

# OBSERVING THE QUESTIONS OF SELF-DETERMINATION AND SECESSION IN THE WAKE OF RECENT EVENTS IN KOSOVO, ABKHAZIA, SOUTH OSSETIA AND CRIMEA

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*Events in Kosovo, Abkhazia, South Ossetia and most recently Crimea have once again brought the controversial topics of self-determination and secession to the attention of the international community. Unfortunately, many issues that have riddled these two topics and which made them controversial in the first place, not the least of which is poor legal regulation, are still present to this day. This paper will consider the theory behind self-determination and secession and then focus on the recent cases that have pinpointed all the shortcomings, inconsistencies and illogicalities of these and related topics.*

Keywords: self-determination, secession, Kosovo, Abkhazia and South Ossetia, Crimea

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## 1. INTRODUCTION

Given the recent and ongoing events in Ukraine, a number of important questions have arisen within the international community. One of the most intricate to arise from the said events is that of Crimea. The case of Crimea is highly interesting from a theoretical standpoint, but at the same time the outcome will have serious ramifications on the international community. By examining the case of Crimea, one can observe the delicate interplay of law and politics and, within it, a number of shortcomings and inconsistencies. The crux of the matter lies in the right to self-determination and its potential embodiment – secession, both of which are problematic due to their regulation within international law, or, more pertinently, the lack of it, as this paper will show.

Over the years, self-determination has been entering and leaving the international community's consciousness, but never quite fading from it completely. The right of self-determination, and all that it entails and potentially clashes with, is both complex and intriguing. This right is often misinterpreted and misused, which is why it needs to be closely examined. This should be done not only by observing theoretical teachings, but

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also by looking at some of the cases that have occurred so far and their influence on subsequent events in the same vein.

Before this paper turns its focus to some of the more recent examples, one must look at the basic terms and principles regarding the topic at hand and understand the distinction and interaction between them. Hence, this paper will begin with an examination of statehood, the most fundamental term related to this subject. Given the tight connection between statehood and recognition, recognition will be observed next. Following the question of recognition, the right to self-determination, perhaps the most complex of the terms tackled in this paper, will then be examined. Later, the principle of territorial integrity, often seen as a counter-principle to that of self-determination, and *uti possidetis* will be considered, and finally the controversial topic of secession will require close inspection.

Secession is a rather specific occurrence, and it does not take much for it to start a chain reaction on a global scale. The case of Kosovo proved to be a powerful agent in causing such an effect. Then, two other cases emerged which share a fair bit in common, but with varying end results, which is why this paper will then shift focus to the cases that preceded the case of Crimea and which are, in a way, linked to it. Namely, South Ossetia and Abkhazia. After observing all three cases, the case of Crimea will be considered. Given that the pro-secession movement in Crimea was a long time in the making, history and recent developments will be examined first, since they hold the key to understanding the most recent events. Only then will the paper focus on Crimea's claims for self-determination and secession, bringing the main focus of this paper to its conclusion.

## 2. BASIC TERMS

### 2.1. Statehood and recognition

Modern international law has heavily expanded its range to a variety of new participants. No longer are states regarded as the only subjects of international law, but intergovernmental organisations, alongside *sui generis* entities (such as the Holy See and the Sovereign Military Order of Malta), have also been widely recognised as subjects of international law. On the other hand, certain subjects, such as non-governmental organisations and individuals, have been at the core of many debates as to whether or not they should be recognised as subjects of international law. Nevertheless, despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons. In addition, despite the rise of globalisation and all that it entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.<sup>1</sup>

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<sup>1</sup> Shaw, M. N., *International Law*, Cambridge, Cambridge University Press, 2008, p. 197.

Given the prevailing role of states in international law, it is of utmost importance to determine the exact criteria for gaining statehood. Unfortunately, international law provides only glimpses of the requirements for statehood. In saying this, however, there has been one convention in particular that has outlined the criteria for statehood. The convention in question is the Montevideo Convention on the Rights and Duties of States,<sup>2</sup> which specified that: "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states".<sup>3</sup> It is most curious that a convention of a regional character has, so far, produced the most thorough answer to the question of the required criteria for statehood. Nevertheless, the stated criteria have been widely accepted by the international community as a set of guidelines when it comes to giving recognition to newly formed states.

However, the said provisions are neither exhaustive nor immutable.<sup>4</sup> For example, the way a new State came to be is often one of the deciding factors that the international community takes into account when deciding whether or not to recognise it. Naturally, a newly formed State that emerged from a peaceful event is likely to garner recognition from the international community faster than one that emerged from a war waged with its predecessor State. The latter example brings a few other criteria into the mix. Namely, who was the agitator in the conflict and have human rights violations occurred?

Although the conditions for statehood, listed in the Montevideo Convention, can be expanded to feature several other conditions, they can likewise be reduced to only three or even two necessary conditions. As will be shown later, some states in their early stages met only the first two conditions of the Montevideo Convention before gaining recognition from other states. That being said, it is hard to find any consistency among recent examples of state recognition. This all points to the fact that the act of recognition is heavily influenced by politics, while the law regarding the topic is severely lacking.

In terms of recognition, there are two different schools of thought regarding its importance for the creation of a State and thus there are two related theories: the constitutive theory and the declaratory one. Essentially, the constitutive theory of recognition holds that recognition creates the international legal personality of a State, by attributing rights and duties to the recognised State.<sup>5</sup> The declaratory theory, on the other hand, attributes much less importance to the role of recognition, as it states that statehood

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<sup>2</sup> The Montevideo Convention on the Rights and Duties of States was signed on 26 December 1933, at the Seventh International Conference of American States in Montevideo, Uruguay, while it entered into force exactly one year later. The contents of this convention centre on the definition and rights of statehood.

<sup>3</sup> Article 1 of the Montevideo Convention on the Rights and Duties of States.

<sup>4</sup> Shaw, *op. cit.* (n. 1) p. 198.

<sup>5</sup> Dugard, J., "The Secession of States and Their Recognition in the Wake of Kosovo", *RCADI*, vol. 357, 2013, p. 45.

is a question of fact,<sup>6</sup> and recognition simply provides evidence of the existence of a State.<sup>7</sup> Basically, for the constitutive theorists, the heart of the matter is that fundamentally an unrecognised "State" can have no rights or obligations in international law, while the declaratory theorists emphasise the factual situation and minimise the power of states to confer legal personality.<sup>8</sup>

Nowadays, of the said two theories, the declaratory theory is the more widely accepted, although the reality of the importance of recognition lies somewhere in between. While most agree that recognition is not actually a condition for the creation of a State, it is hard to imagine a State existing without, at least, some kind of recognition. In essence, it is of paramount importance for an aspiring State not only to fulfil the legal criteria for statehood, but also to garner as much recognition from the international community as possible.

## 2.2. Self-determination

The principle or, better still, the right to self-determination<sup>9</sup> has an interesting history. Nowadays, it is no longer talked about as a novel theoretical possibility in legal or political debates, but rather as an indisputable legal right. Treaties, solemn declarations of the General Assembly of the United Nations<sup>10</sup> and decisions of the International Court of Justice<sup>11</sup> recognise self-determination as a legal right.<sup>12</sup> That being said, while the right to self-determination has indeed been explored, given its context and relevance to contemporary international law, this does not mean it is free from many dangling questions. In fact, as a whole, the right of people to self-determination is frustratingly ambiguous.<sup>13</sup>

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<sup>6</sup> Declaratory theorists mostly point to the Montevideo Convention on the Rights and Duties of States for the list of requirements that need to be fulfilled in order for an entity to become a State.

<sup>7</sup> Dugard, *op. cit.* (n. 5) p. 47.

<sup>8</sup> Shaw, *op. cit.* (n. 1) p. 446.

<sup>9</sup> As a legal term, it first emerged in the Treaty of Versailles (1919), which was used as a constitutive act for the League of Nations. Some scholars even point to the American Declaration of Independence (1776) and the French Revolution (1789) as some sort of origin for the right to self-determination.

<sup>10</sup> Self-determination consolidated its place in international law by being mentioned in the Charter of the United Nations, but it was not until the Declaration on the Granting of Independence to Colonial Countries and People (1960) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970) that self-determination was provided with a more detailed explanation.

<sup>11</sup> Several cases were brought before the International Court of Justice, such as the Western Sahara Case (1975) and the East Timor Case (1995). The East Timor Case in particular is interesting, given how the International Court of Justice explicitly stated that self-determination is "one of the essential principles of contemporary international law", which enjoys "an *erga omnes* character". See: Summary of the Judgment of 30 June 1995 in the case concerning East Timor (Portugal v. Australia) <http://www.icj-cij.org/docket/index.php?sum=430&p1=3&p2=3&case=84&p3=5>

<sup>12</sup> Dugard, *op. cit.* (n. 5) p. 31.

<sup>13</sup> Summers, J., "The Internal and External Aspects of Self-determination Reconsidered", in: French, D. (ed.), *Statehood and Self-determination*, Cambridge, Cambridge University Press, 2013, p. 229.

The first question that arises is: what exactly is self-determination? While the question is relatively simple, the answer is unfortunately anything but. While the right to self-determination is indeed mentioned, in some form or another, in many instances of international law, the exact definition of the said right eludes us. There have been many attempts<sup>14</sup> to define self-determination as a right, but all these can be boiled down to the same few core elements. For example, the Declaration on the Granting Independence to Colonial Countries and People, contained in resolution 1514 (XV) of 1960, proclaims that: "All people 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."<sup>15</sup> The elements of this distilled definition are at the core of almost every other definition, but with this, vagueness starts and questions arise. Who are these "people"? How and when can they enforce their right to self-determination?

While there are still no clear-cut answers to these questions, especially since there is no continuity to be found in the (recent) cases concerning the said right, some things have become at least a bit clearer during its development. In order to truly understand this right, one must observe it from the very beginning, since it is neigh on impossible to fully comprehend it from just a single source of international law.

The full implications of the notion of self-determination, introduced into international politics by Woodrow Wilson<sup>16</sup> after World War I and affirmed by the Charter of the United Nations, were unknown, but feared, by the international community in 1945.<sup>17</sup> Because it was more of a political aspiration<sup>18</sup> first and foremost, especially during World War I, regulations concerning the topic were essentially non-existent. Such uncertainty filled many states with apprehension, given that such a principle could very well endanger the territorial integrity of a State.

To alleviate such concerns, the whole principle was limited to the context of dealing with decolonisation. Between the 1950s and 1960s, self-determination was frequently invoked in the United Nations to end colonial rule and this led to the adoption, in 1960, of General Assembly resolution 1514 (XV), entitled the Declaration on Granting Independence to

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<sup>14</sup> For instance, the definition of self-determination can be found in the International Covenant of Civil and Political Rights, the African Charter of Human and People's Rights, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, and many others.

<sup>15</sup> Dugard, *op. cit.* (n. 5) p. 78.

<sup>16</sup> For him, self-determination was the "logical corollary of popular sovereignty and synonymous with the principle that governments must be based on the 'consent of the governed'". Velasco, Z. A., "Self-determination and Secession: Human Rights-based Conflict Resolution", *International Community Law Review*, vol. 16, issue 1, 2014, p. 78.

<sup>17</sup> Dugard, *op. cit.* (n. 5) p. 79.

<sup>18</sup> It would not be unreasonable to think that behind this "push for a noble cause" were hidden ulterior motives. The political and economical map of the world was vastly different at that time compared to the present day. Several European countries (such as the United Kingdom, France and Spain, to name a few) had a very wide network of colonies throughout the world. With that came economic benefits and, more importantly, political leverage on a global scene. The United States was facing the possibility of falling behind in relevance, since it was not able to keep up with the rise of the said colonial empires.

Colonial Countries and People, which proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations", pursuant to the people's right to self-determination.<sup>19</sup>

However, things began to change. As the process of decolonisation drew to a close, new situations emerged<sup>20</sup> and the field of application of the right to self-determination was greatly expanded. This is no more apparent than in the two conventions on human rights,<sup>21</sup> both dating from 1966. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights uses almost the same wording found in the previously mentioned Declaration on the Granting Independence to Colonial Countries and People when discussing the right to self-determination. With those two conventions, the right to self-determination strengthened its position in international law not only as a legal right, but as a basic human right.

The transformation of self-determination as a political principle into a basic human right is not the only major stage of its development. The second major change for this right came in the light of making a distinction between internal and external self-determination. However, the division of self-determination into internal and external aspects is not spelled out with any precision in international instruments, leaving considerable ambiguity as to what these two aspects might relate to.<sup>22</sup>

Since self-determination was no longer reserved for people that lived in colonies, fear, figuratively speaking, started to creep into many states. Since states feared that their territorial integrity was at stake, legal theorists across the world began to figure out a way to essentially minimise the risk of a possible follow-up event - secession. So, in an effort to accommodate both the competing right to self-determination and the principle of territorial integrity, legal theorists propounded the view that self-determination could be pursued internally "within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states".<sup>23</sup>

Although there is uncertainty over the precise meaning of internal self-determination, it is widely seen as encompassing the right of the people within an independent State to choose the government of that State and to participate in a government that represents

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<sup>19</sup> Velasco, *op. cit.* (n. 16) p. 79.

<sup>20</sup> The African continent in particular saw the emergence of many dissatisfied people within states, who clamoured for secession as a means to an end. That is, they sought to exercise their right to self-determination. The results vary greatly. While there are examples of unsuccessful secessions (i.e. Katanga and Biafra), there are also secessions that proved to be successful (i.e. Eritrea and South Sudan). For a more detailed analysis as to why these secessions proved to be either successful or unsuccessful, see: Dugard, *op. cit.* (n. 5).

<sup>21</sup> Apart from the said conventions, the Helsinki Accords (1975), the Charter of Paris (1990), the European Community's Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, the European Community's Declaration on Yugoslavia (1991) and the Vienna Declaration on Human Rights (1993) all contemplate the right to self-determination, unrelated to decolonisation. Dugard, *op. cit.* (n. 5) p. 83.

<sup>22</sup> Summers, *op. cit.* (n. 13) p. 233.

<sup>23</sup> Velasco, *op. cit.* (n. 16) p. 82.

the whole people of the territory and which confers equal rights on all persons and respects and protects their human rights.<sup>24</sup> Essentially, internal self-determination is the preferred way of dealing with self-determination, while external self-determination is seen as the last resort. The frequently cited criteria of the right to external self-determination<sup>25</sup> are: grave and repeated violations of human rights and the continuous negation of the right to internal self-determination.<sup>26</sup>

The whole point of dividing the right to self-determination into two separate subcategories was and still is completely redundant. It just shows how muddled the thought process behind this right truly is. Over time, self-determination almost became a synonym for secession. While the two terms do indeed have a point of intersection, the two should not be seen as one. Self-determination pertains to human rights, while secession forms part of a wider debate on statehood and state recognition,<sup>27</sup> which is why dividing self-determination into two groups makes no sense. The division itself means that essentially a group of people are "locked out" of the said right in certain circumstances, which makes no sense, seeing how self-determination is a basic human right meant for all people. Furthermore, the division itself actually appears to approve the tight linkage between the right to self-determination and the follow-up process of secession.

With the division came the question: "who are these people that enjoy the right to external self-determination?" Unfortunately, there is no general consensus on an answer, just theoretical speculation. One of the most well-rounded theories notes that in order to qualify as a "people", a minority must demonstrate that it occupies part of the territory of an established State in which it forms a clear majority.<sup>28</sup> However, had the two terms been clearly separated, ultimately, the problem of defining "people" would disappear entirely and become irrelevant.<sup>29</sup>

### 2.3. Territorial integrity and *uti possidetis*

One of the key elements that defines a State is its territory. It should come as no surprise then that international law plays a crucial part in protecting a State's territory. Two principles in particular ensure that the territorial boundaries of states will be respected,

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<sup>24</sup> Dugard, *op. cit.* (n. 5) p. 86.

<sup>25</sup> In a sense, external self-determination can be seen as some sort of remedy for an ungrateful position people may find themselves in, in certain states, and that is why external self-determination is generally called the right to "remedial self-determination" and the instrument that enforces it is often called "remedial secession". Velasco, *op. cit.* (n. 16) p. 82

<sup>26</sup> Ryngaert, C., Sobrie, S., "Recognition of States: International Law of Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia", *Leiden Journal of International Law*, vol. 24, issue 2, 2011, p. 479.

<sup>27</sup> Velasco, *op. cit.* (n. 16) p. 87.

<sup>28</sup> Dugard, *op. cit.* (n. 5) p. 91.

<sup>29</sup> Velasco, *op. cit.* (n. 16) p. 87.

if necessary at the expense of self-determination – territorial integrity and *uti possidetis*.<sup>30</sup> These two principles are not nearly as controversial<sup>31</sup> as the previously explained self-determination, but both principles still need clarification.

Territorial integrity as a principle can be found in many declarations, resolutions, constituent acts and the like.<sup>32</sup> For example, it is mentioned in the already cited<sup>33</sup> Declaration on the Granting Independence to Colonial Countries and People of 1960 and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970. The latter declaration notes that "every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country". Whenever the principle of territorial integrity is mentioned, it is always regarded as one of the founding principles of utmost importance for a State. Basically, the principle of respect for territorial integrity is a corollary of state sovereignty, as it provides the territorial framework, that is, the spatial context for the existence of the State.<sup>34</sup>

Territorial integrity is closely connected with the doctrine of *uti possidetis*, according to which colonial boundaries and possibly the boundaries of federal units are to be respected and protected by international law, however arbitrary and unjust their origin.<sup>35</sup> *Uti possidetis* played an important role in the decolonisation era, as it was considered the only workable solution to protect the stability of administrative or colonial borders during the process of decolonisation.<sup>36</sup> One thing worth noting is that *uti possidetis* is not *ius cogens*, which means that it does not necessarily have a crucial effect on the formation

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<sup>30</sup> The doctrine of *uti possidetis* is rooted in an edict of Roman property law which allowed a person in possession of property to provisionally continue possession of the property during litigation over ownership of the property. The edict was summarised in the phrase *uti possidetis, ita possideatis* – as you possess, so may you possess. Dugard, *op. cit.* (n. 5) pp. 31 and 100.

<sup>31</sup> Which, no doubt, has to do with the subjects at whom these principles are aimed. Territorial integrity and *uti possidetis* are aimed at states and the protection of their territories, while self-determination is aimed at people, and at their protection from states. Since states are *de facto* the creators of international law, it is clear to see who has the upper hand in this matter. Besides, it is in the best interest of states to precisely regulate the question of territorial boundaries, while at the same time leave the question of self-determination vague and open to interpretation.

<sup>32</sup> Apart from the declarations listed in the next sentence of the main text, the most notable examples would be: the Charter of the United Nations, the constitutive acts of the Organization of American States and the African Union and the Charter of the Association of South-east Asian Nations.

<sup>33</sup> See *supra*, p. 4.

<sup>34</sup> Dugard, *op. cit.* (n. 5) p. 99.

<sup>35</sup> Cf. *ibid.*, p. 100.

<sup>36</sup> Ryngaert, Sobrie, *op. cit.* (n. 26) p. 479. However, that does not mean the principle of *uti possidetis* died out alongside the process of decolonisation. Most recently, it was invoked in the process of Yugoslavia's dissolution, but its usage outside the process of decolonisation was met with heavy criticism (for a detailed explanation as to why it was criticised, see: Dugard, *op. cit.* (n. 5) p. 151) and was not invoked in later cases. That being said, one should also question the use of the principle of *uti possidetis* within the context of decolonisation. What exactly makes its use in the process of decolonisation more justifiable than in the process of Yugoslavia's dissolution? Regardless of the context, the principle of *uti possidetis* is a seriously flawed solution for determining borders, which arguably creates more problems than it solves.

of new territorial boundaries. Other factors need to be taken into account, such as self-determination and whether or not there is an agreement between the two states.

### 3. SECESSION

Secession is another controversial topic, enveloped in a mist of uncertainty. There is no multilateral treaty on the said subject, which means its content depends upon the following variables: the state practice of nearly 200 nations, the influence of their half-dozen major legal systems, the-not-so-subtle impact of distinct cultures and politics, and the varied perceptions about the content of the laws that govern them.<sup>37</sup> That being said, in this case, politics have the final word on the matter. The problem with the notion of politics taking over the role of law, apart from the obvious uncertainty it brings, is the sheer inconsistency and hypocrisy visible across many, if not most, cases revolving around the question of secession. The excuse which occasionally appears, proclaiming that each case is *sui generis*, is quite absurd. Without consistency, not even customary law can be formed.

When people within a State are denied the right to co-exist equally with the rest of the State's population and when gross violations of human rights are repeatedly committed against them, they have the right to secede. In other words, once a certain threshold of violations has been perpetrated by the government against a collective of individuals located on an identifiable part of the territory of the State, the right for this collective of individuals to secede from that territory is triggered.<sup>38</sup> Secession is seen as the last resort,<sup>39</sup> when every other option fails and people's lives would be seriously endangered if they were to remain in such a State. Therefore, some see secession as some sort of remedy, and hence the coined term "remedial secession".

Remedial secession, however, is a legal myth; secession is not a remedy recognised in international law for violations committed by a State.<sup>40</sup> In fact, remedial secession as a term can be seen as some sort of oxymoron. Secession, in reality, does not remedy the fact that people are not given the opportunity to participate in the government of a State, nor does it remedy the fact that there have been continuous violations of human rights against them. What secession actually does is that it shifts the balance of power in the newly-formed State. In other words, rather than remedying the human rights situation by

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<sup>37</sup> Slomanson, W. R., "Legitimacy of the Kosovo, South Ossetia and Abkhazia Secessions: Violations in Search of a Rule", *Miskolc Journal of International Law*, vol. 6, issue 2, 2009, p. 2.

<sup>38</sup> Del Mar, K., "The Myth of Remedial Secession", in: French (ed.), *op. cit.* (n. 13) p. 79.

<sup>39</sup> The notion that oppressed people have a right to secede, as a last resort, has its roots in the writings of classical international law jurists, Grotius and Vattel. Grotius, in his work *De Jure Belli ac Pacis Libri Tres*, argues that part of a territory has no right to separate "unless it plainly appears that it is absolutely necessary for its own preservation". Vattel similarly says, in *Le droit des gens: principes de la loi naturelle, appliques a la conduite et aux affaires des Nations et des Souverains*, that people may only secede in the "case of clear and glaring wrongs, [such as] when a prince for no apparent reason attempts to take away our life or deprive us of things without which life would be miserable". Dugard, *op. cit.* (n. 5) p. 113.

<sup>40</sup> Del Mar, *op. cit.* (n. 38) p. 79.

ensuring greater compliance through the establishment and/or strengthening of a "human rights culture" in the State in question, the implementation of the doctrine would reproduce a similar starting point on a smaller scale; a new State in which minorities are present and in which the ethnic tensions might remain equally unresolved.<sup>41</sup> This is not to say that secession in itself is a bad thing. It certainly is most unfortunate when it has to occur on account of the factors that preceded it, but, if it can lead to less suffering and oppression of the people in a State, then that is the way to go.

The most difficult problem secession encounters is the unspecified criteria that need to be met in order for it to be realised. Since there are no treaties concerning the topic and the practice of states across the board is inconsistent at best, it is rather difficult to list the criteria. However, Dugard has managed to assemble five conditions that seemingly have to be met for secession to happen:

- 1) there must be people with a separate identity based on ethnicity, race, religion, language or culture;
- 2) the said people must occupy a distinct part of a territory of the State<sup>42</sup> and constitute a majority in that territory;<sup>43</sup>
- 3) the said people must have been denied the right to meaningful participation in government and representation in the political structures of the State;<sup>44</sup>
- 4) the said people must have been subjected to widespread and gross violations of their fundamental human rights;
- 5) the said people must have exhausted all reasonable opportunities to secure respect for their human rights and to exercise the right to meaningful participation in government and representation in the political structures of the State.<sup>45</sup>

The first four conditions are relatively straightforward and there should not really be any problems in discerning whether or not the given people meet the mentioned criteria. The fifth condition, however, poses its fair share of problems. What exactly are these "reasonable opportunities" the said people must exhaust before securing the right to secede? This usually means that representatives of both the State and the people must sit down and negotiate. However, this begs the following question: how soon after particularly serious violations begin is secession triggered?<sup>46</sup> One cannot expect that these negotiations will eventually and miraculously produce a solution, after just giving them some time, while fundamental human rights are being violated. Yet, this is exactly what the international community expects in most cases of (potential) secession. Often

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<sup>41</sup> Cf. *ibid.*, p. 80.

<sup>42</sup> This effectively means that minorities that are widespread across a State, without having a notable concentration on a particular piece of territory, would not be eligible for secession, even if all the other criteria were met.

<sup>43</sup> These first two criteria link secession with self-determination.

<sup>44</sup> If one were to accept the division of self-determination into internal and external subcategories, this criterion would point to internal self-determination.

<sup>45</sup> Dugard, *op. cit.* (n. 5) p. 117.

<sup>46</sup> Del Mar, *op. cit.* (n. 38) p. 102.

the validity of secession, in the eyes of the international community, hinges on whether or not the said community deems that the oppressed people have engaged in enough negotiations, even if all the previous talks have failed miserably.

Apart from these five conditions, a sixth one could also be added. Namely, the secession of a territory accomplished by the use of force, by a third state against the predecessor State, would be illegal and would be met with the sanction of non-recognition.<sup>47</sup> This prohibition comes from a peremptory norm contained in the Charter of the United Nations<sup>48</sup> and the General Treaty for the Renunciation of War (1928).<sup>49</sup> While the aforementioned five conditions could be classified as positive ones that need to be met, this condition, the use of force by a third State, is a negative one and should not be met if secession is to be deemed valid.

Still, Dugard's aforementioned five conditions are purely of a theoretical nature and are not part of international law. In reality, these conditions are nothing more than a set of guidelines which states may or may not choose to follow when giving validity to secession and thus to its end product, a newly emerged State. Even though statehood itself, as was previously mentioned, has its fair share of criteria that need to be fulfilled, and recognition of other states is of a declaratory nature, there is no denying that a State cannot function in international relations without gaining some significant recognition. As demonstrated by past and recent events, the decision to recognise a new State, to accord independence to or to give approval of secession is a matter of political judgment, and so it is largely affected by the interests of the effective power players and of the international community as a whole.<sup>50</sup> Therefore, giving validity to secession is still, sadly, a question more of a political nature than a legal one, while the answer to it can easily be manipulated.

### **3.1. Recent cases**

#### **3.1.1. Kosovo**

The cases of Kosovo, Abkhazia and South Ossetia are interesting in relation to the potential formation of legal criteria regarding secession. These three cases are not unlike each other, yet the outcome of Kosovo, on one hand, and Abkhazia and South Ossetia, on the other, differs greatly. Not only that, but the international community's perspective also changed radically over the years. While the international community disregarded the sovereignty claims of these entities during the early 1990s, a number of states re-

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<sup>47</sup> Dugard, *op. cit.* (n. 5) p. 30.

<sup>48</sup> Article 2 of the Charter of the United Nations.

<sup>49</sup> Article 1 of the General Treaty for the Renunciation of War, also known as the Kellogg-Briand Pact.

<sup>50</sup> Velasco, *op. cit.* (n. 16) p. 88.

evaluated their claims to independence fifteen years after the collapse of the federations.<sup>51</sup>

Situated south of Serbia and bordered by Macedonia, Albania, Montenegro and Serbia, Kosovo has a population of some 2 million, of which 90 per cent are Kosovo Albanians and 8 per cent Serbs.<sup>52</sup> Kosovo enjoyed some form of autonomy in the Socialist Federal Republic of Yugoslavia, although in 1989 Serbia unilaterally and unconstitutionally removed Kosovo's autonomy,<sup>53</sup> prompting Kosovo to declare independence in 1991.<sup>54</sup> This declaration of independence was almost completely ignored by the international community<sup>55</sup> due to the Badinter Arbitration Commission's<sup>56</sup> controversial take on the situation. The Commission did not accept that Kosovo could secede, since Kosovo was a province of Serbia, albeit autonomous.<sup>57</sup> Years of bloodshed then ensued.

The first years of declared independence featured a non-violent separatist movement of the people of Kosovo. However, by 1995-1996, the non-violent separatist movement was largely replaced by the Kosovo Liberation Army, an armed guerrilla group, whose campaign of attacks against Serbian security forces led to a major military reaction by the then Federal Republic of Yugoslavia, causing massacres and massive expulsions of ethnic Albanians.<sup>58</sup> After failed attempts at negotiations, this conflict culminated in 1999 with NATO's intervention and the subsequent aerial bombardment of Serbia that lasted three months, which made the Yugoslav army withdraw from Kosovo.

Following the said events, the Security Council of the United Nations adopted Resolution 1244 (1999) in which it replaced Serbian sovereignty in Kosovo with an international civilian administration and a NATO-led<sup>59</sup> military force.<sup>60</sup> This in turn led to more autonomy for Kosovo that peaked in 2008 with the Kosovo Assembly's unilateral declaration of independence for Kosovo.

There is often a difficult and unclear dividing line between the acceptable recognition of a new State, particularly one that has emerged or is emerging as a result of secession, and

<sup>51</sup> Bolton, G., "International Responses to the Secession Attempts of Kosovo, Abkhazia and South Ossetia 1989-2009", in: French (ed.), *op. cit.* (n. 13) p. 79.

<sup>52</sup> Dugard, *op. cit.* (n. 5) p. 157.

<sup>53</sup> Following the abolition of Kosovo's autonomy, a number of discriminatory laws were introduced, prohibiting Albanians from the unauthorised sale of private property and restricting Albanian language education. Bolton, *op. cit.* (n. 51) p. 113.

<sup>54</sup> Dugard, *op. cit.* (n. 5) p. 157.

<sup>55</sup> Albania was the only State that recognised Kosovo at that time, which in itself is understandable taking into account the actual people who inhabited Kosovo.

<sup>56</sup> The Badinter Arbitration Commission is the more commonly used name for the Arbitration Commission created with the intention of providing legal advice to the peace conference on Yugoslavia.

<sup>57</sup> Welhengama, G., Pillay, N., "Minorities' Claim to Secession by Virtue of the Right to Self-Determination: Asian Perspectives with Special Reference to Kosovo and Sri Lanka", *Nordic Journal of International Law*, vol. 82, issue 2, 2013, p. 259.

<sup>58</sup> Gioia, A., "Kosovo's Statehood and the Role of Recognition", *The Italian Yearbook of International Law*, vol. 18, issue 1, 2008, p. 13.

<sup>59</sup> Later, NATO's presence was replaced by that of the European Union.

<sup>60</sup> Welhengama, Pillay, *op. cit.* (n. 57) p. 260.

intervention in the domestic affairs of another State by way of premature or precipitate recognition.<sup>61</sup> In this regard, it is striking how quickly the international community was to embrace Kosovo as an independent State. Within less than two weeks from the declaration of independence, 21 states had already recognised Kosovo as a sovereign State, including 12 European Union Member States and, most notably, the United States of America,<sup>62</sup> while the most prominent states that opposed recognition, apart from Serbia, were Russia and China. A legitimate question arose: "how could Kosovo be recognised as a State when it does not actually fulfil the criteria for statehood?" Even though Kosovo had indeed declared independence, it is also undeniable that Kosovo itself did not have effective control over its territory. As the UN Secretary-General pointed out in July 2008, the Serbian Government had consolidated its control of structures in Serb-majority areas, particularly Northern Kosovo, where local municipal elections had been held and, as a result of these elections, new parallel municipal authorities were operating in all Serb-majority municipalities.<sup>63</sup> There is also no denying the crucial influence and the enduring presence of the United Nations and, now, the European Union, among Kosovo's institutions.

Worth noting are two radically different approaches to justifying the given recognition, or lack of it, of Kosovo by states. Most recognising states stressed different political considerations<sup>64</sup> in support of their act, without going into detail about the law concerning the terms and conditions of secession, including possible exceptions,<sup>65</sup> while non-recognising states based their arguments more on the principles of international law,<sup>66</sup> with varying clarity. This is not to say that the arguments of the non-recognising states were completely void of political stances, but these were carefully and discretely woven between the lines. Non-recognising states were also quick to point out the dangers of precedent-setting recognition of a breakaway region such as Kosovo for international and local stability, while several recognising states acknowledged this danger and explicitly stressed the "unique character" of Kosovo in their declarations of recognition, anxious to refute the claim that a dangerous precedent was being set.<sup>67</sup> In the end, it seems that the recognising states intended not to recognise Kosovo as a State that met the requirements of statehood, but rather to ensure the fulfilment of these requirements through their act of recognition,<sup>68</sup> which made the political nature of recognition ever more apparent.

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<sup>61</sup> Shaw, *op. cit.* (n. 1) p. 461.

<sup>62</sup> Gioia, *op. cit.* (n. 58) p. 5.

<sup>63</sup> Cf. *ibid.*, p. 16.

<sup>64</sup> The most prominent political considerations were those that stressed that giving recognition to Kosovo would provide peace and stability to the region.

<sup>65</sup> Almqvist, J., "The Politics of Recognition: The Question about the Final Status of Kosovo", in: French, D. (ed.), *op. cit.* (n. 13) p. 173.

<sup>66</sup> The most obvious principle of international law that was evoked in this context was the principle of territorial integrity.

<sup>67</sup> Almqvist, *op. cit.* (n. 65) p. 476.

<sup>68</sup> Dugard, *op. cit.* (n. 5) p. 161.

Obviously, Serbia was not thrilled by the declaration of independence, even though everything pointed to its inevitability. Almost as an act of desperation, Serbia turned to the International Court of Justice. The United Nations' General Assembly, at the behest of Serbia, requested from the International Court of Justice an advisory opinion<sup>69</sup> on the legality of this declaration under international law.<sup>70</sup> The posed question was extremely narrow in scope and, unfortunately, so was the Court's advisory opinion. The Court simply stated that the declaration itself "did not violate any applicable rule of international law".<sup>71</sup> More importantly, the Court kept silent about the consequences of the declaration of independence, including the recognition of Kosovo.<sup>72</sup> What is clear is that the approach of the International Court of Justice to Kosovo was consistent with the classical trend to allow power politics and civil war to determine the emergence of states.<sup>73</sup>

When Kosovo's secession is observed through those five aforementioned conditions, there is no doubt that the said secession is valid. Kosovo Albanians certainly fit the bill of people with a separate identity, when compared to Serbs. Their ethnicity, culture and language are all fundamentally different from those of Serbs. However, if one were to expand on this condition and consider the identity of Kosovo Albanians in relation to that of native Albanians, things become more complicated and not as easily discernible. This condition, a potential seventh one if you will, could prove to be very important in determining the future of an aspiring State, since people who seek secession might not want as the end result a new State *per se*, but rather a merger with the State they originate from, if there is one. This condition would open up a whole new set of questions and it is debatable if it should even factor in, considering the very nature of the right of secession. This potential condition is rather complex and would require a far more elaborate analysis, not one merely on the sidelines of a paper, but rather forming the main topic of it. However, for now it serves more as food for thought. Moving on, given how Kosovo Albanians populate a distinct part of the territory and how they greatly outnumber every other population there, it is easy to see how the second condition is also fulfilled. With Serbia's unilateral removal of Kosovo's autonomy, its suppression, and the following war atrocities committed during the conflict, there is no denying that the third and fourth conditions were met. And finally, there have been several attempts at negotiations, but each failed due to Serbia's unwillingness to show even a sign of good faith.

So, in all, the theoretical five conditions that need to be satisfied in order for secession to gain validity were satisfied. However, if the sixth condition, the prohibition on the use of

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<sup>69</sup> The exact question being: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" See: 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 (2008).

<sup>70</sup> Ryngaert, Sobrie, *op. cit.* (n. 26) p. 474.

<sup>71</sup> See: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, ICJ Reports, ISSN 0074-4441, ISBN 978-92-1-071107-4, 2010, para. 122.

<sup>72</sup> Ryngaert, Sobrie, *op. cit.* (n. 26) p. 475.

<sup>73</sup> Welhengama, Pillay, *op. cit.* (n. 57) p. 264.

force by a third State against a predecessor State, comes into play, things become slightly tricky. The legality, or illegality for that matter, of NATO's intervention and the following aerial bombardment is a topic for another discussion, but there is no doubt that the autonomy and, ultimately, the independence of Kosovo was, if not made possible, then at least greatly hastened by NATO's intervention.

Even if one is to say that all six of the listed conditions for secession were met successfully, this still leaves the question of Kosovo's statehood and its recognition. If one was just to take into account the Montevideo Convention's four criteria for statehood, it is doubtful whether Kosovo constituted a State, at least at the beginning of its proclaimed independence. While a permanent population and a defined territory are apparent, a government and the capacity to enter into relations with other states are, or at least were, questionable. At different stages, the United Nations and the European Union have heavily incorporated their institutions within Kosovo's government and its own institutions, so that the true sovereignty of Kosovo, especially in its beginnings, is questionable, as is the question of its recognition before it gained true sovereignty over its territory.

In conclusion, there are still lingering questions about Kosovo's secession and recognition, but without doubt a precedent has been set.<sup>74</sup> All subsequent cases of secession will be viewed through the prism of Kosovo's example, whether or not that is to the liking of the recognising states.

### 3.1.2. Abkhazia and South Ossetia

The cases of Abkhazia and South Ossetia share many similarities with the case of Kosovo, which is why the comparison of these cases is inevitable. Both Abkhazia and South Ossetia were autonomous regions<sup>75</sup> in the Republic of Georgia, with an approximated population of 240,000 and 70,000 respectively. Both became regions of Georgia after World War II, although Russia began to issue its passports to the ethnic Russian inhabitants of both provinces in the early 1990s, which resulted in a shift of ethnic balance.<sup>76</sup>

The shift in ethnic balance resulted in palpable ethnic tensions, which ultimately led to civil war. After a period of civil war in the early 1990s, the Republic of Georgia reached uneasy coexistence with the two ethnic regions, which had organised themselves as *de facto* autonomous entities, supported by Russia.<sup>77</sup> However, the push for independence of both regions became greater with each passing year. Both regions declared their independence unilaterally: Abkhazia in 1999 and South Ossetia in 2005 – but neither of

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<sup>74</sup> Especially given the vast number of recognising states. Currently, the number of recognising states stands at around 110. See: <http://www.kosovothanksyou.com/>

<sup>75</sup> The Soviet Union, which was led by Stalin, ceded both South Ossetia and Abkhazia to the then Georgian Soviet Socialist Republic and both regions enjoyed a certain amount of autonomy within a new State. However, after the demise of the Soviet Union, Georgia stripped the said regions of their autonomy, which sparked the separatist movement that only grew in strength as time passed.

<sup>76</sup> Slomanson, *op. cit.* (n. 37) p. 5.

<sup>77</sup> Ryngaert, Sobrie, *op. cit.* (n. 26) p. 476.

these declarations resulted in recognition by other states.<sup>78</sup> Several years later and following certain events Russia formally recognised both Abkhazia and South Ossetia as independent states. Soon after Russia's recognition, a few other states followed suit.

Russia proclaimed itself a mediator in these ethnic conflicts and sent some of its peacekeeping troops<sup>79</sup> to the conflict-torn territories of Georgia. However, underlying tensions escalated in the summer of 2008, when Georgian troops launched an offensive against the South Ossetian capital, Tskhinvali, which in turn made Russia react immediately with a fierce counter-offensive, officially in response to the killing of Russian peacekeeping forces by Georgian troops.<sup>80</sup> Soon afterwards, Abkhazia joined the conflict. With two fronts opened and Georgia's military power being heavily outstripped by Russia's, Georgia quickly retreated and the conflict ended within days of breaking out. Thanks to mediation by the European Union's president Nicolas Sarkozy, who was also the French president at the time, the parties reached a six-point ceasefire agreement on 12 August 2008.<sup>81</sup>

It did not take long for Russia to capitalise on the precedent set by the secession and recognition of Kosovo. On 26 August 2008, a few weeks after the cessation of hostilities, Russia formally recognised South Ossetia and Abkhazia as independent states.<sup>82</sup> This move by Russia mirrors perfectly the recognition of Kosovo by western states and, especially, the United States of America. Unlike the recognising states in the case of Kosovo, Russia did not solely provide political reasoning for its given recognition.

On the contrary, Russia cited many international documents<sup>83</sup> that should have given legal validity not only to its given recognition, but also to the secession of both regions. This is certainly a step in the right direction, although it has to be said that Russia's recognition was primarily politically driven, since Russia is yet to recognise Kosovo. Rarely has any other State<sup>84</sup> followed Russia's recognition.

One other thing that connects the cases of South Ossetia and Abkhazia with the case of Kosovo is the involvement of the International Court of Justice. Georgia mainly sought to assert the legitimacy of its claim to sovereignty over Abkhazia and South Ossetia by

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<sup>78</sup> Dugard, *op. cit.* (n. 5) p. 164.

<sup>79</sup> Worth noting is the fact that, in October 2003, Russia announced its right to militarily intervene in all former Soviet States wherever ethnic-Russian human rights are allegedly violated. Slomanson, *op. cit.* (n. 37) p. 7.

<sup>80</sup> Ryngaert, Sobrie, *op. cit.* (n. 26) p. 476.

<sup>81</sup> Tancredi, A., "Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia", *The Italian Yearbook of International Law*, vol. 18, issue 1, 2008, p. 49.

<sup>82</sup> Ryngaert, Sobrie, *op. cit.* (n. 26) p. 476.

<sup>83</sup> Among others, Russia cited the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, since it claimed that people of South Ossetia and Abkhazia were denied the right to self-determination.

<sup>84</sup> Other recognition that followed Russia's came from Nicaragua, Venezuela, Nauru, Transnistria and, of course, mutual recognition from both states.

bringing disputes before the International Court of Justice, but the application failed on procedural grounds.<sup>85</sup>

It would be wise to run again through those five conditions that are often used as guidelines for determining the validity of secession to see if the cases of South Ossetia and Abkhazia fulfil the theoretical requirements. Right from the start, some difficulties arise. Given the history of these regions and how a substantial number of people that claimed the right to self-determination acquired Russian nationality, alongside their previous nationality, be it of South Ossetia or Abkhazia, it is slightly more difficult than in the case of Kosovo to determine whether these people have a separate identity. This fact, coupled with the fluctuation in numbers, also makes it somewhat difficult to proclaim that these people form a majority in their respective regions. Difficulties aside, these questions have already been resolved by the parties themselves, since Georgia had previously granted South Ossetians the right to self-determination.<sup>86</sup> Abkhazia is a similar story.

Georgia's unilateral decision to deny South Ossetia and Abkhazia the right to autonomy in the early 1990s, which later led to civil war, is a clear breach of the right to self-determination. The question of widespread and gross violations of human rights is muddled by the fact that the conflicts were poorly catalogued by the international community. In his speech, Medvedev, who was at the time the acting president of Russia, claimed that ethnic cleansing occurred twice: between 1990 and 1994 and during the 2008 war.<sup>87</sup> It is not easy to determine the exact number of people killed or displaced during the given timeframes, as numbers differ greatly depending on the source, but even without the exact number it seems most sources do agree that the number is indeed high. The case of Abkhazia, on the other hand, is characterised by cross-accusations<sup>88</sup> for ethnic cleansing. With the launch of Georgia's military offensive against the two said regions, the condition of exhausting all reasonable other options before secession flew out of the window. Clearly, Georgia was no longer interested in negotiating the matter, even if it had shown the will for negotiating in the beginning and actually proposed some promising solutions.<sup>89</sup>

Russia's intervention is similar in effect to NATO's in Kosovo. Perhaps it was even more justified, at least at the beginning. Even though Russia was a self-proclaimed mediator, the fact remains that Georgia's troops killed Russia's peacekeeping forces, which Russia deemed as an assault on its integrity. However, Russia clearly overstepped the mark when

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<sup>85</sup> Dugard, *op. cit.* (n. 5) p. 166. Also see: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports, ISSN 0074-4441, ISBN 978-92-1-071125-8, 2011.

<sup>86</sup> Thomas, R., "The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits and International Law", *Fordham International Law Journal*, vol. 32, issue 6, 2008, p. 2040.

<sup>87</sup> Bolton, *op. cit.* (n. 51) p. 125.

<sup>88</sup> Although a 1994 UNHCR report described "ethnic cleansing", the UNSC adopted more neutral language, condemning "attempts to change the demographic composition of Abkhazia". *Cf. ibid.*, p. 127.

<sup>89</sup> Georgia came to favour "asymmetrical" federalism, according to which Abkhazia would receive a higher level of self-government than South Ossetia. *Cf. ibid.*, p. 129.

it pushed its military forces deeper into Georgia's territory, and it still keeps a portion of its forces in the region to this day.

When all is said and done, South Ossetia is a clearer case for secession and is not entirely unlike Kosovo, while the case of Abkhazia is harder to justify with the cross-accusation of ethnic cleansing. However, as was the case with Kosovo, Russia's recognition of statehood for both these regions came prematurely, as neither of the regions had effective control over their territories, nor could they act in international relations without Russia's heavy assistance. Still, it has to be noted that the double standards of all actors involved in these cases is striking.

## 3.2. The Case of Crimea

### 3.2.1. Brief history and recent developments

The Crimean Peninsula, colloquially called Crimea, is a peninsula surrounded by the Black Sea and the Sea of Azov. To the north lies the Ukrainian mainland, while to the east, across the sea, it borders with the Russian Federation and one of its regions, Kuban to be precise. Its specific location has made it an important strategic position for centuries, while different points of entry to the peninsula, be it via sea or land, meant that different cultures<sup>90</sup> would inevitably clash and ultimately mix.

Historically, Crimea has seen many changes in its political status and ethnic composition. To explain the ethnic diversity and the resulting tension found in Crimea today, one must look at three defining moments in Crimea's history. In the Middle Ages, Crimea was under the control of the then Kiev Empire, thus in the beginning it was mostly populated by Ukrainians. That was up until the 13<sup>th</sup> century, when Tatars made an assault on the Kiev Empire and the "Golden Horde" took over Crimea.<sup>91</sup> After the fall of the Mongolian Empire, the majority of Tatars left Crimea, so Ukrainians again made up the vast majority of the population. That is, until the 18<sup>th</sup> century, when it fell under the control of the Russian Empire. With the internal migrations within the Russian Empire during the 19<sup>th</sup> century, a process of fundamental change to the ethnic balance in Crimea began.<sup>92</sup>

The ethnic balance continued to change drastically after World War II. Following the end of the war, on Stalin's orders, nearly all the Tatars were forced to leave Crimea, while a new batch of Russians moved in and inhabited the territory, thus forming the majority of the Crimean population.<sup>93</sup> In 1954, Crimea was put under the control of the Ukrainian Soviet Socialist Republic, within the Soviet Union. As time passed, Crimea's wish for

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<sup>90</sup> Through the centuries, various nomads would penetrate the peninsula by land from the north, while the maritime superpowers (such as Ancient Greece and the Roman and Ottoman Empires) would occupy the south of the peninsula in order to build ports and cities for their commercial and military activities.

<sup>91</sup> Burda, S. *Povijest Ukrajine*, Zagreb, Hrvatsko-ukrajinsko društvo, 2009, p. 339.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

independence grew, especially within the Russian population there. The idea of Crimean autonomy came to partial fruition in 1991. The Parliament of the newly independent Ukraine brought a decision in 1991 to form the Soviet Autonomous Republic of Crimea within Ukraine.<sup>94</sup>

The given autonomy meant that Crimea was granted its own administration, albeit only within the boundaries of Ukraine. However, this form of autonomy did not satisfy the Russians' strong desire for independence. For this reason, encouraged by the support and the politics of Moscow, which tried to nullify the 1954 transfer of Crimea, Russian separatists issued a declaration of independence in 1992, brought forth in the Crimean parliament, but it was soon rendered null and void.<sup>95</sup> With that, the cry for independence seemingly died away. However, a single spark was all that was needed for that cry to blaze out again. The trigger came in late 2013, in the form of the Ukrainian crisis.

Following the decision of Ukraine's government in late November 2013 to call off preparations for the Association Agreement with the European Union, massive public demonstrations engulfed Kiev's Independence Square (Maidan) and other major Ukrainian cities.<sup>96</sup> A number of outside observers attributed Kiev's implicit rejection of the European Union to pressure from Moscow.<sup>97</sup> The demonstrations were peaceful in nature, but as it became evident that the protesters planned to "occupy" Maidan for as long as it took, even staying overnight on the square, the government sent in the riot police to forcefully clear it from the protesters. This resulted in many injured and/or arrested people.<sup>98</sup> This turned the once peaceful protests into riots. Violent clashes between protesters and police erupted in late January 2014 in Kiev, with the first deaths reported on 22 January.<sup>99</sup>

The protests changed not only in intensity, but in their end goal as well. The protesters, now furious with their government, demanded the government's resignation, the organisation of new parliamentary and presidential elections, the release of the demonstrators that had been arrested and the repealing of the restrictive laws adopted by the parliament on 16 January and signed by the President the following day.<sup>100</sup> In the months to come, elections took place and the arrested demonstrators were set free.

This political crisis in Ukraine served as tinder to reignite Crimea's separatist movement. During the Ukraine crisis, two political currents clashed: one that was pro-European, and the other that was pro-Russian. Most of Crimea's population favoured the latter, which

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<sup>94</sup> Cf. *ibid.*, p. 340.

<sup>95</sup> Cf. *ibid.*, p. 342.

<sup>96</sup> Ramet, V., Garcés de los Fayos, F., Romanyshyn, I., *Policy Briefing: Ukraine's Crisis Intensifies: Protests Grow More Radical, the Authorities More Repressive*, Brussels, Directorate-General for External Policies of the Union - Policy Department, 2014, p. 5.

<sup>97</sup> Cf. *ibid.*, p. 10.

<sup>98</sup> Among the injured and arrested were not only protesters, but journalists as well.

<sup>99</sup> Ramet, Garcés de los Fayos, Romanyshyn, *op. cit.* (n. 96) p. 4.

<sup>100</sup> *Ibid.*

comes as no surprise given the ethnic make-up of the population, so when the pro-Russian government fell, the clashes between the two currents became especially intensive in Crimea.

Russia expressed concern over the whole situation and the safety of Russian speakers who inhabited Crimea. It did not take long for Russia to act. On 1 March 2014, the Federal Council of the Russian Federation authorised the deployment of Russian Federation armed forces in Ukraine, in order to protect the interests of Russia and of the Russian-speaking population<sup>101</sup> in Crimea and in the entire country.<sup>102</sup> Russia went on to hasten the procedure of giving Russian citizenship to the Russian-speaking population, which would lead to an even greater ethnic imbalance in the region. Following Russia's intervention, the supposedly self-proclaimed and illegitimate authorities of Crimea decided on 6 March 2014 to ask Russia to incorporate Crimea into the Russian Federation and called a referendum for 16 March 2014 on Crimean secession from Ukraine, thus violating the constitutions of both Ukraine and Crimea.<sup>103</sup>

Russia's intervention was condemned by the international community, and several measures<sup>104</sup> have already taken effect to put pressure on Russia to pull out its forces from Crimea and to stop it from supporting the pro-Russian separatists across Ukraine.

### 3.2.2. Secession of Crimea and the territorial integrity of Ukraine

Crimea shares some of the similarities with the cases of Kosovo, Abkhazia and South Ossetia, but at the same time it is a very different case of secession. The events that preceded it are, in many ways, rather unique. It would be best to explore the uniqueness of Crimea and its similarities with the three aforementioned cases through the prism of Dugard's five theoretical conditions for secession.<sup>105</sup> This section focuses primarily on the Russian ethnic group found in Crimea, since, of all the ethnic groups there, it is the one that advocates the secession of Crimea the most.

The demographics of Crimea, as already stated, have undergone some drastic changes over the course of Crimea's history. However, since the 19<sup>th</sup> century, there was continuity in the form of three ethnic groups that together consistently formed almost the entirety

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<sup>101</sup> This is effectively the same reasoning Russia used when it sent its peacekeeping forces to Abkhazia and South Ossetia. Russia bases this practice on the decision made in October 2003. See: *supra*, note 79.

<sup>102</sup> Point F of the European Parliament Resolution of 13 March 2014 on the Invasion of Ukraine by Russia (2014/2627(RSP)).

<sup>103</sup> Point D of the European Parliament Resolution of 13 March 2014. For the text of the Resolution, see: *supra*, n. 102.

<sup>104</sup> For example, the talks on visa matters have been suspended, the Member States of the European Union have suspended their participation in the G8 Summit in Sochi and, most recently, Russia has been the target of many economic measures from both the European Union and the United States. In fact, most recently, the European Union agreed to a package of significant additional restrictive measures targeting sectoral cooperation and exchanges with Russia. See the Answer given by High Representative/Vice-President Ashton on behalf of the Commission (5 September 2014) Register Reference: P8\_RE(2014)005969.

<sup>105</sup> See: *supra*, p. 284.

of the population of the peninsula – Russians, Ukrainians and Crimean Tatars. All three of these groups, apart from not sharing the same ethnicity, have their own cultures and languages, which is to say that each of these groups has its own identity.

With all the recent developments, it is hard to pin an exact number and percentage on each of these groups. However, in the 2001 Ukrainian Census,<sup>106</sup> around 60% of the people declared themselves Russians, while around 25% and 10% declared themselves Ukrainians and Crimean Tatars respectively. Another thing that must be taken into account is the language chosen as their native one by Crimea's population. According to the same 2001 census, around 75% of Crimea's population gave Russian as their native language, while the Crimean Tatar and Ukrainian languages were each claimed to be their native language by 10% of the population respectively.<sup>107</sup> This is especially important, because Russia expressed its desire to speed up the process of granting Russian citizenship for the Russian-speaking population. This effectively means that the balance might swing even more to the Russian ethnic side.

The distinctness of the territory these people inhabit could not be any clearer. The Crimean peninsula is surrounded by sea and the part of land that connects it with the mainland can be seen as a natural border that separates Crimea from Ukraine. While the exact number of how many Russians truly inhabit Crimea today is not known, given that the most recent numbers came from 2001, it is without doubt that they form the majority of Crimea's population. Apart from the origin of such a vast majority, no one really disputes the fact that Russians in Crimea fulfil the first two theoretical conditions. The case of the overwhelming majority of the population recalls the case of Kosovo, while the origin of such a majority comes strikingly close to the cases of Abkhazia and South Ossetia. The distinct part of the territory is what all four cases share. And this is pretty much where all the similarities between Crimea and the other three cases end.

The problems in the claims of secession start in the following three conditions. The first is what is commonly known as "internal self-determination". While the idea of the Autonomous Republic of Crimea with its own administration, albeit only within the boundaries of Ukraine, was not exactly what Russians had in mind when they demanded autonomy, it is hard to argue that Crimea's population and, among it, the Russians, were denied the said right. The Russians may not have been satisfied with their overall influence over the years in Ukraine's government, but in recent years, before the crisis broke out, it is undeniable that the government was indeed pro-Russian.

The question would certainly be more open for debate during the time before the creation of the Autonomous Republic of Crimea. There is also the question of how the new pro-European government would treat Crimea in the months and years to come, when it

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<sup>106</sup> See: <http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea/>

<sup>107</sup> See: <http://2001.ukrcensus.gov.ua/eng/results/general/language/Crimea/>

properly took the reins of the State. One cannot avoid feeling that, at this point in time, the Russians might have misjudged the moment for their long-awaited secession.

Another stumbling point is the non-existent violations of the fundamental human rights of Russians. There were no instances whatsoever of attacks on or intimidation of Russian or ethnic Russian citizens in Crimea.<sup>108</sup> Even Russia's intervention, or invasion, depending on one's stance, was intended more as an early protective measure to ensure the safety of its citizens in Crimea and not to extinguish possible breaches of human rights. While Russia's presence might, in theory, have prevented an escalation of events and possible human rights violations, the fact remains that there were no reports of gross and widespread violations up until that point.

The separatists were, however, so adamant in their desire for Crimea to secede that they never even wanted negotiations with the new Ukrainian government, and no real negotiations ever took place. They sought to capitalise fully on Ukraine's crisis and went on to call a referendum on secession. The referendum was successful,<sup>109</sup> but was disregarded as unlawful by Ukraine and almost the entirety of the international community. Obviously, separatists had not exhausted all reasonable opportunities for negotiations, since the object of their long-lasting desire was something that was not negotiable.

One must also ponder on the validity of Russia's intervention and its influence on the outcome of the secession. Putting aside the questionable pre-emptive nature of the intervention, as one could possibly attempt to justify it as an early protective measure, that was carried out to ensure the safety of Russians in Crimea, but the sheer scope and tenacity of it are especially problematic. The European Parliament took a position in which it described Russia's intervention as an act of aggression and, as such, a violation of the sovereignty and territorial integrity of Ukraine that is against international law and in breach of Russia's obligation<sup>110</sup> to respect the territorial integrity and sovereignty of Ukraine.<sup>111</sup> The problem with this intervention is that it did not stop at being a defensive action that was meant to ensure peace in this time of crisis, but it also assumed traits of aggression.<sup>112</sup> Not only did Russian and pro-Russian soldiers seize many key strategic

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<sup>108</sup> Point C of the European Parliament Resolution of 13 March 2014. For the text of the Resolution, see: *supra*, n. 102.

<sup>109</sup> The final results show that almost 97% of voters in Crimea voted in favour of joining Russia. See: [http://www.huffingtonpost.com/2014/03/17/crimea-referendum-final-results\\_n\\_4977250.html](http://www.huffingtonpost.com/2014/03/17/crimea-referendum-final-results_n_4977250.html)

<sup>110</sup> Russia signed the Budapest Memorandum on Security Assurances for Ukraine in 1994, alongside the United States and the United Kingdom.

<sup>111</sup> Point A of the European Parliament Resolution of 13 March 2014. For the text of the Resolution, see: *supra*, n. 102.

<sup>112</sup> In fact, on 13 March 2014, the Government of Ukraine referred to the European Court of Human Rights a breach of the provisions of the European Convention on Human Rights by the Russian Federation and lodged an inter-state application under article 33 of the Convention against the Russian Federation. Letter dated 17 March 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/196). The European Court of Human Rights decided to grant an interim measure calling upon both Contracting Parties concerned to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian

points in Crimea, but Russia deployed even more troops to the area and continued to support the pro-Russian gunmen.

This brings the question of the probability of successful secession without Russia's intervention. While, indeed, the pro-Russian separatists held their own against Ukraine's military force and even managed to hold a referendum on the question of secession, it is also unquestionable that Ukraine's forces only started to retreat after Russia intervened. One could draw a parallel between the United Nations' intervention in Kosovo and Russia's intervention in Crimea, as both shared a similar outcome – after a quick, but forceful intervention, the military troops of the predecessor states had to withdraw. However, the circumstances that preceded the intervention radically differ in the said cases.

It is clear, if one is to take the five conditions set by Dugard as paramount for the validity of secession, that Crimea would not classify as a prime candidate for secession. However, since there are essentially no legal rules governing the topic, merely theoretical contemplations, one should not immediately dismiss Crimea as a potential precedent-setting candidate. It is true that there were no gross violations of human rights in the case of Crimea, but one has to wonder how rational it is for a State to dismiss long-lasting calls for independence from people that constitute a majority in a distinct part of its territory and that are clearly unhappy at being a part of the said State? If neither of the parties is happy with this "relationship" and if such discontent persists for a great amount of time, perhaps it would be best for both parties to accept the reality and allow secession to take place. Of course, the eventual outcome of any secession could go either way for both states, but it would be irrational to persist with a stalemate indefinitely.

Politics, however, are usually guided by interest, and this is why governments will always try to prevent secession from happening in their own State, while at the same time, if it is in their interest, they will support claims for secession from other aspiring states. This is also the main reason the topic of secession is not regulated by international law. Such openness to interpretation easily leads to manipulation, which is one of the key elements of politics.

Nevertheless, states occasionally do fit legal reasoning in their decisions to offer or deny support to a newly emerging State. In the case of Crimea, states opted for the international principle of territorial integrity as the defining theme of their reasoning as to why they did not support the secession of Crimea. However, there is a catch in this reasoning. The said principle is aimed at relations between states and not at internal matters of a State. Since, at the time, Crimea was a part of Ukraine, the principle of territorial integrity would

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population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment). Both states were also asked to inform the Court as soon as possible of the measures taken to ensure that the Convention was fully complied with. Press release issued by the Registrar of the Court ECHR 073 (2014).

not really be applicable. But, alas, because of Russia's intervention, the international community could still use the said principle as their argument. Which it repeatedly does.

In the case of Crimea, what is happening is that the international community is focusing less on the reasoning behind the secession and more on Russia's intervention. Between the lines it can be read that the international community, apart from Ukraine, does not actually automatically dismiss the call for secession because of the reasoning behind it, but more because of how it was executed. This was done mainly with the aid of Russia. One also has to wonder whether the reaction of the international community would be the same if some western state had intervened instead of Russia.

The question of the held referendum must also be addressed. The Parliament of Crimea decided to accede to the Russian Federation, and with a decree<sup>113</sup> it scheduled for 16 March 2014 a local Crimean referendum, including the city of Sevastopol, with the following questions: "Do you support Crimea's reunification with the Russian Federation?" and "Do you support the restoration of Crimea's Constitution of 1992 and Crimea's status as a part of Ukraine?"<sup>114</sup> The decree was suspended the following day by the Acting President of Ukraine, and was immediately referred to the Constitutional Court of Ukraine. The Constitutional Court found that, by having adopted the Decree, the Crimean Parliament had violated the principle of territorial integrity of Ukraine enshrined in the Constitution of Ukraine<sup>115</sup> and had thus breached the Constitution of Ukraine.<sup>116</sup> Apparently, according to the Constitution of Ukraine, the Autonomous Republic of Crimea can only organise referendums on local matters and not on the topic of changing borders.

This stance was accepted by both the European Parliament<sup>117</sup> and the General Assembly of the United Nations.<sup>118</sup> It is worth noting that this constitutional principle of territorial integrity differs from the principle of the same name found in international law. One focuses on the inner-state, while the other on inter-state relations. Both principles are called upon in Crimea's case. When secession, as one of the embodiments of self-determination, enters into play, things become even more interesting. A question arises: which right takes precedence in this case – the State's right to territorial integrity or the people's right to secede, based on the basic human right of self-determination?

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<sup>113</sup> The full name of the decree is the "Decree on Holding an All-Crimean Referendum", dated 6 March 2014.

<sup>114</sup> Letter dated 15 March 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/193) p. 1.

<sup>115</sup> According to Article 73 of the Constitution of Ukraine, any question of changing the territory of Ukraine shall be subject, exclusively, to an all-Ukrainian referendum and the only body that can announce such a referendum is Ukraine's parliament. Further, in Article 134 of the Constitution, the Autonomous Republic of Crimea is stated to be an integral part of Ukraine's territory.

<sup>116</sup> Letter dated 15 March 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/193) p. 1.

<sup>117</sup> See: points D and 3 of the European Parliament Resolution of 13 March 2014. For the text of the Resolution, see: *supra*, n. 102.

<sup>118</sup> See: Resolution adopted by the General Assembly on 27 March 2014 (RES/68/262).

While it is true that Ukraine's constitution does not directly forbid secession, it clearly attempts to restrict it. The principle of territorial integrity found in Ukraine's constitution limits any change of Ukraine's territory to an all-Ukrainian referendum in all cases, which goes against the reasoning behind the right to secession, in which a minority of a certain State seeks to secede from the predecessor State. In saying this, however, a referendum on the matter is not actually needed for secession to take place.

Another thing worth mentioning is the fact that a couple of other regions, located in the east of Ukraine, followed in the footsteps of Crimea, spearheaded by the cities of Donetsk and Luhansk.<sup>119</sup> Perhaps unsurprisingly, both of these regions were condemned by Ukraine and the vast majority of western states for their wish to secede from Ukraine and, ultimately, join Russia.

Ultimately, even if one justifies the secession of Crimea, the questions of statehood and the following recognition still remain. Similar to the cases of Kosovo, Abkhazia and South Ossetia, the case of Crimea does not yet fulfil all the criteria for statehood. As with the previously examined cases, Crimea does indeed feature a permanent population and a defined territory, but, given Russia's heavy presence on its territory, the effectiveness of its government is, at this moment in time, highly questionable. This means that Crimea is not yet fit to be recognised by the international community and, as such, any recognition of it that has already been granted or that will be granted in the near future would count as premature.

#### 4. CONCLUSION

The topics of self-determination and secession are riddled with vagueness, inconsistencies and hypocrisy, which are best seen in the cases of Kosovo and South Ossetia. There does not seem to be a will within the international community to finally regulate the said topics, since there have been many examples, whether successful or not, of secession over the last few decades and yet the law concerning the topic has barely moved from its initial starting point. It is even debatable if any customary law has been formed, based on the sheer inconsistencies found in practice. Although it has to be said that even if states are preventing the creation of law in this case, theoreticians have all the while been hard at work trying to make at least some sense of this mess. However, even theoreticians have stumbled occasionally, while trying to justify the actions of (their) states.

The case of Crimea is particularly interesting. If we go solely by the theoretical teachings, then it certainly should not be recognised as a State. However, the reality is that the legal aspect of secession is so underdeveloped that, if there is a will, Crimea could easily be

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<sup>119</sup> According to the results, announced by the *de facto* authorities in Donetsk and Luhansk, about 90% of a turnout of 70%, and 96% of a turnout of nearly 75% respectively voted for State sovereignty. See: <http://www.theguardian.com/world/2014/may/12/ukraine-crisis-donetsk-region-asks-join-russia>

recognised as a State. Politics, not law, have conjured up the current state that Crimea finds itself in and, ultimately, will determine its future. Even though rare are those who support Crimea's pursuit for secession from Ukraine, one has to be realistic and admit that a substantial number of people do not wish to be part of Ukraine and that they inhabit a large portion of the land. Nobody "wins" by forcing Crimea and its inhabitants to remain part of Ukraine, while secession offers uncertainty for both sides, but mainly for Crimea. The crux of the problem is that secession still resides mostly in the political, not legal, sphere and hopefully this paper has shown some of the major shortcomings of such a situation and why this area of international law is in dire need of further development, primarily through regulation. Until the international community musters the courage to finally regulate this topic and many others related to it, and provides consistency in its decisions, there will be many other "Crimeas" across the world. And who is to say they do not have the right to secede? Certainly not international law.

Sažetak

**RAZMATRANJE PITANJA SAMOODREĐENJA I ODCJEPLJENJA U SVJETLU NEDAVNIH DOGAĐAJA NA KOSOVU, U ABHAZIJI, U JUŽNOJ OSETIJI I NA KRIMU**

Događaji na Kosovu, u Abhaziji, u Južnoj Osetiji i nedavni događaji na Krimu još su jednom pozornost međunarodne zajednice usmjerili na kontroverzna pitanja samoodređenja i odcjepljenja. Na žalost, mnoga pitanja koja prožimaju ove dvije teme i koja ih čine kontroverznima, među koja pripada i manjkava pravna regulacija, do danas su nerazjašnjena. Ovaj članak razmatra teorijske temelje ovih dviju tema te se nakon toga usredotočuje na nedavne slučajeve koji su upozorili na sve nedostatke, nedosljednosti i nelogičnosti u ovim i s njima povezanim temama.

*Ključne riječi: samoodređenje, odcjepljenje, Kosovo, Abhazija, Južna Osetija, Krim*

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