

SECESSION IN INTERNATIONAL LAW

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The phenomenon of secession by virtue of which parts of a State's territory become independent States is not new. It has gone through different phases throughout history. Apart from the processes experienced at the end of the Cold War by the end of last century, tension around pro-independence movements is back on the agenda of several democratic EU Member States. Scotland and Catalonia are two clear examples but not the only ones. The next steps in these two territories might trigger tensions in other EU Member States as well. In democratic environments, these political tensions should be dealt with in a pacific and democratic way, ensuring full observance of the national legal systems and the political and territorial organization set forth therein. Resorting to the national legal systems is also the original answer given by international law.

From the point of view of international law, unilateral secession is only accepted in the context of decolonization and the right to self-determination of the peoples. The Advisory Board for National Transition created by the Government of Catalonia recognized this fact in its Report No. 4. However, it should be noted that in strict legal terms the Catalan case does not fall under the definition of secession inasmuch as the territory under colonial domination should have a legal condition that differs from that of the colonizer, which is not the case. For this reason, there is no contradiction between the principle of territorial integrity and the principle of self-determination: in the context of decolonization, the former gives way to the latter. It is thus crystal clear that the principle of self-determination of the peoples as conceived by the United Nations focuses on those peoples under colonial rule or foreign occupation and is absolutely not applicable to secessionist tensions within democratic States that are members of the European Union.

Leaving aside the cases of decolonization, international law understands secession processes and the creation of new States as pre-legal phenomena. And it only embraces them when the creation of these new States is actually effective, or when they emerge as a consequence of serious violations of human rights or of a situation threatening international peace and security and requiring the intervention of the Security Council. In other words, no norms and principles have been adopted under the scope of international law that allow for the unilateral secession of a territory, that is, that consider a unilateral declaration of independence as legal.

International law does neither authorize nor forbid unilateral declarations of independence for they are understood as something alien to it, an internal matter of each State. Consequently, it merely acknowledges, when applicable, the international effects and legal consequences that might arise from specific, existent and effective political realities. If we were talking about a pacific and agreed process of secession, international law would regulate the consequences of the creation of this new State, and the rest of the States would then recognize it or not. If the process is not pacific and agreed upon, other principles of international law are applicable such as the principle of non-intervention in other States' internal affairs, the prohibition of the threat or use of force or the respect for human rights.

Additionally, international practice as seen during the processes of decolonization and the creation of new independent States of Central and East Europe acknowledges the preexisting territorial borders, reaffirms the States' territorial integrity and denies the viability of recurrent secession processes. In this respect, some voices claim that the International Court of Justice Advisory Opinion on Kosovo's unilateral declaration of independence underpins the international legal nature of a hypothetical unilateral declaration of independence. In my opinion, this is a completely misguided approach. It seems to me that the opinion of the International Court of Justice has been overused in a simple and decontextualized manner and its content has not been thoroughly examined. Likewise, the extensive and interesting legal grounds pointed out by the Canadian Supreme Court as regards the secession of Quebec have not been given due attention.

In any case, there are different groups for whom the right to secede from the State cannot be proscribed. We are talking about territorial communities whose ethnic, religious, linguistic or cultural identity is repeatedly persecuted by the national institutions and their territorial offices, or whose members are subject to serious and systematic discrimination in the exercise of their civil and political rights leading to widespread violations of both the individuals' and the peoples' basic human rights. In this sense, only on an exceptional basis could international law acknowledge and support a unilateral secession if justified as a last resort, that is, secession as a solution, given a situation of severe violations of human rights and of the principle of self-determination in its internal dimension, as clearly shown by the Kosovo case. In addition, also exceptionally, international law refuses unilateral declarations of independence not on the grounds of their unilateral nature but rather on the grounds of their link to the infringement of basic norms and principles of international law, as happened in the case of Crimea.

In a democratic context, all political aspirations should be channeled ensuring respect for the rule of law on which fair and equal societies are built. Despite the fragile international consensus on the precise meaning of the term "rule of law", there is no doubt that in the last few years international law is witnessing its emergence as a principle or value of universal nature. Although it might be true that it does not constitute a legal obligation under international law, it does from the point of view of the European Union. Also, the last steps taken by international law clearly show the inseparable nature of democracy, human rights and rule of law. Consequently, any unilateral pro-independence action is inconsistent with a democratic context under international law, as proved by the cases of Quebec and Scotland.