

CONSIDERATIONS ON TERRITORIAL INTEGRITY AND UNILATERAL SEPARATION

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ABSTRACT:

THE LAST DECADE OF THE XXTH CENTURY WAS WITNESS AND BENEFICIARY OF A NEW INTERNATIONAL ENVIRONMENT REGARDING HUMAN RIGHTS AND FREEDOMS PROMOTION. THE FRAME WITHIN THE OBSERVATION OF HUMAN RIGHTS AND FREEDOMS EXTENDED WAS LARGER THAN EVER BEFORE, BECOMING A STATE POLICY TOGETHER WITH JURIDICAL GUARANTEES. THE MOST IMPORTANT CHANGE WAS IN THE EAST OF THE SPACE OF THE CONFERENCE FOR SECURITY AND COOPERATION IN EUROPE. THE RECOMMENDATION 1201 (1993) WAS A REFERENCE MOMENT AT THAT TIME IN THE EFFORTS OF THOSE TRYING TO OBTAIN THE RECOGNITION OF THE COLLECTIVE RIGHTS FOR THE NATIONAL MINORITIES, WITH CONSEQUENCES SUCH AS THE RECOGNITION OF THE STATE LOCAL AUTONOMY ON ETHNICAL CRITERIA.

EVEN FOR THE COLONIES THE UNILATERAL SECESSION WAS AN EXCEPTION. THE SELF-DETERMINATION WAS FIRSTLY A MATTER OF COLONIAL AUTHORITY TO APPLY OR NOT; SUPPORTING UNILATERAL SELF-DETERMINATION BY THE UN TOOK PLACE ONLY IF IT WAS BLOCKED BY THE COLONIAL AUTHORITY. OUTSIDE THIS FRAME, THE UN WAS VERY RESERVED IN APPROVING THE SEPARATION OF AN ENTITY FROM THE STATE OF WHICH IT BELONGS AGAINST THE WILL OF THE RESPECTIVE GOVERNMENT.

KEY WORDS: COLLECTIVE RIGHTS, SECCESION, TERRITORIAL INTEGRITY

The principle of states' territorial integrity is largely affirmed and accept territorial integrity and as general practice, being a firm provision of the International Law. Although is an old legal provision concerning the nation-state itself, it has been reaffirmed repeatedly during the last years. It is considered that the Unilateral Independence Proclamation in Kosovo on 17th of February 2008 issued by The Self-Governing Interim Institutions does not respect the norms and principles of The International Law.²

The principle of states' territorial integrity is protected by laws forbidding the interference with the internal laws, as stipulated in Article 2(7) of The U. N. Charter³ and by

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² See Resolution A/RES/63/3 from 8th of October 2008.

³ Article 2(4) of The UN Charter reffers to one of the UN principles forbidding the use of violence fin internatinal relations; the same principle being stipulated in The Declaration Regarding The Relations of Friendship and Cooperation Between States, according to the UN Charter, which is considered one of the basic elements of the principle of sovereign equality. See: *Declaration on Principles of International Law*

The Final Act from Helsinki⁴ and The Charter for a New Europe from Paris, 21th of November 1990.

The viral and detrimental interethnic and inter-confessional conflicts freed from the control of the authoritarian regimes busted out violently. Great problems regarding these aspects appeared in many European multinational states as well in some Euro-Asian states. Czechoslovakia divided into two states, Czechia and Slovakia, following a constitutional way, without affecting its stability and security climate and with respect for the democratical orientation of its institutions. The ex-soviet states managed a peaceful transition to their new status. The Russian-Chechen conflict; the one in The republic of Moldavia, regarding Transnistria; the conflict between Armenia and Azerbaijan regarding The Nagorno-Karabakh region; the conflicts in Georgia, caused by the separatist movements in Abkhazia and South Ossetia were difficult to solve, caused victims and instability but did not reach in effects and consequences the amplitude of a local war. In Eastern Europe, the inter-ethnic tensions appeared even in some Unitarian national states. The totalitarian states used to be anti-democratic and oppressive towards all people, and apart from this, sometimes the minorities to be subject to discrimination and persecution on ethnical criteria. Getting rid of these regimes and enlisting to democracy created a political and legal frame as well as a social environment favorable to observing human rights and freedoms established by The UN Charter, The Universal Declaration of Human Rights, The Final Act of The OSECE for all human beings regardless sex, race, language and ethnicity, social status and education level.

This has been without a doubt, a major step forward to consolidate democratic life, even though there were difficulties, some of these created by the states having ethnical minorities historically set on the respective territory, as there is the case of Hungary. But in Europe these ethnical, religious or developmental conflicts and tensions were not proper to East only; the North of Italy also experienced a recurrence of separatist tendencies. In Tirol, the German and the Italian communities came very close to an armed conflict. The same happened in Spain, with the Basques and the Northern Ireland.⁵

Other continents experienced the same problems, caused by ethnical, religious or even tribal conflicts. In Africa the worst conflicts happened in Rwanda, in 1994, between the Hutus (majority) and the Tutsis (minority). In three months, about 800 thousand people-Tutsi mainly- out of a total of de 7.9 million were massacred while other 2 million took refuge in the neighbor countries and another 2 million took refuge in areas less exposed in their own country.⁶

Concerning Friendly Relations and Co-operation Among States on Accordance With the Charter of the United Nations, GA Res 2625, UN GAOR, 25th sess., Suppl. No. 8, UN Doc. A/8028 (1970), 121 at 122.

⁴ The Final Act from Helsinki adopted on August the 1st, 1975 at The Confrence for Security and Cooperation in Europe stipulates: "The states taking part will respect the territorial intergity of state participating. Therefor, they will restrain from any action contravining to the aims and principles contained in The UN Charter, regarding the territorial intergity and political liberty of any of the states participant, and especially from any action regarded as a threat or any use of force. The member states will not take military actions against any other member state and will not engage in actions forbbiden by The International Law. None such actions will be accepted as legal." See: *Final Act of the Conference on Security and Co-operation in Europe*, (1975) 14 I.L.M. 1292, at 1295; UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, p. 2, para. 2, <http://www.unhcr.org/refworld/docid/3ae6b39ec>.

⁵ See A. Buchanan, *Justice Legitimacy and Self-Determination: Moral Foundations for International Law* (New York: OUP, 2004), 229–30.

⁶ See J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge: Cambridge University Press, 1996), 9.

The right to separation is not stipulated in The International Law.⁷ Creating a new state within a colonial frame does not mean separation. The right to self-determination in the post-colonial frame doesn't necessarily mean the right to independence.

The unilateral separation doesn't guarantee the exercise of any of the rights stipulated by The International Law. Out of the colonial frame, the self-determination principle is not validated as the principle from which the right to unilateral separation from an independent state raises. In this context, the self-determination is in the first place the process by which the populations of different states determine their future by constitutional processes without the external interferences. It is the responsibility of the govern of the country confronting to the desire of a part of its population to pronounce separation and manage the situation, for example, to insist that any change should be a constitutional action. The International Law has always been favorable to states' territorial integrity and governs of the respective countries are encouraged to oppose to unilateral separations by any legal means possible. The third parties should remain neutral regarding separation issues during such a conflict; otherwise their support could be qualified as involvement into the internal affairs of the respective state. The reluctance manifested by the international community in accepting unilateral separation can be illustrated by referring to the so-called "Protection Clause" stipulated in The Declaration of Friendship Relations.⁸ The World UN Conference on Human Rights held in Vienna in 1993 reaffirmed the "Protection Clause" using a slightly different language.⁹

THE PRINCIPLE OF SOVEREIGNTY AND TERRITORIAL INTEGRITY

According to this clause, a state who's govern represents the entire people on the entire territory , without distinctions of one kind or another, that is a state asked on equality of rights, regarding race, sex, religion, respects the self-determination principle for all its citizens and is to protect its territorial integrity. In such a state, citizens exercise their right to self-determination by participating in the governing system on equal bases. The position adopted by the Juridical Commission named by The Nation's League to examine the Case of The Aaland Islands in 1920 remains valid despite the later alterations on the self-determination principle.¹⁰

The principle of sovereignty and territorial integrity established by The Final Act from Helsinki should be interpreted observing the key-principles stipulated in the Act, including the principle of equality in rights and that of peoples' self-determination. Moreover, according to the declaration on the Principles of The International Rights regarding the Friendship and Cooperation Relations between the States from 24th of October 1970, the principle of the

⁷ The answer of The Slavic Republic to The Justice International Court in consultations for the question send by The UN General Assembly (Resolution A/RES/63/3 8th of October 2008), "Does The Unilateral Independence Declaration of The Kosovo Temporary Govern respect the international law?"

⁸ The Declaration of the Friendship Relations specifies this in the elaboration of self-determination principles: "None of the above mentioned paragraphs should not be interpreted as authorizing or encouraging any action meant to destroy or affect, totally or partially the territorial integrity or the political unity of independent states, led according to the principles of equality in rights and self-determination, and are led by a govern that represents the majority of people and makes no discriminations." See: *Declaration on Friendly Relations, Principle (VII)*, 123.

⁹ The Declaration states: "According to the International Law and the Friendship Relations between states mentioned in the UN Charter, the right to self-etermination does not mean to authorise or encourage any affecting actions that could dismantle or affect, totally or in part the territorial integrity of an independent state led by a govern representing the majority, with no discriminations." See: *Declaration on Friendly Relations, Principle (VII)*, 125.

¹⁰ "The International Law does not validate the right of ethnical groups to separate from the state of which they are part, by simply saying so." See: *Report of the Committee of Rapporteurs (Beyens, Colander, Elkens)*, 16 April 1921, LN Council Doc. B7/2I/68/106 [VIII], 27-8.

Self-determination right shouldn't be interpreted as „a principle that legitimates or encourages any action that might dismantle or affect, totally or partially, the territorial integrity or the political unity of the independent or sovereign states, led according to the principles of equality and self-determination of people.”¹¹

Thus, the principle of territorial integrity is considered a basic of The International Law on which the international community was founded and keeps functioning. This principle must be taken under serious consideration when considering any unilateral Independence Declaration.¹²

After 1985, the process of OSECE ascended, though difficulties were encountered during the first years, due to the results obtained at The Conference for Thrust and Security Measures and for Disarmament (Stockholm, 1984-1986), as well as the changing East-West political climate. Two essential moments especially marked the OSCE process: The Reunion of the States Part of OSCE in Vienna from 4th of November 1986-19th of January 1989 and The Summit of OSCE from Paris on 19th-21th of November 1990.¹³

The Vienna Reunion, like the ones preceding it from Madrid and Belgrade was to examine the way the stipulations of The Final Act and of the other OSCE acts were observed. After more than two years of deliberations - some controversed - especially on human rights and basic liberties, The Reunion concluded with a Final Document containing the results of the debated issues and the future objectives assumed by the participant states.¹⁴

The Vienna Reunion underlined the agreement of the participant states that the observing of the principles in The Final Act from Helsinki-under every aspect - was vital to the improvement of mutual relations, thrust and security. In a vision anticipating the changes of 1989, the participants reaffirmed the will to respect the mutual right to choose and develop political, social, economical and cultural systems, as long as these reglementations were in conformity with The Declaration observing the principles in The Final Act from Helsinki and other legal provisions of The OSCE. In conformity to the results at the Stockholm Conference previously mentioned, the Vienna Reunion approved the beginning of negotiations on means to increase thrust and security as well as negotiation on conventional security forces in Europe. Both forums were to begin on March, 6th, 1989 within The OSCE Process.¹⁵

The Final Act guarantees the fundamental human rights and insists upon the rights of people belonging to different minorities, the freedom of movement and the right to live in any state. The novelty in this respect was the right to leave from and return into one's own country. The other important moment, namely The Reunion at high level in November 1990, in Paris was something new in the history of The OSCE, since the chiefs of states or governs were

¹¹ See *Final Act of the Conference on Security and Co-operation in Europe*, (1975) 14 I.L.M. 1292, at 1295; UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, p. 3, para. 2, <http://www.unhcr.org/refworld/docid/3ae6b39ec>.

¹² Resolution A/RES/63/3 on 8 Octobre 2008.

¹³ See "Declaration on the Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union," Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991, *EC Bulletin 12-1992*, 119.

¹⁴ The final document shows that „Member states saluted the favorable development in the international situation past the Madrid Reunion in 1983 and expressed satisfaction that the OSCE process was a vector in it. Considering the intensity of the political dialog between them and the progresses made in discussing military security and disarmament. They agreed to new efforts to consolidate the progress and for further improvements of the mutual relations."

¹⁵ See, Paul Dănuț Duță, Teodor Frunzeti, Ion Panait, *Operațiuni și misiuni OSCE. Studiu de caz: Moldova*, Sibiu: Tehno Media Publishing House, 2008, pp.35.

reunited for the first time after the moment of signing the Final Act in 1975. They now adopted the "The Paris Charter for a New Europe. A new era of democracy, peace and unity."¹⁶

The participants reassured that the cultural, ethnical, religious identity of minorities was to be protected, and guaranteed the right to free speech and maintaining cultural identity for the minoritarians, without discrimination. The Charter underlined it was the duty of every democratically elected govern to promote human rights and fundamental freedom.

The last decade of the XXth century was witness and beneficiary of a new international environment regarding human rights and freedoms promotion. The frame within the observation of human rights and freedoms extended was larger than ever before, becoming a state policy together with juridical guarantees. The most important change was in the East of the space of The Conference for Security and Cooperation in Europe.

The European Council has many juridical instruments to promote democracy and respect for human rights.¹⁷

THE RIGHT TO SELF-DETERMINATION

On 3rd of February 1993, The UN General Assembly adopted the „Declaration on the rights of the people belonging to national, ethnical, religious and linguistic minorities”¹⁸ which guaranteed the states were to respect the rights of people falling into one or more categories of the ones above mentioned.¹⁹

The OSCE and European Council were to systematically deal the protection of the people belonging to national minorities, at a regional level.²⁰

¹⁶ At the beginning the Charter declared: „*We, the chiefs of states or governs of the states part in The Conference for security and cooperation in Europe, have gathered in Paris in a time of profound changes and historical hopes. The time of confrontation and dividing has ended in Europe. We declare that from now on our relation will promote cooperation and respect. Europe frees herself from the legacy of the past. People's courage and will and the force of the ideas contained in The Final Act from Helsinki have opened a new democratically era bringing peace and unity in Europe. Now we are to fulfill the hopes and dreams that nourished our people for decades: to fight for a democracy based on the respect of human rights and fundamental freedom; prosperity by economical freedom and social equity; equal security for our countries. The ten principles of the Final Act will led us to this future, to better relations as they did during the last 15 years. To fulfill all these is the base of our initiatives adopted today, for our nations should live according to their aspirations.*”.

¹⁷ The European Convention for defending human rights and fundamental freedom (1950); The European Court for Human Rights (1959); The frame - convention to protect national minorities (1995), The European Comitee for rightfull democracy (Venice Comitee) (1990).

¹⁸ See Paul Dănuț Duță, Teodor Frunzeti, Ion Panait, *Op.cit*, pp. 32-36.

¹⁹ Minority members have the right to enjoy their own culture, to work and practice their religion, to use their own aternal language, both in private and publicly, free of any discrimination. The Declaration admitted the right of the minorities to have organisations, to take active part in cultural, religious, social, economical and public life of the community, to have and maitain free relations with other members of their group and with persons from other minorities or other states based on their ethnical, religious, cultural or linguistical appurtenence. See: *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 68th sess., Suppl. No. 12, UN Doc. A/61/L.67 (2007).

²⁰ Chiefs of states and goernes declared in The Paris Charter for a new Europe (Paris, 1990): „Decided to encourage the precious contribution of the national minorities to our life we enage to improve further on their life. We declare that friendly relations between our people, the peace, justice, stability and democracy call for the protection of ethnical, cultural, linguistical and religious national minorities and for the building of the conditions to promote this identity. Human rights of the minorities should be respected in full. See: M. Sellers, *The New World Order: Sovereignty Human Rights and the Self-Determination of Peoples* (Oxford: Berg, 1996), 22.

In April 1991 a serious analysis concerning these issues is made, showing up the diversity of the problems from the juridical, historical, political and economical points of view.²¹

The experts rapport underlined that people belonging to a national minority would have the same rights and would have the same obligations as the rest of the population; some states reported positive results by creating special legislative bodies for minorities to manage their problems, even bodies elected democratically to exercise self administration in the cases when the territorial autonomy was not involved.²²

The experts' Report didn't make recommendations regarding such experiences and showed the participant states „noted with interest" their existence²³. But the idea of collective rights for minorities-issued in the Recommendation No. 1201 (1993) of The Parliamentary Gathering of the UE Council - suggested a protocol for the rights of the national minorities.²⁴

The Recommendation 1201 (1993) was a reference moment at that time in the efforts of those trying to obtain the recognition of the collective rights for the national minorities, with consequences such as the recognition of the state local autonomy on ethnical criteria. These provisions didn't get support from the decisional factors in The UE Council, whose Ministers Committee adopted at Strasbourg on 10th of November 1994 „The Frame-Convention for the protection of the National Minorities”, to regulate an number of juridical norms meant to protect national minorities, to help maintain their national identity, considering the rights of the persons belonging to the respective minority. This became a fundamental juridical document allowing for the approach of the problems raised by the national minorities within the general context of assertion and protection of human rights, so as to encourage the living together of different minorities and of the majority of population, to stimulate togetherness and cooperation of all people within a democratically frame, with no discriminations. The same idea appeared in the so-called „Balladur Plan" or „The pact for Stability in Europe”. Edouard Balladur, the French Prime-Minister launched this plan at the beginning of 1993, to „promote good vicinity relations and encourage countries to consolidate their frontiers and solve the problems of the national minorities ”.²⁵

²¹ Te Experts' Reunion Rapport underlined the national minorities are part of the society in which they live, being an enrichment factor for each of these states and societies. Minorities rights should be respected and they should be given the rights to function as citizens. The member countries consider they should find constructive ways to solve the problems by negotiations and consultations, to improve the situation of minorities. They admit that promoting the dialogue between states and between states and the people belonging to national minorities will be very successful in the climate of a free change of information and ideas. See: L. Chen, ‘Self-Determination and World Public Order’, *Notre Dame Law Review* 66 (1991): 1287-1290.

²² See: P. Clark, ‘Taking Self-Determination Seriously: When Can Political and Cultural Minorities Control Their Own Fate?’, *Chicago Journal of International Law* 5 (2004): 737.

²³ This was not random. Different formulas for self-administration and local administration and territorial autonomy on ethnical criteria call for the recognition of the collective rights for the minorities. But all international documents regarding these issues refer to the members of the minorities, not to the groups, that is they treat people as individuals, according to the Universal Declaration of Human Rights. See: M. Shaw, ‘Peoples, Territorialism and Boundaries’, *European Journal of International Law* 3 (1997): 478-494.

²⁴ The Recommendation (art. 11): „in regions where they held majority, the persons belonging to a national minority have the right to have local or autonomous authorities of their own or to have a special status in accordance with the historical and territorial specific situation, respecting the state's legislation." Article 12 mentioned that none of the provisions in the protocol is to be interpreted as a limitation or restriction of any individual right of the persons belonging to a national minority. See: R. Muharremi, ‘Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited’, *Review of Central and East European Law* 33 (2008): 401, 406.

²⁵ This general formulation doesn't express the essence of the plan proposed by the French Prime-Minister namely the recognition of the collective rights for the minorities, and admitted that solving the minority

In the expression "all people are entitled to self-determination", there is no universally accepted definition of the word "people", or of the notion of self-determination. For some specialists the right to self-determination always includes the right to form a state, even in the case when the people that might benefit from this right would be pleased with other stately forms of organization. Others consider this right has a larger domain of applicability, implying that every human collectivity defining itself as such has the right to be recognized, to choose its own future and to democratically exercise its political will. Either of these arguments excludes the right to secession.

„What is very important in all relevant instruments and in stately practice regarding the importance of territorial integrity is the fact that by "people" one should understand all people in the given territory. All members of some distinct minority groups are part of the population within the territory; yet, minorities are not entitled to self-determination, that is they are not entitled to secession, independence, or to join similar groups from other countries.

The minorities must be protected by guaranteeing them the respect of human rights for every individual according to art. 27 of the International Pact for Civil and Political Rights from 1966.²⁶

In the non-colonial context there is a common model for the answers of the international community to the unilateral secession and to threaten with such a thing, a model with normative significance.²⁷

The international community is reticent towards supporting the unilateral secession or separation and there is no admittance of the unilateral right to separate based on the vote of the majority of population from a sub-division or territorial unit. Basically, the right to self-determination for a group or ethnical minority can only be reached by participating in the constitutional system and by respecting the territorial integrity.²⁸

In most cases, the referendum held in the territories willing to separate turned out in favor of the majority. But even in those areas where there is a strong and continuous appeal to independence, that is an issue for the respective government to solve in a democratically way.²⁹

Even for the colonies the unilateral secession was an exception. The self-determination was firstly a matter of colonial authority to apply or not; supporting unilateral self-determination by The UN took place only if it was blocked by the colonial authority. Outside this frame, The Un was very reserved in approving the separation of an entity from the state of which it belongs against the will of the respective government.³⁰

problems could involve „minor alterations" at the borders and came with the solution that a state that was candidate to the UE should embrace the French solution in return for the UE membership and became an initiative of the European Council, functioning as „preventive diplomacy" as a model for the Eastern Europe.

²⁶ "In the states where there are ethnical, religious or linguistically minorities, persons belonging to those minorities would not be refused the right to enjoy their own culture, religion, language, together with other members of their communities."

²⁷ See H. Quane, 'The United Nations and the Evolving Right to Self-Determination', *International and Comparative Law Quarterly* 47, no. 3 (1998) 537.

²⁸ See A. Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge University Press, 1995).

²⁹ See D. Orentlicher, 'Separation Anxiety: International Responses to Ethno-Separatist Claims', *Yale Journal of International Law* 23, no. 1 (1998): 49–50.

³⁰ Vezi, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514, UN GAOR, 15th sess., Suppl. No. 16, UN Doc. A/4884 (1960) 66.

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