Papers of BAS
Humanities and Social Sciences
Vol. 2, No 3-4, 2015

LAW

TWO UNILATERAL INDEPENDENCES: KOSOVO AND TRANSNISTRIA IS THERE ANY DIFFERENCE?

Natalia Cwicinskaja[1]

Abstract: The main point of this article is a comparison between two cases: Kosovo and Transnistria. More than 20 years passed since these entities seceded from their "mother" states, although the situation of these two entities differs completely. Kosovo is recognised by 111 States, while Transnistria is not recognised by any state at all. The both discussed cases are the examples of unilateral secession. In turn, the doctrine of "remedial secession" is not fully applicable in those cases. Transnistria and Kosovo do not fully meet the traditional criteria for statehood. The main difference between these two cases is the degree of international support. Discussed cases reveal that not international law, but the will and political interests of great power is becoming the decisive factor in legality of secession.

Key words: Kosovo, recognition, secession, self-detrmination, Transnistria

I. Introduction

The dissolution of the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s caused the creation of the biggest number of newly independent states. The international community recognized all states that have arisen after the collapse of these two multi-entity states. But besides the newly established states both in the Balkans and on the territory of former USSR the entities have appeared to have aspired to be a state, but their status was not clear and fully precise. It primarily concerned Kosovo and Transnistria.

[1] This article was completed on 30th June 2015. Much of the research for this article was undertaken during two months research stay at the *Institute* for *International Law* of Peace and *Armed Conflict* in Bochum (11-12.2011). I would like to thank Prof. Hans-Joachim Heintze for his help and comments on the earlier draft of this Article. Part of this research was presented on the conference "Moldova – the leader of a region or state of crisis? Political, social and cultural challenges of modern Moldova" – 10-11.05.2012 (Poznan, Adam Mickiewicz University).

At the beginning of the 90s those two entities were respectively the integral part of Serbia (then being one of the constituent republics of the SFRY) and the Moldavian Soviet Socialist Republic (MSSR) (then being one of the constituent republics of the USSR). After the dissolution of the SFRY Serbia became a part of the Federal Republic of Yugoslavia (FRY). The dissolution of the SFRY has led to proclamation of the Resolution of Independence and Sovereignty by Kosovo underground parliament **[Judah, 2008].**

The situation was quite similar in Transnistria. During the process of dissolution of the Soviet Union, the MSSR declared itself sovereign on June 23rd, 1990 [**Декларация (Declaration), 1990**] and declared independence from the USSR on August 27th, 1991, thus becoming the Republic of Moldova [**Декларация, 1991**].

At the same time the area of Transnistria became self-proclaimed Pridnestrovian Moldavian Republic (PMR). More than 20 years have passed since the events described above, however the current status of these two entities is entirely different. Kosovo Assembly adopted the Declaration of Independence on February 17th, 2008 and 111 states recognised Kosovo.[2] In Transnistria, on August 25th, 1991 the Supreme Council of the PMR adopted the Declaration of Independence of the PMR [**Декларация о независимости Приднестровской (Declaration of independence), 1991**]. Only South Osetia, Abkhazja and Nagorno-Karabakh (unrecognised states) recognized it as a sovereign entity after it had declared independence [**Абхазия (Abkhazia), 2006; Вице-спикер (Vice-speaker), 2010**].

The main purpose of this article is to bring clarity to two crucial questions:

1. What is the difference between those two entities?

2. Why the recognition of the independence of Kosovo by some States was described as unique and now this entity is recognised by these States, and why Transnistria remains unrecognised entity under the international law and therefore is considered an integral party of the Republic of Moldova?

Clarification of the questions referred to above would allow the author to study the differences and to draw some parallels between Kosovo, on the one hand, and Transnistria, on the other. Following the answers to these two questions, Section II explores whether or not international law currently supports the legality of both Kosovo's and Transnistria's unilateral secessions. It considers that if Kosovars and Transtrians are "People" for the purpose of the right of self-determination, what are the links between "remedial" secession and the right of self-determination and territorial integrity. It is also examined what was both Serbia's reaction to Kosovo's Declaration of Independence and Moldova's reaction to Transnistria's Declaration of Independence. Section III presents contemporary approach to statehood and describes the statehood criteria as well as issues of international recognition, especially the practice of states in case of Transnitria and Kosovo. And finally Section IV offers conclusions.

[2] Recognition texts available from: http://www.kosovothanksyou.com/ [Accessed: 8 June 2015].

II. Secession and the right of self – determination

II. A Unilateral aspects of declarations of independence

Both declarations of independence: Kosovo Declaration of Independence from 2008 and Transnistrian Declaration of Independence from 1991 were based on the respective claims that these entities have seceded from their parent states, - Moldova and Serbia.

It was pointed out in those declarations that parties of the above-mentioned conflicts (Kosovo vs. Serbia, Transnistria vs. Moldova) were unable to reach an agreement on the future status of the respective territory that would satisfy all of them. Kosovo Declaration of Independence stated, "Regretting that no mutually acceptable status outcome was possible, in spite of the good-faith engagement of our leaders …. We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state". And according to Transnistrian Declaration of Independence, "The Supreme Council of PMR … considering repeated refusal of the Republic of Moldova of the proposals on the formation of a federal republic consisting of: Gagauz Republic, the Transnistrian Republic and Moldova …. Solemnly declare: PMR is proclaimed an independent state".

Both Serbia and Moldova found those statements to be illegal.

Belgrade immediately rejected the unilaterally declared secession of its province. On February 18th, 2008, the Government of the Republic of Serbia adopted Decision to annul the illegitimate acts of the Provisional Institutions of Self-Government in Kosovo and Metohija on their adopted Declaration of Unilateral Independence [**Decision, 2008**]. The same day the National Assembly of the Republic of Serbia declared Kosovo's declaration of independence as null and void per the suggestion of the Government of the Republic of Serbia, saying that the breakaway province remains an integral part of Serbia, in accordance with the country's constitution and the UN Charter [**Resolution, 2008**].

Serbian President B. Tadic during the emergency session of the Security Council (SC) on February 18th, 2008 following Kosovo's Declaration confirmed that Belgrade would never recognize the secession of Kosovo [**Security, 2008**]. In turn, the Serbian Foreign Minister V. Jeremic has called on the OSCE and the Council of Europe to condemn "the unilateral and illegal" declaration of secession of Kosovo. Meetings took place on 19th and 20th February 2008 respectively [**Serbian, 2008, Saryusz-Wolski, 2008].** By that time the foreign ministry of Serbia recalled ambassadors from the countries that had already recognized Kosovo. Sometimes the reaction of Serbian authorities was very emotional, as for example the threat to sue USA and all other countries, that recognized Kosovo's unilateral secession, before international courts.

On September 23rd, 2008 Serbian President B. Tadic formally asked the UN General Assembly (GA) to back a resolution requesting the International Court of Justice (ICJ) to render an advisory opinion on the question - does the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo stay in accordance with international law? The UN GA resolution adopted on October 8th, 2008 backed the request of Serbia to seek

an advisory opinion from the ICJ on the legality of Kosovo's unilaterally proclaimed independence [**Request, 2008**]. The ICJ delivered its advisory opinion on July 22nd, 2010; it declared, "The declaration of independence of the 17th February 2008 did not violate general international law because international law contains no "prohibition on declarations of independence" [**Accordance, 2008**].

It was obvious that nothing changed the position of Serbia, neither the opinion of the ICJ, nor the increasing recognition of Kosovo. Even pressure from the EU was ineffective. Serbian representatives have been emphasizing at every occasion that they would never accept Kosovo independence. For its part, at the same time the Serbian side has tried to find creative solution in the international field for that case.

While analysing Moldova's reactions to the Declaration of Independence of Transnistria, it should be remembered above all that the Declaration of Independence of Transnistria, coincided with the Declaration of Independence of Moldova. New Moldavian authorities did not accept separatist position of the Transnistrian authorities and started to take steps to put the territory of Transnistria back under the Moldavian control. At that time Moldova has only police forces that were not strong enough to impose the Moldavian sovereignty over Transnistria. Transnistria in its turn was protected by troops of the USSR and due to that fact the Moldovan government had little chances to resolve the conflict with Tiraspol through the use of force.

Starting from 1992 the Republic of Moldova attempted to internationalise the conflict. The Minister of Foreign Affairs of the Republic of Moldova N. Tiu at the 47th Session of the UN General Assembly began this process with the speech about situation in Transnistria and the 14thRussian army. One should also mention the Moldavian attempts to involve states from Commonwealth of Independent States (CIS) in the conflict. On March 5th, 1992 the Moldavian Parliament appealed to the Supreme Council of the Russian Federation and Ukraine for support in resolving the Transnistrian conflict. It deserves attention, that heads of the CIS states aspired to keep the territorial integrity of the Republic of Moldova in the Declaration on the situation in the left region of the Republic of Moldova from March 20th, 1992 [**Declaration**, **1992**]. At the Helsinki Summit of CSCE on July 10th, 1992, President of the Republic of Moldova M. Snegur proposed that consideration should be given to "the question of applying the CSCE peacekeeping mechanism in a way adequate to our situation" [**Background**, **1994**]. However, that took place before ceasefire agreement was signed. According to conditions for the CSCE peacekeeping missions contained in the Helsinki Document, namely establishment of ceasefire, this step was impossible. Ceasefire agreement was signed later on July 21st, 1992 by the presidents of the Russian Federation (B. Yeltsin) and Moldova (M. Snegur) [**Agreement, 1992**].

Starting from the 1993 the CSCE was actively involved in conflict negotiations and the CSCE Mission was created that year. The CSCE Mission laid out basic principles of a special status for Transnistria for the first time on November 13th, 1993 [**Report 13, CSCE, 1993**]. That proposal devised the setting up of a Special Region of Transnistria that would be an integral part of the Republic

of Moldova but would enjoy considerable self-rule, especially its own regional executive, elective assembly and court.

During the period of 1994-2001, the leadership of Moldova and Transnistria with the involvement of representatives of the OSCE, the Russian Federation and Ukraine, signed a number of documents that were important for political settlement.[3] These international and bilateral agreements seem to create a basis for acceptable solution for both sides. Although the above measures were not successful. The Moldavian side applied the strategy of unilateral settlement of the Transnistrian issue that of course was not acceptable to the Transnistrians. On the other hand, throughout the whole process of settlement the mediators repeatedly made attempts to bring the parties to common positions but unfortunately with no results.

Since 2002 we can observe a change of the Moldavan strategy for Trasnistrian case. The Moldova's authorities accepted the idea of autonomy as the basis for negotiations, what was even reflected in internal law - by adopting on July 22nd, 2005 of Law No. 173-XVi "Law on the Basic Provisions of the Special Legal Statute of the Localities from the Left Bank of the Dniester River" [**Закон, 2005**].

Also a number of plans to give Moldova a federal structure have been proposed by the OSCE, the President of Moldova and the Russian Federation.[4]

Unfortunately, we can observe, that the position of Tiraspol authorities has remained constant. As it was noted by O. Nantoi, "... none of the documents signed during more than 15 years related to the transdniestrian problem were fully implemented by Tiraspol. Tiraspol normally followed only provisions in the signed treaties that were beneficial for them, disregarding everything else that could lead to a normalization of the situation" [**Nantoi, 2009**].

It is important to remember that the official position of Chisinau and all mediators, participated in solving of the conflict, as well as the entire international community, remains constant: the conflict should be resolved in compliance with the territorial integrity of the Republic of Moldova.[5]

II. B Secession

The legality of claims expressed in both Declarations of independence of Kosovo and Transnitria should be considered in the light of international law on secession and the practice of states in relation to the attempts of secession.

---

[3] E. g., The Memorandum "on the Bases for Normalization of relations between the Republic of Moldova and Transnistria" signed on 8th May 1997, where it was fixed that Moldova and Transnistria were equal parties in the process of building up a common state; Agreement "on confidence Measures and Development of contacts between the Republic of Moldova and Transdniestria" signed in Odessa on March 1997, which envisaged that Ukrainian peacekeepers would be deployed in the security zone as military observers.

[4] E. g., so- called "Kozak Memorandum" – officially Russian Draft Memorandum on the Basic Principles of the State Structure of a United State in Moldova, was proposed in 2003 as a detailed proposal for a united asymmetric federal Moldavian state; The Ukrainian (so called "Yushchenko Plan") "Plan for settling the Transnistrian Problem" was published on 20 May 2005.

[5] See e.g. European Parliament resolution of 21 October 2010 on implemented reforms and developments in the Republic of Moldova, P7_TA-PROV(2010)0385.

International law does not provide any legal definition of "secession". Generally speaking, it is a process, which has the creation of new states as its outcome [**Kohen, 2006**]. Crawford and Kohen propose a narrow definition of secession, which means the creation of a new independent entity through the separation of a part of the territory and the population of an existing State, without the consent of the latter [**Crawford, 2006; Kohen, 2006**]. Many scholars provide their own classifications of secession [**Radan, 2008; Kohen, 2002**]. The main question, which has to be considered, is the following: does international law permit or prohibit secession? As W. R. Slomanson mentioned, international law does not permit secession, nor prohibits secession [**Slomanson, 2009**]. He also stresses, "From the birth of the UN, diplomats and jurists have dogmatically maintained that the right of self-determination does not include the general right to secession; and that there is no general right to Secession" [**Slomanson, 2009**]. It is natural that respect of territorial integrity is essential for States. But on the other hand, there are no clear criteria for lawful secession.

Cases of successful and unsuccessful secessions after the 1960 are well documented. Examples of successful secession are scarce: here we can mention Bangladesh. The positions of scholars are fairly similar in that case [**Geldenhuys, 2011; Dugard, Raic, 2006; Heraclides, 1990**]. Plenty of examples of failed secessions can be found especially in Africa. In a couple of African's secessionist cases the principle of territorial integrity overwhelmed the right of self-determination [**Dugard; Raic, 2006**]. One has also observed similar cases in Asia and the Pacific Region [**Dugard; Raic, 2006**]. As it was stressed by L. Thio, "In the face of many failed and continued attempts at unilateral secession, the Asia-Pacific States generally adhere to the principle of territorial integrity" [**Thio, 2006**].

Analysing the cases of Kosovo and Transnistria it would be desirable to recall the practice used and accepted by international community during the disintegration of the SFRY and the USSR. Therefore, the process of dissolution of both countries and the reaction has been widely discussed [**Rich, 1993; Czaplicski, 1998; Antonowicz 1992**], however only the legal principles applied by the international community will be considered.

The key differences in the international society reaction to the disintegration of these two states were based on the degree of engagement in each particular case. In case of the disintegration of the USSR the engagement of third states and international organisations was minimal, in case of the SFRY – the EC, later EU states, the USA, the UN and the NATO were deeply involved in different ways. Among other things, that was due to the way of disintegration of the state in its early stage. The SFRY disintegration was accompanied by ethnic wars and conflicts, while the USSR case was relatively peaceful.

The approach to the regulation of dissolution although initially remained the same in both cases. States of the EC, currently the EU, agreed to recognise the former republics only if they fulfil the requirements of Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" (16 December 1991) [**Turk, 1993**].

One of these requirements was "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement". Likewise the position of Badinter Commission was based on Friendly Relations

Declaration and confirmed the inviolability of all Yugoslavian republics in accordance with the principle *of uti possidetis juris* (Latin for „as you possess under law") [**Pellet, 1992**]. The Commission also used the term "dissolution" rather than "secession" [**Pellet, 1992**]. State practice confirmed that the recognition of the states created after the disintegration of the SFRU in most does not have occurred without the consent of the parent state. International community have, in fact, relied on the same principle with respect to the successors of the former Soviet Union. Distinguishing feature of the disintegration of the Soviet Union was mutual consent of the constituent Republics to dismantle the Union. According to S. Blay, "The republics did not secede as such from the union, they dissolved it …. No rule of international law prohibits the mutual dissolution of a state by its component units and the subsequent creation of states out of those units" [**Blay, 1994**].

Shortly thereafter, the international community recognised the new post – soviet States.

It seems that the principle of *uti possidetis* choked the right of self – determination in many secessionist cases. Consider the fact that since the end of the II World War there was no new state created outside colonial context that became a member of the UN without the consent of parent state [**Geldenhuys, 2011**].

As J. Crawford mentioned, even after dissolution of the SFRU and the USSR, when more than 20 new states emerged, the principle of territorial integrity had overwhelmed and no territory could secede from state without its acceptance [**Crawford, 2006**]. So it could be stated, that until Kosovo's recognition in 2008, territorial integrity remained the defining principle of the international system, secession without the consent of the parent state was generally unacceptable.

From those perspectives, secessions of both Kosovo and Transnitria seem to be unlawful, due to the fact that in both cases there was no consent of parent states. On the other hand, international law recognises a right of people to self-determination that is considered through internal and external self-determination.

II. C The right of self – determination

The right of peoples to self-determination is recognised as one of norms *jus cogens* [**Commentary, 2001**].

That right is expressed in the first (common) article of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

Initially that right was used in colonial contexts and became a legal base for creation of new post-colonial states. After post-colonial period the idea of self-determination in international law is balanced by the principle of territorial integrity. This has been emphasized both in the Vienna Declaration, UN World Conference on Human Rights, 1993 (Vienna, 1993) and in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations [**Declaration, 1970**].

The above documents point out that the right of self-determination does not justify dismemberment, if a state is performing itself in accordance with the right of self-determination. This could suggests two kinds of self-determination, one that involves dismemberment of states that do not conduct themselves properly, and a second kind that is respected by states that do perform themselves properly. According to above-mentioned criteria both internal and external self-determinations are distinguished [**Seymour, 2011**].

As the Supreme Court of Canada established in the Quebec case, "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances" [**Reference, 1998**].

The term of "defined circumstances" remains an important point in this sense. An widespread view is taken by many scholars that these circumstances must be the following: a distinct People; gross human rights violations; and no alternative but secession [**Dugard; Raic, 2006**].

The Supreme Court of Canada also confirmed that [**Reference, 1998**].

It should be noted here that this doctrine is not commonly accepted. For example, M. Shaw described it as "the subject of much debate [**Shaw, 1997**].

Although we do not have so wide confirmation of that doctrine in state practice [**Vidmar, 2009].**

Extremely important in this matter is the claim of the Supreme Court of Canada in the above-mentioned case: "Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession.... Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession ... "[**Reference, 1997**].

In order to apply the doctrine of so-called "remedial secession" to the cases of both Transnistria and Kosovo, we have to check if "defined circumstances" took place and what was the reaction of the international community to those cases.

The definition of element "People" is by no means uniform. Notable in this regard remains the description of "People" provided by the UNESCO International Meeting of Experts for the Elucidation of the study of the Concepts of Right of peoples in 1989: "a "people" is a group of individual human beings who enjoy some or all of the following common features: a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life" [**International, 1989**].

In addition, among them, the UNESCO experts mentioned, that "the group as whole must have the will to be identified as a people or the conscious-

ness of being a people ...” [**International, 1989**]. So, “a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist” [**Vidmar, 2009**].

However, in practice, a time of transformation of a group into the “people” is difficult to determine.

At the time of declaration of independence of Transnistria in 1991 the ethnic composition was the following: Moldavian - 40%, Russian - 25%, Ukrainians – 28% [**Nedelciuc, 1992**]. The remaining population consisted of Jews, Poles, Bulgarians, Gagauzians, Romas and other nationalities. They used Russian as a common language. What they also shared were both the reluctance to the Moldavian language and the fear of integration with Romania. Transnistrian's leaders skilfully exploited the fear and belief of their inhabitants that a union between Moldova and Romania was inevitable. The real reasons of that independence were the economic interests of the local leaders.

After 1992 Transnitria authorities provided national doctrine of Transnitria that articulates the existence of “Transnistrians” even during the existence of the USSR. In Transnistria there were many researches and popular articles confirming that theory [**Babilunga, 2010; Moruchkov, 2006**].

National doctrine and elapse of time (more than 20 years have passed since the Declaration of Independence) contributed in a certain sense to the development of Transnitrian people's identity. According to the research of Patrik Bruno, absolute majority of surveyed residents in Transnitria (77%) identified themselves specifically as the Transnistrian people [**Bruno, Vel'mot, Viernik, 2007**].

We can't forget that there was a generation of people born after the declaration of independence and brought up on the lecture of history about Soviet times and the war with Moldova in 1992. During the author's own trips to Transnitria it became evident, that young 'Transnitrians', as they name themselves, perceive the Republic of Moldova as the enemy. The situation appears to be similar to the situation of Taiwan that was discussed by J. Crawford **[Crawford, 2006][6].**

Assessing the current situation, one can agree that the Transnistrians as “People” have been created. But if consider the starting point for separatist movements by the time of the declaration of independence, it seems to be only political manipulation of the then Transnitrian leaders. According to the above, it could be stated, that at the moment, when the Declaration of Independence was proclaimed, we can't speak about 'Transnitrians' as a People for the purpose of the right of self-determination people.

Regarding Kosovo, situation seems to be less complicated. According to the Statistical Office of Kosovo, in 2000 Kosovo's total population had the following ethnic composition: Albanians 88 %, Serbs 7%, other 5% (Kosovo, 2006). And according to latest CIA The World Factbook in 2014 Kosovo population's ethnic composition consists in 92,9% of Albanians and 7,1% of other nationalities. (The World Factbook). It could be stated, that a few decades of struggle for autonomy and the treatment of Kosovar Albanians by Serbs contributed to the de-

[6] “Whether or not there was [a people of Taiwan] in 1947, the experience of a half century of separate self-government has tended to create one”.

velopment of own identity of Kosovar Albanians. As it pointed out by J. Vidmar, "... a constitutional arrangement for internal self-determination was applied to Kosovo Albanians in the 1974 Constitution of the SFRY and was *mutatis mutandis* revived under international administration" [**Vidmar, 2009**].

So when it comes to Kosovar Albanians we could qualify them as a People for the purpose of the people's right of self-determination.

The second prerequisite for a legal recognition of secession requires gross human rights violations. A concept of 'gross human rights violations' by the Republic of Moldova in Transnistria is very hard to substantiate. As in early 1990 well as contemporary times there were no preconditions for a humanitarian catastrophe, neither mass exodus of refugees, nor a ground for ethnic cleansing [**Ivanov, Zhuravel, 2009**]. This does not mean though, that violations of human rights there had not happened at all. Each armed conflict is accompanied by abuse of human rights to a lesser or greater extent. In Transnistria conflict Moldavian armed troops were accused by Russia of shooting at the houses, courtyards and cars from heavy machine-guns mounted on armoured vehicles. It was reported that Moldavian paramilitaries were shooting at civilians, who were helping wounded PMR national guards or hiding in their houses those trying to flee the cities or towns. Eyewitnesses testified in Moldavian media and raised similar accusation against the other side. There have been numerous cases of shooting at ambulance cars and both sides accused each other of such actions **[Массовые, 1992**]. But nevertheless we shouldn't forget, that Transnistrian conflict was considered the least hostile among other similar conflicts. As one can see, circumstance of 'gross human rights violations' could not be applicable to the Transnistrian case.

In the case of Kosovo the situation was rather different. Gross human rights violation took place undoubtedly. Oppression of Albanians has continued through the whole period starting from the end of the World War II till the end of the NATO intervention. However, the gross human rights violation ended by adoption of resolution 1244 that has placed Kosovo under transitional UN administration. The question arises whether a criterion of gross human rights violations in this case could be used for legitimacy of Kosovo secession. It seems that application of this criterion to Kosovo is doubtful, because few years passed since establishment of the UN transitional administration in 1999 (the end of gross human rights violations) and the Declaration of Independence in 2008.

The element number three for a legitimate secession is that there is no alternative but secession. As it seems this element does not apply in neither of the cases. In Transnistria, as we know, negotiations are still pending. From the moment of the Declaration of Independence in 1991, Soviet troops (currently the Russian 14th Army) presence in Transnistria has been used as a protective umbrella for the political aspirations of the Transnistrian authorities and made it possible for the authorities to evade negotiations with the Moldavian side. As one can see now there are still alternatives of secession, which have to be discussed, and they are being discussed.

In Kosovo the situation is more complicated. The two sides of the conflict, Kosovo Albanians and Serbs, stand on different positions. Serbia has an opinion that there is still a possibility for finding the agreed solution. But Kosovo posi-

tion is intransigent – only independence, although it is supported by the USA and Western governments. And this is a major difference between positions of both sides [**Orakhelashvili, 2008].**

The main difference between the situation in Transnistria and in Kosovo lies with the fact that the position of Kosovo, (there is no alternative but secession) is supported by Western Europe and the USA. In relation to the Transnistria no such support does exist. Objectively, however, in both cases there are possibilities to continue seeking resolutions of the conflicts.

Consequently, referring to the right to "remedial secession", it's not possible, based on the above-mentioned, to find Transnistria and Kosovo to be clear examples of such secession.

III. Statehood Criteria and Recognition

III. A Statehood Criteria

To analyse international reaction to both cases of unilateral secession in the first instance we have to examine statehood criteria and the role of recognition in a creation of new states when unilateral secession has taken place. First of all, it is necessary to recall The Montevideo Convention on Right and Duty of States dated 1933, which defines four elements as requirements in order to claim statehood: "(a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states" [**The Montevideo, 1933**].

Evaluation of the different elements is not an objective of this article, because this topic is widely discussed and well known in the literature on the subject. However we should apply these elements straight to both cases of Transnistria and Kosovo. But consequently, there is no uniform result.

It is beyond dispute that both Transnistria and Kosovo have a permanent population: according to last census in Transnistria in 2004 in total, in the areas controlled by the PMR government, there are 555,347 people [**Fomenko, 2009**] and according to CIA The World Factbook estimated data in 2014 Kosovo's population stands at 1,870,981 persons [**The World Factbook**]. The same situation is with territories of both entities in their historic borders – they are fulfilling the requirement of territory.

The third requirement "government" distinguishes the two entities. J. Crawford described government as "the most important ... criterion of statehood, since all the others depend upon it" [**Crawford, 2006**]. Government have to exercise effective control within the territory of the state and operate independently from the authority of governments of other states.

Transnistria uses a semi-presidential system, where the President is the head of state and the Prime Minister is the head of government. There is the Supreme Council, which in fact is the parliament of the PMR. A judicial system of Transnistria was established by the Constitution of the PMR. According to the Law on Judicial System in the PMR, the judiciary is independent and operates independently of legislative and executive branches. The judicial power is exercised through the courts in constitutional, civil, administrative, criminal and arbitration proceedings. The government of Transnitria indeed exercises authority over the entire territory.

Obviously, discussion on the existence of Transnistria entity is impossible without taking into account the Russian factor. On the one hand it may seem, that the existence of Transnistria is not possible without Russia. On the other hand, one can certainly say that the dependence on Russia is not as great as often assumed. There are quite regular serious conflicts between Tiraspol and the Kremlin. Even the economic dependence of Transnistria on Russia is not so obvious compared to other non-recognized states of the CIS, since Transnistria operates real market economy, and companies are mostly export-oriented and registered in Moldova. Everything that has been mentioned above demonstrates that Transnistria fulfils the third requirement.

Contrariwise, the situation with Kosovo is rather different. The system of power in Kosovo consists of the following components: the Assembly of Kosovo established in 2001, the President who is the head of the entity, the Executive, also named the Government, and the judicial system, which is composed according to the Constitution 2008 of an independent judiciary and consists of the Supreme Court and subordinate courts, the Constitutional Court, and the independent prosecutorial institution. Despite the existence of legislative, executive and judiciary the EULEX was deployed in Kosovo. One of the roles of EULEX is following: "EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices" [**Council, 2008**]. So the EULEX authority to "retaining certain powers" with respect to some of the key areas of the sovereign state, is thus questioning the Kosovarian government's ability to govern its own territory. Therefore opposite to Transnistria, Kosovo does not satisfy this criterion.

The fourth criterion, criterion of the capacity to enter into relations with other states poses problems for both Transnistria and Kosovo. As J. Crawford mentioned, such a capacity is "a consequence of statehood, not a criterion for it" [**Crawford, 2006]**. Due to that the situation is very simple: both entities have capacity to enter into relations with states that have recognized them as a state. And they don't have this capacity to those states that have not recognized them. Transnistria haven't got any capacity to enter into relations with other states, and Kosovo is able to enter relations with 111 states.

Analysing the above said one can easily notice that none of the two entities meet all the criteria set by The Montevideo Convention on Right and Duty of States 1933.

III. B Recognition of a state

In order to take effect in international law, secession should be recognized by the international community [**Radziejowska, 2014**].

Two principal theories dominate debate about recognition of a state: the constitutive and the declaratory one. According to the constitutive theory, the recognition constitutes the State – it means that only after recognition the entity has an international personality. In this case, according to J. Dugard and D.

Raic "Recognition therefore becomes an additional requirement of statehood" [**Dugard, Raic, 2006**].

According to the declarative theory, the existence of a state is independent of recognition by other states. Recognition in that theory is only a political act that confirms that a state already exists.

Currently the declarative theory is mostly supported in the doctrine. However, it should be considered that "the general perception of recognition as declaratory, it sometimes has constitutive elements because international personality depends on recognition" [**Vidmar, 2009**]. If we examine the practice in cases with Kosovo and Transnistria, it becomes evident that the constitutive theory is applied rather than the declaratory one. Recognition has become the indicator of the successful secession.

As we well know, Transnistria doesn't have any recognition by the existing states. Fundamentally different is the situation of Kosovo: since the Declaration of Independence till the end of February 2008 it was recognised by 21 states, including USA, France, United Kingdom, Germany, Italy, Peru, Austria, Poland. Till June 2015 Kosovo was recognised by 111 states. The main difference is that the Kosovo Declaration of Independence was coordinated by part of international community (in particular the USA and some of the EU states). All these states, of course, recognised Kosovo as a state. Transnistrian Declaration of Independence was a self-made act and therefore had no international support and no recognition. In case of Kosovo a fairly uncommon phenomenon was noted, namely, Kosovo declared independence with the prior approval of the number of States, that have promised recognition in advance. It could be considered that the declaration of Kosovo's independence before its adoption was the subject of discussions between the Kosovo authorities and the authorities of some States. Kosovo authorities have been convinced that after declaring independence, it will be recognized at least by half of the existing states. This confirms the theory set by M. Steria that peoples have been able to secede successfully from mother states only in the case of support by most of the great powers [**Sterio, 2013].**

Seven years passed since the issuance of Kosovo Declaration of Independence and according to R. Caplan and S. Wolff "... recognition ... has helped to consolidate independent statehood" [**Caplan, Wolff, 2015**].

This fact confirms the re-emergence of the constitutive theory, although, the States supporting Kosovo independence used the concept of the "unique case". As it was proved by practice, such concept could be used for every secessionist conflict with omission of legal criteria of statehood and recognition as it happened in that case.

IV. Conclusions

The main point of this article was a specific comparison between the two cases. The intention was to analyse two conflicts, that allowed to elaborate their similarities and differences. In accordance with some criteria there are differences, and with reference to some other - similarities.

Both conflicts are examples of a territorial conflict. But the reasons of the conflicts and their history are rather different. The Transnitrian conflict has

mainly an economic background, while Kosovo is mostly an ethnic one. The intensity of the armed actions in those conflicts was different as well. The conflict in Transnistria was characterized by a relatively small number of victims, while the Kosovo conflict, even was aggravated by ethnic cleansing and outside military intervention. Participation of third countries in these conflicts was more vivid in Kosovo than in Transnistria. It is assumed that in Kosovo, in fact, it supported creation, protection and even the actual existence of the entity's structures.

Without any doubt, both discussed cases are cases of unilateral secession. Secession is not illegal in itself, but assessment of its legality depends on several criteria. The first one relating to a consent of the parent state in both cases was not achieved. But, as we remember, there is the doctrine of so-called "remedial secession", which, however, does not have a wide support in state practice. Applying the doctrine of "remedial secession" to cases of Transnistria and Kosovo, it turns out that it was impossible to find both Transnistria and Kosovo to be clear examples of such a secession. We could hardly apply the right of self-determination to Transnistrians, as well the critera of both "gross human rights violations" and "no alternative but secession". In turn, the case of Kosovo is more complicated, but, even despite that, leads to similar conclusions. Although Kosovar Albanians may be considered as the "People" in the meaning of the right of self-determination, but application of criterion of "grave human rights violations" to Kosovo is doubtful, as these violations in fact ended in 1999. The claim that there were "no alternative but secession" for Kosovo is doubtful as well.

Both Transnistria and Kosovo have significant difficulties in meeting traditional statehood criteria. Interesting is the fact that unrecognised Transnistria generally appears, for that matter, comparatively better than partially recognized Kosovo. In contrast to Kosovo this entity has independent government that is free from international involvement and it is able to exercise authority on its own territory without the third parties. Both entities have problems with the capacity to enter into relations with other states. Transnistria has no capacity at all, and Kosovo is able to have relation only with the states, which have recognised it.

Besides that Kosovo had particular recognition among international community and Transnistria does not have it at all. This means that the recognition is rather a political issue rather than a legal one. States practice with the recognition of Kosovo demonstrates that recognition has become an indicator of the successful secession, thereby supporting the constitutive theory of recognition.

However, the main difference between these two cases remains in the degree of international support. Discussed cases reveal that not international law, but the will and political interests of great powers are becoming the decisive factor in the international recognition of secession.

ABBREVIATIONS

CIS – Comonwealth of Independents State
CSCE – Conference on Security and Co-operation in Europe
EU – European Union
EULEX – the European Union Rule Of Law and Mission in Kosovo
FRY – Federal Republic of Yugoslavia
ICJ – International Court of Justice
MSSR – Moldavian Soviet Socialist Republic
MSSRT – Moldavian Soviet Socialist Republic of Transnistria
OSCE – Organisation on Security and Co-operation in Europe
PMR – Pridnestrovian Moldavian Republic
SC – Security Council
SFRY – Socialist Federal Republic of Yugoslavia
UN GA – United Nations General Assembly
USSR – Union of Soviet Socialist Republic

REFERENCES

Абхазия, Южная Осетия и Приднестровье признали независимость друг друга и призвали всех к этому же [Abkhazia, South Ossetia and Transnistria have recognized each other's independence and called upon all to the same], 17 November 2006. Available from: http://www.newsru.com/russia/17nov2006/aup.html [Accessed 8th June 2015].

Babilunga, Nikolai; 2010. *Распад СССР и кризис молдавской государственности* [Raspad SSSR i krizis moldavskoi gosudarstvenosti]; Русин [Rusin]; 22; 4; 112-135.

Bruno, Patrik;Vel'mot, Ф. Shanse; Viernik, Oleg. 2007. *Международное право и независимость Приднестровья* [Mezhdunarodoe pravo i nezavisimostTransnistria]; Bendery; Izdatelstvo "Poligrafist".

Вице-спикер парламента Абхазии: Выборы в НКР соответствуют всем международным стандартам [Vice-Speaker of the Parliament of Abkhazia: NKR elections comply with all international standards], 23 May 2010. Available from: http://www.panarmenian.net/rus/world/news/49007/ [Accessed 8th June 2015].

Декларация о независимости Приднестровской Молдавской Республики [Declaration of independence of the Pridnestrovian Moldavian Republic]; 25 August 1991. Available from: http://mfa-pmr.org/index.php?newsid=230 [Accessed 8th June 2015].

Декларация о независимости Республики Молдова [The Declaration of Independence of the Republic of Moldova], 27 August1991, Monitorul Oficial; 1991; № 11.

Декларация о суверенитете Советской Социалистической Республики Молдова [Declaration of Sovereignty of the Soviet Socialist Republic of Moldova], 23 June 1990, Вести Верховного Совета Советской Социалистической Республики Молдова [Bulletin of the Supreme Council of the Soviet Socialist Republic of Moldova]; 1990; № 8/192.

Закон № 173 от 22.07.2005 об основных положениях особого правового статуса населенных пунктов левобережья Днестра (Приднестровья) [The law No 173 from 22.07.2005 on the basic provisions of the special legal status of localities from the left bank of the Dniester River (Transnistria)]; *Monitorul Oficial*; 2005; № 101-103.

Ivanov, Stanislav and Zhuravel, Valerii. 2009. Региональные конфликты и роль России в их урегулировании [Regionalnie koflikti i rol Possii]; *Право и безопасность* [Pravo i bezopasnost']; 33; 4; 15- 19.

Массовые и наиболее серьезные нарушения прав человека и положение в зоне вооруженного конфликта в г. Бендеры. Июнь – Июль 1992 [The mass and the most serious violations of human rights and the situation in the conflict zone in the city of Bendery. June - July 1992]; 11 September 1992. Available from: http://www.memo.ru/hr/hotpoints/moldavia/benderyr.htm [Accessed 8th June 2015].

Moruchkov, Ivan; Этноним "приднестровец" и его социальный аспект в формировании самоидентификации граждан Приднестровской Молдавской Республики [The ethnonym «pridnestrovets» and its social dimension in the formation of self-identification of citizens of the Pridnestrovian Moldavian Republic]; December 2006. Available from: http://www.ia-centr.ru/archive/public_details8c3c.html?id=234 [Accessed 8th June 2015],

Fomenko, Vladimir. 2009. Демографическая ситуация в Приднестровье в постконфликтный период [The demographic situation in the aftermath of conflict in Transnistria]; in: Schelar', Galina; Bobkowa, Elena; Cheke Bianka (eds.); Молдова-Приднестровье. Общими усилиями-к успешному будущему [Moldova-Transdniestria. Joint efforts for a successful future]; Chisinau; Izdatelstvo Cu drag; 82-101.

Accordance with international law of the unilateral declaration of independence in respect of Kosovo*;* ICJ Advisory Opinion of 22 July 2010; *ICJ Reports 2010*; 403-453.

Agreement on Principles of a Peaceful Settlement of the Armed Conflict in the Transdnestrian Region of the Republic of Moldova; 1992; 21 July. Available from: http://www.stefanwolff.com/publications/official-documents-and-proposals [Accessed 8th June 2015].

Antonowicz, Lech. 1992. *Rozpad ZSRR ze stanowiska prawa międzynarodowego*; Państwo i Prawo, 9, 20-29.

Background Paper "The Transnistrian Conflict in Moldova: Origins and Main Issues"; 1994; 10 June; Vienna; *CSCE Conflict Prevention Centre*.

Blay, Sam. 1994. Self-Determination: A Reassessment in the Post-Communist Era; *Denver Journal of International Law and Policy;* 22; 2-3; *275-315*.

Caplan, Richard and Wolff, Stefan. 2015. *Some Implications of the Advisory Opinion for Resolution of the Serbia-Kosovo Conflict; in: Milanovic, Marco; Wood, Michael (eds.); 317-331; Oxford; Oxford University Press*.

Commentary (5) on the Article 26 of Responsibility of States for internationally wrongful acts; 2001; *ILC Report on the Work of its Fifty* – Third Session; UN Doc A/56/10.

Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo; *EULEX Kosovo*; OJ 2008, L42.

Crawford, James. 2006. *The Creation of States in International Law*; Oxford, Clarendon Press.

CSCE Mission to Molodva, Report No. 13, 1993, 13 November. Available from: http://www.osce.org/moldova/42307 [Accessed 8th June 2015].

Czapliński, Wladysław. 1998. *Zmiany terytorialne w Europie Środkowej i Wschodniej i ich skutki międzynarodowoprane* (1990-1992); Warszawa; Wydawnictwo Scholar.

Decision on the annulment of the illegitimate acts of the Provisional Institutions of Self-Government in Kosovo and Metohija concerning the proclamation of unilateral independence; 2008; UN Doc. S/2008/260; 20-21**.**

Declaration by the Heads of the member States of the wealth of Independent States on the situation in the left regions of the Republic of Moldova signed in Kiev on 20 March 1992. Available from: http://www.old.gov.md/slidepageview.php?l=ru&idc=615 [Accessed 8th June 2015].

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations; 1970; *GA Res. 2625 (XXV) of 24 October 1970*.

Dugard, John and Raic, David. 2006. The role of recognition in the law and practice of secession; in: Kohen Marcelo G (ed.); Secession: *International Law Perspectives;* 94-137; New York; Oxford University Press.

Geldenhuys, Deon. 2011. Secession and Contested States; in: Pavkovic Alexander, Radan Peter (eds.), The Ashgate Research Companion to Secession; 285-297; Farnham, Burlington; Ashgate Publishing.

Heraclides, Alexis. 1990. Secessionist Movements and External Involvement; *International Organisation*; 44; 3; (1990), 341-378.

International Meeting of Experts on further study of the concept of the rights of peoples Unesco; 1989; 27-30 November; Final Report and Recommengations. Availanle from: http://unesdoc.unesco.org/images/0008/000851/085152Eo.pdf [Accessed 8th June 2015],

Judah, Tim. 2008. *Kosovo What Everyone Needs to Know*; Oxford University Press; 1st edition.

Kohen, Marcelo G. 2002. Cr´eation d'Etats en droit international contemporain; in: *Bancaja Euromediterranean Courses of International Law*; 6; 546-635.

Kohen, Marcelo G. 2006. Introduction; in: Kohen; Marcelo G (ed.); Secession: *International Law Perspectives;* 1-19; New York; Oxford University Press.

Kosovo Declaration of Independence, 17 February 2008. Available from: http://www.assembly-kosova.org/?cid=2,128,1635 [Accessed 8th June 2015],

Kosovo in Figures 2005; 2006; Statistical office of Kosovo. Available from file:///C:/Users/Admin.N/Downloads/Kosovo%20in%20figures%202005.pdf [Accessed 8th June 2015],

Lauterpacht, Hersch. 1944. Recognition of States in International Law; *The Yale Law Journal;* 53; 3; 385-458.

Menon, P.K. 1994. *The law of recognition in International Law*. Basic principles; Lewiston,Queenston,Lampeter; Edwin Mellen Press.

The Montevideo Convention on Right and Duty of States; 1933; 26 December; LNTS,165, 20.

Nantoi, Oazu. 2009. Sources and Settlement Prospects of the Transdniestrian Conflict; in: Moldova–Transdniestria: *Working Together for a Prosperous Future Negotiation Process;* 160-178; Chisinau; Publising House.

Nedelciuc, Vasile. 1992. *The Republic of Moldova*; Chisinau, Universitas.

Orakhelashvili, Alexander. 2008. Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo; *Max-Planck Yearbook of United Nations Law;* 12; 1-44.

Pellet, Alain. 1992. The Opinion of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples, *European Journal of International Law*, 3; 1; 178-185.

Radan, Peter. 2008. Secession: A Word in Search of a Meaning; in: Pavkovic, Alesander, Radan, Peter (eds); *On the Way to Statehood: Secession and Globalisation*; 17-32; Aldershot, Burlington; Ashgate Publishing.

Radziejowska, Maria. 2014. Law and Lawlessness: The Secession and Russia's Absorption of Crimea; PISM Bulletin; No. 43; 628; 26 March 2014. Available from: https://www.pism.pl/files/?id_plik=16914 **[**Accessed: 8th January 2015**],**

Reference re Secession of Quebec; 1998; 2 S.C.R. 217.

Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law; 2008; GA Res. 63/3 of 8 October 2008; UN Doc. A/RES/63/3.

Resolution of the National Assembly of the Republic of Serbia on the confirmation of the Decision of the Government of the Republic of Serbia on the annulment of the illegitimate acts of the Provisional Institutions of Self-Government in Kosovo and Metohija concerning the proclamation of unilateral independence; 2008; UN Doc. S/2008/260; 19-20.

Rich, Ronald. 1993. Recognition of States: The Collapse of Yugoslavia and the Soviet Union; *European Journal of International Law*, 4; 1; 36-65.

Saryusz-Wolski, Jacek, Vuk Jeremic at EP following Kosovo's independence declaration: " I am ashamed as a European", 21 February 2008. Available from: http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20080219IPR21605 [Accessed 8th June 2015],

Security Council Meets in Emergency Session Following Kosovo's Declaration of Independence, with Members Sharply Divided on Issue, Security Council 5839th Meeting (PM); 2008; 18 February. Available from: http://www.un.org/News/Press/docs/2008/sc9252.doc.htm [Accessed 8th June 2015],

Serbian Foreign Minister Vuk Jeremic addresses the OSCE Permanent Council on Kosovo's independence declaration; 2008; 19 February. Available from: http://www.osce.org/pc/49473 [Accessed 8th June 2015],

Seymour, Michel. 2011. Internal Self-Determination and Secession; in: Pavkovic, Alexander; Radan, Peter (eds.), *The Ashgate Research Companion to Secession*; 385-398; Farnham, Burlington; Ashgate Publishing.

Shaw, Malcom N. 1997. Peoples, Territorialism, Boundaries; *European Journal of International Law*, 8; 3; 478-507.

Slomanson, William R. 2009. Legitimacy of the Kosovo, South Ossetia and Abkhazia secessions: Violations in search of a rule; *Miscolc Journal of International law*; 6; 2; 1- 27.

Sterio, Milena; 2013. The Right to Self-Determination in International Law. "*Selfistans", secession, and the rule of the great powers*; Abingdon, Routledge.

Thio, Li-ann. 2006. International law and secession in the Asia and Pacific regions; in: Marcelo G. Kohen, (ed.), *Secession: International Law Perspectives*; 297-354; New York; Oxford University Press.

Turk, Danilo. 1993. Recognition of States: A Comment; *European Journal of International Law*, 4; 1; 66-91.

Vidmar, Jurie. 2009. International Legal Responses to Kosovo's Declaration of Independence; *Vanderbilt Journal of Transnational Law*; 42, 779-851.

Vienna, Declaration and Programme of Action, *World Conference on Human Rights*; 1993; UN Doc. A/CONF.157/23.

The World Factbook. Available from: https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html#People. [Accessed 8th June 2015],

Correspondence address:

Natalia Cwicinskaja – Assistant Professor, Dr
at the Chair of International Law
and International Organizations,
Faculty of Law and Administration,
Adam Mickiewicz University
al. Niepodległości 53, 61-714
Poznań, Poland
e-mail: nc@amu.edu.pl