

SELF-DETERMINATION: PEOPLE'S WILL OR STRATEGIC INTEREST?

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Introduction

Self-determination is an international norm which has developed relatively recently. It is an important basis for human rights and democracy, having greatly contributed to ending colonialism and apartheid. One striking aspect of this norm is that its interpretation and application are extremely diverse, and have evolved over time, intertwining international politics and law. In other words, the concept is multi-faceted and contains a significant degree of ambiguity, leading to a tendency of each actor to interpret and utilize it for their own interests.¹

Ambiguity pervades many aspects of this concept. Who is the “self”: people, nation or state? What are the subject and scope of the determination? How can the determination be attained, and under what conditions?

These are not only philosophical or legal questions, but also crucial questions for international security, as many armed conflicts have been and still are fought under the manifestation of self-determination. One of the recent examples is the annexation of Crimea by Russia, which has caused serious concern in the international community.²

This article analyzes how self-determination has been perceived and applied, focusing on strategic interests. In addition, several cases are studied to provide suggestions for attaining self-determination in a more harmonious way.

I. The Original Concept

The origin of the idea “self-determination” goes back to the French and American Revolutions.³ The concept is clearly reflected in the US Declaration of Independence signed in 1776, which stipulates that “to secure these rights (unalienable human rights), governments are instituted among men, deriving their just power from the consent of the governed.” The core of self-determination is the idea that people are not a property of the ruler and that governance should be conducted in accordance with the free will of the people. Freedom from repression by the ruler and democracy have a deep root in American liberalism, which can even traced back to Mayflower Compact in 1620.

¹ Alfred Cobban, *The Nation State and National Self-Determination*, Collins, 1969, p. 14; Dov Ronen, trans. Urano, *Jiketsu towa nanika (The Quest for Self-Determination)*, Tosui Shobo, 1988, p. 11.

² UN General Assembly Resolution (A/RES/68/262), for which 100 states voted in favor, 11 states voted against, and 58 states abstained.

³ Antonio Cassese, *Self-determination of Peoples*, Cambridge University Press, Cambridge, 1995, p. 11.

President Wilson, a firm believer in liberal principles, sought to use the principle of self-determination for peace and stability in Europe after World War I. Of his proposed “Fourteen Points” presented in 1918 as a blueprint for world peace, eight related to territorial issues including establishment and adjustment of frontiers according to nationalities. Although this basic idea itself can hardly be contested, both the geographic composition of nationalities and the strategic interests of the Allied Powers were too complex to enable its consistent application. Moreover, the concept can be utilized to challenge the *status quo*, leading to the breakup of the existing States and authorities. In reality, the Allied Powers used this concept during the post-WWI settlements on a pick-and-choose basis, considering their national interests and possible implications for stability and security.⁴

On the other hand, the idea of self-determination has a second, completely different root. During World War I, a leader of socialism, Lenin pursued self-determination from the perspective of class struggle. In his view, laborers had been exploited by bourgeoisie and should be freed from it by means of secession from the repressive authorities based on the popular will.⁵ Needless to say, his ultimate objective was the eradication of imperialism and the achievement of solidarity among newly-created entities under proletarian leadership.

Regardless of the apparent contrast between the two origins, self-determination is a convenient tool to justify a challenge to the *status quo*, as long as one is on the “self” side. Therefore, the scope and definition of “self” are crucial in any application of the concept. On that point, there are generally two schools of thought. One school focuses on the political unity of people, paying attention to subjective elements, such as political will to belong to a certain unit. The other school tends to focus on objective criteria, such as race, language, and religion.⁶

In addition, it is widely accepted that two aspects are involved in process of realizing self-determination. First, a group of people who identify themselves as the “self,” are entitled to make their own decisions on their political status without interference of outside actors. This is described as “external self-determination.” The second aspect, “internal self-determination” requires a mechanism to ensure that everyone in the unit can participate in the decision making and forming a will of the people⁷. This can be seen as the corollary to popular sovereignty and democracy. The former aspect, on the other hand, is closely related to non-interference, territorial sovereignty, and often used to justify independence from colonialism and secession. Thus, self-determination can be described as a “two-edged sword,”⁸ which can unite and disunite people.

⁴ The prioritization of national and strategic interests by Italy, France, and Britain could be seen in the transfer of South Tirol from Austria to Italy. Cobban, A., *op. cit.*, pp. 58-62.

⁵ Gen Kikkawa, *Minzokujiketsu-no Hateni (After National Self-Determination)*, Yushindo, 2009, pp. 53-56.

⁶ Yoshito Sumiyoshi, ‘Kokurenniokeru Jinmin no Jiketsukennni Tsuite’ (On Self-Determination of Peoples in the UN), *Houritsu Ronsou*, Vol. 51, No. 2-3, 1979, p. 39

⁷ Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, 1978, p. 14.

⁸ “It is a two-edged concept which can disintegrate as well as unify.” Clyde Eagleton, ‘Excess of Self-determination’, *Foreign Affairs*, July, 1953, p. 592.

II. *The League of Nations*

1. The Covenant of the League of Nations

In his Fourteen Points, President Wilson endeavored to create a “general association of nations” that would guarantee the political independence and territorial integrity of the states. He proposed to stipulate a principle of nationalities in fixing borders, the concrete wording of which was provided in negotiations on a covenant of the League of Nations. The idea was hardly implementable in view of the complex ethnic composition in Europe as well as the contradictory national interests of negotiating partners. Therefore, State Secretary Lansing strongly opposed the idea, stating that “the phrase (self-determination) is loaded with dynamite. It will raise hopes that can never be realized.”⁹ Later, Wilson himself admitted his naiveté in the Committee of Foreign Relations of the US Senate by saying that he used the word (a right of self-determination) “without the knowledge that nationalities existed, which are coming day after day.”¹⁰

2. The Case of Aaland Islands

Although Wilson’s proposal was rejected and the word “self-determination” was not contained in the covenant, the principle of self-determination was basically accepted by the member states of the League of Nations. The case of the Aaland Islands gives important clues as to how the international community understood the principle at that time and utilized it to resolve international disputes.

Historically, the Aaland Islands, together with the Finnish provinces, belonged to the Swedish Crown. In 1809, Sweden was forced to hand over Finland and the islands to the Russian Empire. Under Russian rule, the islands were administered as a part of the Grand Duchy of Finland. As the Russian Empire was dissolved by the 1917 revolution, Finland was able to achieve independence in 1918. Although the overwhelming majority of the residents of the islands speak Swedish, Finland claimed the title over the islands on the basis that the area had been incorporated in and governed as part of Finland under Russian rule. Most residents, fearful of a possible threat to their language and culture, wished to take this opportunity to become part of Sweden, which accepted their petition and brought the issue to the League of Nations in 1921. This was a typical case of conflicting claims of territorial integrity and sovereignty on one hand, and the will of the linguistic/ethnic minority population which has more communality with a neighboring state on the other hand.

The Council of the League set up a Committee of Jurists to give an opinion as to whether the case fell under the domestic jurisdiction of Finland and what measures could be recommended. According to the Committee’s report¹¹, “the principle of self-determination of peoples plays an important part in modern political thought,” but cannot be considered as having “the same footing as a positive rule of the Law of Nations.” The Committee noted that

⁹ Buchheit, *op. cit.*, pp. 64-66; Cassese, *op. cit.*, p. 22.

¹⁰ Cobban, *op. cit.*, pp. 64-65.

¹¹ Report of the International Committee of Jurists, *Official Journal*, League of Nations, October 1920.

the grant or refusal of the right of national groups to determine their own political fate is a matter of domestic jurisdiction in normal situations. However, it also noted that Finland was a State created as a result of a revolution, and that the transition from *de facto* existence to *de jure* State could not be viewed as a normal situation. As a result, the Committee identified the League's competence to deal with the issue and recommended that the effect of the principle of self-determination "must be taken into account in the interest of the internal and external peace of nations." This case is noteworthy as it was one of the first interstate disputes settled by an international organization.¹²

In the Council debate, this case was understood as an issue "based on the right of people to dispose of their own destinies, proclaimed by President Wilson."¹³ After detailed consideration of the historical background, the residents' wishes, and relevant security implications as well as consultations with the two States, the Council adopted a unanimous resolution¹⁴ recommending an agreement that provided for the islands' autonomous status in Finland, guarantee of their Swedish language and tradition, restrictions on immigration and land-purchase by persons other than inhabitants, and an international monitoring mechanism. It was accepted by both States and has become a model case of peaceful dispute settlement on self-determination and minority issues.

III. *The United Nations (UN) and the End of Colonialism*

1. The UN Charter

The principle of self-determination, which gained prominence as a political idea in the League of Nations, became an international norm by means of its reference in the UN Charter. The insertion of a paragraph on self-determination was proposed by the Soviet Union.¹⁵ The debates on the paragraph seems to have focused primarily on whether self-determination implies the right of secession based the people's will. The lack of clarity in the terms "state", "nation", and "people" added confusion to the debates. Belgium, concerned about possible secession of its minority population, proposed an amendment with a view to preventing such an interpretation. However, the proposal was rejected after a brief discussion, leaving a vague explanation that self-determination applies to "states, nations, and peoples" without any definition of these three words.¹⁶ Thus, the original Soviet proposal became Article 2. Paragraph 4 of the Charter without any modification.

¹² Remarks on the Aaland Islands Solution by Ms. Patricia O'Brien, Under-Secretary General for Legal Affairs, UN, January 17, 2012.

¹³ Report Presented to the Council of the League of Nations by the Commission of Rapporteurs, LN Council Document, B7 21/68/106 (1921), p. 1.

¹⁴ The Aaland Agreement in the Council of the League of Nations, *League of Nations Official Journal*, September, 1921.

¹⁵ Ruth B. Russel, *A History of the United Nations Charter*, The Brookings Institution, Washington, D. C. 1958, p. 811. The proposed wording as one of the purposes of the UN was "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."

¹⁶ *Ibid.*, pp. 810-813.

It is extremely difficult to define the intended scope of application and who constitutes “people.” In fact, a Special Rapporteur of the UN, while recognizing the risk that the ambiguity might allow the principle to be used against territorial integrity or to justify the aggressive motivation of foreign countries, admitted that any definition becomes useless once a people becomes aware of being a “people”.¹⁷ Setting aside the ambiguity of the terminology, two aspects should be kept in mind. One is the fact that self-determination is not set as an objective in itself in the UN Charter, but respected as a foundation to achieve friendly relations among nations. The other is that self-determination is coupled with the equal rights of peoples, thereby leading to the principle of mutual respect among States, State sovereignty, and non-intervention.

2. Two Declarations and Two Covenants

In reality, self-determination was most often utilized as a tool to end colonialism. The UN Charter provides a mechanism on how to deal with colonies and divides them in two categories, trusteeship and non-self-governing territories, the latter not being expected to become independent. But the passion and desire to end colonialism outstripped the system built in the Charter, and the worldwide anti-colonial movement led to the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the General Assembly (GA) in 1960.¹⁸ It stipulates that self-determination is not just a principle but a right held by all peoples, and that administrative powers should transfer all power to the peoples of trust and non-self-governing territories so that they can freely determine their political status.

In addition, two Human Rights Covenants were adopted in 1966, both of which contain the famous common Article 1, which reads as follows: “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.” For the first time, this statement made a clear link between the right of a group as a “people” and human rights of individuals; a link that tends to emphasize the internal aspect of self-determination, namely participation of individuals in decision making. This link also made it clear that the right of determination is not just a one-time right utilized to gain independence, but a continuous right to ensure the expression of will in political and economic affairs.

Furthermore, in 1970, another declaration on self-determination¹⁹ was adopted in the UN GA, which stipulates that alien subjugation, domination, and exploitation constitutes not only a violation of self-determination but a denial of human rights, thereby fueling external self-determination. This declaration also offered several concrete choices for peoples under colonialism, such as an independent State, free integration with an independent State, or any other political status. The 1970 Declaration borrowed many wordings from the 1960 Declaration, but it should be noted that there is one important difference resulting from the progress of anti-colonialism and the confrontations between the democratic West and the socialist East. During the period, many new States were established and superpowers tried to

¹⁷ Aureliu Cristescu, *The Right to Self-determination: Historical and Current Development on the Basis of the United Nations Instruments*, United Nations, 1981, p. 40.

¹⁸ A/RES/1514 (XV).

¹⁹ A/RES/2625 (XXV), which is entitled “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”.

bring them into their own bloc. Understandably, peoples who had long suffered from colonialism had greater sympathy with socialism and tended to apply authoritative form of governance or socialist dictatorship. For the West, such a situation was not only contrary to their political philosophy and strategic interests, but also an apparent denial of internal self-determination. Therefore, they slightly modified the wording of the 1960 Declaration and inserted an implicit requirement to safeguard internal self-determination while exercising external self-determination. The relevant clause of the 1970 Declaration reads as follows:

“Nothing in the foregoing paragraphs shall be construed as authorizing... any action... which dismembers... the territorial integrity... of sovereign States, conducting the principles of equal rights and self-determination... thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”²⁰ It should be interpreted that the government is recognized as representing the people only when all members of the population are guaranteed the equal right of political participation.²¹

Regardless of such efforts, the application of the right of self-determination from the 1950s to 1970s was focused on anti-colonialism and external self-determination, which was materialized by way of independence. Upon the granting of independence, fixing territorial borders is a crucial and tricky issue especially when colonial borders did not match the ethnic composition. Therefore, the International Court of Justice (ICJ) made a clear judgment in the Frontier Dispute Case, that the principle of *uti possidentis juris* (administrative boundaries in colonial territories being transformed into international frontiers) is an established principle of international law for general application, whose purpose is to prevent risks to disputes and conflicts over frontiers which might threaten the independence and stability of newly independent States²². Thus, most cases of independence followed this judgment.

3. The Case of Comoros

One interesting exception is the case of Comoros. The Comoro archipelago and its population were governed by France. France agreed to permit independence by referendum, which took place in 1974. The vast majority of the entire population favored independence, but two-thirds of the votes cast by residents of the Mayotte Island were negative. When a constitution for a new state was drafted, the French Parliament enacted a law admitting independence and providing the people of Mayotte for a choice between remaining a part of France or being integrated with the newly independent state. Thus, a referendum in Mayotte was planned.

The representative of the Comoros strongly criticized the separate referendum, claiming that it infringed upon territorial integrity and national unity.²³ This stance was strongly supported by many African countries, as they had been forced to follow *uti possidentis juris* by respecting colonial borders that were created without any consideration on ethnic, linguistic, and religious differences. Fearing that other secession movements might emerge, if such a separate vote would be allowed, they proposed a resolution²⁴ in the Security Council (SC) to

²⁰ Underline by author

²¹ Cassese, *op. cit.*, p. 112.

²² *Frontier Dispute (Burkina Faso vs. Republic of Mali)*, Judgment, I.C.J. Report, 1986, pp. 565-567.

²³ S/PV. 1886, and S/11953.

oppose the planned referendum. However, it was rejected by a French veto, and the Mayotte Island was separated from the Comoros based on the outcome of the referendum. This development shows the incoherence of the practices in the international community, when the people's will and the principle of territorial integrity contradict.

4. The Case of East Timor

Another outstanding case is that of East Timor. In the colonial period, the island was administered by the Netherlands and Portugal. The two states concluded an agreement to divide the island; West Timor was governed by the Netherlands and East Timor by Portugal. After World War II, Indonesia declared independence and integrated West Timor in it. As the dictatorial Portuguese Government insisted on the continuation of colonialism, East Timor remained under its administration. With the revolution in Portugal in 1974, an independence movement started in East Timor, but then Indonesia occupied the territory by use of force in 1975. This was considered as a denial of the right of self-determination and territorial integrity, and contrary to the principle of *uti possidentis*. The SC and GA of the UN adopted a resolution calling for the respect of territorial integrity and self-determination and requesting Indonesia to withdraw its forces immediately.²⁵ Nevertheless, Indonesia claimed that East Timor traditionally constitutes a part of its territory and ignored the resolution.

Although additional resolutions were adopted in the following years, it became evident that the strong objections to and criticism against Indonesia's action were fading out year by year. In fact, the language in the resolutions continued to be watered down and the support to the resolutions tended to decline.²⁶ For instance, the last GA resolution on this issue (A/RES/37/30) contained neither a request for withdrawal nor a criticism of the Indonesian occupation, and it had only 50 votes in favor, with 46 States against, and 50 States abstaining. The fact that the US, Canada, Australia, and many Asian countries opposed to such a soft resolution may be explained by the strategic importance of maintaining amicable relations with Indonesia; for the Western states, blocking independent movement by a leftist group might have overridden the right of self-determination in view of the strategic interests in the Cold War era.

This case serves as another example that the consideration of national and strategic interests might hinder the universal and coherent application of self-determination.

IV. Post-Colonialism

By 1980, two decades after the 1960 Declaration was adopted, the number of UN member states increased to 154 in 1980, or three times the original members. While decolonization seemed to have almost completed, a new type of application of self-determination emerged, which was triggered by the end of the Cold War. The most notable cases were the dissolution of the Union of Soviet Socialist Republic (USSR) and the Socialist Federal Republic of

²⁴ S/11967. France voted against it; the UK and the US abstained.

²⁵ S/RES/384, which was adopted unanimously, and A/RES/3485 (XXX) (Y70-N10-A43)

²⁶ A/RES/31/53 (Y68-N20-A49), A/RES/32/34 (Y67-N26-A47), A/RES/33/39 (Y59-N31-A44), A/RES/34/40 (Y62-N31-A45).

Yugoslavia (SFRY).

1. The Cases of USSR and SFRY

The USSR was structured as a federal state formed by agreements among republics based on their free self-determination. Therefore, its Constitution provided for the right of republics to freely secede from the USSR.²⁷ Although no concrete procedure for secession were stipulated, most of the republics that wished to secede voluntarily conducted a referendum to demonstrate legitimacy. From a perspective of legal procedure, though, the series of declaration of independence made by the republics were outside the legal framework.²⁸ This raised an issue of state recognition.

Like the USSR, the Constitution of the SFRY provided for secession, but explicitly required an agreement of all the republics to change borders.²⁹ Although ethnic Serbs accounted for 40% of the entire SFRY, they constituted a majority only in the Republic of Serbia. Therefore, other republics, each of which had their own majority population, desired independence, but the SFRY, politically led by the Republic of Serbia, strongly resisted secession, which triggered armed conflicts fueled by ethnic hatred.

2. The Reaction of the European Community

European countries were deeply involved in the conflicts in the SFRY. Concerned about the deteriorating situation, the European Community took several innovative measures. One of them was an arbitration commission, “Badinter Commission,” established in the framework of the Peace Conference on Yugoslavia. European countries strongly criticized an attempt to change borders by force, and they expressed a determination not to accept a policy of *fait accompli*. The Commission, composed of five jurists, provided legal opinions on secession and state recognition.

The second innovative measure was the establishment of common guidelines on the recognition of new States in the SFRY and USSR,³⁰ which was agreed on December 16, 1991. The most interesting aspect of the guidelines is that the respect for “the rule of law, democracy and human rights” as well as for “rights of ethnic and national group and minorities” were stipulated among the conditions for the recognition of States. With this statement, democracy and the rule of law, the basic components of the “governance of governed” (i.e., internal self-determination), were made a clear precondition for independence (i.e., external self-determination). It can be said that the internal and external self-determination got inseparable and became two sides of one coin. This was an enormous deviation from the traditional principles regarding State recognition,³¹ which does not consider the degree of democracy as a

²⁷ Article 72 of the Constitution; Cassese, *op. cit.*, p. 266.

²⁸ *Ibid.*, p. 266.

²⁹ *Ibid.*, p. 269.

³⁰ Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, whose text was submitted to the UN GA and contained in A/46/804 (annex).

³¹ According to The Montevideo Convention on Rights and Duties of States, the qualifications for a state are (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with the other States.

requirement for a State. In addition, the guarantee of minority rights was included as another condition, probably because of the fear that confrontation among ethnic groups might destabilize not only domestic situations but also the entire region. The declarations of independence also required conducting a referendum and respecting the basic documents of EC. This seems to have changed the traditional practice of state recognition from an objective and legal judgment based on facts, into an action designed to achieve foreign policy goals.³² On one hand, it can be seen as an effort to achieve unity and stability in Europe and to promote respect for human rights and democracy. On the other hand, critics view the setting of political conditions as a value judgment³³ and a revival of Eurocentric imposition of its own standard of civilization.³⁴ It is undeniable that this precedent, in one way or another, paved the way for a more flexible and policy-oriented approaches to the recognition of States.

3. The Case of Kosovo

Probably one of the most controversial cases related to self-determination and secession has been the independence of Kosovo, about which uncountable research and analysis have been conducted. Kosovo was once a center of the Kingdom of Serbia, but was occupied and governed by the Ottoman Empire from the late 14th to the early 20th century. When Serbia regained its control by means of victory in the Balkan War, the region was mostly inhabited by Albanians as a result of immigration under the Ottoman Empire. After World War II, Kosovo formed a part of the Republic of Serbia inside the SFRY. For about 40 years, it enjoyed an autonomous status, ranging from the constitutional court to its own parliament. But when President Milosevic amended the Constitution to abolish this special status, a movement to regain autonomy started. As this movement was often repressed by the use of force, the demands by the Albanian population escalated from autonomy to independence. The confrontation was intensified with the creation of the Kosovo Liberation Army (KLA), involving ethnic cleaning and terrorism. After NATO's military intervention and a round of mediations, a cease-fire was finally agreed and the UNSC resolution (S/RES/1244) was adopted to set up a tentative framework for stability in the region. It involved the deployment of an international civil and security presence for interim administration as well as the start of a political process with a view to achieving a final solution that would provide for substantial autonomy for Kosovo, maintaining the principles of sovereignty and territorial integrity of Serbia. A Special Envoy of the UN Secretary-General was also appointed to facilitate the process.

Despite these international efforts to achieve a final political solution, fundamental differences between Serbia and Kosovo hindered an agreement. Therefore, in 2007, after eight years of this tentative framework, the UN Special Envoy proposed that the independence of Kosovo would be the only viable solution.³⁵ His findings indicated that the people of Kosovo

³² Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', *European Journal of International Law*, Vol. 4 No. 1, 1993, p. 56. It is also analyzed that the decisive factor of prompt recognition of new states by EC was the recognition that the heavy loss of human lives and hundreds of thousands of refugees constituted an "imminent threat and instability to regional security." Dajena Kumbaro, *Final Report: The Kosovo Crisis in and International Law Perspective*, Office of Information and Press, NATO, June 16, 2001.

³³ *Ibid.*, pp. 56-57.

³⁴ Takane Sugihara, *Kokusaiho-Kougi (Lectures on International Law)*, Yuhikaku, 2008, pp. 203-204.

were increasingly taking responsibility for managing their own affairs, but that uncertainty about their future status was hindering economic and financial development, thereby contributing to social instability. His proposal was objected by some important actors, such as Serbia and Russia. However, in February 2008, Kosovo unilaterally made a declaration of independence. The US, Germany and other European countries immediately recognized it as a new state, while Russia and Serbia strongly criticized it, claiming that the independence was contrary to the UNSC Resolution 1244, which reaffirmed the commitment to sovereignty and territorial integrity. They also emphasized that there is no right of secession under international law. Serbia proposed a resolution in the GA for requesting the ICJ to provide its advisory opinion on the legality of the unilateral declaration of independence.³⁶ The question posed to the ICJ was as follows: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” The reaction to this proposal was divergent, dividing across regional and political groups.³⁷ Some States opposed the proposal, saying that it might open the door for others to seize on opinion’s language to bolster claims for secession. Others expressed concerns that it was not a constructive way to stabilize the situation or that this special case should not be generalized. Nevertheless, many States supported the proposal, claiming respect for international law or hoping that the opinion would block state recognition. Finally, the resolution was adopted with many abstentions.³⁸

It also brought about a rare occasion where many States expressed their official and detailed interpretations on such sensitive and delicate issues as the right of self-determination and secession. The views expressed by States were extremely diverse.³⁹ China, for example, claimed that the scope of self-determination is limited to colonial domination and foreign occupation. While Cyprus completely denied the right of secession, Poland contended that the right of self-determination may entail secession as a last resort under extreme situations such as genocide (so-called “remedial secession”). Interestingly enough, Russia, in its written statement of April 16, 2009, accepted the notion of “remedial secession,” while denying its application to Kosovo. This attitude seems to have been impacted by other ethnic conflicts, wherein it was deeply involved, as shown below.

In its advisory opinion, the ICJ, while admitting that “radically different views were expressed” on “remedial secession,” stated that “it is not necessary to resolve these questions in this case.”⁴⁰ It also noted that general international law contains no applicable prohibition of the declarations of independence,⁴¹ and that the declaration made by “the democratically elected leaders of our people” in Kosovo should be seen as an act outside the framework created by Resolution 1244.⁴² Thus, it concluded that the declaration violated neither the resolution nor

³⁵ S/2007/168.

³⁶ GA/10764.

³⁷ The debate on the draft resolution is contained in A/63/PV. 22.

³⁸ A/RES/63/3 (Y77-N6-A74).

³⁹ For written statements by various States, see <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&code=kos&p3=1>

⁴⁰ *Accordance with International Law of Unilateral Independence of Kosovo, Advisory Opinion*, I.C.J Reports, 2010, July 22, 2010, paras. 82-83.

⁴¹ *Ibid.*, para. 84.

⁴² *Ibid.*, paras. 107-109.

the international law. In essence, the advisory opinion left two messages: (1) a unilateral declaration of independence is not a violation of international law, and (2) the legality of the “remedial secession” remains extremely unclear. It is not easy to assess whether or to what extent it has encouraged separatist movements around the world, as the Kosovo case is unique in many aspects. Nonetheless, it is undeniable that it gave separatists more leeway in interpreting the right of self-determination.

4. South Ossetia and Abkhazia

Kosovo's unilateral declaration of independence can be seen as having had some centrifugal effects. One example can be seen in Georgia, a former republic of the USSR. South Ossetia and Abkhazia, each of which had an autonomous status, tried to secede from Georgia in several occasions. In 1991, hostilities broke out between Georgia and South Ossetia. Russia brokered a cease-fire, and peace-keeping operations involving all three parties began. Although South Ossetia had a historical connection with Russia, the new President of Georgia, after the “rose revolution” in 2003, pledged to regain central government authority over the separatist regions,⁴³ and deployed more police and intelligence officers. He took a course toward seeking close cooperation with Western Europe, such as a future membership in NATO. In April 2008, NATO decided to admit Ukraine and Georgia as a future member of NATO.⁴⁴ This decision is considered to have had significant influences on fragile situations in the region. For Russia, it demonstrated a threat of further expansion of NATO.⁴⁵ For Georgia, it might have given an impression that NATO would be on its side and would assist it in case of war.⁴⁶ These developments caused an escalation of tension and triggered massive hostilities by both sides, notably military attacks on South Ossetia villages by Georgian forces on August 07, 2008.

On August 8, the Russian President officially stated⁴⁷ that “Russia has historically been a guarantor for the security of the peoples of the Caucasus,” and accused the attacks by the Georgian troops on Russian peace-keepers and the civilian population of South Ossetia as an act of aggression as well as a gross violation of international law. Russia initiated a military intervention and occupied the bulk of the region within a few days. Brokered by the EU, a six-point peace plan⁴⁸ was agreed upon within a week, which included the withdrawal of forces to pre-conflict positions, while allowing “additional security measures.” France proposed a draft resolution⁴⁹ in the SC for getting global endorsement of this peace plan. On August 19, the Russian representative rejected it by arguing that the draft resolution had been motivated by NATO for propaganda purposes and that it contains only two of the six points in the peace

⁴³ Jim Nichol, *Russia-Georgia Conflict in August 2008*, Congressional Research Service, March 03, 2009, pp. 2-3.

⁴⁴ Bucharest Summit Declaration, April 03, 2008, para. 13.

⁴⁵ Keiichi Hirose, *Kironitatsu- NATO (NATO at a cross-road)*, Japan Institute of International Affairs, 2010, pp. 24-26.

⁴⁶ Sebastian Schaeffer, ‘The Kosovo Precedent’, *Caucasian Review of International Affairs*, 2009, Vol. 3, No. 1, pp. 108-110.

⁴⁷ Statement by President Medvedev on the Situation in South Ossetia, August 08, 2008.

⁴⁸ <http://www.smr.gov.ge/docs/doc111.pdf#search=France+South+Ossetia+six+point+peace+plan>

⁴⁹ *Repertoire of the Practice of the Security Council*, 16th Supplement (2008-2009). The draft resolution was not circulated as an official document, but can be found at <http://www.cfr.org/international-organizations-and-alliances/un-resolution-georgia-draft/p16935>

plan.⁵⁰ The real reason of the rejection, however, seems otherwise: while the peace plan excludes the principle of territorial integrity of sovereignty, the draft resolution clearly stated it in the first paragraph. Based on the fact that the Russian President recognized statehood of South Ossetia and Abkhazia just one week after the deliberations in the SC, it can be analyzed that Russia could not accept the wording on territorial integrity.

To justify this state recognition, the Russian President emphasized in his official statement⁵¹ on August 26 that the Georgian President, under the motto of “Georgia for Georgians,” had opted for genocide and “dashed all hopes of peaceful coexistence.” In his view, the peoples in the two regions have “the right to decide their destiny by themselves” in accordance with the UN Charter and UNGA Declarations, and this was the only possible choice to save human lives. Although Russia stated that it was not deviating from its position against the unilateral independence of Kosovo, the logic in legitimizing its own state recognition to South Ossetia and Abkhazia seems to have exactly followed Kosovo’s case as one of “remedial secession.” This is probably the reason why Russia expressed a favorable position on “remedial secession” in its written statement to the ICJ in April 2009.

The discussion in the SC after the state recognition was one of the most acrimonious discussions.⁵² Many member states criticized Russia, calling its military intervention a violation of the UN Charter, and viewing its state recognitions as a denial of the territorial integrity and sovereignty of Georgia. The Russian representative refuted the criticism by drawing a comparison between this case and the Kosovo’s case, claiming that NATO had used its forces without SC authorization and that many States already recognized Kosovo as a State, neglecting the SC Resolution 1244, which stipulated respect for state sovereignty and territorial integrity. It may be that Russia wished to punish the West for recognizing Kosovo.⁵³ In addition, Russia’s security and strategic interests in stopping a possible NATO expansion, and its economic interests in gas and oil pipelines in Georgia might have played additional important roles.

The cases of Kosovo and South Ossetia may appear to have some common elements: (a) ethnic and historical differences from other parts of the country, (b) extensive autonomy and special status in the past, (c) shrinking autonomy and a sense of threat, and (d) surfacing of mistrust and escalation of tension amidst the dissolution of a rigid federal framework. Nevertheless, there are enormous differences. In Kosovo, large-scale military attacks were conducted by the Serbian authorities with a clear objective of ethnic cleansing and forced displacement. Moreover, extensive global efforts were conducted with the hope of sustaining the unity of the state, including international administration mechanism that lasted for nearly a decade. This evidence suggests that all the avenues available were tested. These differences explain the sharp discrepancy in the number of state recognitions between Kosovo and South Ossetia.⁵⁴ This case can serve as another example demonstrating that the strategic interests of major States can strongly influence the way of application of self-determination, leading to

⁵⁰ S/PV. 5961, p. 13.

⁵¹ Statement by the Russian President on major issues, August 26, 2008.

⁵² S/PV. 5969.

⁵³ Nichol, *op. cit.*, p. 12.

⁵⁴ According to Ministry of Foreign Affairs of Japan, as of May, 2014, 107 States had recognized Kosovo as a State, whereas only five States recognized South Ossetia, according to the Max Plank Encyclopedia of Public International Law, January, 2013.

armed conflicts in the worst cases.

V. *The Present Situation*

There are still many claims for the right of self-determination, such as those of the Kurdish population, Palestinian people, and Tibetan people. A case that recently concerned the international community most gravely seems to be independence of Crimea and its annexation by Russia.

Crimea and Sevastopol were territories of the Republic of Russia in the former USSR. They were transferred to the Republic of Ukraine in 1954 without consulting the residents in the region. In the process of the dissolution of the USSR in 1991, Russia and Ukraine negotiated to fix the border between the two republics, and agreed that Crimea was a *de facto* and *de jure* Ukrainian territory.⁵⁵ Russia expected that the two states would remain good neighbors, and that the ethnic Russians in Crimea would enjoy minority rights. In Ukraine's 1992 Constitution, Crimea was defined as an independent state within the country, but the Constitution was amended to degrade its status to an autonomous republic.⁵⁶

From the geo-strategic viewpoint, Ukraine is of crucial importance in the region. As the expansion of the EU and NATO proceeded, Ukraine was caught between NATO/EU members and Russia. Russia has held the right to use the port of Sevastopol as a military base of its Black Sea fleet until 2017 in accordance with the bilateral agreement signed in 1997. Ukrainian President Yushchenko, who hoped to join NATO, announced that Ukraine would not extend the lease of the port. To secure the continuous use of the military base, Russia made a concession by offering Ukraine a 30% discount on Russian natural gas in 2010. This shows the crucial importance of Sevastopol to the Russian military.

In addition, Ukraine, with nearly 20% ethnic Russian citizens, has experienced internal tension between pro-Europeans and pro-Russians, causing domestic political instability. For example, pro-NATO President Yushchenko succeeded in gaining future NATO membership status in 2008, as stated above. Just two years later, the next President, Yanukovich introduced a domestic law prohibiting a participation in any military alliance.⁵⁷ The fall of his government after massive protests caused domestic unrest and violence by pro-Russian citizens and triggered Russian military intervention.

The movement for independence was surprisingly quick. Just one month after the fall of the Yanukovich regime, both the parliament of Crimea and the City Council of Sevastopol declared independence and expressed their desire to be integrated with Russia. A referendum was conducted immediately, and it is reported that 96% of the voters were in favor of integration. The Russian side immediately enacted a constitutional law to annex the two regions.⁵⁸

Many UN member states criticized the military intervention by Russia as an unlawful use

⁵⁵ President Putin's address to State Duma deputies at the Kremlin, March 18, 2014.

⁵⁶ Speech by the Russian Permanent Representative to the UN, A/68/PV. 80, p. 3.

⁵⁷ Overview of Ukraine, Embassy of Japan in Ukraine, as of October 2011, http://www.ua.emb-japan.go.jp/jpn/info_ua/overview/6defence.html

⁵⁸ President Putin's address, *op. cit.*

of force that neglected territorial integrity and sovereignty of Ukraine.⁵⁹ Before the referendum, a draft resolution was submitted in the SC, reaffirming its commitment to sovereignty and territorial integrity, the importance of the peaceful solution through dialogue, non-recognition of the outcome of the referendum, and the respect of human rights including minority rights.⁶⁰ Although this proposal was co-sponsored by 42 States, it was vetoed by Russia with China abstaining. Many States also denied the legality of the referendum, as it was conducted contrary to the Ukrainian Constitution and did not meet the democratic standard.⁶¹ Immediately after the referendum, the GA adopted a resolution⁶² with a similar spirit and wordings to the SC draft resolution.

The Russian government seems to have utilized every possible argument to justify its use of force in the Ukrainian territory as well as its annexation of Crimea and Sevastopol. The arguments can be summarized as follows:

- (a) Crimea was originally a part of Russian territory, and was arbitrarily transferred to Ukraine without consulting the citizens, without any prospect of the consequences that would be caused by the dissolution of the USSR⁶³
- (b) The need to protect Russian minorities from repression by the Ukrainian government⁶⁴
- (c) Importance of respecting the free will of the population as a realization of the right of self-determination, and evidence of precedents under which unilateral secession and independence were admitted, such as Mayotte in the Comoros and Kosovo⁶⁵
- (d) Crucial security needs to prevent the possible use of Sevastopol by NATO forces⁶⁶

It is not difficult to find counter-arguments to each of them. First of all, the historical connection cannot justify the annexation. Since Crimea and Sevastopol once legally and clearly constituted Ukrainian territory, the unilateral change of border is not allowed. As for the objective of ensuring minority protection, it lacks evidence of serious human rights violations, and proposals for international monitoring were rejected by Russia itself. Moreover, the referendum was not only illegal under the Ukrainian constitution, but also inadequate, because voters were obliged to choose between integration with Russia and independence within Ukraine, having no option to select the *status quo*.⁶⁷ This case differs from the case of the Comoros, as France did not use force to compel a separate referendum in Mayotte. It also differs from Kosovo as there is no evidence or global recognition on the grave human rights

⁵⁹ Statements by the US, the UK and France are contained in S/PV. 7124; Statements by the US, the UK, France, Australia, Luxembourg, and the Republic of Korea, are contained in S/PV. 7125.

⁶⁰ S/2014/189.

⁶¹ Statements by the US, France, Chili, the Republic of Korea, the UK, Chad, Jordan, and Lithuania are contained in S/PV. 7144.

⁶² A/RES/68/262 (Y100-N11-A58).

⁶³ President Putin's address, *op. cit.*

⁶⁴ S/PV. 7124, pp. 4-5; S/PV. 7144, p. 9 (the Russian Ambassador stated there are "all signs of ethnic cleansing").

⁶⁵ Presidential Putin's address, *op. cit.* The President noted that Ukraine did the same thing when it seceded from the USSR, and he referred to the ICJ's advisory opinion on the unilateral declaration of independence by Kosovo; The Russian Ambassador referred to the cases of Kosovo and Comoros, as precedents for the use of a referendum in one part of a State for independence or separation. S/PV. 7134, p. 16.

⁶⁶ President Putin's address, *op. cit.* The President stated that it would be "a perfectly real threat to the whole of southern Russia", if a NATO navy were "in our backyard or in our historic territory."

⁶⁷ S/PV. 7134, p. 6.

violations. As for Crimea, no sustained international efforts to find a solution other than secession were made. From every perspective, this is not a case where “remedial secession” can be applied as a last resort. Finally, the argument based on a strategic perspective might be politically understood, but would never be accepted as a legal justification of annexing neighboring territories.

The case of Crimea demonstrates many lessons as well as challenges. First of all, each of earlier cases of self-determination shows distinctive features in terms of historical, political, economic, social, and cultural situation, as well as the reactions by the international community. In other words, each case is unique. Nevertheless, one particular aspect of a case can be utilized to justify other cases, which continue to accumulate as a sort of reference book offering a variety of precedents. The wide range of prior cases provides more and more flexibility in the interpretation and application of self-determination. In addition, the difficulty in responding to cases of apparent abuses of self-determination might create an unintended consequence of accepting the *fait accompli*.

Will the case of Crimea serve as a new precedent for unilateral secession from an existing State based on self-determination? Will it encourage separatist movements around the world? How can and should the international community be prepared?

VI. *A Future Direction and Concluding Remarks*

Ethnic and religious nationalism is on the rise. Globalization, represented by a massive flow of ideas, information, goods, people, and funds across borders, continues to accelerate. As the globalization connects peoples and activities around the world, it often brings about the standardization of rules, technology and lifestyle, thereby uniting peoples. On the other hand, it might marginalize peoples who do not benefit from this development. They may fear influences from outside. Such a phenomenon seemingly fuels the groups’ sense of ethnic or religious identity, which may encourage separatist movements based on the right of self-determination. It might also destabilize regions and the entire world, often involving a change of borders and the use of force.

The international community has struggled with the concept of self-determination and has not succeeded in establishing any definite formula for it. The difficulties are inherent in the multi-faceted nature of the concept and the variety of possible applications. In view of the divergence of claims and situations related to self-determination, it is neither desirable nor possible to have a clear-cut definition of who a “self” is, what can be determined, and how determination can be achieved. Nevertheless, it seems necessary to move beyond ad-hoc responses based on strategic interests toward more principled, coherent, and universal approaches.

For that purpose, several considerations can be suggested with a view to creating a more stable mechanism. First, it is of crucial importance to have both aspects of self-determination (internal and external) in mind. Since the concept of self-determination was utilized mainly for decolonization between 1950s and 1970s, too much emphasis has been placed on the external aspect of self-determination. As decolonization has been almost completed, the balance between external and internal aspects needs to be adjusted. For example, in cases of secession, a newly created State, normally much smaller than the original State, often faces economic problems

and security challenges and needs to cooperation with neighboring States, including the one which it seceded from. In addition, as ethnic composition never coincides neatly with the new borders, a new minority is created in a new State, which often means just the exchange of minority and majority positions. Therefore, in discussing the future of self-determination, more attention should be paid to the importance of internal aspect of self-determination, which unites people through democratic process and dialogue among different groups in a state.

Second, it may be necessary to overcome the dichotomy between international and domestic affairs. Traditionally, a change of the internal political status of a part of a state, such as an autonomous province is considered a domestic issue. On the other hand, a secession and change of borders are considered to be a serious international issue. In history, there are plenty of examples wherein a change of domestic political status or neglect of minority rights triggered a separatist movement based on self-determination. As this development gravely impacts the regional and global security situation, the international community normally intervenes only after the domestic disputes have escalated into serious armed conflict. Therefore, it is desirable to put in place an international monitoring mechanism to prevent such escalation, and to provide mediation activities at an early stage seeking sustainable and peaceful solutions that are acceptable to both parties. The case of Aaland Islands may serve as a model for such a mechanism.

Third, the international community should make it clear that the use of force must never be allowed even for the purpose of self-determination. In the same vein, a change of borders or political status by the use of force should never be accepted as a *fait accompli*. The united and coherent attitude of the international community is essential for that purpose.

Lastly, it is often emphasized that self-determination is the right of all peoples to determine their own destiny. It should not be neglected, however, that any right has an aspect of responsibility and limitations, because other parties have the same right, and thus the right should be exercised by paying due respect to others' right. This recognition is particularly important because, regardless of how the holder of the right of self-determination is defined, one "self" needs to coexist with other groups that also retain the status of "self." In addition, regardless of the importance of self-determination, it is not an absolute norm that overrides other important norms, such as the non-use of force and sovereignty. Therefore, the right of self-determination should be interpreted and applied in harmony with other groups' rights as well as other important international norms. A simple insistence on one's own right will not bring about a sustainable solution. From this perspective, the international framework, including the UN and the ICJ as well as regional organizations, needs to be fully utilized with a view to facilitating dialogue between parties at an early stage, so that options for balanced and amicable solutions can be provided before mistrust and hatred escalate to a point of no return.