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SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW

EDITED BY CHRISTIAN WALTER,
ANTJE VON UNGERN-STERNBERG,
AND KAVUS ABUSHOV

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Preface

The present volume is the result of co-operation on the issue of self-determination and secession with a specific focus on conflicts in the CIS region. It started with a workshop which was organized by the Institute of International Law on 16 and 17 February 2012 at the Ludwig-Maximilians-University in Munich. At the workshop, discussions were held on the general issues of self-determination and secession on the basis of four case studies related to the CIS region (Nagorno-Karabakh, Abkhazia, South Ossetia, and Transnistria). Three remaining case studies were added for comparative purposes (Kosovo, Eritrea, and Western Sahara).

The publication of these case studies (parts II and III of the book) and the general international legal considerations in part I of the book were made possible by the Azerbaijan Diplomatic Academy which generously funded the workshop in Munich. We are grateful for invaluable linguistic and technical support by Stefanie Hempel, Melanie Kühn, Markus Vordermayer, and Carl Robert Whittaker.

Munich and Baku, November 2013
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List of Abbreviations

AFISMA	African-led International Support Mission to Mali
AOU	Organization of African Unity
AQIM	Al-Qaida in the Islamic Maghreb
ASSR	Abkhazian Autonomous Soviet Socialist Republic
CERD	Committee for the Elimination of Racial Discrimination
CIS	Commonwealth of Independent States
EC	European Community
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ELF	Eritrean Liberation Front ELF
EPLF	Eritrean People's Liberation Front
FPA	Fisheries Partnership Agreement
FRY	Federal Republic of Yugoslavia
FTA	Free Trade Agreement
FYROM	Former Yugoslav Republic of Macedonia
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICR	International Civilian Representative
IDP	Internally Displaced Person
JCC	Joint Control Commission
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MNLA	National Movement for the Liberation of Azawad
MUJWA	Movement of Unity and Jihad in Western Africa
OSCE	Organisation for Security and Co-operation in Europe
SADR	Sahrawi Arab Democratic Republic
SRSG	Special Representative of the Secretary-General
TPLF	Tigrean People's Liberation Front
UNMIK	United States Interim Administration Mission in Kosovo
UNOVER	United Nations Observer Mission to Verify the Referendum in Eritrea

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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,[1] 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),[2] and Nagorno-Karabakh (Azerbaijan). These four entities claim

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

[2] 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,[3] 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[4] is generally considered to be too vague to provide a right to self-determination,[5] subsequent developments led to the acknowledgement of such a right in customary[6] 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;[7] 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)[8] 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,[9] 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

[3] Cf. A Cassese, *Self-determination of People–A Legal Reappraisal* (CUP 1995) 11–27.

[4] 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'.

[5] 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.

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

[7] UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514 (XV).

[8] *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).

[9] 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,[10] 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.[11] 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.[12] 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.[13]

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

[10] Cf. D Thürer and T Burri, 'Secession' in Wolfrum (n 5) MN 1.

[11] 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.

[12] 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.

[13] 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