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A Look at the Crimean Declaration of Independence through the Lens of International Law

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Abstract

It has been argued that the government officials in Kyiv are attempting to retake Crimea and restore sovereignty over the region. It is appealing since the issue of Crimea remains unsettled. In 2014, the Crimean parliament promulgated the Declaration of Independence and imminently voted for a referendum to accede to the Russian Federation. Similar cases also occurred in Donetsk, Luhansk, Zaporizhzhia, and Kherson in 2022. This article will examine Crimean rights to self-determination to assess whether such acts comply with international law. Furthermore, this article will mainly focus on Crimean's declaration of independence and its referendum to determine the status and impact of such acts. It can be seen that Crimea, as de facto is part of Russia. However, as de jure, the territory might belong to Ukraine. Considering that they have voted for independence, both the Crimean people and Ukraine authorities can further negotiate a new legal status to accommodate their rights..

I. Introduction

Towards the end of 2013, there was a series of internal protests to stop Yanukovych's decision to sign an association agreement with the EU (Marxsen, 2014). During the protests, more than 100 people was killed and many others was injured (Marxsen, 2014). In February 2014, Yanukovych was removed from office and soon after Crimea's parliament officially adopted the Declaration of Independence on 11 March 2014 (Walter, Ungern-Sternberg & Abushov, 2014). Thus, this declaration led to a referendum on joining Russia, which took place just five days later on March 16, 2014 (Walter, Ungern-Sternberg & Abushov, 2014). As a result of the referendum, a second declaration was announced the following day by the Supreme Council of Crimea. Finally, on March

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18, 2014, the Russian Federation and the Republic of Crimea signed the 'Agreement on the Acceptance of Republic of Crimea into the Russian Federation and the Creation of a New Federation Entity within the Russian Federation' (Pronin, 2015). Such a treaty emphasizes the status of the peninsula that, formerly, was an 'autonomous republic' to be 'republic', with the joining of Crimea with other republics of the Russian Federation and the city of Sevastopol was added to the federal subject.

The Crimean and Russian authorities had claimed that Crimea's Unilateral Declaration of Independence doesn't violate international law. Likewise, the Russian Federation claims that the referendum was held in accordance with international norms (Driest, 2015). On 18 March 2014, President Putin even mentioned the "famous president of Kosovo" and referred to the right of self-determination to justify the separation of Crimea from Ukraine (Driest, 2015). However, on 27 March 2014, the United Nations General Assembly (UNGA) introduced the resolution of 68/262, highlighting that the referendum conducted in the autonomous Republic of Crimea and the city of Sevastopol had no validity and could not form the basis for any alteration of the status of the autonomous Republic of Crimea or the city of Sevastopol; and called upon all international entities, including states, not to recognize it (UNGA, 2014).

This paper will further examine Crimea's right to self-determination to justify whether their vote for independence (including the declaration and referendum) was correct in accordance with international law. Furthermore, the Crimean status and the impact of the declaration will be explained as a result of such examination. However, to form the analysis, it is also necessary to show the current situation of the state law examination regulated by the Montevideo Convention.

II. Revisiting Montevideo

In the context of the international system, personality (or legal entity) is paramount. An entity which gains personality can maintain its rights in doing, or not doing, international action and, inter alia, be responsible for its breaches of obligation by being subjected to the claims (ICJ, 1949; Crawford, 2019). States as vital subjects of international law - because of their personality - can have the capacity to make agreements and make claims related to violations of international law (Crawford, 2019).

However, it is also important to note that international legal personality and the legal capacity to perform international legal acts should be distinguished. The first is a prerequisite and the last is the capacity to take action in the field of international law. So that not all international legal persons do enjoy all kinds of capacities. For example, 'natural persons cannot enter into international agreements' (Crawford & Nouwen, 2010). Therefore, it means that 'to be bound by international law, i.e. to be burdened with obligations is something different from being able to perform legal acts' (Crawford & Nouwen, 2010).

Regardless of that, there is a measurement in international law to test such personality. From a traditional perspective, it is widely accepted that the Montevideo Convention is a standard tool for examining statehood in a particular way. An entity will become a state if it has: a) permanent population, b) a defined territory, c) government, d) capacity to enter into relations with other states (Montevideo Convention art. 1, 1933). Nicholson divides it into two coexisting rules: norms of effectiveness (including the effective government of people and territory) and norms of recognition (Nicholson, 2019; Wolfrum, 2011).

Just applying this rule can be a problem in this contemporary era. It seems that Somaliland has achieved effectiveness and can actually pass the test of statehood due to having a steady population (mostly Somali Issaqs); defined territory (based on British colonial boundaries); and governance (on a relative scale, having achieved order and stability) (Hoyle, 2000). However, it is not considered a country. On the other hand, other entities, such as Somalia, Chad, and Sudan, which have not met the effectiveness criteria, are still treated as states according to international law (Crawford & Nouwen, 2010).

Recognition norms on the other hand, play an important – though not necessary – role on the international scene. Both schools of thought have reshaped the notion of confession, although in modern times, many scholars have taken the view that confession is declarative. The declarative theory means that 'a state may exist without being recognized, and if it does, then, whether other states have formally recognized it or not, it has the right to be treated by them as a state' (Clapham, 2012). However, in post-colonial conditions, where no area is considered terra nullius, declarative theory may require other, paradoxical circumstances. One such circumstance is the formation of a consensual state (implicitly containing a direct acknowledgment to exist as a state) (Vidmar, 2012). For example, approval from the parent country Ethiopia, in the case of Eritrea; and Indonesia, in the case of East Timor. It can be seen that declarative theory is, to some extent, similar to constitutive theory.

While declarative theory remains paradoxical, constitutive theory also inevitably faces criticism. There is no clear explanation of how many countries are needed to recognize an entity to obtain its status as a country, nor are there clear - beyond politics - objective qualifications for how a country can be recognized. Bangladesh and Kosovo, in this context, are the best state practice of the constitutive theory since such states were respectively accepted 'by consent' of the parent state and got many recognitions from the third parties (Crawford, 2007; Visoka et al., 2019). Biafra, on the other hand, had also been recognized - albeit few - by African states but the conclusion drawn to Biafra was premature (Ijalaye, 1971; Shaw, 2017). On this account, Biafra was not perceived as a state (Mehta, 2016). Here, the notion of recognition legitimacy can play a part in deciding whether an entity can be counted as a state or not. 'Ineffective but legitimate political communities can be recognized as states (Guinea-Bissau, Croatia, Bosnia and

Herzegovina), while effective but illegitimate political communities cannot be recognized (Southern Rhodesia, Turkish Republic of Northern Cyprus and Transdniestria)' (Tierney, 2015). It seems happened to Crimea where it has achieved effectiveness but failed to get legitimate status. However, it may not be appealing the international lawyers because it requires moral theory to justify such a legitimacy (Buchanan, 1999).

In relation to that, recognition may be the product of political action but will also have legal consequences (in terms of personality: duties and obligations) (Vidmar, 2012). This argument is seemingly supported by Wheatley (on the complexity theory) who writes that 'the emergence of new states must pass two-stage processes: first, we must be able to see the patterns of regulatory communications adopted by the law and politics actors and institutions; second, we need to allocate meaning to those patterns to decide whether an emergent entity can be regarded as a "State"' (Wheatley, 2016). It simply means that the international law system is very complex as it involves the systems of law and politics, that are also complex. That's why we can never easily judge the 'right' answer to the statehood claim since different actors may result to different conclusions.

Overall, the Montevideo Convention may be important but not enough. Based on the explanation above, it seems that the Convention needs to be adaptive to a certain extent in responding to the current situation. In a similar vein, Crawford once noted that 'the Montevideo Convention was drafted at a time when the principle of self-determination was not generally recognized in international law, …' (Crawford, 1990). In this context, the parameter claims to statehood today are not adequate and have to be modified in order to suit society's needs. The additional criteria of statehood might be included, for example, independence, sovereignty and self-determination (Crawford, 2019; Mehta, 2016).

III. The Lens of International Law towards Crimean's Declaration of Independence

a) Self-Determination and Secession

'If independence is the decisive criterion of statehood, then the self-determination is a principle concerned with the right to be a state' (Crawford, 2019). The principle of self-determination must be properly implemented to pass the prerequisites for independence to become a country. To begin with, this principle is embodied in Articles 1(2) and 55 of the UN Charter with reference to the words 'the people' (United Nations Charter art. 1(2) & 55, 1945). While there is no clear definition about the terms of 'people', many scholars provide that may be applied to several groups of persons within the state. International experts coined consensus that the term 'people' is defined as a group of persons, who share identifiable common characteristics, and such characteristics are distinguished from other groups. These are the following characteristics

that can be involved some or all: (i) common historical tradition; (ii) racial or ethnic identity; (iii) cultural homogeneity; (iv) linguistic unity; (v) religious or ideological affinity; (vi) territorial connection; or (vii) common economic life (UNESCO, 1990).

With regard to Crimea, it is debatable whether the term 'people' can be applied to the inhabitants of the peninsula or not. Driest (2015) argues that the population shares common territory and has been discerned (due to its autonomous status) by political unit within Ukraine. The population also multi-ethnic as it is constituted by 58% Russian, 24% Ukrainian and the rest is Tartar minority (Wilson, 2015). It means, the majority of Russians alone cannot be counted as representative of the Crimean people as a whole. This condition is different from Albanians who controlled 90% of the total population of Kosovo when it declared its independence from Serbia (Wilson, 2015). As a result, Driest (2015) concludes that such interpretations are too broad to fit a 'people' threshold and tend to be based on territory rather than 'people' rights.

In addition, the right to self-determination in the post-colonial era is divided into two aspects: 'first, the right to internal self-determination (territorial self-government) for indigenous peoples and the people; secondly, the limited and extraordinary right to external self-determination (i.e. the right to determine the international status of a territory) for peoples excluded from political life, and for the 'constituent peoples' of ethnic federations in the process of dissolution. '(Wheatley, 2005). The right to internal self-determination is, in several ways, very important because it has been established as a conditio sine qua non for the effective implementation and enjoyment of human rights; and has become a crucial factor in assessing the legitimacy and representativeness of a country's government; and it has become a conditio sine qua non for the legitimate exercise of external self-determination (Raič, 2002).

When the right of internal self-determination cannot be achieved, 'people' can exercise their right through external self-determination (by means of dissolution, merger and union) (Raič, 2002). Crawford further explores that self-determination can be achieved in a number of ways, such as 'the formation of a new state through secession, association in a federal state, or autonomy or assimilation in a unitary (non-federal)' state (Crawford, 2019). Secession here must be excluded from the right of external self-determination and its form is always unilateral. It must also be distinguished from the 'consensual' qualification of secession as occurred in the Scottish referendum (Tierney, 2013). The definition of secession normally refers to the situation where a new state is established and recognised without the 'consent' of the parent state. In this sense, one possible answer to justify unilateral secession is only through 'remedial secession'. While there is no legal basis in the contemporary international law, the supreme

court of Canada in the Reference re Secession of Quebec may provide strictly exceptional circumstances to get remedial secession. It may be applicable when "a people is subject to alien subjugation, domination or exploitation outside a colonial context", "a people is blocked from the meaningful exercise of its right to self-determination internally", and as an act of "last resort" or commonly regard as ultimum remedium (Supreme Court of Canada, 1998; UNGA Res 1514 (XV), 1960). However, it is still highly controversial to implement this idea since the positive international law doesn't encompass such type of secession, nor does it become a norm in customary international law (Brilmayer, 1991).

Even when it is entailed under international law, it would not apply to the case of Crimea because there were lack of evidences. First, there was no request to enhance the autonomy status of Crimea so that it is insufficient to re-exercise the right of internal self-determination. If there was a marked absence of the right of internal self-determination, then the right of external self-determination could not be exercised. Second, 'there have been no reports of gross human rights violations or structural discriminatory treatment of the Crimean population by the Ukrainian authorities' (Driest, 2015; Geiß, 2015). Therefore, the population is not subject to foreign conquest, domination or exploitation. Even when there was many international law scholars may agree that it requires a high burden of proof. As in Bangladesh, it might have clear evidence of 'oppressed people' but it is still considered as state creation based on consent, not secession (Vidmar, 2010). Third, there were no threats exist (in terms of 'outright armed attack') from the parent country to the 'people' on the peninsula so that the idea of last resort cannot be implemented (Driest, 2015). In this sense, Kosovo is a good practice country where secession caused by repression cannot be justified as a last resort (Vidmar, 2010).

b) The Declaration of Independence and the Referendum

Based on the explanations above, Crimean population was not considered as 'people' but now it seems no longer the case here. Nonetheless, Crimean population has voted for independence and such vote for independence is 'the right to a process leading to the establishment of a sovereign and independent state' (Tierney, 2015). Rather, it would be a violation of international legal obligations whereby a state rejects the possibility of independence or imposes unreasonable conditions or limits the establishment of sovereign independence (Tierney, 2015). In addition, the rights to self-determination have become erga omnes (ICJ, 2004). So, if the Crimean population was entitled to be 'people', they should have the rights to self-determination. It is also important to note that secession is absolutely different with the rights to self-determination (see above III.a.). Therefore, not having the right to secede does not mean that the people of Crimea do not have the right to self-determination. Also, having the right to

self-determination does not necessarily lead to changes in a country's territory. These last two sentences will be further elaborated in light of the fact that the people of Crimea have declared their independence and held their referendum.

Indeed, the people of Crimea have the right to self-determination and because of this right, the people of Crimea decided to declare their independence. Many authors have compared the declaration to the Kosovo Case (Paço, 2016; Mehta, 2016). According to the International Court of Justice (ICJ), adoption of the Declaration of Independence does not violate general international law, Security Council Resolution 1244 (1999) or the Constitutional Framework for Provisional Self-Government (ICJ, 2010). On the same opinion, however the ICJ recognizes that there is relevant international practice whereby a unilateral declaration of independence can be categorized as 'invalid' (Marxsen, 2014). The court concluded that against the law applied as follows:

[T]he illegality attached to (some other) declarations of independence… stemmed not from the unilateral character of these declaration as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens) (ICJ, 2010).

Many scholars have argued in the same way that the Crimean Declaration of Independence was illegitimate because there was an illegitimate use of force which clearly violated jus cogens. However, this is not the case because the law on the use of force is lex specialis under the UN Charter. One thing that needs to be highlighted is that declaring a certain territory as independent does not automatically fulfill the criteria given in the Montevideo Convention (Mehta, 2016). There are no international regulations or even state practices that make such an act mandatory in the formation of a new state. In line with that, Vidmar argued that 'the democratically expressed will of the people to support independence does not create a new state.' In other words, it may be necessary but it is not a sufficient condition for establishing a state. (Vidmar, 2018).

Another interesting argument is that even though there is no prohibition in force based on state practice and general international law, unilateral declarations of independence are still prohibited based on the principle of territorial integrity (Jusufaj, 2015). However, it seems irrelevant because the principle of territorial integrity does not apply to sub-state actors but applies to relations between states. It is indeed relevant if the sub-state actors are involved in the activities of other countries either directly or indirectly (Marxsen, 2015). In addition, the Constitutional Court in Spain provided the understanding that the 'people' united in the state must be the only subject that can decide on matters of territorial integrity' (Garrido-Muñoz, 2018). In this sense, residents of Catalonia who are part of the Spanish people themselves can violate the Constitutional

Law, particularly regarding territorial integrity, because they declared independence unilaterally. Hench, in this context, the unilateral declaration of independence promulgated by the Crimean people may violate the Ukrainian national constitution on territorial integrity, but, again, this is not a matter of international law. Some may argue that Russia violated several international obligations under the agreements made by the two sides with Ukraine, which led to serious criticism of its territorial integrity. However, it is very difficult to prove. For example, Russian Troops in Crimea, had occurred long before the declaration was announced. In fact, such an existence has actually been protected by the Black Sea Fleet Status of Force Agreement (SOFA) 1997 (Marxsen, 2014). In short, Crimea's Declaration of Independence may not violate international law, but it also has no legal effect in terms of establishing a new nation.

The second major compelling argument is about the referendum. To make the referendum relevant, the 'people' had to pass what Peters called 'procedural and material conditions' (preconditions to justify the right to self-determination), which did not appear to be met in the case of Crimea (Calliess, 2015). The first (procedural conditions) means that democratic procedures, peace and negotiation fatigue regarding internal political autonomy must be achieved. When comparing to the Kosovo case, this process actually has been skipped since the central government of Ukraine was not given a chance to address these concerns. The latter (material conditions) requires persistent and massive human rights violations and a long-lasting denial of the right to internal self-determination. It could be seen that the conditions have not been met (see III.a). The people of Crimea have not been oppressed by the parent state and have enjoyed its autonomous status (Värk, 2014). It is very similar to the Catalan case (Sterio, 2021). Given the available facts, it is difficult to say that Crimean people have the rights to self-determination externally to further proceed to the referendum. Nevertheless, it cannot be denied that Crimean people have voted for independence through referendum.

The main legal act representing the will of the people for self-determination is the territorial referendum (Jusufaj, 2015). In order to make it legitimate, such referendum needs to be free and fair under international legal standards (including the proper timing and consensus of the respective governmental authority that holds the political sovereignty) (Jusufaj, 2015). Although it is not binding, the Venice Commission has developed a Code of Good Practice on referendums, which provides organizational and practical rules that widely accepted by practice of states, as an expression of hard international law (Marxsen, 2014). In line with that, Peters then argues that the most important and arguably hard international legal standards are: a) peacefulness; b) universal, equal, free and secret suffrage; c) the framework conditions of freedom of media

and neutrality of the authorities; and d) international referendum observation (Calliess, 2015).

When applied to the Crimean case, these four sets of international legal standards have not been met. Firstly, it was not peaceful because it was held in front of the guns and tanks of the Russian army and unidentified troops (Calliess, 2015). Thus, it could be seen that 'people' were under threat of force and because of that the referendum was not representing the genuine will of the concerned population. Secondly, it may be universal but it could not be ensured that all the voters has been registered. On the grass root levels, there was not sufficient time for deliberation and dialogue between the ethnic groups in Crimea. Moreover, it was not free since there was an absence of free public debate and was full of reports on intimidation (Jusufaj, 2015). Thirdly, based on the limited factual evaluation of the situation during the referendum, it seems the neutrality of public authorities and press freedom, particularly in news coverage, have not been secured in Crimea (Marxsen (2014). Finally, the referendum was held in the absence of international observers (Jusufaj, 2015). In addition to that, the referendum in Crimea was held without the consensus of Ukrainian authorities. It made the process seems to be forced as it is very unilateral. The Venice Commission even determined that Crimean referendum was in full violation of the Ukraine constitution (Venice Commission, 2014).

Regardless of that, it is important to note that holding a free and fair territorial referendum is only necessary but not a sufficient requirement for a territorial realignment to be accepted as lawful by international law (Vidmar, 2015; Calliess, 2015; Jusufaj, 2015). In Crimean case, the pre-requisites to conduct referendum have not been fulfilled and also the referendum held was not legitimate since it does not meet international legal standards. Therefore, any territorial alteration cannot be justified and its territorial status still belongs to Ukraine. In support of this, the UNGA has passed Resolution 68/262, highlighting that the referendums held in the Autonomous Republic of Crimea and the city of Sevastopol have no validity and cannot form the basis for any change in the status of the Autonomous Republic. Crimea. or the city of Sevastopol. Whether an entity is recognized as a state or not does not affect its status as a state. However, it cannot be applied to justify Crimean status as a new state because not only does complexity theory match with it, but also Crimean population does not pass pre-conditions to be independence as a new state. Moreover, Vidmar then explores that even when 'the people' have successfully and democratically carried out a legitimate referendum, it does not mean that it created the right to independence (Vidmar, 2015; Calliess, 2015; Jusufaj, 2015). In this case, such a referendum only creates an obligation to negotiate the new legal status of the territory with sovereign authorities.

IV. Conclusion

In conclusion, according to international law, although they do not have the right to secede, the people of Crimea still have the right to self-determination. However, due to a lack of prerequisites (procedural and material) to justify self-determination for independence, they were unable to proceed any further. In this sense, the declaration of independence must not violate international law (outside debates over the use of force and violations of territorial integrity). However, it also has no legal ramifications for creating a new nation. This may be necessary but it is not a sufficient criterion to complete the parameters of Montevideo in this contemporary era. The Crimean referendum, on the other hand, fell short of international legal standards. Appropriate or not, a free and fair territorial referendum is only a necessary component but not a sufficient requirement for any territorial change. Even when a referendum has been successful and democratically conducted, this does not mean that it creates the right to independence. Therefore, based on the above, it can be concluded that the Republic of Crimea still de jure belongs to Ukraine. Given the fact that they have voted for independence, neither the people of Crimea nor the Ukrainian authorities can further negotiate a new legal status for their right of accommodation.

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