelevant in relation to the crisis in Crimea. This is probably the reason why Russia preferred to abandon altogether its traditional position of inexistence of a right to “external self-determination” outside the context of decoloni-

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<sup>50</sup> See *J. Summers*, *Peoples and International law. How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, 2007, 274 et seq. and *P. Gaeta*, *The Armed Conflict in Chechnya before the Russian Constitutional Court*, EJIL 7 (1996), 564 et seq.

<sup>51</sup> See §§ 7 and 8 of the Memorandum. See also § 3: “The States support the inviolability of one another’s existing frontiers and are opposed to any acts which undermine their stability ...” and § 5 “The States shall refrain from any direct or indirect interference in the internal affairs of another State member”.

<sup>52</sup> In an interview with the BBC <<http://www.news.bbc.co.uk>> the Russian President *D. Medvedev* said that “Russia had been obliged to act following a ‘genocide’ started by his Georgian counterpart against separatists in South Ossetia”.

<sup>53</sup> See <<http://www.icj-cij.org>>, § 88 (and, more generally, §§ 74-104). Russia concludes that in no case could the people of Kosovo benefit from such an exceptional right and that their declaration of independence was not in accordance with general International Law.

zation, suggesting that the people of Crimea and Eastern Ukraine were exercising “a right enshrined in the Charter of the United Nations”.

#### 4. The Irrelevance of the Theory of “Remedial Secession”

“Remedial secession” theory is a doctrine whereby an infra-state community that is the victim of oppression and massive violations of human rights by the encompassing state and that is unable to exercise its right to internal self-determination can resort in certain circumstances to secession by way of *ultimum remedium*.

Even if, to the best of my knowledge, Russia has not invoked this theory about the crisis in Crimea, it has nonetheless implicitly but clearly given the impression that it was relying on it by referring on several occasions to a very worrying situation for the Russian-speaking populations of Crimea and eastern Ukraine. Thus Russia spoke of “an unconstitutional armed *coup d'état* carried out in Kyiv by radical nationalists in February, as well as by their direct threats to impose their order throughout Ukraine”,<sup>54</sup> who “wish to exploit the fruits of their victory to trample the rights and basic freedoms of the people”<sup>55</sup> and who made “threats of violence [...] against the security, lives and legitimate interests of Russians and all Russian-speaking peoples”.<sup>56</sup> For Russia, therefore, it was an issue of “defending our citizens and compatriots, as well as the most import[ant] human right – the right to life”.<sup>57</sup>

Even so, this theory of “remedial secession” cannot underpin an “exceptional” right of the inhabitants of Crimea to self-determination for at least two reasons.

First, it should be noted that the “remedial secession” theory is highly controversial and it is still not clearly established that it is accepted by positive law. It might be recalled in this respect that the starting point for the contemporary construction of the “remedial secession” theory was the Declaration on Friendly Relations (Resolution 2625) of the UN General Assembly of 24.10.1970. This Declaration, which is hostile to secession, plainly shows that self-determination other than in the context of decolonization should not endanger the territorial integrity of independent states. However, the Declaration’s attachment to the principle of states’ territorial integri-

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<sup>54</sup> S/PV.7138 of 15.3.2014, 2.

<sup>55</sup> S/PV.7125 of 3.3.2014, 3.

<sup>56</sup> S/PV.7125 of 3.3.2014, 3.

<sup>57</sup> S/PV.7125 of 3.3.2014, 3.

ty seems to come up against an important limitation. Paragraph 7 of the Declaration, concerning the right of self-determination, states that, in the post-colonial context, this right cannot be construed as authorizing or encouraging any action that would dismember or impair the territorial integrity or political unity:

“of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”.

The observance of states' territorial integrity therefore seems to be conditional and the theory of “remedial secession” has been constructed by means of an *a contrario* interpretation. This safeguard clause has been taken up in other texts, as well as by national courts and tribunals (e.g. Canada's Supreme Court in 1998) and certain international organs (especially the African Commission on Human and Peoples' Rights in two separate cases examined in 1996 concerning Katanga and in 2009 concerning southern Cameroon) although without any positive assertions being made.<sup>58</sup>

Since then, doctrinal debate about the positive character of “remedial secession” has raged on. While some scholars have come out clearly in favour of the positive character of the theory,<sup>59</sup> others wonder whether what seems an ever more widely shared *opinio juris* might not have preceded still insufficient practice,<sup>60</sup> while yet others express great doubt as to the positive character of the theory.<sup>61</sup>

The proceedings in the International Court of Justice on the advisory opinion requested by the UN General Assembly on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* confirmed the deep division in the international community in this regard. While some states supported this theory in their written and oral arguments to the Court,<sup>62</sup> others opposed it.<sup>63</sup> For its part, the International

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<sup>58</sup> For a presentation of these cases see *T. Christakis*, *Secession*, in: Oxford Bibliographies Online, 2012, <<http://www.oxfordbibliographies.com>>.

<sup>59</sup> Beginning with *L. Buchheit* (note 33).

<sup>60</sup> *T. Christakis* (note 1), 285 et seq. or *C. Griffioen*, *Self-Determination as a Human Right: The Emergency Exit of Remedial Secession*, 2009, <<http://www.staging.njblog.nl>>.

<sup>61</sup> See for example *O. Corten*, *A propos d'un désormais 'classique': Le droit à l'autodétermination en dehors des situations de décolonisation, de Théodore Christakis*, *RBDI* 36 (1999), 340 et seq. or *A. Tancredi*, *Neither Authorized Nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia*, *Ital. Y.B. Int'l L.* 18 (2008), 37 et seq.

<sup>62</sup> See the expositions by Albania, Estonia, Finland, Germany, Ireland, Jordan, Lithuania, the Maldives, the Netherlands, Poland, Russia, Slovenia, Switzerland, and Kosovo.

Court of Justice carefully skirted around the question in its opinion of 22.7.2010, preferring instead a very close reading of the General Assembly's request.<sup>64</sup>

The second reason the “remedial secession” theory is not applicable in the case of Crimea is of a factual nature. There is absolutely no indication that massive violations of human rights have been committed by the Ukrainian government in these regions. This has indeed been emphasized on several occasions by various states in the Security Council.<sup>65</sup>

### III. No Prohibition of Secession Either? The Limits of the Principle of Effectiveness

The fact that positive law does not recognize that “peoples” or “ethnic groups” have a right of secession other than in the context of decolonization does not mean that secession is “prohibited” as a matter of principle (1.). Secession in the post-colonial world is not so much a question of “law” as of “fact” and the principle of effectiveness is supposed to be the fundamental criterion (2.). This does not mean, though, that international law tars with the same brush both separatist groups and governments fighting against secession. Law is not “neutral” in this domain and stands clearly on the side of central governments which enjoy a number of privileges denied to separatists (3.). Above all, international law prohibits secession when it results from a violation of a fundamental norm such as the prohibition of aggression, which inevitably raises the question of the legal characterization of the events in Crimea (4.).

#### 1. “General International Law Does Not Prohibit Secession”

The fact that international law does not prohibit secession (save the situations that will concern us below) may seem surprising on the face of it when a comparative review of states' constitutions reveals that the vast majority

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<sup>63</sup> See the expositions by Argentina, Azerbaijan, Belorussia, Bolivia, Brazil, Burundi, China, Cyprus, Iran, Romania, Serbia, Slovakia, Spain, Venezuela, and Vietnam.

<sup>64</sup> *T. Christakis* (note 10), 78.

<sup>65</sup> “Listening to the representative of Russia, one might think that Moscow had just become the rapid response arm of the office of the United Nations High Commissioner for Human Rights” ironized the United States in S/PV.7125 of 3.3.2014, 4.

of them prohibit unilateral secession.<sup>66</sup> How is it that states do not prohibit internationally what they generally prohibit domestically? There is often in reality, as we have seen in relation with Russia, a marked contrast between states' attitudes toward a secessionist crisis threatening their own territory and their attitude when the crisis threatens the territorial integrity of some other state.<sup>67</sup> States' contradictions, the reflection of their interests and political preferences, probably go some way to explaining the absence of any prohibition on secession in international law, the remainder of the explanation being supplied by states' realism and the technically near-impossible character of a general prohibitory rule. States *will not* and *cannot* close the door on secession for good because they know it is difficult to stop history and to freeze the map of the world.

Accordingly, no international treaty prohibits secession; as for state practice and their *opinio juris*, they do not indicate the existence of any such prohibition either. The several "safeguard clauses" provided for in the relevant soft law and hard law texts already referred to are not designed to prohibit secession but rather to exclude any interpretation favourable to the existence of a right of secession outside of the context of decolonization.

The International Court of Justice was right on this in affirming in its advisory opinion of July 2010 on Kosovo that

*"general international law contains no applicable prohibitions of declarations of independence"*.<sup>68</sup>

From this point of view, therefore, a referendum such as that organized by the Crimean authorities on 16.3.2014 is not as such "unlawful" under international law, no more so for that matter than a unilateral declaration of independence that might follow on from such a referendum. This point had been illustrated by *James Crawford* in his oral argument to the ICJ in the Kosovo affair:

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<sup>66</sup> Of 108 constitutions I have reviewed just two (Saint Christopher and Nevis of 1983 and Ethiopia of 1994) seem to recognize such a right of unilateral secession. More than 80 have wording showing that any unilateral attempt to secede should be deemed anti-constitutional, and some of them even provide for the state to adopt concrete measures to combat secessionist activities. The silence of the constitutions of certain countries as to the possibility of unilateral secession is usually construed by the supreme courts or political organs of those states as ruling out any right of secession, as illustrated by the celebrated decision in *Texas v. White* of 1868 of the US Supreme Court or the opinion of Canada's Supreme Court on Quebec of 20.8.1998.

<sup>67</sup> For examples see above note 1.

<sup>68</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports 2010, para. 84.

*“Mr. President, Members of the Court, I am a devoted but disgruntled South Australian. ‘I hereby declare the independence of South Australia.’ What has happened? Precisely nothing. Have I committed an internationally wrongful act in your presence? Of course not.”*<sup>69</sup>

True, such acts are clearly violations of the Ukrainian Constitution which adheres to a unitary approach to the state.<sup>70</sup> But such constitutional provisions have no legal effect on the international order. They are “mere facts” as affirmed by the Permanent Court of International Justice back in 1926<sup>71</sup> or the Badinter Commission in 1991 about the Yugoslav Constitution.<sup>72</sup> The argument of several Western leaders that the Crimean referendum is illegal because contrary to the Ukrainian Constitution is therefore not admissible as such. Criticisms in respect of the arrangements for organizing the referendum might be much more relevant,<sup>73</sup> even if it may be wondered whether positive international law contains enough specific rules on the subject to declare this referendum “unlawful” on a procedural basis.<sup>74</sup>

## 2. The Test of Effectiveness

In the absence of any prohibitory rule, any infra-state entity may attempt to secede. Should it incontrovertibly succeed in establishing a new effective situation, that is, in bringing together the “constituent components” of a state, then a new state may be born.

For the secessionist entity to have its secession recognized, it will have to convince the members of the international community of the existence of a

<sup>69</sup> United Kingdom, Verbatim Record, CR 2009/32 (2009), 47.

<sup>70</sup> Under Article 73 of the Ukrainian Constitution “Alterations to the territory of Ukraine shall be resolved exclusively by the All-Ukrainian referendum”.

<sup>71</sup> See *Case concerning certain German interests in Polish Upper Silesia*, PCIJ, Judgment of 25.5.1926, Series A, No. 7, 19.

<sup>72</sup> This was the arbitration commission (which despite its name was only advisory) of the European Conference for Peace in Yugoslavia, set up by the Council of Ministers of the European Communities on 27.8.1991. Opinion No. 1 of 29.11.1991, published in RGDIP (1992), 264.

<sup>73</sup> As emphasized, for example, by the US in the Security Council “The self-anointed Crimean leaders set a referendum with full backing from Russia. That date was to be 25 May. They then reset the date for 16 March, allowing less than two weeks to prepare for and carry out a vote – two weeks on an issue of monumental importance [...]. The referendum ballot that will be put to voters contains no option to vote for the status quo. Ballots with nothing checked will reportedly be ruled invalid”. S/PV.7134, 13.3.2014, 6.

<sup>74</sup> See A. Peters, Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea’s Alteration of Territorial Status under International Law, at <<http://www.ejiltalk.org>>.

“population” in a “defined territory” with a “sovereign government”. This last point is decisive in passing the “effectiveness test”. The secessionist entity must not only put in place a governmental apparatus but also convince others that this government is definitively sovereign, sovereignty being the idea which “in the relations between States signifies independence”, as *Max Huber* emphasized in 1928.<sup>75</sup> A new state cannot therefore be born of a secession unless it manages to escape from the legal order of its predecessor state by imposing and maintaining exclusively its own authority over its territory, so demonstrating that “the State has over it no other authority than that of international law”.<sup>76</sup> As was emphasized in a 1992 study of the potential independence of Quebec:

“[t]he secession would be considered successful if, for a sufficient period of time, the Quebec authorities managed to exclude the application of Canadian law on their territory and, on the contrary, succeeded in establishing a legal order derived from their own laws and decisions”.<sup>77</sup>

In light of the foregoing it is easy to understand the strategy and actions of the separatists in Crimea who, methodically since late February 2014, have taken over all of the public buildings and attempted to establish their own authority in the peninsula while excluding all exercise of authority by the Ukrainian government, army, and police. It is therefore supposedly as an “independent” and sovereign country that Crimea asked for its attachment to the Russian Federation after the referendum of 16 March. The Crimean separatists thus sought to achieve in 20 days what others (e.g. Somaliland) have been unable to accomplish in 20 years – recognition of the effective character of their secession.

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<sup>75</sup> See the arbitration in the *Island of Palmas Case (or Miangas)*, Permanent Court of Arbitration, 4.4.1928, RSA, Vol. II, 838.

<sup>76</sup> From *D. Anzilotti's* description of sovereignty in his individual opinion on PCIJ advisory opinion of 5.9.1931 in *Customs regime between Germany and Austria*, Series A/B, No. 41, 57.

<sup>77</sup> *T. Frank/R. Higgins/A. Pellet/M. Shaw/C. Tomuschat*, L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté, Etude commandée par la Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, in : *Les Attributs d'un Québec souverain* (Québec, Bibliothèque nationale, 1992), Exposés et études, Vol. 1, § 2.41, 410. English translation: *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, on <<http://www.english.republiquelibre.org>>.

### 3. Rejection of the Argument of “Neutrality” of International Law: Ukraine’s Right to Protect Its Territorial Integrity

A review of practice reveals that some secessionist movements have sometimes managed to establish incontrovertible effective control over their territory for several years without being considered as states by the members of the international community. Entities such as Somaliland, Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh have lived long lives as *de facto* states since their declarations of independence in the early 1990s. Yet they have gone virtually unrecognized.<sup>78</sup> Separatist movements elsewhere have managed to establish large “measures” of effective control for years, but without being held to be states either. Chechnya is a very informative example in this respect. Chechnya declared its independence in November 1991 and its government exercised effective control over the territory for three years, excluding any control by the Russian Federation.<sup>79</sup> However, although it brought together the three “constituent components”, the interstate community failed to “recognize” it or treat it as a state. The conflict that followed the intervention by the Russian army in December 1994 was never deemed to be an “international” conflict. On the contrary, the states and international organizations, while expressing their concern about the humanitarian situation, asserted that Chechnya was an integral part of the Russian Federation.<sup>80</sup> Even after the humiliating defeat of Russia and the emplacement of sound and incontrovertible effective control by Chechnya from August 1996, states did not want to recognize Chechnya’s independence, the new intervention by the Russian army in its territory three years later being considered part of an internal conflict.

These examples show there is nothing automatic about the “objective” formation of a state. The international community’s cognizance of state effectiveness, even of incontrovertible effectiveness, may be an intricate and

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<sup>78</sup> Armenia had, of course, recognized Nagorno-Karabakh while a handful of countries, including Russia, finally recognized Abkhazia and South Ossetia after the conflict of August 2008 between Russia and Georgia.

<sup>79</sup> As *D. Hollis* observes, “From its declaration of independence in December 1991, until Russian troops invaded on December 11, 1994, Chechnya possessed a permanent population, living within defined borders, governed by President Dudayev and his administration. [...] Although Dudayev’s authority did not go uncontested inside Chechnya, none of the opposition groups ever posed a serious threat to his government’s effective control over the republic or its population.” *D. Hollis*, *Accountability In Chechnya – Addressing Internal Matters With Legal and Political International Norms*, *Boston College Law Review* 36 (1995), 815.

<sup>80</sup> For a summary of international reactions to the Chechen conflict see *D. Hollis* (note 79).

complex matter requiring a great deal of time. The idea of “lasting” effectiveness therefore replaces the idea of “instant” effectiveness which, as if by the wave of a magic wand, transformed the secessionist entity into a state having managed to bring the “constituent components” together. In other words, it is not really the “success” of the secession that law takes notice of but rather its “ultimate success”, its capacity to impose itself and to create a seemingly irreversible situation.<sup>81</sup> The achievement of mere effectiveness is therefore not enough in principle. A secession should not be considered successful unless the former regime does not take steps to challenge the validity of the secession or, at least, unless it is established for certain that it can no longer successfully restore its authority. This is what *H. Lauterpacht* underscored in 1947 when he wrote that effective control was to be established “beyond all reasonable doubt” and “the parent State must in fact have ceased to make efforts, promising success, to reassert its authority”.<sup>82</sup> In the same way, *J. Crawford* maintained that the consent of the predecessor state to the secession is necessary at least until such time as the secessionist entity has firmly established its control beyond all hope of return to the *status quo ante*.<sup>83</sup>

This analysis shows that while international law “does not prohibit” secession, it remains *hostile* to it, it disapproves of it for want of prohibiting it and puts major impediments in its way that effectiveness can probably overcome, but not automatically so and not without effort.

One of the foremost of these impediments is the establishment of a *presumption against effectiveness* of the secession and in favour of the territorial integrity of the pre-existing state. Effectiveness therefore has more of a role to play in terms of acknowledgement or rather resignation of the pre-existing state (which, compelled by force of circumstance, realizes it no longer really has any choice and relinquishes its attempts at recovery) than in terms of the “automatic” birth of a new state.

So long as it respects human rights and abides by the law of armed conflict, a central government has the right to resort to force and to its police powers to counter an armed separatist movement and restore its territorial

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<sup>81</sup> It is this theory of “ultimate success” which has been highlighted by some domestic courts having had to rule on the issue of secession. See *T. Christakis* (note 1), 263 et seq.

<sup>82</sup> *H. Lauterpacht*, *Recognition in International Law*, 1947, 8.

<sup>83</sup> See his opinion requested by the Attorney General of Canada in the matter of a *Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada*, entitled “State Practice and International Law In Relation to State Secession”, Supreme Court of Canada, No. 25506, February 1997, § 28. (republished in: *BYIL* 69 (1998), 85 et seq.).

integrity.<sup>84</sup> Even if peaceful means, negotiation, dialogue, and democratic processes are preferable by far to the use of force, force may prove necessary in some instances, especially if the separatists themselves undertake armed activities to secure the desired effective control. But, while, as we shall see, international law clearly prohibits outside military intervention or aid for the benefit of separatists, central government's right to use its police powers is in no doubt and has been clearly asserted on several occasions – for example for the benefit of Russia in the Chechen conflicts<sup>85</sup> or currently for the benefit of Ukraine.<sup>86</sup>

Should the secessionists succeed even so in imposing incontrovertible effective control, third states might then decide to recognize the new situation. However, this faculty of recognition comes up against at least two obstacles. For one thing, it should not in principle be granted “prematurely”, that is before the establishment of uncontested effectiveness<sup>87</sup> – even if the automatic recognition of Kosovo the day after its independence was proclaimed on 17.2.2008 was a contrary and ambiguous “precedent” in this respect.<sup>88</sup> For another thing, and above all, there is an obligation not to recognize a state if the secession process involves some violation of a fundamental rule of international law.

#### 4. The Prohibition of Secession Resulting from an Act of Aggression or a Violation of a Fundamental Rule of International Law

The argument that international law “does not prohibit secession in principle” admits a notable exception insofar as a secession must be considered unlawful when it results from a breach of a fundamental rule of international law. This was clearly acknowledged by the ICJ in its advisory opinion of 22.7.2010 on Kosovo. The Court added an important proviso to its aforesaid position that “general international law contains no applicable prohibitions of declarations of independence”. Ruling on a number of historical

<sup>84</sup> See *T. Christakis*, *La sécession : Une question de simple fait?*, Working Papers of the European Society for International Law (2007), available on <<http://www.esil-sedi.eu>>.

<sup>85</sup> See above.

<sup>86</sup> President *Obama* declared on 2 May that “The Ukrainian government has the right and responsibility to uphold law and order within its territory”. See <<http://www.theguardian.com>>.

<sup>87</sup> On “premature recognition” see *T. Christakis* (note 58).

<sup>88</sup> At the time independence was proclaimed, the Kosovo authorities could not claim to pass the effectiveness test since the territory was still under UN administration.

cases in which the UN Security Council and/or General Assembly had characterized attempted secessions as “invalid” or “unlawful”, the Court emphasized that:

“the illegality attached to the declaration of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”.<sup>89</sup>

This position of the Court is an important one as it put to rest *Jellinek’s* old idea that secession and the process of formation of a new state is “merely a fact” and by definition escapes the ambit of law.<sup>90</sup>

Practice shows that it is in connection with the violation of two mandatory norms of international law that the international community declined to consider as “states” entities that were created in the context of those violations.

The first norm relates to the right of self-determination. Thus, Southern Rhodesia was never considered to be a state either by the United Nations or by the international community despite its indisputable effectiveness.<sup>91</sup> Review of 15 years worth of resolutions and decisions by UN organs clearly shows that they did not consider Southern Rhodesia to be a state, but a non-self-governing territory of the United Kingdom. Likewise, the Bantustans of South Africa, although enjoying formal state attributes were not considered to be states because their creation was contrary, in particular, to the right of self-determination of the peoples making them up.<sup>92</sup>

The second mandatory rule with which effectiveness must comply is that of the prohibition of aggression. Thus, the bid for statehood of the Turkish Republic of Northern Cyprus (TRNC) in 1983, nine years after the Turkish army invaded Cyprus, ran into vigorous opposition from the Security Council which immediately denounced this attempted secession, consider-

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<sup>89</sup> ICJ (note 68), para. 81.

<sup>90</sup> By this old theory the birth of a state is as “primary” a fact as the birth of a person. As *J. Verhoeven* wrote in *La reconnaissance internationale : déclin ou renouveau?*, A.F.D.I. 1993, 38: “The state’s existence rests in principle exclusively on effectiveness, whatever the circumstances – of law or fact – enabling it to come about. Just as a child is born from the coupling of its makers ... regardless of the circumstances, even if monstrous, of its procreation.” (*our translation*).

<sup>91</sup> *Ian Smith’s* minority government did indeed exercise effective control over the entire territory of Southern Rhodesia. As *James Crawford* emphasized in *The Creation of States In International Law*, 1979, 103: “There can be no doubt that, if the traditional tests for independence of a seceding colony were applied, Rhodesia would be an independent State.”

<sup>92</sup> Cf. *T. Christakis* (note 1), 266 et seq.

ing the proclamation of independence to be “legally invalid”.<sup>93</sup> A few months later, in response to the exchange of “ambassadors” between the TRNC and Turkey (the only state to recognize the secession), the Security Council condemned in its Resolution 550 (1984) “all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership” declaring them “illegal and invalid”.<sup>94</sup> Several other international organs and organizations reacted just as determinedly, underscoring the “unlawfulness” or “invalidity” of the proclamation of independence and supporting the Security Council Resolutions. International courts and tribunals have confirmed this position as shown, among others, by the judgment in *Loizidou v. Turkey (Merits)* by the European Court of Human Rights (ECHR) on 18.12.1996. Dismissing the defendant’s line of argument that the TRNC was an independent state, the Court emphasized that “the international community does not regard the ‘TRNC’ as a State under international law and that the Republic of Cyprus remains the sole legitimate government of Cyprus”.<sup>95</sup>

These precedents and especially that of the TRNC obviously raise the question of the legal characterization of the events that unfolded in Crimea in February-March 2014. We will not examine this question in detail as this topic is covered by another article in this Journal.<sup>96</sup> It seems nonetheless to be clearly established that the Russian army played an important part in the events in Crimea in February-March 2014. In a recent article, *Antonello Tancredi* concluded that Russia had not only violated UN Charter article 2(4) but had also committed an “act of aggression” within the meaning of General Assembly Resolution 3314 (1974).<sup>97</sup> In any case it seems clear that Russia cannot advance any credible legal justification in support of this intervention in Crimea. As I have demonstrated elsewhere, Russia cannot rely on either of the two “classical” exceptions to the prohibition of the use of force, namely self-defence and Security Council authorization – as for the arguments of “humanitarian intervention”, “invitation by the separatists” or supposed invitation from Ukraine’s former President *Yanukovich*, they are all fallacious and with no basis in fact or law.<sup>98</sup> In order to clearly differentiate the case of Crimea from other precedents of use of force such as Tur-

<sup>93</sup> Para. 2 operative part of S/RES 541 of 18.11.1983.

<sup>94</sup> Para. 2 operative part of S/RES 550 of 11.5.1984.

<sup>95</sup> ECHR, Case of *Loizidou v. Turkey*, Judgment of 18.12.1996 (Merits), § 44.

<sup>96</sup> See *Veronika Bilkova* in this volume.

<sup>97</sup> *A. Tancredi*, The Russian Annexation of the Crimea: Questions Relating to the Use of Force: Questions of International Law, Vol. 1, 2014, available at <<http://www.qil-qdi.org>>.

<sup>98</sup> *T. Christakis*, Les conflits de sécession en Crimée et dans l’est de l’Ukraine et le droit international, J.D.I. (2014), No. 3, 750 et seq.

key's invasion of the northern part of Cyprus in 1974 or Indonesia's 1975 invasion of East Timor, Russia also pointed out that the events in Crimea had led to virtually no deaths<sup>99</sup> and that many Ukrainian soldiers on the spot, far from resisting, had sided with the separatists. However, such arguments do not seem to decisively influence the unlawful character of the Russian intervention. To claim the contrary would be to suggest that whenever the victim of a military intervention is unable to react effectively because of an overwhelming imbalance in strength between victim and aggressor, the intervention would miraculously become lawful!<sup>100</sup>

#### IV. Conclusion: Resolving the Tensions Between the Facts and the Law

To conclude, it can be seen that the real problem with the Crimean crisis is not so much the will of its inhabitants to separate from Ukraine, which is fairly clear despite the irregularities of the referendum of 16 March, as the Russian military intervention that made this result possible and for which no support can be found in international law. The secession of Crimea thus seems to be the outcome of a violation of *jus cogens* rules, which immediately raises the question of the response of international law to the unlawful *de facto* situation arising from it.

Indeed, no self-respecting legal order can remain indifferent to the events that have marked Russia's annexation of Crimea. Failure to react would send the message that "might makes right" and would harm international relations because powerful states might henceforth be tempted to use force against their neighbours to provoke "blitz secessions" and annex ethnic, linguistic, or religious "sister" minorities who dream of becoming part of the "motherland". The several rounds of "sanctions" ordered so far by the United States, the European Union, and certain other states have so captured the attention of the media that they have overshadowed the most important sanction laid down in this respect by general international law that is incumbent in principle on all states: the obligation of non-recognition.

In a separate article I have tried to examine the practical implications of the obligation of non-recognition in this case, analyse its relationship with

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<sup>99</sup> As *V. Putin* (note 39) said, "I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties".

<sup>100</sup> Ought it to be forgotten in this respect that *Hitler's* "Anschluss" of 12.3.1938, the annexation of the Sudetenland later that same year and the establishment of the Nazi Protectorate of Bohemia-Moravia in 1939 were all achieved without spilling blood?

the sanctions adopted by some states and highlight several difficulties for the future. I have also proceeded to an analysis of the possible solutions to the expected high tensions between the principle *ex iniuria ius non oritur*, which requires not accepting the *fait accompli*, and the principle *interest reipublicae ut sit finis litium*, which calls for some dose of realism.<sup>101</sup>

Several countries have indeed declared that they will “never” accept this *fait accompli*.<sup>102</sup> In the light of such forceful declarations by several countries as to their attachment to the obligation of non-recognition in the case of Crimea, it would be odd to see them progressively relinquish this attachment and give precedence to hard-headed calculations of their economic interests. As *Maurice Bourquin* wrote back in 1938, “when one organizes collective constraint to put it in the service of law, it is essential to ensure its supremacy. Nothing is more disastrous, nothing serves law itself more poorly than to engage in such a game and to end in failure”.<sup>103</sup> On the other hand, how can it be ignored that Crimea is now annexed *de facto* by Russia and that this annexation, unlawful as it is, but achieved without bloodshed, was very probably what the majority of its population wanted (the crude irregularities of the referendum notwithstanding)?

The answer to all of these difficult questions is that for Crimea, as probably for other very difficult cases that sour international relations (Palestine, Cyprus or the Western Sahara spring to mind) only a solution that is negotiated and freely accepted by all the protagonists will probably bring about a solution to this fierce conflict between unlawful *effectivités* and the law.

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<sup>101</sup> *T. Christakis* (note 98), 752 et seq.

<sup>102</sup> France in S/PV.7144 of 19.3.2014, 7. See also, for example, the position of the United States “We must stand together denying recognition and imposing consequences for that illegal act”, *ibid.*, 11); Australia “The international community will not recognize Russia’s annexation of Crimea”, *ibid.*, 13; Luxembourg “The international community does not recognize any measure to integrate the Ukrainian Autonomous Republic of Crimea within the Russian Federation via the referendum”, *ibid.*, 17); or the European Union “It [the European Union] strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognize it”, A/68/PV.80 of 27.3.2014, 4.

<sup>103</sup> *M. Bourquin*, *La stabilité et le mouvement dans l’ordre juridique international*, RdC 64 (1938), 33.