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ARTICLE

Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law

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Abstract This article considers the (il)legality of Crimea's unilateral secession from Ukraine from the perspective of public international law. It examines whether the right to self-determination or an alleged right to (remedial) secession could serve as a legal basis for the separation of the Crimean Peninsula, as the Crimean authorities and the Russian Federation seem to have argued. The article explains that beyond the context of decolonization, the right to self-determination does not encompass a general right to unilateral secession and demonstrates that contemporary international law does not acknowledge a right to remedial secession. With respect to the case of Crimea, it argues that even when assuming that such a right does exist, the threshold in this regard is not met. In the absence of a legal entitlement, the article subsequently turns to the question whether Crimea's unilateral secession was prohibited under international law. It contends that while the principle of territorial integrity discourages unilateral secession, it does not actually prohibit it. Nonetheless, there are situations in which an attempt at unilateral secession is considered to be illegal in view of the circumstances. It is argued that it is precisely this exception that is relevant in the case of Crimea.

Keywords Self-determination · (Remedial) secession · Territorial integrity · Crimea · Russian Federation

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1 Introduction

On 17 March 2014, following a highly contested referendum, Ukraine's Autonomous Republic of Crimea declared its independence and filed an application to 'reunite' with the Russian Federation.[1] Crimea's request was welcomed by Russia and, on the following day, President Putin and the representatives of Crimea signed an accession agreement that formally designated the Republic of Crimea as a federal subject of the Russian Federation.[2] The crisis on the Crimean Peninsula has raised various pertinent questions of international law. This is also reflected in the arguments adduced by the Crimean and Russian authorities, which both made reference to international law in their attempts to justify the events. Crimea's declaration of independence made a reference to, *inter alia*, the Charter of the United Nations and the International Court of Justice's (ICJ) advisory opinion on Kosovo's independence, arguing that the Court had ruled that unilateral declarations of independence do not violate international law.[3] Likewise, the Russian Federation claimed that the referendum held was in compliance with international norms. In his address of 18 March, President Putin recalled 'the well-known Kosovo precedent' and referred to the right to self-determination in order to justify Crimea's secession from Ukraine. He argued:

> As it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing, almost word for word. Ukraine used this right, yet the residents of Crimea are denied it. Why is that?[4]

It is notable that the Russian Federation contended that the people of Crimea had exercised their right to self-determination on various occasions. During the debates in the UN Security Council, the Russian representative presented a similar view, claiming that:

> [i]n strict compliance with international law and democratic procedure, without outside interference and 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.[5]

[1] See 'Crimea declares independence, seeks UN recognition', 17 March 2014, http://rt.com/news/crimea-referendum-results-official-250/. Accessed August 2015.

[2] See 'Agreement on the accession of the Republic of Crimea to the Russian Federation signed', 18 March 2014, http://eng.kremlin.ru/news/6890. Accessed August 2015.

[3] See 'Crimea parliament declares independence from Ukraine ahead of referendum', 11 March 2014, http://rt.com/news/crimea-parliament-independence-ukraine-086/. Accessed August 2015.

[4] See 'Address by the President of the Russian Federation', 18 March 2014, http://eng.kremlin.ru/news/6889. Accessed August 2015.

[5] UN Security Council, UN Doc. S/PV.7144, 19 March 2014, p. 8.

Likewise, the Russian Federation submitted in the General Assembly that during the referendum, 'an overwhelming majority of the Crimean population voted in favor of being with Russia, as a consequence of which it 'could not refuse the Crimeans' wish to support their right to self-determination in fulfilling their long-standing aspirations'.[6] The Russian Federation thus seems to hold the view that the right to self-determination equals or at least includes a right to independence, i.e. unilateral secession. More specifically, it may even be said that the Russian Federation (implicitly) relied on the doctrine of remedial secession, which is seen to encompass a right to unilateral secession in case of serious injustices suffered by a people. President Putin advanced remedial arguments in his speech of 18 March, contending that

> those who opposed the coup were immediately threatened with repression. Naturally, the first in line here was Crimea, the Russian-speaking Crimea. In view of this, the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives […]. [N]aturally, we could not leave this plea unheeded; we could not abandon Crimea and its residents in distress.[7]

To the same effect, the Russian Federation claimed in the Security Council that there had been 'threats of violence by ultranationalists against the security, lives and legitimate interests of Russians and all Russian-speaking peoples' in Crimea and Eastern Ukraine and that 'the issue is one of defending our citizens and compatriots, as well as the most import[ant] human right—the right to life'.[8]

The accuracy of these views presented, however, is highly questionable under contemporary international law. This article therefore aims to assess Crimea's separation from Ukraine against the backdrop of the international legal framework concerning the right to self-determination and secession. To this end, this article will first briefly introduce the background of the events that led to the issuing of Crimea's unilateral declaration of independence. It will then turn to what Crimea sought to achieve with its declaration, i.e. secession from Ukraine. The question of whether or not Crimea had a right to unilaterally secede from Ukraine will be considered. In this respect, it will be argued that beyond the context of decolonization, the right to self-determination does not encompass a general right to unilateral secession. Moreover, particular attention will be paid to the contested theory of remedial secession—an issue that has not received thorough discussion in scholarly debates on the events in Crimea so far.[9] It will be explained that positive international law does not encompass a right to remedial secession. In the absence of a legal entitlement, the question then arises whether Crimea's unilateral secession was actually prohibited under international law. Seeking to answer this question, it will be contended that while the principle of territorial integrity discourages

[6] UN General Assembly, UN Doc. A/68/PV.80, 27 March 2014, p. 3.

[7] See 'Address by the President of the Russian Federation', 18 March 2014, http://eng.kremlin.ru/news/6889. Accessed August 2015.

[8] UN Security Council, UN Doc. S/PV.7125, 3 March 2015, p. 3 (Mr. Churkin).

[9] Exceptions in this respect may be Christakis (2015), Vidmar (2015) and Walter (2014), who briefly touched upon the matter.

unilateral secession, it does not prohibit it. Nonetheless, there are situations in which an attempt at unilateral secession is considered to be illegal in view of the circumstances. It will be argued that it is precisely this exception that is relevant in the case of Crimea.

2 The Crisis in Crimea

In order to understand Crimea's separation from Ukraine, it is necessary to briefly sketch the background of the events in. As President Putin has argued on several occasions, Crimea has historically been linked to Russia.[10] Indeed, the Crimean Peninsula was annexed by the Russian Empire in 1783 and was part of Russia until 1954, when the then General Secretary of the Communist Party, Nikita Khrushchev, awarded Crimea to the Ukrainian Soviet Socialist Republic as a token of friendship. With the dissolution of the Soviet Union in 1991, however, Crimea became part of a newly independent Ukraine and converted into a constituent entity of that State. The peninsula was formally granted the status of an Autonomous Republic within Ukraine with the adoption of the 1996 Ukrainian Constitution.[11] The uneasy relationship between Ukraine and the Russian Federation was consequently put to an end with the 1997 Treaty on Friendship, Cooperation, and Partnership, in which both States pledged to 'respect each other's territorial integrity, and confirm[ed] the inviolability of borders existing between them'.[12]

The Ukrainian Revolution of 2014, which was initiated by the Euromaidan movement in the capital of Kiev, had significant effects in Crimea as well. With an ethnic Russian majority inhabiting the peninsula,[13] the Crimean authorities had always strongly supported the pro-Russian policies of the then President, Viktor Yanukovych. The ousting of his regime and replacement by a pro-European interim government, followed by the approval of a Draft Bill that would revoke the 2012 State Language Policy Bill, thereby banning Russian as an official language within Ukraine,[14] sparked secessionist demands in Crimea. In late February 2014, armed

[10] See e.g., 'Address by the President of the Russian Federation', 18 March 2014, http://eng.kremlin.ru/news/6889 (claiming that 'In people's hearts and minds, Crimea has always been an inseparable part of Russia'). Accessed August 2015.

[11] See Chapters IX and X of the Ukrainian Constitution.

[12] Art. 2 Treaty of Friendship, Cooperation of Partnership between Ukraine and the Russian Federation, http://www.dtic.mil/dtic/tr/fulltext/u2/a341002.pdf (Annex, unofficial translation). Accessed August 2015.

[13] Crimea has a population of more than 2 million people of which approximately 58 % are ethnically Russian, 24 % are Ukrainian, and 12 % are Crimean Tatar. See 'State Statistics Committee of Ukraine, All-Ukrainian Population Census 2001', http://2001.ukrcensus.gov.ua/eng/results/general/nationality/. Accessed August 2015.

[14] The 2012 State Language Policy Bill was signed by President Yanukovych and gave minority languages—including Russian—the status of an official language when a minority group making up 10 % of the residents of a particular region would have this language as their native language. The Draft Bill defined the Ukrainian language as the sole official State language at all levels in Ukraine. See Verkhovna Rada of Ukraine, 'On Principles of the State Language Policy', http://zakon4.rada.gov.ua/laws/anot/en/5029-17. Accessed August 2015.

men without insignia—labelled as 'little green men' who were later admitted to be Russian troops[15]—were reported to have invaded the major Crimean airports and military bases. They also seized key buildings in the peninsula's capital Simferopol, including the Crimean Supreme Council, and installed a new, pro-Russian Prime Minister.[16] On 1 March 2014, the above-mentioned Draft Bill was vetoed by the interim President of Ukraine, Oleksandr Turchynov, but to no avail. After the Russian Parliament approved President Putin's appeal to deploy military troops in Ukraine that same day,[17] Russian forces rapidly took control over Crimea.[18]

Only a fortnight after Russian troops were deployed on Ukrainian territory, on 11 March 2014, 78 out of 100 Members of the Crimean Supreme Council voted for a declaration of independence. The preamble to the declaration reads as follows:

> We, the members of the parliament of the Autonomous Republic of Crimea and the Sevastopol City Council, with regard to the Charter of the United Nations and a whole range of other international documents and taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July 22, 2010, which says that [a] unilateral declaration of independence by a part of the country does not violate any international norms, make this decision jointly.[19]

The adoption of this declaration paved the way for the referendum on Crimea's status that was scheduled for 16 March 2014. If the outcome of the referendum would be in favour of Crimea's reunification with the Russian Federation, the Crimean authorities would declare Crimea to be an independent State and subsequently submit a request to join Russia. According to the official figures, an overwhelming majority of 95.5 % of all votes cast, with a turnout of approximately 83 % of Crimea's registered voters, indeed expressed support for Crimea to become part of the Russian Federation.[20] Consequently, on 17 March 2014, the Crimean parliament declared the Republic of Crimea to be an independent State and requested the Russian Federation 'to admit the Republic of Crimea as a new subject with the status of a republic'.[21] President Putin subsequently signed an executive

[15] President Putin himself acknowledged that the so-called 'little green men' in Crimea had been Russian troops, whose presence was to ensure that the people of Crimea could express their opinion during the referendum of 16 March 2014. See 'Putin Acknowledges Russian Military Servicemen Were in Crimea', 17 April 2014, http://rt.com/news/crimea-defense-russian-soldiers-108. Accessed August 2015.

[16] See 'Gunmen Seize Parliament in Ukraine's Crimea', Raise Russian Flag, 27 February 2014, http://edition.cnn.com/2014/02/27/world/europe/ukraine-politics/. Accessed August 2015; Reuters, 12 March 2014, http://www.reuters.com/article/2014/03/12/us-ukraine-crisis-osce-idUSBREA2B1C120140312. Accessed August 2015.

[17] See 'Vladimir Putin submitted appeal to the Federation Council', 1 March 2014, http://eng.kremlin.ru/news/6751. Accessed August 2015.

[18] For a timeline concerning the events, see 'Ukraine Crisis Timeline', http://www.bbc.com/news/world-middle-east-26248275. Accessed August 2015.

[19] 'Crimea parliament declares independence from Ukraine ahead of referendum', 11 March 2014, http://rt.com/news/crimea-parliament-independence-ukraine-086/, accessed August 2015.

[20] Ibid.

[21] 'US EU set sanctions as Putin recognises Crimea "sovereignty"', 17 March 2014, http://uk.reuters.com/article/2014/03/17/uk-ukraine-idUKBREA1H0EM20140317. Accessed 30 July 2014.

order recognizing the Republic of Crimea as an independent State.[22] The next day, on 18 March 2014, an accession agreement formally declaring Crimea to be a federal subject of the Russian Federation was signed by President Putin and the representatives of Crimea.[23] With this accession agreement, which was ratified by a federal law on 21 March 2014,[24] Crimea had officially become part of the Russian Federation.

3 In Search of a Right to Unilateral Secession for Crimea

Groups or entities wishing to secede from the State to which they formally belong often invoke a right to secede stemming from the right to self-determination of peoples. While the Crimean authorities themselves did not explicitly do so in the declaration of independence, it was seen above that the Russian Federation on various occasions referred to the right to self-determination in order to justify Crimea's secession from Ukraine. In view of these claims, this section aims to shed light on the question of whether Crimea has a right to unilateral secession under contemporary international law.

As a preliminary remark, it first deserves to be noted that the question of a right to *unilateral* secession under international law only becomes relevant when the parent State opposes the breaking away of part of its territory. For instance, prior to the referendum on Scottish independence that was held on 18 September 2014, the United Kingdom's government in Westminster had indicated that it would respect the outcome: '[i]f a majority of those who vote want Scotland to be independent then Scotland would become an independent country after a process of negotiations'.[25] Hence, should Scotland have voted for independence during the referendum of 18 September 2014,[26] it would have qualified as an example of consensual secession, since the UK government had approved the referendum and committed itself to accept its outcome, also in case of a vote for independence.[27] In such circumstances, domestic

[22] 'Executive Order on recognising Republic of Crimea', 17 March 2014, available at http://eng.kremlin.ru/news/6884, accessed August 2015.

[23] 'Agreement on the accession of the Republic of Crimea to the Russian Federation signed', 18 March 2014, available at http://eng.kremlin.ru/news/6890, accessed August 2015.

[24] 'Laws on admitting Crimea and Sevastopol to the Russian Federation', 21 March 2014, available at http://eng.kremlin.ru/news/6912, accessed August 2015.

[25] See 'Scottish Independence Referendum', https://www.gov.uk/government/topical-events/scottish-independence-referendum/about#what-happens-if-there-is-a-yes-vote. Accessed August 2015. Following the so-called Edinburgh Agreement, which was signed by Scottish First Minister Alex Salmond and the UK Prime Minister David Cameron and gave Scotland the powers to hold a referendum, the Scottish Parliament approved the terms of the plebiscite in the Scottish Independence Referendum Bill, SP Bill 25B, 27 June 2013, http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25bs4-aspassed.pdf. Accessed August 2015.

[26] On 18 September, 55.3 % of the Scottish population voted against independence. See 'Scotland independence referendum—Results', http://www.bbc.com/news/events/scotland-decides/results. Accessed August 2015.

[27] On the international legal consequences of Scotland's (hypothetical) secession, see Crawford and Boyle (2012).

law and procedures govern the secession.[28] The same may apply to those cases in which the domestic constitution of the parent State includes a provision determining that specific constituent entities have a right to secede.[29] The 1994 Ethiopian Constitution is one of the few contemporary examples of constitutions explicitly providing for secession, as it stipulates that '[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'.[30] It should be noted, however, that such general constitutional provisions are rarely effective in practice when they do not encompass a clear procedure or mechanism for secession as well.[31] Only in exceptional cases has a constitutional arrangement actually led to the emergence of an independent State. Examples in that respect are the secession of Montenegro from the State Union of Serbia and Montenegro, and the secession of South Sudan from Sudan. In both cases this involved a situation in which the constitution providing for a right to secession was drafted in the context of peace negotiations and provided for a mechanism to effectuate this right.[32]

This section will first explain that international law does not include a right to external self-determination or unilateral secession beyond the context of decolonization. In this context, special attention will be paid to the concept of remedial secession and its position in international law, as this doctrine seems to have been relied upon implicitly by the Russian Federation. Subsequently, the lawfulness of Crimea's secession from Ukraine will be evaluated against the backdrop of the above-mentioned legal framework.

3.1 The Right to Self-Determination in the Context of Decolonization and Beyond

As was observed above, the Russian Federation claimed that the people of Crimea have lawfully exercised their right to self-determination by seceding from Ukraine and seeking unification with Russia. In the context of decolonization, the right to self-determination indeed encompassed a right to independence. The UN Charter introduced the notion of self-determination as one of the principal purposes of the United Nations.[33] While both Articles 1(2) and 55 explicitly refer to self-determination and its inclusion in

[28] This is not to say that the secession is necessarily in accordance with international law. As will be explained in Sect. 4 *infra*, an attempt to secede is illegal when connected with egregious violations of norms of general international law, in particular those of a *jus cogens* character. See ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 81.

[29] Weller (2005) pp. 16, 19. For a more elaborate discussion of constitutional secession, see Radan (2011), pp. 333–343.

[30] Constitution of the Federal Democratic Republic of Ethiopia, adopted on 8 December 1994, Art. 39(4), http://www.refworld.org/docid/3ae6b5a84.html. Accessed August 2015.

[31] Examples in this respect are the Soviet Union and the Socialist Federal Republic of Yugoslavia (SFRY). While the constitutions of the Soviet Union and the SFRY included a right to secession, in the absence of a clear mechanism for effectuating this process, the successor States did not emerge on this constitutional basis. See Vidmar (2012b), pp. 710–711.

[32] For a more elaborate discussion of these examples, see ibid., pp. 711–715.

[33] Charter of the United Nations, 26 June 1945, 1 UNTS XVI.

the UN Charter was an important step in the development of the notion, its precise legal status and content remained unclear. Light was shed on this in the context of decolonization, when self-determination became a legal entitlement for colonial peoples. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'[34] and declared that '[a]ll peoples have the right to self-determination'.[35] It became clear that this right could be exercised both externally—through independence from the metropolitan State—and internally, as long as it was based on the freely expressed will of the people concerned. As the Declaration on Principles of International Law concerning 1960 Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (hereafter: Friendly Relations Declaration) indicates, the modalities of exercising the right to self-determination could involve 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people'.[36] In the context of decolonization, however, the right to self-determination was an entitlement for colonized entities only: the inhabitants of trust territories and non-self-governing territories.[37] At present, trust territories now no longer exist,[38] and there are only seventeen non-self-governing territories left that are still to be decolonized on the basis of the right to self-determination.[39]

The view that the right to external self-determination extends beyond the context of decolonization, however, is by no means self-evident. States have been reluctant to recognize such legal entitlement for other than peoples under colonial domination, alien subjugation and foreign occupation for various reasons.[40] In this respect, the principle of territorial integrity plays an important part. Enshrined in Article 2(4) of the UN Charter, the Friendly Relations Declaration and various other international instruments, this fundamental legal principle is seen to safeguard 'the territorial framework of independent States'.[41] States and commentators alike have

[34] Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly Resolution 1514 (XV), UN Doc. A/RES/1514(XV), 14 December 1960, Preamble.

[35] Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly Resolution 1514 (XV), UN Doc. A/RES/1514(XV), 14 December 1960, para. 2.

[36] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970, Principle V, para. 4.

[37] Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV), UN Doc. A/RES/1514(XV), 14 December 1960, para. 5.

[38] For a definition of trust territories, see Art. 77 UN Charter.

[39] For guidelines on what constitutes a non-self-governing territory, see 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, General Assembly Resolution 1541 (XV), UN Doc. A/RES/1541(XV), 15 December 1960, Principle IV. For a list of today's non-self-governing territories, see http://www.un.org/en/decolonization/nonselfgovterritories.shtml. Accessed August 2015.

[40] See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970, Principle V, para. 2.

[41] Blay (2013), para. 1.

often contended that beyond the decolonization process,[42] unilateral secession is incompatible with the territorial integrity of States. In fact, it is frequently argued that the principle of territorial integrity prohibits attempts at unilateral secession. While it will be explained in Sect. 4.1 that this argument is not fully adequate, it does reflect the importance attached to the principle and the interests of States in protecting their territory against unwished-for alterations of borders. In addition to these disruptive effects on the national level, States generally fear that acknowledging a right to unilateral secession would affect international stability and even open a Pandora's box.[43]

In view of the above, unsurprisingly, no convention encompasses a general right to independence or unilateral secession for peoples, minorities, or other groups. Common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[44] As such, it seems to grant a universally applicable right to self-determination that is not limited to the colonial context and does not outlaw the option of unilateral secession. However, the preparatory works of the Human Rights Covenants demonstrate that the provision was not intended to grant a right to unilateral secession to non-colonial communities.[45] In addition to the Human Rights Covenants, various soft law instruments include a reference to self-determination beyond the context of decolonization as well.[46] Examples are found in the Friendly Relations Declaration,[47] the Helsinki Final Act,[48] the Charter of Paris,[49] and the Vienna Declaration and Programme of Action.[50] It is important to note, however, that these references

[42] It is important to note that the principle of territorial integrity was not seen to apply to the overseas territory of a metropolitan State.

[43] See e.g., Cassese (1995), p. 1.

[44] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3.

[45] For the drafting history of Art. 1(1) ICCPR, see Bossuyt (1987), pp. 32–37.

[46] While not legally binding per se, soft law instruments may well have an important role to play in international law. First, it should be noted that the Friendly Relations Declaration is seen to be reflective of customary international law (see Sect. 3.2 *infra*). Moreover, as Dinah Shelton argued, soft law instruments may also 'fill in gaps in international legal instruments' and 'form part of the […] State practice that can be utilized to interpret treaties'. It is particularly this interpretative function that renders the instruments referred to important for the present purposes. See Shelton (2010), pp. 166–167.

[47] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970, Principle V, para. 7. See Sect. 3.2 *infra* for a discussion of the safeguard clause of the Friendly Relations Declaration.

[48] Conference on Security and Co-operation in Europe, Conference on Security and Co-operation in Europe Final Act, Helsinki, 1 August 1975, 14 ILM 1292 (1975), Principle VII.

[49] Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe, Paris, 21 November 1990, 30 ILM 193 (1991), para. 7.

[50] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Part I, para. 2.

generally contain a so-called 'safeguard clause' emphasizing that the exercise of the right to self-determination should be limited to prevent threats to the territorial integrity of States.[51] The safeguard clauses contained in these instruments thus appear to preclude interpreting the right to self-determination as encompassing a legal entitlement to unilateral secession. In practice, States have generally not accepted attempts at unilateral secession either. To the same effect, no entity that has emerged through unilateral secession has been admitted to the United Nations as long as the parent State was opposed to this.[52]

Accordingly, in the post-decolonization era, an internal, intra-State dimension of the right to self-determination has been emphasized that focuses on its implementation within the framework of the existing State. As such, self-determination should be realized in the relationship between peoples and their government, and involves a continuous entitlement that does not cease to exist as soon as an independent State has been created. This focus on internal self-determination was also confirmed by the *Reference re Secession of Quebec*, in which the Supreme Court of Canada was confronted with the hypothetical question whether Quebec would have a right to secede unilaterally from Canada under, *inter alia*, international law. The Supreme Court stressed that '[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state'.[53] This basically requires the presence of a government representing the people inhabiting the territory without any distinction and popular participation in the political decision-making process of the State.[54] Various arrangements may be implemented in order to facilitate effective participation and true representation of the whole people to the territory. Federalism and autonomy arrangements, either concerning certain substantive issues or with respect to a defined territory, are relevant instruments in this respect, as they offer enhanced self-government for groups within the State.[55] Preserving the territorial *status quo* of the parent State, such arrangements are often presented as (preferable) alternatives to secession.

A prominent question concerns who actually constitutes a 'people' as a holder of the right to self-determination beyond the context of decolonization. As was already explained, in the decolonization era peoples entitled to self-determination were the inhabitants of trust and non-self-governing territories, i.e. the population of territories that had not yet attained full independence. Beyond this decolonization process, the right to self-determination as described above is first and foremost a right of the inhabitants of an existing State as a whole. As Judge Yusuf noted in his Separate Opinion attached to the *Kosovo* Advisory Opinion, it is 'particularly […] a right of the entire population of the State to determine its own political, economic

[51] See Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 127.

[52] See Crawford (2006), p. 390 and pp. 391–402.

[53] Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 126.

[54] See Conference on Security and Co-operation in Europe, Conference on Security and Co-operation in Europe Final Act, Helsinki, 1 August 1975, 14 ILM 1292 (1975), Principle VII.

[55] On various arrangements in this respect, see e.g. Weller (2009a).

and social destiny and to choose a representative government'.[56] In addition to this, it is accepted that certain parts of that population can also be regarded as holders of the right to (internal) self-determination. This was also endorsed by the Canadian Supreme Court, which noted that '[i]t is clear that a people may include only a portion of the population of an existing State'.[57] While international law does not offer a definition of what constitutes a 'people' commonly agreed upon, several characteristics are generally regarded as guiding in this respect. First, the members of the group share objectively identifiable common features that distinguish them from other groups. This may involve some or all of the following features: '(a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life'.[58] The relationship of the group with a particular territory is often considered to be an essential precondition, as was also observed in the influential study prepared by Aureliu Cristescu.[59] In addition to these objective features, a subjective element is frequently mentioned. This subjective element refers to 'the belief of being a distinct people distinguishable from other people inhabiting the globe, and the wish to be recognized as such, as well as the wish to maintain, strengthen and develop the group's identity'.[60] As this concerns the internal perception of the group itself, it may be difficult for outside observers to determine whether the subjective requirement is fulfilled. Notwithstanding this difficulty, it is important to note that (ethnic, religious, or linguistic) minorities should not be confused with 'peoples'. Minorities have been defined as groups

> numerically smaller to the rest of the population of the State, in a non-dominant position, whose members, being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and so, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language.[61]

Thus, similar to peoples, minorities are generally characterized by a combination of objective and subjective elements. In most cases, however, they lack the

[56] See ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, Separate Opinion Judge Yusuf, para. 9.

[57] Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217, paras. 123–124.

[58] UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Final Report and Recommendations, Paris, 22 February 1990, SHS-89/CONF.602/7, para. 22 (1).

[59] UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments. Study Prepared by A. Cristescu, UN Doc. E/CN.4/Sub.2/404/Rev.1 (1981), para. 279 (noting that the existence of a people 'implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population').

[60] Raič (2002), pp. 262–263. See also UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Final Report and Recommendations, Paris, 22 February 1990, SHS-89/CONF.602/7, para. 22 (3–4).

[61] UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. Study Prepared by F. Capotorti, UN Doc. E/Cn.4/Sub.2/384/Add.1–7 (1991), para. 568.

connection with a particular territory, as a result of which most minority groups do not constitute subgroups in the sense of peoples entitled to self-determination. Instead, persons belonging to minorities enjoy, *inter alia*, the rights protected in Article 27 of the ICCPR, which grants them—on an individual basis[62]—the right 'to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

3.2 A Right to Remedial Secession?

While it was explained that no *general* right to unilateral secession exists under contemporary international law, over the last decades, it is increasingly often argued in literature that, in exceptional circumstances, a *qualified* right to unilateral secession may arise in case of serious injustices suffered by a people. Such an alleged right to remedial secession is generally construed on the basis of the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (hereafter: Friendly Relations Declaration),[63] which is considered to be reflective of customary international law.[64] After having endorsed that all peoples have a right to self-determination, Principle V, paragraph 7 of the Declaration stipulates:

> Nothing in the foregoing paragraphs [concerning the right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, 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.[65]

This so-called 'safeguard clause' was reiterated in the Vienna Declaration and Programme of Action, albeit phrased somewhat differently.[66] Both clauses indicate

[62] The rights of minorities are 'in-community-with-others-rights': individual human rights that can be exercised in community with other members of the group.

[63] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970.

[64] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 80 (referring to ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, paras. 191–193). This is not to say, however, that the *a contrario* interpretation of the safeguard clause, as explained below, also reflects customary international law.

[65] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970, Principle V, para. 7.

[66] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Part I, para. 2.

that beyond the context of decolonization, the exercise of the right to self-determination of peoples should not disturb the territorial integrity of States. Yet, proponents of a right to remedial secession have interpreted the clauses as indicating the conditional character of the principle of territorial integrity. In this regard, they have advanced an *a contrario* reading implying that States not respecting the right to internal self-determination of their population would forfeit the protection of their territorial integrity. This would then clear the way for unilateral secession as a remedy for serious injustices, or so it is argued.[67] Such a position was taken by, *inter alia*, Lee C. Buchheit and Antonio Cassese.[68] Subsequent to the writings of these scholars, a significant amount of scholarly literature has argued in favour of a right to remedial secession and touched upon circumstances under which such a right would arise.[69] As such, the frustration of meaningful internal self-determination, the existence of flagrant violations of fundamental human rights, and structural discriminatory treatment of a people have often been mentioned as parameters for the exercise of a right to remedial secession. Moreover, proponents of a right to remedial secession commonly regard it as an *ultimum remedium*, a last resort remedy for such injustices. The exhaustion of peaceful remedies is therefore considered to be an additional prerequisite as well.[70] Despite the relative consensus on these parameters, authors supporting the existence of a right to remedial secession are divided on the question of the subjects of such legal entitlement. While a right to remedial secession is generally considered to be a right of 'peoples', the detailed interpretation of this notion has remained problematic. In particular, scholarship seems divided on the question of which sub-State groups—numerical, linguistic, religious, ethnic minorities or otherwise—could be seen as the beneficiaries of such a right.[71]

It should be emphasized, however, that scholarship is by no means conclusive on the existence of a right to remedial secession in international law, as numerous authors have rejected this thesis. Some have done so for rather practical reasons, such as Alexandra Xanthaki, who raised the question of who would be able to determine whether a certain people would have a right to remedial secession in view of the circumstances.[72] While this is a relevant question indeed, more fundamental and decisive objections deserve to be singled out. First, it should be noted that it is highly problematic to base such a sweeping entitlement on the basis of an inverted reading of the safeguard clauses. As Malcolm Shaw argued,

> [s]uch a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial

[67] Van den Driest (2013), pp. 106–107.

[68] Buchheit (1978), pp. 221–222; Cassese (1995), p. 118.

[69] See e.g., Dugard and Raič (2006), pp. 103–104; Franck (1993), pp. 13–14; Kooijmans (1996), p. 215; Murswiek (1993), pp. 26–27; Raič (2002), pp. 324–328; Ryngaert and Griffioen (2009), para. 14; Tomuschat (1993), pp. 9–11. For more references, see Van den Driest (2013), p. 109 (fn. 48).

[70] Van den Driest (2013), p. 113.

[71] For two opposing views, see e.g., Cassese (1995) pp. 112–121 and Raič (2002) pp. 251–258. See also Van den Driest (2013), pp. 115–117.

[72] Xanthaki (2007), p. 144.

> integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed before the qualifying clause in the provision in question.[73]

As such, the theoretical foundations of a right to remedial secession are rather fragile. In addition, the thesis of remedial secession should be rejected in view of the lack of compelling evidence for the practical existence of such a right.[74] Although the doctrine of remedial secession may certainly be appealing from a moral perspective[75] and can be appreciated against the backdrop of the process that is often referred to as the humanization of the international legal order,[76] it will be demonstrated below that it only has a very weak basis in practice.[77]

3.2.1 Support for Remedial Secession in the Decisions and Opinions of (Semi-) Judicial Bodies

Some judicial and semi-judicial bodies have made reference to the theory in cases brought before them. An early—if not the very first—reference to the idea of what would later be labelled as remedial secession can be found in the report of the Committee of Rapporteurs, who were appointed by the League of Nations to render an opinion in the *Åland Islands* case in 1921. The case involved a legal dispute between Sweden and Finland and concerned the question whether the inhabitants of the Åland Islands—an archipelago in the Baltic Sea—were allowed to secede from Finland and integrate with Sweden, in view of the cultural and linguistic ties with the latter. Attaching great importance to stability within States, the Committee of Rapporteurs rejected the existence of an absolute right to unilateral secession. At the same time, however, it seemed to leave open the possibility of secession as a last resort: '[t]he separation of a minority from the State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees'.[78] According to the Committee of Rapporteurs, however, this did not apply to the Ålanders, since no evidence of oppression could be found. Therefore, the Committee of Rapporteurs deemed it possible to reach a settlement short of secession that would guarantee the cultural identity of the Ålanders, for instance through an autonomy arrangement.[79]

[73] Shaw (1997), p. 483.

[74] This has also been argued by, *inter alia*, Hilpold (2009), p. 47; Tancredi (2006), pp. 184–186; Vidmar (2015), p. 370. For more references, see Van den Driest (2013), pp. 118–121.

[75] For a moral perspective, see e.g., Buchanan (2004), pp. 353–373.

[76] This refers to the development of international law from a primarily State-centred system towards a human-centred system, in which States are no longer the sole actors and which is increasingly concerned with respecting and promoting the interests of human beings. On this development, see e.g., Cançado Trindade (2010); Meron (2009). See also Van den Driest (2013), pp. 314–319.

[77] On this question in general, see Van den Driest (2013).

[78] Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), 16 April 1921, LN Council Doc. B7/2I/68/106 [VII], paras. 27–28.

[79] Ibid., para. 128.

The most often cited contemporary judicial reference to remedial secession concerns the Canadian Supreme Court's decision in the *Reference re Secession of Quebec*. When asked whether Quebec would have a right to secede unilaterally from Canada under international law, the Supreme Court noted that only in exceptional circumstances might the right to self-determination be exercised externally through secession. Yet, the Supreme Court acknowledged that this would only apply to 'the most extreme of cases and, even then, under carefully defined circumstances'. It observed that several scholars had argued that 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession'.[80] Notably, the Supreme Court immediately mitigated its proposition by adding the—often ignored—caveat that it remained 'unclear whether this […] actually reflects an established international law standard'.[81] The Supreme Court did not find it necessary to elaborate on this matter though, since it deemed that the exceptional circumstances referred to were 'manifestly inapplicable' to the case of Quebec.[82] As such, the acknowledgement of a right to remedial secession remained confined to an *obiter dictum*.

The most recent example of a case in which the right to remedial secession was touched upon concerns the *Kosovo* Advisory Opinion.[83] In this case, the ICJ was asked by the UN General Assembly whether the unilateral declaration of independence of 17 February 2008, issued by the Provisional Institutions of Self-Government in Kosovo, was in accordance with international law.[84] The Court interpreted the question before it restrictively, avoiding pronouncing itself on the legal consequences of the declaration or the question whether or not Kosovo had achieved statehood. It likewise left aside the contemporary meaning of the right to self-determination and the acceptance of remedial secession under international law.[85] On these matters, the Court observed that States taking part in the advisory proceedings had demonstrated 'radically different views' on the scope of the right to self-determination beyond the context of decolonization and, notably, that

> [s]imilar differences exited regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some

[80] Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 134.

[81] Ibid., para. 135.

[82] Ibid., para. 138.

[83] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403.

[84] UN General Assembly Resolution 63/3 (Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law), UN Doc. A/RES/63/3, 8 October 2008. The resolution was adopted by a recorded vote of 77 in favour with 6 against and 74 abstaining.

[85] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 51.

participants maintained would give rise to a right of 'remedial secession' were actually present in Kosovo.[86]

Subsequently, the Court observed that arguments in favour of a right to remedial secession were virtually always made as a secondary argument only.[87] The Court did not consider it necessary to 'resolve such questions in the present case' as it deemed those issues to be 'beyond the scope of the question' which was before it.[88] Commentators and judges alike have criticized the Court's narrow approach.[89] Yet, the Court's restraint is generally in line with the pronouncements of other judicial and semi-judicial bodies that, as was also highlighted above, have mostly used very cautious language when considering the existence of a right to remedial secession.[90] This conveys the impression that they sought to avoid attaching far-reaching consequences to their decisions. In addition, it should be emphasized that the pronouncements on the matter remained limited to an *obiter dictum* and that in no case has a right to secede unilaterally been granted as a remedy to the injustices which occurred in the case at hand. As such, the evidence for the existence of a right to remedial secession as provided in case law is only very weak.

3.2.2 Remedial Secession as a Norm of Customary International Law?

This brings us to the question whether an entitlement to remedial secession may have emerged as a norm of customary international law.[91] For a customary norm to crystallize, the presence of representative and virtually uniform State practice and *opinio juris* is required.[92] It is therefore important to consider whether international practice evidences these two elements of customary international law on the matter of remedial secession. The case of Bangladesh has repeatedly been suggested as evidencing the existence of a right to remedial secession. As was argued by John Dugard and David Raič, for instance, the case of Bangladesh is widely acknowledged as an example of a lawful and successful secession following severe

[86] Ibid., para. 82.

[87] Ibid., para. 82.

[88] Ibid., para. 83.

[89] See e.g., Arp (2010); Burri (2010); Christakis (2011); Hannum (2011); Ryngaert (2010); Schrijver (2010). See also ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, ICJ Reports 2010, p. 403, Separate Opinion Judge Yusuf, paras. 5–6; ibid., Declaration Judge Simma, para. 7.

[90] See also African Commission on Human and Peoples' Rights, *Katangese Peoples' Congress v. Zaire*, Comm. No. 75/92, 1995 (not dated), paras. 4–6; European Court of Human Rights, *Loizidou v. Turkey*, Application No. 15318/89, Judgment (Merits), 18 December 1996, Concurring opinion of Judge Wildhaber joined by Judge Ryssdal, paras. 1–2; African Commission on Human and Peoples' Rights, *Kevin Nwanga Gumne et al. v. Cameroon*, Comm. No. 266/2003, 2009 (not dated), paras. 194–200. For an elaborate analysis of all relevant cases, see Van den Driest (2013), pp. 121–155.

[91] Statute of the International Court of Justice, Art. 38(1)(b).

[92] ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, p. 3, para. 77; ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, para. 207.

oppression and gross human rights violations.[93] In addition to Bangladesh, the more recent case of Kosovo has often been referred to as the test case of a right to remedial secession.[94] While these cases may indeed be relevant to the doctrine of remedial secession in view of the backdrop against which the secessions took place, it will be demonstrated below that they do not present clear and compelling State practice in that respect.[95]

3.2.2.1 The Case of Bangladesh Bangladesh, formerly known as East Pakistan, unilaterally declared independence from Pakistan in 1971.[96] The East had faced severe domination and discrimination by the central authorities in Islamabad. When the elections for the National Assembly of Pakistan held in December 1970 led to an overwhelming victory of the Bengali Awami League, which aimed at gaining autonomy for the East, the central government in Islamabad suspended the National Assembly's inaugural session in March 1971 and crushed the resistance with large-scale military actions. According to some, this even culminated in genocide.[97] On 10 April 1971, while still being involved in an armed conflict with the military forces of the central government, the Awami League proclaimed the independence of East Pakistan. As the violence against and the brutal oppression of the Bengalis continued, India eventually intervened in early December 1971 to fight the Pakistani forces, which surrendered after 2 weeks of war.[98]

Considering these events, it may well be maintained that the breakaway of Bangladesh from Pakistan (initially) constituted an example of unilateral secession that, in view of the severe oppression and gross human rights violations involved, served a remedial purpose. This is not necessarily to say, however, that it actually qualifies as a case in which a right to remedial secession was accepted and applied by the international community. In this respect, it is important to note that the UN General Assembly subsequently adopted Resolution 2793 (XXVI), which called for the withdrawal of Indian forces, but did not make any reference to the right to self-determination or an entitlement to (remedial) secession for the East.[99] Moreover, it should be borne in mind that although the human rights violations in East Pakistan and the news reports of genocide may have led to international sympathy for the declaration of independence, it did not lead to widespread recognition of the newly

[93] Dugard and Raič (2006), pp. 120–130. See also Ryngaert and Griffioen (2009), paras. 24–27; ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Oral Statement of the Netherlands (Lijnzaad), CR 2009/32, 10 December 2009, para. 10.

[94] Tancredi (2006), pp. 187–188.

[95] For a more elaborate analysis of these and other cases sometimes mentioned in this regard (i.e. Eritrea and the successor States of the USSR and SFRY), see Van den Driest (2013), pp. 233–290.

[96] For background information on Bangladesh, see Pavković and Radan (2007), pp. 103–104.

[97] For an extensive documentation of the atrocities, see International Commission of Jurists (1972), pp. 26–41.

[98] Crawford (2006), pp. 140–141.

[99] UN General Assembly Resolution 2793 (XXVI), UN Doc. A/RES/2793 (XXVI), 7 December 1971.

proclaimed State. Only after the Indian intervention had ousted the Pakistani forces and thus created a '*fait accompli*'[100] did various States decide to recognize Bangladesh. It is to be emphasized, however, that Bangladesh only became universally recognized and admitted to the United Nations after Pakistan had eventually recognized it in early 1974.[101] As such, the resignation and acknowledgement of the situation by the parent State appear to have been decisive for the international community's recognition of Bangladesh, rather than the oppression and human rights violations taking place on the territory. It thus seems that the international community did not consider a right to remedial secession to exist at that time.[102]

3.2.2.2 The Case of Kosovo On 17 February 2008, Serbia's restive province of Kosovo issued a unilateral declaration of independence.[103] The international responses to this declaration and the advisory proceedings before the ICJ have provided a unique opportunity to gain an insight into the contemporary stance of the international community as to attempts at unilateral secession and, more specifically, the theory of remedial secession. For, Kosovo's unilateral declaration of independence combined with the territory's history of oppression, gross human rights violations and international administration arguably renders Kosovo an eligible candidate for a claim to remedial secession. Following the issuing of its declaration of independence, the case of Kosovo was extensively discussed in the Security Council and General Assembly.[104] The records of the debates demonstrate that UN Member States generally reflected a strong adherence to the traditional prerogatives of States, such as State sovereignty and territorial integrity, and/or emphasized the need for a negotiated solution with a view to regional peace and stability.[105] These lines of reasoning appear to be consistent with the conventional approach to the right to self-determination as explained above, which prioritizes the achievement of internal self-determination on the basis of negotiations and discourages the option of secession as long as the consent of the parent State remains forthcoming. On a more practical level, this stance would also reduce the risk that Kosovo could serve as a precedent for other secessionist entities in the world.[106]

In contrast to the political discourse sketched above, the context of the legal proceedings of the *Kosovo* Advisory Opinion led more States to signify the right to self-determination and the concept of remedial secession. According to the ICJ,

[100] Crawford (2006), p. 393.

[101] See UN Security Council Resolution 351 (1974), UN Doc. S/RES/351 (1974), 10 June 1974; UN General Assembly Resolution 3203 (XXIX), UN Doc. A/RES/3203 (XXIX), 17 September 1974.

[102] Van den Driest (2013), p. 278.

[103] For the history of Kosovo, see e.g. Judah (2008); Summers (2011), pp. 3–51; Weller (2009b), pp. 25–40.

[104] See in particular UN Security Council, 5839th meeting, UN Doc. S/PV.5839, 18 February 2008 and UN General Assembly, 22nd plenary meeting, UN Doc. A/63/PV.22, 8 October 2008.

[105] For a more elaborate analysis of the relevant debates in the Security Council and General Assembly, see Van den Driest (2013), pp. 234–237.

[106] Quane (2011), p. 198.

however, there was a 'sharp difference of views' among States on these matters.[107] As such, the ICJ seemed to suggest that in the *Kosovo* proceedings, no widely shared *opinio juris* was reflected on the contemporary scope of the right to self-determination and the existence of a remedial right to unilateral secession. Indeed, when examining the submissions of the 43 States—predominantly Western States—that participated in the written and oral proceedings before the Court, it becomes apparent that most States rejected the theory of remedial secession for varying reasons, often involving the lack of evidence for such legal entitlement.[108] In addition to the authors of Kosovo's unilateral declaration of independence, only eleven States[109] expressed support for the existence of a right to remedial secession under contemporary international law.[110] While the precise conditions for the exercise of such right put forward by these States differed to a certain extent, in essence, two prerequisites may be singled out. The first is substantive in nature and requires that the people at issue suffers from a persistent refusal of internal self-determination by the central authorities of the State. The presence of gross human rights violations was either viewed as an expression of this denial, or as an additional requirement. The second prerequisite is procedural in nature and requires that any viable peaceful options to resolve the situation internally are absent. That is to say that remedial secession operates as an *ultimum remedium*.[111] In this respect, it is interesting to refer to the stance of the Russian Federation, which set the threshold relatively high compared to other States acknowledging a right to remedial secession. It argued that a right to remedial secession could emerge under certain conditions

> limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question.

[107] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 82.

[108] For a detailed analysis of the submissions in the advisory proceedings, see Van den Driest (2013), pp. 261–273.

[109] These States were Albania, Estonia, Finland, Germany, Ireland, Jordan, the Netherlands, Poland, the Russian Federation, Slovenia, and Switzerland. Some States merely touched upon the acknowledgement of a right to remedial secession or even accepted it rather implicitly, but most commented on the matter at length. See e.g., ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of Albania, 14 April 2009, paras. 81–95; Ibid., Written Statement of Estonia, 13 April 2009, paras. 2.1–2.2; Ibid., Written Statement of Finland, 16 April 2009, paras. 6–12; Ibid., Written Statement of Germany, 15 April 2009, paras. VI.1–VI.2; Ibid., Written Statement of Ireland, 17 April 2009, paras. 28–34; Ibid., Oral Statement of Jordan (Al Hussein), CR 2009/31, 9 December 2009, paras. 35–38; Ibid., Written Statement of the Netherlands, 17 April 2009, paras. 3.6–3.22; Ibid., Oral Statement of the Netherlands (Lijnzaad), CR 2009/32, 10 December 2009, paras. 9–10; Ibid., Written Statement of Poland, 14 April 2009, paras. 6.1–6.12; Ibid., Written Statement of the Russian Federation, 16 April 2009, paras. 76–103; Ibid., Written Comments of Slovenia, 17 July 2009, para. 8; Ibid., Written Statement of Switzerland, 25 May 2009, paras. 63–97.

[110] See ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of the Russian Federation, 16 April 2009, para. 88.

[111] See Van den Driest (2013), pp. 245–261.

> Otherwise, all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existing state.[112]

According to the Russian Federation, this threshold was not met in the case of Kosovo. It considered that Serbia's offers for enhanced autonomy were rejected by the Kosovar authorities and found that, in 2008, there was no longer any (threat of) extreme oppression of the Kosovo Albanian population by Serbia.[113] While it has been contended by some States that the passage of time actually contributes to the fulfilment of the above-mentioned procedural condition for the exercise of a right to remedial secession,[114] it is indeed questionable whether secession can still be seen to operate as an *ultimum remedium* when years have passed since oppression and gross human rights violations took place, as was the case in Kosovo.

In the proceedings, most of the States supporting the existence of a right to remedial secession substantiated their claims with reference to the safeguard clauses of the Friendly Relations Declaration and the Vienna Declaration and Programme of Action, the reports in the *Åland Islands* case, and the relevant paragraphs in the *Reference re Secession of Quebec*.[115] It is striking, though, that virtually no State claimed that the existence of a right to remedial secession is rooted in practice. Even where this was asserted, the validity of this claim was hardly underpinned with reference to specific examples from practice. The Netherlands was one of the few States to argue that the creation of Bangladesh and Croatia could be seen as relevant cases in this respect, yet it did so without further explanation.[116] From the limited number of references to practice, it may be deduced that States did not consider international practice to provide for particularly strong support for a right to remedial secession under international law, possibly even due to the presumed absence of State practice that is both relevant and sound in this respect.[117] To the same effect, it is highly questionable whether the case of Kosovo in itself presents State practice on the issue of remedial secession. As the serious injustices suffered by the Kosovo Albanians had already been over for 9 years when the declaration of independence was issued in 2008, it may well be argued that the situation had 'lost its emergency character' and thus cannot be seen as State practice in support of a

[112] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of the Russian Federation, 16 April 2009, para. 88. It should be noted that Russia's acceptance of a right to remedial secession in general may be understood against the backdrop of Russia's support for Georgia's secessionist regions South Ossetia and Abkhazia, and Moldova's restive region of Transnistria.

[113] Ibid., paras. 89–103.

[114] See e.g. ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of the Netherlands, 17 April 2009, para. 3.15.

[115] See Van den Driest (2013), pp. 246–261.

[116] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Oral Statement of the Netherlands (Lijnzaad), CR 2009/32, 10 December 2009, para. 10.

[117] Van den Driest (2013), p. 260.

right to remedial secession.[118] Kosovo's disputed international legal status today seems to support this line of reasoning as well. So while the case of Kosovo may reflect some limited *opinio juris* on the existence of a right to remedial secession under contemporary international law, it does not present an example of State practice in this respect either. Taken together with the absence of such practice beyond the case of Kosovo, it should thus be concluded that a right to remedial secession cannot be seen to have crystallized as a norm of customary international law.[119]

3.3 A Right to External Self-Determination or Remedial Secession for Crimea?

Having explained the contemporary scope of the right to self-determination and the (non-)existence of a right to remedial secession under international law, it becomes relevant to consider the events in Crimea in light of the above. In this respect, it is important to first note that the Constitution of Ukraine does not provide for a provision granting Crimea or any other part of the territory a right to secede. As the European Commission for Democracy Through Law (commonly known as the Council of Europe's Venice Commission) pointed out, the Constitution of Ukraine does not even allow for referendums on secession.[120] While it is true that the Constitution does recognize referendums as an expression of the will of the people, this does not imply that referendums are constitutional by definition. In fact, various provisions of the Constitution of Ukraine demonstrate that the secession of part of the territory of Ukraine cannot be the result of a local referendum. First, Article 2 of the Constitution emphasizes the importance of the sovereignty of Ukraine and the indivisibility and inviolability of its present borders.[121] With respect to referendums more specifically, the Constitution subsequently provides that the Autonomous Republic of Crimea is competent to organize and conduct local referendums,[122] but as Article 73 stipulates, '[i]ssues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum'.[123] So, since referendums concerning the change of the Ukrainian territorial *status quo* can only be decided by a referendum on the national level, Crimea was not authorized to organize and conduct a local

[118] Oeter (2015), p. 64.

[119] For a more extensive appraisal of State practice and *opinio juris*, see Van den Driest (2013), pp. 290–296.

[120] European Commission on Democracy Through Law, Opinion on whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles, CDL-AD(2014)002-e, Venice, 21–22 March 2014, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)002-e, paras. 10–19. Accessed August 2015.

[121] Constitution of Ukraine, text provided by the Ukrainian authorities on 13 March 2014, http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)012-e, Art. 2. Accessed August 2015.

[122] Ibid., Art. 138(2).

[123] Ibid., Art. 73.

referendum on its secession from Ukraine. To put it even stronger, for such secession to be constitutional, a constitutional amendment would be required, since the Constitution recognizes the Autonomous Republic of Crimea as an 'inseparable constituent part of Ukraine'.[124] As the Venice Commission pointed out, however, such a constitutional amendment would be prohibited by means of Article 157 of the Constitution, which determines that no constitutional amendments shall be made 'if the amendments foresee the abolition or restriction of human and citizens' right and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine'.[125] The Constitutional Court of Ukraine confirmed the unconstitutional character of Crimea's decision to hold a referendum on its independence in its decision of 14 March 2014.[126] Consequently, Crimea could not claim a right to secession under Ukrainian constitutional law. The case of Crimea also does not represent an example of what is often called consensual secession, as the Ukrainian authorities in Kiev strongly opposed the breaking away of the Crimean Peninsula and continue to uphold their territorial counterclaim to date.[127]

The question thus rises whether international law granted (the people of) Crimea a right to unilateral secession. To this end, it should first be determined whether the inhabitants of the Crimean Peninsula actually qualify as the holders of the right to self-determination: a 'people'. As was explained above, it is generally seen that not only the population of an existing State as a whole constitutes a 'people', but that distinct groups within the population may also qualify as such. In that respect, the members of the group share certain objectively identifiable common features—e.g. ethnic, cultural, linguistic, and/or religious—that distinguish them from other groups. Moreover, it is essential that the group has a connection with a particular territory, that it believes to have a distinct group identity and wishes to be recognized as such. Some of the groups inhabiting the peninsula—in particular the ethnic–Russians and Crimean Tatars[128]—may well be considered as ethnic minorities within Ukraine, thus entitled to minority protection under international law.[129] However, it is debatable whether the population of Crimea *as a whole* constitutes a 'people' under international law. Although it is clear that the inhabitants of the Crimean Peninsula share a common territory and constitute a separate political unit within Ukraine as a result of Crimea's autonomous status,[130]

[124] Ibid., Art. 134.

[125] Ibid., Art. 157.

[126] For an English-language summary of the decision, see Constitutional Court of Ukraine, Summary to the Decision of the Constitutional Court of Ukraine, No.2-rp/2014, dated March 14, 2014, available at http://www.ccu.gov.ua/en/doccatalog/list?currDir=238920. Accessed August 2015.

[127] See e.g. 'Ukraine PM: Crimea was, is and will be an integral part of Ukraine', 7 March 2014, http://edition.cnn.com/2014/03/06/world/europe/ukraine-russia-tensions/. Accessed August 2015.

[128] What is more, the Crimean Tatars have a long-standing claim for recognition as the indigenous people of the Crimean Peninsula.

[129] For instance, under Art. 27 ICCPR.

[130] On the status of the Autonomous Republic of Crimea within Ukraine, see Constitution of Ukraine, text provided by the Ukrainian authorities on 13 March 2014, http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)012-e, Chapter X. Accessed August 2015.

it remains questionable whether they actually have a distinct group identity and the wish to be identified as such. In fact, it seems that the population of the Crimean Peninsula is too diverse to meet the threshold of a 'people'.[131] Only when taking a territorial approach to the right to self-determination and applying it to the territory of Crimea rather than its inhabitants could the right to self-determination be invoked.[132] Such an interpretation, however, is undesirable since the relevant treaties and instruments clearly stipulate that the right to self-determination is a right of 'peoples' rather than territories.[133]

Even when assuming that the right to self-determination does apply to either the population or the territory of Crimea, no general right to unilateral secession could be claimed, as the right to self-determination does not encompass such a right in the post-decolonization era. Alternatively, an alleged right to remedial secession could be said to provide for a legal basis for secession. As was observed above, during the debates in the Security Council, the Russian Federation has claimed that the 'lives and legitimate interests' of the Russian(-speaking) population in Crimea were at stake,[134] thereby implicitly relying on a right to remedial secession. Such argument, however, cannot be upheld on the basis of both legal and factual grounds. The doctrine of remedial secession is highly controversial and cannot be said to be part of positive international law, be it customary law or otherwise. Even when taking a very progressive stance and assuming the existence of a right to remedial secession, it should be concluded that such right would not apply in the case of Crimea. In both literature and case law, the right to remedial secession is generally described as an entitlement that would only emerge under exceptional circumstances. The denial of meaningful internal self-determination, the existence of gross human rights violations, and structural discriminatory treatment of the group are frequently mentioned as prerequisites for such a right. What is more, even proponents of a right to remedial secession consider this option to be an *ultimum remedium*, thus requiring genuine attempts at settling the dispute internally first. It is clear that Crimea does not meet this high threshold. In this respect, it is relevant to note that there are no indications that Crimea's status as an Autonomous Republic within Ukraine was inadequate for enabling the meaningful exercise of the right to internal self-determination.[135] But even if this was the case, it should be emphasized that there have been no requests for enhanced autonomy for the Crimean Peninsula. As such, it cannot be convincingly argued that secession was a remedy of last resort. Moreover, there have been no reports of gross human rights violations or structural

[131] But see Peters (2015), pp. 258–259.

[132] For this line of reasoning, see Weller (2009b), p. 17.

[133] See Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217, para. 123. For a similar argument, see Vidmar (2011), p. 364.

[134] UN Security Council, UN Doc. S/PV.7125, 3 March 2015, p. 3 (Mr. Churkin).

[135] On Crimea's autonomous status and the relationship between the various groups inhabiting the peninsula, see Bowring (2005).

discriminatory treatment of the Crimean population by the Ukrainian authorities.[136] The approval of the draft bill of 23 February 2014, aiming to define the Ukrainian language as the sole official State language within Ukraine,[137] might have fuelled the fear of discriminatory treatment and oppression of the ethnic-Russian population of Crimea[138] and may even conflict with minority rights standards. However, it cannot plausibly be said that this circumstance meets the high standard for an alleged right to remedial secession—let alone that it meets the even more radical standard that was previously set by the Russian Federation itself. As was observed above, against the backdrop of the events in Kosovo, the Russian Federation had acknowledged a right to remedial secession in case of 'an outright armed attack by the parent state, threatening the very existence of the people in question'.[139] When applying this to the situation in Crimea, it should be concluded that it does not even come close to the 'extreme circumstances' under which the Russian Federation accepted a claim for remedial secession. All things considered, it should thus be concluded that the Crimean authorities could not claim a right to remedial secession, not even *de lege ferenda*.

4 The (Il)legality of Crimea's Unilateral Secession

Having demonstrated that Crimea could not claim a right to external self-determination or unilateral secession, not even as a remedy of last resort, a pertinent question is whether its unilateral secession from Ukraine was in fact prohibited or illegal under contemporary international law. In this context, the principle of territorial integrity is often invoked as a shield against attempts at unilateral secession.[140] To assess whether—in the absence of a legal entitlement—international law actually prohibited Crimea's attempt at unilateral secession, this section will first consider whether the principle of territorial integrity can be seen as a ban in this respect. It will be argued that while the various safeguard clauses referring to

[136] Neither have there been indications of violations of the human rights of the ethnic-Russian population in Crimea. See Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine, 15 April 2014, http://www.ohchr.org/en/countries/ENACARegion/Pages/UAIndex.aspx. August 2015; Parliamentary Assembly of the Council of Europe, Recent developments in Ukraine: threats to the functioning of democratic institutions, Resolution 1988 (2014), 9 April 2014, para. 15.

[137] See Verkhovna Rada of Ukraine, 'On Principles of the State Language Policy', available at http://zakon4.rada.gov.ua/laws/anot/en/5029-17. Accessed August 2015.

[138] See also Parliamentary Assembly of the Council of Europe, Recent developments in Ukraine: threats to the functioning of democratic institutions, Resolution 1988 (2014), 9 April 2014, para. 11.

[139] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of the Russian Federation, 16 April 2009, para. 88.

[140] See e.g., ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of Argentina, 17 April 2009, paras. 69–80; Ibid., Oral Statement of China (Xue), CR 2009/29, 7 December 2009, para. 25.

this principle certainly discourage attempts at unilateral secession, they do not strictly preclude it. Yet, this section will subsequently explain that there are circumstances under which an attempt at unilateral secession is prohibited nonetheless, and that this exception applies to the case of Crimea.

4.1 The Principle of Territorial Integrity and Unilateral Secession

As was already noted, the principle of territorial integrity is highly valued by States and it is often said to be violated by attempts at unilateral secession. It is questionable, however, whether the principle actually prohibits such unilateral action under international law. In the *Kosovo* Advisory Opinion, the ICJ notably concluded that '[t]he principle of territorial integrity is confined to the sphere of relations between States'.[141] The Court substantiated its position by referring to three international instruments containing a clause on the principle of territorial integrity, i.e. Article 2(4) of the UN Charter,[142] Principle I, paragraph 1 of the Friendly Relations Declaration,[143] and Article IV of the Helsinki Final Act.[144] These paragraphs are all explicitly addressed at States and primarily denote territorial integrity in the context of the prohibition of the threat or use of force in inter-State relations. As such, the territorial integrity of one State may only be violated by another State. Since secession is by definition sought by entities that are not (yet) States—but aspire to become one—unilateral action aimed at secession would not impair the principle of territorial integrity.[145] In this view, the principle of territorial integrity generally does not pose a barrier to or even a prohibition on attempts at (unilateral) secession. Only when a third State would actively support a secessionist attempt by the threat or use of force, or when the secession would be carried out by foreign authorities in the sense that they invade a territory with a view to separating it from the parent State, would these events violate the principle of territorial integrity.[146]

Disregarding the applicability of the principle of territorial integrity with respect to unilateral secession, the view presented by the ICJ seems to be in line with what is often called the 'legal neutrality' of international law on this matter:

[141] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 80.

[142] Art. 2(4) reads: 'All Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

[143] Principle I, para. 1 stipulates that 'States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'. See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970.

[144] Art. IV declares that '[t]he participating States will respect the territorial integrity of each of the participating States'. Conference on Security and Co-operation in Europe Final Act, Helsinki, 1 August 1975, 14 ILM 1272 (1975).

[145] See also Vidmar (2012a), p. 163.

[146] See Crawford (2000), p. 158.

international law neither authorizes unilateral secession, nor prohibits it. Instead, it should be regarded as a domestic affair of the parent State, while only the consequences of such action—e.g. questions of statehood, the obligation for third States to refrain from supporting the secessionist entity,[147] and in some instances an obligation to withhold recognition[148]—are regulated by international law.[149] While the ICJ's position on the scope of the principle of territorial integrity is understandable considering the sources it relied on and is accurate to a certain extent, it is too restrictive. As I have explained elsewhere in greater detail,[150] the Court overlooked other references that indicate the need for a more inclusive interpretation of the principle of territorial integrity and show that it does apply to cases of unilateral secession. In this respect, it is important to note that in addition to the paragraph in the Friendly Relations Declaration that was mentioned by the Court, the principle of territorial integrity is elaborated upon in Principle V, paragraph 7 as well. This safeguard clause, which was already mentioned above in the context of the doctrine of remedial secession[151] but was ignored by the Court, denotes the principle of territorial integrity against the backdrop of the right to self-determination. It protects the principle of territorial integrity beyond the threat or use of force and seems to construe the principle as a limitation to the exercise of the right to self-determination, which suggests that the principle of territorial integrity is addressed to the subjects of the right to self-determination, i.e. peoples. This reading is supported by the fact that the ultimate paragraph of Principle V explicitly calls upon States to respect territorial integrity in their international relations.[152] Moreover, several other instruments concerning the rights of indigenous peoples and minorities, such as the UN Declaration on the Rights of Indigenous Peoples[153] and the Council of Europe's Framework Convention for the Protection of National Minorities,[154] indicate that non-State entities are also expected to observe the principle of territorial integrity.[155] Phrased differently, the principle of territorial integrity has an *intra*-State dimension in addition to the traditionally and often referred to *inter*-State dimension. This implies that the principle of territorial integrity is actually relevant with respect to attempts at

[147] See, e.g., Nolte (2006), pp. 76 et seq.

[148] See, e.g. Dugard and Raič (2006), pp. 100–101.

[149] See, e.g., Crawford (2006), p. 390.

[150] See Van den Driest (2015).

[151] See Sect. 3.2.2 *supra*.

[152] Vidmar (2011), p. 369.

[153] Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295 (2007), UN Doc. A/RES/47/1 (2007), 7 September 2007, Art. 46(1).

[154] Framework Convention for the Protection of National Minorities and Explanatory Report, 1 February 1995, 34 ILM 351 (1995), Art. 21.

[155] For a more elaborate discussion of these instruments and an analysis of practice, see Van den Driest (2015), pp. 474–478.

unilateral secession.[156] The Russian Federation even seems to have taken this position one step further in the proceedings of the *Kosovo* Advisory Opinion, arguing that the obligation 'to respect territorial integrity is a legal obligation stemming from peremptory norms of international law. Those norms are binding not only upon Member States, but upon *all subjects of international law*'.[157]

Relying on its intra-State dimension, some authors have interpreted the principle of territorial integrity to encompass an outright prohibition of unilateral secession under international law. Malcolm N. Shaw, for instance, has interpreted Security Council Resolutions that call upon secessionist entities within a State to respect the territorial integrity as involving 'an international legal duty *not* to secede'.[158] In even stronger terms, Alexander Orakhelashvili, has argued that the application of the principle of territorial integrity 'necessarily outlaws secession without the consent of the parent state'.[159] Such an understanding of the principle of territorial integrity, however, seems to be too far-reaching considering the cautious language employed by the relevant sources. When reading the Friendly Relations Declaration's safeguard clause carefully, it is striking that it merely indicates that the 'dismemberment' or 'impairment' of the territorial integrity of a State is not 'authorized' or 'encouraged'.[160] The UN Declaration on the Rights of Indigenous Peoples employs similar restrained terminology.[161] What is more, the Framework Convention for the Protection of National Minorities specifies that the rights proclaimed in the Convention should not be understood 'as implying any right to […] act contrary to' the principle of the territorial integrity of States.[162] Hence, the rights enshrined in the Framework Convention should not be interpreted as including a right to unilateral secession. This leaves it open to question, however, whether the exclusion of a *right* to secede unilaterally necessarily implies that such action is also *illegal* or *prohibited* under international law. As I have argued

[156] This intra-State dimension was also acknowledged by Judge Yusuf in his separate opinion attached to the *Kosovo* Advisory Opinion. According to Judge Yusuf, the safeguard clause of the Friendly Relations Declaration 'primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their *fragmentation due to separatist forces*'. See ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, Separate Opinion Judge Yusuf, para. 12 (emphasis added).

[157] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Oral Statement of the Russian Federation, CR 2009/30 (Gevorgian), 8 December 2009, para. 34 (emphasis added). It should be noted, however, that the peremptory character of the principle of territorial integrity is questionable. See e.g., Vidmar (2012a), p. 166.

[158] Shaw (2014), p. 379 (emphasis in the original).

[159] Orakhelashvili (2008), p. 13.

[160] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970, Principle V, para. 7.

[161] Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295 (2007), UN Doc. A/RES/47/1 (2007), 7 September 2007, Art. 46(1).

[162] Framework Convention for the Protection of National Minorities and Explanatory Report, 1 February 1995, 34 ILM 351 (1995), Art. 21.

elsewhere, this cannot be plausibly argued in view of the careful phrasings referred to above.[163] Nonetheless, since international law highly values the territorial integrity of States and expects States as well as non-State actors to uphold this fundamental principle, it should be considered to constitute a serious barrier to attempts at unilateral secession.

4.2 Circumstances Prohibiting Unilateral Secession

Although unilateral secession is not prohibited in general terms—not even by the principle of territorial integrity—this is not to say that such events are not regulated by international law at all and that entities with separatist ambitious are thus allowed to act without any restraints in what some have termed as a 'Lotus land of freedom'.[164] As was recognized by the ICJ in the *Kosovo* Advisory Opinion, practice shows that unilateral declarations of independence are considered to be illegal acts when stemming from serious violations of fundamental norms of general international law. With reference to the examples of Southern Rhodesia, Northern Cyprus, and the Republika Srpska, in which the Security Council had labelled the respective attempts at new State creation as invalid or unlawful, the Court concluded that

> the illegality attached to the declarations of independence […] 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*).[165]

Although the Court explicitly pronounced itself on the (il)legality of declarations of independence rather than attempts at unilateral secession more in general, the exception phrased does pose legal limitations on attempts at unilateral secession in a broader sense. In fact, it prohibits (unilateral) secession when the attempt is connected with flagrant violations of international law, most prominently *jus cogens* norms. The example of Northern Cyprus may be particularly illustrative for the present purposes.[166]

Following British rule in Cyprus, the Greek and Turkish communities in Cyprus reached a set of arrangements concerning the constitutional structures of Cyprus and the role of Greece and Turkey in guaranteeing these structures. The arrangements also protected the territorial integrity of Cyprus and prohibited the union of Cyprus with another State or the secession of part of the territory. However, the

[163] See Van den Driest (2015), p. 481. See also Christakis (2011), p. 85; Vidmar (2012b), p. 708.

[164] See, for instance, Christakis (2011), p. 83 and Peters (2011), pp. 95–108, referring to the principle developed in the *Lotus* case that what is not prohibited, is permitted.

[165] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 81.

[166] See also Vidmar (2015), p. 376.

constitutional framework proved unsustainable.[167] Tensions between the Greek and Turkish communities paralyzed the institutions and by 1963, the Turkish community in Cyprus lived separately in enclaves and proved practically self-administering. After the military coup by Greek Cypriots who questioned the constitutional framework of Cyprus, Turkey sent in military forces in July 1974 and occupied the northern part of the island in order to support the Turkish Cypriot population. The UN General Assembly deplored the situation and called for the withdrawal of foreign armed forces.[168] Nonetheless, the unlawful occupation continued and on 15 December 1983, the Turkish Republic of Northern Cyprus (TRNC) was proclaimed.[169] The UN Security Council subsequently adopted Resolution 541 (1983) in which it 'deplore[d] the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus' and considered it to be 'legally invalid'.[170] Consequently, the Security Council called 'upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus' and 'not to recognize any Cypriot State other than the Republic of Cyprus'.[171] To the same effect, Resolution 550 (1984) condemned 'all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership' and declared them to be 'illegal and invalid'.[172] The Security Council subsequently reiterated its 'call upon all States not to recognise the purported state of the [TRNC] set up by secessionist acts'.[173] Although not explicitly noted by the Security Council, it was Turkey's unlawful occupation of the north of Cyprus that led to the illegality of the TRNC's declaration of independence and secessionist actions. In other words, since Turkey sought to create the TRNC in violation of the prohibition of the threat or use of force, the issuing of the declaration of independence of 15 December 1983 and subsequent secessionist acts were considered to be unlawful under international law. The consequence of this illegal attempt at the creation of a new State was an obligation *erga omnes* to withhold recognition.[174]

[167] Crawford (2006), p. 143.

[168] UN General Assembly Resolution 3212 (1974), UN Doc. A/RES/3212, 1 November 1974, para. 2.

[169] Crawford (2006), p 144.

[170] UN Security Council Resolution 541 (1983), UN Doc. S/RES/541, 18 November 1983, paras. 1–2.

[171] Ibid., paras. 6–7. Despite the legally non-binding character of Resolution 541, which was not adopted under Chapter VII, no State has recognized the TRNC except for Turkey, whose action was condemned by the Security Council. See UN Security Council Resolution 550 (1984), UN Doc. S/RES/550 (1984), 11 May 1984, para. 2.

[172] Ibid.

[173] Ibid., para. 3.

[174] This obligation emerged as a political obligation in the *Stimson* doctrine. Today, the obligation of non-recognition arises under customary international law and is enshrined in Art. 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts. See International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 Yearbook ILC, Vol. II (Part Two), p. 26, Commentary to Art. 41. See also Crawford (2006), pp. 158–162.

4.3 The (il)legality of Crimea's Secession from Ukraine

Having explained the relevant legal rules for determining the lawfulness of attempts at unilateral secession, the implications for the case of Crimea now merit consideration. In view of the above, it is clear that while the people of Crimea were to respect the territorial integrity of Ukraine, the principle of territorial integrity did not prohibit them from seceding.[175] As such, Crimea's attempted secession from Ukraine did not violate international law. However, the specific circumstances surrounding Crimea's attempted separation from Ukraine do raise some serious issues. Most prominently, the question presents itself whether the presence of the Russian military on the Crimean Peninsula qualifies as 'the unlawful use of force or other egregious violations of norms of international law, in particular those of a peremptory character',[176] which would render the declaration of independence an illegal act and consequently preclude the attempted secession.

It is important to note in this respect that the presence of Russian troops in Crimea was lawful to the extent that it remained within the scope of the 1997 Black Sea Fleet Agreement between Ukraine and the Russian Federation. This treaty, which was extended until 2017 in 2010, gives the Russian Federation the authority, *inter alia*, to deploy troops on the Crimean Peninsula.[177] While a maximum of 25,000 soldiers was allowed under the Agreement, they were only authorized to stay on the military bases and to move between these bases and the territory of the Russian Federation. The treaty also stipulated that those troops are to respect Ukrainian law and sovereignty, and do not interfere in the internal affairs of Ukraine. Moreover, the treaty only covered troops that are part of or attached to the Black Sea Fleet. As it was reported that Russian troops were operating outside their agreed bases, seizing Crimean airports and military bases and occupying key buildings including the Crimean Supreme Council,[178] it appears that the Russian military presence was by no means justified by the 1997 Black Sea Fleet Agreement. As such, their invasion and active (armed) support of Crimea's attempt at unilateral secession violated the principle of non-intervention and the territorial integrity of Ukraine.[179] In addition, the events in Crimea can be qualified *prima*

[175] This is not to say, however, that the principle of territorial integrity was not violated by the Russian Federation. See Van den Driest (2015).

[176] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 81.

[177] Agreement Between Ukraine and the Russian Federation on the Status and Conditions of the Russian Black Sea Fleet's Stay on Ukrainian Territory, 28 May 1997, English translation in: Black (1998), p. 129. Following the incorporation of Crimea, the treaty was unilaterally terminated by the Russian Federation under Arts. 61 and 62 of the Vienna Convention on the Law of Treaties. See Kremlin, Termination of Agreements on the Presence of Russia's Black Sea Fleet in Ukraine, 2 April 2014, http://en.kremlin.ru/events/president/news/20673. Accessed August 2015.

[178] See Sect. 2 *supra*.

[179] In this respect, it may be noted that the 1997 Treaty of Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation also guaranteed respect for Ukraine's territorial integrity and the inviolability of its borders. See Treaty of Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, 31 May 1997, reprinted in Black (1998), p. 217.

facie as the threat—and possibly also the use—of force as prohibited by Article 2(4) of the UN Charter.[180] In line with the argument by the Ukrainian Association of International Law,[181] some have even contended that the Russian Federation committed an act of aggression as defined in General Assembly Resolution 3314 (XXIX).[182] Notwithstanding the precise qualification of the Russian military intervention in Crimea—as the breach of Ukraine's territorial integrity, the threat of force, the use of force, or an act of aggression—it seems safe to contend that it involved an egregious violation of a norm of general international law, possibly even of a peremptory character.[183] Since the unlawful acts by the Russian Federation have clearly facilitated the issuing of Crimea's unilateral declaration of independence,[184] this constituted an illegal act in the terms of the *Kosovo* Advisory Opinion, as a consequence of which Crimea's attempt at unilateral secession was prohibited under international law.[185]

5 Conclusions

This article aimed to assess Crimea's separation from Ukraine against the backdrop of the international legal framework concerning the right to self-determination and secession. To this end, it was first examined whether the right to self-determination or an alleged right to remedial secession could serve as a legal basis for the separation of the Crimean Peninsula, as the Crimean authorities and the Russian Federation seem to have argued. It was explained, however, that beyond the context of decolonization, the right to self-determination does not encompass a general right

[180] See e.g., Bílková (2015), p. 32; Christakis (2014), pp. 750 et seq.

[181] For an English translation of the appeal by the Ukrainian Association of International Law, see Akande (2014).

[182] See e.g., Sari (2014); Tancredi (2014). For an analysis of possible (progressive) justifications for the Russian intervention in Crimea, such as intervention by invitation, the protection of nationals abroad and humanitarian intervention, see Bílková (2015), p. 49; Christakis (2014), pp. 750 et seq.; Walter (2014), pp. 307–309.

[183] This qualification certainly applies when adhering to the argument presented by the Russian Federation in the context of the case of Kosovo, where it contended that the principle of territorial integrity is a peremptory norm. See ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Oral Statement of the Russian Federation, CR 2009/30 (Gevorgian), 8 December 2009, para. 34.

[184] See also Marxsen (2014); Vidmar (2015), pp. 375–376.

[185] It deserves to be noted that the illegality surrounding Crimea's attempt to secede has not remained without legal consequences. Sanctions have been imposed on the Russian Federation and the illegality of Crimea's unilateral declaration of independence has triggered a customary legal obligation for all States not to recognize the new factual situation. This obligation was first articulated in a draft resolution by the Security Council, which was not adopted due to a negative vote by the Russian Federation (see UN Security Council, UN Doc. S/2014/189, 15 March 2014, para. 5). In similar wording, General Assembly Resolution 68/262 subsequently reaffirmed the territorial integrity of Ukraine and called 'upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea […] and to refrain from any action or dealing that might be interpreted as recognizing such altered status' (see UN General Assembly, Resolution 68/262, UN Doc. A/RES/68/262, 27 March 2014, para. 6; vote record: 100 votes in favour, 11 votes against, 58 abstentions).

to unilateral secession. Instead, this right is expected to be implemented internally, within the framework of the existing State. Subsequently, the article demonstrated that contemporary international law does not acknowledge a right to remedial secession, as is often argued in literature. It is not only questionable whether such right could actually be based on an *a contrario* reading of the safeguard clauses, but also, practice does not provide for strong evidence in this respect. Judicial and semi-judicial bodies have generally used very cautious language as regards the existence of a right to remedial secession, their pronouncements on the matter have remained limited to an *obiter dictum* and in no case has a right to unilateral secession actually been granted as a remedy to the injustices that occurred in the case at issue. The article also demonstrated that on the basis of the practice of and views presented by States, it cannot be concluded that a right to remedial secession has crystallized as a customary norm. While the case of Kosovo may be seen to reflect some limited *opinio juris* on the existence of such a right, State practice is virtually absent.

With respect to the case of Crimea, it was argued that while some of the groups inhabiting the peninsula may well be considered as ethnic minorities entitled to minority protection under international law, it remains questionable whether the population of Crimea as a whole constitutes a 'people' as holders of the right to (internal) self-determination in the first place. Moreover, even when taking a very progressive stance and assuming that a right to remedial secession does exist, the case of Crimea does not meet the high threshold in this respect. There are no indications that the meaningful exercise of the right to internal self-determination of the Crimean population was denied and there have been no reports of gross human rights violations or structural discriminatory treatment by the Ukrainian authorities. As a consequence, the Crimean authorities could not claim a right to remedial secession.

In the absence of a legal entitlement, the article subsequently turned to the question whether Crimea's unilateral secession was prohibited under international law. It was first argued that the principle of territorial integrity should be seen to have an *intra*-State dimension in addition to the often referred to *inter*-State dimension and, as such, is relevant to attempts at unilateral secession. But while the principle of territorial integrity strongly discourages such attempts, the cautious phrasings of, for instance, the Friendly Relations Declaration, the UN Declaration on the Rights of Indigenous Peoples, and the Framework Convention for the Protection of National Minorities indicate that it does not actually prohibit them. Nevertheless, there are situations in which an attempt at unilateral secession is considered to be illegal in view of the circumstances. In the *Kosovo* Advisory Opinion, the ICJ concluded that declarations of independence are illegal when '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*)'. While the Court pronounced itself on declarations of independence rather than attempts at unilateral secession more in general, it was contended that it does pose legal limitations in this respect. It is precisely this exception that is relevant in the case of Crimea: its attempted unilateral secession was illegal due to it being the outcome of the unlawful Russian military intervention on the peninsula, which

qualifies as an egregious violation of a norm of general international law, possibly even of a *jus cogens* character.

All in all, it should be concluded that the arguments involving an alleged right to self-determination and (remedial) secession as advanced by the Crimean and Russian authorities in attempting to justify the events on the Crimean Peninsula cannot be upheld. On the contrary: Crimea's unilateral secession from Ukraine clearly was illegal under international law.

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