Crimea's Self-Determination in the Light of Contemporary International Law

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Abstract

The article discusses the notion of both the principle of self-determination of peoples and the right of peoples to self-determination. It deals with the most complex issues of the right to self-determination, such as the concept of "the people", the legitimacy of secession as a form of self-determination and the concept of "remedial secession". A brief historical sketch of the development of statehood of Crimea is considered. The article then discusses the legal basis for a right to external self-determination by the people of Crimea and the subsequent unification with Russia.

I. The Right of Peoples to Self-Determination in Modern International Law

1. The Principle of Equal Rights and Self-Determination of Peoples

The principle of self-determination of peoples was developed in modern international law, as evidenced by the provisions of Art. 1 para. 2 of the Charter of the United Nations (UN Charter), which recognizes that friendly relations between nations will develop on the basis of respect for the

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principle of legal equality and self-determination of peoples. The legal content and the status of this principle in international law was expressed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter of 1970 (the Friendly Relations Declaration 1970),[1] as well as in the Declaration of Principles of the Helsinki Final Act of the Conference on Security and Co-operation in Europe of 1975 (the Helsinki Final Act 1975).

As stated in the Friendly Relations Declaration 1970, all peoples have the right to determine freely, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the UN Charter. It follows that the main objective of this principle is the proclamation and recognition of equal rights and of the right to self-determination of peoples. The Friendly Relations Declaration 1970 states that

> "every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the UN Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order […] to promote friendly relations and cooperation among States; […] bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter."[2]

The final part of the Friendly Relations Declaration 1970 states the international legal status of the principles contained in it. In particular, it points out that the principles of the UN Charter, as embodied in this Declaration, constitute basic principles of international law, and therefore all states are encouraged to apply these principles in their international activities and develop their mutual relations on the basis of strict observance of these principles.

The legal content of this principle is reflected in the rights of peoples to self-determination and the corresponding obligations of States, which are the main subjects of international law. This is its peculiarity: While all other fundamental principles of international law set out the rights and obligations of states, the principle of self-determination of peoples proclaims not

[1] UN General Assembly Resolution 2625 (XXV), 24.10.1970.
[2] UN General Assembly Resolution 2625 (XXV).

only rights and obligations of states but also rights of non-state actors – namely of the peoples.[3]

2. The Right of Peoples to Self-Determination

The fundamental principle of equal rights and self-determination of peoples acknowledges a right to self-determination which was first declared in the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (The Colonial Independence Declaration 1960).[4] The Declaration stated that all peoples have the right to self-determination; by virtue of that right they are entitled to freely determine their political status and freely pursue their economic, social and cultural development.

Although the text of the Colonial Independence Declaration 1960 dealt with the rights of "all peoples", its adoption was the result of the decolonization process, which is reflected in the title and content of the document. In this regard, international law doctrine formed the view that the right to self-determination particularly addresses "colonial peoples" while other peoples, not being under colonial rule and residing in the territory of already formed states, have already realized their right to self-determination.[5] However, today this position has been superseded and the discussion on whether this right applies to peoples living within existing states seems superfluous.[6]

Later, the right of peoples to self-determination was stated in a number of different international legal instruments: treaties, declarations etc.[7] Art. 1

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[3] Thus, *G. Seidel*, A New Dimension of the Right of Self-Determination in Kosovo?, in: C. Tomuschat, Kosovo and the International Community. A Legal Assessment, 2002, 203 et seq. writes: "whereas all other fundamental principles of public international law aim to protect *status quo*, the principle of self-determination safeguards the dynamic development of international relations and thus makes a peaceful change to the *status quo* – under certain exceptional conditions – possible".

[4] UN General Assembly Resolution 1514 (XV).

[5] Peoples fighting against foreign occupation (those considered the Arab people of Palestine) or the peoples fighting against racist regimes (the people of South Africa in 1948-1994) were equated with oppressed peoples in the exercise of their right to self-determination, which was recognized in Art. 1 para. 4 of the Additional Protocol I to the Geneva Conventions of 12.8.1949, and relating to the Protection of Victims of International Armed Conflicts 1977.

[6] *G. Seidel* (note 3), margin number 204. At the same time *J. O'Brien*, International Law, 2001, 165 et seq., expresses the opinion that "the principle of self-determination is fraught with difficulty when any attempt is made to extend it beyond the narrow colonial context".

[7] Charter of Paris for a New Europe 1990 (Paris Charter 1990); Art. 20 of the African (Banjul) Charter on Human and Peoples' Rights 1981; the Vienna Declaration and Pro-

para. 1 of the International Covenant on Economic, Social and Cultural Rights and the identical wording of Art. 1 para. 1 of the International Covenant on Civil and Political Rights 1966 (Human Rights Covenants 1966) provide that all peoples have the right to self-determination. Unlike the Friendly Relations Declaration 1970, there were no indications on the relationship between the principle of self-determination and the right of peoples to self-determination. In these documents the right to self-determination was proclaimed as a right which has to be recognized by all participant States.

The practice of the International Court of Justice (ICJ) has recognized the right to self-determination of peoples as valid under international law[8]. National courts have also recognized its existence (judgment of the Supreme Court of Canada in 1998 concerning the secession of Quebec)[9].

In the final analysis, we may conclude that the principle of self-determination of peoples has developed into a generally accepted norm of international law, which has the character of a customary norm of international law. This fundamental principle of international law provides universally recognized rights of peoples to self-determination, giving the people the right to freely determine, without external interference, their destiny, including the right to secede from the state.

The most controversial theoretical issues in this field of international law is the definition of the subject (the beneficiary) of the right to self-determination and the legal justification of the right to secession as one of the forms of self-determination. As for the subject of this right, the main difficulty is that there are neither international legal acts nor is there evidence in international judicial practice of any satisfactory criteria for the notion of "people".[10] This lack often leads to controversies regarding specific situations of self-determination.

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gramme of Action of the World Conference on Human Rights 1993; Art. 2 para. 1 of the Arab Charter on Human Rights 2004; Art. 3 of the Declaration on the Rights of Indigenous Peoples 2007 recognized the right of indigenous peoples to self-determination.

[8] *South West Africa* Case, ICJ Reports 1950; *South West Africa* Case, ICJ Reports 1971; *Western Sahara* Case, ICJ Reports 1975; *East Timor* Case, ICJ Reports 1995; *Construction of a Wall* Case, ICJ Reports 2004; *Kosovo* Case, ICJ Reports 2010, etc.

[9] *Reference re Secession of Quebec*, 161, DLR, 4th Series (1998).

[10] UN Charter, Colonial Independence Declaration 1960, the Friendly Relations Declaration 1970 and other international legal documents using the term "people" do not contain any legal criteria for determining it. The same can be said about the decisions and conclusions of the ICJ that concern various aspects of the peoples of the mandated territories (*South-West Africa* Case), colonial territories (*Western Sahara* Case) or other peoples (*Kosovo* Case), etc. The ICJ refers to the concept of the "people" but does not describe its legal content. Attempts to define the term "people" that are found in documents of international organizations (for

At the same time, international legal scholarship recognizes that the right to self-determination is of a collective nature, so that "only groups that qualify as such, can access the right".[11] However, in the broadest sense of the word peoples are considered as "large, anonymous human groups possessing certain national characteristics".[12] Links to national traits bring the concept of the "people" close to the concept of the "nation", allowing some scholars to argue that a people, like the nation, is characterized by the following: accommodation in a common area, economic integrity of the population and related social integrity, the presence of certain elements of a common culture and an awareness of this fact. Additional factors that stimulate integrity may be racial or linguistic proximity, common religion, etc.[13]

A no less complex international legal issue is the question of whether the right to self-determination also constitutes a right to secession. On the one hand, the Friendly Relations Declaration of 1970[14] and a number of other documents[15] considered it a legitimate means of exercising the right to self-determination, if a people succeeds in separating a part of the state's territory.

On the other hand, international practice knows many examples of peoples having a recognized right to self-determination, which are nevertheless unable to exercise this right through secession for quite a long time. This is because the state, in whose territory the people resides, impedes the attempts for secession, for example, by preventing the holding of a referendum to determine the will of the people.

In international legal scholarship, there is a debate about the legitimacy and legality of the right of secession. Some authors recognize the right to

example, in a special report, made within the framework of UNESCO, UN Doc. SHS-89/CONF. 602/7, Paris, 22.2.1990.) also do not have a legal character. Furthermore, according to Professor *S. Chernichenko*, Theory of International Law, Vol. II – Old and New Theoretical Problems, 1999, 174 et seq.: "notions such as 'people' and 'nation' do not have and cannot have a clear legal content".

[11] *J. Summers*, Peoples and International Law, 2014, 7 et seq.

[12] *J. Summers* (note 11), margin number 6. However, some lawyers recognize the presence of only three human communities in international law, distinguishing by whether they have the appropriate rights: peoples, minorities and indigenous populations. *M. G. Kohen*, Introduction, in: M. G. Kohen, Secession – International Law Perspectives, 2006, 9 et seq.

[13] *S. Chernichenko* (note 10), margin number 177.

[14] The Declaration specifically states that "The establishment of a sovereign and independent State, the free association or integration with an independent State […] constitute modes of implementing the right of self-determination of that people." (note 1).

[15] See the Helsinki Final Act 1975 and the Vienna Declaration and Program of Action of the World Conference on Human Rights 1993.

secede for the peoples of both federal and unitary States,[16] while others believe that the right to secession is not generally recognized by international law and is permitted only in exceptional cases, for example, when the existence of the people within a state is in danger.

Therefore, the right to secession is at least not completely excluded from international law and may, under certain conditions, be used by the people to implement their right to self-determination. In addition, some lawyers, anticipating the dire consequences of the "political divorce" between the people and the state, call for caution and discretion, noting that "secession qualifies as a complex process, the pros and cons of which must be carefully weighed before a definitive judgment can be given".[17] This caution seems quite reasonable, since the absence of clear rules in international law and established procedures for secession should be accompanied by a careful study of all the relevant circumstances.

The right of secession is based on the will of the self-determining people. This idea was formulated much earlier by *J. Locke*, according to whom the will of the people is the source of legitimacy for the government to administer the territory.[18] His theory was used during the War of Independence of the United States and the French Revolution and was further developed in international law. It must be admitted that its evolution has been controversial, especially for the peoples of the colonies. European metropolises have denied them the right to self-determination, which is clearly contrary to the idea of equality of peoples.

In contemporary international law the idea of *J. Locke* on the free will of the people as the legal basis of the right to self-determination of people is supported by the ICJ, which expressed the view that the application of the right to self-determination requires a free and genuine expression of the will of the people concerned.[19]

3. Some Reflections on the Concept of "Remedial Secession"

Without prejudice to the radical approach to the right to self-determination, allowing its implementation by all peoples, including ethnic

[16] See *Y. Dinstein*, Is there a Right to Secede?, in: ASIL Proceedings, 1996, 299 et seq. : "… a people unhappy about its political status within the bounds of an existing State –federal as much as unitary – is entitled to secede and create a new State."

[17] *C. Tomuschat*, Secession and Self-Determination, in: M. G. Kohen, Secession (note 12), 26 et seq.

[18] *J. O'Brien* (note 6), 162 et seq.

[19] *Western Sahara* Case (note 8), para. 55.

groups, we consider a more cautious approach, which allows secession of a territory in exercising the right to self-determination of one of the peoples inhabiting it only in exceptional circumstances. This position is known to be associated with the concept of "remedial secession" proposed for the purpose of legitimizing secession. The concept of "remedial secession" was referred to by the ICJ in the *Kosovo* Case. However, the Court "considers that it is not necessary to resolve these questions in the present case".[20] Nonetheless in the academic literature, this concept is widely commented upon. Moreover, the recognition by a large number of states of Kosovo's independence from Serbia, appeared to be a clear violation of the territorial integrity of the Republic of Serbia. Furthermore, Kosovo is not the only example in the history of contemporary international relations, before the situation in Crimea, where the right to self-determination through secession was exercised by a people that was not under colonial rule.[21]

The question raised in this regard, in particular by *C. Tomuschat*, is far from merely rhetorical. He asks: "Can the lessons that have been learned from Kosovo be generalized, or will Kosovo remain a unique *rocher de bronze*, with no real chance of being emulated in the near future?"[22] We should acknowledge that any example is contagious.[23] The separation of Abkhazia and South Ossetia from Georgia in 2008 and now the Crimean case of 2014 provide obvious evidence that haste in applying theoretical concepts can cause a chain reaction, which today may be considered as emerging international practice.

The concept of "remedial secession" is based on the so-called "safeguard clause" contained in para. 7 ("The principle of equality and self-determination of peoples") of the Friendly Relations Declaration 1970. It provides that

> "none of the above provisions 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples, as described in this section of the Declaration, and thus possessed of a

[20] See *Kosovo* Case (note 8), para. 82, 83.
[21] See Bangladesh in 1971, Eritrea in 1993, South Sudan in 2011.
[22] *C. Tomuschat* (note 17), 38.
[23] However, in regard to the *Kosovo* Case it is contested whether it has any precedential value under international law. See *S. Oeter*'s contribution to this volume. See also *A. Peters*, Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence Was not Contrary to International Law Set an Unfortunate Precedent?, in: M. Milanovic/M. Wood (eds.), The Law and Politics of the Kosovo Advisory Opinion, 2015, 291 et seq.

government representing the whole people belonging to the territory without distinction as to race, creed or color".

A truncated form of this provision is set out in the Paris Charter of 1990, in which the State parties reaffirmed "the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States".[24]

The analysis of this situation causes mixed feelings because it is not clear to whom the principle is actually addressed. Who shall have the right to interpret the basic elements of the right to self-determination and what is the procedure of its implementation? As set out in the Friendly Relations Declaration 1970, interpreters could either be the States to whom a number of the provisions of this Declaration are addressed, they could be the nations that wish to exercise their right to self-determination in the form of secession or they could be any international bodies (e.g. the courts) or international intergovernmental organizations in the framework of their competencies.

Given the lack of relevant practice, it is logical to assume that this requirement of the Friendly Relations Declaration 1970 will be extended to all subjects of international law, which are involved in varying degrees, in the settlement of the situation, but with certain reservations.

Another criterion of the ban on promoting or authorizing actions leading to the violation of the territorial integrity of states is the condition that such states are in compliance with the principle of equal rights and self-determination of peoples as set out in this section of the Friendly Relations Declaration 1970, and thus possess a government that represents the whole people belonging to the territory without distinction as to race, creed or colour. In the Vienna Declaration of the World Conference on Human Rights 1993, with reference to the Friendly Relations Declaration 1970, it was established that states shall comply with the principle of equal rights and self-determination of peoples and thus have a government that represents the interests of all the people in their territory without distinction of any kind. The phrase "without distinction of any kind" was decisive for the prohibition of discrimination of groups not belonging to the dominant ethnic group.[25]

[24] Charter of Paris for a New Europe 1990.

[25] UN World Conference on Human Rights, Vienna Declaration and Programme of Action, ILM 32 (1993), 1663 et seq.

II. Brief Historical Sketch of the Development of Statehood of Crimea

The historical record of the Crimean peninsula dates from 1200 B.C., when it was inhabited by the Tauri, who were connected with the other Black Sea nations. From 800-400 B.C., Greek colonies were established on Crimea which became part of the ancient world. Then the Scythians migrated to Crimea and transferred the centre of their kingdom there. From 63 B.C. to 257, Crimea was under the control of the Roman Empire. Then there were conquests of Crimea by the Goths, the invasion of the Huns, and after that the rule of the Byzantine Empire. In 1239 Crimea was conquered by the Mongols and became part of the Golden Horde. In 1475, the Ottoman Empire conquered the peninsula and the Crimean Khanate, created decades earlier, fell under vassalage to the Ottoman Empire.

The Crimea became a part of Russia in April 1783 by the Manifesto of the Empress Catherine II, and a year later the Tavricheskaya region (oblast) was created on its territory. In 1802, Crimea was transformed into a province (gubernia).

After the collapse of the Russian Empire during the Civil War (1917-1923), the territory of Crimea was declared an integral part of Russia by all successive governments. The Crimean Autonomous Soviet Socialist Republic (CASSR) as part of the Russian Soviet Federal Socialist Republic (RSFSR) was formed on 18.10.1921. At the conclusion of the Treaty establishing the Union of Soviet Socialist Republics (USSR) on 30.12.1922, the CASSR became part of the Russian Federation and was transformed into the Crimean region (oblast) in 1945.

In 1954, the Crimean region was transferred from the RSFSR to the Ukrainian Soviet Socialist Republic (Ukrainian SSR). This transfer of territory was a purely domestic administrative matter. Within the Soviet Union republics did not have an independent territory, but were considered as parts of the same territory of the Federation, under the territorial supremacy of the Soviet Union. Therefore, the transfer of Crimea to Ukraine did not take into account the will of the population living there, especially since no referendum was held on the issue. In addition, according to Russian scholars, the instruments of transfer of the Crimean region from RSFSR to Ukraine were undertaken by public authorities of the RSFSR who were not competent to decide such questions. In other words, they were in violation

of applicable constitutional law of the RSFSR[26]. Accordingly, these instruments did not have legal force from the moment of their adoption.[27]

The allegation that the republics of the USSR were the subjects of international law is untenable. Their international personality was dependent on that of the USSR and was of very limited nature. In any case, the boundaries between the subjects of the Soviet federation were purely administrative and did not have any international legal significance.

On 20.1.1991, in the context of a deep political crisis in the Soviet state system, a referendum was held in Crimea. Of the total number of the participants, 93.26 % voted in favour of the restoration of the CASSR as a subject of the USSR, i.e., they favoured independence from Ukraine and the formation of an independent state subject to the Soviet federation along with Ukraine and the RSFSR.[28] This solution was recognized by the USSR and Ukraine, but has not been implemented due to the collapse of the USSR.[29]

On 5.5.1992, the Supreme Council of Crimea adopted the act on state independence of the Republic of Crimea, which was supposed to take effect after confirmation by the Crimean referendum scheduled for 2.8.1992. On 6 May of the same year the Constitution of Crimea was adopted.[30] However, on 13.5.1992, the Supreme Council of Ukraine found the proclamation of the act of state independence and on the referendum to be unconstitutional,

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26 The decision was adopted by the Presidium of Supreme Council of the RSFSR February 19. This republican body had no power to decide territorial questions (Art. 33 of the Constitution of the RSFSR). Art. 16 of the Constitution of the RSFSR provided that the territory of RSFSR may not be changed without the consent of the RSFSR. According to the Russian scholar *A. V. Fedorov*, Legal Status of Crimea. The Legal Status of Sevastopol, 1999, 11 et seq., no government authorities of the RSFSR were granted the right to change the territory of the RSFSR or to give consent to its change. For comparison, Art. 15 of the Constitution of the Ukrainian SSR stipulated that the territory of the Ukrainian Soviet Socialist Republic may not be changed without the consent of the Union of Soviet Socialist Republic.

27 *A. V. Fedorov* (note 26), margin number 11.

28 *V. G. Vishnyakov*, Crimea: Law and Policy, 2011,132 et seq.

29 The USSR law "On the procedure for addressing issues related to the secession of Union republics from the USSR" of 3.4.1990 in Art. 3 provided that in the federal republic, composed of the autonomous republics and other autonomous communities, the referendum shall be held separately. The peoples of the autonomous republics were granted the right to an independent decision whether to stay in the Soviet Union or the federal republic, as well as to raise the question about their state-legal status. Accordingly, the Crimean referendum of 1991 was legitimate, and its implementation should be carried out in future by the state bodies of the Ukrainian SSR and the USSR. The Supreme Council of Ukraine has distorted the will of the Crimean people and only partially implemented its results in terms of changing the name of this territory, adopting the law on the rehabilitation of the Crimean Autonomous Republic within Ukraine in February 1991.

30 *A. V. Fedorov* (note 26), 17.

suspended the Supreme Council of Crimea's actions and dissolved the Crimean Parliament.[31] On 9.7.1992, the Supreme Council of Crimea declared a moratorium regarding the decree on the referendum.[32] In other words, the referendum failed and the will of the people of Crimea could not be determined. This suggests that the people of Crimea was clearly refused its right to external self-determination.

Further strengthening of the Crimean statehood was interrupted by the actions of the Government of Ukraine. In 1995, Crimean authorities adopted the Constitution of Crimea, which significantly reduced the competences of the state and municipal authorities of the Republic of Crimea.[33] The constitution that was eventually adopted on 21.10.1998 further maintained this trend.[34]

It should be noted that the unilateral determination of the legal status of Crimea by the government of Ukraine brought significant restrictions on the rights of the people. In particular, in 1992, the inhabitants of Crimea were declared citizens of Ukraine without their consent.[35] Moreover, the Crimean Republic was denied the right to land and natural resources, and the official status of the Crimean Tatar and Russian languages was abolished in favour of a single national language – Ukrainian.

The unconstitutional coup that took place in Ukraine on 22.2.2014 caused protests by the population of Crimea. Accordingly, the executive bodies of the Autonomous Republic of Crimea refused to recognize the legitimacy of the new Ukrainian government.

On 16.3.2014 a referendum on the status of Crimea was held. According to official figures 83.1 % of the voters of Crimea took part in the referendum, 96.77 % of whom voted in favour of the reunification of Crimea with Russia as a subject of the Russian Federation.[36] Based on these results, Crimea was declared a sovereign Republic on 17.3.2014, which included Sevastopol as a city with a special status. On 18.3.2014, a Treaty was signed between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea to Russia, according to which two new entities within the Russian Federation were formed – the Republic of Crimea and the federal city of Sevastopol. The federal law on the accession of Crimea to

31 *V. G. Vishnyakov* (note 28), 164 et seq.
32 *A. V. Fedorov* (note 26), 17.
33 *A. V. Fedorov* (note 26), 21.
34 *A. V. Fedorov* (note 26), 25.
35 This did not constitute a violation of international law, because international customary law does not grant a right of option to the inhabitants of a territory in the case of state succession.
36 Rossiyskaya gazeta, No. 6333 (61), 18.3.2014.

Russia was signed on 21.3.2014 and was ratified together with the accession treaty.

From the above, we may draw the following conclusions. From the 18th century to the beginning of the 1990s, Crimea was part of the Russian Empire and then of the USSR. In 1991, with the collapse of the USSR, Crimea remained part of Ukraine, but during 1991-1992 public authorities and the population of Crimea repeatedly expressed a desire to exercise its right to self-determination first in the USSR, but as an independent subject of the federation along with Ukraine and Russia, and then as an independent state. Ukraine, after first recognizing the Crimea Autonomous Republic then unilaterally interrupted the formation of an independent statehood of Crimea without accepting the will of its people regarding the inclusion of Crimea in the structure of the Ukrainian state.

The referendum in Crimea on 16.3.2014 was the confirmation of a previously manifested will of the people of Crimea to restore its statehood and demonstrates the consistency in the people's defence of its right to self-determination.[37]

III. Self-Determination of Crimea in the Light of Contemporary International Law

The problem of Crimea in contemporary international relations since the collapse of the USSR had not been subject to any significant attention. However, after the unconstitutional coup in Ukraine on 22.2.2014 and the decisions of the state bodies of Crimea to hold a referendum on independence, it became one of the most widely discussed topics in world politics at the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE) and the European international organizations (Council of Europe, European Union). Discussions in the UN Security Council, the UN General Assembly and the European organizations were politicized and often of a very emotional nature.

The analysis of the problem of self-determination of the people of Crimea should be carried out based on the rules of general international law, taking into account the internal legislation of Ukraine and Crimea. It should be borne in mind that, at the moment, Crimea is part of the territory of the

[37] See for a discussion to which extent the referendum satisfied international standards: *A. Peters*, The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum, in: C. Calliess (ed.), Staat und Mensch im Kontext des Völker- und Europarechts: Liber Amicorum für Torsten Stein, 2015, 255 et seq.

Russian Federation, as is evident from the relevant international legal instruments and the domestic Russian legal acts.

The treaty between Russia and the Republic of Crimea "On the accession of the Autonomous Republic of Crimea and the creation as new subjects of the Russian Federation"[38] forms the international legal foundation for the unification of Crimea and Russia (on the premise that it can be considered a valid treaty concluded between two international legal subjects under international law). First of all, the Parties in deciding about the reunification, recalled the historic community of their people and took into account the existing connections between them. Therefore, the public in Russia and Crimea perceives this act as a symbol of the restoration of historical justice and the realization of a historical title to reunite the people of Crimea with their historical homeland – Russia. In his address on the occasion of the decision to approve the Treaty on the accession of new subjects to the Russian Federation, Russian President *V. Putin* pointed out the historical community of the peoples of Crimea and Russia.[39]

As is known, in its Opinion on the unilateral declaration of independence of Kosovo, the ICJ did not consider the question of the historical significance for Serbia of the formation of statehood of Kosovo. Generally, a reference to the historical basis is extremely rare in international law. It is accepted, for example, in the justification of historical rights to some coastal marine areas (historic bays, and others) or with regard to the validity of a right of transit passage through the territory of another state. However, it also cannot be ignored when it comes to reuniting historically united nations. The division of Russia and Crimea was largely artificial and in the process of the disintegration of the USSR a satisfactory legal settlement of territorial issues was, for historical reasons, not implemented. Subsequently the conclusion of bilateral agreements between the Russian Federation and Ukraine, as well as documents of the Commonwealth of Independent States (CIS) (although *de-jure* Ukraine is a founder, but not a member of the CIS) stated only the *status quo* and did not address the question of the legal status of some of the disputed territories, which means that there are still some unresolved territorial disputes and conflicts on the territory of CIS member states.

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[38] The Treaty between the Russian Federation and the Republic of Crimea on the accession the Republic of Crimea to the Russian Federation and the creation as new subjects in the Russian Federation, in: Collection of Legislation, 2014, No. 14, Art. 1570.

[39] *V. Putin*, Address by President of the Russian Federation, 18.3.2014, <http://www.kremlin.ru>.

The main international legal basis for the conclusion of the Treaty on the accession of Crimea to Russia lies in the principle of equal rights and self-determination of peoples as enshrined in the UN Charter. As pointed out above, all peoples have an inalienable right to freely and without external interference determine their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right. The right to self-determination of the people of Crimea has been realized by the free and voluntary will of the people in the Crimean referendum held in the Autonomous Republic of Crimea and Sevastopol on 16.3.2014. In that referendum the people of Crimea decided to reunite with Russia as a subject of the Russian Federation. Based on the results of the referendum state bodies of the Republic of Crimea and the city with special status of Sevastopol approached the Russian Federation with a proposal for accession. Russia accepted the offer.

In order to determine the validity of that expression of the will of people, we point out the factors that determine its lawfulness. First of all, one should pay attention to the fact that already under Ukrainian constitutional law, Crimea was assigned a special status as an autonomous republic. This autonomy was not a "gift from above" (the government or the Parliament of Ukraine), but rather the contrary. It was the result of a long and consistent struggle of the people of Crimea for the right to develop freely their political, economic, social and cultural institutions.

We have already noted that since 1991, the Crimean people repeatedly demonstrated the will to create first an independent entity within the Soviet Union, and then to realize national independence within the framework of Ukraine. Consent to be a part of Ukraine was expressed freely in the Constitution of Crimea in 1992, but it was accompanied by the proclamation of its supremacy in relation to natural resources, material, cultural and spiritual values and the exercise of sovereign rights within the whole territory of the Crimean Republic. It was also established that the Republic of Crimea in the face of its public bodies and officials shall have in its territory all powers, except those which the Republic voluntarily delegates to Ukraine and which are secured by the constitutional law of the Republic. Nevertheless, the development of the Crimean State was forcibly terminated by the central government of Ukraine, without any hint of a desire to take into account the will of the people of Crimea. The republic was deprived of all its rights, except the right to be called an Autonomous Republic.

Ukraine did not allow the people of Crimea to freely determine its will by means of internal democratic procedures (plebiscite, referendum, etc.). This can be interpreted in the spirit of the Friendly Relations Declaration

1970 as depriving a people of the right to internal self-determination, rather than acting in a spirit of respect for that right and promoting and assisting in its implementation. This illegal coercion prevented the free exercise of the right to internal self-determination. However, this coercion brings into play the right to external self-determination and freedom to choose the path of its development, including the right to determine freely its historical destiny in accordance with international law.

Moreover, there is no doubt that the people of Crimea may be considered a people by the standards of international law. They have developed a political-ethnic community, which is the bearer of the right to self-determination. Earlier we referred to the wording that defines people as large, anonymous group of people who have certain national characteristics. This definition is quite applicable to the people of Crimea, which in its composition is poly-ethnic. This feature was noted by the president of Russia in his address on 18 March:

> "Crimea is a unique blend of different peoples' cultures and traditions. This makes it similar to Russia as a whole, where not a single ethnic group has been lost over the centuries. Russians and Ukrainians, Crimean Tatars and people of other ethnic groups have lived side by side in Crimea, retaining their own identity, traditions, languages and faith."[40]

In the referendum on independence the people of Crimea – all ethnic groups living in Crimea – showed themselves as one self-determined people and overwhelmingly opted for a reunification with Russia.

Since the will of the people must form the core element in the formation of the government, all references to the unconstitutionality of the referendum cannot be accepted, especially since Ukraine's government was overthrown by an unconstitutional coup.

The events in Crimea that led to the independence and accession to Russia may also be interpreted as case of "remedial secession". As widely acknowledged, the applicability of this concept largely depends on the context and the special circumstances of the case. *C. Tomuschat*, analyzing different aspects of the concept of "remedial secession", expresses the view that

> "remedial secession should be acknowledged as part and parcel of positive law, notwithstanding the fact that its empirical basis is fairly thin, but not totally lacking: as pointed out, the events leading to the establishment of Bangladesh and the events giving rise to Kosovo as an autonomous entity under international admin-

[40] *V. Putin* (note 39).

istration can both be classified as coming within the purview of remedial secession".[41]

In our opinion, the situation in spring of 2014 in Crimea, was characterized as follows:

There was an unconstitutional coup on 22.2.2014 that deprived the Crimean people of the right to representation in the central government of Ukraine. Radical nationalist elements came to power in Kiev; they openly expressed threats against all those disagreeing with them, especially persons acting for the preservation of the Russian language and culture in the territory in which they lived. The population of Crimea, as we know, did not hide their cultural and linguistic affinity to Russia.

Along with official armed groups (army, police, etc.) "private" militias (so-called "national guard") were deployed in the country. The latter were composed of extremist nationalists who began to carry out punishment against disagreeable people, including violence. Formal power structures did not prevent physical attacks (beatings, insults, humiliations of human dignity, torture, etc.) by violent extremist nationalist-wing dissidents, including attacks against candidates for presidency of Ukraine. The result was that a number of candidates were forced to withdraw their candidacy.[42]

Moreover, a brutal massacre of dissidents in Odessa took place on 2.5.2014.[43] This was a triumph of nationalist lawlessness. Dozens of people were killed or burned alive simply because they wanted to speak Russian. In view of this it can hardly be argued that the central government in Kiev adheres to European democratic standards.

There is also information about Ukrainian but Russian speaking intellectuals (journalists, teachers, etc.) who have "disappeared" and whose disappearance has not been investigated and prosecuted by the authorities.[44] Western and international human rights organizations began to give their

[41] *C. Tomuschat* (note 17), 42.

[42] *E. Shestakov*, Yanukovych Held in Europe – Around the Finger. Under pressure from the West, Yanukovych has led the country to bloodshed and split it, Rossiyskaya Gazeta, 24.2.2014; Oleg Tsarev refused to participate in the elections of the President of Ukraine, in: Rossiyskaya Gazeta, 29.4.2014.

[43] Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine, 15.6.2014, <http://www.ohchr.org>, paras. 37-50.

[44] Office of the United Nations High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine, 15.5.2014, <http://www.ohchr.org>, paras. 103, 104; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Ukraine, A/HRC/27/75, September 2014, para. 23.

comments on events associated with the flagrant violations of human rights in Ukraine just after the start of military operations in the Donbass.

The discussions in the United Nations, the OSCE, and European Institutions on the "Crimean issue" are strongly one-sided. This confirms that the people of Crimea had to rely on their own strength and that a remedy through the international community was not to be expected. Rather, only an appeal to neighbouring states, in this case Russia, for assistance in ensuring the basic right to life and the right to freedom of expression, promised to secure the right to self-determination of the Crimean people.

In the Crimean situation the physical existence of the people was at stake and therefore a secession from Ukraine was justified under the requirements of "remedial secession". Of course, compared to Bangladesh, Kosovo and other examples of this kind, the situation in Crimea was different. In fact there were no mass killings of civilians or full-scale military actions, but this was not to the merit of the Ukrainian government or the international community.

In our view the situation in Crimea during this period was determined by the fact that the political and legal situation prevailing after the unconstitutional coup in Ukraine caused a real threat to the life, health and human rights of the majority of the population of Crimea, which from the beginning rejected unconstitutional methods of political struggle. Evidence of this threat were political provocations, expressed in the killing of demonstrators in Simferopol and other forms of violence and intimidation of political activists in Crimea, attempts to physically eliminate the leaders of the movement for self-determination, and the deployment of regular Ukrainian armed troops in order to intimidate the protesting population, etc. Under these circumstances, it was urgent to hold a referendum in order to promptly decide on the question whether the Crimean people wanted to remain part of Ukraine or not. Doing so was logical, legitimate and justified from the perspective of international law and international morality.

To wait, as in Rwanda and other "hot spots" of the world, and to act only when the number of victims ran into hundreds of thousands, and sometimes millions of tortured people and then strive to restore the trampled justice through subsequent international criminal justice cannot be justified from the standpoint of morality and humanity. The slogan "*fiat justitia pereat mundus*" undoubtedly prevails when the threat to the lives of a vast number of people becomes reality.

This analysis has shown that the current concept of the right of peoples to self-determination forms a valid legal norm. In exceptional circumstances, the right to self-determination also opens the legal possibility of seces-

sion. However, unfair treatment of a variety of nationalities still occurs and to our deep regret, international law and the international community cannot offer them satisfactory solutions to ensure their rights. This leads to the perpetuation of ethno-national conflicts and threats to regional and worldwide security. The current design of the right to self-determination and the right to secession is not able to eliminate these threats. Further analysis and development of proposals for the advancement of the relevant institutions of the system of modern international law is mandatory.