

Separatism or legitimate aspirations to independence?

by Dessislava Cheytanova¹

On 26 April 2007, the Secretary General of the United Nations presented to the President of the Security Council the final report of Martti Ahtisaari, Special Envoy of the United Nations Secretary-General on Kosovo's future status. In his final report, Martti Ahtisaari clearly stated his view that "*independence is the only option for a politically stable and economically viable Kosovo.*"² His recommendation, supported by the Secretary General of the United Nations, for independence of Kosovo (initially supervised by the international community and supported by international civilian and military presences) met the support of a number of actors on the international plane, including the United States and the EU, but faced firm opposition from the Russian Federation and China.

Commentators on the Kosovo status talks have referenced, not without ground, the so called "frozen conflicts" in Euroasia, one of which is the conflict related to the region of Transdniestria in Moldova. While a lot has been said and written about Kosovo in the last ten-fifteen years, Transdniestria is a region, which has been left out of the spotlight in international politics and about which few people know.

The United Nations have not been actively involved in the efforts for the resolution of the conflict for the legal status of Transdniestria, but the Organization for Security and Cooperation in Europe (OSCE) has made a significant contribution in this respect. It is noteworthy, however, that unlike Kosovo, a status of a sovereign State for Transdniestria has never been an option under consideration by the OSCE participating States. Reinforcement of the territorial integrity of Moldova, although with an understanding about a special status for Transdniestria within the territory of Moldova, has always been the declared policy of the OSCE participating States.

This inevitably raises the questions: Is Transdniestria different from Kosovo? Are the aspirations to independence of the peoples of Transdniestria legitimate?

In search of a response to these questions, this article will examine the historical roots of the conflict and set out the different options, which have been considered for the settlement of the Transdniestrian conflict. This article will further analyse each of the arguments, put forth by the self-proclaimed government of Transdniestria, in support of their claim for independence and compare them with the arguments put forth in support of Kosovo's independence.

In this context the application of the legal norm of self-determination will be examined.

In connection with the Western Sahara Advisory Opinion of the International Court of Justice at The Hague, Judge Dillard wrote:

'...It is for the people to determine the destiny of the territory and not the territory the destiny of the people...'

If light of the foregoing, should the application of the principle of self-determination not always prevail over the doctrine of territorial integrity of States, when conflicts related to the legal status of a territory are settled? If not, what criteria are applied to justify its application to one secession movement, but not to another? On what basis is one secession movement qualified as a separatist's action, while another as an effort to exercise a legitimate right to self-determination, provided under international law?

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² S/2007/168, report of the Special Envoy of the Secretary General on Kosovo's future status; paragraph 10

This article will show that in contemporary international law, the application of the principle of self-determination is not always a prevailing consideration in the resolution of the conflicts related to territorial secession. On the contrary, using the Transdniestrian conflict as an example, it will be shown that often, the principle of self-determination is overridden by considerations of preserving the territorial integrity and political unity of States. While this approach purportedly maintains peace and stability in a region, it is in fact the very spark that ignites the violence and hostilities between the parties to a conflict. Further, it puts into question the fundamental character of the principle of self-determination.

Historical Roots of the Conflict³



⁴Transnistria is a narrow valley located between the Dniester River, to the west, and the border with the Republic of Ukraine to the east. In the course of their history, these two parts of the current Republic of Moldova, have rarely been under the same rule. They fall for the first time under the control of the same political power (Russia) only in 1812, but are separated again in 1918, when the territory of Moldova on the west bank of the Dniestr River proclaims independence from Russia and unites with the Kingdom of Romania. Transnistria does not join Romania and forms the Moldavian Autonomous Soviet Socialist Republic (1924-1940) as an autonomous province within the Ukrainian Soviet Socialist Republic. On 28 June 1940, under the terms of the secret protocol of the Molotov-Ribentrop pact, the USSR forced Romania out of Moldavian territory on the west bank of the Dniestr River and annexed this territory. Transnistria was rejoined with the territory on the west bank to form the Moldavian Soviet Socialist Republic, which had the borders of the present-day Republic of Moldova. However, shortly after, Moldova was invaded by the Axis forces and Romanian rule was established on the whole territory. In August 1944, Soviet Troops re-conquered from the German and Romanian forces the of today's Moldova and re-established the Moldavian Soviet Socialist Republic (MSSR) within the borders from 1940. Under

Soviet rule, a process of “sovietization” began in the MSSR, which included the promotion of a Moldavian ethnic identity, different from the Romanian. While Russian was established as the primary language, the language (Romanian) used until that time by the majority of the population on the territory of Moldova was named to be Moldovan, and the alphabet was changed from Latin to Cyrillic. Transnistria was considered to be more “Soviet”, and it quickly became the political and economical centre of the MSSR.

Notwithstanding the foregoing, the conflict between the west bank territory of Moldova and Transnistria originates from more recent events. In the period August to December 1989, the Supreme Soviet of Moldova amended the Constitution and passed a series of language laws, which established the Moldavan (Romanian) language, written in Latin (using the Romanian alphabet), as the “State Language”. While the laws stated that the Russian language would be the “interethnic language of communication” and that Romanian, Russian and Gagauz would be the official languages, certain other provisions of the laws were considered by the Russian speaking population of the Republic of Moldova to be discriminatory. For

³ The information in this section is based on OSCE reports, which can be found at www.osce.org and on Charles King *The Moldovans- Romania, Russia and the politics of culture* ,Stanford, California, Hoover International Press (2000)

⁴ Map, US Department of State web site, see <http://www.state.gov/r/pa/ei/bgn/5357.htm>

example, the “Law on the Use of Languages on the Territory of the Moldovian SSR” contained a provision requiring all public servants and others, whose work brings them in contact with the general public (transport, trade, culture, public health, etc.) to speak Romanian and Russian and in areas with predominately Gagauz population, also Gagauz at a level, allowing them to fulfill their professional obligations. The law also included a provision for mandatory language examinations as of 1 January 1994. While it could be argued that these provisions are balanced, they were viewed by the Russian speaking population in the Republic of Moldova as intended to cause them detriment and to empower Romanian speakers, as all Romanian speakers spoke Russian, as a result of the many years Soviet rule, whereas not all Russian speakers spoke Romanian.

On 27 April 1990, the Supreme Soviet adopted the Romanian tricolor with the Moldovan coat of arms and the national anthem of Moldova was changed to the song, which was also Romania’s national anthem before 1946 and after 1989. On 23 June 1990 a declaration of State Sovereignty was passed by the Supreme Soviet of Moldova. The declaration gave supremacy of Moldovan legislation over the legislation of the Soviet Union and enshrined multiparty democracy in Moldova. These actions created concerns among the minorities of Moldova of a possible unification of Moldova with Romania, and were followed shortly after by a proclamation of independence by the Gagauz Union Republic on 19 August 1990 and the Transdnistrian Moldovan Republic on 2 September 1990. Both proclamations were condemned by the Supreme Soviet of Moldova. However, both self-proclaimed entities proceeded with electing their own presidents and parliaments. The first violent clashes in Transdnistria occurred in November 1990 over control of municipality buildings in the region.

In light of the language issue, the Transdnistrian conflict is often perceived as an ethnic conflict between Romanians and Slavs living in Moldova. However, Pal Kolsto, Andrei Edemsky and Natalya Kalashnikova have argued that to call the Transdnistrian conflict, one between ethnic Moldovans (or Romanians) and Russophones, would be a “*gross oversimplification*”.⁵

Others have agreed. Charles King noted:

‘...There were far more Ukrainians and Russians west of the Dniestr River than in Transdnistria[...]. In Transdnistria as a whole, Moldovans formed nearly 40 percent of the total population of just over 600,000. Rather, although the Transdnistrian dispute was generally portrayed as a revolt by Slavs against the nationalizing policies of Chisinau, the real source of the violence after 1990 lay in fact at the level of elite politic [...]. The reaction to the national movement was not a revolt by minorities, but a revolt by displaced elite against those who threatened to unseat them...’⁶

Dov Lynch stated that the conflict was ‘...ethnically driven only to the degree that the language issue and the prospect of reunification with Romania aroused fears in left bank population, including its Moldovan component. Nonetheless, the roots of the conflict were political and economic. Under the Soviet rule, the Moldovan Union Republic had been governed by elites from the Transdnistrian region. In the 1980s, a new generation of leaders from Bessarabia rose to challenge Transdnistria’s predominance. Combined with this, Moldova’s movement towards political and economical independence threatened Transdnistrian’s control of local industries, and especially, the subsidies that the factories on the left bank received from Moscow...’⁷

On 27 August 1991, following the Moscow *coup* attempt, the Supreme Soviet of Moldova adopted the Declaration of Independence of the Republic of Moldova.

⁵ Pal Kolsto & Andrei Edemsky with Natalya Kalashnikova, *The Dniester Conflict: Between Irredentism and Separatism*, 45 EUR.-ASIA STUD. 978 (1993)

⁶ Charles King, *supra* note 3 at 187

⁷ Dov Lynch *‘Engaging in Euroasia’s Separatist States’*, United States Institute of Peace (2004) at 33

Tension between the territory of Moldova on the west bank of the Dniester River and Transdniestria escalated towards the end of 1991 and beginning of 1992 and resulted in further violent clashes and armed fighting. The hostilities between Chisinau and Transdniestria ended with the signature of the cease-fire agreement between the Russian Federation and the Republic of Moldova on 21 July 1992.

Settlement Talks

The first attempts for achieving a political settlement of the conflict were made in the beginning of 1993. Transdniestria proposed a draft treaty, which foresaw a confederation structure for the Moldova with virtual independence for Transdniestria. This proposal was rejected by the Moldovan authorities, which made a counter-proposal for a special status of Transdniestria within the Republic of Moldova. Moldova's proposal, however, was rejected by Transdniestria.

In November 1993, the OSCE Mission in Moldova⁸ issued a report outlining “a proposal on a special status for the left-bank Dniester areas (Transdniestria; Russian: Pridnestrovie) within the Republic of Moldova as a basis for talks between both parties to the conflict.”⁹

This report explored different options available under international law for settlement of the conflict and suggested a special status for Transdniestria within the Republic of Moldova. The report emphasised that the maintenance of the territorial integrity of the Republic of Moldova should be an overriding consideration in the assessment of the different options for settlement of the conflict. In light of the foregoing, the division of Moldova into two or more separate States, either coexisting side by side or within a “confederation”, was ruled out at the outset. While, the report excluded secession of Transdniestria, in principle, it provided for the right to “external self-determination” of the peoples of Transdniestrian in the event of unification of the Republic of Moldova with the Republic of Romania. Notwithstanding OSCE's concerns for the preservation of the territorial integrity of the Republic of Moldova, the OSCE recognised that a Moldovan unitary State, in which Transdniestria would be ruled directly from the centre, would also not be a viable option for settlement of the conflict.

The format, in which the negotiations process is being conducted today, was established gradually in the course of the years 1994 and 1995. In 1994, the OSCE and the Russian Federation began acting as mediators. Ukraine joined the negotiation process as a mediator in 1995, and in 2005, the United States and EU joined the process as observers.

On 8 May 1997, the Moldovan President and Smirnov signed a Memorandum on the Basis for Normalization of Relations between the Republic of Moldova and Transdniestria (“Moscow Memorandum”). In this Memorandum, the parties agreed that they will construct their future relations within the framework of a common State. However, it soon became apparent that the parties had a different notion of ‘common State’. A number of new settlement proposals were presented by the parties and/or the mediators during the period 1998 – 2007. While in the course of the negotiations, the parties managed to resolve some secondary issues, which could be considered relevant to the conflict resolution, during this period they had not come any closer to a settlement of the conflict, itself. Over time, although not openly expressed, it appeared as if Transdniestria was moving away from the concept of a “common State” with Moldova and moving back towards its original claims for sovereignty.

On 31 January 2007, the Transdniestrian Supreme Soviet adopted a resolution repealing its decision of 6 January 1993 on the possible creation of a confederation with Moldova. During

⁸ The OSCE Mission in Moldova was mandated by the OSCE participating States in February 1993 and deployed in April the same year. One of the main tasks of the Mission, stated in its mandate was to promote and facilitate negotiations leading to a lasting political settlement of the conflict, with an understanding about a special status for Transdniestria.

⁹ Report No. 13 by the OSCE Mission to Moldova 13 November 1993, see <http://www.osce.org/moldova/13426.html>

the same session the Supreme Soviet also revoked another resolution from 2003 concerning a possible federation with Moldova. On the basis of the latter resolution the Supreme Soviet had established the expert group to work within the framework of the Joint Constitutional Commission initiated by Moldovan President Voronin in 2003. With the Supreme Soviet's decision on 31 January 2007, which entered into force on 5 February 2007, this expert group was dissolved. While these resolutions had only declaratory character, their repeal was indicative of Transdniestria's position on a 'common State' with Moldova.

And finally, with the submission of Martti Ahtisaari's report to the United Nations Security Council and the 'Comprehensive Proposal for the Kosovo Status Settlement', as other unrecognized States, Transdniestria also appears to have resolved to await the outcome of the Kosovo Status negotiation, prior to addressing the issue of settlement with Moldova.

On 16 June 2007, the 'foreign ministers' of the four unrecognized entities in the area of the former Soviet Union, Transnistria, Abkhazia, South Ossetia and Nagorno Karabakh, held a 'foreign minister' summit of their 'Community for Democracy and Rights of Nations' in Tiraspol.

During the summit the four 'ministers' adopted a Declaration on the Principles of Peaceful and Fair Settlement of Post-Soviet Conflicts, stressing that these conflicts should be resolved exclusively by peaceful political means, on the basis of respect for the positions of all parties to the conflicts and under the unconditional recognition of the peoples' right to self-determination. The four unrecognized states called for respect of the will of the Abkhaz, Nagorno Karabakh, Transnistrian and South Ossetian people for independence as expressed in their various referenda. They also stressed that in the event that the United Nations proceeds with independence for Kosovo, the four unrecognized entities would prepare an additional declaration.

Analysis of arguments in support of the legitimacy of Transdniestria's claim to independence

In the course of Transdniestria's struggle for independence the two most commonly stated arguments in support of Transdniestria's claim have been 1) the denunciation of the Molotov-Ribbentrop pact by Moldova, and 2) the right to self-determination of the peoples of Transdniestria. Each of these arguments will be examined in turn below.

The denunciation of the Molotov-Ribbentrop pact

In the Declaration of Independence of the Republic of Moldova¹⁰, Moldova referred to the denunciation of the Molotov-Ribbentrop pact as an argument in support of its claims to independence from the Soviet Union. According to Moldova, the denunciation of the pact rendered it null and void *ab initio* and would eliminate its legal and political consequences.

Picking up on this argumentation, Transdniestria argued that the denunciation of the Molotov-Ribbentrop pact would also automatically revert Transdniestria to the autonomous State, which it was prior to 1940, when the Supreme Soviet of the USSR adopted the 'Decree concerning the frontiers between the Ukrainian SSR and the Moldavian SSR', as a consequence of the Molotov-Ribbentrop pact.

However, it is worthy of note that under international law the denunciation of a treaty would make that treaty voidable and release the parties from the obligation of further performing it, but in the interest of legal certainty, it would not necessarily render the treaty void *ab initio* and revert the position of the signatories to the *status quo ante*.

Nonetheless, it should be acknowledged that should one accept that the denunciation of the Molotov-Ribbentrop pact gives legitimacy to Moldova's claim for independence from the Soviet Union, then Transdniestria's argumentation is not entirely void of substance. It is not clear, however, what the status of Transdniestria under such a scenario would be, considering

¹⁰ adopted by Moldova's Supreme Soviet on 27 August 1991,

that prior to the annexation of Bessarabia, Transnistria was an autonomous province within the Ukrainian Soviet Socialist Republic.

Notwithstanding the foregoing, the legal effects of the denunciation of the Molotov-Ribbentrop pact appear to be irrelevant for the determination of the territorial boundaries of the Republic of Moldova and particular the determination of the legal status of Transnistria. As the pact was by its virtue a German-Soviet non-aggression treaty, Germany's aggression against the Soviet Union on 22 June 1941, which marked the commencement of the Second World War, was a violation of the treaty provisions and thus terminated the Ribbentrop-Molotov pact. While Moldova remained within the territory of the Soviet Union after the war, this was pursuant to the Peace Treaty of 10 February 1947, which superseded the Molotov-Ribbentrop pact. Consequently, challenging today's borders of Moldova constitutes a challenge to the political-territorial consequences of the Peace Treaty of 1947, and not the Ribbentrop-Molotov pact.

Self-Determination

The second argument of Transnistria in support of its claim for independency has proven to be even more controversial than the first. This is due not only to the specific circumstances of the Transnistrian conflict, but also because of the controversial character of the "principle of self-determination" in general: '...a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion...'¹¹

The concept of self-determination was initially expressed as a political concept at the end of the XIXth and the beginning of the XXth century in connection with the nationalist movements resulting from the weakening and subsequent disintegration of the Ottoman, Austro-Hungarian and Russian Empires. The territories of the former empires required new sovereigns and the concept of self-determination seemed to conveniently suit the purposes of the Great Powers in the re-defining of new boundaries within Europe. According to H. Hannum, self-determination in 1919 had little to do with the demands of the 'peoples' concerned, unless those demands were consistent with geopolitical and strategic interests of the Great Powers.¹² The 'World Order' has undergone significant changes since 1919, which have in some cases resulted in evolution of the concept of self-determination. Nonetheless, it seems that not much has changed with respect to the manner in which the principle of self-determination is being applied today.

However, as noted in the Preliminary Objections of the South West African Cases - the generality and political aspect of the principle of self-determination did not deprive it of its legal content. However, is the principle of self-determination an absolute principle of international law?

Self-Determination and Jus Cogens

The 1969 Vienna Convention on the Law of the Treaties (VCLT) introduces the term 'peremptory norm of general international application' (*jus cogens*), and defines it in its Article 53.¹³

While initially the application of this definition was limited to the convention¹⁴, it has subsequently been widely accepted by jurists as a general definition of *jus cogens*. Unfortunately, neither the VCLT nor any other legal instrument provides a list of norms, which would qualify as *jus cogens*. Nevertheless, certain characteristics of such norms could

¹¹ H. Hannum, 'Autonomy, Sovereignty and self-determination', University of Philadelphia Press (1996) at 29

¹² *Ibid* at 28

¹³ Article 53 VCLT: '...a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character...'

¹⁴ Art. 53 of VCLT includes the words: '... for the purposes of the present convention ...'

be deduced from the definition. These features of the norms, forming the body of *jus cogens*, establish them as absolute, unconditional and overriding principles of international law.

Some jurists claim today that the continued invocation of the right to self-determination in international law and practice has given it the status of a peremptory norm and that the right to self-determination today enjoys the privileged position of a *jus cogens* norm¹⁵. If this is indeed the case, then international law should put aside other considerations and recognize the right of peoples to self-determination as an absolute right in all cases, even if the exercising of this right would result in changes to the boundaries of States. Such application would be in line with Judge Dillard's pronouncement in connection with the Western Sahara Case, quoted above. In practice this would mean that the expression of the free will of peoples, for example through a referendum, to form a sovereign unit within the boundaries of the territory, occupied by them, would constitute sufficient legal ground for the forming of the new sovereign unit. In Transnistria's case, such legal ground would have been provided by the referendum of January 1990, which resulted in 96% of the population of Transnistria favouring wide autonomy and if necessary, the future creation of an independent State.¹⁶

The reality, however, is quite different. The difficulties arise, as acknowledged by Professor Brownlie¹⁷ from the conflict of the right to self-determination with other peremptory norms of international law, such as the doctrine of territorial integrity and sovereignty of States or the rules on the use of force. This would imply, as stated by Professor Hannum that some fundamental principles of international law are "more fundamental" than others.¹⁸ This in itself is a contradictory statement. However, this contradiction seems to be enshrined in the very legal instruments, which have established the right to self-determination as a right under international law. References to the right to self-determination in UN Documents can seldom be found without a reference to the territorial integrity and sovereignty of States.¹⁹

Does the right to self-determination exist outside the colonial context?

Even though the General Assembly resolutions 637, 1514 and 2625 refer to "all" peoples, the obvious question which arose after the adoption of the Declaration on the granting of Independence to Colonial Countries was does the right to self-determination exist outside of the colonial context.

The practice of States and the United Nations indicates that while existence of the right to self-determination was acknowledged as having a general application, the right to "external" self-determination recognized only in the colonial context, as will be shown below.

¹⁵ Hector Gross Espiel, *Implementation of United Nations Resolutions Relating to the Right of People Under Colonial and Alien Domination to Self-Determination*, Special Rapporteur, UN E/CN.4/Sub.405, 20 June 1978 at 33-35; Brownlie, *Principles of Public International Law*, Oxford university Press (1998) at 515

¹⁶ Charles King, *supra* note 3 at 189

¹⁷ Brownlie, *supra* note 15 at 517

¹⁸ H. Hannum, *supra* note 11 at 47

¹⁹ 1960 Declaration on the granting of Independence to Colonial Countries affirms both the rights to peoples to self-determination and the principles of territorial integrity and inviolability of State borders. The 1970 Declaration of the Principles of International law concerning the Friendly Relations and Cooperation among States, provides that every State must aid the realization of the principle of '...self-determination of the peoples...', but also that '...nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action, which would dismember or impair [...] the territorial integrity or political unity of a sovereign State...'. The principles of territorial integrity of States and the exclusion of changes to existing boundaries as an expression of the principle of self-determination, except with the consent of the States concerned, have been affirmed in numerous other international treaties and declarations since 1970: Vienna Convention of Diplomatic Relations; 1966 VCLT, 1975 Helsinki Final Act; 1978 Vienna Convention on Succession of States in Respect of treaties; The Opinions 2 and 3 of the Conference on Yugoslavia Arbitration Commission ('Badinter Commission'); Declaration of the United Nations World Conference on Human Rights in 1993; The Constitutive Act of the African Union.

Does the right to self-determination include the right to secession?

It is not clear that the concept of self-determination was intended to include the right to secession. In fact, it would appear from the documents on the UN Charter Debates that a possible ‘amalgamation’ of nationalities was considered as potential expression of the principle of self-determination, rather than secession²⁰.

The need to address the right to “external” self-determination only arose with the commencement of the decolonization process, for which the right to self-determination provided a convenient platform. Article 3 of GA Res. 637²¹ recognized the right of ‘non-self-governing territories’ to self-governance and complete independence. The Declaration on the Granting of Independence to Colonial Countries went even further and proclaimed independence as the principle means through which self-determination is implemented. This was, however, clearly limited to the colonial context.

Further, secession was recognized only in strict adherence to the principle of *uti possidetis*²². Thus, the right to self-determination in the colonial context appeared to apply to ‘territories’ and not to ‘peoples’. Contrary to Judge Dillard’s pronouncement, it was the ‘territories’, which determined the boundaries of the new entities, rather than the ‘peoples’.

In sum, secession as an expression of the traditional right to self-determination has been recognised by international law, but only on an exceptional basis, in the limited context of decolonization. It is noteworthy that, in fact, the creation of this “exceptional” right to secession could be interpreted to confirm the rule that secession was, in principle, not recognized as an available option for expression of self-determination - *exceptio probat regulam in casibus non exceptis*.²³

Finally in the eighties, the right to self-determination appeared to have been put ‘under control’. While it had acquired a broader sense with respect to colonies and non-self-governing territories, there was practically none of those left in the world. With respect to all other “peoples”, self-determination was confined within the restrictive frame established by the international community with the purported aim of maintaining peace and stability.

After 1989, the end of the ‘Cold War’ and the dissolution of the Soviet Union and Yugoslavia posed new challenges for the restrictive doctrine of self-determination, which has been established. These events led to the establishment of the doctrine of ‘constitutional self-determination’. As will be shown below, the doctrine of constitutional self-determination was also established an exception to the limited content of the right to self-determination, with a view to confirming that the right to self-determination does not include a general right of secession.

Constitutional Self-determination

Article VIII of the 1975 Helsinki Final Act requires the participating States of the CSCE to ‘...respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States...’

Article I of the same document states that State frontiers ‘...can only be changed, in accordance with international law, by peaceful means and by agreement...’ In essence, this would mean that should the central government consent to a change in its borders, the seceded entity would be recognised by the international community. In this respect, it is not surprising that the scenario provided for in the 1975 Helsinki Final Act has rarely occurred in practice, as it is precisely the act of the granting of consent, which is normally the essence of any self-

²⁰ UNCIO VI, 300 at 703-704

²¹ adopted on 16 December 1952

²² UN GA Res.1514 and 1541, *Burkina Faso-Mali Case*, ICJ (1986).

²³ A Medieval Latin legal principle, which means in translation ‘the exception confirms the rule in the cases not excepted’.

determination conflict. It seems unlikely that the central State would be prepared to create or amend national laws to accommodate the right for unilateral secession of part of its territory. Under the protection of the doctrines of territorial integrity and sovereignty of States, there is no obligation under international law on a State to make provisions for, and/or accept, changes to its borders, except in certain explicitly defined circumstances, noted above.

Notwithstanding the foregoing, provisions to this effect have been found in the domestic law of some States²⁴, although their invocation is made subject to the fulfilment of certain conditions, e.g. the conducting of a referendum. The first attempt to invoke such a provision, namely Article 72 of the 1977 Constitution of the USSR, was made by the Baltic States in 1989-1990. Article 72 provided:

‘Each Union Republic shall retain the right freely to secede from the USSR’.

The secession was opposed to by the central authorities, which based their opposition on the provisions of Article 78 of the 1977 Constitution of the USSR, which provided:

‘The territory of a Union Republic may not be altered without its consent. The boundaries between Union Republics may be altered by mutual agreement of the Republics concerned, subject to ratification by the Union of Soviet Socialist Republics’

It is apparent that this provision rendered Article 72, quoted above, virtually meaningless. In 1991, after the attempted *coup d’etat* in Moscow, the USSR dissolved entirely. Thus, the application of a constitutional norm, providing for unilateral secession was not tested in practice. The new States, which emerged from the dissolution of the USSR were established within the federal borders. The moves for independence by territories²⁵, including Transdnistria, within several of the new States were rejected by the central governments of those States. As in the colonial cases, the doctrine of constitutional self-determination was applied in strict adherence to the principle of *uti possidetis* and with due consideration to protecting the territorial integrity of the new States.

Another opportunity for putting a norm of this nature to the test was presented by the Socialist Federal Republic of Yugoslavia (SFRY). The SFRY was a multiethnic Federal State consisting of six Republics and two autonomous regions. The Constitution of the SFRY of 1974 provided:

‘The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle ...’.

This provision was interpreted to imply that the Republics had been accorded an express right to self-determination and secession. On 25 and 26 June 1991, two of the Republics - Slovenia and Croatia – sought to exercise their rights under the Constitution and declared their independence. This move was strongly apposed by Serbia, who had managed to gain the ascendancy within the SFRY in the second half of the 80’s. The international community initially did not recognise the independence of Slovenia and Croatia and supported the territorial integrity of Yugoslavia. However, soon after, Bosnia and Herzegovina, also made move towards secession from Yugoslavia. It soon became apparent that the dissolution of Yugoslavia was inevitable. At that point the EC decided to use the instrument of recognition to effect this process. On 16 December 1991 the Foreign Ministers of the EC issued the Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union. The Declaration set out a number of conditions, which have to be fulfilled by the entities applying to recognition, as a prerequisite for the granting of such recognition by the EC. The EC States introduced another element, as well. They proposed a procedure to determine whether the entities applying for recognition fulfilled the prerequisites for such

²⁴ Constitution of Ethiopia of 1994; Constitution of Principality of Liechtenstein of 1921; Constitution of the USSR of 1977, Constitution of SFRY of 1974

²⁵ Chechnya, Transdnistria, South Ossetia, Abkhazia, Nagorno- Karabakh

recognition. According to the procedure for recognition, each entity seeking relations with the EC had to apply formally for recognition. The applications were submitted to the Badinter Commission for advice. Six entities applied – Slovenia, Croatia, Bosnia, Macedonia, Kosovo and a Serb enclave in Croatia – Krajina. The Badinter Commission examined each application and issued a series of opinions. The Badinter Commission confirmed the right of peoples to self-determination and that the exercise of this right could extend even to independence. However, it was emphasised that self-determination could be exercised only on the basis of existing internal federal boundaries and rejected the applications of Kosovo and Krajina.

The expansion of the content of the right to self-determination by the cases of the USSR and SFRY appear to have been brought about by political events, rather than by an express wish of the international community to develop further the legal concept of the right to self-determination. Initially, States were reluctant to recognise the right to secede as a legitimate expression of the right to self-determination of peoples, outside the colonial context. However, when it became apparent that such a development is inevitable in the cases of the USSR and Yugoslavia, the actors on the international plane attempted to ensure that this will not create a precedent, which would encourage secession movements elsewhere in the world. This led to the creation of the doctrine of constitutional self-determination. Under this doctrine, in order for an entity to be considered as having a legitimate right to secede, the following two conditions would have to be fulfilled: 1) the right to self-determination of the constituent units of a State would have to have been assigned to them in the Constitution of a State in a clear and unambiguous manner, and 2) the entity has to have been specifically nominated in the Constitution of the State, as with the constituent federal Republics within a State, for it to be entitled to external self-determination.²⁶

Kosovo and Transdniestria

The Badinter Commission confirmed that Kosovo does not fulfill the criteria for constitutional self-determination. In this respect, Martti Ahtisaari's proposal for independence of Kosovo clearly deviates from the established position of the international community on the secession of territories from a sovereign State, as an expression of the right to self-determination.

Prior to the proposal for independence of Kosovo it could have been concluded that Transdniestria did not have a legitimate claim to secession from Moldova. However, the proposal for independence of Kosovo has yet again put the doctrine of self-determination to the test. As Kosovo does not fall within any of the exceptions to the right of external self-determination, established by international law and State practice, its secession without the consent of the central State, would create a clear precedent of prevalence of the right to self-determination over the principles of territorial integrity and sovereignty of States. However, the international community was not ready to take this step. Instead, the States supporting the proposal for independence of Kosovo (notably the EU and United States) have taken the view that Kosovo's case is one of *sui generis* and should not be regarded as a precedent for the resolution of other conflicts or for expanding the content of the right to self-determination.

In his report on Kosovo's future status, Martii Ahtisaari explicitly states that '...Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts...'. It is argued that with the unanimous adoption of SC Res. 1244, the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.²⁷ However, it is debatable whether the United Nations involvement in Kosovo was intended to pave the way for succession of Kosovo from Yugoslavia. NATO's intervention in 1999 and the subsequent adoption of SC Res. 1244 were justified on humanitarian grounds with the aim of putting an end to the violation of human

²⁶ Marc Weller, 'The Self-determination Trap', *Ethnopolitics*, Vol. 4, no. 1 (2005)

²⁷ UN S/2007/168 at 4

rights and the hostilities, to which the parties had resolved for the settlement of the conflict. It is noteworthy that both the NATO and the United Nations, at that time, were committed to maintaining the territorial integrity of Yugoslavia. In this respect, the argumentation, provided by Martii Ahtisaari, in support of his proposal for independence of Kosovo is not convincing.

Contrary to the views of the supporters of Martii Ahtisaari's proposal, Russia and some other states involved in the 'frozen conflicts' of the former Soviet Union, believe that the resolution in Kosovo will set a precedent for these conflicts. President Putin has repeatedly stated that the outcome in Kosovo will and should establish 'common principles' for dealing with "frozen conflicts".²⁸

Dissenting views as to the uniqueness of the Kosovo situation have also emerged among researchers and scholars.²⁹

It has been argued by the supporters of the proposal for independence of Kosovo that secession of Kosovo would not constitute a deviation from the established content of the norm of self-determination. Reference has been made to the 1970 United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which excludes secession as means of forming a sovereign State when the existing State respects the equal rights and self-determination of peoples. More recently, the Supreme Court of Canada, in *re Secession of Quebec*³⁰ has found that '... a right to external self-determination (which in this case potentially takes the form of assertion of a right to unilateral secession) arises only in the most extreme cases, and even then under carefully defined circumstance...' In this respect, it has been argued that the secession of Kosovo is justified in light of the human rights abuses and complete denial by the central State of the possibility for the peoples of Kosovo to exercise internal self-determination. However, the international community has condemned the human rights abuses and the denial of internal self-determination by the central States in Chechnya and North Iraq, and yet there has been little or no support for the suggestion that the population of Chechnya and the Kurdish population of North Iraq have a legitimate claim to independence.

Arguments in support of the uniqueness of the Kosovo situation based on the definition of the 'peoples' have also been found to be equally applicable to other separatists' groups, whose right to external self-determination has not been recognized as legitimate by the international community. While, as noted above, it could be argued that the Transdnestrrian conflict is not ethnic and thus the inhabitants of Transdnestrria do not constitute "peoples", as stated by the Supreme Court of Canada in the Succession of Quebec opinion³¹, the meaning of 'peoples' is somewhat uncertain. At various points in international legal history, the term 'peoples' has been used to signify citizens of a nation-State, inhabitants of a specific territory or an ethnic group.

²⁸ Euroasia Daily Monitor, 2 February 2006; '...Putin says world should regard Kosovo, separatist Georgian regions, on equal footing...', International Herald Tribune Europe, 13 September 2006; Southeast European Times, 25 September 2006, 'G-8 fails to agree on Kosovo', International Herald Tribune Europe, 8 June 2007; etc.

²⁹ See summary of panel discussion held at the London School of Economics, 22 January 2007, with Dr. Florian Bieber, University of Kent, and Prof. Bruno Coppieters, Vrije Universiteit Brussels, chair Dr. James Hughes, London School of Economics/Editor of Development and Transition, at http://www.developmentandtransition.net/uploads/issuesAttachments/18/Dev_And_Trans%20eng.pdf, pp.9-12

³⁰ *Re Secession of Quebec*, 2 S.C.R 217, para. 123 (1998)

³¹ *Ibid.*

The Transdniestrian leadership has taken the view that the Kosovo precedent will be important for the future of Transdniestria. In their opinion, Transdniestria has an even better case for independence than Kosovo.³² While at the same time Moldovan leaders see little resemblance between the conflicts in Kosovo and in Transdniestria.³³

While undoubtedly, the peoples of each separatist movement or de facto State have their historical, political, economical and cultural specificities, with respect to their right to self-determination, the statement that Kosovo represents a *sui generis* is debatable. In light of the foregoing, it could very well be, that the recognition of the right to secession by the peoples of Kosovo and the creation of a sovereign State of Kosovo, in the absence of the consent of the Yugoslavia, may set a precedent, which would put into question the established State practice of protecting the territorial integrity and sovereignty of States in all circumstances that do not qualify under the doctrines of the colonial or constitutional self-determination.

Conclusion

The historical evolution of the right to self-determination indicates that it is not the inability, but the reluctance, on part of the international community, that prevented the definition of the scope of the right of self-determination. The absence of a clear definition of self-determination and rules for its application creates legal uncertainty, which allows governments quickly to engage in the re-defining and/or restricting the scope of the right of self-determination and/or the rules for its application every time the assertion of the right to self-determination threatened to encroach upon their shared perception of central States' interests.

As a result, the legitimacy of any claim for external self-determination, and in particular Transdniestria's claim, cannot be determined in accordance with established principles of international law, but is subject to the recognition of such legitimacy by the international community. While, recognition undoubtedly has judicial implications, it remains essentially political in its nature.

Therefore, notwithstanding the incorporation of the norm of self-determination in international law instruments, and statements to the contrary, almost a century after its proclamation by Woodrow Wilson in his famous "Fourteen Points", the right to self-determination appears to still resemble more a political concept rather than a non-derogatory, relatively indelible legal norm, accepted and recognized by the international community of States as a whole.

Under the purported aim of maintaining stability, order and peace, this has allowed governments to take comfort from the fact that they have constructed the rule of self-determination in a way that does not in any way affect their ability to quash separatists groups and to assert the doctrine of territorial integrity.³⁴ Ironically, as observed by Professor Weller, it has become clear that this system is not likely to generate the peace and stability it was meant to achieve. '...By privileging stability over "justice" (at least as seen by those struggling for "liberation"), peace has been sacrificed...'³⁵

³² 'Transdniestrian President Jealous about Kosovo Variant', Infotag (Tirasol, 17 February 2006); The Tiraspol Times, 18 may 2007

³³ 'Kosovo Experience is no Good for Transdniestria – Voronin', Infotag (Chisinau, 21 February 2006)

³⁴ Marc Weller, *supra* note 26, at 4

³⁵ *Ibid.* at 27