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Re-building the Empire.
The right of secession in public international law in the context of quasi states: the case of the Republic of Crimea and Pridnestrovian Moldavian Republic (PMR)

Summary. *The problem of secession has recently become one of the most important issues of not only public international law, but also of the world geopolitics. Declaration of Independence announced by the authorities of Autonomous Republic of Crimea and the city of Sevastopol combined with the risk of escalation of the conflict in Pridnestrovian Moldavian Republic (PMR) and in the Eastern Ukraine have re-evoked the questions about the legal status of so-called quasi-states (unrecognized states). Therefore the main objective of this article is to analyze the legality of secession of the RC and PMR.*

It sheds the light on the conflict between the right of people to self-determination and the principle of the territorial integrity. The article examines the conditions of lawful secession stipulated in Reference re Secession of Quebec (ruling of the Supreme Court of Canada in regard to the legality of secession of the Quebec province) together with the definition of quasi-states (sovereignty de iure and de facto) and the understanding of term "the people" in international law. This legal framework is thereon applied to the cases of RC and PMR.

Key words: *secession, quasi-states, right of people to self-determination, the people, international recognition, principle of territorial integrity, Pridnestrovian Moldavian Republic (PMR), Crimean Crisis, Republic of Crimea*

Streszczenie. *Zagadnienie prawa do secesji stało się w ostatnim czasie jednym z najważniejszych problemów nie tylko w nauce prawa międzynarodowego, ale przede wszystkim w realnej geopolityce. Ogłoszenie niepodległości przez władze Autonomicznej Republiki Krymu i miasta Sewastopol połączone z ryzykiem eskalacji konfliktu w Naddniestrzańskiej Republice Mołdawskiej (PMR) oraz na wschodniej*

Ukrainie przywołały pytania o status prawny tak zwanych quasi-państw (państw nieuznawanych). Dlatego głównym celem tego artykułu jest analiza legalności secesji Republiki Krymu oraz PMR.

W opracowaniu omówiono kwestie konfliktu pomiędzy zasadą samostanowienia narodów i zasadą integralności terytorialnej. Artykuł poddaje analizie warunki legalności secesji zawarte w Reference re Secession of Quebec (orzeczenie Sądu Najwyższego Kanady ws. legalności secesji prowincji Quebec) w połączeniu z definicją quasi-państw (suwerenność de iure i de facto) oraz rozumieniem pojęcia „naród" w prawie międzynarodowym. Tak przygotowany schemat prawny zostaje następnie implementowany do konkretnych przypadków Republiki Krymu i Naddniestrzańskiej Republiki Mołdawskiej.

Słowa kluczowe: *secesja, quasi-państwa, zasada samostanowienia narodów, naród, uznanie międzynarodowe, zasada integralności terytorialnej, Naddniestrzańska Republika Mołdawska, kryzys krymski, Republika Krymu*

1. The right of people to self-determination vs. principle of territorial integrity

The right of secession stems from the conflict between the right of people to self-determination and principle of territorial integrity. Thus the crucial questions is when the self-determination should prevail over the territorial integrity resulting in the rightfulness of the creation of new state on the basis of secession.

The right of people to self-determination has its very roots in the art 1(2) of Charter of United Nations, which clearly stipulates as the purpose of the United Nations: *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, (...)* [1]. Though it should be underlined, that this provision was strictly connected with the sovereign equality of the states, not with the rights of other entities or individuals [2, p.3]. However, due to the developing process of decolonization the substance of the self-determination was gradually extended. The citizens of former Colonial Countries[i] were directly granted the right to freely decide about their international status by the provisions of the Declaration of Granting of Independence to Colonial Countries and People [3, p.5]. Subsequently

the "International Covenant on Political and Civil Rights" and "International Covenant on Economic, Social and Cultural Rights" adopted in 1966 confirmed that: *1. All peoples have the right of self-determination* [4]. The broad meaning of the self-determination was finally enshrined in the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States". Declaration firstly confirms the fundamental nature of principle of territorial integrity but at the same time it stipulates the there might occur exceptional circumstances justifying the infringement of this principle in favor of self-determination: *"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*."[5] The interpretation of this provision leads to the conclusion that "the peoples" might exercise right to self-determination if the government of the state, which citizens they are, is oppressive and acts in the way which is discriminatory for the group claiming for the secession. Incorporating such understanding of this principle to the international legal order was confirmed by the International Court of Justice in cases of Namibia in 1971[6] and Western Sahara in 1975 [7]. Especially in the latter judges clearly stated that the right of self-determination is one of the fundamental principles of international law which rules the process of decolonization and which refers to "the people", though Court did not provide the definition of "the people". The aforementioned rulings deals with the cases of "colonial people", but the practice of states and UN resolutions confirmed that right of self-determination is not restricted only to colonial context but to all people subjected to foreign occupation ergo "the people" itself has become the entity of the right of self-determination [8, p. 88-91].

2. Reference re Secession of Quebec

The broad meaning of right of self-determination was also adopted in the *Reference re Secession of Quebec*, which was an advisory opinion of the Supreme Court of Canada regarding the legality, under both Canadian and international law, of a unilateral secession of Quebec province from Canada. The Court evoked different international documents juxtaposing self-determination with territorial integrity pointing out, that exercising of this right cannot violate the sovereignty of exiting states [9]: Though this general remark was developed in the next part of the adjudication, where judges refer to the provisions of "Declaration on Principles of International Law": "*A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity* [9]". In other words, court pointed out that the right to secede is strictly restricted to the people which cannot meaningful exercise the right to self-determination within existing state. Thus there is a presumption in favor of the principle of territorial integrity [10 p.234]. This conclusion gives a rise to the three conditions which must be jointly met in order to create a right to secede outside the decolonization context [2 p.7]:

a) The people - the entity which claim to secede is "the people"

b) Oppression - the policy of the authorities of the state from which the group would like to secede effects in infringements of human rights against the member of this groups. These breaches must have the substantial and long-lasting character and it should include some kind of tangible violence, e.g. tortures, imprisonments, abductions [10, p.234]. Nonetheless according to some scholars also non-physical maltreatments against the rights embodied in the Covenants on Human Rights ought to be considered as oppression e.g. right to enjoy their culture, practice their own religion or us their own language [11].

c) The last resort - there are no other effective means – both in domestic and in international law – to protect their national identity. Thus the secession is the *last resort*. The biggest drawback of this condition is its high level of subjectivism stemming from different extralegal reason, namely the geopolitical interests of members of the international community. So far nor practice, neither legal doctrine has create the set of

guidelines which can objectively stipulate when the secession becomes the last resort. Thus it is necessary to separately examine each case of prospective secession to assess if there are any other means of resolving the dispute underlying the claim to secede [12 p.98]

However, in fact the most controversial component of abovementioned theory is the notion of the people itself.

3. The People

The attempt to designate the definition of "the people" was made by UNESCO during the "International Meeting of Experts on the further study of the concept of the rights of peoples" held in Paris in 1989. The output of the meeting "The Final Report and Recommendations" stipulates, that the people are: *the group of individual human beings who enjoy some or all of the following common features: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life* [13]. Moreover it is widely accepted that the people are not limited to the ethnic community, but to all geopolitical communities bonded with the common goal embodied in the pursuit of common national interest: raison d'Ètat (reason of the State). However "the peoples" must be clearly distinct from "the minorities", as United Nations Human Rights Committee directly announced that "peoples" have a right to self-determination, whilst "minorities" are deprived of this power [10 p.231-232].

Unfortunately, currently there is a lack of definition of "minority". Even The Framework Convention for the Protection of National Minorities of Council of Europe do not provide such a definition. Though for the purpose of this dissertation the most comprehensive definition should be the one created by Canadian Jules Deschênes Quebec Superior Court judge in 1995: *A group of citizens of a State, constituting a numerical minority in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another (...)"*[14]. It is highlighted in the doctrine of international law, that the state which has the authority over the minority

should protects its right thus this minority has no right neither the necessity to create its own independent territorial unit [15 p.61].

To summarize the term the people as the constitutive condition of lawful secession it must be always thoroughly examine if the group is "people" in the aforementioned sense of meaning.

4. The quasi-states[ii]

The quasi-states are the entities claiming the independence and exercising de facto sovereignty, but at the same time lacking de iure sovereignty. Thus such an entity: controls its territory and resources, has the means of enforcement and security, is factually independent from other international entities and is at least partially capable to enter into international relations, carry out various functions of states (at least at the minimal level) including healthcare, education, social security [16 p.22]. Although this entity is hindered by the lack of international recognition. Hence from the legal point of view quasi-state is still the integral part of fully recognized state, though it does not accept this dependency. The denial of international community to recognize quasi states arises from the conviction that the citizens of this territory do not have the right to self-determination and thereby their act of secession was illegal.

The currently existing quasi-states are: Somaliland, Northern Cyprus, Abkhazia, Southern Ossetia, Transnistria (PMR) and Nagorno-Karabakh. The questions remain about the status of Kosovo, Republic of China(Taiwan) and Western Sahara. It must be stressed that four of them are the former parts of USSR and their existence is closely related to the policy of Russian Federation.

5. The cases of Pridnestrovian Moldavian Republic (PMR) and Republic of Crimea (RC)

The aim of case study part of this article is to implement aforesaid conditions of lawful secession to the cases of existing quasi-states of PMR and RC to appraise if they had a right to secede in the name of self-determination of people.

PMR

PMR is a strip of land between the River Dniestr and the eastern Moldovan border with Ukraine with the capital in the city of Tiraspol. Formally it is the part of Republic of Moldova. Before the dissolution of USSR it was the part of Moldavian Soviet Socialistic Republic and historically these terrains belongs to Bessarabia. PMR was formed as the effect of war of Transnistria in 1992. In the final stage of the conflict the separatists were supported by the former Soviet 14th Guard Army controlled by Kremlin. The ceasefire was signed on 21 July 1992 and has been in force to the present day.The PMR has been since today recognized only by three other former USSR quasi-states: Abkhazia, Nagorno-Karabakh and Southern Ossetia.

The assessment on legality of unilateral secession:

1. The People – according to the official census from 2004[iii] there were 555,347 people living in the areas controlled by the PMR government including Moldovans – 32.10%, Russians – 30.35% (approximately 28% of them hold Russian passports) , Ukrainians – 28.81 %, Bulgarians – 2,50%. This statistic data clearly shows that the populations of PMR constitutes the multi-national patchwork consisting of different minorities instead of the one, internally cohesive and bonded with the reason of the State "people" in the sense agreed by the international community.

2. The oppression – analysis of the previous proceedings of Moldavian authorities do not reveal any serious and/or long-lasting violations of human rights of citizens of PMR. Such a cases might have only occurred during the war of Transnistria, but those incidents were assignable to both sides of the conflict. It should be underscored that in 2001 Moldavian parliament enacted Law of the Republic of Moldova on the Rights of Persons Belonging to National Minorities and the Legal Status of their Organizations. This act clearly stipulates that Moldavian state guarantees equality before the law to persons belonging to national minorities alongside with prohibiting any kind of discrimination based on the national affiliation [17]. In next articles it lays downs the details of this protection[iv]. Moldova also ratified the most important international treaties concerning human rights protection *e.g.* The Universal Declaration on Human Rights, Covenants on Human Rights and Helsinki Final Act [18 p.64].

3. The last resort – the negotiations on the determining the status of PMR has been pending since the ceasefire in 1992. The process is facilitate by the OSCE. In 1997

the preliminary agreement, called "Primakov Memorandum" was signed but it has remained void due to the different interpretations of its provisions by Tiraspol and Kishinev. In 2003 counselor of Vladimir Putin proposed a settlement called "Kozak Memorandum" envisaging the creation of the asymmetric federal Moldovan state with Transnistria being minority but still very influential part of the federation [19 p.32-34]. This proposition was finally dismissed by Kishinev as detrimental for the territorial integrity of the state. In November 2011 the multilateral negotiations were resumed[v] within so-called "2+5 format" specially created under the aegis of the OSCE - with Moldova and Transnistria as parties to the conflict, Russia, Ukraine and the OSCE as intermediaries, and the United States and the European Union as observers [20].

In the aftermath of the Crimean accession to Russia the situation in PMR has been rapidly changing. It is highly possible that the next round of 2+5 talks planned to take place in Vienna in 10-11. April would be cancelled. The PMR authorities might deny participation in the negotiation accusing Moldova about imposing sanctions and Ukraine about establishing blockade on the border.

Republic of Crimea (RC)

The case of Republic of Crimea is highly specific and might be perceived as a precedent in the history of quasi-states. The main feature which makes it extraordinary is the aim of the secession. Whereas the other states seceded in order to gain sovereignty and pursued recognition by international community as independent states, the RC goal was to legitimize the referendum on joining the Russian Federation (RF). The process of seceding consisted of a few stages. On 11. March 2014 the Crimean Parliament and City Council of Sevastopol announced the Declaration of Independence from Ukraine: (…)*with regard to the charter of the United Nations (...) and taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July, 22, 2010*[vi]*, which says that unilateral declaration of independence by a part of the country does not violate any international norms, make this decision jointly: 1.If a decision to become part of Russia is made at the referendum of the March 16, 2014, Crimea (...) will be announced an independent and sovereign state with a republican order. (...) 3. If the referendum brings the respective results. Republic of Crimea as an independent and sovereign state will turn to the*

Russian Federation with the proposition to accept the Republic of Crimea (...) into Russian Federation [21].

Following this announcement the referendum on the status of Crime took place on 16. March 2014 with the outcome of 95% votes for the unification with Russia. As a result on 18. March 2014 representatives of authorities of RC and President Vladimir Putin signed an Agreement on Admitting to the Russian Federation the Republic of Crimea. Finally on 21. March 2014 the process of ratification of the treaty was finalized[vii] and RC official become the new constituent entity of RF. The Declaration of Independence was recognized only by RF and Kirgizstan. The referendum itself was condemned in the Resolution of UN General Assembly.

The assessment on legality of unilateral secession:

1. People – according to the official Ukrainian census from 2001 the ethnic composition of RC is: Russians: 58.5%; Ukrainians: 24.4%; Crimean Tatars: 12.1%;Belarusians: 1.5%; Tatars: 0.5% [22], thereupon there is no separate group of "People of Crimea". The only nation which does not have its own states are Tatars, but they should be perceived as the minority protected under Ukrainian domestic law. Moreover the Crimean Tatars was the group which protested most vehemently against accession to RF.

2. Oppression – no violation of human right by the authorities of Ukraine

3. Last resort – no negotiation, the process of potential extension of the autonomy within the Ukrainian state has not been started or even prospected.

7. Conclusive remarks

To summarize heretofore deliberations it seems quite clear in the light of international legal framework that the populations of PMR and Republic of Crimea do not have the right to self-determination, ergo they do not have a right to secede. These quasi-states are therefore illegal entities infringing the principle of territorial integrity of existing states.

However the Ukrainian crisis evidently shows the problems with delineation the firm frontier between the public international law and geopolitics. At the very moment when I write these words the group of separatist in Eastern Ukraine proclaimed the

creation of the sovereign state of the People's Republic of Donetsk [23] and People's Republic of Kharkov. Though it might sounds like the grim hoax, but the truth is that right to secede has become the handy "skeleton key" which can be used to open the doors for separations movements destabilizing the sovereign states in favor of the new imperial policy of Kremlin. President Vladimir Putin apparently read Machiavelli and knows that: *A prince, therefore, being compelled knowingly to adopt the beast, ought to choose the fox and the lion; because the lion cannot defend himself against snares and the fox cannot defend himself against wolves. Therefore, it is necessary to be a fox to discover the snares and a lion to terrify the wolves* [24]. In this context it seems clever to carefully read the relief map in the search for new holes for "skeleton key" of secession, which might change the global balance of power and tells us more about coming conflicts.

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