

# Self-Determination and Secession in International Law

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# 1

## Introduction

### Self-Determination and Secession in International Law—Perspectives and Trends with Particular Focus on the Commonwealth of Independent States

*Christian Walter and Antje von Ungern-Sternberg*

#### I. The Problem

Self-determination and secession constitute central issues of international law. Peoples and minorities in many parts of the world assert a right to self-determination, autonomy, and even secession which conflicts with the respective mother states' sovereignty and territorial integrity. Apart from its practical relevance, this conflict also demonstrates how modern visions of international law, promoting rights of individuals and groups against the state, might clash with older visions that emphasize the role of the sovereign state for the protection of stability and peace. After the Advisory Opinion of the International Court of Justice concerning the Declaration of Independence of Kosovo, rendered in 2010,<sup>1</sup> many questions of self-determination and secession remain open. In particular, debate surrounds the question of how the right of self-determination—predominantly shaped in the period of decolonization following World War II—has developed in the post-colonial era. The Commonwealth of Independent States (CIS), emanating from the former Soviet Union, provides a good starting point for examining the current state of the law of self-determination and secession because it hosts four corresponding conflicts, concerning Transnistria (Moldova), South Ossetia, Abkhazia (both Georgia),<sup>2</sup> and Nagorno-Karabakh (Azerbaijan). These four entities claim

<sup>1</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010* [2010] ICJ Rep 403.

<sup>2</sup> Georgia formally declared her withdrawal from the CIS on 18 August 2008. It became effective one year later.

to be entitled not only to self-determination but to secession, and they base that claim on historic affiliations and on charges of discrimination and massive human rights violations committed by the mother state.

Where does international law currently stand on self-determination and secession? Self-determination started off as a political concept which was promoted by the protagonists of the American Declaration of Independence and the French Revolution, by socialist leaders and by Woodrow Wilson, and which played a certain role in the post-World War I settlement of territorial arrangements within Central and Eastern Europe,<sup>3</sup> but materialized into a legal right only after World War II. Even though the principle of self-determination incorporated into Art. 2 (1) and Art. 55 UN Charter<sup>4</sup> is generally considered to be too vague to provide a right to self-determination,<sup>5</sup> subsequent developments led to the acknowledgement of such a right in customary<sup>6</sup> and treaty law, as evidenced by the following documents: the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples* of the UN General Assembly states that all peoples have a right to self-determination (N° 5) and laid the legal foundation for the decolonization policy of the UN;<sup>7</sup> Art. 1 of the two Covenants on Civil and Political and on Economic, Social and Cultural Rights (1966) established the right to self-determination as a treaty right; and, last but not least, the *Friendly Relations Declaration* of the UN General Assembly (1970)<sup>8</sup> confirms the right to self-determination, which entails the right of all peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development' (Principle 5).

However, the exact contents of the right remain a matter of dispute: who is entitled, ie what constitutes a people—and may other groups, such as indigenous groups or ethnic, linguistic, religious, or other minorities also rely on it? Is the right, due to its historical origins, solely applicable in situations of decolonization and of military occupation, as the ICJ acknowledged in 2004,<sup>9</sup> or also to the many other conflicts of self-determination? And what exactly does self-determination comprise: minority rights, autonomy or, as a matter of last resort, a right to secession if the incumbent state does not honour its obligations? This volume, which

<sup>3</sup> Cf. A Cassese, *Self-determination of People—A Legal Reappraisal* (CUP 1995) 11–27.

<sup>4</sup> According to Art. 1 (2) UN Charter one of the purposes of the UN is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. This is reaffirmed in Art. 55 UN Charter in which the UN commits itself to several goals concerning international economic and social co-operation '[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

<sup>5</sup> Cf. Cassese (n 3) 42; D Thürer and T Burri, 'Self-Determination' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP online 2013) MN 8.

<sup>6</sup> Acknowledged in *Western Sahara Case* (Advisory Opinion) [1975] ICJ Rep 12, para 54 et seqq.

<sup>7</sup> UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514 (XV).

<sup>8</sup> *Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in Accordance with the Charter of the United Nations*, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625 (XXV).

<sup>9</sup> Acknowledged by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 118.

is dedicated to the problem of self-determination and secession, attempts to find answers particularly to the latter question—which, however, requires examining the former ones as well.

Secession, ie the unilateral withdrawal from a state of one of its constituent parts with its territory and population,<sup>10</sup> is not duly received in international law. As a legal order based on sovereign states, international law favours stability and the integrity of its principal legal subjects. Formally, it neither prohibits nor authorizes secession, as has been confirmed by the ICJ in its recent Advisory Opinion on Kosovo.<sup>11</sup> But this indifference normally benefits the incumbent state since it allows the state to fight secessionist groups. According to the traditional view, the right to self-determination—which does not entail a right to secession—does not effectively counterbalance the strong position of the mother state. This view can rely on a strong commitment to the ‘territorial integrity’ of states that goes along with most commitments to self-determination.<sup>12</sup> However, tendencies in international law which strengthen human rights in general and the right to self-determination in particular might eventually give rise to a right to secession. It is argued, notably, that ‘remedial’ secession following severe and widespread human rights violations should be acknowledged.<sup>13</sup>

## II. Perspectives and Trends

The chapters of this book depict different perspectives and trends concerning the problem of self-determination and secession. Some of the more general aspects will be specified in the following.

### 1. Self-determination and secession between national and international law: when and how does international law step in?

Self-determination and secession lie at the intersection of national and international law. Events which are originally governed exclusively by national law become matters of concern to international law at a particular point in time. At the same time, national law might continue to influence international law. The

<sup>10</sup> Cf. D. Thürer and T. Burri, ‘Secession’ in Wolfrum (n 5) MN 1.

<sup>11</sup> The Court stated that ‘general international law contains no applicable prohibition of declarations of independence’; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010 [2010] ICJ Rep 403, para 84.

<sup>12</sup> Cf. Art. 2 (4) UN Charter; N° 7 *Declaration on the Granting of Independence to Colonial Countries and Peoples*; *Friendly Relations Declaration*. Common Art. 1 of the International Covenants, while not referring to territorial integrity, obliges all states to promote and respect the right to self-determination ‘in conformity with the provisions of the Charter of the United Nations’, thereby implying respect for territorial integrity.

<sup>13</sup> C. Tomuschat, ‘Secession and Self-determination’ in MG Kohen (ed), *Secession—International Law Perspectives* (CUP 2006) 23, 42.

following chapters show, however, that this interplay between the national and the international legal orders may vary considerably depending on the specific legal question at stake.

First of all, it is interesting to note that a right to secession, though not (yet) established under international law, might exist under national law. The four case studies from the CIS refer in particular to the 1977 Constitution of the Soviet Union which provided for a right to secession. This right, however, was confined to Soviet Union Republics and did not extend to autonomous regions within those republics. Therefore Transnistria, South Ossetia, Abkhazia, and Nagorno-Karabakh, which did not enjoy the rank of a Soviet Union Republic but merely constituted autonomous regions within the Republics of Moldova, Georgia, and Azerbaijan, could not rely on such a right.

But when and how does international law step in? The relevant beneficiaries of the right to self-determination are comprehensively defined by international law, as **Joshua Castellino** describes in his contribution on 'Peoples, Indigenous Peoples, and Minorities'. He suggests a reading of the two Covenants on Civil and Political and Economic, Social and Cultural Rights that would strengthen the position of indigenous peoples by discerning five models of self-determination, ie (1) full political self-determination for 'peoples', (2) political self-determination including proprietary rights for territorially based indigenous peoples, (3) non-political self-determination for non-territorially based indigenous peoples in order to guarantee human rights and to address concerns of personal autonomy, (4) non-political self-determination for minorities which, again, comprises respect for human rights, notably non-discrimination, and allows for access to special measures promoting equal opportunities, but excludes self-determination in a political sense, and (5) a remedial right of secession in the event where widespread and consistent rights denial occurs against a recognizable vulnerable group (indigenous people or minority). However, he stresses that subsequent settlers have claims, too, which—as the example of the conflicts in the CIS shows—legally and politically complicates their solution.

The **use of force** in conflicts regarding self-determination is a further element shaped by international law. **Antonello Tancredi**, in his contribution on 'Secession and Use of Force', challenges the traditional view that the international regime on the use of force, conceived to apply in international relations, is totally unrelated to the problem of secession. He demonstrates that different factors can intervene to 'internationalize' separatist struggles. First, he exhibits tendencies in favour of the customary extension of the non-use of force to internal conflicts, but concludes that they have not yet matured into law. Examining the relationship between the incumbent state and third states, he then elaborates that foreign military interventions carried out upon the invitation of the former with a view to repelling a secessionist attempt are, in practice, well tolerated, whereas external intervention upon invitation by the secessionists or by a civil war party are prohibited—which can clearly be demonstrated by reference to the external support of the breakaway regions in Georgia (provided by Russia) and in Azerbaijan (provided by Armenia). Tancredi therefore concludes that the international regime on the use of force still favours the incumbent state.

Finally, **Anne Peters**, in her contribution ‘The Principle of *Uti Possidetis Juris*: How Relevant is it for Secession?’, claims that *uti possidetis* can potentially transform any type of internal territorial demarcation that has been established in domestic law prior to secession into an international one once secession has succeeded. She demonstrates, however, that the CIS member states which are affected by secessionist attempts are not constituted as federation-type states with internal domestic administrative boundaries but rather as unitary states, and that older administrative lines stemming from the pre-independence era cannot be opposed against the currently existing ‘mother’ states since they are not acknowledged in their domestic law. As a consequence, the breakaway territories cannot rely on *uti possidetis*. From a more general perspective, it seems that the internal, ie federal, structure of a state—a potential right to secession under national law notwithstanding—might be influential once a secession is successful.

## 2. The role of law and judicial law-making in the field of self-determination: caution or assertion?

As has become evident by now, the position of international law on the issue of secession is far from clear. There are counter-directional fundamental principles of international law (self-determination on the one hand, territorial integrity as part of a state’s sovereignty on the other), which are not easily reconcilable. What is the proper role of the judiciary in such an unsettled area of law? Should it push developments into a certain direction or should it act rather cautiously and leave the active part to other actors? These issues of law-making are treated in the contributions by **Christian Walter** and **Stefan Oeter**. In his chapter ‘The Kosovo Advisory Opinion: What It Says and What It Does Not Say’, Christian Walter analyses the ICJ’s Advisory Opinion as a tightrope exercise between different functions of an international judiciary. As a dispute settlement body, the Court has the task of facilitating the settlement of disputes which otherwise might (continue to) endanger international peace and security. At the same time, the ICJ, just as any national judicial organ, contributes to the development of the law. Walter argues that the judicial minimalism of the Court helped the settlement of the Kosovo conflict because it politically facilitated the acceptance of independence in the concrete case of Kosovo; yet while doing so, the Court resisted temptation to press the further development of international law into a secession-friendly direction.

But who, then, is to develop the law on secession? Here, the contribution by Stefan Oeter on ‘The Role of Recognition and Non-Recognition with Regard to Secession’ comes into play. Does recognition as a legal instrument help in assessing competing claims of sovereignty which are voiced both by a seceding entity and by the respective mother state? Oeter, who is also more critical of the Court’s judicial minimalism, is sceptical. He analyses the role of recognition in international law as it currently stands as basically an instrument whose use is determined by interests of bilateral diplomacy. Hence, he argues, recognition is unable to process competing claims of sovereignty as issues which are of importance to the overall

structure of the international community, in which interests of individual groups need to be balanced against general interests, such as stability of borders or foreseeability of decisions. In consequence, Oeter calls for the strengthening of the role of recognition, which under existing legal practice and doctrine is understood as being purely declaratory. In Oeter's analysis, the Kosovo declaration of independence and the developments which have ensued in the CIS area strongly argue for the development of mechanisms of collective recognition, a claim which would automatically imply the increased legal and political relevance of such collective acts of recognition.

### 3. Challenges to the traditional role of the state: from sovereignty and stability to legitimacy—a right to remedial secession?

The general question underlying a legal assessment of self-determination and secession is whether a modern conception of the state in international law will focus less on state sovereignty and the state's role in providing stability and more on the legitimacy of states. The ever-growing importance of human rights, the ideal of a state's responsibility to protect<sup>14</sup> and a nascent principle of democratic governance<sup>15</sup> stress the importance of a state's legitimacy and therefore point in this direction. If international law recognized a right to remedial secession as a response to gross human rights violations, this would be in line with this general trend: state sovereignty is no longer an end in itself, it is part and parcel of a state's responsibility to protect its population. If state sovereignty is no longer used to fulfil this purpose but, quite to the contrary, severely endangers human rights, it may be forfeited and a right to secession might result.

The authors of this volume's contributions present different views regarding this question. Whereas some authors, like **Joshua Castellino**, **Anne Peters**, and **Tom Burri**, claim that a very exceptional right to remedial secession exists, others remain sceptical. The authors of the case studies on the conflicts in the CIS come to the conclusion that the corresponding practice does not contribute to the establishment of such a right, whereas Tom Burri argues that the four examples do not contradict such a right. The legal assessment of the conflict in Kosovo seems to be equally mixed. Some, like **Antonello Tancredi** and Anne Peters, consider it to provide a possible argument in favour of remedial secession, while others, like Stefan Oeter and **James Summers**, the author of the case study on Kosovo,

<sup>14</sup> Cf. AB Bellamy et al. (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff Publishers 2010); A Peters, 'The Responsibility to Protect—Spelling Out the Hard Legal Consequences for the UN Security Council and its Members' in U Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 297; I Winkelmann, 'Responsibility to Protect' in Wolfrum (n 5).

<sup>15</sup> TM Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46; GH Fox, 'The Right to Political Participation in International Law' (1992) 17 YJIL 539; N Petersen, *Demokratie als teleologisches Prinzip—Zur Legitimität von Staatsgewalt im Völkerrecht* (Springer 2009); F Ehm, *Das völkerrechtliche Demokratiegebot—Eine Untersuchung zur schwindenden Wertneutralität des Völkerrechts gegenüber den staatlichen Binnenstrukturen* (Mohr Siebeck 2013).



deny that the corresponding practice is conclusive in this regard. However, the question of legitimacy regards not only the potential right of remedial secession, but also some of the related topics. Thus, Antonello Tancredi finds that even though the international regime on the use of force normally favours the incumbent state, a state can be sanctioned internationally, or in extreme cases even be considered devoid of the full prerogatives relating to the use of internal force, if it is deemed responsible for gross violations of human rights or humanitarian law or if it threatens or violates other collective interests of the international community. This follows from the idea that the preservation of the unity of the state, rather than being a right, is a state's responsibility towards its citizens and the international community. As regards the issue of recognition, Stefan Oeter stresses the importance of the new pattern of collective recognition as a tool in political conflict management, practised for the first time by the EU member states in the case of the dissolution of the former Yugoslavia, where recognition was made dependent upon a catalogue of criteria of legitimate statehood. He argues that the collective approach to recognition necessarily relies on a set of normative criteria as a guideline for such common action, which implies that it is less the effectiveness of a secession than some (normative) criteria of legitimacy that matter.

The traditional role of the state is further and very generally challenged in the chapter by Tom Burri, 'Secession in the Caucasus: Causes, Consequences and Emerging Principles', which brings the four case studies and the case of Kosovo together. Even though he admits that no international right to secession emerges from these cases (while stressing that the development does not rule out the notion of remedial secession), he puts some of the 'softer' arguments against secession and autonomy into perspective. He calls into question the notion that secession is contagious, that autonomy snowballs into secession, and that the layered nature of minority problems prevents conflict solution by territorial secession. In his conclusion, he claims that not secession but the status of statehood itself, due to its binary (all or nothing) quality, might be the underlying problem of the conflicts of self-determination, suggesting that statehood should either be freely available to all who desire it or rethought or abolished altogether.

#### 4. Types of conflicts

A final layer of analysis concerns different types of conflicts. International law's traditional approach to secession makes a fundamental distinction between claims of secession deriving from a postcolonial situation and all other claims presented by entities which are distinguished from the mother country on the basis of ethnic, historical or cultural criteria without belonging to a postcolonial scenario. To illustrate the similarities and differences between these different types of conflicts, the book relies on case studies which primarily serve as a basis for the (comparative) analysis of developments in the CIS region. These case studies cover four conflicts in the CIS (**Bill Bowring** on Transnistria, **Farhad Mirzayev** on Abkhazia, **Christopher Waters** on South Ossetia, and **Heiko Krüger** on Nagorno-Karabach) and three further conflicts which, due to the use of military force, have entered the

sphere of international law (James Summers on Kosovo, **Sven Simon** on Western Sahara, and **Gregory Fox** on Eritrea). The three additional conflicts were selected for comparative purposes. The situations in Western Sahara and in Eritrea both have a clear colonial background which, however, is superseded by additional claims for self-determination which do not belong exclusively to the decolonization process but rather can be viewed as typical minority/majority conflicts. The conflict in Kosovo, by contrast, is—at least geographically—situated outside the classical arena of decolonization, which focuses on Africa, Asia, and South America. Kosovo exhibits the specific problems of conflicts surrounding claims for self-determination in multi-ethnic or multicultural societies.

The comparative analysis of these conflicts, both in an intra-CIS and in a general perspective, reveals that the traditional assumption of international law that secession is, in principle, lawful when occurring in a postcolonial context and, in principle, unlawful in any other context rests on assumptions which seem at least questionable. The conflicts in Western Sahara and Eritrea have a clear colonial background, even though they do not concern secession from the colonial power; the CIS conflicts are a legacy of the Soviet empire and which entities were granted a constitutional right to secession under Soviet domestic law as republics and which entities were denied such a right because of their lower status in the internal federal hierarchy of the Soviet Union seems, at least to some extent, arbitrary. If, as is clearly shown in the chapter by Anne Peters, international law tends to transfer the *uti possidetis* principle from its formerly purely colonial application to the determination of borders in case of the dissolution of a complex multi-layered federal structure such as existed in the former Soviet Union (and the former Yugoslavia), the question may be raised as to whether the current legal distinction between postcolonial and other types of secession is still convincing.

On a more fundamental level, the historical background of both the former Soviet empire and the former Yugoslavia shows certain parallels to colonial structures which allow us to add a further question mark to the fundamental distinction between postcolonial and other types of secession. Even the very definition of colonialism becomes unclear in that context, given the fact that most multi-ethnic or multicultural societies have witnessed different periods with different groups settling or being resettled.

### III. Outline of the Book

Methodologically, the general chapters of the book are all based on the factual and legal background provided for in the case studies, while at the same time, of course, also reflecting the general development of the law outside the specific context analysed in the case studies. The book starts from the more general questions and, from there, moves on to the specific issues dealt with in the case studies. The overall starting point for the chapters in the general part of the book is the current significance of the Kosovo Opinion, including its relevance for conflicts in the CIS region (Walter). The book subsequently treats the relevant beneficiaries

of the right to self-determination and, thus, possibly also of secession (Castellino), and the possible influences of third parties, both by use of force (Tancredi) and by recognition (**Oeter**). It then covers the crucial questions of borders (Peters) and ends with a detailed comparative assessment of the CIS conflicts (Burri).

The second part consists of the four case studies concerning conflicts in the CIS, which provide the factual material and a legal analysis of the respective conflict. Finally, three further case studies are added to allow for a comparison outside the CIS and, notably, between conflicts with a clear colonial background (Western Sahara and Eritrea) and the CIS conflicts which stand at the centre of the book.