

UNILATERAL DECLARATION OF INDEPENDENCE BY STATES AND THEIR RECOGNITION UNDER INTERNATIONAL LAW- COMPARING KOSOVO AND CRIMEA

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ABSTRACT

There is no doubt that the right to self- determination consists of one of the most controversial rights in international law. In the company, of equally controversial concepts like sovereignty and territorial integrity, it has emerged as a precursor to some of the most acute claims of secession in the world today, including the independence claims of Catalonia, Kurdistan etc. As recent events have shown - for example the Unilateral Declaration of Independence by Kosovo –there is very little that international law can do if a portion of a territory decides to segregate itself from the rest. It is still doubtful whether Kosovo’s act could be called legal under international law. The ICJ judgment in the case of Kosovo, for example, does not adequately clarify the legitimacy of the Declaration. It is in this context one needs to redefine the understanding of Right to Self Determination in International Law. Generally, it accommodates the claims of the people to secede from the host country only in colonial context. But there are claims of independence by people beyond the colonial context. The response of the international community has been varied in different situations with respect to the recognition of the seceding entities as states. This paper is an attempt to analyze the legality of unilateral declaration of independence of Kosovo and compare it that of Crimea.

Keywords: Self-Determination, Sovereignty, Secession, Unilateral Declaration of Independence, Recognition.

I. INTRODUCTION

The right to self -determination is a collective right of the people to freely determine their political status and to freely pursue their economic and cultural development. This is a group right given to the communities and groups of people which enable them to prosper and preserve their culture. It also ensures that these people are able to participate in the economic, political and social processes so that the distinct character of their community is reflected in the institutions and the government under which it lives. This right protects the people from being subjugated to foreign and alien domination and exploitation. This right is recognized as a human right and now finds its place in the common Article 1 of the two human right covenants.¹

It can be stated that the historical development of self-determination began with the Peace of Westphalia in 1648.² The political revolutions taking place in Western Europe reflected the ideas of representative government. At the same time in Central Europe there were growing movements for independence based on the ideologies of nationalism. As a principle of International Law, self- determination started gaining significance after the First World War. It was President Woodrow Wilson and Lenin who first advocated that self-determination should be the basis of international relation.³ Post World War- I the idea of self-determination can be associated with the

¹ See Article 1 of The International Covenant on Civil and Political Rights, 1966 and Article 1 of The international Covenant on Socio Economic and Cultural Rights, 1966. “*All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social and cultural development.*”

²Martti Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 *International and Comparative Law Quarterly* 251

³Nora Y.S Ali, ‘For Better or worse? Force Marriage of Sovereignty and Self- Determination’ (2014) 47 *Cornell International Law Journal* 426

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development of mandate system⁴ which was devised under the League of Nations as a humanitarian method of administering the former colonies of the defeated powers - in practice though it was more a state centred principle rather than the rights of the individuals.

II. INTERNATIONAL LEGAL FRAMEWORK AND SELF-DETERMINATION

The Right of Self- Determination is one of the most controversial human rights that have been granted to the people. As a human right, it connotes the right of every person to choose the sovereign, under which they live, right to be free from alien or foreign domination and right not to be handed over from one sovereign to another like a property. Article 1 (1) of the United Nations *International covenant on Civil and Political Rights* (1976) states that “*All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”⁵.

In the Charter of United Nations, self-determination was declared as one of the fundamental principle of the United Nations⁶. Its status as the basic rights of the people was however, only recognized after it was incorporated in the two human rights instruments adopted by the UN namely the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Right*.⁷ The immediate effect of the incorporation was that it created an obligation on the member states to respect the people’s right to self-determination. The recognition however was limited in that it was applicable only in the colonial context.⁸ The states recognized that the people of the oppressed colonies have a right to achieve independence and choose their political status. The General Assembly also adopted a series of resolutions proclaiming the right to self-determination. For example, the resolution adopted by the UN General Assembly in 1960 on the *Declaration on Granting of Independence to Colonial Countries and Peoples*⁹ states that subjection of people to alien dominance is a fundamental violation of human right and is contrary to the purposes and principles of the UN Charter. It also states that all people have the right to self-determination and by virtue of that they can freely determine their political status, pursue their economic, social and cultural development. An important aspect of the 1960 Resolution was that it made the right to self-determination unconditional in that it completely bars inadequacy of economic, political and social preparedness as a ground for delaying independence. The 1960 Resolution was followed by the Resolution on the *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among the States in Accordance with the Charter*, 1970 which aimed at speedy end to colonialism having due regard to the freely expressed will of the peoples concerned.¹⁰ According to this Resolution the states have the duty to refrain from any action depriving the people of the right of self-determination and independence, as well as the positive obligation to enable the people under colonial domination to achieve independence. Unlike the 1960 Resolution, the 1970 Resolution makes it clear that the states shall refrain from any action aimed at total or partial disruption of national unity and territorial integrity of any other state.

III. INTERNAL AND EXTERNAL RIGHT TO SELF –DETERMINATION AND THE PRINCIPLE OF TERRITORIAL INTEGRITY UNDER INTERNATIONAL LAW

The extent and the consequent impact which the exercise of self-determination can have on sovereignty and territorial integrity of a nation state has always been a subject matter of great concern in international law. The principle of territorial integrity, which prohibits nation states from promoting border changes and secessionist movements in other countries. In the context of international law, the concept of territorial integrity finds support in Article 2(4) of the United Nations Charter. Art 2(4) as contained in the charter reads as follows

⁴ Deborah Z. Cass, ‘Re- Thinking Self Determination : a Critical Analysis of Current International law Theories’ (1992) 18 Syracuse J. Int’l. & com 219. Art 22 of the League Covenant.

⁵ Common Article 1 of The International Covenant on Civil and Political Rights, 1966 and Art The international Covenant on Socio Economic and Cultural Rights, 1966

⁶ See Article 1(2) of the Charter of United Nations

⁷ See Article 1 of The International Covenant on Civil and Political Rights, 1966 and Article 1 of The international Covenant on Socio Economic and Cultural Rights, 1966. “*All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social and cultural development.*”

⁸ S.R.Chauhan and N.S.Chauhan (eds.), *International Dimensions of The Human Rights*, Vol. 3, (Global Vision Publishing House 2012) 845

⁹ GA. Res.1514

¹⁰ GA. Res.2625

*“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”*¹¹

The right to self-determination exists in two versions, namely, internal self-determination and external self-determination¹². Internal Self-Determination is a form of political freedom in which the objects of self-determination are sought to be achieved without compromising the territorial integrity of a nation.¹³ This version of the right relies on some kind of institutional autonomy to work out the overall dynamics of political and economic freedom that lies at the heart of self-determination¹⁴. Over the year it has seen the emergence of a number of autonomous institutions in different countries allowing aggrieved subjects limited access to political and economic freedom in their governance.¹⁵ While it may be hard to define what actually constitutes internal self-determination, there is little doubt that it envisages a democratic movement in which efforts are made to preserve the cultural identity of the aggrieved people and to ensure their development in line with the majority of the population. Arguably therefore, as long as the right to self-determination is absorbed within and by the democratic process, it does not pose a threat to territorial integrity of a nation and most nation states have the resources to deal with it.

Self-determination becomes a controversial subject when it is sought to be enforced by what is known as external self-determination. External self-determination means those extreme cases when the group of people seeks to separate from the parent state to self-govern¹⁶. At a practical level external self-determination is often accompanied by a claim to secede from the host country. While this may not always lead to the breaking up of the parent country, the claim to secede is often accompanied by long period of violence and armed conflicts often involving support from external actors.¹⁷

External-self - determination, paired with the right to secede consists one of the most disputed topics in international law. Though international law does not prohibit secession altogether but the scholars of international law have often tried to project an image of secession which could be justified on moral grounds, while also ensuring that efforts are made to make the justifications commensurate with the overall dimension of international law. Thus, when an entity secedes from the parent state by exercising the right to external self-determination a question arises regarding the status of the seceding entity. Does the seceding entity automatically enjoy international personality and can be recognized as a sovereign state without any further procedure? Or there are certain other requirements to be fulfilled before enjoying international legal personality. In absence of any international organ competent to determine the international legal personality of the territorial entity the recognition of the seceding entity by other states leads plays an important role in the attribution of international legal personality¹⁸. Under international law, for a state to

¹¹ Article 2(4) of the Charter of the United Nations

¹² Nora Y.S.Ali (note 3) 431

¹³. The UN General Assembly’s version as discussed before endorses this version. Self-determination understood in this sense does not preclude independence; though independence understood in this sense means limited autonomy over important areas of governance without actually giving the right to secede. A good example in this regard is the State of Jammu and Kashmir in India. Under Art 370 of the Indian Constitution the State of Jammu and Kashmir is granted special autonomy according to which Union legislation is not applicable in the state except those in the field of defense, communication and foreign policy.

¹⁴ Nora Y.S.Ali (note 3) 431

¹⁵ Reference in this regard can be made of Iraqi Kurdistan or the Kurdistan Region of Iraq. Kurdistan basically is an autonomous region recognized by the Constitution of Iraq. Presently there is an ongoing dispute between the Iraqi Government and the Kurdistan Regional Government on various issues. In the midst of the dispute a referendum was held on 25 September 2017 for the Independence of Iraqi Kurdistan. The Referendum has not been recognized by the Iraqi Government till date. One can also take the example of Catalonia which is an autonomous community in Spain. For more discussion of Catalonia refer the title .

¹⁶ Nora Y.S.Ali (Note 3) 432

¹⁷. For most part external-self determination involving support from external actors constitutes a violation of territorial integrity of a nation state and can serve as a basis of Intervention by the UN Security Council. It should be noted that any legitimate intervention has to be carried under the authorization of the UN Security Council, which however, could be hindered by the veto exercised by the permanent members of the SC. A good example of this was the NATO Bombing of Federal Republic of Yugoslavia during the Kosovo war from 1995-1999. NATO countries attempted to get authorization of the Security Council but they were vetoed by Russia and China.

¹⁸ H. Lauterpacht, ‘Recognition of States in International Law’ (1944) 53 Yale Law Journal 385

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exist in the international community and to exercise the rights and privileges guaranteed by international law, it must be recognized by the other states¹⁹.

IV. RECOGNITION AND NON -RECOGNITION AND SECESSION

In international law, for a state to exist in the international community and to exercise the rights and privileges guaranteed by international law, it must be recognized by the other states²⁰. However, the law does not provide the conditions for recognition and states are free to determine the conditions for recognition, hence it is entirely a political act. There are two established theories of recognition, namely, the constitutive theory and declaratory theory. According to the constitutive theory, a state acquires a legal personality to exercise the rights guaranteed by international law only on being recognized by the established states. On the other hand, according to the declaratory, a political entity acquires the legal personality of a state as soon as it fulfills the required conditions of statehood. Or in other words, if a political entity exercises sovereignty over a well defined territory and population then that entity acquires the status of a sovereign state. The declaratory theory, however, avoids the political and constitutional legitimacy of the regimes and also ignores the state building process.²¹

As highlighted earlier, the question that arises in the context of Self-Determination and secession is that when a secessionist entity unilaterally declares independence, does it become a sovereign state under international law? And whether the members of the international community are obligated to recognize it as state? Traditionally, there existed a strong bias against the of the secessionist entities²². The practice of non-recognition of the secessionist entities was based value judgment that respect for sovereignty and territorial integrity was the basis of international law²³. However, in the cases of Kosovo, Abkhazia, and South Ossetia it has been noticed that the recognition granted to states created by secession. As already stated in the previous paragraphs self-determination is a recognized right of the people and it can allow secession in certain circumstances. But at the same time in order to maintain international peace and stability, there must be a normative constraint on the secessionist entities²⁴. Thus, as far as the recognition of the secessionist entities are concerned, collective recognition will be more effective than unilateral secession. Such practice of collective recognition started after the dissolution of Yugoslavia, wherein for the recognition of the successor state by the neighboring European Union states depended on a catalogue of legal criteria including democracy, human rights, rule of law, protection of minorities etc. This practice of collective recognition is far more effective than the traditional declaratory theory of recognition. Here, the recognizing states act as the responsible members of the international community and tries to control the secessionist movements and thereby respecting the territorial integrity of the original states²⁵. To explain it further in the next part the researcher has made a comparative study of the unilateral declaration of independence of Kosovo and the annexation of Crimea.

Case of Kosovo

The Serbian government for years carried out organized aggravation of the Albanian population of Kosovo. This was met for years with passive resistance finally in 1996 violence began to be used occasionally against the Serb police and armed forces which finally amounted to a civil war between the Kosovo Liberation Army (KLA) on one side and the Serb forces consisting of the police and army on the other. The conflict escalated and gathered international attention.²⁶ The Security Council adopted several resolutions characterizing the situation in Kosovo as a threat to international peace and security²⁷. The intensity of the crisis escalated but unfortunately the Council failed

¹⁹ Fred. L. Morrison, 'Recognition in International Law: A Functional Reprisal' (1967) 34 The University of Chicago Law Review 857

²⁰ Recognition under international law is a statement by states and other international legal person as to the status in international law of the another real or alleged international legal person. Malcolm N. Shaw, *International Law* (6th Edition Cambridge University Press 2008) 445

²¹ Stefan Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession' in Christian Walter, Antje Von Ungern – Sternberg , et.al. (eds), *Self- determination and Secession in International Law* (Oxford University Press 2014) 48

²² Stefan Oeter (note 21) 50

²³ *ibid*

²⁴ See Generally, David Raic, *Statehood and the Law of Self-Determination* (Volume 43 Kluwer Law International 2002) 89-305

²⁵ *ibid*

²⁶ Colin Warbick, 'Kosovo : The declaration of Independence' (2008) 57 International Law Quarterly 675

²⁷ *ibid*

to take military action under chapter VII of the U.N. Charter as Russia and China continued to threaten their veto. Finally, NATO undertook intervention on humanitarian ground without the authorization of the Security Council's authorization. In 1999, the Security Council adopted resolution 1244²⁸, which authorized the creation of an international military presence in Kosovo known as the 'Kosovo Force' (KFOR) and an international civil presence (the United Nations Interim Administration Mission in Kosovo, "UNMIK") and laid down a framework for the interim administration of Kosovo²⁹. The main objective of the resolution was to establish an interim regime in order to stabilize the situation in Kosovo and also to facilitate peaceful negotiation between the Serbs and the Kosovans for determining the future political status of Kosovo. However, the negotiations failed and in 2008 the Kosovo Assembly unanimously declared Kosovo to be independent from Serbia.

The validity of the unilateral declaration of independence under international law was highly disputed as it was inconsistent with the principles of sovereignty, territorial integrity and political independence. The General Assembly requested the advisory opinion of the International Court of Justice regarding the legality of the unilateral declaration under International Law³⁰. The ICJ found that there was 'no prohibition on declaration of independence' under international law and under the Security Council Resolution 1244³¹. One major criticism against the decision was that it was setting a bad precedent for similar problems in other places and that the decision would be interpreted as supporting secessionist movements as it did not clarify that under what circumstances secession may be allowed. The court also refused to comment on the status of Kosovo post the declaration, it made some practical observations as well. The President of ICJ Hishashi Owada for, example, observed that international law contains no 'prohibition on declarations of independence', while also accepting that recognition was entirely a political act. True to his observation and despite Serbia's vehement opposition to the declaration of independence by Kosovo, today there is little doubt as to the legal status of Kosovo as an independent political entity, having received diplomatic recognition from as many as 116 countries as an independent state³².

Case of Crimea

Geographically Crimea is located in eastern Europe on the northern coast of the Black Sea. It is in the south of the Ukrainian region of Kersom and west of Russian region of Kuban. The demography of Crimea consists of mostly Russians and also there are large number of Ukrainians, Crimean Tartars, Portic Greeks residing there³³. Crimea was annexed by the Russian Empire in 1783. Thereafter, it became an autonomous republic within Russian Soviet Federative Socialist Republic USSR in 1917. In 1954 it was transferred to the Ukrainian SSR within USSR. The USSR was finally dissolved in 1991, the Minsk Agreement declared the dissolution of the soviet union and establishment of CIS³⁴. The fifth article of the Minsk Agreement stated that the countries involved would respect each others territorial integrity and the inviolability of the existing borders within the commonwealth. So, Ukraine became an independent sovereign state in 1991 and Crimea was turned into an autonomous republic within Ukraine. In 1992, the Crimean parliament passed the Crimean constitution, and there was uprising of a movement towards declaration of Crimea as an independent state. However, immediately after the adoption of the constitution, another amendment in the constitution was adopted where Crimea was declared as a part of Ukraine. There was a constant push and pull existing between Russia and Ukraine with respect to Crimea. In between the Russian government declared the 1954 agreement as void at the same time the central government of Ukraine tried to undermine the autonomy of Crimea. Finally, in 1997, Russia and Ukraine entered into the *Treaty of Friendship, Co-operation and Partnership between Ukraine and Russia*. This bilateral treaty reiterated the principle of territorial integrity and mutual respect of the international borders of the two countries³⁵. At the same time Russia also agreed to supply natural gas to Ukraine in lieu of Ukraine allowing limited presence of the Russian Black Sea Fleet in Crimea in the city of Sebastopol till 2017. After the 2010 elections in Ukraine, Viktor Yamukorych was elected as the President.

²⁸ United Nations Security Council Resolution 1244

²⁹ Ralph Wilde, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' (2011) 105(2) *The American Journal of International Law* 301

³⁰ ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO ADVISORY OPINION OF 22 JULY 2010. Available at: <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

³¹ *ibid*

³² As of now Kosovo has received 116 diplomatic recognitions as an independent state. This includes 106 UN member states, 23 EU Members and 25 NATO Members. While Serbia does not recognise Kosovo as an independent state it has started normalising relations with it by virtue of the Brussels Agreement.

³³ Alan W. Fisher, *The Crimean Tatars* (Hoover Institution Press 1978), 3

³⁴ *ibid*

³⁵ *ibid*

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Viktor was pro- Russian leader and that helped Russia to control the political affairs of Ukraine. Victor continued to be in power till 2014 and in the meantime he entered into an agreement governing the presence of the Russian Black Sea Fleet in the territory of the Ukraine till 2042³⁶. At the same time, the long negotiated agreement between Ukraine and the European Union regarding establishing of free trade zone was also suspended by President Viktor. These events led to a strong opposition of President Viktor. Clashes between the protestors and the riot police became violent, and resulted in deaths of many civilians. For the purpose of safety, President Viktor fled to Russia on 22nd February and on the same day the parliament in an extraordinary session resolved to oust him from the post. With these events the violence in Ukraine escalated as the pro-Russian groups considered the removal of the president as illegitimate. Moreover, in Crimea the Russians feared a forced Ukranization and anti Russian moves by the central govt in Crimea³⁷. Thereafter, president Viktor sought help from the Russian government and on March 1st govt of Russia deployed Russian troops to Ukraine with the aim to bring the situation in Crimea under control. On March 11, the Autonomous Republic of Crimea and the Sebastopol City voted a '*Declaration of Independence of the Autonomous Republic of Crimea and Sebastopol*' and called for a referendum and also expressed the intention of unification with Russian Federation³⁸. The referendum was strongly opposed by the members of EU and USA. The Security Council attempted to adopt a resolution to declare the referendum of Crimea as illegal, however, the attempt failed as Russia voted against and China abstained from voting.³⁹ However, the referendum took place and Crimea and Sebastopol were declared as independent republics. This independent republic of Crimea and Sebastopol signed an agreement to join the Russian federation. From this point onwards, Russian troops marched in openly and started driving the Ukrainians out of the peninsula.

Following these incidents, the Parliamentary Assembly of the Council of Europe passes a resolution wherein the Crimean referendum was not recognized as valid as the use of force by Russian federation was condemned as an act of aggression. This was also condemned by the North Atlantic council and the G-7 nations. The General Assembly also passed a resolution where the referendum and the annexation of Crimea was declared as illegitimate and all the states and international organizations were called upon not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status⁴⁰. In order to understand why was the referendum and the annexation of Crimea not recognized whereas Kosovo has been recognized by many countries let us compare the two cases with the parameters of international law.

Comparing the Independence of Kosovo and Annexation of Crimea

Unlike the case of Kosovo, secession of Crimea and its annexation to the Russian federation did not get recognition from the international community which raises a serious doubt regarding the status of Crimea. As already said, international law does not prohibit secessions, however, for the legitimacy of the secessionist entity it is necessary that the creation of the entity must observe peremptory norms or the international *jus cogens* norms. In order to ascertain that why Kosovo has been recognized by many states and why Crimea has not been recognized, the case of Kosovo and Crimea can be compared on various parameters.

Intervention

In both the cases there has been foreign interventions, in the case of Kosovo there was NATO's intervention in 1999 and in the case Crimea there was Russia's intervention in 2014. Though the legality of NATO's intervention can be debated, but it is important at this point to understand that the unilateral declaration of independence by Kosovo in 2008 was not a direct consequence of the NATO's intervention⁴¹. NATO's intervention was in response to the conflict going on between the Serbs and the Albanians for several years. In 1998 the security council passed resolution 1160 under chapter VII of the charter, which determined the situation in Kosovo as a threat to international peace and security and called for establishment of an arm embargo. The intensity of the crisis escalated but unfortunately the Council failed to take military action under chapter VII as Russia and China continued to threaten their veto because according to them the situation in Kosovo was within the domestic jurisdiction of Federal

³⁶ Christian Marxen, 'The Crimea Crisis- An International Law Perspective' (2014) 74 Zao RV 367

³⁷ *ibid*

³⁸ *ibid*

³⁹ See UN Security Council, Draft Resolution, UN Doc. S/2014/189 of 15.3.2014.

⁴⁰ See UN General Assembly Resolution 68/262 of 27.03.2014

⁴¹ Christian Walter, 'Postscripts- Self-Determination, Secession and Crimean Crisis 2014' in Christian Walter, Antje Von Ungern – Sternberg, et.al. (eds), *Self-determination and Secession in International Law* (Oxford University Press 2014) 299

Republic of Yugoslavia (FRY)⁴². Moreover, the Security Council adopted resolution 1244, which authorized the creation of an international military presence in Kosovo known as the ‘Kosovo Force’ (KFOR) and an international civil presence (the United Nations Interim Administration Mission in Kosovo, “UNMIK”) and laid down a framework for the interim administration of Kosovo. The setting up of the UNMIK itself runs counter to the claim of territorial integrity and sovereignty of Serbia and hence can be said not violating art2(4) of the UN Charter.⁴³ On the other hand, in the case of Crimea the declaration of independence has a direct causal link between the Russian intervention. Russia justified the intervention on two grounds, firstly the intervention was claimed to be on the grounds of self-defense for the purpose of protecting the Russians Nationals in Crimea. Secondly, the intervention was carried out in response to the help sought by president Viktor from the Russian government⁴⁴.

To begin with the first justification put forward by Russia that protecting the nationals abroad is an exception to the prohibition of use of force under art 2(4), the international law does not conclusively establish such an exception to art 2(4).⁴⁵ In the absence of a conclusive treaty law or a principle of customary international law if one enquires on the jurisprudence that has developed with respect to interventions and self-defense, then is absolutely clear that such a right is conditional and not absolute. Humphrey Waldock stated that such an action in order to be legitimate is subject to fulfillment of three conditions, i) when there is an imminent threat of injury to nationals and there is a systematic violation of human rights, ii) when the territorial sovereign is unwilling and unable to protect the rights of the people and iii) that the measures taken by the intervening state is strictly confined to the object of protecting the national against atrocities⁴⁶. As far as the case in Crimea is concerned, there has been no record or reporting of systematic and widespread human rights violation of the Crimean Russians by the Ukrainians. Neither did Russia ever bring the matter of persecution of Russians in Crimea to the international forums. Thus, the situation fails to be qualified as the one where due to gross human right violation intervention can be allowed. Moreover, a number of authors pointed out that Russia started a policy of mass issue of Russian passports to the Russian speaking Crimean population as a preparatory measure for annexation⁴⁷. This policy of passportization undermines the claim of Russia that the intervention was to protect the human rights only.

Secondly, the Russian government claimed that the request to intervene was made by the overthrown president of Ukraine hence the intervention does not violate Art2(4). Here the question arises that whether the request made by the president, who was already a pro-Russian leader, can be presumed as the request made by state of Ukraine? In short the question is when can an act of the president be considered as an act of state? In this context let us analyze the Ukrainian Constitution. Art 85(23) of the Ukrainian constitution says that the authorization from the *Verkhovna Rada* i.e the Presidium of the Supreme Soviet of the Ukrainian Soviet Socialist Republic is needed for request for assistance from a foreign army⁴⁸. Thus, the request made without the authorization cannot be recognized as the consent given by the state and hence forms no exception to the territorial integrity principle. Moreover, the International Law Commission’s (ILC) comments on Art. 20 of the ‘Draft Articles on State Responsibility’ states that a state can be precluded from the state responsibility if the injured state has given ‘consent’⁴⁹. The jurisprudence which has developed regarding the word consent requires that the consent is i) clear and unambiguous ii) really expressed iii) valid under international law. Also in the Nicaragua case, it was held by the ICJ that the prerogative of requesting foreign intervention lies with the legitimate government⁵⁰. In the case of Crimea, the president was already ousted from power thus the consent by the president lacks legitimacy. Thus, we can conclude that the Russian intervention in Crimea was a clear cut violation of territorial integrity and sovereignty of Ukraine.

Legality of the Referendum

⁴² *ibid*

⁴³ Robin Geib, ‘ Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind’ (2015) 91 INT’L L. STUD. 425

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ Darina Gerdzhikova, ‘The Russian Intervention and Use of Force in Crimea – “Did the annexation of Crimea constitute an act of aggression by Russia?’ (Tilburg University 2015)

⁴⁷ Michael Kofman, Katya Migacheva et.al (eds), *Lessons Learnt From Russia’s Operation in Crimea and Eastern Ukraine* (Rand Corporation 2017) 21

⁴⁸ Art 85(23) CONSTITUTION OF UKRAINE. Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on June 28, 1996

⁴⁹ Article 20 of the ILC Draft articles on Responsibility of States for Internationally Wrongful Act states that : Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

⁵⁰ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1984

UNILATERAL DECLARATION OF INDEPENDENCE BY STATES AND THEIR RECOGNITION UNDER INTERNATIONAL LAW- COMPARING KOSOVO AND CRIMEA

Now let us analyze the legitimacy of the referendum held in Crimea immediately after the intervention by Russia. Generally speaking, referendums are the direct expression of the general will of the people. And discussed earlier that the right of self-determination and secession is a right that is given to the people and also the international human rights regime does recognize the rights of people to freely participate in elections⁵¹. There are many example of referendums that took place in the past and resulted in the execution of the right of self-determination of people after the two world wars, during the decolonialization movement, after the end of cold war and also on various other occasions like in the case of East Timor, Montenegro, South Sudan etc. But the international law is silent on the question regarding the execution of the right to self-determination. It does not conclusively establish that referendums are the only way to exercise the right of self-determination. Thus, it can be said that referendums are one of the way to for execution of the right of self-determination. Having said this it is also important to keep in mind that referendums do not legitimize those situations which otherwise violated the principles of international law and at the same time international law must regulate the conduct of referendums and establish certain rules of conduct. In this context in 2005 the Council of Europe's Parliamentary Assembly issued the Recommendation "*Referendums: towards good practices in Europe.*" A year later the Venice Commission adopted a "*Code of Good Practice on Referendums.*" To be a valid referendum there are few conditions to be satisfied which includes: i) Referendums can't be held if it is not allowed by the domestic constitution. ii) a reasonable preparation time, iii) supervision by an international body, iv) setting up of panels to oversee the voting and v) Absence or at least restraint of the Military forces of the opposing parties, vi) Question asked in the referendum must be clear and unambiguous⁵².

To begin with the legality of referendum under the Ukraine's constitution, Article 2 of the constitution states that "Ukraine shall be a unitary state" and the "territory of Ukraine within its present border is indivisible and inviolable"⁵³. Article 134 sets forth that Crimea is an "inseparable constituent part of Ukraine"⁵⁴. Art 13(2) provides Crimea with a certain set of authorities and allows, inter alia, to hold referendums⁵⁵. These rights are, however, limited to local matters. Art 73 of the constitution makes clear that alterations to the territory of Ukraine require an all-Ukrainian referendum⁵⁶. Therefore, the referendum took place was clearly beyond the scope of the domestic constitution of Ukraine and hence violating the international standard adopted for the conduct of referendum⁵⁷. Neither other the requirements regarding reasonable preparation time, supervision by a neutral international body and monitoring of the voting were complied. Additionally, the factual evidences shows that the Russian soldiers had taken control of Crimea and controlled the public infrastructure during the referendum which definitely is not according to the international standard set for conduct of referendum and questions the fairness of the process.⁵⁸ Moreover, the Venice Commission's Code of Good Practice says that the referendum could only have been held on a of the questions which will be unambiguous and which would then have been answerable with yes or no⁵⁹. But in the case of Crimea the people were asked to choose in between the options of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation or restoring the Constitution of the Republic of Crimea of 1992 and of Crimea's status as part of Ukraine. Hence, the people were left with the option of choosing between two courses of action without having the chance to opt for the status quo in which Crimea⁶⁰. Additionally, the second alternative was ambiguous, because there were two versions of the Crimean constitution in force in 1992. One openly stated that Crimea formed a constitutive part of Ukraine, and the other did not and hence the definitive meaning of the second alternative remains unclear.

Annexation by Russia

⁵¹ Jure Vidmar, *Crimea's Referendum and Secession: Why it Resembles Northern Cyprus More than Kosovo*, EJIL: TALK (Mar. 20, 2014), <http://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo>

⁵² Juan Francisco EE, *Self-Determination and Humanitarian Secession in International Law of a Globalized World - Kosovo v. Crimea* (Springer 2017) 119

⁵³ Article 2 of the Constitution of Ukraine

⁵⁴ Article 134 of Ukraine.

⁵⁵ Article 13 (2) of the Constitution of Ukraine

⁵⁶ Article 73 of the Constitution of Ukraine

⁵⁷ Juan Francisco EE(note 52)

⁵⁸ Ibid

⁵⁹ Paragraph 15 of Venice Commission Opinions and Reports Concerning Referendums. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2017\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)001-e)

⁶⁰ Juan Francisco EE(note 52) 123

Immediately after the result of the referendum, where the majority voted in favour of integration with Russia, the Autonomous Republic Crimea and Sebastopol declared their Independence as the Republic of Crimea. Thereafter, there was a treaty between the Russian Federation and the Republic of Crimea on acceptance of the Republic of Crimea into the Russian Federation⁶¹. According to the Art. 65(2) of the Russian Federation the admission and the creation in it of a new subject under the Russian Federation shall be carried out according to the rules established by the federal constitutional law.⁶² The Federal Constitutional Law No. 6 FKZ, lays down the procedure for the admission and the creation in it of a new subject under the Russian Federation. It says that there shall be a bilateral treaty between Russia and the state intending to join the Russian Federation initiated by the later. Thus, there always remains a question on the validity of the agreement between Russia and Crimea because as per the Federal Constitutional law the agreement must be entered between Russia and the relevant 'state'. At the time of the agreement no state other than Russia itself recognized Crimea as an independent state. Thus, a serious question rises about the status and authority of the 'republic of Crimea' to enter into such agreements. Hence the accession agreement is neither valid according to the Federal Constitutional law nor according to the Vienna Convention on the Law of Treaties of 1969. Moreover, this act of the Russian Federation clearly violated the Territorial integrity and sovereignty principle enshrined in the UN Charter and also it amounted to the violation of the Minsk Agreement and also the 'Treaty of Friendship' of 1997 entered between Russia and Ukraine where the states mutually agreed to respect each other's territorial integrity and confirm the inviolability of their common borders. As stated by the Canadian Supreme Court in the Quebec Case⁶³: "*The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination— a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.*" Though the court did not define the term most extreme has not been defined but it can be argued that it refers to systematic and gross human rights violation and the secession in these cases are remedial. So, the above explanation clearly establishes that the threshold required for remedial secession was not met. Crimea already enjoyed the status of an "autonomous republic" within Ukraine and thus there was no denial of internal self-determination. At the same time there is no evidence of widespread and systematic human rights violations in Crimea. Thus, Russian intervention and the secession both amounted to the violation of the basic principles of international law.

V. CONCLUSION

The extent of the right of self-determination and whether it includes right to secede or not is not clear. However, it is also clear that international law does not prohibit the unilateral declaration of independence. This raises a serious risk of unregulated claims of secession and fragmentation of states coupled with armed conflict and disturbance of the international peace and security. While the international legal status of de facto regimes formed by the unilateral declaration of independence are still shrouded in uncertain, scholars have argued that these entities should comply to the minimum standards of international law in order to be recognized by the international community. Thus, in the absence of any international standard to determine the legality of the state formed by unilateral declaration of independence, the recognition or non-recognition of states by the existing members of the international community becomes very important. Most of the contemporary scholars are of the view that recognition is essentially declaratory and merely acknowledges the existence of the other state however the acquisition of legal personality by the new states do not depend on the recognition by other existence states. However, it can be said that though recognition is declaratory but, in the cases, where the states are formed by self-determination groups claiming independence from the parent state the traditional conditions of statehood are not existing for example as seen in the case of Kosovo and Crimea 'constitutive' impact. Mere fulfilment of the elements of statehood are not sufficient to possess the international personality and to be recognised as a sovereign independent state. The manner in which the state is formed and the compliance with the standards in international treaty as well as customary law plays an important role to determine whether or not the secessionist entities can claim the international legal personality.

⁶¹ The treaty between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian federation on Forming New Constituent Entities Within Russian Federation. Signed on 18.03.2014.

⁶² Article 65(2) of the Constitution of Russian Federation

⁶³ Reference re Secession of Quebec, (1998)2 SCR217