

Does International Law Grant the People of Crimea and Donetsk a Right to Secede?

Revisiting Self-Determination in Light of the 2014 Events in Ukraine

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IN THE FIRST PART OF the article, I provide an overview of the main developments in the regulation of self-determination under international law.¹ I show that, notwithstanding the language found in some international instruments alluding to the rights of all peoples to self-determination, only some peoples in some unique political situations have in effect been able to fully exercise the right to self-determination.² In part two, I discuss the erosion of the “no-secession” rule that denied international recognition to secessionist movements seeking to exercise self-determination, referring to the Bangladesh and Kosovo precedents. In part three, I describe the events of 2014 in Ukraine—the attempted secession of Crimea and Donetsk—and assess their impact on the law of self-determination. The main concern I express is that the combined effect of the international response to Crimea and Kosovo throws international law on self-determination into a state of uncertainty, threatening the stability of the existing state system.

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The dramatic events that transpired in Ukraine in the first half of 2014—including the *Maidan* revolution of February 2014, the establishment of a secessionist Republic of Crimea and its annexation by Russia in March 2014, and the creation of another secessionist entity in April 2014 (the so-called Donetsk People's Republic)—invite a reexamination of the current status under international law of the principle of self-determination. In particular, it may be argued that the ambivalent international reaction to the events in Ukraine suggests that the legal relationship between the right to self-determination and the principle of territorial integrity of existing states is in flux. While classic articulations of the right to self-determination under international law forbid the unilateral secession of subnational entities and uphold the sanctity of the internationally recognized borders of existing states, international reactions to early twenty-first century events in Kosovo and Ukraine cast doubt over the continued relevance of these articulations. Instead, the events in Kosovo and Ukraine present the possibility of a new legal and political paradigm that tolerates a rather broad right of secession. The events of 2014 in Ukraine and subsequent international reactions provide us with a particularly interesting case study, allowing us to form a better opinion on the legality of unilateral acts of secession under current international law and on future directions for the development of the right to self-determination.

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THE INTERNATIONAL LAW OF SELF-DETERMINATION

Although the principle of self-determination has a long pedigree in political science theory and has significantly affected international relations in the first half of the twentieth century, its transformation into a binding norm of universally

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applied international law only occurred after World War II.³ The UN Charter proclaimed self-determination as a core principle of the new international organization. Similarly, the movement toward

decolonization in the 1950s and 1960s founded its main legal claim on this principle.⁴ The transformation of self-determination from a political doctrine, subject to selective application, to a legal and universal right culminated with the inclusion of the right of all peoples to self-determination as the first substantive articles of both 1966 UN covenants on human rights.⁵

Still, the right of all peoples to self-determination was never understood as being absolute—that is, truly providing all ethnic groups who may constitute

a people with the right to freely determine their political status. In the 1960 UN General Assembly Declaration on Colonial Countries and Peoples, UN member states qualified their endorsement of the right to self-determination with the proposition that “any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”⁶ In the same vein, the 1970 UN General Assembly Declaration on Principles of International Law stipulated that “nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”⁷ It should be noted, however, that the declaration afforded protection of integrity and unity only to those existing states that conducted themselves in accordance with the principle of self-determination, i.e., “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”⁸ It was further alleged that a broader right to “remedial secession” might exist under international law, permitting oppressed peoples to secede from existing states as a measure of last resort.⁹ The status and breadth of this exception to the no-secession rule, however, has remained controversial ever since.¹⁰

Even after these legal developments, the right to self-determination, which was recognized in the aforementioned international instruments, is still narrow in scope and confined to four particular political contexts: colonialism, foreign occupation, racist regimes, and the disintegration of existing states. Arguably, in all four contexts the protection of territorial integrity and political unity of sovereign states has been of little relevance. In the case of the mid-twentieth century decolonialization movement and in situations of illegal occupation, the foreign states controlling the colonial or occupied territory had no internationally recognized title over it. As a result, recognizing the self-determination claims of colonized and occupied peoples in Asia and Africa did not conflict with any legitimate sovereignty claim of another state. Similarly, when racist regimes in South Africa and Rhodesia lost international legitimacy, this bolstered international calls for political change in the name of self-determination, suggesting that the right to self-determination is tied to the realization of the right of peoples to self-governance (sometimes referred to as *internal self-determination*) and that peoples excluded as a group from participating in the government of their own country have not yet realized their right to self-determination. Finally, the establishment of new independent states after the disintegration of the Soviet Union and Socialist Federal Republic of Yugoslavia coincided with the discon-

tinuation of the preexisting federal states. As a result, the emergence of new states from the ruins of the old states did not violate the territorial integrity or political unity interests of the latter.

Interestingly, all new states and political transformations created through realization of the right to self-determination in the second half of the twentieth century have been constituted in accordance with the *uti possidetis* (or sanctity of borders) principle—the principle that establishes the borders of new states on the basis of the borders of the preceding political entities.¹¹ Hence, the boundaries of new states in Africa and Asia followed colonial demarcation lines; the boundaries of East Timor, which rid itself from the yoke of Indonesian occupation, followed the 1975 boundary between Indonesia and Portuguese-controlled East Timor; no changes were made to the international boundaries of South Africa or Rhodesia following their transition to majority rule; and the boundaries of the new independent states established in the former USSR and Yugoslavia strictly followed the historic internal boundaries that separated the federal republics.¹² Even the boundaries of Kosovo, established—though not universally recognized—on the basis of the controversial doctrine of remedial secession (secession as a remedy for the oppression of a minority group), conform to the internal boundaries of the autonomous region of Kosovo within the Republic of Serbia. At the same time, attempts to draw new boundaries by secessionist movements in Spain, Canada, the United Kingdom, and Russia, all of which were trying to carve out territory from existing states, gained limited international traction. This suggests that the international right to self-determination stops at the international boundaries of

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“People” has been defined in international law based upon considerations of geography, not demography.

sovereign states controlled by government structures enjoying a minimum degree of international legitimacy. In other words, international law does not confer a right of unilateral secession from existing and internationally recognized sovereign states.

The right to self-determination of peoples and its realization in accordance with the *uti possidetis* principle suggests that “people” has been defined in international law, in effect, based upon considerations of geography, not demography. A people may qualify for self-determination and seek independence or a merger with another state if it constitutes the entire population residing within the internationally recognized borders of a territory, over which no other state exercises legitimate sovereignty. Conversely, groups of persons not qualifying for internationally recognized peoplehood, like French-speakers in Canada, Basques in Spain, Catholics in Northern Ireland, or Chechens in Russia, are only entitled

under international law to internal self-determination.¹³ This right to internal self-determination comprises minority rights (e.g., prohibition against discrimination and a degree of cultural, linguistic, religious and educational autonomy) and special methods for accommodating the minority in the national political process (which may include special parliaments or membership in consultative bodies). While no legal right to secession exists, minority groups may negotiate through political means their secession from existing states with the latter's consent, as had happened, among other instances, in Sudan, Serbia-Montenegro, and Czechoslovakia.

EROSION OF THE NO-SECESSION RULE?

The no-secession rule, which protects the territorial integrity and political unity of existing states, offers a neat formula for both reconciling the rights of peoples to self-determination and maintaining the stability of the existing international system. The value the international community places on territorial stability and the sovereignty of existing states is a key factor in explaining the failure of the vast majority of attempts by minority groups and territorial subunits to obtain international support for secession. Indeed, few states recognized the secessionist political entities that sought to emerge from Congo (Katanga in 1960), Nigeria (Biafra in 1967), Cyprus (Turkish Republic of Northern Cyprus in 1975), Moldova (Transnistria in 1990), Azerbaijan (Republic of Nagorno-Karabach in 1991), Somalia (Somaliland in 1991), Georgia (South Ossetia in 1991 and Abkhazia in 1999), and Yemen (South Yemen in 1994).¹⁴

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Still, two exceptions to the international community's support for the no-secession rule can be identified in recent decades. The first involves East Bengal's secession from Pakistan in 1971 and the establishment of Bangladesh, an event sometimes cited as a precedent for the availability of remedial secession.¹⁵ International reaction to this unilateral secession was generally, though not universally, favorable, and a majority of nations extended their recognition to the new state. Still, the significance of this precedent is not clear, since the recognition of Bangladesh by Pakistan in 1974 put the matter of the legality of this unilateral secession to rest.

The second, more recent precedent is that set by the secession of Kosovo from Serbia, officially executed through the 2008 Declaration of Independence adopted by the Kosovo Assembly. This act of secession, regarded in some of the literature as another example of remedial secession, has attracted considerable, though again, less-than-universal support.¹⁶ The International Court of Justice,

which was requested to render an advisory opinion on the legality of the Kosovo Declaration of Independence, held that no rule of international law prohibits it. However, the Court refused to pass judgment directly on the legal effects of the Declaration, on the legality of the act of secession it purported to implement, or on the availability of a right to remedial secession in circumstances where sovereign states have failed to meet their international responsibility to protect their residents.¹⁷

Thus the Bangladesh and Kosovo precedents show that a significant part of the international community has accepted the proposition that extraordinary situations, typically entailing gross human rights violations against minority groups, may justify a deviation from the no-secession rule. Even Russia, which had opposed Kosovo's act of secession, has recently supported secessionist movements in Georgia based on a remedial rationale—suggesting perhaps that, in principle, Russia is less opposed to the remedial exception to the no-secession rule than to its application in practice. If international law is moving toward a new exception to the no-secession rule, this development would appear to coincide with other developments encroaching on national sovereignty interests in the name of human rights. These developments include the Responsibility to Protect (R2P) doctrine, the removal of official immunities from heads of state prosecuted by international tribunals, and the increased influence of international human rights law upon the conduct of domestic affairs.¹⁸

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THE RIGHT TO SECEDE AS APPLIED TO UKRAINE

At first glance, the events that have transpired in Ukraine in 2014 do not change the terms of the debate on the right of minority groups residing in subnational territorial units to secede from existing states. The new Donetsk People's Republic has not attracted any international recognition, and it is questionable whether it even enjoys broad political support in eastern Ukraine. Likewise, the Crimean act of secession was condemned by a substantial majority in UN General Assembly Resolution 68/262 (2014).¹⁹ In addition to affirming Ukraine's right to territorial integrity, this resolution called on all states to desist from attempts to modify its borders and to refrain from recognizing any change in the status of Crimea. The secession was also broadly opposed in the Security Council, where only Russia voted against a resolution condemning the pro-secession referendum.²⁰ It is nevertheless worth mentioning some remarkable features of the Crimean secession, because they may affect our views about the state of international law on self-determination.

First, while General Assembly Resolution 68/262 encountered limited opposition (11 nations voted against it), it did not enjoy the support of as many states as one might have expected given the existence of the no-secession rule. Only 100 states voted in favor of the resolution, and 58 states abstained, citing in many cases the adverse effects of the resolution on the prospects for peaceful settlement of the crisis in the Ukraine.²¹ Since many of the states that opposed the Crimean

secession had supported the Kosovo secession, it actually appears as though a sizeable majority of states now accept the right of peoples to secede from existing states under certain circumstances, even if those circumstances cannot be placed into one of the four traditional contexts for self-determination (colonialism, occupation, government of racial exclusion, and disintegration). It is particularly remarkable that a large number of developing states, including China, that in the past were extremely sensitive about erosion of national sovereignty and territorial integrity, abstained in the General Assembly vote on Crimea—which purported to uphold these very same values.²²

Second, the less-than-universal nature of the opposition to the Crimean secession is of particular significance given the weakness of the “remedial secession” claim advocated by Crimea. Unlike Bangladesh and Kosovo, where secession followed wide-scale atrocities, the overall situation on the ground in Crimea in the weeks leading up to the secession was relatively calm and stable. Furthermore, whereas those states that have recognized the independence of Kosovo and the secessionist regions in Georgia have done so following a lengthy period of de facto separation and loss of control by the central government over the breakaway region, no such period of separation presented itself in the case of the Crimea.²³ In fact, less than a month passed between the revolution in Kiev and the Crimean secession, thereby rendering it almost impossible to maintain—as required by the remedial secession literature—that Crimea’s act of secession was an act of last resort, or preserved the real status quo on the ground. Thus, it appears that the extent to which the Crimean secession and subsequent annexation to Russia are regarded as based not only upon raw political and military power but also upon new legal claims, they go well beyond past precedents.

It is true that Crimean politicians explained the March 2014 referendum on independence by referencing the Maidan square coup d’état, which took

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place in Kiev the preceding month, and the infraction of human rights and minority rights that ensued across Ukraine.²⁴ Yet, unconstitutional changes of government have never been viewed by the international community as a proper justification for secession, nor have sporadic human rights violations that fall short in scale and gravity of crimes against humanity or genocide. Furthermore, the authenticity of these remedial claims on behalf of Crimean separatists can be doubted. In fact, it appears that the main motivation behind the move to secede was the long-held desire by many Crimean residents—perhaps the majority of the peninsula's population—to rejoin Russia.²⁵ The significance of the relatively weak international opposition to the Crimean secession thus lies in its departure from previous justifications for exemptions to the no-secession rule, which could be reconciled—even if only barely—with the principle of state sovereignty. Here, an act of secession has taken place in direct contradiction to the *uti possidetis* rule—without a plausible remedial rationale that can be tied to a failure by an existing state to meet the obligations to sovereignty and self-determination. Hence, the limited opposition to Crimea's secession and annexation by Russia may be a harbinger of greater tolerance on the part of the international community to unilateral acts of secession.

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Finally, the swift annexation of Crimea by Russia—as a purported realization of the right to self-determination of the Crimean people—has meant that opponents of the Crimean secession have to challenge directly the territorial sovereignty of one of the permanent members of the Security Council. These events place the right to secede of irredentist groups, or of subnational regions historically linked to other countries, at the forefront of international power politics. Furthermore, these events may reflect a loss of the relative consensus that was built around the limited nature of exceptions to the no-secession rule. The swift annexation of Crimea also reduces the ability of legal experts to gauge international support or opposition to the act of secession, as there is less need and occasion for third-party nations to extend recognition to the boundaries of existing states (i.e., Russia) rather than to the very existence of new states (i.e., an independent Crimea). As a result, a state of uncertainty will likely continue regarding the acceptance of the new, broad exception to the no-secession rule advanced by Crimea and supported by Russia.

CONCLUSION

Post–World War II international law has identified the right to self-determination as one of the constitutive elements of the new world order. Still, international

lawmakers, mostly existing states, were until recently careful to limit the scope of the right to self-determination in order to safeguard the stability of the international state system. As a result, a no-secession rule emerged, limiting the application of self-determination to exceptional cases involving colonialism, foreign occupation, racial exclusion from government, and disintegration of existing states. Even when the possibility of remedial secession entered into international legal discourse, following acts of secession in Bangladesh and Kosovo, such an exception was still ultimately tied to ideas about the most basic obligations attendant to sovereignty and framed in a limited fashion (i.e., as a reaction to extreme forms of state oppression).

The less-than-universal opposition to the Crimean act of secession may represent a change of the international legal and political paradigm. It is a change that would allow self-determination to be invoked as a remedy to comparatively minor political grievances, to reverse historical dispositions of sovereign title over territory (notwithstanding the *uti possidetis* rule), or to simply advance the strategic interests of major states who are ready to flex their political and military muscles. If this act of secession proves successful over time—and the unimpressive number of states voting in favor of UN General Assembly 68/262 (2014) perhaps indicates that success is within reach—other minority groups may actively seek to secede from existing states, and the stability of the international system might face a serious risk.

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Indeed, secessionist movements in Donetsk (eastern Ukraine) already present us with images of the anarchy that may ensue from the emergence of a broad exception to the no-secession rule and from the loss of a geography-based understanding of the right to self-determination, which together confer that right upon the entire population of an internationally recognized territory (a state or, in special cases, a subnational territorial unit). This is the case because the move for a right to self-determination based on ethnic or linguistic criteria might result in multiethnic countries in municipality-by-municipality struggles for political control. Such a state of affairs is hardly conducive for world order or for protection of human rights within the state—the latter interest arguably being the *raison d'être* of the post–World War II international state system that was based on self-determination. 

NOTES

1. The author thanks Professor Yael Ronen for her helpful comments to a previous draft and is grateful to the members of the *Brown Journal of World Affairs* for their excellent editing work.

2. For more on this topic, see: Roman Jakobson, “The Beginnings of National Self-Determination in

Europe,” *The Review of Politics* no. 7 (1945): 29.

3. One may note in this regard the plebiscites held in the aftermath of World War I to determine sovereignty over some contested regions in Europe (e.g., in Schleswig and East Prussia) and the mandate system under the League of Nations Covenant designed to provide tutelage for “backwards” peoples not yet ready to assume political responsibility over the territories they inhabit. Covenant of the League of Nations, June 28, 1919, art. 22, 128; see also: Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 23–31; Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2004), 198–202, 282–4; David Raic, *Statehood and the Law of Self-Determination* (The Hague: Kluwer Law International, 2002), 171.

4. For example, see: Declaration on the Granting of Independence to Colonial Countries and Peoples (UN G.A. Res. 1514 (XV)), December 14, 1969, UN Doc. A/RES/1514(XV).

5. International Covenant on Civil and Political Rights, December 19, 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, December 19, 1966, 999 UNTS 3.

6. Declaration on the Granting of Independence to Colonial Countries and Peoples (UN G.A. Res. 1514 (XV)).

7. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, October 24, 1970, UN Doc. A/RES/25/2625.

8. Ibid; The declaration was adopted during the international campaign against the minority white supremacist rule in South Africa and Rhodesia.

9. For example, see: Jure Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice,” *St. Anthony’s International Review* no. 37 (2010); Antonello Tancredi, “A Normative due process in the Creation of States,” in *Secession: International Law Perspectives*, ed. Marcello G. Kohen (Cambridge: Cambridge University Press, 2006), 171, 183–7.

10. For example, see: Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2010 ICJ 403, 438; Katherine Del Mar, “The Myth of Remedial Secession,” in *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, ed. Duncan French (Cambridge: Cambridge University Press, 2013), 79.

11. Steven R. Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States,” *American Journal of International Law* 90 (1996): 590.

12. In this regard the holding of the Badinter Commission was entrusted with delineation of the boundaries between Bosnia-Herzegovina and Serbia Croatia. See: “Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia,” January 11, 1992, 31 ILM 1499, 1500 (“Except where otherwise agreed, the former boundaries become frontiers protected by international law”).

13. “Reference re Secession of Quebec,” (1998) 2 S.C.R. 217, at para. 128.

14. John Dugard and David Raic, “The Role of Recognition in the Law and Practice of Secession,” in *Secession: International Law Perspectives*, ed. Marcello G. Kohen (Cambridge: Cambridge University Press, 2006), 94, 111–9; Peter Radan, “Secession: Can it be a Legal Act?,” in *Identity, Self-Determination and Secession*, ed. Igor Primoratz and Aleksander Pavkovic (Surrey, UK: Ashgate Publishing Limited, 2006), 155, 167; Christopher J. Borgen, “Public International Law and the Conflict Over Transnistria,” in *Managing International Conflicts: Lessons from Moldova and Cyprus*, ed. Mansur Akgun (Istanbul: Istanbul Kultur University Publication, 2013), 83, 94.

15. Tancredi, “A Normative due process,” 171, 179.

16. See: James Summers, “Kosovo,” in *Self-Determination and Secession in International Law*, ed. Christian Walter et al. (Oxford: Oxford University Press, 2014), 235, 251. At the time of writing, 107 states have recognized the state of Kosovo—about 55 percent of the UN membership.

17. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, advisory opinion of July 22, 2010, International Court of Justice, 438.

18. See: Julia Hoffman and André Nollkaemper, eds., *Responsibility to Protect: From Principle to Practice*, (Amsterdam: Amsterdam University Press, 2012); see: Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: Oxford University Press, 2013), 538–57; see: Johan D. van der Vyver, “Sovereignty,” in *The Oxford Handbook of Human Rights*, ed. Dinah Shelton (Oxford: Oxford University Press), 360.

19. UN Resolution 68/262 Territorial Integrity of Ukraine, UN Doc. A/RES/68/262 (2014).

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20. "UN Security Council action on Crimea referendum blocked," UN News Centre, March 15, 2014.
21. See: "General Assembly Adopts Resolution Calling Upon States not to Recognize Changes in Status of Crimea Region," UN Press Release, March 27, 2014.
22. China abstained in the Security Council vote.
23. The independence of Abkhazia and South Ossetia was recognized by four states (including Russia).
24. Alexei Pavlishak, "Crimea's Supreme Council makes fundamental decision to join Russia as federal subject," *ITAR-TASS*, March 6, 2014.
25. "Crimea won't work with 'illegitimate' Kiev government: PM Aksyonov," RT News, March 7, 2014.

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