The Annexation of Crimea and the Boundaries of the Will of the People

*By Jure Vidmar**

Abstract

The secession of Crimea and—more broadly—the conflict in Ukraine reopened questions concerning the limits of a democratic expression of the will of the people and the use of force in order to procure annexation of a territory belonging to another State. This article seeks to clarify the law governing the change of the legal status of a territory through secession and merger with another state. It argues not only that the right of self-determination does not grant an entitlement to alter the legal status of a territory, but also that general international law does not prohibit such an alteration. The rules of international law favor the stability of the *existing* international borders and thus the territorial status quo, but this does not mean that a unilateral attempt at altering an existing territorial arrangement automatically constitutes an internationally wrongful act. Any change of the legal status of a territory becomes illegal, however, upon an *outside* use of force. Such an illegality cannot be "cured" by a democratically expressed will of the people.

A. Introduction

On 16 March 2014, Crimea held a referendum on its future legal status as a territory.[1] Reports indicated that the choice to join Russia was supported by an overwhelming ninety-five-point-five percent of all votes cast, with a turnout percentage of eighty-three percent.[2] A day earlier, Russia vetoed a draft Security Council Resolution that sought to declare the referendum as "having no legal validity" and to urge the international community not to recognize its results.[3] Thirteen members of the Security Council, with China abstaining,

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[1] *See Crimea Referendum: Voters 'Back Russia Union,'* BBC NEWS (Mar. 16, 2014), http://www.bbc.com/news/world-europe-26606097.

[2] *Id.*

[3] *See UN Security Council Resolution on Ukraine* (C-Span broadcast Mar. 15, 2014), *available at* http://www.c-span.org/video/?318324-1/un-security-council-meeting-ukraine.

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otherwise supported the draft resolution.[4] On 17 March 2014, the Crimean Parliament declared independence and applied to join Russia.[5] Russia formally annexed Crimea on 21 March 2014.[6] The international legal validity of this act remains contested. On 27 March 2014, the United Nations (UN) General Assembly adopted Resolution 68/262, which called on all states "to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means."[7] One hundred states voted in favor of adopting the Resolution, but notably, eleven States voted against, and as many as fifty-eight States abstained.[8] While widespread, the condemnation of Russia's annexation of Crimea was far from being universal.

The recent episode with Crimea and Ukraine, more broadly, reopened questions on the limits of a democratic expression of the will of the people, and the use of force in order to procure annexation of a territory belonging to another state. Although most claims for self-determination arise in the context of an attempt for independence, the right can be consummated in the form of integration with another state.[9] Self-determination is not an absolute right and would normally not result in a change of international borders. At the same time, secession is not necessarily prohibited under international law. When are claims for independence or integration with another state made within the zone of international legal neutrality? When are such claims illegal internationally? What is the role, if any, of a democratic expression of the will of the people? This paper thus seeks to clarify the law governing the change of the legal status of a territory, secession, and merger with another state. It argues that the rules of international law favor the stability of the *existing* international borders and thus the territorial status quo, but this does not mean that a unilateral attempt at altering an existing territorial arrangement automatically constitutes an internationally wrongful act. But any change of the legal status of a territory becomes illegal upon an *outside* use of force. The referendum and the declaration of independence in Crimea, therefore, neither create territorial illegality, nor territorial entitlement for Russia. Territorial illegality is rather created by Russia's military

[4] *Id.*

[5] *See Crimean Parliament Formally Applies to Join Russia*, BBC NEWS, Mar. 17 2014, http://www.bbc.com/news/world-europe-26609667.

[6] *See Ukraine: Putin Signs Crimea Annexation*, BBC NEWS (Mar. 21, 2014), http://www.bbc.co.uk/news/world-europe-26686949.

[7] G.A. Res. 68/262, ¶ 2, U.N. Doc. A/RES/68/26 (Mar. 27, 2014).

[8] *Id.*

[9] *See* G.A. Res. 25/2625 (XXV), ¶ 121, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) (stating principle V provides that the right of self-determination can be implemented by establishing 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").

involvement. Such an illegality cannot be "cured" by a democratically expressed will of the people.

B. Self-Determination Versus Territorial Integrity

Claims for independence generally mean a clash between the right of self-determination and the principle of territorial integrity of states. Those claiming independence speak of self-determination as if it were an absolute right of peoples, while governments that try to counter secession see territorial integrity as an absolute right of states. Neither right is absolute. The principle of territorial integrity is elaborated in the Declaration on Principles of International Law:

> Nothing in the foregoing paragraphs [concerning the right of 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 [sic].[10]

While secession is not *authorized* or *encouraged*, the wording of the principle does not imply it would be illegal or even prohibited.[11] As international law is neutral on the

[10] *Id.*

[11] The argument in favor of international legal neutrality was advanced in a number of pleadings before the ICJ in the Kosovo Advisory Opinion. Consider the following illustrative arguments: "A declaration of independence . . . constitutes a purely internal legal act and not an international legal act." *See* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Public sitting on the advisory opinion, I.C.J. CR 2009/28, 27 para. 31 (Dec. 4, 2009) (argument of Jean d'Aspremont on behalf of Burundi) (emphasis in original); "A declaration [of independence] issued by persons within a State is a collection of words writ in water . . . [W]hat matters is what is done subsequently, especially the reaction of the international community." *See* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Public sitting on the advisory opinion, I.C.J. CR 2009/32, 47 para. 6 (Dec. 10, 2009) (argument of James Crawford on behalf of the United Kingdom); "State practice confirms that the adoption of a declaration of independence, or similar legal acts, frequently occurs during the creation of a new State. As such, this very act—the act of declaring independence—is legally neutral." *See* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Public sitting on the advisory opinion, I.C.J. CR 2009/29, 52 para. 11 (Dec. 7, 2009) (argument of Andreja Metelko-Zgombic on behalf of Croatia). A different argument was, however made on behalf of the United States, for example, which acknowledged that declarations of independence do not entirely fall outside of the purview of international law: "We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other

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question of unilateral secession, unilateral declaration of independence is not per se illegal, only its success is very unlikely.[12] In the absence of a positive entitlement to independence, the zone of international legal neutrality effectively preserves territorial status quo. This is why a unilateral declaration of independence usually remains ineffective; but ineffective is not the same as illegal.

Secession is thus a process of overcoming a competing claim to territorial integrity.[13] The most effective and unambiguous mode of secession is by consent of the parent state and thus a waiver of its claim to territorial integrity.[14] This is what happened recently with the United Kingdom and Scotland.[15] The United Kingdom agreed to respect the outcome of the referendum on independence, no matter the outcome of the vote. In the end, there was a "no vote,"[16] but it remains significant that the most important potentially state-creative element in the episode was politically-realized consent. Such an acceptance by a central government is relatively rare in international practice. Further, states are never under an obligation to accept independence of one of its units.

I. How About Remedial Secession?

The Supreme Court of Canada reaffirmed, in *Reference re: Secession of Quebec,* the fact that self-determination does not grant a right to secession, but the Court also speculated that secession might be an entitlement where it is demanded by oppressed peoples:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—

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peremptory norms, such as the prohibition against apartheid." *See* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Public sitting on the advisory opinion, I.C.J. CR 2009/30, 30 para. 20 (Dec. 8, 2009) (argument of Harold Hongju Koh on behalf of the United States).

[12] *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 390 (2d ed. 2006).

[13] *See* Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEO. WASH. INT'L L. REV. 101, 109 (2012).

[14] *Id.* at 114.

[15] *See* Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (Oct. 15, 2012), http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence; *see also* Stephen Tierney, *Legal Issues Surrounding the Referendum on Independence for Scotland*, 9 EUR. CON. L. REV. 359, 362–63 (2013) (affirming that the agreement between the governments of Scotland and the UK "contrasts sharply with so many States where the issue of secessionist or sovereignist referendums has been the source of such deep and protracted disagreement").

[16] *See Scottish Referendum: Scotland Votes 'No' to Independence*, BBC NEWS (Sept. 19, 2014), http://www.bbc.com/news/uk-scotland-29270441.

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> a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[17]

Some writers have also advanced remedial secession.[18] Oppression effectively looks like colonialism. Common sense then asks us why a people would have the right to independence only if their oppressor is far away, but not if the oppressor is right next to them. As Buchanan notes:

> If the state persists in serious injustices toward a group, and the group's forming its own independent political unit is a remedy of last resort for these injustices, then the group ought to be acknowledged by the international community to have the claim-right to repudiate the authority of the state and to attempt to establish its own independent political unit.[19]

Yet, international law understands colonialism in the so-called salt-water definition—that is, as European possessions outside of Europe.[20] Such an understanding of colonialism also follows from the Declaration on the Granting of Independence to Colonial Countries and Peoples, which provides that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation,"[21] but then also specifies that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible

[17] Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.).

[18] *See* Antonello Tancredi, *A Normative 'Due Process' in the Creation of States Through Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 171, 176 (Marcelo G. Kohen ed., 2006) (providing a thorough account on the academic support for "remedial secession").

[19] ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 335 (2004).

[20] *See id.* at 339–40 (providing a definition of "salt water colonialism," which refers to the understanding of colonialism in the sense of European overseas possessions, but does not cover oppression within the metropolitan territory of a State).

[21] *See* G.A. Res. 1514 (XV), ¶ 1, U.N. Doc. A/RES/1514 (Dec. 14, 1960).

with the purposes and principles of the Charter of the United Nations."[22] The Declaration also makes specific references to non-self-governing and trust territories,[23] which clarifies that the process of decolonization does not relate to the metropolitan territory of a state. The principle of territorial integrity protects the metropolitan territory of the State itself, but not the overseas possessions. It is important to note in this regard that the decision to end colonialism was political and the process of decolonization then created a number of new States.

As far as internal oppression is concerned, the Supreme Court of Canada indeed said that the right to independence *perhaps* only arises where secession would be the last resort for ending oppression, or where there is no meaningful arrangement in place for internal self-determination.[24] The Canadian Supreme Court phrased this cautiously with a number of caveats, and it was an *obiter dictum* in any case. As the Court said, Quebecers in Canada are not oppressed in any case, so the remedial right to secession did not need to be examined for the merits of the case.[25]

If there was such a right, it would need to exist under customary international law, for which we need uniform state practice and *opinio juris*. There may be some *opinio juris*, which is not uniform,[26] and virtually no state practice. Perhaps the 1971–74 events in Bangladesh could be taken as such,[27] but even that is problematic, as Bangladesh did not become a State undoubtedly before Pakistan gave its consent in 1974.[28] It would be plausible to argue that secession ended oppression if Kosovo declared independence in 1999,[29] but it declared independence in 2008 when oppression had been over for nine years.[30]

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[22] *Id*. ¶ 6.

[23] *Id*. ¶ 5.

[24] 2 S.C.R. 217, at para. 126.

[25] *Id*. at para. 135.

[26] *See* Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 831–34 (2009) (giving a thorough analysis of state practice opposing remedial secession).

[27] Bangladesh (formerly known as East Pakistan) was a geographically separate entity that declared independence from Pakistan in 1971. In the circumstances of brutal oppression over the Bengali people, India intervened militarily and drove Pakistani forces out of East Pakistan (Bangladesh). It was not until 1974, when Pakistan itself granted recognition, that Bangladesh became universally recognized and a member of the UN. *See* CRAWFORD, *supra* note 12, at 393.

[28] *Id*.

[29] In 1999, Kosovo was placed under the regime of international territorial administration by Security Council Resolution 1244, adopted under Chapter VII of the UN Charter. The Resolution was adopted in response to the years of violence, severe oppression, and armed conflict, which led to NATO intervention without UN Security Council's authorization. From 1999 until its independence in 2008, Kosovo was thus governed in separation from

In Crimea, an attempt at invoking remedial arguments was made, *inter alia*, in the speech of President Putin on 18 March 2014:

> [W]e hoped that Russian citizens and Russian speakers in Ukraine, especially its southeast and Crimea, would live in a friendly, democratic and civilised [sic] state that would protect their rights in line with the norms of international law. . . . [T]he new so-called authorities [of Ukraine] began by introducing a draft law to revise the language policy, which was a direct infringement on the rights of ethnic minorities. . . . [W]e can all clearly see the intentions of these ideological heirs of Bandera, Hitler's accomplice during World War II. It is also obvious that there is no legitimate executive authority in Ukraine now, nobody to talk to. Many government agencies have been taken over by the impostors, but they do not have any control in the country, while they themselves . . . are often controlled by radicals. . . . [T]hose 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. This would have been betrayal on our part.[31]

While certain policies of the Ukrainian authorities were certainly questionable, the situation was not comparable to Bangladesh where genocide was possibly at stake.[32] Remedial secession is also conceptualized as the last resort for ending systematic oppression.[33] Even if the doctrine of remedial secession were accepted in international

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Serbia but legally it nevertheless remained Serbia's province. Independence was declared in 2008, when Serbia no longer exercised effective control over Kosovo, and its oppressive policies had been over for nine years. *See generally* Vidmar, *supra* note 26.

[30] *See* Kosovo Declaration of Independence (Feb. 17, 2008), http://www.assembly-kosova.org/?cid=2,128,1635.

[31] *See Address by President of the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 18, 2014), http://eng.kremlin.ru/news/6889.

[32] CRAWFORD, *supra* note 12, at 393.

[33] 2 S.C.R. 217, at para. 126.

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law, in Crimea, neither the threshold of oppression nor the definition of a remedy of last resort had been met. Furthermore, as demonstrated in this section, secession is never an entitlement in international law, not even where legitimized on remedial grounds. It is true, however, that a declaration of independence resulting from severe oppression may make international recognition more forthcoming. Regarding Crimea, this means that even if ethnic Russians were oppressed by Ukraine, this would not lead to an entitlement to secession, although foreign states could have been more willing to recognize and thus accept the alteration of the territorial status had severe oppression been at stake. The question arises as to whether Crimea's annexation by Russia could be "legalized" through international recognition.

II. Constitutive Recognition

Contemporary writers see recognition as a declaratory legal act, not constitutive.[34] The political reality of recognition, however, is not as straightforward as textbooks on international law may suggest. Under some circumstances, widespread recognition could have state-creating effects. The Supreme Court of Canada in the Quebec case acknowledged this:

> The ultimate success of . . . a [unilateral] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.[35]

Indeed, it has been established above that issuing a unilateral declaration of independence is not per se illegal, but is likely an ineffective act. Such a declaration could become effective, however, if widely accepted by other states through recognition. Recognition can thus be either declaratory or constitutive, depending on the circumstances. If Scotland voted for and declared independence, recognition would surely be merely declaratory. The central government of the United Kingdom waived its claim to territorial integrity and the rest of the world would merely acknowledge the new legal situation by granting recognition.

In other examples, recognition can, however, attempt to create a new legal situation rather than acknowledge it. Kosovo, for instance, may be an example of the "Quebec

[34] *See* MARTIN DIXON, ROBERT MCCORQUODALE & SARAH WILLIAMS, CASES AND MATERIALS IN INTERNATIONAL LAW 158 (5th ed. 2011).

[35] 2 S.C.R. 217, at para. 155.

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constitutive formula": where an attempt at secession is unilateral, widespread recognition can have constitutive effects.[36] As always with constitutive recognition, the question arises: How many and whose recognitions are necessary? This is the old "constitutive trap." Are 110 recognitions enough? Is it enough to be recognized by some influential states—such as the United States, the United Kingdom, France, and Germany—but not by other influential states—such as China, Russia, Spain, South Africa, and, in general, by very few Latin American, Asian and African states?[37] The dilemma is similar to that of a glass which can be seen as being either half-empty or half-full. What is the objective legal status of Kosovo?

Foremost, statehood is not an objective physical fact. Statehood is legal status of a territory,[38] and legal status can sometimes be ambiguous or contested. Historically, many legal theorists analogized statehood with objects and even people.[39] Some writers today still insist that states are "born" as natural persons.[40] Arguably, international law issues a birth certificate to "naturally born states" via recognition.[41] In municipal law, the existence of a natural person does not depend on whether or not a birth certificate was issued. The same ought to hold true in international law and where states are concerned.[42] There is always only so much one can achieve with metaphors, and it is often counterproductive if we try to take them too far. Comparing recognition and birth certificate may be appealing, but how exactly are states born the way children are born? By analogy to municipal law, it may be possible to compare states to corporations rather than individuals: They are legal persons, but not natural ones.

Statehood is international legal status; it is not objective physical fact. In some borderline examples, statehood can be ambiguous. Widespread recognition of a unilateral attempt at secession can have state-creating effects, although it is not possible to pinpoint precisely how much recognition would suffice. Furthermore, as doctrine and even state practice confirm, not even granting recognition to a unilateral attempt at secession is illegal.[43] International law *does* allow changes of the legal status of a territory without consent of

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[36] *Id.*

[37] *See Who Recognized Kosova as an Independent State*, KOSOVO THANKS YOU, http://www.kosovothanksyou.com.

[38] Vidmar, *supra* note 13, at 702.

[39] *See* GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 137 (2d ed. 1905).

[40] *See* STEFAN TALMON, KOLLEKTIVE NICHTANERKENNUNG ILLEGALER STAATEN 222 (2004).

[41] *Id.* at 218–20.

[42] *Id.*

[43] 2 S.C.R. 217, at para. 126.

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the parent state.[44] Therefore, the secession of Crimea from Ukraine is illegal merely because Ukraine did not give its consent. In principle, it would be possible for Crimea to secede from Ukraine *unilaterally* had it received virtually universal recognition. An argument will now be made, however, that other circumstances existed which made this particular secession illegal and foreign states have the duty to withhold recognition.

C. The Use of Force and the Limits on Neutrality of International Law

This article argues that international law is, in principle, neutral on the question of unilateral secession and that declaring independence without consent of the parent state is not an internationally wrongful act. The Crimean Declaration—and very likely also the referendum—may well have violated Ukrainian Constitution, but this is irrelevant for international law.[45] Under some circumstances, however, such declarations can still be illegal, albeit not just because they are unilateral.

As was confirmed even in the otherwise very narrow Kosovo Advisory Opinion:

> [T]he illegality attached to [some other] 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*).[46]

This pronouncement of the ICJ is highly significant. The Court was otherwise heavily criticized for establishing a formalistic distinction between issuing a declaration of independence and creating a state.[47] Here it affirmed that under some circumstances even

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[44] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, para. 79 (July 22) (recalling that throughout history states commonly emerged upon declarations of independence which were initially unilateral. Ultimately, the Court concluded: "In no case . . .does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law.").

[45] *See* Christopher Borgen, *Can Crimea Secede by Referendum?*, Opinio Juris (Mar. 6, 2014), http://opiniojuris.org/2014/03/06/can-crimea-secede-referendum.

[46] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, para. 81 (July 22).

[47] *See, e.g.*, Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused*, 24 Leid. J. Int'l L. 155 (2011).

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a declaration itself might be illegal where it tries to consolidate a situation created in violation of *jus cogens*. This doctrine is largely based on the practice developed with regard to Turkey's forceful creation of Northern Cyprus,[48] declarations of independence of Southern Rhodesia,[49] four South African Homelands,[50] and South Africa's illegal presence in Namibia.[51] There are also some older potentially relevant examples, such as Japan's creation of Manchukuo.[52] The unilateral character of declarations of independence did not create the territorial illegality in these circumstances (for example, without approval of parent states); it was created by the fact that these entities intended to become states as a result of illegal use of force or in pursuance of apartheid.

It is true that several resolutions of UN organs called for non-recognition in these instances, but these resolutions were generally not legally binding. So, for the most part, the duty of non-recognition did not draw normative force from the Security Council's Chapter VII powers. The duty of non-recognition rather applied under general international law. Given the norms involved, the following doctrine applies: Where declaration of independence is issued in violation of *jus cogens*, it is illegal and other states have a duty to withhold recognition. Articles 40 and 41 of the International Law Commission (ILC) Articles on State Responsibility have confirmed this doctrine. Article 41(2) provides that "no State shall recognize as lawful a situation created by a serious breach [of *jus cogens*] . . . nor render aid or assistance in maintaining that situation."[53]

Applying this doctrine to Crimea, the general neutrality of international law means that the people of Crimea are not precluded from holding a referendum, and even *declaring* independence and/or willingness to integrate with Russia. International law does not, however, give them a *right* to secession from Ukraine and/or integration with Russia. Not

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[48] *See* S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983).

[49] *See* G.A. Res. 1747 (XVI), U.N. Doc. A/RES/1747 (XVI) (June 27, 1962); *see also* S.C. Res. 202, U.N. Doc. S/RES/202 (May 6, 1965); *see also* G.A. Res. 2022 (XX), U.N. Doc A/RES/2022 (XX) (Nov. 5, 1965); *see also* G.A. Res, 2024 (XX), U.N. Doc. A/RES/2024 (XX) (Nov. 11, 1965); *see also* S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965); *see also* S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965); *see also* S.C. Res. 277, U.N. Doc. S/RES/277 (Mar. 18, 1970).

[50] *See* G.A. Res 2671F, U.N. Doc. A/RES/2671F (Dec. 8, 1970); *see also* G.A. Res. 2775, U.N. Doc. A/RES/2775 (Nov. 29, 1971); *see also* G.A. Res. 31/6A, U.N. Doc. A/RES/31/6A (Oct. 26, 1976); *see also* G.A. Res. 402, U.N. Doc. A/RES/402 (Dec. 22, 1976); *see also* G.A. Res. 407, U.N. Doc. A/RES/407 (May 25, 1977); *see also* G.A. Res. 32/105 N, U.N. Doc. A/RES/32/105N (Dec. 14, 1977); *see also* G.A. Res. 34/93 G, U.N. Doc. A/RES/34/93 (Dec. 12, 1979); *see also* G.A. Res. 37/43, U.N. Doc. A/RES/37/43 (Dec. 3, 1982); *see also* G.A. Res. 37/69A, U.N. Doc. A/RES/37/69A (Dec. 9, 1982).

[51] *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

[52] CRAWFORD, *supra* note 12, at 133.

[53] G.A. Res. 56/83, annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

even the democratic and overwhelming will of the people expressed at the referendum changes this position. International law remains neutral on this issue. In the absence of widespread international recognition, the Crimean intention would remain ineffective without Russia's use or threat of force.[54] Even if the actual use of force were still contested, Russian activities constitute at least a threat of force,[55] which is likewise prohibited by Article 2(4) of the UN Charter.[56]

This is where the neutrality of international law on declarations of independence ends. In the sense of paragraph eighty-one of the Kosovo Advisory Opinion, we are no longer talking about a *unilateral* declaration of independence but an attempt at secession in violation of *jus cogens*.[57] This circumstance triggers Article 41 of the ILC Articles on State Responsibility.[58] All states—including the wrongdoer —are obliged to withhold recognition. The obligation does not apply because Ukraine's constitution would not allow secession or because there is no political approval from Kiev. It applies because Russia created an illegal territorial situation by use or threat of force. In other words, Russia created a situation legally comparable to Northern Cyprus, albeit integration rather than independence was sought in this instance. Hence, unilateral secession is not per se illegal. It becomes illegal when another state uses force to make a territorial switch effective, be it in the form of annexation or creation of a puppet state.

Concerning recognition, one might ask why the duty to withhold recognition, as reflected in Article 41 of the ILC Articles on State Responsibility, is necessary if recognition could not create a state. Some writers see declaratory recognition as a dogma and then use evasive language when they need to deny any constitutive effects. One such position is eloquently advanced by David Raič:

> [T]he obligation of non-recognition has a declaratory character in the sense that States are considered to be under a legal obligation not to recognize a specific situation which is *already* legally non-existent. Thus,

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[54] *See* Nico Krisch, *Crimea and the Limits of International Law*, EJIL TALK! (Mar. 10, 2014), http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/; *see also* Aurel Sari, *Ukraine Insta-Symposium: When Does the Breach of a Status of Forces Agreement Amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA*, OPINIO JURIS (Mar. 6, 2014), www.opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/.

[55] *Id.*

[56] U.N. Charter art. 2, para. 4.

[57] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, para. 81 (July 22).

[58] *See* G.A. Res. 56/83, annex, art. 41.

> the obligation of withholding recognition is not the cause of the fact that an illegal act does not produce the intended results, that is, legal rights for the wrongdoer. Non-recognition merely declares or confirms that fact and the obligation not to grant recognition prevents the validation or 'curing' of the illegal act or the situation resulting from that act.[59]

How would recognition cure an illegal territorial situation? This is simply a way of saying that recognition could create a State without actually uttering this international legal heresy. What would happen if Cyprus recognized Northern Cyprus? The rest of the world would follow within days and thus "cure" the illegality; that is, the world would create a State. And what if Ukraine recognized the incorporation of Crimea into Russia? Such an acceptance would also have some "curing" effects, although this should not have been the case, as the injured state cannot release another state from its responsibility to comply with peremptory norms.[60] Again, the political reality of recognition would take precedence over Article 41 of the ILC Articles on State Responsibility.

In sum, unilateral secession is unlikely to be effective, but effectiveness could be procured through international recognition. A unilateral character does not make secession per se illegal. Nevertheless, secession is illegal where effectiveness is given to it through use or threat of force by a foreign state. In such circumstances, other states are under the obligation to withhold recognition. Namely, widespread recognition of an illegally-changed legal status could create legal rights for the wrongdoer: either creation of an independent state or international acceptance of annexation.

D. Democratic Expression of the Will of the People

Thus far, this article has established the circumstances in which a change of the legal status of a territory can be effective and the role of other states in this process. The article now turns to the role of the will of the people and the modes of its expression. When annexing Crimea, Russia invoked democratic legitimacy and the will of the people in favor of the territorial shift.[61] The question thus arises of whether the will of the people can trump territorial illegality and whether the particular referendum in Crimea met the required standards to be seen as being legally relevant internationally.

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[59] DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 105 (2002).

[60] *See* G.A. Res. 56/83, annex, art. 26.

[61] *See Address by President of the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 18, 2014), http://eng.kremlin.ru/news/6889 (arguing that "[a] referendum was held in Crimea on March 16 in full compliance with democratic procedures and international norms.").

In the Western Sahara Advisory Opinion, the International Court of Justice (ICJ) pronounced, "[T]he application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned."[62] Such an expression is usually formalized through referendums on the future legal status of a territory. In the aftermath of the First World War, several referendums on the legal status of European territories took place under the League of Nations auspices.[63] Referendums were also held in the process of decolonization after the Second World War.[64] The post-Cold War period saw the emergence of a number of new States, and independence referendums were held in the territories of the Soviet Union, the Socialist Federal Republic of Yugoslavia (SFRY), Eritrea, East Timor, Montenegro, and South Sudan.[65]

There are notable absences of independence referendums in Czechoslovakia[66] and Kosovo.[67] As the ICJ remarked in Western Sahara, however, the requirement for consultation may be dispensed with where the will of the people is obvious and unambiguous.[68] This was the case in some instances of decolonization, where referendums were not held but the will of the people was nevertheless clear.[69] The same cannot be said for the dissolution of Czechoslovakia. No referendum was held and it was unclear whether separation really was the will of the people,[70] yet the Czech Republic and Slovakia emerged as new States.[71]

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[62] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para. 55 (Oct. 16).

[63] Henry E. Brady & Cynthia S. Kaplan, *Eastern Europe and the Former Soviet Union*, *in* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 175 (David I. Butler & Austin Ranney eds., 1994).

[64] Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 612 (2003); *see also* YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 91 (1994).

[65] *See* JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE 65–115 (2013).

[66] CRAWFORD, *supra* note 12, at 402.

[67] VIDMAR, *supra* note 65, at 190, 196.

[68] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para. 55 (Oct. 16).

[69] *Id.*

[70] VIDMAR, *supra* note 65, at 190.

[71] *Id.*

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I. The Legal Effects of Independence Referendums

As independence is not an entitlement, holding a referendum is only a necessary, but insufficient, requirement for independence. Recent practice indeed saw a number of referendums in favor of independence which did not result in creation of a new state.[72] Under international law, independence referendums are therefore not binding on the central government. This needs to be qualified with the pronouncement of the Supreme Court of Canada in the Quebec case. Referring to the principle of democracy entrenched in Canadian constitutional law, the Court established that, in a democratic State, an expression of the will of the people in favor of independence could not be ignored.[73] An obligation would be put on both sides to negotiate the future legal status of the independence-seeking territory.[74] The Supreme Court of Canada made it clear, however, that such negotiations would not necessarily lead to independence.[75]

It follows that independence referendums generally do not have direct or self-executing legal effects. At best, they can trigger negotiations but do not create a right to independence. The central government can nevertheless commit itself in advance to respecting the outcome of the vote, as in the referendums in East Timor,[76] Montenegro,[77] and South Sudan.[78] It seems that binding referendums are more of an exceptional feature used in an internationalized peace process rather than a standard in constitutional democracies. Scotland was an exception in this regard. Unlike the situation of Quebec, the central government was committed to entering into negotiations *with* a predetermined outcome had the majority of Scottish voters supported it. But what is considered to be a majority?

II. Clear Expression of the Will of the People

In the Quebec case, the Supreme Court of Canada expressed the general threshold for validity of an independence referendum: "The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question

[72] *See* CRAWFORD, *supra* note 12, at 403–11 (providing a comprehensive overview).

[73] 2 S.C.R. 217, at para. 87.

[74] *Id.* para. 91.

[75] *Id.*

[76] VIDMAR, *supra* note 65, at 192–93.

[77] *Id.* at 193–94.

[78] *Id.* at 194–95.

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asked and in terms of the support it achieves."[79] The definition of the phrase "free of ambiguity" was further specified by the Canadian Clarity Act passed in 2000.[80] With regard to the winning majority, the Act specifies that clarity of the decision may be determined by: "(i) the size of the majority of valid votes cast in favour of the secessionist option; (ii) the percentage of eligible voters voting in the referendum; and (iii) any other matters or circumstances ... consider[ed] to be relevant."[81] While the Clarity Act refers to, *inter alia*, "percentage of eligible votes," the threshold for the success of a referendum is not quantified.

With regard to phrasing the referendum question, some guidelines again follow from Canadian responses to independence referendums in Quebec. The Clarity Act further specified the Supreme Court's formulation that the phrasing of the question needs to be "free of ambiguity."[82] In this context the Act provides:

> [A] clear expression of the will of the population of a province that the province cease to be part of Canada could not result from
> (*a*) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or
> (*b*) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.[83]

Drafters of the Clarity Act evidently pictured two referendums questions in Quebec, both of which implied a future economic association with Canada.[84] Furthermore, the

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[79] 2 S.C.R. 217, at para. 87.

[80] *See* Clarity Act, S.C. 2000, c. 26, art. 1, para. 3 (Can.).

[81] *Id.* art. 2, at para. 2.

[82] *Id.*

[83] *Id.* art. 1, at para. 3.

[84] In 1980, the referendum question read:

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referendum question in 1980 did not ask directly on independence but rather on a mandate for the Government of Quebec to negotiate a new arrangement with the rest of Canada, possibly leading to independence. While reflecting the Quebec experience, the minimum standard set by the Clarity Act reaches beyond the specific Canadian context and has universal validity. Indeed, a misleading question could not yield "free and genuine expressions of the will of the people,"[85] as demanded by the ICJ in Western Sahara.

The Scottish question was exceptionally clear: "Should Scotland be an independent country? Yes/No."[86] This was not the case in Crimea where two questions were asked: "Are you in favour of unifying Crimea with Russia as a part of the Russian Federation?"; and "[a]re you in favour [sic] of restoring the 1992 Constitution and the status of Crimea as a part of Ukraine?"[87] At the very least, this formulation is ambiguous. Worse still, it may well mean that the incorporation in Russia would happen by detour through the 1992 Constitution.[88] The status quo was not even offered. Effectively, the choice may well have been between a straightforward integration with Russia, and a somewhat complicated integration with Russia. This is much different than the simple yes or no clearly phrased question in Scotland.

> The Government of Québec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Québec to acquire the exclusive power to make its laws, administer its taxes and establish relations abroad in other words sovereignty and at the same time, to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will be submitted to the people through a referendum; on these terms, do you agree to give the Government of Québec the mandate to negotiate the proposed agreement between Québec and Canada?

And in 1995: "Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Québec and of the agreement signed on 12 June 1995?" *See* Patrick Dumberry, *Lessons Learned from the Secession Reference before the Supreme Court of Canada*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 416, 418–20 (Marcelo G. Kohen ed., 2006).

[85] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, para. 55 (Oct. 16).

[86] *See Referendum on Independence for Scotland Advice of the Electoral Commission on the Proposed Referendum Question*, THE ELECTORAL COMMISSION (Jan. 2013), http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.

[87] *See* Richard Balmforth, *No Room for 'Nyet' in Ukraine's Crimea Vote to Join Russia*, REUTERS (Mar. 11, 2014), http://www.reuters.com/article/2014/03/11/us-ukraine-crisis-referendum-idUSBREA2A1GR20140311.

[88] Keir Giles, *Crimea's Referendum Choices Are No Choice at All*, CHATHAM HOUSE (Mar. 10, 2014), https://www.chathamhouse.org/media/comment/view/198079#.

How about a clear winning majority? Unlike all other independence referendums in comparative practice, the Scottish regulation did not specify the winning majority.[89] There was a silent understanding, however, that a relative majority of all votes cast would decide.[90] Such a majority was relatively undemaviolatending and did not even prescribe a participation rate. South Sudan, for example, prescribed fifty percent plus one vote, at a participation rate of at least sixty percent.[91] A demanding majority of all those eligible to vote has been formally prescribed only on one occasion—in Slovenia in 1991.[92] Nevertheless, such a demanding majority is almost always achieved in practice. Only Montenegro has become independent in recent practice with a vote falling under fifty percent of all those eligible to vote.[93]

The Crimean vote for joining Russia was overwhelming: Ninety-five-point-five percent at a turnout rate of eighty-three percent.[94] State practice, however, shows that territorial referendums are only a necessary but not a sufficient requirement for a change in the legal status of a territory. A successful referendum, though democratically legitimate, does not create an entitlement to independence. At best, it creates a duty to negotiate a new legal status of the territory that could well lead to wider autonomy and self-government. As the Crimean referendum did not alter the existing international boundaries, Russia's activities were directed against territorial integrity of another state and thus prohibited by Article 2(4) of the UN Charter.[95] Furthermore, given the questions asked and the fact that there was virtually no time for deliberation and dialogue between the ethnic groups in Crimea, even democratic legitimacy of the referendum appears to be in question. This is not to say that international law does not take account of the demands of ethnic Russians in Crimea, or even that the referendum itself was illegal under international law. It is rather that Russia's intervention led to an international territorial illegality.

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[89] *See* SCOTTISH PARLIAMENT, SCOTTISH INDEPENDENCE REFERENDUM BILL (2013), at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61076.aspx (last visited on Oct. 30, 2013).

[90] *See* Andre Lecours & Stephanie Kerr, *Towards the Scottish Referendum*, 3 FEDERAL NEWS no. 8 (Dec. 2012), http://ideefederale.ca/documents/Dec_2012_ang.pdf (arguing that the UK government was willing to accept this relatively low threshold also because the opinion polls are consistently showing the threshold would not be met).

[91] *See* UNITED NATIONS DEVELOPMENT PROGRAMME, THE COMPREHENSIVE PEACE AGREEMENT (2005), http://www.sd.undp.org/doc/CPA.pdf; *see also* UNITED NATIONS MISSION IN SUDAN, THE SOUTHERN SUDAN REFERENDUM ACT, art 41 (2009), http://unmis.unmissions.org/Portals/UNMIS/Referendum/SS%20Referendum%20MOJ-Englis.pdf.

[92] *Plebiscite on the Sovereignty and Independence of the Republic of Slovenia*, Official Gazette of the Republic of Slovenia, No. 44-2102/1990 (Dec. 2, 1990), art. 3.

[93] INTERNATIONAL CRISIS GROUP, MONTENEGRO'S REFERENDUM, Briefing No. 42, 6 (2006).

[94] *See Crimea Referendum: Voters 'Back Russia Union,' supra* note 1.

[95] *See* U.N. Charter art. 2, para. 4 ("All members shall refrain in their international relations from the threat or 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.").

E. Conclusion

International law is neutral on the question of unilateral secession. Where declared unilaterally, secession is unlikely to be effective unless the entity establishes effective control over the territory and foreign states are widely willing to recognize the shift of territorial sovereignty. They are not required to do so; granting recognition is never a duty. Furthermore, legal neutrality ends where outside force is used or threatened in order to effectively sever a territory from its parent state. Under such circumstances, foreign states are precluded from granting recognition and the law cannot be "updated" with new facts. A legal fiction is thus established: A detached or annexed territory is still a part of that state. In Crimea, the problem is not that secession from Ukraine would be unilateral. It is rather that it would be achieved by Russia's illegal resort to force. As a consequence, Crimea is under Russia's effective control, but, in international law, such legal fiction has been established that the territory is still under Ukraine's sovereignty.

The exercise of the right of self-determination and democratically expressed will of the people neither create a right to independence, nor "cure" territorial illegality caused by illegal use of force. A forceful annexation of a territory of a foreign state is thus prohibited in international law, even if widely supported by the majority population of that territory. Not any detachment of a territory from its parent state is illegal however; it is only unlikely to succeed. The referendum in Crimea could, at best, create a duty on both sides to negotiate a future legal status of the territory without a predetermined outcome. This could even be a wider arrangement for autonomy and self-government, perhaps even with certain elements of shared sovereignty, but does not necessarily lead to integration with Russia.