

**AN APPRAISAL OF THE LEGALITY OF UNILATERAL DECLARATIONS OF INDEPENDENCE:
DISTINGUISHING CRIMEA FROM KOSOVO***

Abstract

The question of whether Kosovo's unilateral declaration of independence from Serbia adopted on 17 February 2008 was in accordance with international law was submitted to the International Court of Justice for determination by the United Nations General Assembly. In its advisory opinion delivered on 22 July 2010, the International Court of Justice ruled that the declaration did not violate any applicable rule of international law.¹ This ruling has not only undermined the stability of international law, but has also created a loophole in international law which is unduly exploited by secessionist groups around the world. For example, Crimea's unilateral declaration of independence from Ukraine in 2014 was specifically premised on this ruling. This paper compared Kosovo's unilateral declaration of independence and Crimea's unilateral declaration of independence so as to find out whether the former justified the latter under international law. The research methodology adopted by the researcher is purely doctrinal, whereas analytical, descriptive and prescriptive approaches were employed. This paper found that unlike Kosovo's unilateral declaration of independence, Crimea's unilateral declaration of independence was a clear illegality because it violated a fundamental rule of international law: it was actualized via Russia's use of force against the territorial integrity of Ukraine. The paper therefore called on the United Nations General Assembly to seek the advisory opinion of the International Court of Justice on the legality of Crimea's declaration of independence so that the same will not serve as a precedent for other secessionist groups.

Keywords: Crimea, Declaration, Independence, International law, Kosovo, Unilateral

1. Introduction

A unilateral declaration of independence is a declaration of independence made without the concurrence of the parent state, but solely on the fiat of the emergent state. The question whether a unilateral declaration of independence is consistent with international law depends not on its unilateral character but on the circumstances surrounding it. A declaration of independence comes within the ambit of international law where the facts preceding it amounted to violation of any rule of international law; but where it violates no rule of international law, the declaration is deemed to be an internal matter of the relevant state in which neither the United Nations nor any other state could interfere with without a clear authorization of the affected state. But determining whether the circumstances surrounding a unilateral declaration of independence violate international law is a juridical duty, which can only be carried out by a judicial body or a quasi judicial body. Over the years, the International Court of Justice (ICJ) has been the principal judicial organ for making this determination, whereas the United Nations Security Council (UNSC) is the principal quasi judicial organ for making the determination.²

In practice, the UNSC is usually the first port of call whenever there is a unilateral declaration of independence being the body primarily saddled with the responsibility for maintaining international peace and security; and the UNSC has declared a number of such declarations illegal. A case in point is the unilateral declaration of independence of Rhodesia from United Kingdom by a racist minority in Southern Rhodesia in 1965 which the UNSC declared a nullity.³ Similarly, the UNSC declared the unilateral declaration of independence of Northern Cyprus from Republic of Cyprus by Turkish Cypriot Authority 'legally invalid'⁴ for being incompatible with international law.⁵ Where the UNSC failed to declare such declaration illegal, the affected state may approach the ICJ through the United Nations General Assembly (UNGA) for its advisory opinion on the legality of the declaration. Thus, at Serbia's request, the UNGA in October 2008 sought the advisory opinion of the ICJ on the legality of Kosovo's unilateral declaration of independence in international law following the failure of the UNSC to determine its legality. After reviewing the general international law, state practice and the UNSC practice vis-à-vis unilateral declaration of independence, the ICJ ruled on July, 22, 2010 that Kosovo's unilateral declaration of independence did not violate any applicable rule of international law.⁶ However, this ruling was not a blanket endorsement of unilateral declarations of independence in international law, since it was evident from the ruling that every unilateral declaration of independence shall be considered on its own merits. Hence, Crimea's unilateral

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¹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports, 2010, para. 122.

² Note that relevant regional and sub-regional organs also perform this duty within their spheres of authority.

³ S/RES/216 (1965) and S/RES/217 (1965).

⁴ S/RES/541 (1983).

⁵ The declaration violated the 1960 Treaty of Guarantee between Republic of Cyprus, Greece, Turkey and United Kingdom.

⁶ *Kosovo Advisory Opinion*, above at note 1 at para. 122.

declaration of independence from Ukraine in 2014, which was largely premised on the ICJ's ruling in *Kosovo Advisory Opinion case* shall be examined to determine whether it was on all fours with Kosovo's unilateral declaration of independence.

2. Meaning and Nature of State under International Law

The meaning of the word 'state' under international law is not the same with its meaning under municipal law, where it means any constituent part of a federal country, like the various states that make up the United States of America. A state under international law means the country itself. But for an entity to attain the status of a state in international law, it must satisfy certain criteria. Thus, under the Montevideo Convention, a state as an international person should possess the following qualifications: a permanent population, a defined territory, government and capacity to enter into relations with the other states.⁷ While possession of a permanent population, a defined territory or a government is easily ascertainable being objective in nature, possession of capacity to enter into relations with the other states is not easily ascertainable being subjective in nature, and as such, it demands a little clarification.

The capacity to enter into relations with the other states implies acceptance of the entity as a state by the existing states. This is because other states cannot enter into relations with the entity without first recognizing it as a state. Thus, according to Gardiner, the capacity to enter into international relations is 'the practical evidence of statehood in the international community is the acceptance by other states through recognition'.⁸ Recognition according to *Black's Law Dictionary* is the 'official action by a country acknowledging, expressly or by implication, *de jure* or *de facto*, the existence of a government or a country, or a situation such as a change of territorial sovereignty.'⁹ It is recognition that truly confers full international personality on an entity as a state because it is the acknowledgment of the political independence and sovereignty of the entity over the territory it occupies.¹⁰ It is also a direct signal to the parent state that the recognizing state has ceased to recognize it as the sovereign authority of the territory. It is for this reason that parent states always regard recognition as a hostile act. For example, Nigeria viewed Tanzania's recognition of the defunct Republic of Biafra as a hostile act and responded swiftly by withdrawing her diplomatic representatives from Tanzania. Nigeria also declared that the Tanzanian action was contrary to the Charter of Organization of African Unity and its principle of respect for the territorial integrity of member states.¹¹ Under the contemporary international law, political independence could either be attained by consensus or through unilateral declaration of independence.

3. Unilateral Declaration of Independence

A unilateral declaration of independence is a declaration of independence made without the consent of the parent state, but solely on the fiat of the emergent state. Although unilateral declaration of independence has been a recognized state practice since the American Declaration of Independence of 1776,¹² the phrase 'unilateral declaration of independence' was used first when the defunct Rhodesia declared its independence from the United Kingdom without the consent of the United Kingdom in 1965.¹³ Unilateral declaration of independence is theoretically founded on the notion of natural law and right as exemplified in the American Declaration of Independence whose first paragraph states as follows:

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the 'laws of nature' and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.¹⁴

In practice, a unilateral declaration of independence is usually resorted to where a consensual independence is practically unattainable, or made impossible by the state from which independence is sought because any state

⁷Convention on the Rights and Duties of States (Montevideo Convention) 1933, art. 1.

⁸R K Gardiner, *International Law* (London: Pearson Education Limited, 2003), p. 180.

⁹BA Garner *Black's Law Dictionary* (8th ed, Thompson West, 2004), p. 1299.

¹⁰H Lauterpacht, 'Recognition of States in International Law', *The Yale Law Journal*, Vol.53, No.3, 1944, pp. 385-458 at 420.

¹¹D A Ijalaye, 'Was "Biafra" at any Time a State in International Law?' 65 *AJIL* (1971), pp. 551-559 at 553-554.

¹²See also Irish Declaration of Independence of 21 January 1919.

¹³D Kenrick, *Decolonization, Identity and Nation in Rhodesia, 1964-1979: A Race against Time* (Springer Nature, 2019), p. 11.

¹⁴Rhode Island, *Public Laws of the State of Rhode Island and Providence Plantations* (Department of State, Office of the Secretary of State, 1822), p. 3.

that makes a consensual independence impossible where there is a legitimate cause for it, makes a unilateral declaration of independence inevitable.

But a mere declaration of independence by a section of a country does not *ipso facto* make it a state under international law unless it satisfies the Montevideo Convention criteria.¹⁵ Thus, most entities that unilaterally declared their independence failed to metamorphose into states. A recent case in point is Catalonia's unilateral declaration of independence from Spain on 27 October 2018.¹⁶ Although the said declaration was successfully carried out, Catalonia did not emerge as a sovereign state because of the failure of the Catalonian government to exercise exclusive authority over the region, as well as its failure to attract recognition from the members of the international community.¹⁷ Moreover, many states that survived unilateral declarations of independence merely existed as *de facto* states for a number of years before their eventual collapse, like the defunct Republic of Biafra which unilaterally declared its independence from Nigeria in 1967 and existed as a *de facto* sovereign state for about three years, albeit under a very excruciating and agonizing condition before its eventual collapse.¹⁸ The case was not different for the conservative white minority government of the then self-governing British colony of Southern Rhodesia, which unilaterally declared its independence as Rhodesia in 1965 and existed as a *de facto* sovereign state for fifteen years.¹⁹

The reason most states that came into being as a result of unilateral declaration of independence hardly survive as sovereign states is because of lack of support from the international community. As a matter of fact, most states detest unilateral declarations of independence because such declarations appear to be at variance with the immutable principle of territorial integrity. Moreover, recognizing such entities as states is usually viewed as interference in the internal affairs of the relevant state. It was for this reason that only 5 states²⁰ recognized the defunct Republic of Biafra as a sovereign state even though it existed for about three years.²¹ It shall be recalled that Article 2 (7) of the United Nations Charter provides that United Nations shall refrain from intervening in matters which are essentially within domestic jurisdiction of any state. Thus, the UNSC, which has the primary responsibility for the maintenance of international peace and security²² is always very circumspect in dealing with unilateral declaration of independence except where it threatens international peace and security, like Rhodesia's unilateral declaration of independence from United Kingdom in 1965, which the UNSC declared illegal and called upon all states to refrain from rendering any assistance to the Rhodesian government.²³ Similarly, the UNSC declared Northern Cyprus' unilateral declaration of independence from Cyprus in 1983 illegal and unlawful and called on all states to disregard it.²⁴

4. Kosovo's Unilateral Declaration of Independence

Kosovo's unilateral declaration of independence from Serbia was adopted on 17 February 2008 by the provisional institutions of self-government of Kosovo. Until then, Kosovo was an autonomous Province in the Republic of Serbia, one of the three emergent states after the break-up of Yugoslavia. This declaration was the height of chain of events which started around 1998 following the outbreak of Kosovo war. This war, which was heavily characterized by ethnic cleansing of Kosovo Albanians by the Serb led central government, created serious humanitarian crises in Kosovo. It took the military intervention of the North Atlantic Treaty Organization (NATO) to end the war and restored peace to Kosovo. In a bid to consolidate the fragile peace facilitated by NATO, the UNSC adopted resolution 1244 in June 1999, which established the United Nations Interim Administration Mission in Kosovo (UNMIK) pending the determination of the final status of Kosovo. But every effort made to determine Kosovo's final status was frustrated by Serbia, and this prompted Martti Ahtisaari, the United Nations special envoy for Kosovo, to propose on behalf of the UN Secretary-General, that Kosovo should become independent subject to a period of international supervision. But a European Union and United States backed UNSC draft resolution to implement the proposal was blocked by Russia via the instrumentality of 'pocket

¹⁵ J Vidmar, 'Conceptualization Declaration of Independence in International Law', *Oxford Journal of Legal Studies*, Vol. No. 1 (2012), pp. 153-177 at 153.

¹⁶ J H Elliot, *Scots and Catalans: Union and Disunion* (Yale University Press, 2018), p. 1.

¹⁷ D Muro et al, 'Does international Recognition Matter Support for Unilateral Secession in Catalonia and Scotland', *Nations and Nationalism*, 26 (2019), pp. 176-196 at 177.

¹⁸ J. Stremlau, *The International Politics of Nigerian Civil War 1967-70* (Princeton, 1977), pp. 177-179.

¹⁹ L. White, *Unpopular Sovereignty: Rhodesian Independence and African Decolonization* (University of Chicago Press, 23 Mar 2015), p.1.

²⁰ D A Ijalaye, 'Was "Biafra" at Any Time a State in International Law?' 65 *AJIL*, 1971, 551-559 at 554

²¹ *Ibid.*

²² United Nations Charter 1945, art. 24 (1).

²³ S/RES/216 (1965) and S/RES/217 (1965).

²⁴ S/RES/541 (1983).

veto.²⁵ Russia's position on Ahtisaari proposal was conveyed to the UNSC by Vitaly Churkin, Russian ambassador to the United Nations, during the UNSC's meeting held on 10 May 2007, where he stated as follows: plan based on that proposal would not only clearly set a negative precedent for international practice, but would also have dangerous consequences for regional and international stability: by rewarding separatism it would encourage that phenomenon in other regions, and could spark a chain reaction that would eventually affect regions throughout the world.²⁶

It was against the above official position of Russia, which left Kosovo with little or no hope of actualizing its independence by consensus that Kosovo opted for unilateral declaration of independence. As expected, Serbia rejected Kosovo's declaration of independence in its entity and termed it 'a flagrant violation of the Security Council resolution 1244,' and called on the UNSC to declare the declaration illegal,²⁷ but a Russia backed UNSC draft resolution aimed at declaring Kosovo's declaration of independence illegal was not adopted. Consequently, Serbia requested the UNGA to seek the advisory opinion of the ICJ on the legality of Kosovo's unilateral declaration of independence.

5. Legality of Unilateral Declaration of Independence in International Law

Unilateral declaration of independence is legally founded on the right of self-determination, which is the right of all people to freely determine their political status and freely pursue their economic, social and cultural development.²⁸ Although one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination,²⁹ the issue of whether the right of self-determination extends to right to unilateral declaration of independence in international law beyond the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, has continued to generate heated debate among scholars and jurists.³⁰ The opportunity the ICJ had to lay this issue to rest in *Kosovo Advisory Opinion case*³¹ was lost because the ICJ ruled that the issue was beyond the scope of the question posed to it by the UNGA.³² Even though the ICJ technically evaded the question of whether the right of self-determination extends to right to unilateral declaration of independence in international law beyond the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, there was no way it could evade the question whether international law prohibits unilateral declaration of independence, since it formed the essence of the question posed to it by the UNGA. For emphasis, the UNGA sought the advisory opinion of the ICJ on the following question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?' In answering this question, the ICJ examined the compatibility of unilateral declaration of independence with international law from three different standpoints. First, the ICJ examined the place of unilateral declaration of independence under the general international law. The ICJ specifically examined the scope of the principle of territorial integrity because the bulk of the arguments against unilateral declarations of independence border on their compatibility with the territorial integrity of the affected states. From the onset, the ICJ recalled that the principle of territorial integrity is an important part of the international legal order and is enshrined in article 2 (4) the United Nations Charter which provides that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

The ICJ also referred to the UNGA Resolution 2625 (XXV), which reflects customary international law.³³ In this resolution, the UNGA reiterated '[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'.³⁴ Finally, the ICJ referred to the Helsinki Final Act of 1 August 1975, in which the participating states declared that they 'will

²⁵ S/PV.5839, 18 Feb. 2008, p. 18 <<https://undocs.org/en/S/PV.5839> > accessed 3 March 2020.

²⁶ S/PV.5673, 10 May 2007, pp. 4-5 <<https://undocs.org/en/S/PV.5673>> accessed 3 March 2020.

²⁷ S/PV.5839, 18 Feb. 2008, p. 4, <<https://undocs.org/en/S/PV.5839>> accessed 3 March 2020.

²⁸ International Covenant on Civil and Political Rights 1966, art. 1 (1).

²⁹ *Kosovo Advisory Opinion*, above at note 1 at para. 82.

³⁰ D French, *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013), pp. 60-61.

³¹ *Kosovo Advisory Opinion*, above at note 1 at para. 122.

³² *Id.*, para. 83.

³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193.

³⁴ *Kosovo Advisory Opinion*, above at note 1 at para. 80.

respect the territorial integrity of each of the participating States.³⁵ After examining the scope of the principle of territorial integrity under the aforementioned sources of general international law, the ICJ noted that the principle is confined to the sphere of interstate relations and not intrastate affairs. This is because the primary function of international law is to regulate relations between states and not relations within states which are regulated by domestic laws.³⁶ Consequently, the ICJ concluded that the 2008 Kosovo unilateral declaration of independence is a matter within the domestic jurisdiction of Serbia, and so did not violate the territorial integrity of Serbia.³⁷

Secondly, the ICJ examined unilateral declaration of independence vis-à-vis state practice. The ICJ viewed state practice in relation to unilateral declaration of independence from two perspectives. On the one hand, the ICJ examined state practice during the eighteenth, nineteenth and early twentieth centuries,³⁸ and found that there were numerous instances of unilateral declarations of independence, often strenuously opposed by the State from which independence was being declared.³⁹ The ICJ specifically noted that some of these declarations resulted in the creation of new states, while some of them did not, and that in no case did state practice as a whole suggest that the act of promulgating unilateral declaration of independence was regarded as contrary to international law, but on the contrary, state practice during this period pointed clearly to the conclusion that international law contained no prohibition of unilateral declarations of independence. On the other hand, the ICJ found that during the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.⁴⁰ The ICJ observed that a great many new states came into existence as a result of the exercise of this right. Also, the ICJ noted that there were also instances of unilateral declarations of independence outside this context and that state practice in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a unilateral declaration of independence.⁴¹

Thirdly, the ICJ examined unilateral declaration of independence in relation to the practice of the UNSC because several participants referred to resolutions of the UNSC which condemned various unilateral declarations of independence. They particularly referred the UNSC resolutions 216 (1965) and 217 (1965) concerning Southern Rhodesia, the UNSC resolution 541 (1983) concerning northern Cyprus and the UNSC resolution 787 (1992) concerning the Republika Srpska. The ICJ noted that in all of those instances the UNSC was making a determination as regards the concrete situation existing at the time that those declarations of independence were made. The ICJ noted that the illegality attached to those declarations stemmed not from their unilateral character, but from the fact that they were connected with the unlawful use of force or other egregious violations of norms of general international law. But, in the context of Kosovo, the UNSC never condemned the declaration even though an emergency session of the UNSC was specifically convoked because of the declaration at the request of Serbia.⁴² This, according to the ICJ, was an indication that there was no general prohibition against unilateral declarations of independence by the practice of the UNSC.

After the foregoing examination of the applicable rules of international law vis-à-vis unilateral declaration of independence, the ICJ opined by ten votes to four that the unilateral declaration of independence of Kosovo adopted on 17 February 2008 did not violate any applicable rule of international law.⁴³ This opinion of the ICJ has continued to be the position of international law on the issue of legality of unilateral declaration of independence.⁴⁴

6. Crimea's Unilateral Declaration of Independence

Crimea's unilateral declaration of independence was the height of the second Ukrainian Revolution which began in February 2014. The immediate cause of this revolution was the impeachment of Viktor Yanukovich, the erstwhile President of Ukraine, on 22 February 2014 and the constitution of an Interim Government headed by Oleksandr Turchynov. While the European Union and the United States quickly recognized Turchynov's Interim Government, Russia did not only reject his Government, but also accused the European Union and the United

³⁵ Helsinki Final Act of 1975, art. IV.

³⁶R K Gardiner, *International Law*, above at note 8 at 180.

³⁷ *Kosovo Advisory Opinion*, above at note 1 at para. 80.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ See *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 102, para. 29.

⁴¹ *Kosovo Advisory Opinion*, above at note 1 at para. 79.

⁴²PV.5839 <<https://undocs.org/en/S/PV.5839>> accessed 3 March 2020.

⁴³*Kosovo Advisory Opinion*, above at note 1 at para. 122.

⁴⁴D French, *Statehood and Self-Determination: Reconciling Traditional and Modernity in International Law* (Cambridge University Press, 2013), pp. 60-61.

States of sponsoring the ouster of Yanukovich; and as such, Russia viewed the ouster of Yanukovich as a *coup d'état*. Indeed, Russia's position that the impeachment of Yanukovich was a form of *coup d'état* cannot be faulted since the relevant provisions of the 1996 Constitution of Ukraine were not complied with during his impeachment, like its Article 111 which provides that not less than two thirds majority of the constitutional members of the Parliament shall approve the impeachment.⁴⁵ His removal from office was therefore a clear case of parliamentary *coup d'état*. However, Russia's contention that Turchynov's Interim Government was illegal and illegitimate is not sustainable because a successful *coup d'état* is not illegal and illegitimate in international law. Hence, according to Hans Kelsen, '[t]he government brought into permanent power by a victorious revolution or a successful *coup d'état* is, according to international law, the legitimate government of the state, whose identity is not affected by these events.'⁴⁶

Although issues relating to the legality of Oleksandr Turchynov's Government are within the domestic jurisdiction of Ukraine, Russia began to openly incite the inhabitants of Crimea to revolt against Turchynov's government. Crimea is a peninsula in the Southern Ukraine with predominant ethnic Russian population. It comprised the Autonomous Republic of Crimea and the City of Sevastopol. Later on, some unidentified battle-ready military personnel, allegedly drafted by Russia, took over all the strategic positions in Crimea including the Crimean Parliamentary building. This propelled the Crimean Parliament to dissolve both the Supreme Council of Crimea (the Regional Parliament) and the Council of Ministers in violation of the Ukrainian Constitution. The Parliament at the same time appointed Sergey Valeryevich as its Prime Minister and called for a referendum on Crimean's independence, which was totally rejected by the Ukrainian Government, as well as the European Union and the United States. Hence, on 28 February 2014, Yuriy Sergeyev, the Permanent Representative of Ukraine to the United Nations, notified the UNSC of the deterioration of the situation in Crimea,⁴⁷ and on 29 February 2014 he gave the UNSC a holistic account of Russia's military actions in Crimea which violated his country's territorial integrity.⁴⁸

Emboldened by Russia's overt military support, the new pro-Russia Crimean Parliament went ahead with the scheduled referendum on 16 March 2014. The referendum asks voters in Crimea to choose between joining Russia or returning to the 1992 Crimean Constitution while theoretically remaining part of Ukraine. The 1992 Crimean Constitution, it shall be recalled was adopted immediately after the break-up of the former Soviet Union and was repealed shortly afterwards. This Constitution described Crimea as a sovereign entity that granted Ukraine only such powers as it sees fit.⁴⁹ Because the two options offered by the referendum were deliberately tailored to favour the pro-Russian secessionists, other inhabitants of Crimea who wanted Crimea to remain part of Ukraine were tactically compelled to stay away from the referendum since no rational option was offered to them.⁵⁰ Little wonder the official result of the referendum disclosed that over 96 percent of those who participated in the referendum voted in favour of unification of Crimea with Russia.⁵¹ Based on the outcome of the referendum, the Supreme Council of the Autonomous Republic of Crimea and the Sevastopol City Council unilaterally declared independence of Crimea on 17 March 2014, and concomitantly applied formally to join Russia.⁵² Expectedly, Russia did not only recognize Crimea's declaration of independence, but also hastily accepted its request to join Russia. Hence, on 18 March 2014 Russia and Crimea signed a treaty of accession under which Crimea and Sevastopol joined Russia as two separate regions.⁵³

⁴⁵C Marxsen, 'The Crimea Crisis: An International Law Perspective', *ZaöRV* 74 (2014), 367-391 at 375.

⁴⁶H Kelsen, *General Theory of Law and State* (New Jersey: The Lawbook Exchange, Ltd., 1945), p. 221.

⁴⁷S/2014/136, Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the UNSC.

⁴⁸S/P.V.712 4, p. 3.

⁴⁹See K Giles, 'Crimea's Referendum Choices Are No Choice at All', Chatham House, March 10, 2014 <<https://www.chathamhouse.org/media/comment/view/198079#>> accessed 3 March 2020.

⁵⁰R Balmforth, 'Crimea Referendum Forces Voters To Choose Between Full Or Partial Takeover By Russia', Reuters, March 12, 2014 <<http://www.businessinsider.com/richard-balmforth-crimea-vote-doesnt-offer-no-option-2014-3#ixzz3E2613iiC>> accessed 3 March 2020.

⁵¹P R Gregory, 'Putin's 'Human Rights Council' Accidentally Posts Real Crimean Election Results', *Forbes*, May 5, 2014 <<http://www.forbes.com/sites/paulroderickgregory/2014/05/05/putins-human-rights-council-accidentally-posts-real-crimean-election-results-only-15-voted-for-annexation/>> accessed 3 March 2020.

⁵²G Hewitt, 'Crimean Parliament Formally Applies to Join Russia', *BBC News*, March 17, 2014 <<http://www.bbc.com/news/world-europe-26609667>> accessed 3 March 2020.

⁵³C Walter, 'Postscript: Self-Determination, Succession, and the Crimean Crises 2014' In C Walter *et al.* (eds) *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), p. 298.

7. Legality of Russia's Military Intervention during Crimea's Declaration of Independence

Russia's military intervention during Crimea's declaration of independence was so obvious that Russia could not deny it. In fact, on 28 February 2014, Russian Council approved President Putin's request to deploy Russian Armed Forces to Crimea. Instead, Russia contended that its military invasion of Ukraine was justified under international law.⁵⁴ In the first place, Russia contended that its military intervention in Crimea was based on invitation. While defending this position on the floor of the UNSC, Vitaly Churkin, the Permanent Representative of Russia at the UNSC, stated that his country's military intervention in Crimea was predicated upon an invitation by Sergey Valeryevich, the Prime Minister of Crimea, for Russia's assistance in restoring peace to Crimea. The invitation, according to him, was supported by Yanukovich, the ousted President of Ukraine, whom Moscow still regards as the de jure President.⁵⁵ As we noted above, Russia's contention that Yanukovich was still the President of Ukraine is not sustainable in international law. This is because even though the ousting of Yanukovich from office was manifestly unconstitutional, it did not violate any rule of international law, and as such lie entirely within the exclusive domestic jurisdiction of Ukraine. Moreover, even if Yanukovich was still in office, he cannot legally enlist Russia's military assistance without the approval of Ukraine's Parliament.⁵⁶ Thus, Russia's argument that Yanukovich approved its intervention in Crimea was totally mischievous. Similarly, Russian's contention that Crimea's Prime Minister requested for its assistance to restore peace to Crimea is not sustainable under international law because at the time the so-called request was allegedly made, Crimea was still part and parcel of Ukraine; and as such, Russia could not legally enter into any external relations with the Crimean Prime Minister without the consent of Ukraine.⁵⁷

The second argument canvassed by Russia in support of its invasion of Crimea was the need to protect Russian citizens in Crimea. This view was espoused by Russia President, Vladimir Putin, while seeking the approval of Russian Council to deploy Russian Armed Forces to Ukraine. According to him:

[i]n connection with the extraordinary situation in Ukraine, the threat to the lives of citizens of the Russian Federation, our compatriots, the personnel of the military contingent of the Armed Forces of the Russian Federation deployed in the territory of Ukraine... I hereby submit to the Federation Council of the Federal Assembly of the Russian Federation a letter on the use of the Armed Forces of the Russian Federation in the territory of Ukraine pending normalisation of the public and political situation in that country.⁵⁸

Briefing the newsmen after Russian Council authorized Putin to use military force in the Ukrainian territory, the Chairperson of the Council, Valentina Matviyenko, noted that the Council urged the President 'to take exhaustive measures, all possible measures, to ensure the security of our citizens living in Ukraine.' Article 2(4) of the United Nations Charter prohibits the threat or use of force against the territorial integrity and political independence of any state, and this prohibition has been held to form part of *jus cogens* norms.⁵⁹ The only exception to this prohibition is the inherent right of individual or collective self-defence under Article 51 of the Charter. But this right of self-defence can only be utilized 'if an armed attack occurs against a Member of the United Nations.' Protection of citizens abroad is not envisaged under Article 51 of the United Nations Charter, and so cannot be a lawful defence for Russia's threat or use of force against the territorial integrity of Ukraine. Such claim could at best be categorized as self-help, which is one of the mischiefs that article 2 (4) of the United Nations Charter is meant to prevent.

However, some scholars have argued that the restrictive right of self-defence under the United Nations Charter exists side by side with the wider right of self-defence under customary international law, and indeed many states have put forward this argument as a justification for using force to protect their nationals abroad. But this argument also goes to no issues not only because of the constitutional character of the United Nations Charter,⁶⁰ but because any conflict between a customary law and treaty law like Article 2(4) United Nations Charter, shall be resolved

⁵⁴ O Merezhko 'Crimea's Annaxation by Russia - Contradiction of New Russia Doctrine of International Law', *ZaoRV* 77 (2015) PP.165-195 at 189 <https://www.zaoerv.de/75_2015/75_2015_1_a_167_194.pdf> accessed 3 March 2020.

⁵⁵ *S/P V.712 4*, p. 5.

⁵⁶ Constitution of Ukraine 1996, art. 85.

⁵⁷ J Vidmar, 'The annexation of crimea and the boundaries of the will of the people', *German Law Journal*, 16(3), 2015, pp. 365-383 at 365.

⁵⁸ 'Federation Council committees support Putin's letter on use of army in Ukraine', *Information Telegraph Agency of Russia*, 1 Mar 2014 <<https://tass.com/russia/721589>> accessed 3 March 2020.

⁵⁹ J A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', 32 *Mich. J. Int'l L.* (2011). pp. 215-257 at 253 <<https://repository.law.umich.edu/mjil/vol32/iss2/1/>> accessed 3 March 2020.

⁶⁰ R S Sobel, 'The League of the Nations Covenant and the United Nations Charter: An Analysis of Two International Constitutions', *Constitutional Political Economy*, Vol. 5 No. 2, 1994, 173.

in favour of the latter because the former is a general provision whereas the latter is a special provision. Thus, according to, Kolb and Gaggioli:

The application of the principle *lex specialis derogate generali* is not restricted to conflicts between conventional rules. It equally applies to conflicts between customary rules and treaty rules... Even though the rule applies to conflict of norm irrespective of their actual sources, it must be acknowledged that it is mostly in connection with conflict of norm between treaty law and customary law that the principle has been resorted to, thereby allowing the former to override the latter.⁶¹

However, there seems to be an emerging state practice justifying the use of force to protect citizens abroad following the consistent resort to use of force by states to protect their citizens abroad and the failure of the UNSC to declare such actions illegal. The most famous case was the use of force by Israel against the territory of Uganda to rescue some hostages held by Palestinian and other terrorists at Entebbe, following the hijack of an Air France. The UNSC debate in the case was inconclusive⁶² even though many states viewed this action as a violation of Uganda's territorial integrity. But notwithstanding this emerging state practice, Russia's military invasion of Ukraine remains a sheer violation of Article 2 (4) of the UN Charter because this emerging state practice 'only offer a very narrow justification for the use of force',⁶³ to rescue or to defend nationals abroad whose lives are under serious threat. On the Contrary, the intervention of Russia in Crimea was not a defensive action but an offensive action aimed at annexing Crimea,⁶⁴ and there is a total prohibition of use of force for pure territorial annexation both under the United Nations Charter and under customary law.⁶⁵ Thus, Russia's attempt to hide under the emerging state practice to justify the illegality of its intervention in Crimea is a mere ploy deployed to mislead the members of the international community.

Russia's military intervention in Crimea was also a breach of Russia's obligation under the 1994 Budapest Memorandum (Memorandum) between Ukraine and 3 veto-wielding members of the UNSC: Russia, United States and United Kingdom.⁶⁶ Under the Memorandum, Ukraine gave up thousands of nuclear warheads, which it inherited from the former Soviet Union, in return for *security assurance* from Russia, United States and United Kingdom.⁶⁷ Prior to the signing of the Memorandum, Ukraine had the world's third-largest nuclear weapons stockpile.⁶⁸ Of Course, if Ukraine did not give up its nuclear warheads, no state, including Russia, could toy with its sovereignty and territorial integrity. Russia cannot claim ignorance of its legal obligations *vis-à-vis* its security assurance to Ukraine under the Memorandum: Russia is obligated to refrain from the threat and use of force against the territorial integrity and political independence of Ukraine. This is in consonance with the principle of *pacta sunt servanda* (agreements must be kept) as provided in the Vienna Convention on the Law of Treaties.⁶⁹

Russia's military intervention in Crimea was predicated on two factors: its overwhelming military might over Ukraine following the latter's destruction of its nuclear warheads in 1994 pursuant to Budapest Memorandum and, more importantly, its veto power, which it used to keep the UNSC at bay over the matter. Indeed, on 15 March 2014 Russia arrogantly vetoed the United States' sponsored draft resolution,⁷⁰ which reaffirmed that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal.' The Draft Resolution also noted that Ukraine did not authorize the referendum on the status of Crimea.⁷¹ It is instructive to note that this Draft Resolution was so popular that all other members of the UNSC supported it except China, which

⁶¹R Kolb and G Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Northampton, MA: Edward Elgar Publishing, 2013), p.226.

⁶²M N Shaw, *International Law* (5th edn, Cambridge University Press, 2004), p. 363.

⁶³C Marxsen, above at note 45 at 374.

⁶⁴V Bílková, "The Use of Force by the Russian Federation in Crimea", *ZaöRV* 75 (2015), 27-50 at 45.

⁶⁵A C Arend, 'International Law and the Preemptive Use of Military Force', *The Washington Quarterly*, Spring 2003, 89-103 at 101.

⁶⁶O Merezhko, above at note 54 at 173.

⁶⁷T Atlas, 'Ukraine Gave Up Nuclear Arms in 1994 Deal Russia Flouts', *Bloomberg*, Mar. 5, 2014

<<http://www.bloomberg.com/news/2014-03-05/ukraine-gave-up-nuclear-arms-in-1994-deal-russia-flouts.html>> accessed 3 March 2020.

⁶⁸M Budjeryn, "Impeachment backstory: The nuclear dimension of US security assistance to Ukraine", *Bulletin of the Atomic Scientists*, November 13, 2019 <<https://thebulletin.org/2019/11/impeachment-backstory-the-nuclear-dimension-of-us-security-assistance-to-ukraine/>> accessed 3 March 2020.

⁶⁹Vienna Convention on the Law of Treaties 1969, art. 26.

⁷⁰S/2014/189, Mar. 15, 2014 <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7138> accessed 3 March 2020.

⁷¹S/P V.712 4 <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7124> accessed 3 March 2020.

voluntarily abstained from voting. If this Draft Resolution was adopted, Russia would not have annexed Crimea because the UNSC resolutions are binding on all Member States of the United Nations.⁷²

8. Unilateral Declaration of Independence: Distinguishing Crimea from Kosovo

Crimea's declaration of independence was predicated on the *Kosovo Advisory Opinion Case*⁷³ where the ICJ opined that international law does not prohibit unilateral declaration of independence. In fact, the preamble to Crimea's declaration of independence specifically referred to this case. Also, it should be recalled that Russia noted in 2008 that Kosovo's declaration of independence has 'set a dangerous precedence' in respect of declaration of independence.⁷⁴ A similar view was expressed by Judge Koroma in his dissenting opinion in the *Kosovo Case*, when he noted as follows:

International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent.⁷⁵

There is, therefore, a need to find out whether Kosovo's unilateral declaration of independence truly justified Crimea's unilateral declaration of independence as contended by many international actors. A careful juxtaposition of the two cases clearly shows that Crimea's declaration of independence was not on all fours with Kosovo's declaration of independence. It shall be recalled that in the *Kosovo Case*, the ICJ specifically noted that what makes a declaration of independence illegal stems not from its unilateral character, but from the illegality of events preceding the declaration. The ICJ specifically cited the cases of Rhodesia's unilateral declaration of independence of 1965 and Turkish Cypriot's unilateral declaration of independence of 1983, which were roundly condemned by the UNSC because of the illegality of the situations preceding them.⁷⁶ The ICJ also observed that any unilateral declaration of independence that violates any *jus cogens* norms is contrary to international law.

Unlike Kosovo's declaration of independence which was autochthonous, Crimea's declaration of independence was achieved through the direct Russian military intervention, which constituted a flagrant violation of Ukraine's sovereignty, territorial integrity and political independence. The prohibition of the use of force against the territory of another state is not just a fundamental rule of international law, but also a *jus cogen norm*.⁷⁷ As Vidmar noted '[a]ny change of the legal status of a territory becomes illegal, however, upon an outside use of force. Such an illegality cannot be 'cured' by a democratically expressed will of the people.'⁷⁸ It was this outside use of force before and during Crimea's declaration of independence that legally distinguished it from Kosovo's declaration of independence. Against this backdrop, it is submitted that the 2008 Kosovo unilateral declaration of independence does not constitute a valid precedent for Crimea's unilateral declaration of independence adopted on 17 March 2014 because of the illegality of the events preceding the latter, *to wit*, Russia's unlawful military intervention. In fact, it was Crimea's unilateral declaration of independence that has set a dangerous precedence and not Kosovo's unilateral declaration of independence as contended by Russia.

9. Conclusion and Recommendation

Unilateral declaration of independence is not unknown to international law because what makes a declaration of independence illegal is not its unilateral character, but the facts surrounding the declaration. It is only when the facts preceding a unilateral declaration of independence amounted to violation of rules of international law that such declaration of independence will be illegal under international law. Kosovo's unilateral declaration of independence from Serbia adopted on 17 February 2008 was not inconsistent with international law because the

⁷² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UNSC Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116.

⁷³ *Kosovo Advisory Opinion*, above at note 1 at para. 122.

⁷⁴ R Francois, 'Independence of Kosovo: does it set a dangerous precedent?', *ESISC*, 28 Feb. 2008 <<http://www.esisc.org/publications/analyses/independence-of-kosovo-does-it-set-a-dangerous-precedent>> accessed 3 March 2020.

⁷⁵ Dissenting Opinion of Judge Koroma, para. 4 <<https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-02-EN.pdf>> accessed 3 March 2020.

⁷⁶ See the following resolutions of the UNSC: S/RES/216 (1965), S/RES/217 (1965) and S/RES/541 (1983).

⁷⁷ J A Green, above at note 59 at 253.

⁷⁸ J Vidmar, 'The annexation of crimea and the boundaries of the will of the people', *German Law Journal*, 16(3), (2015), pp. 365-383 at 365.

facts surrounding its adoption did not violate any rule of international law.⁷⁹ On the contrary, Crimea's unilateral declaration of independence is a clear violation of international law because it was actualized via Russia's use of force against the territorial integrity and political independence of Ukraine contrary to the United Nations Charter and 1994 Budapest Memorandum between Russia and Ukraine. It is therefore recommended that the UNGA should formerly seek the advisory opinion of the ICJ on the legality of Crimea's declaration of independence so that the same will be officially declared a nullity; otherwise the same will serve as a dangerous precedent for other secessionist groups around the world.

⁷⁹ *Kosovo Advisory Opinion*, above at note 1 at para. 122.