

**The non-recognition of Russia's annexation of Crimea:
three different legal approaches and one
unanswered question**

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1. *Introduction*

Crimea's referendum for self-determination and Russia's ensuing annexation completed on 21 March with the signature by President Vladimir Putin of two *ad-hoc* federal laws (the Federal Constitutional Law On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol, and the Federal Law On Ratifying the Agreement between the Russian Federation and the Republic of Crimea on Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation New Constituent Entities)¹ has sparked a wave of international protest and accusations, especially by governments in West, that by doing so Russia was committing a grave violation of international law. Recurrent have been the claims by States and international organizations declaring that the alteration in status of Crimea shall never be recognised. In terms of legal consequences, non-recognition has

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¹ Laws on admitting Crimea and Sevastopol to the Russian Federation (press release), <<http://eng.kremlin.ru/acts/6912>> accessed 29 April 2014; Treaty between the Russian Federation and the Republic of Crimea on the acceptance of the Republic of Crimea into the Russian Federation and on creation of new federative entities within the Russian Federation (unofficial translation) (18 March 2014), <www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sevastopol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary> accessed 29 April 2014.



been one of the two international law ‘techniques’ (the other being the imposition of targeted sanctions) through which Russia’s annexation has been addressed.

In the language and terminology employed by Western and European governments one can detect striking similarities with the wording used by the then US Secretary of State, Henry Stimson, in 1932 at the peak of the Manchurian crisis in the Far East, in which the US government sent identical diplomatic notes to the Japanese and Chinese governments declaring its refusal to recognize any *de facto* situation or treaty impairing the treaty rights of China and the United States and the former’s territorial integrity or political independence. The so-called ‘Stimson doctrine’ was seen as the first affirmation on the international plane of the principle of *ex iniuria ius non oritur*, i.e. of the principle of non-recognition of situations brought about through the illegal use of force against the sovereignty and territorial integrity of a country and it gave rise to a concerted action of non-recognition within the League of Nations aiming at isolation the existing regime in Manchuria.² In the United Nations era the doctrine of non-recognition has acquired an established status under general international law, equally recognised by the UN General Assembly and Security Council, by the case of law of international tribunals and by the International law Commission (ILC), even if a considerable degree of uncertainty remains over its foundation under positive law and over its precise scope of application.

The present contribution examines the current non-recognition practice with regard to Crimea, in order to identify the legal significance of such practice under the three prevailing accounts and theories of non-recognition in international law, namely the normativist account, the ILC or ‘communitarian’ account and the ‘realist’ account. It also examines the scope of non-recognition obligations potentially accruing upon third States and international organizations. It concludes by answering one question, namely which of the three doctrines of non-recognition finds confirmation in the recent practice concerning Crimea.

² Cited in R Langer, *Seizure of Territory* (Princeton University Press 1945) 58. On the Stimson doctrine see also W Meng, ‘Stimson Doctrine’ in R Bernhardt (ed.), *EPIL* (1982) Vol IV 690; and D Turns, ‘The Stimson Doctrine of Non-Recognition: its Historical Genesis and Influence on Contemporary International Law’ (2003) 2 *Chinese J Intl L* 105.



2. *Non-recognition practice concerning the annexation of Crimea*

Non-recognition practice concerning the recent situation in Crimea has been quite significant, yet so far limited to the non-recognition of the referendum held on 16 March 2014 and of the ensuing annexation by Russia. At the present early stage, it has not extended to the avoidance of implied forms of recognition. In this latter respect one may only mention reports concerning the decision of the the European Organisation for the Safety of Air Navigation (Eurocontrol), acting in cooperation with the International Civil Aviation (ICAO) and the European Safety Aviation Authority (EASA), recommending to international operators that they avoid flying into Crimean airports and through Crimea Airspace and not recognising the provision of air navigation services other than from Ukrainian official authorities.³

As far as the non-recognition of the referendum and of Russia's annexation is concerned, the relevant practice is predominantly, but not exclusively, originating from Western countries and organizations. In a statement issued on 12 March 2014, the G-7 leaders have declared that

‘[...] such referendum would have no legal effect. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process which would have no moral force. For all these reasons, we would not recognize the outcome.’⁴

According to the joint statement issued by the President of European Commission, José Barroso, and the President of the European Council, Herman Van Rompuy, on 16 March 2014 ‘the European Union considers the holding of the referendum on the future status of the territory of Ukraine as contrary to the Ukrainian Constitution and international law. The referendum is illegal and illegitimate and its outcome will not

³ ‘European air traffic regulator suspends flights to Crimea’, 2 April 2014, <<http://en.itar-tass.com/russia/726248>>, accessed 29 April 2014. See ICAO State Letter (2 April 2014) Doc. EUR/NAT 14-0243.TEC (FOL/CUP), <www.public.cfinu.eurocontrol.int/PUBPORTAL/gateway/spec/PORTAL.18.0.0.4.49/_res/140243Simferopol.pdf>, accessed 2 May 2014.

⁴ Statement of G-7 Leaders on Ukraine (12 March 2014), <www.whitehouse.gov/the-press-office/2014/03/12/statement-g-7-leaders-ukraine>, accessed 29 April 2014.



be recognised.⁵ On the same day and on a similar tone, the White House has declared that '[the] referendum is contrary to Ukraine's constitution, and the international community will not recognize the results of a poll administered under threats of violence and intimidation from a Russian military intervention that violates international law.'⁶ NATO's Secretary-General, Anders Rasmussen, on 19 March, has stated that 'Crimea's annexation is illegal and illegitimate and NATO Allies will not recognize it'.⁷

At the level of the United Nations, the draft resolution concerning the referendum in Crimea and presented by 41 countries (predominantly Western countries) for approval by the Security Council at the meeting of 15 March was vetoed by Russia, with only China abstaining in the vote.⁸ The resolution reaffirmed in the preamble that 'no acquisition of territory resulting from the threat or use of force shall be recognised as legal'; it declared that the referendum could 'not have legal validity' and could 'not form the basis for any alteration of the status of Crimea'; and it 'call[ed] upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing such altered status.' During the meetings of the Security Council of 15 and 19 March calls for the non-recognition of the results of the referendum and of the prospective annexation by Russia were voiced by the delegations of France, the United Kingdom, Lithuania, Australia, Jordan, Ukraine and Luxembourg.

On 24 March, the UN General Assembly has approved a draft resolution proposed by Poland, Lithuania, Germany, Canada, Ukraine and Costa Rica, with 100 votes in favour, 11 against and 58 abstentions, ti-

⁵ Joint statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso (16 March 2014), <http://ec.europa.eu/commission_2010-2014/president/news/archives/2014/03/20140317_1_en.htm>, accessed 29 April 2014.

⁶ White House, Statement by the Press Secretary on Ukraine (16 March 2014), <www.whitehouse.gov/the-press-office/2014/03/16/statement-press-secretary-ukraine>, accessed 29 April 2014.

⁷ 'NATO Secretary General condemns moves to incorporate Crimea into Russian Federation', 18 March 2014, <www.nato.int/cps/en/natolive/news_108100.htm>, accessed 29 April 2014.

⁸ UNSC Draft Resolution, UN Doc S/2014/189; UNSC Verbatim Record (15 March 2014) UN Doc S/PV.7138.



tled 'Territorial integrity of Ukraine'. Paras. 5 and 6 of the operative part of the resolution reiterate, in almost identical words, the determinations made in the draft Security Council resolution vetoed by Russia a few days earlier; it includes the call for non-recognition of 'any alteration of the status of the Autonomous Republic of Crimea and of the city of Sevastopol' and to avoid 'any action or dealing that might be interpreted as recognizing such altered status.'⁹ The delegations of the EU, Norway, Georgia, Turkey, Liechtenstein in their statements have expressly referred to the need for non-recognition of the outcome of the referendum and of Russia's annexation of Crimea.¹⁰

3. *Three theories of non-recognition in international law*

With respect to a policy of non-recognition adopted individually or collectively by States, such as is the case with Crimea, the following questions arise, and namely: whether non-recognition is mandatory under international law; if that is the case, what is the legal basis of such obligation; and what is its precise scope of application. These questions are addressed (and answered) in different manners in three prevailing accounts of non-recognition under international law.

a) The 'normativist' approach to non-recognition

The first approach we shall discuss is what we could refer to as the 'normativist' approach. The main feature of the normativist approach is that non-recognition is a legal obligation stemming from the objective illegality and invalidity of a given situation created in violation of international law. We could also define such illegality and invalidity as '*erga omnes*', in the sense that it is opposable to all international legal subjects, which are under a duty not to recognize as lawful that situation.

One can find expressions of that approach in the *Namibia* advisory opinion, in which the Court was asked by the Security Council to identify the legal consequences stemming from the latter's adoption of resolution 276, which *inter alia* declared South Africa's continued presence

⁹ UNGA Res 68/262 (24 March 2014) UN Doc A/RES/68/262.

¹⁰ UNGA Verbatim Record (24 March 2014) UN Doc A/68/PV.80.



in Namibia illegal and called upon States to refrain from any dealings with South Africa concerning Namibia.¹¹ In examining the consequences for third States of the declaration of illegality of South Africa's presence in Namibia, the Court relied on norms of general international law in order to precisely identify the obligations incumbent upon non-member States of the UN – as such not bound by obligations imposed by the Security Council. According to the Court 'the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia [were] opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law [...]'.¹² In the opinion, the Court also identified those relations which were incompatible with the determination of illegality made by UN political organs, such as entering into treaty relations, invoking and applying already existing treaty relations, exchanging diplomatic or consular missions and entering into economic relations, in other words, any acts or dealings that could 'imply recognition' that the situation was legal.¹³ The Court also introduced an element of flexibility in the doctrine of non-recognition, by stating that 'the non-recognition of South Africa's administration of the Territory should not result in the depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.'¹⁴ We shall refer to this qualification made by the Court as the 'Namibia exception'.

The 'normativist' view is also supported by Judge Higgins separate opinion in the later advisory opinion *Legality of the Wall* in which the British judge criticized the Court's decision to infer the obligation of non-recognition accruing upon third States with regard to the situation created by the construction of the Wall in the occupied Palestinian ter-

¹¹ *Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16.

¹² *ibid* 55.

¹³ *ibid* 56.

¹⁴ *ibid* 55.



ritories from the *erga omnes* nature of the obligations breached. According to Judge Higgins '[t]hat an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of *'erga omnes'*. It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails 'decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para 115). [...] [T]he Court emphasized that 'A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.' (Ibid., para 117.) [...] Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*.'¹⁵ In sum, both the *Namibia* opinion and Judge Higgins' separate opinion derive the *erga omnes* effect of the unlawful situation, hence the obligation of non-recognition accruing upon third parties, from the objective illegality and invalidity of the situation at hand as determined by a UN organ.

As impliedly recognised in Judge Higgins' separate opinion, the main difficulty with espousing the latter view is that one has to rely on an authoritative determination at the level of the United Nations declaring the objective illegality of the situation and calling upon States not to recognise the new situation as lawful, in order to avoid possibly conflicting assessments made by third States. The legal consequences deriving from such a shortcoming of the theory at hand, which was propounded by Portugal in its contentious proceedings against Australia in the *East Timor* case, may be conspicuous; exactly due to that the Court in *East*

¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), Separate Opinion of Judge Higgins, [2004] ICJ Rep 216.



Timor affirmed that ‘the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.’¹⁶ Ultimately, the Court did not accept Portugal’s argument that the scope of the dispute with Australia could be limited to the latter’s compliance with obligations of non-recognition deriving from a number of resolutions adopted by the Security Council, exactly because those resolutions urged all parties to respect the right of self-determination of the people of East Timor, condemned Indonesia’s invasion, yet did not explicitly determine the illegality of the situation and require non-recognition. In other words, a ‘triggering’ determination is necessary in order to render the duty operational.

In the case of Crimea, as we have already seen, the Security Council was unable to approve a resolution declaring the situation as ‘illegal’ and calling upon member States not to recognize the results of the referendum organized by the Crimean authorities. Yet such a resolution was adopted by the General Assembly, the determination of which may be considered more authoritative and representative than that of the Security Council, in that the whole of the international community is there represented, had an opportunity to voice its views and to vote on the draft resolution.

From the perspective of the source of legal obligation, one can first identify the principle of *ex iniuria ius non oritur*, hence making the obligation as deriving from a general principle of law. The view was authoritatively held by Hersch Lauterpacht in a famous passage of his classic book published in 1947, in which he held that ‘to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrong-doer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative.’¹⁷ The principle operates as a ‘trigger’ for non-recognition when it is applied in

¹⁶ *East Timor Case (Portugal v. Australia)* (Jurisdiction) [1995] ICJ Rep 103.

¹⁷ H Lauterpacht, *Recognition in International Law* (CUP 1947) 421.



relation to a legal claim to a certain status which is opposable *erga omnes*, such as in the case of an annexation or with regard to the claim to be considered the legitimate government of a country despite the establishment of a regime of *apartheid*.¹⁸

But a further, possibly complementary, explanation is possible. And namely that the duty incumbent upon third parties may result from the *erga omnes* nature of certain subjective rights of State: in the case at hand, the right that Ukraine enjoys to see its territorial integrity respected, not only against forcible actions aimed at undermining it such as the Russian intervention in support of Crimea's separatists, but also against other types of actions aiming at undermining its territorial integrity, such as recognition of the new *status quo*. That is clearly spelled out in the 1970 General Assembly Declaration on Friendly Relations, which states that '[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal'.¹⁹ The same formula is also to be found in the Declaration on the Strengthening of International Security adopted by the General Assembly in 1970.²⁰ A similar formulation appeared in the Definition of Aggression in 1974: '[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.'²¹

The same *erga omnes* character is enjoyed by the right of self-determination, as confirmed by the wording of common Article 1 of the International Covenant for Civil and Political Rights (ICCPR) and of the International Covenant for Economic, Social and Economic Rights (ICESCR), which provides that '[t]he States Parties to the present Covenant[s], including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect the right, in conformity with the provisions of the Charter.' In its General Comment No. 12 the Human Rights Committee has added that '[t]he obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States

¹⁸ M Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 683.

¹⁹ UNGA Res 2625 (XXV) (24 October 1970).

²⁰ UNGA Res 2734 (XXV) (16 December 1970) para 5.

²¹ UNGA Res 3314 (XXIX) (14 December 1974) art 6 para 3.



parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination'.²² Following from that, one can explain the '*erga omnes* illegality' of South Africa's presence in Namibia as the resultant of a violation of the right of self-determination of the people of Namibia, which was opposable *erga omnes*. The violation of the subjective rights of the people of Namibia was explicitly recognised by the Court where it held that '[...] all States should bear in mind *that the injured entity is a people* which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted' (emphasis added).²³

The main problem with identifying the legal basis in primary rules of conduct is that it is unclear whether implied forms of recognition come under the purview of the primary norms prohibiting explicit, formal recognition: by resorting to a restrictive, textual interpretation of those obligations, a State may argue that allowing commercial relations with an annexed territory does not enter into conflict with its duty to withhold recognition of the annexation as 'legal'; or with its duty to facilitate the realization of the right of self-determination of a people which has been subjected to foreign occupation. An analysis of the *travaux préparatoires* of the General Assembly resolutions concerning the duty of non-recognition of territorial acquisitions resulting from the use of force shows that the addition of the qualification 'as legal' or 'as lawful' was exactly intended to address the preoccupations of Western countries keen to avoid a regulation that would preclude *de facto* contacts and relations with illegal regimes.²⁴ A comprehensive theory of non-recognition is better accommodated by relying on the principle of *ex iniuria ius non oritur*, which may create a presumption against any form

²² UNCHR, 'General Comment no. 12: The Right to Self-determination of Peoples' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (13 March 1984) para 6.

²³ *Namibia* (n 11) 56.

²⁴ S Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International of the International Legal Order: Jus Cogens and Obligations Erga Omnes Obligations* (Martinus Nijhoff 2006) 99.



of recognition of the illegal regime, save for the specific circumstances falling under the 'Namibia exception'.

b) *The 'communitarian' approach to non-recognition*

The second approach is that codified by the ILC at Articles 40 and 41 of the articles on the responsibility of States for internationally wrongful acts and it may be better described as 'communitarian' according to its content and rationale. A duty of non-recognition shall arise when the situation is the result of a 'gross violation of obligations deriving from a peremptory norm' of international law.²⁵ Replacing the previous idea of setting up a special regime for international crimes and of relying on the concept of *erga omnes* obligations,²⁶ the ILC in the 2001 draft articles decided to introduce the notion of 'serious violations of peremptory norms of international law' in order to spell out an aggravated regime of State responsibility. Among the consequences of the responsibility arising out of grave breaches of peremptory norms, for example the prohibition of aggression or the obligation to respect the rights of self-determination of peoples, Article 41(2) provides for the obligation for States not to 'recognize as lawful a situation created by a serious violation' of a peremptory norm, together with the additional obligation not to render aid or assistance in maintaining that situation.²⁷ To that extent, the duty of non-recognition arises not only from the nature of the obligation breached – it must be an infringement of an obligation arising out of a norm of *ius cogens* – but such violation must be of a serious nature, i.e. to use the ILC articles' wording a 'gross and systematic failure to fulfil the obligation'.²⁸ The ILC approach sees the duty of non-recognition as a communitarian countermeasure to react to the most egregious breaches of norms of a fundamental nature and to

²⁵ Articles 40 and 41, 2001 ILC Articles on State Responsibility with Commentary, in Report of the International Law Commission Fifty-third Session UN Doc A/56/10 277-292.

²⁶ For a critical appraisal of the choice to abandon the concept of *erga omnes* obligations, in order to espouse that of *ius cogens*, see P Picone, 'The Distinction Between *Jus Cogens* and *Erga Omnes* Obligations' in E Cannizzaro (ed), *The Vienna Convention Beyond the Law of the Treaties* (OUP 2011).

²⁷ ILC Articles on State Responsibility with Commentary (n 25).

²⁸ *ibid.*

bring to an end the illegal situation resulting therefrom. As a matter of fact the duty of non-recognition is part of a broad array of community measures aimed at restoring the *status quo ante*: Article 41(1) provides for a positive duty of all States to co-operate to bring to an end through lawful means any Article 40 situation; the second part of Article 41(2) provides for a further duty to abstain from rendering any form of aid or assistance in maintaining the unlawful situation.²⁹

The latter approach has two advantages as compared with the former. Firstly, it differentiates between violations in general — which may be either minor or may not fall under the purview of a *ius cogens* norm or *erga omnes* obligation — and violations that because of their gravity and because of the ‘public interest’ underlying the affected norms require a coordinated effort by the international community in rendering ineffective the results deriving from the violation of international law. In this sense, it is a secondary obligation applying regardless of the specific content of the primary norm which has been violated; and it is less reliant on the position of the injured State, whose waiver or recognition ‘cannot preclude the international community interest in ensuring a just and appropriate settlement’.³⁰ The second one is that it builds on a practice of States and international organizations that sees non-recognition as a reaction to the most significant violations of fundamental rules protecting the interests of the international community and as a necessary tool the international community has developed in order to deny legal effectiveness to a *de facto* situation. It is also confirmed, even if with different conceptual tools, by the ICJ in the *Wall* advisory opinion.

In the opinion, the Court held that, in view of the *erga omnes* character of the obligations breached by Israel — namely those related to the self-determination of the Palestinian people and their protection under international humanitarian law — through the construction of the wall in the West Bank and in and around East Jerusalem, States are under an obligation not to recognize the illegal situation.³¹ According to the Court, it is thus the nature of the obligations breached that makes

²⁹ On the relationship among the three different obligations see *Legality of the Wall* (n 15) Separate Opinions of Judge Higgins and Judge Kooijmans.

³⁰ ILC Articles on State Responsibility with Commentary (n 25) 289-290.

³¹ *Legality of the Wall* (n 15) 200.



non-recognition by other States obligatory in terms of international law. While one may share the employment by the ICJ of a different conceptual toolbox as compared to the ILC, and yet wonder over the real motivations behind that choice, the duty of non-recognition is also conceived as a communitarian countermeasure to repair the consequences of a breach of a norm so fundamental for the international community. This approach should not be confused with the concept of '*erga omnes*' employed by the same Court in *Namibia*, as in that case the term only indicated the effect of the illegality determined by the UN political organs with regard to the violation of certain rights belonging to the people of Namibia — namely opposable *erga omnes* —, not the quality of the obligation breached as protecting an interest of the international community as a whole.

The problem of the impartial, third-party, 'triggering' determination identified with the normativist approach remains with the 'communitarian' approach. In order for the obligation to become truly operational, one must at least rely on an authoritative determination made at the level of the United Nations, be it the Security Council, the General Assembly or the International Court of Justice. These procedural aspects, which pertain to the coordination of States as 'care-takers' of the international community, are most prominent for their absence in the ILC draft articles. Despite the 'blatant', 'manifest' nature of the violations of international law involved in the ILC approach and the fact that the ICJ propounds a theory based on the nature of the obligations breached which may warrant an active role of all States and international organizations as guardians of international legality, it is a fact that egregious violations of peremptory norms have managed to even escape the rhetoric of non-recognition, when put into motion by powerful actors: one can mention both the Kosovo and Iraq examples, where the Security Council and parts of the international community have endeavored to *recognise, rather than non-recognise* the *status quo* produced by blatant violations of Article 2, para 4, of the UN Charter.³² In other cases, the ambiguities of authoritative determinations, such as those concerning East Timor and Western Sahara, have provided sufficient room for

³² E Milano, *Unlawful Territorial Situations in International Law* (Brill 2006) 190-265.

manoeuvre for international actors wishing to impliedly recognise the legal authority of wrongdoers over those territories.³³

Moreover, if we were to identify the precise legal basis of the ILC approach, one is left halfway between a customary rule, with an inconsistent practice not satisfying the requirements of generality and uniformity if we except territorial acquisitions by force and *apartheid* regimes, and a selective application of the general principle of *ex iniuria ius non oritur*. Given that the net result is almost overlapping with the 'normativist' explanation in that not much is left in terms of practice invoked in the commentary beyond instances of practice concerning acts of aggression or forcible denial of self-determination through *apartheid*, one is left wondering whether the difference between the two approaches is limited to the emphasis of the ILC and ICJ approach to the communitarian nature of the reaction, rather than on the subjective rights of the injured subject; and whether the ILC distinction between primary and secondary norms is in this specific respect analytically helpful.

Be that as it may, in the case of Crimea, the link between non-recognition and the violation of *erga omnes* obligations is impliedly recognised in the preamble of General Assembly resolution 68/262, where specific mention is made of Article 2 of the UN Charter and of the duty of States to refrain from the threat or use of force against the territorial integrity and political independence of other States; despite the absence of any determination concerning Russia's responsibility for military action or its act of annexation. Or in the statement of 12 March of the G-7 leaders, in which it is declared that '[i]n addition to its impact on the unity, sovereignty and territorial integrity of Ukraine, *the annexation of Crimea could have grave implications for the legal order that protects the unity and sovereignty of all states*. Should the Russian Federation take such a step, *we will take further action, individually and collectively*'.³⁴

³³ *East Timor* (n 16) 104; Council Decision of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco OJ L 349 1.

³⁴ Statement of G-7 Leaders on Ukraine (n 4), emphasis added.



c) *Non-recognition as a sanction*

A third stream has conceived non-recognition as a sanction. In a legal system, such as the international one, lacking procedural mechanisms of authoritative, impartial and legally binding determinations, one is left with the different reactions of States and international organizations to wrongful acts. Hence, non-recognition should be construed as a social sanction aiming at the isolation of the wrongdoer, that international actors undertake in order to induce a cessation of the illegal conduct. In other words, in a decentralized legal system such as international law one can hardly envisage a form of 'objectively' illegal or invalid situation. The illegality is determined and enforced by each and every State, individually or collectively through international organizations, which may decide to sanction such illegality *inter alia* by deciding not to recognise any legal effects deriving from that situation.

Under one version of the latter theory non-recognition as such is not mandatory under any rule of international law; it is simply the result of the free choice of the State or a group of States. Of course, a policy of non-recognition may be adopted by the Security Council and, if sanctioned through recourse to its Ch. VII powers, the policy may become binding upon States. As a matter of fact, Article 41 of the UN Charter itself, that is the provision that together with Article 25 may provide the legal basis for the adoption of such kind of measures, exemplifies the measures not involving the use of force that the Security Council may decide with specific reference to a wrongdoing State, by referring to the severance of diplomatic and economic relations: non-recognition is one of the tools in order to achieve the international isolation of wrongdoing State. The present approach was held by the Australian government in the *East Timor* proceedings before the ICJ: 'Australia denies that States are under an automatic obligation under general international law not to recognise or deal with a State which controls and administers a territory whose people are entitled to self-determination. There is no automatic obligation of non-recognition or non-dealing, even though that State may be denying the people the right to self-determination.'³⁵ Some

³⁵ CR 95/14, 16 February 1995 at 36, para 5 (James Crawford), <www.icj-cij.org/docket/files/84/5327.pdf>, accessed 29 April 2014. See also A Pert 'The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties'



years earlier, the Australian government had declared the following with regard to Indonesia's annexation of East Timor: 'This is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize de facto that East Timor is part of Indonesia.'³⁶ Australia's views were upheld by the ICJ in its decision on jurisdiction, where it was impliedly held that an obligation of non-recognition could not be deduced by Security Council resolutions in the absence of a clear language to that effect (and hence impliedly affirming that such obligations could not derive from general international law).³⁷

Other authors, on the other hand, while construing non-recognition of grave violations of peremptory norms as mandatory under general international law as a result of the operation of the principle of *ex iniuria ius non oritur* maintain that non-recognition is not a consequence of the objective illegality and invalidity of the situation, but the means by which such illegality and invalidity is sanctioned and enforced.³⁸

The present approach(es) to non-recognition may be labelled as 'realist', in the sense that it is apparently faithful to the realities of international law. An obligation of non-recognition may accrue for third parties only as a result of obligations clearly imposed by primary rules: hence an obligation of non-recognition may accrue upon a third party as a result of a binding Security Council resolution; or, with regard to a secessionist entity, by a primary obligation not to proceed to premature recognition in the absence of an established and effective governmental organization, which has deprived the central government of control and authority over a certain part of its territory. Reactive measures are better

[2014] Chinese (Taiwan) YB Intl L and Affairs (forthcoming), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368618>, accessed 29 April 2014. Australia's position on non-recognition, together with the practice originating from other States concerning unrecognised entities, is described in ILA Committee Recognition/Non-Recognition Second (Interim) Report (2014), <www.ila-hq.org/en/committees/index.cfm/cid/1032>, accessed 2 May 2014.

³⁶ Quoted in O Dörr, *Kompendium völkerrechtlichen Rechtsbesprechungen* (Mohr Siebeck 2004) 593.

³⁷ *East Timor* (n 16) 104.

³⁸ E.g. A Tancredi, 'A Normative "Due Process" in the Creation of States through Secession', in M Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 199-207.



described as 'sanctions', which may take the form of third-party countermeasures in cases of grave breaches of fundamental principles of international law (a controversial possibility under the ILC law of State responsibility).³⁹ Yet the theory does not account for the fact that in most of the cases in which an unlawful situation has received none or scanty recognition, that has been often the result of determinations made by the Security Council and of hortatory measures, which did not fall under umbrella of Ch. VII.⁴⁰

If we apply the 'realist' theory to the Crimean situation, we see that non-recognition of Crimea's annexation remains a discretionary sanction; no obligation is imposed by General Assembly resolution 68/262; even the Security Council draft resolution vetoed by Russia on 15 March would not have made non-recognition clearly mandatory in that it was adopted in the effort to facilitate a peaceful solution of the dispute and it was clearly an act adopted under Ch. VI of the Charter.

4. *Scope of non-recognition: possible measures to be adopted with regard to Crimea*

A comprehensive approach to non-recognition is not limited to the formal recognition of the legality of the situation as such, such as an act of annexation, but it also extends to all relations, of an economic, political, diplomatic, commercial nature which imply recognition of the illegal situation. In broad terms, and with regard to the application of the doctrine of non-recognition to the situation in Crimea, States and international organizations shall refrain from any formal act of recognition of Russia's legal authority over Crimea and from any act which implies recognition of such authority. That is confirmed by para 6 of GA Res 68/262, which calls upon States, international organizations and specialized agencies 'to refrain from any action or dealing that might be interpreted as recognizing any [...] altered status [of Crimea].'

Yet implied recognition is the ambit of the doctrine(s) of non-recognition where most uncertainty remains and where the gap between normative principles and the actual practice of States remains wide. The

³⁹ ILC Articles on State Responsibility with Commentary (n 25) 349.

⁴⁰ Dawidowicz (n 18) 693.

recent practice of the EU entering into fisheries agreements with Morocco extending to the waters off the coast of Western Sahara shows exactly that.⁴¹ As examples concerning the situation in Crimea, one may mention non-recognition measures and stances which would implement a policy of non-recognition, which also avoids implied forms of recognition. Namely: a) ensure that Russian-badged exports from Crimea (or circumvented elsewhere) do not benefit from preferential Ukrainian trade tariffs and are prevented from entering national markets, including the EU market; b) adopt legislation preventing exports into Crimea if Russia was to impose Eurasian Customs Union regulatory requirements; c) ensure that visa application processes continue to respect Ukrainian sovereignty, by simply continuing to follow pre-annexation rules; d) refuse recognition of Russian passports issued in Crimea after the date of annexation; e) refuse recognition under international law of Russia's claims to the territorial waters and exclusive economic zone off the coast of Crimea; f) refuse to negotiate new agreements and apply existing ones with Russia including Crimea in their territorial scope of application. If we adopt the stance that non-recognition stems from a secondary obligation or from the application in international law of the principle *ex iniuria ius non oritur* and it extends to implied forms of recognition, all these measures seem mandatory under international law. At any rate, limited exceptions would apply, especially with a view to ensuring respect for the human rights of the local population; they may normally extend to the recognition of acts of the local authorities, such as the registration of births and marriages, and to local judicial remedies for the purpose of protecting the rights of individuals.⁴²

Yet a coherent and comprehensive policy of non-recognition may require further positive action by States. For instance, States should take appropriate measures to ensure that Crimean goods cannot access their market through Russia, by requiring that Russian authorities provide negative certification guaranteeing that goods are not partly or wholly sourced from Crimea. In the case of Russia's failure to provide such certification, States may decide to apply targeted restrictions on certain categories of goods that have a high risk of originating from

⁴¹ Council Decision of 16 December 2013 (n 33).

⁴² *Case of Cyprus v. Turkey* (Merits), European Court of Human Rights, Series A, No 4, 5 (10 May 2001).



Crimea. Moreover, States may adopt guidelines for national companies on the legal implications of operating and/or investing in Crimea - including the legality of transactions with businesses that own or make use of assets expropriated by the Russian authorities or Crimean authorities. They may also actively discourage their own nationals from visiting Crimea, through travel advice notices recommending against all/but essential travel and warning of the lack of consular assistance in Crimea. All these examples, on the other hand, imply positive actions by the States, which are discretionary in nature even under the 'legal' theories of non-recognition. As a matter of fact, positive actions may result in proper sanctions: one can think of the possibility for States and international organizations of imposing asset freezes, travel and export bans on those Russian or Crimean individuals that have benefitted from the illegal expropriation of Ukrainian owned assets, including infrastructure, in Crimea.

5. Conclusion: answering the question

Russia's annexation of Crimea has met the firm protest of significant parts of the international community and it has led the General Assembly to call upon States and international organizations not to recognise any change in the status of Crimea. The call has been matched by the decisions of certain sectors of international community to impose sanctions against certain entities and individuals which have promoted and benefitted from the separation of Crimea from Ukraine.⁴³ The non-recognition practice just mentioned has surely reinforced non-recognition as a reactive measure to grave violations of fundamental legal principles regulating the relations among States. Yet one fundamental question remains unanswered: which of the three doctrines of non-recognition is better reflected in the current practice concerning Crimea?

⁴³ Travel restrictions and the freeze of assets have been decided by the US administration and by the EU against public officials, representatives and entities in Crimea and Russia. For the latest sanctions imposed by the EU see Council Implementing Regulation (EU) No 433/2014 of 28 April 2014 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine OJ L 126 48.



The question does not prompt an easy, straight answer. The recurrent invocation of Ukraine's sovereignty and territorial integrity and of the inacceptability of territorial annexations, sometimes in connection with the affirmation of a non-recognition policy, may indicate a reinforcement of the 'normativist' paradigm, especially if we emphasise non-recognition as a primary obligation related to the prohibition of aggression and annexation. The invocation of the legal principle of territorial integrity and of the need to respect the principles of international law embodied in the UN Charter has been general and widespread, even among those countries that due to political reservations have decided to abstain in the vote before the General Assembly. On the other hand, the communitarian paradigm is most prominent in the determinations made by international organizations and States: as a further example, one may recall the US statement to the effect that '[i]n this century, we are long past the days when the international community will stand quietly by while one country forcibly seizes the territory of another. We call on all members of the international community to continue to condemn such actions, to take concrete steps to impose costs, and to stand together in support of the Ukrainian people and Ukraine's territorial integrity and sovereignty.'⁴⁴ Finally, non-recognition can be seen as the '*de minimis*' measure, in a broad array of tools, parts of the international community have adopted against Russia and Crimea's authorities, in order to bring to an end the illegal situation through the imposition of political and economic 'costs' to Russia's adventurism. To that extent, the sanctions paradigm is also present in the practice we have analysed, especially if we look at the practice of Western countries, which have been most vocal in invoking a policy of non-recognition. Ultimately, the affirmation of a policy and a duty of non-recognition which reveals all three dimensions underlying the three doctrines of non-recognition is a sign that international law, at least at the very beginning of a situation produced by a grave violation of its fundamental norms, endeavours to exercise the three functions, which, in turn, underlie the three doctrines: the protection of subjective rights of the injured party; the affirmation of a community interest in the protection of fundamental norms; and the need to enforce the legal norms which are being breached. In sum, in a functional perspective, the relation among the three ap-

⁴⁴ White House (n 6).



proaches may be better described as one of complementarity, rather than mutual exclusion.

That leads to a further question (which will remain unanswered, at least for the time being): will the achievement of these three objectives be undermined by the passing of time, by the *normative Kraft des Faktischen* in the long run, by the gradual, creeping acceptance and acquiescence to the *status quo* of Russia's annexation? That remains the main and enduring challenge to the doctrine(s) of non-recognition and one that none of the theories presented can easily dispose of.

