

The Legal Aspects of the Donbas Problem in the Context of Self-Determination and the Right to Secession

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Abstract

The full-scale military intervention of the Russian Federation on the territory of Ukraine in 2022 again put the territorial problems of Ukraine on the agenda of international relations and international law. Note that along with Crimea, which is often mentioned by the international community, the issue of Donbas is also relevant for Ukraine. The emergence of the Donbas problem is directly related to the Russian Federation. As a result of Moscow's first indirect and then direct intervention in the east of Ukraine (in Donbas), two new unrecognized states were formed - the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR). Later these territories were annexed by Russia. The article examines the quasi-states of the DPR and LPR not recognized by the international community within the framework of the principles of self-determination, secession, and territorial integrity of international law.

The main goal of this study was to determine whether the separatist formations that arose in the east of Ukraine have the right to self-determination and secession, taking into account the international legal principle of the territorial integrity of states.

Process tracking and case study methods were used as research methodology. Cause-and-effect relationships between political processes were established and legal documents were studied. Data collected from history, international law and similar fields have been cited to explore the presented topic.

The main novelty of the study is that the problem of Donbas was assessed taking into account the right to self-determination, the right to secession and the principle of territorial integrity of Ukraine.

Keywords: self-determination, territorial integrity, secession, Donbas, Ukraine, international law

Правові аспекти проблеми Донбасу в контексті самовизначення та права на відокремлення

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Анотація

Повномасштабне військове втручання Російської Федерації на територію України в 2022 році знову поставило територіальні проблеми України на порядок денний міжнародних відносин і міжнародного права. Зауважимо, що поряд із часто згадуваним міжнародним співтовариством Кримом, актуальним для України є й питання Донбасу. Виникнення проблеми Донбасу безпосередньо пов'язане з Російською Федерацією. У результаті спочатку непрямого, а потім прямого втручання Москви на сході України (на Донбасі) утворилися дві нові невизнані держави – Донецька народна республіка (ДНР) і Луганська народна республіка (ЛНР). Пізніше ці території були анексовані Росією. У статті розглянуто невизнані міжнародним співтовариством квазідержави ДНР та ЛНР в рамках принципів самовизначення, сецесії та територіальної цілісності міжнародного права.

Основною метою цього дослідження було визначити, чи мають сепаратистські формування, що виникли на сході України, право на самовизначення та відокремлення враховуючи міжнародний правовий принцип територіальної цілісності держав.

В якості методології дослідження використано методи відстеження процесу та кейс-стаді. Встановлено причинно-наслідкові зв'язки між політичними процесами та досліджено правові документи. Щоб дослідити представлену тему, були цитовані дані, зібрані з історії, міжнародного права та подібних галузей.

Головною новизною дослідження є те, що проблема Донбасу оцінювалася з урахуванням права на самовизначення, права на відокремлення та принципу територіальної цілісності України.

Ключові слова: самовизначення, територіальна цілісність, відокремлення, Донбас, Україна, міжнародне право

Introduction.

Ukraine is the largest country in Eastern Europe in terms of both population and territory. At the same time, it is the largest military, economic, and technological power in post-Soviet geography after the Russian Federation (Büyükkıncı, 2004, p. 401). Ukraine has historically been perceived as a strategic buffer zone by Western Europe and Russia. In addition, Russia, which has seen Ukraine as its border region for centuries, with a dense population of Russian-speaking people, has had difficulty accepting Ukraine as an independent state. According to the American political scientist Zbigniew Brzezinski, who emphasized the importance of Ukraine for Russia, although Russia is unlikely to lose its imperial power without Ukraine, Russia will certainly become an empire if Ukraine is subordinated to it (Brzezinski, 1994, p. 80).

Research results.

When we look at the relationship between Russia and Ukraine through the window of the most recent history, it can be seen that in the post-Cold War period, Ukraine has become the center of geostrategic interests between the West and Russia. In the 1990-s and 2000-s, the government of Kyiv faced a dilemma of choosing a side between NATO and the European Union (EU) on the one hand and the Russian Federation on the other. Ukraine has become a potential candidate country for the EU membership. For Russia, it is the most important "near abroad" country due to its geostrategic position and economic potential.

In 2013, Russia perceived attempts to sign the EU-Ukraine Association Agreement is an important step towards the integration of Ukraine into the EU, as a threat to its security. The increase in the number of countries joining NATO and the EU in Eastern Europe has called into question Russia's influence in this region. Disagreed with the geopolitical changes in the region Russia violated the territorial integrity of Ukraine directly and indirectly. This process took place in two stages with an interval of 8 years and is still ongoing. In 2014, the Autonomous Republic of Crimea under the sovereignty of Ukraine was annexed by Moscow.

Then, the forces supported by Moscow created the DPR and LPR, which are unrecognized separatist republics, in the territory of the Donbas region of Ukraine. On February 24, 2022, Russian President decided to launch a «special military operation» against Ukraine, thus, Russia launched another attack against Ukraine's territorial integrity. As it is clear, the problem of Donbas is a legal problem as well as a political problem. The main goal of this article is to analyze the problem of Donbas not from a political point of view, but from the aspect of international law.

This article analyzes the problem of Donbas from the point of view of international law. Since the concepts of «principle of territorial integrity» and «right to secession» are usually used in relation to similar problems, it is essential to define these concepts.

Conceptual framework: self-determination, territorial integrity, and the right to secession. The concept of «self-determination» has different meanings in different periods (Çelik, 2015, p. 198). The concept of self-determination emerged with Aristotle and later developed in the works of French Revolution thinkers and 17th-century Italian political scientists (Kampelman, 1993, p. 6; Kılınc, 2008, p. 952; Kütükcü, 2004, p. 260). The concept in question did not initially have the exact meaning it has today, and over time it went through a process of conceptual development. The early 20th century can be described as a turning point for the principle of self-determination. After the First World War, self-determination began to attract more attention from the international community. Immediately after the war, US President Woodrow Wilson put forward 14 principles in his speech on January 18, 1918, and defended the principle of self-determination in point 5, emphasizing that peoples have the right to self-determination in line with liberal principles: «A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined».

The principle of self-determination is addressed in articles 1, 2 and 55 of the United Nations Charter and has found its place in international law (Abdullahzade, 2014a, p. 164). Article 1 of the Charter lists the UN's purposes as follows: The Purposes of the United Nations are ... develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...

Self-determination is regulated in the UN Charter as an undefined principle rather than a right (Abdullahzade, 2014a, p. 164) and does not impose legal obligations on member states. In order to eliminate this ambiguity and define the content of the concept more precisely, resolutions were adopted by the UN General Assembly in the 1960-s (Taşdemir, 2016, p. 647). In fact, with the «Declaration on the granting of independence to colonial countries and peoples» (1960), articles 1/2 and 55 of the UN Charter were expanded and it was stated that the realization of the principle of self-determination should not be contrary to other principles in the UN Charter, including the principle of territorial integrity of the country. In the «Declaration on Permanent Sovereignty over Natural Resources» (1962), sovereignty over natural resources was stated as a part of the principle of self-determination, and it was emphasized that this right should be used for the benefit of the people of the relevant state and that foreign investments should not restrict the sovereignty of the relevant state over these resources (Uz, 2007, p. 67). The «International Covenant on Civil and Political Rights» and the «International Covenant on Economic, Social and Cultural Rights»

(1966) made important contributions to the right of self-determination becoming a binding rule of international law (Abdullahzade, 2014a, p. 164): « 1/1 Article. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development».

The principle of self-determination has also been included in international documents outside the UN General Assembly. For instance, the «African Charter on Human and Peoples' Rights» (1981) included articles on the equality of peoples and the right to self-determination. In addition, the right in question was included in the «Charter of Paris for a New Europe» (1990) and it was emphasized that it could be used in a way that did not conflict with territorial integrity and other principles of international law (Uz, 2007, p. 69).

The right to self-determination is generally not recognized in the context of the establishment of a new state through secession from one state. The reason for this is the principle of «territorial integrity of the state» or «territorial integrity», which is accepted as an established principle in international law (Kılınç, 2008, p. 958). The principle of territorial integrity began to be implemented as a political principle in the 20th century under the name of the integrity of the state's territory. According to this principle, the territory of a state established in accordance with the rules of international law cannot be subject to fragmentation or division without the consent of the state in question, and other states must respect this integrity (Ali, 2013, p. 91). The principle of territorial integrity was first included as a general rule in the Covenant of the League of Nations. According to Article 10 of the Covenant of the League of Nations: «The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League».

The principle of territorial integrity of states has had a very important place in the international legal order and the UN system after the Second World War. The principle in question is regulated in Article 2, paragraph 4 of the UN Charter, which prohibits the use of force against the territorial integrity and political independence of any state (Gündüz, 2015, p. 110).

Although there is a contradiction between the principle of self-determination and the principle of territorial integrity, during the Cold War, the principle of territorial integrity was prioritized by the parties. The right to self-determination was seen as a right of "autonomy" rather than a right of independence (Taşdemir, & Özer, 2017, p. 68).

To define the scope and meaning of the right to self-determination we need to focus on two characteristics of this right. The first one is related to the internal organization of states and means that people choose the form of government they want without any external pressure. The second is the right of people to choose the sovereignty

of the state they want, including the establishment of an independent state (Pazarıcı, 2010, p. 141-142). Due to its internal and external dimensions, self-determination is divided into internal self-determination and external self-determination. Nevertheless, such a distinction is not made either in the UN Charter or in other international documents (Ehtibarlı, 2016, p. 151). The principle of self-determination generally includes three basic rights: i) the right of the people to choose the political, economic, social, and cultural system they want within the country without any external pressure; ii) the right of colonies to independence; iii) the right to secede from an existing independent state (Dayıoğlu, 2017, p. 6).

The right of internal self-determination is generally accepted as the right of a people who have gained independence to determine the form of government they want. In other words, it is the right of a nation, people, or community, including people of different ethnic origins, to determine the constitutional order and form of government they desire, without being subject to external pressure (Ehtibarlı, 2016, p. 167-168). This dimension of self-determination does not actually present many problems. This right, unlike external self-determination, is not one that, once exercised, ends, or diminishes (Taşdemir, & Özer, 2017, p. 57). Internal self-determination has recently attracted more attention from the international community. The reason for this is that, unlike the international community's reaction to events such as the disintegration of existing states and the creation of new states, the protection of the right to self-determination of peoples living in existing states is considered more harmless and appropriate (Ehtibarlı, 2016, p. 167). The right to self-determination has been perceived and implemented in Western countries more as a form of self-government and participation in governance. In other words, this principle has been addressed and defended only in its internal dimension in Western democracies (Abdullahzade, 2014b, p. 159).

External self-determination is the right of a people to choose to be affiliated with the state they want, including establishing an independent state (Pazarıcı, 2010, p. 142). While the internal right of self-determination aims to ensure that the entire population lives in a pluralistic society, the external right of self-determination aims to establish a new state or to establish autonomy within a state (Çelik, 2015, p. 199-200). As mentioned above, external self-determination was first used by Wilson within the scope of his 14 principles and was perceived to be applied to countries under colonial, occupied and tutelage (Abdullahzade, 2014a, p. 166). With the dissolution of the USSR and Yugoslavia after the Cold War, the application of this right outside the colonies became a topic of discussion (Pazarıcı, 2010, p. 142). The international community, which until this period had been skeptical about the external dimension of the right to self-determination, except for the peoples under occupation and colonial rule, was faced with the

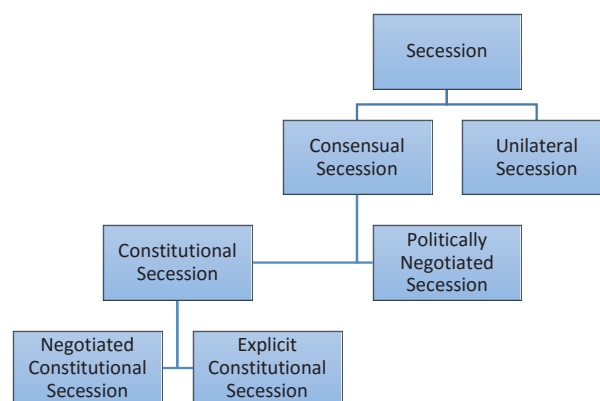
problem of the broader applicability of this right on the basis of separatist actions that came to the fore with the dissolution of the USSR and Yugoslavia (Abdullahzade, 2014b, p. 160).

Secession is the loss of a part of a state from its sovereignty. The main debates about the right to self-determination are about whether or not the right to secession should be included in this right. Supporters of the right to secession argue that self-determination has no meaning without this right. However, those who support the right to secession have also made the exercise of this right conditional on compelling reasons. In other words, according to these authors, if a people feel exploited, if they are left in constant economic poverty, if cultural autonomy and people's lives are in danger, there is a justification for the right to secession (Uz, 2007, p. 72-73). In other words, while the external dimension of internal self-determination was accepted as legitimate for peoples under colonial rule, in other cases independence was tied to certain conditions (Ülger, 2016, p. 57). In cases where the internal right of self-determination is continuously violated, the external right of self-determination, which includes the right to secede, arises. For example, in Kosovo, it is argued that the Kosovars have the right to secede as a «corrective» or «last resort» due to the continuous and systematic violation of the minority rights and human rights of the Albanians by the Serbian administration (Taşdemir, 2016, p. 654). The secession process can be negotiatory or combative. In this respect, it is necessary to distinguish between the types of separation: i) consensual secession; ii) unilateral secession. There are also two types of consensual separation: i) constitutional secession; ii) politically negotiated secession (Taşdemir, & Özer, 2017, p. 93-94). At the time of constitutional separation, the consent of the main state to secession exists and the process of secession does not involve the threat or use of force by the parties. The realization of secession is carried out in accordance with the clear provision in the constitution. In this regard, there are two types of this method: i) negotiated constitutional secession; ii) explicit constitutional secession.

In the case of a consensual constitutional secession, the parties agree among themselves as a result of negotiations, make changes in the state's constitution that foresee the right to secede, and secede in accordance with the relevant amended article of the constitution. In the explicit constitutional secession method, there must be clear provisions regarding secession in the existing constitution of the state and the secession process is foreseen as a procedure in the constitution. The 1931 Chinese Constitution, the 1974 Yugoslavian Constitution and the 1977 Soviet Union Constitution can be cited as examples of such constitutions (Taşdemir, & Özer, 2017, p. 94). Secession by political negotiation, like constitutional secession, does not involve the threat of using force. It is important that both the central state and

the secessionist party are willing to resolve the issue. Examples of secession by political negotiation in history include Norway's secession from Sweden in 1905, the Southern Ireland's secession from the United Kingdom in 1922, and the secession of post-Soviet republics from the Soviet Union (Taşdemir, & Özer, 2017, p. 94-95).

Unilateral secession is an attempt to achieve secession without the consent of the main state, by using force or threatening to use force. There are mutual claims of sovereignty between the existing state and the separatist party regarding the problematic region. Unilateral secession is often achieved by announcing the result of a referendum. However, in such a case, two situations arise for unilateral secession: first, secession is illegal in terms of both international and national law; second, secession is carried out without negotiations and consent with the main state. Examples of successful unilateral secession include the secession of Algeria from France, Indonesia from the Netherlands, the Democratic Republic of Vietnam from France, and the former Yugoslav states. Examples of unsuccessful unilateral secession include the secession of Chechnya from Russia, Tibet from China, Transnistria from Moldova, and Abkhazia and South Ossetia from Georgia (Taşdemir, & Özer, 2017, p. 94-95).



The emergence of the Donbas problem. The Donbas region is the geographical region where the Luhansk and Donetsk oblasts are located in eastern Ukraine. Although the ethnic structure of Donbas is heterogeneous, this region, which borders Russia, also has a large Russian population. According to the 2001 census data, approximately 38% of the population of Donetsk Oblast and approximately 39% of the population of Luhansk Oblast are Russians. (The number and composition of the population of Donetsk region, 2001; The number and composition of the population of Luhansk Oblast, 2001).

Following the dismissal of Ukrainian President Viktor Yanukovich on February 22, 2014, during the Euromaidan movement and the coming to power of a pro-Western government in Kyiv, separatism that began in Crimea spread to the Donbas region. In a short time, the Donbas People's Militia operation, led by

businessman P. Gubarev, was established in the Donetsk region. The operation consisted of former members of the law enforcement forces of the ousted Yanukovich government, pro-Russian local residents and foreign volunteers, mainly Russian citizens.

On April 7, the separatists announced the establishment of the Donetsk People's Republic and the declaration of its sovereignty. On April 21, separatists elected V. Bolotov as the regional governor of Luhansk, and on April 27, they declared the establishment of the Luhansk People's Republic. On May 11, referendums on independence were held in both separatist formations. In both referendums, voters could say «yes» or «no» to the question «Do you support the declaration of state independence of the Donetsk/Luhansk People's Republic?». The Russian word «samostoyatel'nost» used in the referendum question can be interpreted as the separatist formation gaining independence by complete secession from the main state and the right to self-government under broad autonomy without complete separation. The use of this word has led to uncertainty among the majority of voters. In the referendum, whose legitimacy was not recognized by the Kyiv administration, according to information released by separatist groups, 75% (Ukraine rebels hold referendums in Donetsk and Luhansk, 2014) of the DPR population and approximately 92% of the LPR population voted in favor of independence.

However, the war between the separatist groups and the Kyiv government in Donbas began even before the referendum. On April 12, separatist armed forces under the command of Russian militant and retired FSB officer Igor Strelkov seized the city of Sloviansk in the north of the Donetsk region and announced that the city had been transferred to DPR control. On April 14, 2014, the interim President of Ukraine Turchynov signed a decree initiating the counter-terrorism operation in the Donbas region of the country, which began fighting between the central government of Ukraine and armed separatists (On the decision of the National Security and Defense Council of Ukraine dated April 13, 2014). Ukrainian ground forces, with the help of aircraft and helicopters, took control of several settlements under separatist control, including Sloviansk, and in August approached Donetsk and Luhansk (Oldberg, 2020).

P. Poroshenko, who came to power in Ukraine with the presidential elections held on May 25, 2014, has continued the counter-terrorism operation launched during the term of his predecessor Turchynov. While Poroshenko promised to bring peace to Donbas shortly, he also stated during his inauguration that the Kyiv government was ready to talk only to civilians, not to terrorists in Donbas (Ukraine president vows not to give up Crimea, 2014). During the spring and summer of 2014, Ukraine's counter-terrorism operations forces managed to liberate more than two-thirds of Donetsk and Luhansk Oblasts from separatists. It was expected that central

government forces would quickly take control of the eastern part of the country and the Russian border, thus preventing Russian support for the separatists. However, the conflict in the town of Ilovaysk in August 2014 was a turning point in the fate of the war. When it became clear that the Ukrainian army could defeat the separatist forces in the strategically important Ilovaysk, Moscow intervened in the war by deploying its conventional troops (Alim, 2020, p. 139). As a result of this intervention by the Russian army and cross-border shelling, Ukraine lost control of a long section of its state border. In August 2014, the intervention of Russian army units stopped the advance of the Ukrainian armed forces and stabilized the borderline between the Ukrainian armed forces and the separatist-controlled territory.

On September 5, 2014, Ukraine, Russia, and the OSCE signed the Minsk Agreement (Minsk I), aiming to establish a ceasefire in the Donbas region (Protocol on the results of consultations of the Trilateral Contact Group, 2014). The Minsk I Agreement attempted to initiate a ceasefire process with the OSCE as an observer. According to the articles of the agreement, the Kyiv government undertook to adopt a law on general amnesty for separatists in certain regions of Donetsk and Luhansk Oblasts (Article 6) and a law on special self-government rights in the relevant regions (Article 3).

Although the Minsk Protocol has not yet entered into force, on September 16, 2014, the Ukrainian Supreme Council adopted an amnesty law and a law on special self-government rights for the separatist regions for an initial period of 3 years. The law regulated the right to use the Russian language in the relevant regions and special status in administration, police/security forces, elections, and economic and cultural rights. (The Law of Ukraine on the Special Procedure, 2014). Following the re-escalation of the war in January-February 2015 and the collapse of the Minsk I process, the need to initiate a new ceasefire process emerged. The Minsk II process was re-initiated in the «Normandy Four» format with the mediation of French President F. Holland and German Chancellor A. Merkel. As a result of the negotiations, a new Minsk Agreement (Minsk II) was signed between the Kyiv government and the separatists on February 12, 2015, with the signatures of the RF and OSCE representatives. The observer status of the OSCE was also accepted in the Minsk II protocol (Package of Measures for the Implementation of the Minsk Agreements, 2015).

Although local hot clashes between the Ukrainian central government and separatist forces continued in Donbas after the Minsk II Agreement, the war had largely stopped and turned into a frozen conflict. On February 21, 2022, the leaders of the separatist DPR and LPR, appealed to Russian President with a request to recognize the independence of the said republics and the independence of both republics was officially recognized by Moscow. On February 22, Putin stated at a press conference that the Minsk Agreements no longer exist,

as Russia recognizes the independence of the DPR and the LPR.

On February 24, 2022, when the war between the Russian Federation and Ukraine began, Russian President announced that he had decided to launch a «special military operation» in eastern Ukraine and that the aim of the operation was not to occupy Ukraine. He claimed that the military operation aimed to protect the Russian-speaking population of the Donbas region, which has been humiliated and subjected to genocide by the Kyiv regime for eight years. Furthermore, he stated that he wanted to see a Ukraine that was demilitarized and denazified. Although the Kremlin stated that it had no intention of occupying Ukraine when it launched its military intervention in Ukraine, a referendum was held on September 17-23, 2022, on the incorporation of the Ukrainian territories occupied by Russia into the Russian Federation, and the separatist DPR and LPR and the newly occupied by Russia Kherson and Zaporizhia regions of Ukraine were annexed by Russia on September 30, 2022. (Russia's Illegal Annexation of Ukrainian Territory 2022).

Conclusions.

As it is known from the above, the problem of Donbas is not a matter of freedom of the said territories from occupation or colonialism by any state, secession as a result of the disintegration of any state, secession as a result of mutual agreement, or exercise of the right to secession on constitutional grounds. The problem of Donbas is an example of attempts to separate a group living compactly within a state with a more heterogeneous and multi-ethnic ethnic composition.

Both when Ukraine was part of the USSR and when Ukraine became an independent state in 1991, Donetsk and Luhansk regions were an integral part of Ukraine, and they did not have any special or autonomous status defined by the Ukrainian constitution. From this point of

view, the secession of Donetsk and Luhansk regions from Ukraine can be discussed based on a decision made by the entire Ukrainian people, including the population of those regions. Thus, according to Article 73 of the Constitution of Ukraine, changing the country's borders is possible only through a referendum in which the entire Ukrainian people will participate. The state of Ukraine opposed the referendum held in Donetsk and Luhansk that declared the independence of those regions, and the referendum on joining the mentioned regions to the Russian Federation.

It should be noted that those who live in the Donbas and support the separation of that region from Ukraine are not all the people of the Donbas region, but one of the other ethnic minorities living within the state borders of Ukraine. Thus, ethnic Russians (or self-identified Russians) living in the Donbas region cannot be directly entitled to the right to external self-determination. Kremlin politicians compare the secession of separatist regions from Ukraine with the example of Kosovo's secession from Serbia and defend the argument that Crimea and Donbas have the right to self-determination. However, the attitude of the Ukrainian administration towards the population of Donbas or Crimea cannot be compared with the violence applied by the Serbian administration to the Albanians in Kosovo.

That is, the secession of Donbas cannot be defined as a "last resort" or a "corrective/compensatory right" as in the case of Kosovo. Application of the lotus principle to the Kosovo problem to the decision of the International Court of Justice, supports that Kosovo is "unprecedented" and cannot be compared with other situations. Russia rejected the West's argument that Kosovo is unique and will not set a precedent and wanted to legitimize the annexation of Ukrainian lands by using Kosovo as an example. Therefore, due to the above-mentioned characteristics, the Kosovo model cannot be an example for Donbas.

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