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CONCEPTUAL AND PRACTICAL APPROACHES REGARDING THE SECESSION OF STATES RELATED TO POSITIVE INTERNATIONAL LAW

CAROLINA CIUGUREANU-MIHAILUȚĂ
PhD, Associate Professor,
Academy of Economic Studies of Moldova
ciugureanu_mihailu.carolina.npha@ase.md
ORCID ID: 0009-0001-8523-8100

Abstract: Nowadays, secession, seen as a peaceful or violent process by which a part of the territory of an existing state breaks away from that state, seems to be a tendency of a global nature. The legal discussion regarding Kosovo's declaration of independence, as well as the act of "integration" of the Crimean peninsula into the Russian Federation, raises a whole series of questions, starting from the issue of the legality of secession, the process of state formation, the role international recognition and the extent to which the international community can intervene in such a process, the effectiveness of the present UN system. This article will be limited to the examination of some theoretical and practical aspects of secession, by reference to positive international law.

Keywords: secession, state, national minority, self-determination, territorial integrity, international recognition.

JEL Classification: K10, K33

Introduction

Looking back, it is clear that the reunification of Germany in 1990 went against the tide of modern history, marking a kind of "swan song" for the old model of the unitary nation-state of the 19th century. Since the fall of the Berlin Wall and the subsequent disintegration of the USSR two years later, things have been unraveling everywhere. Agitated minority movements demanding recognition, autonomous rights, or absolute independence, given that the end of the Cold War weakened the global geostrategic "straightjacket" have become commonplace worldwide.

Today, secession, viewed as the action of a group peacefully or violently separating from the rest of the community to establish another group or to unite with another state (Dima, E., […], 2007, p. 1764), appears to be a global trend: separatists, secessionists, and independentists can be identified from Taiwan, Xinjiang, and Somalia to Sri Lanka, Georgia, and the West Country.

The year 2008, through the declaration of independence of Kosovo, divided the international community's vision on the issue of secession. There are no clear-cut camps of those ready to approve Kosovo's declaration and those reluctant or opposed to it. Countries like the USA, the UK, France, and Germany - which were closely involved in the failed diplomacy that led to the NATO attack on Yugoslavia and the subsequent UN administration of Kosovo - were among the most eager to see the final status of Kosovo resolved. They argued in favor of supporting the principle of self-determination for the sake of stability in the Balkans.

On the contrary, Serbia's support came from countries in a similar situation. Venezuela and Iran often take positions opposing those of the USA. Cyprus, Romania, Spain, and China are on the same side of personal interest - the concern that a precedent could be set for separatist regions in their own backyard if the green light is given to self-determination. Thus, they argued in favor of a country's right to protect its territorial integrity and oppose separatist regions that unilaterally threaten their borders.

Russia, one of Serbia's most loyal supporters, found itself in a delicate position. Russia is not eager to see the precedent set by Kosovo applied to areas within its own borders, such as Chechnya. However, the precedent helped justify Moscow's hasty recognition of South Ossetia and Abkhazia after they separated from Georgia, as well as the "incorporation" of Crimea into its territory through the laws of March 21, 2014.

A legal discussion regarding Kosovo's declaration of independence and the "integration" of the Crimean Peninsula into the Russian Federation raises a whole series of questions, starting with the legality of secession, the state formation process, the role of international recognition, and the extent to which the international community can intervene in such a process and the effectiveness of the current UN system. The article below will focus on examining theoretical and practical aspects of secession in relation to the principles of self-determination and territorial integrity.

The Concept of Secession

Both the doctrine and the normative part of public international law (*Convention on Succession of States in Respect of Treaties*, Art. 2(1)(a)) consider secession to be the transfer of a territory from one state to another, whether to an existing state or to a newly formed state.

In general, international law has remained neutral regarding the right to unilaterally declare the independence of a territory. In other words, international law neither prohibits a population from organizing a referendum nor recognizes any unilateral right to secession and annexation to another state. What international law clearly prohibits is the promotion of secession under conditions contrary to *jus cogens*, such as the illegal use of force (*ICJ Advisory Opinion* No. 2010/25, Para 81).

The UN International Law Commission has established that if a declaration of independence is issued in violation of *jus cogens*, the declared independence is considered illegal, and the international community has an obligation to refrain from recognizing the political act of independence. Similarly, the Vienna Convention on the Law of Treaties declares treaties concluded as a result of the use of force or threats of force, in contradiction to the principles of international law in the UN Charter, to be void (*Convention on the Law of Treaties*, Art. 52).

International political case law and relevant jurisprudence (*ICJ Advisory Opinion* No. 2010/25) confirm the geopolitical reality of declarations of independence and acts of unilateral secession exercised under the principle of self-determination and/or in contradiction to domestic and international law but ultimately do not affect the de facto situation, namely the secession of states.

In such situations, the issue of statehood becomes relevant, specifically, which of the two major conceptions prevails in the international community's approach: the constitutive theory, which argues that recognition by the international community is the essential criterion of statehood, or the declarative theory, which maintains that statehood is a legal status independent of recognition, based

on the Montevideo Convention on the Rights and Duties of States of 1933, which establishes the criteria defining statehood: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.

Modern international law and practice converge in not allowing the removal of the principle of the self-determination of peoples from the historical context of colonialism in which it was recognized and its transposition into arguments justifying a right to unilateral secession in the case of independent nation-states.

Furthermore, international law identifies the beneficiary of the right to self-determination. According to relevant documents (*Declaration on Principles of International Law; Charter of the United Nations*), the right to self-determination is a right of peoples. None of the provisions of positive law regarding self-determination negates this initial position. All documents containing regulations on self-determination refer to "peoples" as its beneficiaries.

No regulation regards national minorities as possessors of the right to self-determination. In all cases, issues related to national minorities are regulated separately, with a series of individual rights guaranteed to them.

Even if one were to accept the opinion that modern international law tends to grant collective rights to minorities, it cannot be argued that self-determination is among these rights. Nor can it be argued, vis-à-vis the theory of internal self-determination, that minorities enjoy such a distinct right apart from the rest of the population of the respective state. The right to internal self-determination belongs to the entire population of the state, reflecting the principle of representative democracy, even though it may lead to specific rights for individuals belonging to national minorities.

In this sense, self-determination serves only to guarantee human rights, and based on it, each individual can choose to belong to any ethnic, religious, or linguistic community. Therefore, the rights "affiliated" with individuals belonging to national minorities are based on the right to self-determination as a general right, and it cannot be claimed that minority rights include a right to self-determination.

International law "distinguishes" human groups to identify those entitled to self-determination (peoples) from those who do not have such a right (national minorities).

The first legal definition of the concept of a minority - and the only one to date with such authority - was provided by the Permanent Court of International Justice, an institution created under the League of Nations, in the case of the Greco-Bulgarian Communities in 1930 (Iancu, Gh., 2002, p. 32). Therefore, a minority was defined as "a group of persons living in a country or a distinct region, having their own race, religion, language, and traditions, maintaining their own ways of practicing their faith, ensuring the education and upbringing of their children according to the spirit and traditions of their race, and supporting each other" (Barth, W. K., 2008, p. 37). Thus, such a community is characterized by attributes of race, religion, language, and tradition and possesses a sense of solidarity aimed at preserving these attributes of the group. However, these elements can easily be found in a possible definition of a people.

Several aspects differentiate national minorities from peoples, the unique beneficiaries of self-determination: Territorial factor: an essential element in the process of constituting peoples. On the

other hand, although national minorities are often concentrated in a certain region, they are often dispersed. Even in the case of territorial concentration, the sense of belonging to that territory is not essential to defining ethnic identity, as it is in the case of peoples. The degree of political organization is much lower in the case of minorities, even though they also establish a series of representative structures. The dynamics of the group are distinct. If in the case of a people, the aspiration for individual existence is essential for defining and becoming one, in the case of minorities, the primary goal is to maintain cultural, linguistic, and religious identity within the existing political organization or by optimizing it (Diaconu, I., 2009, p. 17-19).

The precedent of Kosovo

In the case of Serbia, the Albanian population, from a numerical point of view, represented a minority population compared to the Serbian one. Relations between the Serbian and Albanian populations in Kosovo have always been marked by mistrust and a lack of desire for mutual coexistence and tolerance. These relations represented an ongoing relationship of "status reversal": whenever the Serbs administered Kosovo, as happened in the interwar period and from the end of World War II until the late 1960s, the Kosovo Albanians were discriminated economically, socially and culturally and were forced to leave. On the other hand, when the Albanians were in a dominant position, usually with the support of external forces - Ottoman, Austro-Hungarian, Italian, German, Bulgarian and NATO - the Serbs were the ones discriminated against and forced to leave Kosovo (Nița, I., 2008).

The mutual resentments made that, although they shared the same territory, the Serbs and the Albanians of Kosovo lived in two parallel societies, reminiscent of "apartheid", without a real desire to build a democratic and sustainable multi-ethnic society. Moreover, after the revocation of Kosovo's autonomy in 1989, all Albanian institutions in Kosovo continued to exist in secret and for almost a decade there were two parallel states - the official one, on the surface, controlled by Serbia, and the Albanian one with political institutions separate, education and health systems, even with unemployment benefits, financed by Albanian emigrants or Albanians working abroad. After 1999, the separate development of the society in Kosovo could continue freely, in the absence of any control from Belgrade, and currently we are witnessing the opposite phenomenon - the Serbs in the north of Kosovo are establishing their own parallel institutions (Nița, I., 2008).

In this way, the degree of definition of the Albanian community long ago exceeded that of a simple minority, the level of cohesion between members, of antagonism towards others, in this case - the Serbian population, of the development of national consciousness, entitling them, perhaps, to consider themselves as a nation.

Moreover, however paradoxical it may seem, from an anthropological point of view it can be stated that the Kosovar Albanians are a distinct people from the population of Albania. The ethnic and linguistic element is overcome in reality by a different history, by a distinct national feeling, originating, in the case of the Kosovar Albanians, from the antithesis with the Serbian population that had a different cultural and religious evolution determined by the historical context.

Even if we accept that the Albanian population can identify itself as a true beneficiary of the right to self-determination, the solution to independence is not obvious. Between two competing rights that of the "Albanian-Kosovar people" to self-determination and that of Serbia to respect its territorial integrity, international law has always given privilege to the latter.

The secessionist movements always base their independence claims on the right to self-determination. However, in the practice of states, courts and international bodies, the refusal to put the sign of equality between self-determination and secession or to admit that the right to self-determination can imply a right to secession has been maintained for almost a century.

In this sense, the Commission of Jurists of the League of Nations pronounced in 1920 in the opinion regarding the status of the Aaland Islands, according to which "positive international law does not recognize the right of national groups as such to separate from the state of which they are a part by simply expressing their will in this sense", as well as, 66 years later, the International Court of Justice, which, in the Decision regarding the border dispute between Burkina Faso and Mali, gives victory to territorial integrity (Prisecariu, R., 2010, p. 87).

The advisory opinion of the Supreme Court of Justice of Canada regarding the secession of Quebec (*Reference re Quebec Secession, 1998*) provides a judicial analysis in the matter, examining the question of self-determination, mainly in relation to the issue of secession, the latter viewed as external self-determination, but also touching on aspects regarding the relationship with representative democracy, the relevance of respect for human rights, the subjects of self-determination.

The Canadian court concludes that "the right to self-determination in international law can, at most, lead to the right to external self-determination only in the situation of former colonies, in the one where a people is oppressed, as in the case of foreign military occupation, or in the situation in which a distinct group is denied effective access to governance in order to achieve its political, economic, social and cultural development. In all these three situations, the respective persons have the right to external self-determination because they are denied the opportunity to exercise their right to self-determination at the internal level. It is obvious that these exceptional circumstances are not applicable in the case of Quebec under the current conditions. Therefore, neither the population of the province of Quebec, whether defined as "a people" or "peoples," nor its representative institutions have the right under international law to unilaterally secede from Canada." (*Reference re Quebec Secession, 1998*)

Previously, the Constitutional Court of the Russian Federation reached the same conclusion regarding secession, in the case regarding the situation in Chechnya. According to the Russian court, "the constitutional provision regarding the maintenance of the integrity of the Russian state is in accordance with the universally recognized principles of the right of nations to self-determination" and, considering the provisions of the clause relating to territorial integrity ("safeguard clause") of the Declaration on friendly relations from the year 1970, the right to self-determination does not "allow or support acts that lead to the dismemberment or complete decomposition of the territorial integrity or political unity of independent and sovereign states that respect the principle of equal rights and self-determination of peoples" (Nița, I., 2008, p. 7).

However, the decision is criticized in the doctrine because, unlike the opinion of the Canadian Supreme Court, it does not take the argument to the end, failing to check the criteria related to the representative and non-discriminatory character of the government stated in the final part of the "safety clause" of the 1970 Declaration (UN General Assembly A/RES/2625(XXV)).

Although the conclusions of domestic jurisprudence do not have direct relevance in international law, their importance cannot be neglected, as they contribute, on the one hand, to the understanding of

such a "flexible" concept as self-determination, and, on the other hand, to the pursuit of the eventual establishment of an *opinio juris* regarding secession.

In the context of legal opposition to the phenomenon of secession, it is at least paradoxical that, in the last century, we have witnessed in reality a continuous process of geopolitical fragmentation, from 46 states, as many as existed in 1945, reaching, in 1965, in the midst of the decolonization process, more than double, so that today the UN has a total of 193 members. This fragmentation is, however, the result of genuine secessionist processes.

Analyzing the cases of decolonization, we find that the vast majority of them do not represent secessionist situations, but are the result of the consensus between the former colonies and the colonial power, in this sense various agreements have even been concluded between the metropolis and the local leaders.

Attempts to separate from the territory of the newly created state were condemned by the UN General Assembly, which constantly proclaimed the maintenance of the territorial integrity of the new states and took into account the will of the entire population of their territories, considered as unique peoples, despite ethnic heterogeneity.

It cannot be affirmed that positive international law equates or incorporates into the content of the right to self-determination a right to secession. Compared to the existing practice, it cannot be argued that secession is seen more and more as a possible new distinct "right" of self-determination. On the contrary, if we were to witness the establishment of an *opinio juris* regarding secession, it would be in the sense that such a right is not recognized.

As in the colonial context, states and international bodies are extremely reserved in accepting the secession of territories from independent states. Although the initial impression is that in recent decades we have witnessed dozens of cases of secession (former USSR, former Yugoslavia, former Czechoslovakia, Eritrea, etc.), in reality, the international community has been extremely cautious in its choice of language and, above all, the legal basis for the recognition of the new states.

Thus, new states such as Senegal (1960), Singapore (1965), Eritrea (1993), the Czech Republic and Slovakia (1993) were created based on the agreement, obtained more or less peacefully, between the interested parties. Therefore, in no case can we speak of secession as a unilateral act in these situations.

A possible different case is that of Bangladesh, often considered in the specialized literature as the only genuine case of secession admitted outside the colonial context, qualified, at the same time, as a special case of "reparative secession". In reality, even in this case things are not so obvious: the initial unilateral act of declaration of independence was not recognized before Pakistan's agreement. Thus, Bangladesh (East Bengal) declared its independence from Pakistan on March 26, 1971, following the refusal of the Pakistani political leadership at that time to recognize the result of the 1970 elections, won by a party from East Bengal. After a short-lived conflict, in which India intervened in favor of East Bengal, the Pakistani armed forces withdrew in December 1971, leaving de facto control to the separatists. On February 2, 1974, Pakistan recognized the new state of Bangladesh and only later, on September 17, 1974, Bangladesh was admitted as a member of the UN. (Nița, I., 2008, p. 9)

The opposite example, which contradicts the theory of "remedial secession" circulated in connection with the independence of Bangladesh, is that of the Kurds. The discrimination, the systematic violations of human rights to which they were and still are subjected, in countries such as Iraq and Turkey, are notorious, undisputed by the international community. However, the efforts to establish an independent Kurdistan did not enjoy support, which proves that fundamental rights violations, in themselves, are not enough for the success of secessionist efforts. (Nița, I., 2008, p. 9)

The dissolution of the Soviet Union at the end of 1991 was also the result of the consensus of the parties involved. The agreement constituting the Commonwealth of Independent States, signed on December 8, 1991 by Belarus, the Russian Federation and Ukraine, to which 11 other republics joined on December 21 of the same year, through the Alma Ata Protocol, stated that "the Union of Soviet Socialist Republics ceased to exist as a subject of international law and geopolitical reality".

In the case of the USSR, the creation of the successor states of the former Yugoslavia is not seen as a case of secession, but as one of dissolution of a federation. With the exception of Serbia, all the other constituent republics of the Federation considered that the disappearance of Yugoslavia was not the result of secession, but of disintegration following the will expressed in this sense by the majority of the constituent republics. The international community was still concerned not to create the appearance of recognizing unilateral acts, none of the former republics being admitted to the UN prior to the adoption by Yugoslavia (Serbia-Montenegro) of a new Constitution, thus implicitly recognizing that they accept the existing factual situation. (Nița, I., 2008, p.11)

Although the Declaration of Independence of February 17, 2008 considers Kosovo as "a special case resulting from the non-consensual breakup of Yugoslavia", the above reasoning regarding the disintegration of the Yugoslav Federation, as opposed to a secessionist process, cannot be applied in favor of Kosovo, which did not constitute a republic within the Federation, but only benefited from a degree of autonomy within the Republic of Serbia. Even if, in fact, Kosovo enjoyed rights equal to those of the republics under the 1974 Constitution, this does not change the formal status of that entity, which has never constituted a federated entity. (Nița, I., 2008, p. 11)

Referring to what was previously exposed to positive international law, we find that the independence of Kosovo has no legal support. It cannot be based on the principle of self-determination, as it does not operate in favor of national minorities as such. Even accepting that the Albanian population of Kosovo has exceeded the limits of the definition of national minorities, being able to claim to represent a distinct people, in the self-determination-territorial integrity relationship, international law gives preeminence to the latter.

However, despite the major lack of legality, the international community is faced with the unilateral declaration of independence by Kosovo and the recognition of this act by a constantly growing number of states.

In the same vein, but in a different context, the legal arguments used by Russia in order to justify the process of secession and integration of Crimea from the perspective of international law, as well as the argument of the similarity between the secession of Crimea and the case of Kosovo independence, are not substantiated.

First of all, in its advisory opinion in the Kosovo case, the ICJ did not confirm the legality of Kosovo's statehood, but only held that the declaration of independence does not contravene international law.

Then the premises of Kosovo's declaration of independence were quite different, that region being under international administration at that time, the motivation being ethnic pressures to which the Kosovar population was subjected, which does not seem to have been the case for the Russian-speaking population of Crimea. In addition, in the case of Crimea there are indications that the secession took place in the context of the presence of military forces other than those of the Ukrainian state, thus under the threat of force. And, last but not least, the acts issued by Russia for the purpose of integrating/annexing the Crimea region had a purpose and produced effects contrary to international law, in particular, in relation to the bilateral treaties between Ukraine and Russia. (Pachiu, L., Dudău, R., 2014, p. 3-4)

In fact, the situation in Crimea is much more similar to the case of Cyprus. After the Turkish population in the north of the island of Cyprus declared its independence in 1983, supported by the Turkish military presence on the territory of the island, and proceeded to create the state called the Turkish Republic of Northern Cyprus, the only state that recognized the statehood of the new entity was Turkey. An important role in directing the attitude of the international community towards the situation in Cyprus was represented by the resolutions of the UN Security Council by which the Turkish Cypriot declaration of independence was declared illegal, and the international community was urged not to recognize the new state entity. As for the southern region of the island, populated by ethnic Greeks, it has acquired full international recognition, except for recognition by Turkey, being a member state of the EU and the UN.

Conclusion

Generalizing, we will mention that the formation of states represents factual situations later recognized in law, without the act of recognition being a condition for the existence of the state. The state is a collectivity composed of a territory and a population subject to an organized political power. The legal act of recognition is regardless of the definition of the state. In other words, "the state is a historical, social and political phenomenon taken into account by law".

More than the issue of the viability of Kosovo as a state, however, the viability of the solution itself is worrying. Based on such formulas, the game of delimitation based on ethnic criteria could continue indefinitely, in a "chain reaction" type sequence: the continuous detachment of smaller and better ethnically delimited entities. This cannot be a sustainable solution from the point of view of regional security and even less so in a global society, where geographical, political, ethnic and cultural borders are increasingly permeable.

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