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INTRODUCTION

MARCELO G. KOHEN

The relationship between secession and international law is a subject that has long attracted the interest of jurisprudence. The emergence of a new State to the detriment of an older sovereign entity disrupts the composition of international society and challenges the very foundations of its main actors. At the time of the creation of the new independent States in the Americas during the eighteenth and nineteenth centuries, the idea of – and consequently, the term – ‘decolonisation’ did not exist. Hence, the process of what was the first phenomenon of independence of colonies from their European metropolises took the form of secession. In other words, these new States were not created as a result of the existence of any right to independence under international law. Their existence came into being as a matter of fact and of recognition by the other members of the more limited community of States of the time.

This approach drastically changed during the United Nations era. Decolonisation, the most important means of creation of new States during the second half of the twentieth century, was not viewed by the international legal order as a case of secession. One of the reasons for this is summarised in the Declaration of Principles of International Law embodied in UNGA Resolution 2625 (XXV): ‘the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it’.¹ The other reason lies in the emergence of the principle of self-determination as a right of all peoples. For the first time in history, international law contained a rule granting a right to some communities, those which qualified as ‘peoples’, to create their own independent States. In spite of this completely new phenomenon, secession remained – actually or potentially – as another important way to create States in the contemporary world.

¹ See Andreas Zimmermann’s chapter ‘Secession and the Law of State Succession’ in this volume.

Cambridge University Press

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Excerpt

[More information](#)

The end of the Cold War brought about new secessionist aspirations and the strengthening and re-awakening of existing or dormant separatist claims in nearly all regions of the world. An observer can be struck by this renewed zeal to create new sovereign States in a world that is more and more interdependent. Apparently, we are facing two simultaneous contradictory phenomena. Globalisation implies, by definition, the losing of competencies by States, the transfer of their power either to the top (as supranational or integration processes show) or to the bottom (mainly through decentralisation, deregulation and privatisation policies within the State adopted by governments nearly all over the world). As an explanation of this paradox, Zygmunt Bauman has advanced the argument that, 'it was the *demise* of state sovereignty, not its triumph, that made the idea of statehood so tremendously popular'.²

The growth of UN membership from its original 51 member States in 1945 to 149 in 1984 was essentially due to decolonisation. The increase in this figure from 151 in 1990 to 191 at present has been essentially due, broadly speaking, to secession. Indeed, even if one accepts the controversial qualifications of the collapse of the Soviet Union and the Socialist Federal Republic of Yugoslavia as cases of dissolution, there is no doubt that these processes of dissolution at least began with secessionist attempts made by some components of both former federations.

I. Secession: broad and strict conceptions

There are different perceptions in legal – as well as political – theories about the phenomenon of secession. Not surprisingly, authors of this collective work adopted or had in mind different perspectives. Some of them followed a broad notion of secession, including in their analyses all cases of separation of States in which the predecessor State continues to exist in a diminished territorial and demographic form. Situations of dismemberment of States, in which the predecessor State ceases to exist, were also envisaged. The case of the Socialist Federal Republic of Yugoslavia obviously attracted much scrutiny, in particular with regard to its legal qualification as a case of secession or dissolution. Other authors also considered situations related to processes of decolonisation.

² Z. Bauman, *Globalization: The Human Consequences* (Cambridge: Polity Press, 1998), p. 64.

Cambridge University Press

0521849284 - Secession: International Law Perspectives

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Excerpt

[More information](#)

INTRODUCTION

3

Most of the contributors adopted a more restricted perception. This is also the view followed by the editor. In the narrower sense of the concept, secession is the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter. Yet, secession can also take the form of the separation of part of the territory of a State in order to be incorporated as part of another State, without the consent of the former. When a new State is formed from part of the territory of another State with its consent, it is a situation of 'devolution' rather than 'secession'.³ This presupposes an agreement between both entities and, as such, is not a source of conflict, at least with regard to the existence of the new State itself.

The lack of consent of the predecessor State is the key element that characterises a strict notion of secession. At the same time, this factor explains why secession is so controversial in international law. On the one hand, the absence of agreement is a source of dispute between the new and the 'parent' State. On the other hand, for want of consent of the latter, the newly formed entity has to find a legal justification for its creation elsewhere. Conversely, the parent State will presumably attest that this justification does not exist in international law and that, on the contrary, the international legal order protects itself against attempts to dismantle it, such as those processes constituting secession. This situation provides a rough summary of the whole picture of the legal implications of secession in international law. The present study, although focusing upon situations of secession, will also address examples of devolution as a way to contrast both processes and the legal consequences thereof.

II. International law: its increasing role regarding secession

Not surprisingly, existing States have shown themselves to be 'allergic' to the concept of secession at all times. Their representatives even carefully avoided the very use of the term 'secession' when involved in codifying the rules of State succession, preferring to speak about 'separation of part of a State'.⁴ This aversion is not simply terminological. It is evidence that

³ For a classification of the different categories of creation of States in the contemporary world see: M. G. Kohen, 'Création d'Etats en droit international contemporain', *Bancaja Euromediterranean Courses of International Law* 6 (2002) 571–4.

⁴ The 1978 Vienna Convention on Succession of States in respect of Treaties did not even distinguish under this heading between true cases of separation (i.e. devolution and secession) and those of dissolution. See its article 34. Cf. articles 17, 30 and 40 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

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Excerpt

[More information](#)

States are not willing to allow even a potential consideration that secession is a situation governed by international law, even after the success of a secessionist State.

The creation of States has traditionally been perceived as a matter of fact. For most authors, international law does not impact upon this process, and is limited to taking note of the existence of a new sovereign entity, with all the legal consequences attached to it, i.e. the existence of rights and obligations in the international realm. Even as recently as 1991, the arbitration commission of the Peace Conference for Yugoslavia (known as the Badinter Commission) insisted that ‘the existence or disappearance of the State is a question of fact’.⁵ As a result of this view, which foresees an insignificant role for international law in this field, very little legal theory on the creation of States emerged. Instead, legal scholarship was concerned mainly with the attitude of the rest of international society with regard to the arrival of a new entity, i.e., recognition.⁶ James Crawford’s reference book *The Creation of States in International Law* constituted the exception to this state of affairs. The study not only dealt with the question, but it also demonstrated that international law had much to say in the matter.⁷

At the end of the Cold War, some of the new States which emerged were created on the basis of international law. In other words, the international legal system played the role of a ‘midwife’, providing legal justification for the creation of new States. This was particularly the case for Namibia in 1990 and East Timor in 2002. Micronesia and Palau achieved their statehood in 1990 and 1994 respectively, when the Security Council put an end to these last trust territories. However, the role of international law in the creation of those States was not new; it was just the continuation of the process of decolonisation of the 1960s and 1970s and probably represented the last remnants of that process. To some extent, the independence of Eritrea in 1993 could also be included in the list of States created by operation of international law, since the territory had been incorporated into Ethiopia by the UN General Assembly, under the condition that

⁵ *ILM* 31 (1992) 1495.

⁶ After the creation of new States following the First World War, some courses at The Hague Academy of International Law dealt with the question, laying stress nevertheless upon political rather than legal considerations, or essentially focusing upon recognition. Cf. R. Erich, ‘La naissance et la reconnaissance des Etats’, *Recueil des cours* 3 (1926) 431–505. By contrast, legal literature related to recognition of States is abundant. The two major works on this are: H. Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947) and J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Paris: Pedone, 1975).

⁷ J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979).

Cambridge University Press

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Excerpt

[More information](#)

INTRODUCTION

5

the territory would hold an autonomous status within a federation,⁸ a condition not respected by the parent State. The other cases of new States which emerged after the end of the Cold War, which represented the larger number of new States, did not benefit from international legal backing. Apparently, these States came into being as ‘a matter of fact’, a situation which international law, it seems, neither sanctions nor prevents. Olivier Corten’s chapter on the existence of a ‘gap’ in international law with regard to secession addresses this problem. He comes to the conclusion that international law’s ‘neutrality’ in this respect is less and less evident, since the mechanisms to protect States from disruption are even stronger today than before.

The traditional view was that secessionist movements, when not under foreign control, were a purely internal affair. According to this view, which is reflected in some chapters of this volume, international law neither encourages secessionism nor prohibits it. Secessionism was a matter of fact: if the secessionist forces were able to impose the existence of a new State, then the international legal system was to record the fact of the existence of this new entity.

The key element for distinguishing between those situations where international law played a direct role by providing a legal justification for the creation of the new State, and those situations where international law did not play such a role, is the status of the territory in question. In the former situations, the territories in question had an international status, such as former mandates, trusteeships, non-self-governing territories or territories having been placed under the sovereignty of an existing State by an international organisation, as was in the case of Eritrea. In the latter situations, the creation of the new sovereign entities was made to the detriment of the territory of an existing independent State. Situations of agreed dissolution, unification or devolution do not create major problems with regard to the very fact of the coming into being of the new States. It is essentially secession that is problematic from the legal perspective. This is shown not only by the cases of unilateral proclamations of independence of the former Yugoslav and Soviet republics, but also by other such proclamations that have not been followed by the effective existence of new States, as in the case of Kosovo, Chechnya, Bougainville, Somaliland, Anjouan, South Sudan, North Ossetia or Abkhazia, to mention a few.

⁸ GA Res. 390 (V) of 2 December 1950. See the discussion of this case in the chapters by Tomuschat and Ouguergouz/Tehindrazanarivelo in this volume.

Cambridge University Press

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Excerpt

[More information](#)

The main interest in the legal analysis of secession from the viewpoint of time is at the moment of the emergence of the new State. In other words, the essential questions at issue concern whether there exists a right to secession and the role of the fundamental principles of international law in supporting or opposing the creation of a new independent entity, as well as the impact of the so-called principle of effectiveness and of recognition in this process. International law also determines certain legal consequences pertaining to the situation after secession. Questions related to the respect for human and minority rights, democracy, and other issues such as respect for boundaries, play a persuasive role in whether or not new States are accepted as members of the international society in recent times. These are not questions that are specifically related to cases of secession but interest all situations where new States are created. As such, there are no specific rules deriving from these fields that apply to a secessionist State. Conversely, the question arises whether secession deserves a particular treatment with regard to some problems related to State succession, such as succession to treaties concluded by the predecessor State, nationality of the inhabitants of the seceding State, distribution of property, debts and archives. Andreas Zimmermann's chapter deals with these aspects of the problem, showing the supplementary difficulties that secession brings in the field of State succession, in particular, when no agreement between the predecessor and the successor State is reached.

III. The impact of fundamental principles of international law

For States, respect of their territorial integrity is paramount. This is a consequence of the recognition of their equal sovereign character. One of the essential elements of the principle of territorial integrity is to provide a guarantee against any dismemberment of the territory. It is not only the respect of the territorial sovereignty, but of its *integrity*. This explains, for instance, why support for secessionist movements, or a colonial power's decision to keep part of the territory of a colony after its independence, can be considered violations of the territorial integrity of the State or the people concerned. It is beyond doubt that this rule plays a fundamental role in international relations and, as a mutual obligation, it requires all States to respect each other's territories. It is a guarantee against eventual *external* breaches, or, in other words, threats against the territorial sovereignty coming from abroad. But does this obligation also apply to internal secessionist movements?

Cambridge University Press

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Excerpt

[More information](#)

INTRODUCTION

7

At first sight, territorial integrity cannot be invoked as a legal argument to oppose secessionist movements, since these do not constitute subjects of international law, as explained by Georges Abi-Saab in his conclusion. In other words, the principle applies to actions coming from abroad, not to threats emanating from inside a State. However, a perusal of recent practice appears *prima facie* as contradictory in this regard. On the one hand, no reference to the respect of the territorial integrity of the Socialist Federal Republic of Yugoslavia (SFRY) was mentioned in the numerous resolutions and declarations adopted at the moment of Slovenia and Croatia's unilateral proclamations of independence, followed by other components of that federal State. In the case of Eritrea, not only did the UN not evoke Ethiopia's territorial integrity, but it actively participated in the organisation of the referendum. On the other hand, in the cases of Bosnia and Herzegovina, Georgia, Azerbaijan, Comoros and Kosovo, among others, the international community addressed all parties involved in those internal conflicts – and consequently secessionist movements also – reminding them of the obligation to respect the territorial integrity of the States concerned and warning in some cases that any entity unilaterally declared in contravention to the principle would not be accepted.⁹

This seeming contradiction can nevertheless be explained in legal terms. As mentioned, the case of Yugoslavia was held by the Arbitration Commission and the UN to be one of dissolution and not of secession. By definition, the territorial integrity principle is not at issue if a State is dissolving: the State in question will not exist any more. The case of Eritrea, for its part, was one in which its special status of autonomy conferred by the UN was not respected by the State into which the territory was incorporated. Conversely, all the cases where an express reference to the respect of territorial integrity was made involved secessionist movements trying to

⁹ See in particular SC Res. 787 (1992) concerning Bosnia and Herzegovina, in which the Security Council '[s]trongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted'. Similarly, SC Res. 971 (1995), which 'calls upon the parties to intensify efforts . . . to achieve an early and comprehensive political settlement of the conflict, including on the political status of Abkhazia, *fully respecting the sovereignty and territorial integrity of the Republic of Georgia*' (emphasis added). Among others, cf. for Georgia, SC Resolutions 876 (1993), 896 (1994) and 906 (1994); for Azerbaijan, SC Resolutions 882 (1993), 853 (1993), 874 (1993) and 884 (1993); for Comoros, the Agreement of Addis Abeba of 13 December 1997 in: 4 *Documents d'actualité internationale*, (Paris: La documentation française, 1998), p. 143 and for Kosovo, cf. SC Resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1244 (1999).

Cambridge University Press

0521849284 - Secession: International Law Perspectives

Edited by Marcelo G. Kohen

Excerpt

[More information](#)

obtain independence through forcible means. This practice reveals a trend to enlarge the scope of application of the principle of respect of territorial integrity to cases where secessionist movements resort to force. This practice prefigures the position of international law to acknowledge the creation of new States only when this occurs through peaceful means.

The principle of the prohibition of the use of force in international relations seems to appear unrelated to the problem of secession, with the obvious exception of foreign military intervention for the purpose of creating a new State, as occurred in the case of the Turkish Republic of Northern Cyprus. Again, it must be stressed that struggle against forcible colonial rule is not at issue here.¹⁰ The traditional cases, in which a central government and a secessionist movement are involved in a violent conflict, are not candidates for the application of the rule prohibiting the use of force. In these cases, the violence used does not amount to a use of force in international relations, but is governed within the domestic sphere of a given State, as stressed by Olivier Corten and Georges Abi-Saab. Forcible repression, armed struggle or terrorism within the boundaries of one State are not governed by *ius ad bellum*, but by the domestic law of the State concerned. This means, on the one hand, that central authorities can resort to the legitimate exercise of forcible means and, on the other hand, that resort to violent measures by separatist movements has no legal ground. Contrary to what happened in the context of decolonisation, international law has not recognised a right to use force for secessionist movements, even in circumstances of grave violations of human rights against minorities or other groups, as the case of Kosovo demonstrates.¹¹ As a matter of course, human rights must be respected in all cases of repression of separatist struggle, as must humanitarian law if the confrontation reaches the level of an internal armed conflict. The case of Chechnya is an example in which these considerations are applicable.¹² Andrew

¹⁰ On this aspect, see G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols', *Recueil des cours* 165 (1979-IV) 366–374.

¹¹ In the above mentioned resolutions (note 9), the Security Council 'condemn[ed] all acts of violence by any party, as well as terrorism in pursuit of political goals by any group or individual, and all external support for such activities in Kosovo, including the supply of arms and training for terrorist activities in Kosovo' and '*Insist[ed]* that the Kosovo Albanian leadership condemn all terrorist actions, *demand[ed]* that such actions cease immediately and *emphasize[d]* that all elements in the Kosovo Albanian community should pursue their goals by peaceful means only'.

¹² In the Declaration of 11 December 1999, in Helsinki, 'The European Council does not question the right of Russia to preserve its territorial integrity nor its right to fight against terrorism. However, the fight against terrorism cannot, under any circumstances,

Cambridge University Press

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Excerpt

[More information](#)

INTRODUCTION

9

Clapham's contribution addresses the particular case in which secessionist movements resort to force, sometimes using terrorist methods, and focuses on problems of qualification in the application of anti-terrorist rules.

The principle of self-determination, when applicable, can lead to the creation of new States. There are not two different rights to self-determination, one internal and the other external, but two aspects of a single right.¹³ If the application of the principle in the context of colonial or foreign rule is no longer controversial, the essential point for the discussion on secession is whether the principle has any relevance in existing States. Christian Tomuschat's chapter concludes that a narrow conception of self-determination prevails in international law. In the editor's view, practice shows that the international legal definition of 'peoples' acknowledges the existence of only one people where there exists a State. The exception is furnished by those cases in which the State defines itself as constituted by a plurality of peoples having the right to self-determination and hence to separate.¹⁴ This is the case, at present, of the constitutions of Ethiopia, and Serbia and Montenegro. This view is not espoused by some contributors (e.g., Clapham, Dugard/Raič), who consider, as does the Canadian Supreme Court, that "a people" may include a portion of the population of an existing state'.¹⁵ Practice, however, shows that a clear distinction among three different categories of human communities is made in international law, each having their corresponding rights: peoples, minorities and indigenous populations. Only peoples have the right to self-determination. The last two groups form part of the first, broader group: the peoples. To speak about national minorities within States makes no sense if those minorities are also considered 'peoples'. By definition, a minority cannot but be identified within a wider human community. Sociological or other definitions of 'peoples' must not be confused with the definition under international law, with which they may or may not coincide. In this particular field, it should also be stressed that the recognition by the international community through the relevant UN organs that a given human community constitutes a 'people' is also

warrant the destruction of cities, nor that they be emptied of their inhabitants, nor that a whole population be considered as terrorist.' Available at: <http://europa.eu.int/abc/doc/off/bull/en/9912/p000031.htm>.

¹³ Cf., however, the chapter on the practice in Africa and the Asia-Pacific regions.

¹⁴ For the editor's analysis of self-determination, see M. G. Kohen, *Possession contestée et souveraineté territoriale* (Paris: P.U.F., 1997), pp. 407–23, as well as 'Création d'Etats en droit international contemporain', pp. 583–9 and 594–6.

¹⁵ *ILM* 37 (1998) 1370, para. 124.

Cambridge University Press

0521849284 - Secession: International Law Perspectives

Edited by Marcelo G. Kohen

Excerpt

[More information](#)

important, as the practice in the field of decolonisation shows.¹⁶ To some extent, recognition with regard to peoples can play a constitutive role, contrary to the situation with regard to the creation of States.

A very controversial issue debated at some length in this book is the scope of the so-called 'safeguard clause' embodied in the Friendly Relations Declaration and repeated in subsequent instruments.¹⁷ For some of the contributors, such as Tomuschat, Dugard/Raič, Ouguerouz/Tehindrazanarivelo and Thio, the interpretation of this clause leads to the legal acceptance of a 'remedial secession', at least as a measure of last resort. If a State is not behaving in the manner prescribed by the Friendly Relations Declaration, then the part of the population being discriminated against could have its right to self-determination recognised, the State acting in contradiction with this right losing the protection of its territorial integrity to this extent. Like other authors in this book (e.g., Tancredi, Corten, and Christakis), the editor does not share this view which, according to him, is not in conformity with the rest of the Declaration's chapter on self-determination. The 'safeguard clause' was originally drafted with situations such as South Africa and Rhodesia in mind, without any intention to extend recognition to any 'secession' rights to the majority of the South African and Zimbabwean peoples, as victims of racist regimes. Curiously enough, it was Pretoria's minority regime which encouraged a 'secessionist' policy, through the creation of Bantustan 'independent' States (Transkei, Ciskei, Bophuthatswana and Venda).

In addition, the interpretation of the safeguard clause as allowing 'remedial secession' would lead, as a consequence of the violation of the internal dimension of self-determination, to the loss of the territory of the State whose government is acting in this way. This is tantamount to saying that when a national, religious or linguistic minority is seriously discriminated

¹⁶ 'The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.' *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 33, para. 59.

¹⁷ 'Nothing in the foregoing paragraphs [related to self-determination] shall be construed as authorising 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 . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.