

# Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?

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## Abstract

In recent years, the right to self-determination has been prone to abuse because of the uncertainties as to its proper operation outside the decolonisation context. This article revisits the content and role of self-determination in light of the recent assertions of this right, with particular reference to Kosovo and Crimea. It examines different facets of this right, and whether it holds an intrinsic link to a democratic form of government. The right to self-determination encompasses the right of a people to choose freely their own political system and to pursue their own economic, social, and cultural development. However, states have no duty in positive international law to introduce or maintain a democratic form of government as a requirement for the realisation of the right to self-determination. Moreover, democracy, construed narrowly as the majority rule of an electoral process, is not a guarantee of the realisation of the right to self-determination. This article will test the extent to which democracy and the development of human rights law have impacted upon the content, limitations and exercise of the right to self-determination.

## Keywords

Self-determination, Secession, Democracy, Elections, Human Rights, Political Participation

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## 1 Introduction

The concept of self-determination of peoples occupies a central place in international law, underlying and at the same time challenging the existence of a sovereign state. From its origins in the late 19th and early 20th centuries, the concept of self-determination has had a strong ideological foundation, polarised between a liberal ideal of democracy and a socialist conception of revolution. It was not until the United Nations (UN) Charter that it gained proper legal recognition,<sup>1</sup> to be identified later as 'one of the essential

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<sup>1</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

principles of contemporary international law.<sup>2</sup> The purpose of this article is to distil the actual content of self-determination as the legal right from the rhetoric that it fuels, in particular, the idea that its exercise is dependent on the existence of democracy.<sup>3</sup>

The UN Charter sets out the concept of self-determination among the purposes of the organisation, albeit in a rather state-centred approach.<sup>4</sup> Originally, 'self-determination' was tied up with 'equal rights' (of states) and had a rather limited meaning, making no reference 'to a right of dependent peoples to be independent, or, indeed, even to vote'.<sup>5</sup> The provisions of the Charter applicable to non-self-governing territories and trusteeship system (ie articles 73(b) and 76(b)) do not use the term 'self-determination', referring instead to 'self-government' or 'independence'.<sup>6</sup> It was only with the development of the decolonisation process that a consensus emerged as to the application of self-determination to all non-self-governing territories.<sup>7</sup> The concept of self-determination of peoples gained a prominent place in General Assembly resolutions and became accepted as a legal right in the context of decolonisation.<sup>8</sup> This right has since been expressed in

(UN Charter). For the treatment of self-determination in the context of the League of Nations, see League of Nations, 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aland Islands Question 5' [1920] Official Journal of the League of Nations, special supplement no 3. For an overview of self-determination as a political concept, see Jure Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 Human Rights L Rev 239, 243–45. For an overview of development from a political principle to legal norm, see Zolio A Velasco, 'Self-Determination and Secession: Human Rights-Based Conflict Resolution' (2014) 16 Intl Community L Rev 75, 78–81.

<sup>2</sup> *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29 (*East Timor Judgment*).

<sup>3</sup> For an overview of the rhetoric of self-determination and the impact of political institutions on its exercise, see James J Summers, 'The Rhetoric and Practice of Self-Determination: A Right of All Peoples or Political Institutions?' (2004) 73 Nordic J Intl L 325.

<sup>4</sup> UN Charter, art 1(2), which provides that one of the purposes is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. Art 55 refers 'to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 112. For a detailed analysis of the diplomatic history and the *travaux préparatoires* in relation to the concept of self-determination in the UN Charter, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 34–42.

<sup>5</sup> Higgins (n 4) 112.

<sup>6</sup> UN Charter, arts 73(b), 76(b).

<sup>7</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, paras 52–53 (*Namibia Advisory Opinion*). All states with self-governing territories have accepted the applicability of the right to self-determination. See, eg, the United Kingdom (15 November 1978) UN Doc CCPR/C/1/Add.37; the Netherlands (16 March 1981) UN Doc CCPR/C/10/Add.3, (4 September 1981) UN Doc CCPR/C/10/Add.5; Australia (11 December 1981) UN Doc CCPR/C/14/Add.1; and New Zealand (29 January 1982) UN Doc CCPR/C/10/Add.6.

<sup>8</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV) (proclaiming that 'all peoples have the right to self-determination' and 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

regional and universal treaties, notably article 1 common to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>9</sup> and is part and parcel of customary international law.<sup>10</sup> It has been widely acknowledged in state practice, and judicial and quasi-judicial pronouncements.<sup>11</sup> Self-determination has been recognised as an *erga omnes* right<sup>12</sup> and even as a peremptory (*jus cogens*) norm.<sup>13</sup>

Although the provisions on self-determination and state practice are clear on the options available for exercising such a right, they provide little guidance as to its content, the 'self' or 'people' entitled to exercise it and its implications outside the decolonisation context. This article cannot do justice to all the ongoing debates surrounding self-determination.<sup>14</sup> Instead, it focuses on the interaction between self-determination and democracy, and the extent to which the developments in human rights law more broadly

United Nations'); Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, UNGA Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541(XV) (providing in principle VI that 'a Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State'); Declaration of Principles of International Law concerning Friendly Relations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) (Friendly Relations Declaration); Organization of African Unity Charter (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 art 3(3); Organization of African Unity Assembly, Cairo Ordinary Session (17–21 July 1964) AHG/Res 17(I). For early views on self-determination as a legal right, see Georges Scelle, 'Quelques Réflexions sur le Droit des Peuples à Disposer d'Eux-mêmes' in DS Constantopoulos and others (eds), *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Schmimelbusch & Co 1957); Constantin Economides, 'Le Droit des Peuples à Disposer d'Eux-mêmes' (1957) 9 *Revue Hellenique de Droit International* 298; Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester UP 1963) 78; Rupert Emerson, 'Self-Determination' (1971) 65 *AJIL* 464; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 101–06.

<sup>9</sup> Article 1 common to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) provide that 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

<sup>10</sup> *Namibia Advisory Opinion* (n 7) para 52.

<sup>11</sup> See Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/Conf.157/24 (Part I) reprinted in (1993) 32 *ILM* 1661, 1665; *Reference re Secession of Quebec* [1998] SCR (Canada) 217, para 124 (*Quebec Reference*); UN Human Rights Committee, 'General Comment 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples' (13 March 1984) UN Doc HRI/GEN/1/Rev.1, 12.

<sup>12</sup> *East Timor Judgment* (n 2) para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155 (*Wall Advisory Opinion*).

<sup>13</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 65. See also David Raić, *Statehood and the Law of Self-determination* (Kluwer Law International 2002) 218–19; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 90 (Dissenting Opinion of Judge Kreća).

<sup>14</sup> Interesting areas of development concern the gradual recognition by the international community of the notion of remedial secession and the extension of the right to self-determination to indigenous people: see United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) UN Doc A/Res/61/295, art 3.

have affected the content and scope of self-determination outside the decolonisation context.

Traditionally, international law has been silent on the choice of internal governance structures to be adopted within each state. However, the end of the Cold War has led to the dissemination of democracy as a system of government, including to the countries that emerged from the dissolution of the USSR and Yugoslavia, a so-called ‘Third Wave of Democratization’ to borrow the words of Samuel Huntington.<sup>15</sup> Legal scholarship, in particular across the Atlantic, promptly advocated for an emerging ‘right to democratic governance’ in international law.<sup>16</sup> The argument is that democratic governance, in particular its procedural elements such as multiparty elections, is necessary for the realisation of self-determination. This article re-evaluates the underlying thesis and argues that democracy conceived as a multiparty political system is not a sufficient condition for the realisation of the right to self-determination in contemporary international law. While there is undeniably a strong link between certain *democratic principles* and the exercise of the right to self-determination, the concepts of democracy and self-determination should not be conflated, contrary to a common view advocated in some circles of scholarship and policy. The validity of self-determination claims today, particularly the ones aiming at disintegration from the parent state, cannot be assessed exclusively against the benchmark of referenda and plebiscites. The risk is one of diluting and abusing the right to self-determination, and perverting its function in international law.

This article is structured as follows: section 2 discusses the operation and limits of the exercise of the right to self-determination outside the decolonisation context; section 3 examines the existing links between self-determination, democratic governance and the human right to political participation as set out in the ICCPR; and section 4 uses the recent examples of Kosovo and Crimea to demonstrate the dangers of too broad a conception of the right to self-determination and the associated risks to the stability of borders in international law.

## 2 The right to self-determination: Its operation and limits outside the decolonisation context

Like many other human rights, the right to self-determination is not absolute. Its exercise is limited by the principles of territorial integrity and *uti possidetis juris* (ie the creation of a new entity must occur within the previous administrative boundaries).<sup>17</sup> It is widely agreed that there are two means of exercising the right to self-determination in international law: an external one, which provides the people with the right to determine

<sup>15</sup> For an overview, see Amy E Eckert, ‘Free Determination or the Determination to Be Free: Self-Determination and the Democratic Entitlement’ (1999) 4 UCLA J Intl L and Foreign Affairs 55.

<sup>16</sup> Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46.

<sup>17</sup> *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554, para 25. See also Robert McCorquodale, ‘Self-Determination: A Human Rights Approach’ (1994) 43 ICLQ 857, 875–76.

the international status of the territory; and an internal one ensuring the right of peoples to self-government within the confines of the parent state.<sup>18</sup>

Outside the decolonisation context, and subject to the potential exception of remedial secession,<sup>19</sup> international law does not bestow upon groups, including ethnic, national, religious, cultural, or linguistic minorities, the right to exercise external self-determination. These groups are instead entitled to a form of self-government or autonomy within the confines of their parent state.<sup>20</sup> As the Supreme Court of Canada held:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.<sup>21</sup>

Similarly, the Badinter Commission of the International Conference on the Former Yugoslavia stressed that 'communities' within a state may have the right to self-determination, but its exercise could not (in the absence of agreement) result in changes to state borders existing at the time of independence. Rather, the right implied an acknowledgement of a people's cultural identity and their legal protection as minorities under relevant international instruments.<sup>22</sup> Accordingly, today self-determination is mainly consummated in its internal form, so as not to 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'<sup>23</sup>

It is questionable whether the choice of a democratic form of government, within the understanding of a multiparty democracy, is yet an additional limitation to the people's exercise of the right to self-determination.<sup>24</sup> The traditional position of international law

<sup>18</sup> Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 5–6.

<sup>19</sup> *Quebec Reference* (n 11). The doctrine of remedial secession remains highly controversial. In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 81 (*Kosovo Advisory Opinion*), the Court took a minimalist approach without discussing the subject. See, eg, Antonello Tancredi, 'A Normative "Due Process" in the Creation of States Through Secession' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006); Simone F van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (CUP 2013); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (OUP 2004).

<sup>20</sup> For state practice see Raić (n 13) 230–33. See generally, Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 EJIL 111 (identifying nine different categories of self-determination settlements).

<sup>21</sup> *Quebec Reference* (n 11) para 126.

<sup>22</sup> Arbitration Commission of the International Conference on the Former Yugoslavia, 'Opinion No 2' (reprinted in 1992) 31 ILM 1497, 1498–99 (Badinter Opinion No 2). See Jan Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Q 186, 204; suggesting that 'the right to internal self-determination came about, it could be argued, as a compromise position: Where secession or external self-determination would be out of reach, the least one could expect from states is that they would somehow not make peoples' lives too miserable.'

<sup>23</sup> Friendly Relations Declaration (n 8) principle 5, para 7.

<sup>24</sup> The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) art 21 and ICCPR, art 25 do not require a multiparty setting as a precondition of the right to political participation. See also UN Human Rights Committee, 'CCPR General Comment 25: Article 25

has been to regard the system of government and the process for decision-making as part of the *domaine réservé* of states. International law does not impose a restriction on the people's choice as to the form of government, as long as the exercise of that choice takes place in a free manner, without any external influence or coercion. Foreseeing democracy as the only legitimate outcome 'cannot truly be considered a free act of self-determination'.<sup>25</sup> Moreover, democracy, conceived as a majority rule in elections, is not a sufficient guarantee for the proper operation of the right to self-determination outside the decolonisation context. The genuine realisation of the right to self-determination implies not only a transparent electoral benchmark, but also respect of the principles of territorial integrity and sovereignty, compliance with and promotion of other human rights, and the implementation of the rule of law.

### 3 Interaction between self-determination, democracy and other human rights

The right to self-determination of peoples has been at the forefront of the 'humanization and democratization of international law'.<sup>26</sup> The end of the Cold War allowed for the recognition of the emerging right to democratic governance in international law.<sup>27</sup> Vidmar writes, 'The entanglement of post-Cold War political development and the emergence of new states led to the idea that democracy should be brought into international law as a normative framework in relation to both existing and emerging states'.<sup>28</sup>

Many scholars have used the right to self-determination as a platform for giving a normative content to the right to democratic governance. At a first glance, there is a considerable interaction between self-determination and certain democratic principles, but is there an intrinsic, even more an automatic link between democracy and the realisation of the right to self-determination? The right to self-determination needs to be exercised in a free and fair way, benefiting from a representative government. However, the choice of people as to the governing system and its modalities is not dictated as

(Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7 (General Comment 25). See also Jure Vidmar, 'Judicial Interpretation of Democracy in Human Rights Treaties' (2014) 3 CJICL 532, 535–38.

<sup>25</sup> Cecile Vandewoude, 'The Rise of Self-Determination versus the Rise of Democracy' (2010) 2 Goettingen J Intl L 981, 984; Eckert (n 15) 69–70.

<sup>26</sup> Abdulqawi A Yusuf, 'The Role that Equal Rights and Self-Determination of Peoples can Play in the Current World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 376.

<sup>27</sup> See Franck (n 16); Gregory H Fox and Brad R Roth, *Democratic Governance and International Law* (CUP 2000); Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in Christian Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff 1993) 270–72.

<sup>28</sup> Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 1.

a matter of positive international law. Mandating that a people must determine to be free, as defined by a particular procedural model of democracy, significantly constrains their right to make a free determination of their own political status.<sup>29</sup> This, of course, is not to say that self-determination should not be exercised, or that the full extent of its consequences can be realised in practice outside a functioning democracy.

One commonly identified link between democracy and self-determination has its foundation in the interdependence of human rights, in particular the individual right of political participation (article 25 ICCPR).<sup>30</sup> Franck contended that the right to self-determination entitled peoples to 'free, fair and open participation in the democratic process of governance freely chosen by each state'.<sup>31</sup> There is some evidence in support of this proposition in the practice of the UN General Assembly.<sup>32</sup> Article 25 ICCPR provides that every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives, which necessarily entails the right to vote and to be elected at genuine periodic elections. Such elections must be by universal and equal suffrage, held by secret ballot 'in circumstances which guarantee the free expression of the will of the electors'.<sup>33</sup> Other provisions of international and regional instruments set up similar parameters for the expression of the will of the people.<sup>34</sup>

However, critically, the democratic interpretation of article 25 ICCPR is not universally accepted in contemporary international law.<sup>35</sup> Nor does the interdependence of human rights imply that self-determination can only be exercised with a particular form of government in place.<sup>36</sup> As the Human Rights Committee pointed out in its General Comment:

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1) peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.<sup>37</sup>

<sup>29</sup> Eckert (n 15) 57.

<sup>30</sup> Matt Craven, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 237; Vidmar, *Democratic Statehood in International Law* (n 28) 153.

<sup>31</sup> Franck (n 16) 50.

<sup>32</sup> Question of Southern Rhodesia, UNGA Res 2022 (XX) (5 November 1965) UN Doc A/RES/2022(XX) para 8.

<sup>33</sup> ICCPR, art 25.

<sup>34</sup> UDHR, art 21; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, protocol 1, art 3 (European Convention on Human Rights); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 23; and African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 13.

<sup>35</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 19–39.

<sup>36</sup> See Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1); Vidmar, 'Judicial Interpretation of Democracy' (n 24).

<sup>37</sup> General Comment 25 (n 24) 2.

On the one hand, both democracy and self-determination are ‘sources of political legitimacy, both are considered to be important for the enjoyment of individual rights and both hold that the power derives from the people.’<sup>38</sup> Article 1 ICCPR and ICESCR could then be regarded ‘as affirming the self-direction of each society by its people, and thus as affirming the principle of democracy at the collective level.’<sup>39</sup> As Cassese pointed out, outside the context of decolonisation, ‘a general rule is now gradually emerging to the effect that peoples of sovereign states are entitled to internal self-determination, i.e. democratic government.’<sup>40</sup>

On the other hand, what kind of democracy does this imply? Are we talking about democracy as a political system? Or democracy in the sense of a government representative of its people without any discrimination? Are we simply talking about particular democratic principles and practices, like elections? Can people’s representation be achieved only in a multiparty electoral context? As James Crawford put it, ‘There can be different ideals or legitimate versions of democracy: is one particular ideal or version to be externally imposed?’<sup>41</sup>

Democracy’s conception in human rights law is ultimately a ‘reflection of the idea that every person, whether a member of a majority or a minority, has basic rights, including rights to participate in public life.’<sup>42</sup> The political theory generally provides for a definition by reference to its procedural and substantive components. The procedural component defines democracy by reference to free and fair elections. The substantive component aims to define democracy by reference to its underlying principles, including political equality and popular sovereignty.<sup>43</sup> Similarly, whereas democracy is not defined in international law, free and fair elections are an integral part of the right to political participation under international human rights law.<sup>44</sup> While the right to political participation and the right of self-determination are interdependent,<sup>45</sup> it is not clear whether the joint reading of these two rights leads to an obligation for states to hold

<sup>38</sup> James J Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff 2007) 372.

<sup>39</sup> James Crawford, ‘Democracy and International Law’ (1993) 64 BYBIL 113, 116. See UN Human Rights Committee, ‘Third Periodic Reports of States Parties due in 1992’ (17 June 1996) UN Doc CCPR/C/76/Add.6, 32. States often refer to the democratic process or the right to democracy in relation to the right of self-determination: eg ‘[t]he exercise of the right to self-determination required the democratic process’ (Germany (13 October 1988) UN Doc A/C.3/43/SR.7, 76); ‘[t]he internal aspects of self-determination (...) includes [sic] the right of people to choose their own form of government and the right to democracy’ (India (17 June 1996) UN Doc CCPR/C/76/Add.6, 32). See also Patrick Thornberry, ‘The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism’ in Christian Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff 1993) 120; Wheatley (n 18) 135–36.

<sup>40</sup> Antonio Cassese, ‘The International Court of Justice and the Right of Peoples to Self-Determination’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 352.

<sup>41</sup> Crawford (n 39) 113.

<sup>42</sup> *ibid* 114.

<sup>43</sup> Wheatley (n 18) 128.

<sup>44</sup> UDHR, art 21; ICCPR, art 25.

<sup>45</sup> General Comment 25 (n 24) 2.



elections in a multiparty setting.<sup>46</sup> For example, in the aftermath of the Cold War, the UN General Assembly passed a number of resolutions aimed at promoting and consolidating democracy, which do not specify the requirement of elections in a multiparty setting and often affirm that the choice of political system is a domestic matter for each state.<sup>47</sup>

It is also not necessarily the case that a 'multiparty democracy automatically leads to realisation of the right to self-determination'.<sup>48</sup> The correlation between the electoral democracy and the exercise of the right to self-determination is not without problems, particularly as it may result in the 'tyranny of the majority'.<sup>49</sup> This in turn could lead to the breach of the right to internal self-determination of a people that constitutes a numerical minority within a state, even in a flawless representative democracy.<sup>50</sup> Vidmar points out to the complexity of voters' decision-making as yet another potential problem of associating the right to self-determination with the electoral process.<sup>51</sup>

Another commonly identified link between the self-determination and the right to democratic governance lies in the 'safeguard clause' of the Declaration on Principles of International Law, where it refers to a 'government representing the whole people belonging to the territory without distinction as to race, creed or colour'.<sup>52</sup> In the *Western Sahara* Advisory Opinion, the International Court of Justice (ICJ or the Court) clarified that the people of a territory entitled to self-determination have the right 'to determine their future political status by their own freely expressed will'.<sup>53</sup> The Court stressed that '[t]he validity of the principle of self-determination, defined as the need to pay regard

<sup>46</sup> Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1) 241.

<sup>47</sup> See, eg, Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, UNGA Res 60/253 (24 May 2006) UN Doc A/RES/60/253, preamble, 11; UNGA, 'Report of the Secretary-General on the United Nations Voluntary Fund for Victims of Torture' (28 July 2006) UN Doc A/61/226, preamble, 8; Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, UNGA Res 62/7 (13 December 2007) UN Doc A/RES/62/7, preamble, 8. For a detailed analysis of different pronouncements of the international community showing no requirement for a multi-party setting of elections, see Vidmar, 'Judicial Interpretation of Democracy in Human Rights Treaties' (n 24) 536–37.

<sup>48</sup> Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1) 242.

<sup>49</sup> Russell A Miller, 'Self-Determination in International Law and the Demise of Democracy?' (2003) 41 *Columbia J Transnatl L* 601, 634–44.

<sup>50</sup> Raić (n 13) 280.

<sup>51</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 156–57.

<sup>52</sup> Friendly Relations Declaration (n 8) principles 5, 7.

<sup>53</sup> *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 70. See also paras 121–22 (Separate Opinion of Judge Dillard) ('the present Opinion is forthright in proclaiming the existence of a "right" (...) The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations'); para 81 (Declaration of Judge Nagendra Singh) ('the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence. (...) Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization'). See also *The Right of Peoples and Nations to Self-Determination*, UNGA Res 637A (VII) (16 December 1952) UN Doc A/RES/637(VII) [A], 2, which expressly states that the exercise of the right to self-determination should take place in accordance with 'the freely expressed wishes of the peoples concerned, the wishes of the people being

to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory.<sup>54</sup> As the Court explained in the *Western Sahara* Advisory Opinion, only in those cases where a collectivity did not constitute a people for the purpose of decolonisation or in cases where, for instance, the wishes of the people were so obvious as to render superfluous any act of consultation, this requirement could be dispensed with.<sup>55</sup> In practice, ‘the will of the people’ meant the will of the *majority* of the inhabitants of a colonial territory.<sup>56</sup>

Yusuf argues that the right to self-determination ‘is manifestly opposable to unconstitutional forms of government such as military governments, as well as to authoritarian or despotic government.’<sup>57</sup> However, are all non-democratic governments *prima facie* in breach of the right to self-determination because they do not have democratic electoral procedures in place? The Declaration on Principles of International Law defined a representative government by reference to ‘race, colour or creed.’<sup>58</sup> As the right to self-determination only applies to peoples, the representativeness of the government for the purposes of self-determination ‘cannot be extended beyond the identities identifying a separate people.’<sup>59</sup>

The response of international community to breaches of the right to self-determination does ‘not suggest that governmental representativeness could be understood in terms of party politics or in any other way beyond the identities relevant for the existence of a separate people.’<sup>60</sup> For example, the UN Security Council has ‘never denied legitimacy to non-elected governments on democracy considerations’ in non-coup situations.<sup>61</sup> There are multiple examples in practice that show that governmental legitimacy is not correlated with a democratic political process. The UN Security Council proclaimed the legitimacy of the government of Kuwait in the context of the Iraqi occupation in 1990 notwithstanding Kuwait’s questionable record of compliance with democratic principles and human rights.<sup>62</sup> Similarly, while the UN Security Council denied legitimacy to the

ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations’.

<sup>54</sup> *Western Sahara* (n 53) para 33: the Court explained that ‘those instances were based either on the consideration that a certain population did not constitute a “people” entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances’.

<sup>55</sup> *ibid* para 59; para 73 (Declaration of Judge Nagendra Singh). See also Michla Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff 1982) 27.

<sup>56</sup> Higgins, *The Development of International Law* (n 8) 104; Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Study prepared by Héctor Gros Espiell: The Right to Self-Determination—Implementation of United Nations Resolutions’ (20 June 1978) UN Doc E/CN.4/Sub.2/405, 10–11.

<sup>57</sup> Yusuf (n 26) 384.

<sup>58</sup> Friendly Relations Declaration (n 8) principle 5, para 7. See also Vienna Declaration and Programme of Action (n 11) para 2, defining a representative government as the one ‘representing the whole people belonging to the territory without distinction of any kind’.

<sup>59</sup> Vidmar, ‘The Right of Self-Determination and Multiparty Democracy’ (n 1) 249.

<sup>60</sup> See Vidmar, *Democratic Statehood in International Law* (n 28) 147–48.

<sup>61</sup> *ibid* 149.

<sup>62</sup> UNSC Res 661 (6 August 1990) UN Doc S/RES/661.

Taliban government of Afghanistan in several resolutions, it did so without qualifying the representativeness in terms of electoral proceedings.<sup>63</sup> Vidmar brings up examples of the dissolution of Yugoslavia that distil democracy from the right to self-determination.<sup>64</sup>

The idea of imposing democracy as the requirement *sine qua non* for the lawfulness of the exercise of self-determination is commendable yet legally questionable. First of all, as the Court stressed in the *Nicaragua* case, the universal human rights instruments do not bind state parties to holding multiparty elections.<sup>65</sup> Second, what international law requires and regards as representative government for the purposes of self-determination does not necessarily coalesce with its conception in the democratic political theory.<sup>66</sup> Third, scholars, in particular across the Atlantic, tend to use democracy as a political system as a solution to all the imperfections of positive law on self-determination. In fact, what they have done is further dilute the content of the right to self-determination by conflating two separate concepts: ie democracy as a political system and the operation of certain democratic principles in the context of self-determination.<sup>67</sup> As Jean Salmon points out, there are indeed many governments in the world that do not adhere to democracy but are nevertheless representative of their peoples.<sup>68</sup> Finally, the exercise of the right to self-determination, in particular in its internal mode, may 'take a variety of forms, from autonomy over most policies and laws in a region or part of a State (...) to a people having exclusive control over only certain aspects of policy.'<sup>69</sup> International law provides no 'guidelines on the possible distribution of power among institutionalized units or regions.'<sup>70</sup> One possible way to define the representativeness of the government in the context of the right to self-determination is that:

the government and the system of government is not imposed on the population of a State, but that it is based on the consent or assented by the population and in that sense is representative of the will of the people regardless of the forms or methods by which the consent or assent is freely expressed.<sup>71</sup>

<sup>63</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333; UNSC Res 1378 (14 November 2001) UN Doc S/RES/1378.

<sup>64</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 151–52.

<sup>65</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 261: 'the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections.'

<sup>66</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 7–8; Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 205.

<sup>67</sup> For the critique of the understanding of the concept of democracy in the literature on the democratic governance, see Susan Marks, 'The "Emerging Norm": Conceptualizing "Democratic Governance"' (1997) 91 ASIL 372; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2000); Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549.

<sup>68</sup> Salmon (n 27) 280.

<sup>69</sup> McCorquodale (n 17) 864.

<sup>70</sup> Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 4) 332.

<sup>71</sup> Raić (n 13) 279.

It remains questionable how much democratic pedigree exists in the concept of self-determination. In the author's view, a right to democracy or democratic governance remains *de lege ferenda*, and should not be conflated with the right to self-determination.

#### 4 Modern assertions of self-determination: Potential for abuse?

Self-determination takes new dimensions in the 21st century. The examples of Kosovo and Crimea, and the volatile status of other similarly placed regions, such as Abkhazia and Ossetia, demonstrate the danger of interpreting and applying self-determination too broadly in detriment of the stability of borders in international law.<sup>72</sup>

During the events leading to the referendum in Crimea on 16 March 2014, the Crimean and Russian authorities sought to justify their actions under international law with reference to the right to self-determination, citing the ICJ's Advisory Opinion on Kosovo.<sup>73</sup> In a statement of 11 March 2014, the Supreme Council of the Autonomous Republic of Crimea proclaimed that it was acting:

with regard to the Charter of the United Nations and a whole range of other international documents and taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July, 22, 2010, which says that unilateral declaration of independence by a part of the country does not violate any international norms.<sup>74</sup>

In a matter of days following the referendum, the Russian Federation took control over Crimea.<sup>75</sup> The example of Crimea shows the misuse of the Kosovo precedent and the implications of the Court's reluctance to circumscribe the concepts of self-determination and secession in its Advisory Opinion. The Court reduced the UN General Assembly's request to a narrow question of whether a declaration of independence as such was prohibited under general international law. The Court avoided any pronouncements on

<sup>72</sup> See 'Medvedev's statement on South Ossetia and Abkhazia' *New York Times* (New York, 27 August 2008) <[http://www.nytimes.com/2008/08/27/world/europe/27medvedev.html?\\_r=0](http://www.nytimes.com/2008/08/27/world/europe/27medvedev.html?_r=0)> accessed 7 August 2015. On 26 August 2008, the Russian Federation recognised the independence of the Georgia's provinces of Abkhazia and South Ossetia. In his statement, the then President Dmitry Medvedev referred to the 'freely expressed will of the Abkhaz and Ossetian peoples' and to international instruments on self-determination, including the UN Charter, the Declaration on Principles of International Law and the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe.

<sup>73</sup> See, eg, Speech by President Putin (18 March 2014) <<http://eng.kremlin.ru/transcripts/6889>> accessed 7 August 2015: 'we had to help create conditions so that the residents of Crimean for the first time in history were able to peacefully express their will regarding their own future'. For a summary of the background on the Crimea crisis, see for example Christian Marxen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 *ZaöRV* 367, 368–70.

<sup>74</sup> 'Crimea Parliament Declares Independence from Ukraine ahead of Referendum' *RT News* (Moscow, 11 March 2014) <<http://www.rt.com/news/crimea-parliament-independence-ukraine-086/>> accessed 7 August 2015.

<sup>75</sup> 'Ukraine: Putin Signs Crimea Annexation' *BBC News* (London, 21 March 2014) <<http://www.bbc.com/news/world-europe-26686949>> accessed 7 August 2015.

whether there was a right to unilateral secession.<sup>76</sup> However, a broader reading of the Opinion by policy makers created room for misinterpretation, gaining a prominent role among the justifications for the referendum and annexation of Crimea by the Russian Federation in March 2014.<sup>77</sup> Peters concludes that ‘the Advisory Opinion, while not being a precedent in a technical sense, has the unfortunate effect, due to its failure to spell out any clear limits of secession, of not preventing subsequent (erroneous) reliance on its narrow findings.’<sup>78</sup> As Judge Yusuf predicted in 2010:

The fact that the Court decided to restrict its opinion to whether the declaration of independence, as such, is prohibited by the international law, without assessing the underlying claim to external self-determination, may be misinterpreted as legitimizing such declarations under international law, by all kinds of separatist groups or entities that have either made or are planning to make declarations of independence.<sup>79</sup>

Crimea and Russia’s reliance on the right to self-determination and the Kosovo precedent was misconceived both factually and legally. Factually, Crimea has benefited from an autonomous status since the emergence of an independent Ukraine, and there were no signs of widespread or systematic violations of the rights of ethnic minorities or the Russian majority on the peninsula.<sup>80</sup> Legally, the evidence of the purported right to remedial secession is inconclusive. Even assuming such right exists in positive international law, there are certain substantive and procedural conditions for its exercise,<sup>81</sup> which only by a whim of imagination could be satisfied in the case of Crimea.

As for the substantive condition, Grant states that ‘[a] community could invoke the right only if the incumbent State committed a serious breach of its obligations to the community.’<sup>82</sup> Grant further explains that ‘[a] serious breach would exist where the government denied the people “a fundamental human right” or failed to represent the people, or both.’<sup>83</sup> As for the procedural condition, there is a need to exhaust effective

<sup>76</sup> See Thomas D Grant, *Aggression against Ukraine* (Palgrave Macmillan 2015) 23–25.

<sup>77</sup> See Anne Peters, ‘Has the Advisory Opinion’s Finding that Kosovo’s Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 291–313.

<sup>78</sup> *ibid.* 293. See also *Kosovo Advisory Opinion* (n 19) para 4 (Dissenting Opinion of Judge Koroma): ‘The Court’s Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.’

<sup>79</sup> *Kosovo Advisory Opinion* (n 19) paras 6, 17 (Separate Opinion of Judge Yusuf).

<sup>80</sup> Any conflict as to the status of Crimea was formally settled by the Treaty on Friendship, Cooperation and Partnership (Ukraine-Russian Federation) (adopted 31 May 1997, entered into force 14 January 1988) reproduced in Andrew D Sorokowski, ‘Ukraine in the World: Studies in the International Relations and Security Structure of a Newly Independent State’ (1996) 20 *Harvard Ukrainian Studies* 319, 319–29; and the 1996 Constitution of Ukraine, granting Crimea the status of Autonomous Republic.

<sup>81</sup> See, eg, *Kosovo Advisory Opinion* (n 19) Written Statement of Albania (14 April 2009) paras 75–85; Written Statement of Denmark (17 April 2009) paras 12–13; Written Statement of Switzerland (25 May 2009) paras 57–97; Written Statement of Germany (15 April 2009) paras 32–37.

<sup>82</sup> Grant (n 76) 27.

<sup>83</sup> *ibid.*

remedies; in other words, secession proper is a question of last resort.<sup>84</sup> Neither of these conditions were met.

The exact threshold for the exercise of remedial secession remains unclear. However, it is a high threshold, which would require showing a systematic and widespread pattern of violations of the rights of a particular community. The human rights record on the peninsula showed some concerns in relation to the treatment of the Crimean Tatar minority, but not the Russian majority or other minorities.<sup>85</sup> Similarly, the rehearsed argument in the media as to the potential repeal of the 2012 legislation indicating Russian as one of Ukraine's minority languages would arguably not reach the threshold of gross and systematic failure to represent the people.<sup>86</sup> For example, in early March 2014, the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities concluded a visit to Crimea, reporting no human rights issues affecting the Russian population.<sup>87</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) concluded that the violations of the rights of the Russian majority were 'neither widespread nor systematic'.<sup>88</sup> The situation in Crimea preceding the referendum and its integration with the Russian Federation cannot be compared to cases of protracted oppression and exclusion or other violations of human rights, including the apartheid system in South Africa or the campaign of ethnic cleansing in Kosovo. Moreover, there was no form of negotiation or dialogue preceding the separation and annexation of Crimea, which clearly demonstrates the failure to seek a consensual solution and thus exhaust any remedies available (even on the assumption that there were violations of such a nature as to warrant remedial secession, which was clearly not the case).<sup>89</sup> As several international bodies have recognised, this represented a failure to seek a remedy and reach a consensual solution through multilateral efforts as a procedural condition of remedial secession.<sup>90</sup>

Crimea could only have seceded within the constitutional framework of Ukraine and in circumstances free from external intervention. The UN General Assembly recognised this in its Resolution 68/262, stating that the referendum 'having no validity,

<sup>84</sup> See, eg, *Kosovo Advisory Opinion* (n 19) Written Statement of the Netherlands (17 April 2009) para 3.11.

<sup>85</sup> See, eg, Committee on Economic, Social and Cultural Rights, 'Consideration of Sixth Periodic Report of Ukraine' (27 December 2012) UN Doc E/C.12/UKR/6, 50–52; Committee on the Elimination of Racial Discrimination, 'Summary Record of the 2099th Meeting' (19 August 2011) UN Doc CERD/C/SR.2099, 8–10.

<sup>86</sup> For a summary of different reports on the human rights compliance in Crimea, see Grant (n 76) 30–33.

<sup>87</sup> See 'Statement by the OSCE High Commissioner on National Minorities on her recent visits to Ukraine' OSCE (The Hague, 4 April 2014) <<http://www.osce.org/hcnm/117175>> accessed 7 August 2015.

<sup>88</sup> OHCHR, 'Report on the Human Rights Situation in Ukraine' (15 April 2014) 73 <<http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/UARReports.aspx>> accessed 7 August 2015.

<sup>89</sup> See Grant (n 76) 29.

<sup>90</sup> See, eg, European Commission for Democracy Through Law, 'Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles"', Opinion No 762/2014 (21 March 2014) CL-AD(2014)002, 26, noting that 'no negotiations aimed at a consensual solution took place before the referendum was called'.

cannot form the basis for any alteration of the status of the Autonomous Republic of the Crimea or the city of Sevastopol.<sup>91</sup> In the preambular part of this Resolution, the UN General Assembly further noted that the referendum ‘was not authorized by Ukraine’. The Resolution is otherwise silent on the invalidity of the referendum albeit making a strong link to the use of force and the territorial integrity of Ukraine.

As the Court stressed in the *Kosovo* Advisory Opinion, any declaration of independence (whether or not preceded by a referendum or plebiscite) may be rendered unlawful in the presence of ‘unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*ius cogens*)’.<sup>92</sup> The Court did not find any such unlawfulness in the declaration of independence of Kosovo, albeit the validity of the act should have been questioned more carefully in the light of the framework set out in the UN Security Council Resolution 1244.<sup>93</sup> The ICJ’s approach to the lawfulness of the declaration of independence in the *Kosovo* Advisory Opinion may be regarded as constructively ambiguous, particularly given its interpretation of whom the authors of the declaration were.

In contrast, the referendum in Crimea was not lawful under international law. First, the referendum was tainted by the Russian aggression against the sovereign territory of Ukraine and the presence of its troops in Crimea prior to and during the referendum.<sup>94</sup> The OSCE Parliamentary Assembly concluded that the referendum was ‘conducted in an environment that could not be considered remotely free and fair’.<sup>95</sup> Second, by contrast to the case of Kosovo (ie of a genuine declaration of *independence*), Crimea’s declaration of independence was from its outset aimed at the territorial integration with Russia. Accordingly, ‘the Crimean secession claim by necessity affects the borders between Russia and Ukraine’, in breach of the principle of territorial integrity in general international law as well as article 3 of the 1997 Treaty of Friendship, Cooperation, and Partnership

<sup>91</sup> Territorial Integrity of Ukraine, UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262, para 5.

<sup>92</sup> *Kosovo* Advisory Opinion (n 19) para 81.

<sup>93</sup> UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244. See Marcelo G Kohen and Katherine Del Mar, ‘The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of “Independence from International Law”?’ (2011) 24 *Leiden J Intl L* 109. See also Sean Murphy, ‘Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 134–66.

<sup>94</sup> See Statement by the Ministry of Foreign Affairs of Ukraine, ‘On Violations of Ukraine’s Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine’ (3 March 2014) <<http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shhodo-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-vijsykovimi-formuvannyami-chf-rf-na-teritoriji-ukrajini>> accessed 7 August 2015; ‘Vladimir Putin Submitted Appeal to the Federation Council’ (1 March 2014) <<http://eng.kremlin.ru/news/6751>> accessed 7 August 2015; Kathy Lally, Will Englund and William Booth, ‘Russian Parliament Approves Use of Troops in Ukraine’ *The Washington Post* (Washington, 1 March 2014) <[https://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7\\_story.html](https://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7_story.html)> accessed 7 August 2015.

<sup>95</sup> European Union OSCE Permanent Council No 992, ‘EU Statement on Ukraine’ (27 March 2014) PC.Del/346/14.

between Ukraine and the Russian Federation.<sup>96</sup> As Grant puts it, ‘The main concern is the effective separation of the territory from the State to which it was understood to belong—and the modality by which that separation was brought about.’<sup>97</sup>

Fundamentally, Crimea never became a new state, and could not be incorporated lawfully into the Russian Federation.<sup>98</sup> Crimea did not fulfil any criteria of statehood in the short period between the referendum, held on 16 March 2014, and the execution of the Agreement on Admission of the Republic of Crimean into the Russian Federation, on 18 March 2014.<sup>99</sup> It certainly lacked any ‘independent public authority and could not be qualified as an independent state.’<sup>100</sup> From a strictly legal point of view, the integration of Crimea into the Russian Federation was nothing else than a forcible acquisition of territory.<sup>101</sup>

The Crimea events also show the need for international law to set more clearly the limits of self-determination and the democratic expression of the will of the people. The fact that the UN General Assembly resolution condemning the annexation of Crimea and affirming the invalidity of the referendum was not passed universally, notably with 11 votes against and 58 abstentions, only confirms this continuing uncertainty or rather neutrality of international law on the possibility of unilateral secession.

## 5 Conclusion

Eleanor Roosevelt stated back in 1952 that ‘[j]ust as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos.’<sup>102</sup> Once regarded

<sup>96</sup> See also Agreement establishing the Commonwealth of Independent States (adopted 8 December 1991) (reprinted in 1992) 31 ILM 143, art 5; Alma-Ata Declaration (adopted 21 December 1991) (reprinted in 1992) 31 ILM 148. For an analysis of the legal obligations breached by the Russian Federation, see Grant (n 76) 103–16.

<sup>97</sup> Grant (n 76) 24.

<sup>98</sup> cf ‘Executive Order on Recognizing Republic of Crimea’ (17 March 2014) <<http://en.kremlin.ru/events/president/news/20596>> accessed 7 August 2015; ‘Speech by the Russian Foreign Minister, Sergey Lavrov, and his Answers to Questions from Deputies during the Plenary Session of the State Duma of the Russian Federation’ (20 March 2014) <[http://archive.mid.ru//brp\\_4.nsf/0/94D6676508BC6C4844257CA2005B0613](http://archive.mid.ru//brp_4.nsf/0/94D6676508BC6C4844257CA2005B0613)> accessed 7 August 2015; ‘Executive Order on Executing Agreement on Admission of Republic of Crimea into the Russian Federation’ (18 March 2014) <<http://en.kremlin.ru/events/president/news/20600>> accessed 7 August 2015.

<sup>99</sup> Christian Walter, ‘Postscript: Self-Determination, Secession, and the Crimean Crisis 2014’ in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and Secession in International Law* (OUP 2014) 304.

<sup>100</sup> *ibid.*

<sup>101</sup> Council of Europe Parliamentary Assembly Resolution 1988, ‘Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions’ (9 April 2014) para 12 <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20873>> accessed 7 August 2015.

<sup>102</sup> Eleanor Roosevelt, ‘The Universal Validity of Man’s Right to Self-determination’ (8 December 1952) 27 Department of State Bull 919.



as ‘incalculably explosive and disruptive’,<sup>103</sup> self-determination has not caused over the years the instability or disorganisation of the international society as some had predicted. In a great majority of cases, it has allowed people to liberate themselves from colonialism and alien domination. As the 21st century unfolds, the internal dimension of the right to self-determination becomes prevalent, a trend which aims to ensure the stability of international borders and coherence of the international legal system more generally. However, as the recent example of Crimea demonstrates, the right to self-determination is prone to abuse of becoming ‘all things to all men’.<sup>104</sup>

This article has examined the exercise of self-determination outside the decolonisation context in the light of developments of human rights law and the universalisation of democracy following the end of the Cold War. It has deconstructed the right to self-determination and its links to democratic governance. It is undeniable that any people entitled to the right to self-determination must exercise it freely, whether through a plebiscite, referendum, or some other agreed procedure. However, the imposition of a multi-party democracy as the form of government is not a requirement in positive international law for the exercise of the right to self-determination, even if many authors argue the point *de lege ferenda*. What international law requires for the exercise of self-determination is the existence of a government that is representative (not necessarily a multiparty democracy), that respects human rights, and that does not discriminate against the people entitled to the right to self-determination.

The international community is yet to witness the emergence of ‘a duty not only of the state concerned, but also of other states and international organisations, to ensure the respect of the rights of peoples freely to choose a government which *truly represents them* and reflects the expression of the will of the majority in free and fair elections’.<sup>105</sup> Yusuf explains that ‘such legal obligation of other states could consist of the withholding of recognition, individually or collectively, from governments which are not respectful of the will of their peoples or the suspension of their membership in universal or regional organizations’.<sup>106</sup> Against the ICJ’s silence in the *Kosovo* Advisory Opinion and Crimea’s annexation, it is hoped at a minimum that self-determination does not regress in time to ‘the sport of national or international politics’.<sup>107</sup>

<sup>103</sup> Rupert Emerson, *Self-Determination Revisited in the Era of Decolonization* (Harvard University Center for International Affairs 1964) 63.

<sup>104</sup> Higgins, *Problems and Process* (n 4) 128.

<sup>105</sup> Yusuf (n 26) 384 (emphasis in original).

<sup>106</sup> *ibid.* For the consequences of the breach of the right to self-determination on third parties, see *Wall* Advisory Opinion (n 12) para 159 (including the obligations of non-recognition and non-assistance).

<sup>107</sup> Jan HW Verzijl, *International Law in Historical Perspective*, vol I (A W Sijthoff-Leyden 1998) 324.