

HOW DOES THE RIGHT TO SELF-DETERMINATION AFFECT THE LEGALITY OF SECESSION: CASE STUDY ON THE 2014 CRIMEA REFERENDUM?

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ABSTRACT

One of the reasons international law so developed was because of the interactions between different states and the disputes that arose through these interactions of various states. As such, the definition of statehood is a topic which resides at the core of international law. Through historical events, how statehood is understood has evolved, bringing with it the idea of self-determination. This is apparent through the various secessionist movements and attempts around the world such as the Kurdistan Independence Movement in Iraq, the Catalonia Independence Movement in Spain, the Scotland Referendum and the Crimea Referendum among many others. Further, situations such as the Palestine-Israel Issue and the formation of Kosovo have prompted the discussion of how identity of the people of a particular territory might play a role in defining what a state is. Hence it has become important to understand how the right to self-determination affects secession. The aim of this paper is to understand how the right to self-determination affects the legality of secession. This paper answers this question through the case study on Crimea's 2014 Referendum. Though these questions have been discussed by the UN and the International Court of Justice through the Advisory Opinion on Kosovo's Declaration of independence¹, it is important to understand whether such a standard will be applicable in answering all questions of self-determination and the legality of secession. This paper will discuss about what self-determination and secession is, including the Crimean Referendum and will attempt to understand whether the standard laid down in the Advisory Opinion on Kosovo applies to the Crimean Referendum.

Keywords: Right to Self-Determination, Secession, legality of secession, Crimean Referendum, Kosovo Advisory Opinion

INTRODUCTION

The primary subject in international law revolves around different states and their interactions, but what exactly constitutes a state and how would statehood be determined? Article I of The Montevideo Convention on Rights and Duties of States, 1933ⁱⁱ gives four qualifications of statehood: 1. Government 2. Territory 3. Population 4. Capacity to enter into relations with other states. Following the setting of these qualifications and analysing this with the historical events of decolonization, the concept of self-determination and questions on recognition of the now decolonized “countries” came into question. New states developed and areas of already established states felt the need to secede.

The aim of this paper is to explain what the right to self-determination is and its effect on the legality of secession with special reference to the 2014 Crimean Referendum. The paper will be divided into four parts. In Part I, I will explain what is self-determination and secession is. This part will also include its significance in Crimea, the referendum held and on what basis Crimea pushed for secession. Part II will deal with the ‘Constitutionality Crisis’ – the legitimacy of the Ukrainian Constitution, the legality of the referendum as well as the constitutionality of Crimea being part of Ukraine. Part III would involve a case comment on the Kosovo Advisory Opinion as an example of self-determination and how the question of secession was answered. The paper will conclude by establishing whether the standard laid down in the Kosovo Advisory Opinion would apply to Crimea.

PART I

Modifying the traditional standards for statehood, the principle of self-determination emerged as an additional criterion for recognition of states, which may be done in two ways- constitutive (a state comes into existence when it is recognized by other states) or declaratory (fulfillment of the criteria laid down to constitute statehood).ⁱⁱⁱ The concept of self-determination has been expressly mentioned in the UN Charter under Article 1(2)^{iv}. Understanding this, it is clear that self-determination forms a basis of recognition. The interpretation of this was held to be that through self-determination, peoples could freely determine their own political status and freely follow their own economic, social and cultural development.^v To constitute this, firstly, there must be some sense of distinctness from the rest of the majority of the population, secondly it must also make up the majority of the population within that specific area in which they are

located.^{vi} Self-determination may be of two types- external or internal. External self-determination would mean that sovereignty is achieved through free association or integration with another state or being independent. Whereas internal self-determination would involve the pursuit of its own social, economic and cultural goals but within the existing state.^{vii} Whatever type of self-determination it may be, the question on territory will play a role. Perhaps the solution that is likely to be adopted is to push for secession – the separation of a territory and population of the state into a new one. However, it must be kept in mind that self-determination will not always lead to secession and neither should it be thought of as the outcome which will inevitably happen. Where typically a unilateral declaration of independence is not recognized (secession is relevant especially when the parent state is opposed), remedial secession may be granted on the basis of serious injustices suffered by the people.

It was in 2014 that the people of Crimea voted for a referendum that would decide their fate to join Russia or stay a part of Ukraine. But, in order to fully understand why the people of Crimea wanted to secede in the first place, we need to understand the events that led up to it. Crimea was a part of the Soviet Union and when it disintegrated it became a part of Ukraine even though there were political tensions with Russia (the biggest republic of the former USSR) on whether it belonged to Ukraine or not. It was formally deemed as an autonomous republic according to the 1996 Ukraine Constitution.^{viii} Further, Russia and Ukraine signed a treaty on cooperation which helped bring peace to the turbulent relationships between the two countries. In February 2013, a draft bill proposing Ukrainian language to be the sole state language was approved. This would not have had any implication but the population in Crimea consisted of approximately 58% ethnically Russians, 24% Ukrainians and 12% Crimean Tatars, according to the 2001 Census^{ix} - leading to an instillation of fear of oppression among the ethnic Russians. Further, discussions were underway on Ukraine joining the European Union, however the then president of Ukraine, Victor Yanukovich backed out and instead signed a loan deal with Russia. Following this there was a wave of protests (termed as the ‘Euromaidan Movement’) and an interim government was elected and consequently the EU deal was signed.

Since people in Crimea were largely ethnically Russians, they supported pro-Russian policies and this change coupled along with the probable banning of Russian as a state language along with the historical inclination of the people towards Russia was what drove Crimea to have a secessionist claim. It was the presence of Russian forces in the Crimean region that served as

a stop in validating the secessionist claim. For this purpose, a referendum was voted on 16th March, 2014, but it was deemed as invalid in international law. A referendum means a vote by an electorate on a political question whereas a plebiscite is a sub-category of a referendum, one which particularly deals with a direct vote on the international legal status but it has a negative connotation of being undemocratic.^x

According to the translated versions of the referendum as per the New York Times,^{xi} there were two options given: to either be in favour of reuniting Crimea and Russia or adopting the 1992 Constitution and its stance on Crimea's position in Ukraine. In both the options, the outcome would be independence of Crimea. However, this referendum was not recognized internationally.

The main basis of this not being recognized was whether Crimea was actually given the right to vote for secession or not, for this focus needs to be put on the interpretation of 'Peoples' as defined in self-determination. To constitute 'peoples', the following thresholds may be looked at: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life.^{xii} While the inhabitants of Crimea did have a territory and separate political unit but it was still too diverse to be deemed as a separate state in itself. A strong territorial claim is not enough to claim secession on the basis of self-determination. On top of that, remedial secession also does not apply since there has been no gross human rights violations and there are high standards as established by the Advisory Opinion on Kosovo (which will be explained in Part III).

Internationally, the referendum was deemed invalid. This is evident in the resolution passed by the UN General Assembly^{xiii} which pushed for the non-recognition of the autonomous status that Crimea claimed after its referendum. The resolution pushed for the non-recognition of the changes in Crimea and of the referendum held. Here, 100 countries gave their approval, 58 abstained and 11 voted against. Similarly, the resolution held by the UN Security Council to reaffirm Ukraine's sovereignty where 15 members voted in the favour, China abstained and Russia vetoed. This had the effect of the resolution not being passed since Russia being a permanent member had veto power.^{xiv} This still goes on to show that majority of the states did not recognize Crimea's independence.

PART II

Not only was the referendum held deemed to be invalid in the international sphere, there were many arguments that held that the referendum went against the Constitution of Ukraine as well. To establish internal self-determination, the constitutional validity of such an action needs to be analyzed. As mentioned in the analysis by the Venice Commission,^{xv} even though Ukraine's constitution recognizes the right to hold a referendum, it does not allow referendums to be held for secession but only as expression of the will of people. Article 2 of the Ukrainian Constitution emphasizes on "indivisibility" and "inviolability" of its borders. Crimea has been given special autonomous status as specified under Chapter X where Article 138(2) provides that local referendums may be conducted but reading it with Article 73, a proviso is placed on the conduction on referendums with regards to those in relation to questions on changes in territory, that an all-Ukrainian referendum is needed, a local referendum will not suffice. Going by this, the referendum was held solely in Crimea and not throughout Ukraine. Such a referendum would only be possible if there was an amendment with regards to the same, but Article 157 of the Ukrainian Constitution prohibits any amendment if it would lead to the violation of the territorial integrity. Hence the parent state was clearly opposed to the secession. This brings us to whether Crimea could have claimed secession through a unilateral declaration of independence. Further, when the referendum took place, there was a presence of pro-Russian soldiers who had taken de facto control of Crimea already, so there was no freedom from restraint of military forces nor the neutrality of public authorities.^{xvi}

Another glaring problem in the conduction of the referendum was the wording of the referendum itself. People had two alternatives from which they could pick- "1. Are you in favor of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation?" or "2. Are you in favor of restoring the Constitution of the Republic of Crimea of 1992 and of Crimea's status as part of Ukraine?".^{xvii} Where the legitimacy of the Ukrainian Constitution is concerned, it is deemed to be valid since Ukraine is recognized by all the countries in the world and is a member of the United Nations.

However, for the secession to hold from the lens of international law, the significance of the prohibition of the referendum becomes a bit irrelevant. Further, since the justification of the referendum was not as per the Constitution, the defense of the principle laid down in the

Kosovo Advisory Opinion^{xviii} was brought in to hold that both the cases were similar and that since remedial secession was granted in Kosovo, the same should be granted for Crimea.

PART III

In the advisory opinion of Kosovo, the International Court of Justice had ruled that a unilateral declaration of independence may be allowed since international law as such does not have any law which forbids a unilateral declaration of independence.^{xix} The conditions in Kosovo play a very significant role in the conclusion that Kosovo's unilateral declaration of independence was not prohibited under international law. Though the court did not comment on whether Kosovo would now constitute a state, it laid down various principles and standards that would guide in the interpretation of the validity of a declaration of independence.

Kosovo declared its independence on 17th February, 2008, after which Serbia claimed that such an action is a unilateral secession which did not have any legal consequence. Serbia further sought international support. The question that was brought forward in the International Court of Justice was "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with International Law?"^{xx} The court held that to determine the same, both the general international law and the *lex specialis* (UN Security Council Resolution 1244^{xxi}) needed to be looked at. The reason why the UN Security Council Resolution 1244 was taken up in the first place was to control the situation in Kosovo. The Albanians had been subject to an oppressive rule by the Serbians and when the resistance movement to the same turned violent, the Serbian Government retaliated with military action resulting in gross human rights violations. This was followed by four of the republics in from the Republic of Yugoslavia breaking away by declaring independence.^{xxii} After this unrest, the UN stepped in, passed a series of resolutions and in 1999, adopted Resolution 1244.

The resolution set up the UNMIK (United Nations Interim Administration in Kosovo), with its objective being to begin the process on the setting up of the self-government in Kosovo, solve the administrative issues and differences between both the Serbian and Kosovar Governments and to protect human rights. A year after the Ahtisaari Plan for discussing the finality of Kosovo's political status was rejected, Kosovo unilaterally declared its independence.

As already mentioned above, since general international law in itself does not put a bar on declarations of independence, the Court in the Advisory Opinion relied on the *lex specialis*. The court analyzed the effect of Resolution 1244 on the declaration of independence. The court maintained that the question put to it did not warrant discussion on remedial secession and that such a declaration will actually lead to creation of a new state. The major reason why the declaration was accepted was since the nature of the UN Resolutions had already set up a mechanism that pointed towards the direction of setting up an autonomous Kosovar State (meaning that Serbia's authority would temporarily stop) on top of the fact that the declaration had been made by a non-state entity (Provisional Institutions of Self-Government).^{xxiii} However, the decision was limited in the sense that it did not elaborate on the right of remedial secession. To this effect, separate opinions of the judges hearing the case were attached in which remedial secession was discussed. According to Judge Trinidad, the acts of violence and human rights violations of such a degree as in Kosovo cannot be defended by citing "territorial integrity".^{xxiv} Judge Yusuf went on to elaborate that the right of self-determination may be applied to other cases apart from the colonized ones, if such would fit into the norms laid down by international law specifically by taking the historical context into consideration.^{xxv}

What set apart Kosovo from Crimea was that firstly, the Kosovar Albanians in the region had been historically subject to inhuman cruelties specifically the genocide mass murder of 1998-1999? Comparing to the situation in Crimea, this was one aspect which was missing- there had not been any gross human rights violations. The incident that led to such dissatisfaction in Crimea was just the change in the official language and pro-EU bids. Further, the referendum held in Crimea was in the presence of Russian military whereas in Kosovo, 1991, a referendum was initiated by the Kosovar Albanian leaders. Another observation is that immediately after the referendum and Crimea's "independence", it acceded to Russia, which makes it claims very dubious. What makes a declaration of independence invalid is the fact that when it was made, there had been a violation of the international law and there had been a presence of unlawful use of force.^{xxvi} The presence of Russian troops without any justification while the referendum was to be conducted shows that unlawful use of force had been present and that the referendum conducted was not entirely neutral.

CONCLUSION

It must be noted that, the validity and recognition of Crimea's independence was defended on the same basis as in the Kosovo Advisory Opinion - its validity in the international sphere on the basis of the right to self-determination. Hence it can be said that both the situations in Crimea and Kosovo may be compared - however, the facts of both are so inherently different that it stops the comparison and instead sets apart both the cases. Further, the decision laid down in the Advisory Opinion in Kosovo, though discussed at length how the unilateral declaration of independence which led to Kosovo's secession was valid, differs significantly from the question that was being used for the validation of Crimea's secession. Kosovo was not able to set up a precedent in answering questions on remedial secession but instead, it acts like an exception. Hence, the standard that was laid down in Kosovo would not apply to Crimea and its secession will be considered as invalid in international law.

ENDNOTES

ⁱInternational Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010.

ⁱⁱArticle I of The Montevideo Convention on Rights and Duties of States, 1933, signed on December 26th, 1933

ⁱⁱⁱMalcolm N. Shaw, *International Law*, Cambridge University Press, 2008.

^{iv}Article 1(2) of the United Nations Charter - To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

^vUnited Nations General Assembly Resolution 2200/XXI, *International Covenants on Human Rights*, A/RES/2200A(XXI) available from <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf)> .

^{vi}Michael Jewkes, *Self-Determination Without Secession*, 28 PUBLIC AFFAIRS QUARTERLY 147 (2014) <<http://www.jstor.org/stable/43575592>>.

^{vii}Ved P. Nanda, *Self-Determination and Succession under International Law* 29 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 305 <<https://heinonline.org/HOL/P?h=hein.journals/denilp29&i=315>>.

^{viii}Chapter IX and X of the Ukraine Constitution

^{ix}'State Statistics Committee of Ukraine, All-Ukrainian Population Census 2001', <<http://2001.ukrcensus.gov.ua/eng/results/general/nationality/>>.

^xThe Referendum Experience in Europe, Pier Vincenzo Uleri, Michael Gallagher eds., 1st edition, Macmillan Press Ltd 1996

^{xi}2 Choices in Crimea Referendum but neither is 'No' <<https://www.nytimes.com/2014/03/15/world/europe/cremea-vote-does-not-offer-choice-of-status-quo.html>>.

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

^{xiii}UN General Assembly Resolution A/RES/68/262 of 27.3.2014, *Territorial Integrity of Ukraine*, A/RES/68/262 <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262>.

^{xiv}UN News, UN Security Council action on Crimea referendum blocked <<https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>>.

^{xv}European Commission For Democracy through Law (Venice Commission) Opinion no. 762 / 2014 <<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29002-e>>.

^{xvi}Christian Marxsen, *The Crimea Crisis – An International Law Perspective* 74/2 Heidelberg Journal of International Law 367 (2014) <<https://ssrn.com/abstract=2520530>>.

^{xvii}*Id.* at 15.

^{xviii}*Supra* note 1.

^{xix}*Supra* note 1

^{xx}*Id.*

^{xxi}UN Security Council Resolution 1244 (1999) (Kosovo), UN Doc. S/Res/1244 (1999), 10 June 1999 <<https://www.un.org/Docs/scres/1999/sc99.htm>>.

^{xxii}S.F. Van Den Driest, *Remedial Secession: A right to external self-determination as a remedy to serious injustices*. Antwerpen: Intersentia, 2013. Print. <https://pure.uvt.nl/ws/portalfiles/portal/5737690/Driest_Remedial_10_04_2013_emb_tot_10_04_2015.pdf>.

^{xxiii}International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Paragraph 81

^{xxiv}International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge AA Cancado Trindade, Paragraph 176.

^{xxv}International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge Yusuf, Paragraph 5.

^{xxvi}*Id.*