



**REMEDIAL SECESSION AS AN EXERCISE  
OF THE RIGHT TO SELF-DETERMINATION  
OF PEOPLES**

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## Abstract

*The purpose of this thesis is to examine whether international law of self-determination authorizes right to secession as remedy to violation of the right to self-determination of peoples. The content the right to self-determination in post-colonial context is very ambiguous and it is unclear whether modern law of self-determination authorizes external self-determination in the form of unilateral secession from existing state. The “remedial secession” theory has emerged that claims that people are entitled to secede under exceptional circumstances when their right to internal self-determination is being denied and there are no available remedies but secession.*

*The methodology of the research was to present the theory of self-determination, to derive the doctrine of “remedial secession” from the theory of self-determination, to determine the status of the “remedial secession” doctrine based on its substantiation in the international practice, and to apply the doctrine on selected cases. The issues of “people” definition, territorial integrity and recognition are also discussed.*

*It is submitted that right to “remedial secession” is a customary rule in the process of formation.*

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# Table of contents

<b>INTRODUCTION.....</b>	<b>1</b>
<b>PART I. RIGHT TO SELF-DETERMINATION OF PEOPLES IN INTERNATIONAL LAW .....</b>	<b>5</b>
1.1. HISTORICAL DEVELOPMENT OF SELF-DETERMINATION .....	5
1.2. CONTEMPORARY LAW OF THE SELF-DETERMINATION .....	7
1.2.1. The ICJ jurisprudence on self-determination .....	12
1.3 FORMS OF SELF-DETERMINATION .....	13
1.3.1. Internal self-determination .....	14
1.3.2. External self-determination .....	15
1.4. SUBJECT OF THE RIGHT TO SELF-DETERMINATION.....	16
1.4.1. Defining a people.....	17
1.4.2. Relationship between minority and people .....	19
1.5. TENSION BETWEEN SELF-DETERMINATION AND TERRITORIAL INTEGRITY .....	22
1.6. RE-SELF-DETERMINATION? .....	24
1.7. GENERAL REMARKS.....	27
<b>PART II. SECESSION AS A REMEDY FOR VIOLATION OF THE RIGHT TO SELF-DETERMINATION OF PEOPLES .....</b>	<b>28</b>
2.1. REGULATION OF SECESSION IN INTERNATIONAL LAW .....	28
2.1.1. Secession and right to secession.....	29
2.1.2 “Lawful” vs. “Unlawful” secession.....	31
2.2. RECOGNIZING SECEDING ENTITIES .....	34
2.2.1. Effectiveness vs. Lawfulness .....	36
2.3. DOCTRINE OF REMEDIAL SECESSION .....	38
2.3.1. “Safeguard clause” formula .....	40
2.4. CONDITIONS FOR THE RIGHT TO REMEDIAL SECESSION .....	43
2.4.1. Meaning of gross human right violations .....	45
2.4.2. Ultima ratio .....	47
2.4.3. Timing for secession.....	48
2.5. GENERAL REMARKS.....	49

<b>PART III. STATUS OF THE RIGHT TO REMEDIAL SECESSION IN INTERNATIONAL LAW .....</b>	<b>51</b>
3.1. LEX LATA OR LEX FERENDA? .....	51
3.2. SUBSTANTIATION OF THE DOCTRINE IN INTERNATIONAL PRACTICE .....	54
3.2.1 Aaland islands dispute in the League of Nations .....	54
3.2.2. Katangese Peoples' Congress v. Zaire .....	56
3.2.3. Reference re Secession of Quebec .....	58
3.3. ICJ ADVISORY PROCEEDINGS IN KOSOVO CASE .....	59
3.3.1. ICJ Advisory Opinion .....	60
3.3.2. States' opinio juris on secession .....	61
3.3.3. Separate opinions of judges on remedial secession .....	69
3.4. A DEVELOPING CUSTOMARY RULE? .....	71
3.4. GENERAL REMARKS .....	72
<b>PART IV. REMEDIAL SECESSION THEORY IN PRACTICE: CASE STUDIES ....</b>	<b>74</b>
4.1. "SUCCESSFUL" SECESSIONS .....	75
4.1.1. Bangladesh secession from Pakistan .....	75
4.1.2. Eritrea secession from Ethiopia .....	77
4.1.3. Kosovo secession from Serbia .....	78
4.2. "UNSUCCESSFUL" SECESSIONS .....	82
4.2.1. Turkish Republic of Northern Cyprus .....	82
4.2.2. Abkhazia .....	85
4.3. GENERAL REMARKS .....	86
<b>CONCLUSIONS .....</b>	<b>88</b>
<b>BIBLIOGRAPHY .....</b>	<b>96</b>

# Introduction

## Background of the study and research question

Right to self-determination is an essential norm of international law, which is reflected both in treaty law and international customary law. Although primarily exercised in the decolonization era through creation of independent states, the right to self-determination remained applicable outside the colonial context. Normally a right to self-determination is fulfilled through so-called “internal” self-determination – “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state”<sup>1</sup>. Such exercise of a right is compatible with the territorial integrity of that state. However, a right to so-called “external” self-determination arises only in exceptional situations. It is common agreement that “external” self-determination can be exercised by colonized or occupied peoples. However, there is no consensus whether there is a right to “external” self-determination outside situations of colonies and foreign occupations.

If there would be a right to “external” self-determination by other peoples, this would potentially take the form of unilateral secession from an existing state and therefore dismember the territory of that state. Would the states – the authors of international law – would allow such dismemberment in certain situation? There is an emerged theory – a “remedial secession” doctrine – which argues that in exceptional cases the right to secession may arise under the right to self-determination. If people are denied internal self-determination by the “parent” state, as a last resort they could opt for “external” self-determination by effecting secession. In such case, the secession would be a remedy for denial of people right to self-determination.

Although the theory seems morally justifiable, there are many issues arising from it. Can “remedial secession” doctrine be traced from the law of self-determination? What is the

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<sup>1</sup> *Reference re Secession of Quebec* S.C.R. 217, para. 126 (Supreme Court of Canada 1998).

status of right to “remedial secession”? Is it part of binding international law or is it only a suggestion by scholars? Does right “remedial secession” have manifestations in the international practice? Is there really a legal right to secession that remedies denial of self-determination? The author will discuss these issues and will try to provide answers to at least some of the raised questions.

The author raises hypothesis that remedial right to secession as an exercise of the right to self-determination in response to violations of human rights norms and denial of people’s self-determination is a customary rule that is in the process of formation.

### **Research sources**

Various sources were used in the research that could be classified in three groups. The first group of sources is legal normative acts: international treaties, the UN Security Council resolutions, and the UN General Assembly resolutions. The second group consisted of special literature: scientific research articles, books and monographs; and documents of international institutions. The last group of sources is practical material: institutional decisions and jurisprudence of courts with related procedural documents.

### **Research methodology**

The methodology of the research was (1) to present the theory of self-determination, (2) to derive the doctrine of “remedial secession” from the theory of self-determination, (3) to determine the status of the “remedial secession” doctrine based on its substantiation in the international practice, and (4) to apply the doctrine on selected cases. The sequence of methodology is reflected on the thesis structure.

The author used various analysis methods in the thesis:

Historic analysis method was *inter alia* used to determine the origins and evolution self-determination and interpret *opinion juris* of states in their historical background.

Systemic analysis method was used to analyze a variety of legal sources (jurisprudence, institutional practice, statutes, treaties, academic articles, etc.) and draw overall conclusions, generalize or summarize.

Logic analysis method was used to draw conclusions based on rules of logic, for example: *a contrario* reading, juxtaposition, contradiction.

Teleological method was used to interpret legal norms and sources based on purpose or intent. For example, the remedial purpose of secession is used to interpret “timing” for secession (subchapter 2.4.3.)

Comparative analysis method was *inter alia* used to compare or contrast various positions of legal scholars, opinions of states and practical examples of secessions

Linguistic analysis method was used to interpret the legal terms, such as “people” and “minority”.

Philosophical analysis method was used to interpret legal sources in the light of philosophy of law, for example “humanist vision” of international law.

Theoretical analysis method uses general theory of law to interpret legal sources, for example to explain “remedial secession” doctrine’s premise of *ubi jus ibi remedium*.

### **Thesis structure**

The thesis is consists of Introduction, Main Body and Conclusion.

The Main body is divided into 4 parts.

The first part presents the historical overview of the law of self-determination, discusses the evolution of the principle of self-determination and examines the status of right to self-determination in the contemporary international law. It also analyses the challenges to the right of self-determination, such as definition of people, tension with territorial integrity and content of the right in the post-colonial world.

In the second part the doctrine of “remedial secession” doctrine is introduced and critically analyzed. The regulation on secession in international law is discussed and institution of recognition reviewed. The chapters examine the theoretical premises of right to remedial secession, discuss the conditions for the right to secede, and add critique to remedial secession theory.

The third part is practice-oriented and analyzes the status of the right to remedial secession in international law. It examines the institutional practice that possibly substantiates remedial secession doctrine. Also the advisory proceedings in the International Court of Justice will be introduced in order to find grounding of secession in the states *opinion juris*.

The fourth part contains case analysis of several secessions in the light of remedial secession doctrine. The theory of right to remedial secession is applied to each case and observations are made in relation to remedial secession doctrine manifestation in practice.

# Part I. Right to self-determination of peoples in international law

## 1.1. HISTORICAL DEVELOPMENT OF SELF-DETERMINATION

The principle of self-determination as an international political idea is usually traced from post-World War I era, when the US president Woodrow Wilson advocated for self-determination for nations as part of US foreign policy for post-World War I international peace arrangements. Self-determination was also used as a reference in Lenin's revolutionary agenda. However, the origins of concept of self-determination could be traced as early as American and French revolutions and was later influenced by "The Spring of Nations" and nationalism. "The principle of self-determination by "national" groups developed as a natural corollary to growing ethnic and linguistic political demands in the 18<sup>th</sup> and 19<sup>th</sup> centuries"<sup>2</sup>.

The "Wilsonian self-determination"<sup>3</sup> meant that peoples are not subjects of a state, but are a sovereign of a state. Wilson's "concern for oppressed ethnic nationalities led to three of the central interlocking elements of the post-war settlement: (1) a scheme whereby identifiable peoples were to be accorded Statehood; (2) the fate of disputed border areas was to be decided by plebiscite; and (3) those ethnic groups too small or too dispersed to be eligible for either course of action were to benefit from the protection of special minorities regimes, supervised by the Council of the new League of Nations."<sup>4</sup>

Although self-determination dominated the political rhetoric in 1920s, the Versailles Treaty that regulated post-war peace settlement "did not implement a coherent theory of self-determination, nor there was a legal expression of the concept in the Covenant of the League

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<sup>2</sup> Hurst Hannum, "Rethinking Self-Determination," *Virginia Journal of International Law* 34 (1993): p. 3.

<sup>3</sup> Anthony Whelan, "Wilsonian self-determination and the Versailles settlement," *International and Comparative Law Quarterly* 43, no. 1 (1994).

<sup>4</sup> *Ibid.*, p. 100.

of Nations”.<sup>5</sup> Nonetheless, the League of Nations indirectly addressed the principle of self-determination through the system of mandates.<sup>6</sup>

The mandates were territories that were “inhabited by peoples not yet able to stand by themselves the strenuous conditions of the modern world” and thus administered by “advanced nations” until these people “have reached a stage of development” so they could “stand alone” without assistance of administering powers (advanced nations).<sup>7</sup> The mandates were generally not considered to be integral parts of the territory of the administering power, although one category of mandates was given equivalent status of integral territory<sup>8</sup>. By such regulation the mandate system implicitly admitted that principle of self-determination is applicable and mandate peoples are entitled to self-governing and this may lead to creation of their independent states in future.

In conclusion, it can be summited that pre-1945 international law understood self-determination as reference to sovereign equality of existing States, and in particular the right of the people of a State to choose its own government without external intervention – therefore self-determination was not understood as a legal right for specific territories (or peoples) to choose their own form of government irrespective of the wishes of the rest of the State of which that territory is a part.<sup>9</sup>

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<sup>5</sup> Lori F. Damrosch et al., eds., *International Law: Cases and Materials*, 5th ed. (West, 2009), p. 324.

<sup>6</sup> Hannum, “Rethinking Self-Determination,” p. 6.

<sup>7</sup> *The Covenant of the League of Nations*, 1920, Article 22.

<sup>8</sup> *Ibid.*

<sup>9</sup> James R. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford University Press, USA, 2007), p. 114.

## 1.2. CONTEMPORARY LAW OF THE SELF-DETERMINATION

The modern concept of self-determination of peoples has developed mainly through the law and practice of the United Nations. Only after adoption of the United Nations Charter in 1945 self-determination was embraced as a legal principle.

The 1945 Charter of the United Nations (UN Charter) states that one of the purposes of the organization is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”<sup>10</sup>. Therefore since the very beginning the principle of self-determination of peoples has been a fundamental basis for the United Nations organization.

As a principle of international law, self-determination of peoples further developed through UN General Assembly resolutions and states’ practice within the context of decolonization<sup>11</sup>. These developments are usually labeled as “law of decolonization” and self-determination had flourished as a main legal (and political) instrument in the process of decolonization. “Under moral and political imperatives of decolonization ... the vague “principle” of self-determination soon evolved into “right” of self-determination.”<sup>12</sup>

In 1960, the UN General Assembly passed two resolutions in the span of twenty-four hours which articulated a change in essential character of the principle.<sup>13</sup> The first, GA Resolution 1541 – the Declaration on the Granting of Independence to Colonial Countries and Peoples – in its preamble called for “speedy and unconditional end to colonialism” and reiterated “respect to principle of self-determination determination of peoples”<sup>14</sup>. Furthermore, the resolution’s “operative paragraph refers expansively to the right of “all

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<sup>10</sup> *Charter of the United Nations*, 1945 Article 1(2)

<sup>11</sup> William K. Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” *Tulane Journal of International and Comparative Law* (2008): p. 275.

<sup>12</sup> Hannum, “Rethinking Self-Determination,” p. 12.

<sup>13</sup> Gerry J. Simpson, “Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age, The,” *Stanford Journal of International Law* 32 (1996): p. 269.

<sup>14</sup> 1960 December 14 UN General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples

peoples” to self-determination and calls to transfer all sovereign powers to trust and non-self-governing territories “or all territories which have not yet attained independence”.<sup>15</sup> The second General Assembly Resolution 1541 has called for “full measure of self-government” for colonial/non-self-governing territories and defined 3 types of self-government:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.<sup>16</sup>

Despite references to all peoples in GA resolution 1514, in practice the right of self-determination has been limited to colonial situations.<sup>17</sup> However, “self-determination could never be considered as exclusive right of colonial peoples”.<sup>18</sup> “Although self-determination had been increasingly used as a justification for the independence of colonial peoples, the right was seen as universal and not limited by the colonial context of its assertions.”<sup>19</sup>

Originally being a principle, the self-determination of peoples eventually evolved into human rights standard. During the negotiations related to drafting the UN human rights instruments, the Afro-Asian bloc successfully argued that self-determination was the most fundamental of all human rights and therefore superseded the enjoyment of all other rights<sup>20</sup>. The right to self-determination was established in the UN human right covenants and became positive part of the treaty law. Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESC)<sup>22</sup> states that:

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<sup>15</sup> Hannum, “Rethinking Self-Determination,” p. 13.

<sup>16</sup> 1960 December 15 UN General Assembly Resolution 1541 (XV) Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter

<sup>17</sup> Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Revised Edition. (University of Pennsylvania Press, 1996), p. 46.

<sup>18</sup> Christian Tomuschat, “Self-determination in a post-colonial world,” in *Modern Law of Self-Determination*, ed. Christian Tomuschat, 1st ed. (Springer, 1993), p. 2.

<sup>19</sup> Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” p. 276.

<sup>20</sup> Simpson, “Diffusion of Sovereignty,” p. 269.

<sup>21</sup> *International Covenant on Civil and Political Rights*, 1966

<sup>22</sup> *International Covenant on Economic, Social and Cultural Rights*, 1966

1. 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. <...>

3. The States Parties to the present Covenant <...> shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The Covenants reaffirmed that the right to self-determination belongs to all peoples and entrenched obligation for the States to promote the realization of peoples' right to self-determination. It is clear that self-determination of peoples is a collective right, which belongs not to individuals but to a certain group (defined as people). According to the UNHCHR, the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.<sup>23</sup>

In 1970 UN General Assembly passed the Declaration on Principles of International Law<sup>24</sup> which *inter alia* comprehensively explained the content of the principle of self-determination of peoples. "It explicitly deems "alien subjugation, domination and exploitation" to be violations of the principle of self-determination and that people denied the right to self-determination may exercise that right by choosing independence, integration, or free association."<sup>25</sup> This declaration effectively expanded the concept of self-determination of peoples outside the colonial context.

"Elaboration of the principle of self-determination in 1970 Declaration provides the cornerstone of the UN approach to the concept"<sup>26</sup>. Although UN Charter allocated recommendatory power for the UN General Assembly resolutions, it can be seriously argued that Declaration on Principles of International Law has binding effect – this declaration was

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<sup>23</sup> UNHCHR, General Comment No. 12: The right to self-determination of peoples (Art. 1): 03/13/1984. ICCPR General Comment No. 12. (General Comments)

<sup>24</sup> 1970 October 24 UN General Assembly resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

<sup>25</sup> Watson, "When in the course of human events: Kosovo's independence and the law of secession," p. 276.

<sup>26</sup> Simpson, "Diffusion of Sovereignty," p. 271.

adopted unanimously without a vote and thus proves *opinio juris* of all UN members about the binding nature of international legal norms in this declaration.<sup>27</sup> Legal scholars agree that this declaration is a “repository of customary international law principles”<sup>28</sup>. The ICJ has also affirmed that the declaration reflects customary international law.<sup>29</sup>

The Declaration on Principles of International Law states that:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.<sup>30</sup>

The document also provides non-exhaustive list of modes of implementing right to self-determination of peoples: “the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people”<sup>31</sup>. On the basis of the modes of implementing the right, self-determination in legal theory is divided into two aspects: internal and external, both of which will be discussed in further chapter.

“Declaration is innovative one very significant sense: It anticipates current developments in reforging the bond between democratic representation and self-determination”<sup>32</sup>. This is reflected in the so called “safeguard clause” (“saving clause”), that reads:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as

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<sup>27</sup> Vadapalas, Vilenas. *Tarptautinė teisė*. Vinius: Eugrimas, 2006 (translated by the author)

<sup>28</sup> Rein Müllerson. “Precedents in the mountains: on the parallels and uniqueness of the cases of Kosovo, South Ossetia and Abkhazia”. *Chinese Journal of International Law* (2009): para. 39

<sup>29</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193

<sup>30</sup> 1970 October 24 UN General Assembly resolution 2625 (XXV) Principle 7

<sup>31</sup> *Ibid.*

<sup>32</sup> Simpson, “Diffusion of Sovereignty,” p. 271.

described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>33</sup>

The famous “government representativeness” passage has been an object of discussion and various interpretations (that will be discussed in further chapters), however it is clear that self-determination is normally linked to implementation of internal aspect of self-determination (democratic self-determination).

Vienna Declaration And Programme Of Action<sup>34</sup>, adopted in the UN World Conference on Human Rights in 1993, reiterated the previous documents and affirmed peoples’ right to self-determination. Moreover the declaration states that “the World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right”<sup>35</sup>.

The Helsinki Final Act mentions principle of self-determination, too:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.<sup>36</sup>

Although it is political document with no binding legal force, it reflects agreement between Western and Soviet blocs on principles governing their relations. The Helsinki Final Act is not only mentions that “all peoples always” have right to self-determination, but also clearly indicates the internal and external aspects of the right.

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<sup>33</sup> 1970 October 24 UN General Assembly resolution 2625 (XXV) Principle 7

<sup>34</sup> *Vienna Declaration And Programme Of Action*, 1993 June 23, The UN World Conference on Human Rights , available at <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/A.CONF.157.23.En?OpenDocument>

<sup>35</sup> *Ibid.* para. 2

<sup>36</sup> *1975 August 1 Helsinki Conference On Security And Co-Operation In Europe Final Act*, Principle VIII

### 1.2.1. The ICJ jurisprudence on self-determination

International Court of Justice (ICJ) has provided its interpretation on principle of self-determination in its jurisprudence.

In *Namibia* Opinion the ICJ has affirmed the firm establishment of principle of self-determination in international law<sup>37</sup>, although the case concerned a colonial territory. In *Western Sahara* Opinion the ICJ strongly affirmed the right of the people of the territory to determine their future political status<sup>38</sup>. Both opinions entrenched that self-determination “was more than a guiding principle to be heeded and promoted by the United Nations, but a full-fledged right that could be invoked by its holders to claim separate statehood and sovereign independence”.<sup>39</sup>

In the *East Timor* case the ICJ went further and affirmed that self-determination is essential principle in international law of *erga omnes* character:

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court <...>; it is one of the essential principles of contemporary international law.<sup>40</sup>

The *Wall* Opinion reiterated the previous jurisprudence of the ICJ<sup>41</sup> and clearly implied that right to self-determination is applicable outside the colonial context.

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<sup>37</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolutions 176 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 31-32

<sup>38</sup> *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, para. 121-122

<sup>39</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 2.

<sup>40</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, para. 29

<sup>41</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 88

### **1.3 FORMS OF SELF-DETERMINATION**

Legal doctrine classifies self-determination in various categories. Some of the categories (forms) reflect general trends of theory of law of self-determination. Other suggested forms are rather terms suggested in the academic writings by legal scholars.

The most commonly used term is colonial self-determination. Colonial self-determination refers to colonial peoples (territories) that exercised their right to self-determination. Simpson notes that other models of self-determination re-emerged to challenge the colonial model.<sup>42</sup> He differentiates indigenous, nationalist, secessionist, democratic, and devolutionary self-determination models.<sup>43</sup> For example, “devolutionary self-determination refers to the various institutional arrangements and innovations used by states to advance reconciliation with national or indigenous groupings. These arrangements include the constitutional models attempted in Canada, the judicial forms the process has taken in Australia, the system of tribal self-government favored in the United States, and regionalism in Spain.”<sup>44</sup> Tomuschat mentions federal right of self-determination<sup>45</sup> which is similar to the devolutionary model Simpson describes. Tomuschat calls any form of self-determination within framework of a State as political self-determination<sup>46</sup>. Political self-determination may take all forms that are less intrusive than secession.

There exists another classification of self-determination, dividing the right into two aspects: internal and external. Internal self-determination means people’s self-determination to live with other peoples in a state or seek autonomy inside the state. External self-determination is people’s decision to establish independent and sovereign state, create free

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<sup>42</sup> Simpson, “Diffusion of Sovereignty,” p. 274.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., p. 258.

<sup>45</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 13.

<sup>46</sup> Ibid., p. 14.

association with an independent State or integrate with an existing independent State. Further sub-chapters will briefly overview each aspect.

### ***1.3.1. Internal self-determination***

Cassese defines internal self-determination as “the right to authentic self-government, that is, right for a people really and freely to choose its own political and economical regime”.<sup>47</sup> McCorquodale also submits that internal aspect of the right concerns the right of peoples within a state to choose their political status<sup>48</sup>. Hannum claims that internal aspect of self-determination is democracy<sup>49</sup>, meaning that people have right to representative and democratic government. Simpson also considers that internal self-determination is alternatively called democratic self-determination<sup>50</sup>.

Self-determination is a continuing, and not once-for-all right.<sup>51</sup> “Unlike external self-determination for colonial peoples – which ceases to exist under customary international law once it is implemented – the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect”<sup>52</sup> Thus, internal self-determination is being exercised continuously.

Internal self-determination may take various forms, including (but not limited to) autonomy within a state, federal arrangements or any other special constitutional arrangements for the people concerned.

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<sup>47</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1999), p. 111.

<sup>48</sup> R. McCorquodale, “Self-Determination: A Human Rights Approach,” *International and Comparative Law Quarterly* 43 (1994): p. 864.

<sup>49</sup> Hannum, *Autonomy, Sovereignty, and Self-Determination*, p. 30.

<sup>50</sup> Simpson, “Diffusion of Sovereignty,” p. 257.

<sup>51</sup> Crawford, *The Creation of States in International Law*, p. 126.

<sup>52</sup> Cassese, *Self-Determination of Peoples*, p. 111.

### 1.3.2. External self-determination

External self-determination is an aspect that is causing much more controversy in the legal theory. According to McCorquodale, external self-determination “was applied most frequently to colonial situations as it concerns the territory of State – its division, enlargement or change – and the state’s consequent international (“external”) relations with other states.”<sup>53</sup> It is not disputed that the creation of independent sovereign states by colonial people is considered as an exercise of external self-determination. Outside colonial context, the external self-determination can potentially be exercised only in the form of secession. All scholars and states agree that in the case of occupation (foreign domination) international law allows right to secede. Three Baltic States seceded from Soviet Union based on that they were occupied and annexed by the Soviet Union during the World War II. Furthermore, today nobody disputes that Palestinian people also hold a right to external self-determination.

“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 the 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 cases and, even then, under carefully defined circumstances.”<sup>54</sup> If a state respects human rights of the people, guarantees to the people access to governance and has representative government – people is considered to have exercised their right to self-determination through internal self-determination. Therefore as long as state respects the internal self-determination of the people, that people is not entitled to external self-determination.

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<sup>53</sup> McCorquodale, “Self-Determination: A Human Rights Approach,” p. 863.

<sup>54</sup> *Reference re Secession of Quebec*, para. 126.

According to the Supreme Court of Canada, right to external self-determination can be basis for secession. The court noted that right to external self-determination arises in three situations: “where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.”<sup>55</sup> “In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”<sup>56</sup> Such position of Supreme Court of Canada is echoed in many academic writings that support secession as an exercise of external self-determination.<sup>57</sup>

#### **1.4. SUBJECT OF THE RIGHT TO SELF-DETERMINATION**

“Notion of a right presupposes identification of its subject”.<sup>58</sup> However, the identification of the holders of right to self-determination is no less controversial as identifying the content of the self-determination. After systemic analysis of the “law of decolonization”, where GA resolutions explicitly refer only to territorial units, one can pose a logical question as Hannum does: are people to be equated with territories?<sup>59</sup> McCorquodale argues that “territorial approach” to self-determination shows a “reckless indifference” to the concept people and should be rejected.<sup>60</sup> Crawford thinks that “the question of the ambit of self-determination, the territories to which it applies, has arguably remained as much a matter of politics of law”.<sup>61</sup> However, the logical conclusion should be that the right to self-

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<sup>55</sup> Ibid., para. 138.

<sup>56</sup> Ibid.

<sup>57</sup> Please see Part II.

<sup>58</sup> Crawford, *The Creation of States in International Law*, p. 115.

<sup>59</sup> Hannum, “Rethinking Self-Determination,” p. 13.

<sup>60</sup> Robert McCorquodale, ed., *Self-Determination in International Law* (Ashgate Pub Ltd, 2000), p. 869.

<sup>61</sup> Crawford, *The Creation of States in International Law*, p. 115.

determination belongs to a people, as the text of relevant legal sources explicitly refers to peoples as subjects of the right.

A people that holds international legal right to self-determination, is also considered a subject of international law.

### **1.4.1. Defining a people**

The conclusion that the subject of the right to self-determination is a “people” does not add any clarity. A people has right to determine its “self” by deciding what form of self-determination it will choose. However, the very notion of “a people” is suffering from a high degree of ambiguousness – international law does not provide any clear criteria how to define “a people”. Fitzmaurice has accurately noted “it is in fact ridiculous because the people cannot decide until somebody decides who are the people”.<sup>62</sup>

Whether certain group constitutes “a people” is rather question of fact than question of law. Nevertheless determination of this fact is very important for the application of law. Only a people is the subject of the right to self-determination. In order to determine whether certain group of individuals constitutes a people, it is important to have sufficient criteria to define a people.

Although Crawford claims that a people can be identified with “reasonable precision”<sup>63</sup>, he tends to use vague term “self-determination unit” in order to define the subject of the right. Nonetheless, some authors have tried to introduce workable definitions of a people. For example, Murswiek in his definition links a people to a territory:

A people, as a group which can be holder of the right to self-determination exists only if it lives in a distinct territory, where it constitutes the majority and where it is able to

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<sup>62</sup> Fitzmaurice, as quoted in Crawford, *The Creation of States in International Law*

<sup>63</sup> Crawford, *The Creation of States in International Law*, p. 124.

speak its own language, develop its own culture, cultivate its traditions or practice its particular religion.<sup>64</sup>

Another workable doctrinal definition could be taken from 1989 UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. In the “Final Report and Recommendations” international experts describes “people” as:

1. a group of individual human beings who enjoy some or all of the following common features:
  - (a) common historical tradition;
  - (b) racial or ethnic identity;
  - (c) cultural homogeneity;
  - (d) linguistic unity;
  - (e) religious or ideological affinity;
  - (f) territorial connection; and
  - (g) common economic life.
2. the group must be of a certain number which need not to be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a state
3. the group as a whole must have the will to be identified as a people or the consciousness of being a people <...>
4. the group must have institutions or other means of expressing its characteristics and will for identity<sup>65</sup>

Analysis of this UNESCO definition suggests that the two-prong test is applied to determine whether a group qualifies as people:

1. Objective test – the group possesses external differences from other groups of individuals.
2. Subjective test:
  - a) Self-consciousness – individuals within the group perceive collectively themselves as distinct people.

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<sup>64</sup> Dietrich Murswiek, “The Issue of a Right to Secession - Reconsidered,” in *Modern Law of Self-Determination*, ed. Christian Tomuschat, 1st ed. (Springer, 1993), p. 27.

<sup>65</sup> 1990 February 22 Final report and recommendations, UNESCO International Meeting of Experts on further study of the concept of the rights of peoples, available at <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

b) Representation – individuals within the group have political/social structures through which they can be represented.

Compared to Murswiek definition, the latter lacks territorial element, but otherwise is more comprehensive. The UNESCO definition could be modified by adding a necessary “territorial” requirement (as suggested by Murswiek) in the objective prong, because “territorial connection” characteristic is used as an alternative requirement. Moreover, Sterio in her definition has suggested to test “the degree to which the group can form a viable entity”<sup>66</sup>. Adding this “viability” requirement in the subjective prong could also add precision to the UNESCO definition of a people.

#### ***1.4.2. Relationship between minority and people***

The issue of definition of a term “people” is important in order to define whether a minority can be regarded as people. There is an existing position that a minority cannot be a people – these are two distinct categories and only a people enjoy right to self-determination<sup>67</sup>. This position may be supported by suggesting that a minority (especially a national/ethnic minority) does not perceive themselves as distinct people – therefore does not meet requirement of subjective test of “a people”.

Also, some may argue that only all population of a state is a people. This opinion would suggest that a people corresponds to a nation, and the (national) minority, which is just a part of this nation, cannot be a subject of the right to self-determination. However such proposition was undermined by Supreme Court of Canada, which well-reasoned its conclusion that the term “people” must be distinguished from terms “nation” or “state”:

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<sup>66</sup> Milena Sterio, “On the Right to External Self-Determination: ‘Selfistans’, Secession and the Great Powers’ Rule,” *Minnesota Journal of International Law* (2010): p. 142.

<sup>67</sup> For example, Bing Bing Jia. “The independence of Kosovo: A unique case of secession?” *Chinese Journal of International Law* (2009) footnote. 38

It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.<sup>68</sup>

Furthermore, one may argue that ICCPR regulates different set of rights for peoples (Article 1) and for minorities (Article 14) thus implying that minorities are distinct category of peoples and members of minorities enjoy only certain cultural, religious or linguistic rights within existing state while peoples are entitled for right to self-determination.

However, in various legal writings exists another position that does not consider "people" and "minority" to be opposite and contradictory terms. Tomuschat observes that states are "anxious to eschew calling a given ethnic group a "people" (in legal sense). Bearing in mind that some ethnic groups that are designated as minorities clearly fall under category of "people" (in ethnic sense), there appears a "legal minimization of communities" by withholding the legal term "people" from them. He suggests that it should be possible "to call a people, in ethnic sense, a people, in legal sense without having to fear that such recognition entails devastating consequences".<sup>69</sup>

According to Ryngaert and Griffioen, "it must be noted that the term "minority" suffers from the same lack of clarity as the term "people". There is no generally accepted definition of what constitutes a minority."<sup>70</sup> Murswiek stresses that the terms "minority" and "people" do not totally exclude one another but rather they partly overlap. It is possible that "one group that is minority in relation to the whole population of a State can, on the one

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<sup>68</sup> *Reference re Secession of Quebec*, para. 124.

<sup>69</sup> Tomuschat, "Self-determination in a post-colonial world," p. 12, 16.

<sup>70</sup> Cedric Ryngaert and Christine Griffioen, "The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers," *Chinese Journal of International Law* (2009): para. 12.

hand, be a national minority in the meaning of the law relating to minorities. But on the other hand, it can be a people in the meaning of the right to self-determination at the same time”.<sup>71</sup>

Minorities and peoples are not mutually exclusive terms and there might be possible that certain group of individuals is both a minority and a people. Ryngaert and Griffioen also arrive to such conclusion:

The difference between an ethnic minority and a people is that national or ethnic minorities usually have a “kin State”. Nevertheless, if a minority has a “collective individuality”, an identity by which it can be distinguished from those living in the “kin State”, it can be considered a “minority-people” and accordingly has the right to self-determination.<sup>72</sup>

Thus, it can be submitted that the two terms are not contradictory and may be overlapping. A certain group of individuals may have characteristics of a people and of a minority at the same time.

The question of minority’s right to self-determination was considered by Conference on Yugoslavia Arbitration Commission (Badinter Commission). Badinter Commission was asked whether Serbian population in Croatia and Bosnia-Herzegovina has right to self-determination (and therefore to create their independent state). The commission did not directly answer the question, but concluded that:

<...> right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.

2. Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law. <...> [T]he Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law <...><sup>73</sup>

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<sup>71</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 37.

<sup>72</sup> Ryngaert and Griffioen, “The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers,” para. 12.

<sup>73</sup> 1992 January 11 Opinion no 2. of Arbitration Commission of Conference on Yugoslavia

The Commission treated the Bosnian Serb population as a “minority” and denied that they have any right to form an independent state.<sup>74</sup> Although some scholars interpret that this opinion of Badinter Commission “effectively reflected the orthodox view that minorities were not peoples with the right to self-determination.”<sup>75</sup>, it is clear that Badinter Commission did not deny that Serbian minority is a subject or right to self-determination. Some scholars argue that “as a remedy, the Serbs of this region were limited to international standards of minority and human rights protection which amounted to autonomy within Bosnia-Herzegovina (internal self-determination) rather than independence (external self-determination).”<sup>76</sup> Crawford also concludes that the Commission “did not deny right of self-determination at the internal level”<sup>77</sup>. On the other hand, some authors do not make any conclusions from the Opinion. Hannum calls the Badinter Commission’s answer as “non-response” that “adds nothing to our understanding of crucial distinction between minorities and peoples”<sup>78</sup>.

## **1.5. TENSION BETWEEN SELF-DETERMINATION AND TERRITORIAL INTEGRITY**

“The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability

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<sup>74</sup> Crawford, *The Creation of States in International Law*, p. 407.

<sup>75</sup> Bing Bing Jia. “The independence of Kosovo: A unique case of secession?” *Chinese Journal of International Law* (2009) para. 19

<sup>76</sup> Daniel Fierstein, “Kosovo’s declaration of independence: an incident analysis of legality, policy and future implications,” *Boston University International Law Journal* (2008): p. 432.

<sup>77</sup> Crawford, *The Creation of States in International Law*, p. 407.

<sup>78</sup> Hannum, “Rethinking Self-Determination,” p. 54.

of relations between sovereign states.”<sup>79</sup> Therefore self-determination and territorial integrity are interlinked and the relationship between them must be determined in order to establish the content of self-determination.

“*Ex facie*, the right to self-determination conflicts with principle of territorial integrity”.<sup>80</sup> This tension arises due to external aspect of self-determination, where peoples are entitled to establish sovereign independent state and thus alter the boundaries of the “parent” state. Colonial self-determination was not considered to be undermining territorial integrity of the metropolitan state because normally colonial/non-self-governing territories were not considered integral parts of the metropolitan state territory in classical sense. The conflict between the two principles is rather appearing in the post-colonial era in relation to external self-determination (right to secession) outside colonial context.

Murswiek submits that the right to self-determination and principle of territorial integrity are co-ordinated to an optimum degree.<sup>81</sup> “When two legal norms conflict, neither should be interpreted in a way that the other one loses its actual effect. <..> Right to secession must be at least guaranteed if the people in question have no other chance of self-determination. <...> On the other hand, right to self-determination must not be interpreted in a way that there is practically nothing left of the principle of territorial integrity”.<sup>82</sup>

Many authors are of opinion that principle of territorial integrity, just like principle of sovereignty, is slowly eroding.<sup>83</sup> The developed human rights standards have imposed many obligations on states and states cannot anymore invoke sovereignty as justification for various human rights violations inside the state. Buchanan rejects “absolutist” interpretation of territorial integrity and calls for “progressive” interpretation of territorial integrity. According to him, principle of territorial integrity applies only to legitimate states that act in accordance

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<sup>79</sup> *Reference re Secession of Quebec*, para. 127.

<sup>80</sup> Simpson, “Diffusion of Sovereignty,” p. 283.

<sup>81</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 38.

<sup>82</sup> *Ibid.*, p. 35.

<sup>83</sup> Simpson, “Diffusion of Sovereignty,” p. 263.

with international legal rules.<sup>84</sup> Self-determination, as an essential principle in international legal order and established human right, may as well impose some requirements on states.

It can be easily argued that the “safeguard clause” of the Declaration on Principles of International Law imposes requirement for states to comply with internal self-determination of peoples and therefore to possess representative government, otherwise the states are not protected by the guarantee of territorial integrity. “The Declaration makes territorial integrity a rebuttable presumption which can be invoked only by states who act in accordance with the principle of self-determination. A number of writers propose a right to self-determination as a remedy when the state’s actions extinguish that presumption, thus resolving tension between territorial integrity and self-determination through affirmation of human rights. An assertion of the right of secession would be a remedy of last resort for peoples and groups”<sup>85</sup>. Murswiek argues that the right of secession is useful for self-preservation of States. Right to secession would be as a sanction for the failure to grant internal self-determination. However, “the threat of the right of secession should then become a motivation for granting autonomy in time and thus making any wish for secession superfluous. In this sense, the best precaution against secession is a right to secession”<sup>86</sup>. Thus, it can be concluded that territorial integrity is not unconditionally applicable to all cases of the exercise of self-determination.

## **1.6. RE-SELF-DETERMINATION?**

Self-determination, first emerged as a political idea for nation state-building in post-World War I era, evolved into a right to colonial self-determination. However, since decolonization is virtually over, it became unclear what is the content of the self-determination in the post-colonial era and whether post-colonial self-determination can be

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<sup>84</sup> Allen Buchanan, “Theories of Secession,” *Philosophy & Public Affairs* 26, no. 1 (1997): p. 50.

<sup>85</sup> Simpson, “Diffusion of Sovereignty,” p. 283.

<sup>86</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 39.

exercised “externally” – namely through secession. Simpson argues that there is a post-Charter distortion of the principle. Such distortion “arose partly because of the attempt to outline a right of self-determination while denying rights to autonomy, or devolution, or democratic representation, or, in extreme cases, secession. In other words, self-determination became detached from the very modalities through which it was most likely to enjoy success.”<sup>87</sup> Many authors tried to “redress” the theoretical vacuum by offering various interpretations of the modern right of self-determination. The author of this thesis suggests a term “**Re**-self-determination” to describe the ongoing processes in the academia that try to “reconsider”<sup>88</sup>, “rethink”<sup>89</sup>, “reconceptualize”<sup>90</sup>, “reapproach”<sup>91</sup>, “reconceive”<sup>92</sup>, “redefine”<sup>93</sup>, “reinterpret”<sup>94</sup>, “reform”<sup>95</sup> or in other ways to revisit the law of self-determination.

Franck argues that self-determination is now properly transforming itself into an emerging right to democratic governance<sup>96</sup> Hannum agrees as well that democratic governance is emerging norm of customary international law.<sup>97</sup> Hannum rejects proposition that secession is authorized by the modern law of self-determination. He offers a new definition of self-determination that “continues to exclude the possibility of unilateral, nonconsensual secession, but it has become infused with broadly defined human, minority and indigenous rights that may signal a new usefulness for the concept of self-determination in the decades to come”.<sup>98</sup> Hannum further argues that “the norm of self-determination in the

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<sup>87</sup> Simpson, “Diffusion of Sovereignty,” p. 286.

<sup>88</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered.”

<sup>89</sup> Hannum, “Rethinking Self-Determination,” p. 1.

<sup>90</sup> Simpson, “Diffusion of Sovereignty,” p. 261.

<sup>91</sup> McCorquodale, “Self-Determination: A Human Rights Approach.”

<sup>92</sup> Lee Seshagiri, “Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law,” *Harvard International Law Journal* 51 (2010).

<sup>93</sup> Hannum, “Rethinking Self-Determination,” p. 67.

<sup>94</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 35.

<sup>95</sup> Allen Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” in *Negotiating Self-Determination*, ed. Hurst Hannum and Eileen F. Babbitt (Lexington Books, 2005), p. 81.

<sup>96</sup> Thomas M. Franck, “The emerging right to democratic governance,” *The American Journal of International Law* 86, no. 1 (1992).

<sup>97</sup> Hannum, “Rethinking Self-Determination,” p. 34.

<sup>98</sup> Hurst Hannum, “Self-Determination in the Twenty-First Century,” in *Negotiating Self-Determination*, ed. Hurst Hannum and Eileen F. Babbitt (Lexington Books, 2005), p. 61.

post-colonial era is both a shield that protects a state (in most cases) from secession and a spear that pierces the governmental veil of sovereignty behind which undemocratic or discriminatory regimes attempt to hide”<sup>99</sup>

McCorquodale argues for a new approach to self-determination – a human rights approach. After using comprehensive classical human rights theory, he concludes that self-determination is a human right, but it is not absolute and has limitations on its exercise. One of the limitation is to protect rights of others and therefore “instead of secession being the only option, peoples would be able to exercise their right of self-determination by such methods as the creation of a federation; guarantees of political power to defend or promote group interests; the giving of special assurances (as with minority rights); providing for a specific recognized status to a group”<sup>100</sup> and so on. According to McCorquodale, a part of general limitation on the right to self-determination is the specific limitation of territorial integrity, therefore “a claim for the exercise of the right of self-determination by secession may be considered contrary to the pressing social need in particular society for territorial integrity, or it may be able to be exercised by different means, such as by internal self-determination”.<sup>101</sup>

Buchanan is offering a “proposal for reforming the international legal response to self-determination issues.”<sup>102</sup> His proposal for reform, as he submits, relies on the “justice-based, or remedial, approach to the unilateral right to secede”.<sup>103</sup>

It is worthy to note that the current “re-self-determination” discussions are particularly (if not exclusively) focusing on the issue of the right to secession. The next parts of the thesis will thoroughly review the international law regulation on secession.

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<sup>99</sup> Hannum, “Rethinking Self-Determination,” p. 68.

<sup>100</sup> McCorquodale, “Self-Determination: A Human Rights Approach,” p. 877.

<sup>101</sup> McCorquodale, *Self-Determination in International Law*, p. 885.

<sup>102</sup> Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” p. 81.

<sup>103</sup> *Ibid.*

## 1.7. GENERAL REMARKS

Self-determination has undergone fundamental evolution in the 20<sup>th</sup> century. Emerged as a political idea in post-World War I era, it was indirectly reflected in the League of Nations mandate system. Only in the UN era self-determination was recognized as a legal principle. Self-determination had been flourishing in the context of decolonization where it evolved into status of legal right. Self-determination becomes a human rights standard and *erga omnes* norm. Since the decolonization processes are virtually over, the self-determination was understood to retain its continuity through right to “internal” self-determination. This means that right to self-determination should be exercised “internally” within the framework of existing state and in compliance with principle of territorial integrity.

However, in past few decades challenges to the law of self-determination have emerged (e.g. secessionism, ethno-secessionism, denial of internal self-determination) and complex questions were posed. There is no clear answer what the subject of the right is, what the post-colonial content of the right is, and whether the classical understanding of self-determination is sufficient in the contemporary international order and its challenges.

In academia a movement of “re-self-determination” has emerged that tries to redress the theoretical vacuum in the concept of self-determination. While some legal scholars claim that self-determination is transforming into right to democratic governance, others argue for possibility of “external” self-determination in exceptional situations. Such “external” self-determination could be exercised through secession. The debate arises in the scholarly whether international law authorizes secession from existing sovereign states.

## Part II. Secession as a remedy for violation of the right to self-determination of peoples

### 2.1. REGULATION OF SECESSION IN INTERNATIONAL LAW

The issue of secession and legal questions surrounding secessions has drawn significant attention among legal scholars and theorists since the rise of “ethno-secessionism”<sup>104</sup> in the 1990’s and the claims of so-called “secessionary independence”<sup>105</sup>. Although not all secessionists ground their (attempted) secessions as exercise of specific entitlement in the international (or domestic) law, there is a considerable rhetoric employed by secessionists that invoke right of self-determination of peoples as a justification for their secessionist activities. Simpson has called these claims as claims for “secessionist self-determination”<sup>106</sup>.

The secessionism itself (be it “ethno-secessionism” or not) is causing many challenges to international legal order. Moreover, from philosophy of law perspective, it is unclear whether secession *per se* should be an object of (international) law. Is there a “law of secession” – *jus secedendi*<sup>107</sup> – and what does it regulate? How a possible international law regulation on secession relates to law of self-determination?

In order to add some clarity, it is important to clarify concepts of secession and right to secession.

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<sup>104</sup> Hannum, “Self-Determination in the Twenty-First Century,” p. 61.

<sup>105</sup> Crawford, *The Creation of States in International Law*, p. 384.

<sup>106</sup> Simpson, “Diffusion of Sovereignty,” p. 274.

<sup>107</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 24.

### 2.1.1. Secession and right to secession

It can be submitted that there is a clear confusion in various legal writings about secession and right to secession. “Secession occurs when part of an existing state separates from that state to become a new state or to join with another. In this way, secession is primarily a matter of fact rather than law.”<sup>108</sup> While secession *per se* is a fact that occurs on ground, it may seem irrelevant to discuss if international law regulates secession. “International law could not possibly take sides in internal power struggles which call into question the very existence of a state”<sup>109</sup> because such struggles are simple facts. Therefore, it can be argued that international law is neutral on secessions.

Corten submits that the “legal-neutrality” thesis is a classical view: “traditionally, international law remains neutral in regard to secession: it neither prohibits, nor authorizes it”<sup>110</sup>. Franck claims that nobody can seriously argue today that international law permits or prohibits secession<sup>111</sup>. Dugard and Raic agrees that one will search “in vain” for international rules on secession – international instruments contain neither explicit prohibition of unilateral secession nor explicit recognition of such a right.<sup>112</sup> Peters argues that the silence of international law in regard to secession may simply mean that secession lies in an “international law-free zone”<sup>113</sup>.

However, international legal issues may arise in relation to legal personality of the seceding entity and its rights and obligations under international law and the rights and obligations of third states as a consequence of that secession.<sup>114</sup> Besides that, international

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<sup>108</sup> Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” p. 274.

<sup>109</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 7.

<sup>110</sup> Olivier Corten, “Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law,” *Leiden Journal of International Law* 24, no. 1 (2011): p. 88.

<sup>111</sup> Thomas Franck *as quoted in* Cristopher J. Borgen, “Kosovo’s Declaration of Independence: self-determination, secession and recognition” (2008). <http://www.asil.org/insights080229.cfm>

<sup>112</sup> John Dugard and David Raič, “The role of recognition in the law and practice of secession,” in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge University Press, 2006), p. 102.

<sup>113</sup> Anne Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” *Leiden Journal of International Law* 24, no. 1 (2011): p. 98.

<sup>114</sup> Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” p. 274.

law, rejecting neutrality, might have evolved criteria for lawfulness or legitimacy of challenge to territorial integrity or national unity of the existing state.<sup>115</sup> Although Corten insists that the ICJ in *Kosovo* advisory opinion<sup>116</sup> “refused to challenge “legal-neutrality” thesis by considering that there is no emerging customary prohibition of secession”<sup>117</sup>, in fact the ICJ did not express opinion that there is no permission of secession or no legal entitlement to secession in international (customary) law. Different from secession, a right (entitlement) to secession is a legal category that could be an object of (international) law and thus question of legality of secession could be posed.

A right to secede is divided in “unilateral” and “consensual” right to secede. The author will use Buchanan’s definitions of the right to secede. “A unilateral right to secede is a claim right that a group has independently of any constitutional provision for secession or any right conferred by consent of the state”<sup>118</sup>. “A consensual right to secede might be granted explicitly in the constitution <...> or might be implicit in the constitution when secession is possible through constitutional amendment <...>. A consensual right to secede might also be created through negotiation.”<sup>119</sup>

Supreme Court of Canada concluded it was “clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their “parent” state.”<sup>120</sup> However, the court did admit that under certain circumstances secession is implicitly allowed under the right of self-determination of peoples.<sup>121</sup>

Proponents of right to unilateral secession may use two arguments: (1) secession is not explicitly prohibited in international law, therefore it is inferentially permitted; (2) states

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<sup>115</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 7.

<sup>116</sup> *Accordance with International Law of Declaration of Independence of Kosovo* Advisory Opinion, I.C.J. Reports (2010).

<sup>117</sup> Corten, “Territorial Integrity Narrowly Interpreted,” p. 89.

<sup>118</sup> Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” p. 82.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Reference re Secession of Quebec*, para. 111.

<sup>121</sup> *Ibid.*, para. 112.

have duty to recognize legitimacy of secession that was made through exercise of self-determination, because self-determination is an *erga omnes* right and states have obligation to respect and promote realization of this right.

In addition to this discussion, author submits that international law cannot contain general prohibition on secession. If there would exist a prohibition of secession, logically such legal norm would be addressed to the seceding entities, not the states. Prohibition of secession would protect sovereign states from territorial dismemberment caused by internal processes. As for external processes, there are existing safeguards that prevent other states to dismember or impair the territory of another state due to international legal norms of non-intervention, non-use-of-force and respect for territorial integrity of other states. If the international rule addresses seceding entity and imposes legal duty on it, it would follow that seceding entity is a subject of international law. Clearly it is not what the authors of international law – the states – would intend.

On the other hand, if international law would contain general permission to secede, this would as well mean that such permission is addressed to seceding entities implying their legal personality in international law. The only coherent way is to argue that international law could contain specific permission which is addressed to peoples, because peoples already are subjects of international law (holders of the international legal right to self-determination).

### 2.1.2 “Lawful” vs. “Unlawful” secession

As it appears that international law is neutral to secession, it should be logically concluded that secessions are neither legal nor illegal (neither lawful, nor unlawful). Secession is a legally neutral act the consequences of which are regulated internationally.<sup>122</sup>

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<sup>122</sup> Crawford, *The Creation of States in International Law*, p. 390.

However, in the UN practice some unilateral declarations of independence (that purported secessions) were considered “illegal” or “legally invalid”.<sup>123</sup> Could such expressions mean that there are situations when secession can be legal or illegal under international law? According to Jia, “if international law does not provide for rules of secession, instances of secession are legal, as long as they do not contravene any basic tenets of international law”.<sup>124</sup> It may be argued that the ICJ in *Kosovo* case has implicitly said that secessions may be illegal, however in such cases the illegality exists not because of the unilateral act *per se*, but due to unilateral act’s connection to violations of international legal norms:

<...> the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).<sup>125</sup>

Based on this ICJ deliberation, it can be logically concluded that there might be situations where unilateral acts of secessionists do not cause “illegality”. Is unilateral secession “lawful” if it complies with principle of self-determination and does not violate other international legal norms? It may be argued that secession of Southern Rhodesia has violated the self-determination principle, because the secessionist government did not represent the majority population and did not express their will for external self-determination (colonial self-determination). As for “Turkish Republic of Northern Cyprus” and “Republika Srpska” secessions, it may be argued that illegality of secessions originated not because Cypriot Turkish community or Bosnian Serb community does not have right to (external) self-determination, but because of external use of force by third states (Turkey and

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<sup>123</sup> See, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

<sup>124</sup> Jia, “The independence of Kosovo: A unique case of secession?” para. 27

<sup>125</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 81.

Serbia respectively). The illegality attached to secession processes may have legal consequences (for example, non-recognition) however it does not eliminate the premise that a certain people hold a right to self-determination.

Use of force is a norm that has *jus cogens* status in international law. The ICJ “said that use of force is prohibited in secession processes, but did not say whether the international prohibition of the use of force is applicable within the territory of not yet definitely dissolved state, and to whom this prohibition addressed”.<sup>126</sup> Does the secessionist entity that purports to be a state is bound by the prohibition? Does the “parent” State is bound by this prohibition with regard to its own territory? According Crawford, “use of force by a non-state entity in exercise of a right to self-determination is legally neutral, that is, not regulated by international law at all.”<sup>127</sup> Moreover, he argues that “the use of force by a metropolitan power against self-determination unit is not a use of force against the territorial integrity and political independence of a state, though it will be in another manner inconsistent with the purposes of the UN”.<sup>128</sup> Third states are obviously bound by non-use-of-force principle, however, does the “safeguard clause” allows third states to use force against territorial integrity and political unity of a state that does not comply with principle of self-determination and thus possess “unrepresentative government”? Does the use of force (intervention) would be lawful?

Crawford differentiates two situations connected unlawful use of force by third States in the context of external self-determination:

1. “An effective self-governing entity is created in accordance with an applicable right to self-determination by unlawful use of force;

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<sup>126</sup> Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” p. 105.

<sup>127</sup> Crawford, *The Creation of States in International Law*, p. 136.

<sup>128</sup> *Ibid.*, p. 137.

2. An effective self-governing entity is created in violation of an applicable right to self-determination by external unlawful force”.<sup>129</sup>

The latter situation clearly indicates that secession from an existing state would be “unlawful”, because the process of secession is connected to violation of the right to self-determination of peoples and prohibition of use of force. The former situation is much more complex because it is two-fold. From one side, the secession would be in compliance with right to self-determination. The secessionists would be a people that exercise their right to external self-determination. From the other side, there would be unlawful use of force by third states that facilitated the secession process. Does this illegality of third state intervention would render secession (external self-determination) “unlawful”? Crawford suggests that “the status of local entity and the legality of the use of force ought to be regarded as separate issues so that the illegality of the intervention should not prejudice the pre-existing right of the local unit to self-determination”.<sup>130</sup>

## 2.2. RECOGNIZING SECEDING ENTITIES

Recognition, although heavily influenced by international politics, is an institution of international law. The so-called “Law of recognition” is regulating the right and duties of existing states towards the entity that claims to be a state and seeks to obtain international legal personality. “States are not obliged to recognize other states but states are obliged not to recognize as states things which are not states, certainly where to do so would prejudice the right of another state”.<sup>131</sup>

There are two dominating theories – constitutive and declaratory – that explain statehood and consequences of recognition.

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<sup>129</sup> Ibid., p. 135.

<sup>130</sup> Ibid., p. 140.

<sup>131</sup> Warbrick, C. “Kosovo: the declaration of independence”, *International & Comparative Law Quarterly* (2008) p.683

The constitutive theory grants recognition an important and powerful role in the international legal order by contending that statehood is conferred by the act of recognition by other states.<sup>132</sup> Thus the recognition of a claimant entity as a state constitutes a state.<sup>133</sup> “No qualifications or legal criteria exist under the constitutive theory for recognition, and unrecognized states would not enjoy the international legal personality of statehood.”<sup>134</sup>

The declaratory theory contends that statehood, and thus international legal personality, arises independent of recognition when certain objective criteria of statehood are met by an entity.<sup>135</sup> Therefore the creation of a state is a simple fact that is acknowledged (declared) by the recognizing states. In conclusion, the main difference between the two theories is that according to the constitutive theory the entity becomes a state after the formal recognition, but according to the declaratory theory the entity becomes a state before the formal act of recognition when it meets factual requirements.

The necessary criteria for statehood are most authoritatively defined in the Montevideo Convention of 1933: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”<sup>136</sup> In addition, the convention explicitly confirms declaratory theory: “The political existence of the state is independent of recognition by the other states”.<sup>137</sup>

There are also other theories on statehood and recognition, e.g. as Sterio described an intermediary view on recognition which asserts “that recognition is political act independent of statehood, but that outside states have duty to recognize a new state if that state objectively

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<sup>132</sup> Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” p. 288.

<sup>133</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 97.

<sup>134</sup> Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” p. 288.

<sup>135</sup> Ibid.

<sup>136</sup> *Montevideo Convention on the Rights and Duties of States* (1933) Article 1

<sup>137</sup> Ibid. Article 3

satisfies the four criteria for statehood”<sup>138</sup>. However the declaratory theory is of the majority view and is prevailing in the academia and modern international law.

In the nowadays international plane where there are established states with defined boundaries, secession becomes the dominant form of state creation. The newly emerged states pose legal questions of recognition for existing states. “If an entity has not met the criteria for statehood, recognition of that entity as an independent state would violate an obligation to another state to respect its territorial integrity.”<sup>139</sup>

However, with regard to seceding entities, the existing states seem to have considerations not only on the effectiveness of secession, but also on the legitimacy of the secession that would allow or preclude recognition. Tomuschat argues that “the criterion of effectiveness will take precedence over any considerations of legitimacy”.<sup>140</sup>

### **2.2.1. Effectiveness vs. Lawfulness**

Traditionally it is understood that creation of states is a matter of fact and not of law”.<sup>141</sup> This view presupposes that “the new governmental authority [have] to be exercised effectively and durably on the new territory; otherwise the recognition would be a breach of international law”.<sup>142</sup>

However, keeping in mind one of the interest of international legal order to reflect realities on ground, “it may be that effectiveness of the emergent entity prevails, so that its illegality of origin will not impede recognition of a state”<sup>143</sup>. Therefore the principle of effectiveness finds itself in a structural tension with legality and legitimacy according to

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<sup>138</sup> Sterio, “On the Right to External Self-Determination: ‘Selfistans’, Secession and the Great Powers’ Rule,” p. 151.

<sup>139</sup> Watson, “When in the course of human events: Kosovo’s independence and the law of secession,” p. 288.

<sup>140</sup> Christian Tomuschat, “Secession and self-determination,” in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge University Press, 2006), p. 44.

<sup>141</sup> Crawford, *The Creation of States in International Law*, p. 108.

<sup>142</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 30.

<sup>143</sup> Crawford, *The Creation of States in International Law*, p. 140.

international law”<sup>144</sup>. The principle of effectiveness “proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane.”<sup>145</sup>

In case of “unlawful” secessions and possible subsequent recognition of seceding entities, it is important to stress that recognition does not legitimize secession:

The ultimate success of [*de facto*] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession <...> in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession.<sup>146</sup>

Tomuschat argues that, for example, widespread recognition of new entity Bangladesh in 1970s was based on the principle of effectiveness.<sup>147</sup>

Dugard and Raic suggests to determine “whether international law contains any rules which, if violated, form a bar to the acquisition of statehood by an otherwise fully effective entity and result in an obligation not to recognize the entity as state. This means that analysis of the question of legitimacy of recognition of secessionary entities as states requires a discussion of question whether the modern law of self-determination contains any rules regarding legitimacy of secession”.<sup>148</sup> Dugard and Raic argues in favour of so called “remedial secession” that authorizes secession as an exercise of external self-determination and concludes that “states are permitted (but not obliged) to acknowledge the seceding entity’s exercise of the right to external self-determination by recognizing it as a state”.<sup>149</sup>

The next chapter will review the “remedial secession” doctrine.

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<sup>144</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 6.

<sup>145</sup> *Reference re Secession of Quebec*, p. 146.

<sup>146</sup> *Ibid.*, para. 155.

<sup>147</sup> Tomuschat, “Secession and self-determination,” p. 30.

<sup>148</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 95.

<sup>149</sup> *Ibid.*, p. 134.

### 2.3. DOCTRINE OF REMEDIAL SECESSION

The term “remedial secession” was first mentioned by Buchheit<sup>150</sup> in his search for standards of legitimacy of secession. Since then the theory arguing for the right to remedial secession has gained considerable support in academia. The term “right to remedial secession” might have some linguistic variations, and alternative terms like “qualified right of secession”<sup>151</sup> or “remedial right to secession”<sup>152</sup> may be found in the academic literature.

Buchanan divides all right-to-secession theories in two groups: Remedial Right Only and Primary Right theories.<sup>153</sup> Primary Right theories advocate for a people’s general right to secede and “do not make the unilateral right to secede derivative upon violation of other, more basic rights.”<sup>154</sup> As a contrast, the Remedial Right Only theories advocate for a specific (remedial) right to secession. Here secession is strictly understood as “a remedy of last resort for persistent and grave injustices, understood as violations of basic human rights”.<sup>155</sup>

Buchanan uses political philosophy methodology and draws parallel between remedial right to revolution and remedial right to secession.<sup>156</sup> Although originally based on Lockean theory, revolution as last resort is also reflected in legal sources, notably in Universal Declaration of Human Rights: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”<sup>157</sup>. However, differently from revolution, “the object of right to secede is not to overthrow the government, but only to sever the government’s control over that portion of the territory”.<sup>158</sup>

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<sup>150</sup> Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978), p. 222.

<sup>151</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 104.

<sup>152</sup> See Buchanan, “Theories of Secession.”

<sup>153</sup> See Ibid.

<sup>154</sup> Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” p. 83.

<sup>155</sup> Ibid., p. 82, 84.

<sup>156</sup> Buchanan, “Theories of Secession,” p. 35.

<sup>157</sup> *Universal Declaration of Human Rights* (1948) Preamble

<sup>158</sup> See Buchanan, “Theories of Secession,” p. 35-36.

Remedial secession doctrine is based on general principle of law *ubi jus ibi remedium*. This principle is applied to the right to self-determination of peoples. That means that if there is people's right to self-determination, there must be a remedy for this right. The argument for the remedy is accurately illustrated by the words of Ryngaert and Griffioen:

What if a State persistently denies a people the fundamental right of internal self-determination? What if a people does not have free choice but is repressed and suffers from gross violations of basic human rights, and all possible remedies for a peaceful solution to the conflict have been exhausted? Should that people not be allowed a “self-help remedy” in the form of external self-determination?<sup>159</sup>

According to remedial secession doctrine, if there is violation of people's right to (internal) self-determination, right to remedial secession might arise as a remedy to the violation of the right to self-determination. In this way, by effecting remedial secession, the people concerned enjoy their right to self-determination “externally”. Tomuschat also argues in favour of *ubi jus ibi remedium* applicability in the international law: “If international law is to remain faithful to its own premises, it must give victims a remedy enabling them to live in dignity”<sup>160</sup>.

The remedial secession theory proponents also use moral and philosophical justifications for remedial secession theory. It is submitted that international legal order is not morally neutral and has humanist vision. There is legal recognition of rights of human beings and of peoples. It is principle of humanity that has inspired various experiments to set up a framework to regulate populations, peoples or minorities rights. Consciousness for duty of care for the human kind is a common denominator in the international legal instruments. Therefore a remedial right to protect a human right (right to self-determination) is compliant with the premises of international legal order.<sup>161</sup>

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<sup>159</sup> Ryngaert and Griffioen, “The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers,” para. 6.

<sup>160</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 9.

<sup>161</sup> For example, see Separate Opinion of Judge A.A. Cancado Trindade in *Kosovo* case

### 2.3.1. “Safeguard clause” formula

The “safeguard clause” in the Declaration on Principles of International Law<sup>162</sup> is one of the main pillars used by remedial secession theory proponents to prove the theory’s basis in (customary) international law. The “well-known passage about unrepresentative governments”<sup>163</sup> is suggested to be authorizing a right to secession. The paragraph reads:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>164</sup>

Normally it is understood that “the requirement of representativeness suggests internal democracy”<sup>165</sup>. However, the remedial secession doctrine proponents argue that secession is authorized as a “latent option”, although in exceptional situations.<sup>166</sup> In the declaration the rejection of secession is first confirmed, but afterwards restricted<sup>167</sup>. Cassese similarly concludes that “impairment of territorial integrity is not totally excluded, it is logically admitted”<sup>168</sup>.

Cassese offers a “translation” of the safeguard clause: “if in a sovereign State that government is ‘representative’ of the whole population, in that it grants equal access to the political decision-making process and political institutions to any group and in particular does not deny access to government to groups on the grounds of race, creed or colour, then that government respects the principle of self-determination; consequently, groups are entitled to claim a right to self-determination only where the government of a sovereign State denies

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<sup>162</sup> 1970 October 24 UN General Assembly resolution 2625 (XXV)

<sup>163</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 19.

<sup>164</sup> 1970 October 24 UN General Assembly resolution 2625 (XXV), Principle 7

<sup>165</sup> Hannum, “Rethinking Self-Determination,” p. 17.

<sup>166</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 27.

<sup>167</sup> *Ibid.*, p. 24.

<sup>168</sup> Cassese, *Self-Determination of Peoples*, p. 119.

access on such grounds.”<sup>169</sup> The proponents of remedial secession doctrine use logic’s method *a contrario* to derive right to secession from the “safeguard clause”. If the state does not act in compliance with principle of self-determination and denies a people its right to internal self-determination, such state loses the safeguard from dismemberment of its territory and people may choose secession to redress a denial of self-determination to them.

“The Declaration makes territorial integrity a rebuttable presumption which can be invoked only by states who act in accordance with the principle of self-determination.”<sup>170</sup> A right to self-determination arises as a remedy when the state’s actions extinguish that presumption. According to Tomuschat, the formulation in the declaration text is somewhat too loose to sanction secession – “secession can only be a step of last resort and should not be granted lightly as remedy”.<sup>171</sup> Simpson agrees that “assertion of the right of secession would be a remedy of last resort for peoples and groups”<sup>172</sup>.

Buchanan does not derive a right to secession solely from the “safeguard clause” but uses a similar logic to the suggested “rebuttable presumption” in the clause. He claims that there is a presumption that existing states that are accorded legitimacy under international law have valid claims to their territories, but “such claims can be overridden or extinguished in the face of persistent patterns of serious injustices toward group within a state. The validity of a state’s claim to territory cannot be sustained if the only remedy that can assure that the fundamental rights of the group will be respected is secession.”<sup>173</sup>

Dugard and Raič argue that the declaration was intended to be addressed to third states.<sup>174</sup> Even the name of the declaration (Declaration on Principles of International Law concerning Friendly Relations and Co-operation **among States** in accordance with the

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<sup>169</sup> Ibid., p. 112.

<sup>170</sup> Simpson, “Diffusion of Sovereignty,” p. 283.

<sup>171</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 10.

<sup>172</sup> Simpson, “Diffusion of Sovereignty,” p. 283.

<sup>173</sup> Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” p. 85.

<sup>174</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 103.

Charter of the United Nations)<sup>175</sup> suggests that addressees are the states. Therefore “safeguard clause” formula is directed to the states: “it may be argued *a contrario* that third states would be entitled to support a people which attempts to secede, even if such support eventually lead to infringement of the territorial integrity of the target State”.<sup>176</sup>

Corten submits that ICJ “indirectly challenged the remedial secession doctrine”<sup>177</sup>. He claims that remedial secession theorists must “[presuppose] that territorial integrity must *in principle* be respected by the secessionary entity, this entity being exceptionally entitled to infringe this principle as a “remedy” to a previous violation of its international right to self-determination.”<sup>178</sup> Bearing in mind that ICJ in its advisory opinion affirmed that the principle of territorial integrity is applicable only to states<sup>179</sup>, Corten concludes that remedial secession theory’s argument is incompatible with the opinion and therefore severely weakened (if not rejected). Although correctly noticing that many remedial secession proponents use such premises, Corten fails to admit that remedial secession theory is primarily based on moral, legal philosophical and human rights approaches<sup>180</sup>, rather than only and exclusively on “safeguard clause” formula.

Moreover, the ICJ conclusion is not weakening the remedial secession doctrine, but could be interpreted as strengthening. Rather than denying “remedial secession”, ICJ has abolished theoretical obstacle – the territorial integrity – that was used as counterargument for remedial secession by a number of the states (in advisory proceedings) and by remedial theory opponents. If safeguard clause is applicable only for states, that means “secessionists” are not bound by the territorial integrity and this reaffirms the neutrality of international law toward “secessionary independence”. However, secessionists should still be interested to

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<sup>175</sup> Emphasis added

<sup>176</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 103.

<sup>177</sup> Corten, “Territorial Integrity Narrowly Interpreted,” p. 89.

<sup>178</sup> *Ibid.*, p. 93. (original emphasis)

<sup>179</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 80.

<sup>180</sup> For instance: *ubi jus ibi remedium*

secede only as last resort remedy, because secession that would be incompatible with right to self-determination (as defined in the “safeguard clause”) would prevent assistance from other states and would cause non-recognition of the seceding entity.

## **2.4. CONDITIONS FOR THE RIGHT TO REMEDIAL SECESSION**

Remedial secession theorists always stress that the theory puts “significant constraint on unilateral secession”.<sup>181</sup> In order to invoke remedial right to secession as an exercise of self-determination, carefully defined circumstances must be met by the secessionists. There are a lot of writings in the academia suggesting the conditions for secession.

Cassese suggests the following conditions might warrant secession: “when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny any possibility of reaching a peaceful settlement within the framework of the State structure.”<sup>182</sup> He concludes that there must be gross breaches of fundamental human rights and the exclusion of any likelihood for a possible peaceful solution.<sup>183</sup>

Ryngaert and Griffioen states that “four cumulative conditions that must be fulfilled before the right of external self-determination may be invoked. First of all, the group invoking the right is a “people”. The “people” has a distinct identity, and represents a clear majority within a given territory. A minority is not necessarily a “people”. Second, massive violations of basic human rights and systematic discrimination at the hands of a repressive regime have taken place. Third, violations cannot be prevented and remedied because the “people” is excluded from political participation, and is not given internal self-determination

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<sup>181</sup> Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” p. 85.

<sup>182</sup> Cassese, *Self-Determination of Peoples*, p. 119.

<sup>183</sup> *Ibid.*, p. 120.

(e.g., through devolution or federalism). Finally, negotiations between the “repressive” regime and the “people” lead nowhere.”<sup>184</sup>

Borgen states that any attempt to claim secession in order to trump territorial integrity must at least show that: “(a) the secessionists are a “people” <...>; (b) the state from which they are seceding seriously violates their human rights; and (c) there are no other effective remedies under either domestic law or international law.”<sup>185</sup>

Fierstein submits that valid claim for secession at least requires “(1) a people (2) subject to historical and persistent State-sponsored human rights abuse (3) with no viable alternative recourse within domestic legal channels.”<sup>186</sup>

Dugard and Raic probably provides the most comprehensive criteria for remedial right to secede:

- (a) There must be a people which, though forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within a part of the territory of that State.
- (b) The State from which the people in question wishes to secede must have exposed that people to serious grievances (carence de souverainete), consisting of either
  - (i) a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination)
  - (ii) serious and widespread violations of fundamental human rights of the members of that people
- (c) There must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.<sup>187</sup>

All in all, it can be summarized that theorists have consensus that the right to remedial secession come into existence when all these conditions are met:

1. Secessionists qualify as “people”
2. There is denial of self-determination of the people (gross human rights violations)

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<sup>184</sup> Ryngaert and Griffioen, “The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers,” para. 6.

<sup>185</sup> Christopher J. Borgen, “Kosovo’s Declaration of Independence: self-determination, secession and recognition” (2008). <http://www.asil.org/insights080229.cfm>

<sup>186</sup> Fierstein, “Kosovo’s declaration of independence: an incident analysis of legality, policy and future implications,” p. 422.

<sup>187</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 109.

3. Secession is a final remedy (of last resort) – an *ultima ratio* mean.

All these three criteria have two-fold uncertainty. First, it is unclear: what is “a people”; what constitutes “denial of self-determination” or “gross human rights violations”; and what can be considered a “remedy”. Second, even if the former are clarified and established, it is unclear who has in particular case to determine: that the secessionists constitute people; that certain situation on ground amounts to denial of self-determination, and that the other remedies given are unavailable or not effective.

#### **2.4.1. Meaning of gross human right violations**

Most states in this world violate human rights of individuals in its jurisdiction. Some of them make very serious breaches of fundamental rights of human beings. What extent of human rights violations warrant right to unilateral secession?

The theorists argue that there has to be violation of “fundamental” (“basic”) human rights. Moreover, these human right violations must qualified as “gross”, “grave”, “serious”. In addition, such violations have to be “systematic”, “widespread”, “persistent”, “massive”.<sup>188</sup>

What are those “fundamental”, or “basic”, human rights? It could be argued that right to self-determination can be considered one and denial of self-determination is a gross violation of human rights. Do “right to life”, “freedom of expression”, “freedom of religion”, “prohibition of discrimination”, “right to privacy”, “freedom of assembly”, “fair trial rights”, “right to election” fall under the category of “fundamental” and “basic” rights?

Buchanan notes that various versions of remedial secession doctrine “define differently the sorts of injustices for which secession is the remedy of last resort. Some recognize only unjust annexation, genocide, or massive violations of the most basic

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<sup>188</sup> See chapter 2.4. for quotations.

individual rights as sufficient to justify unilateral secession; others would include the state's violations of intrastate autonomy arrangements for minorities or the state's failure to acknowledge valid claims to intrastate autonomy".<sup>189</sup>

The "safeguard clause" sets requirement for states to have representative government "without distinction as to race, creed or colour" thus implying prohibition of discrimination. However, what degree of discrimination can render right to secession? Murswiek argues that "there cannot be a right to secession in every case of discrimination, especially if there are still chances that the state authorities may stop the discrimination when requested or even if legal remedies are given".<sup>190</sup>

Hannum considers that if remedial secession doctrine would be accepted in international legal system, "international law should recognize a right to secession only in the rare circumstance when the physical existence of territorially concentrated group is threatened by violations of fundamental rights"<sup>191</sup> He pinpoints that "genocide is illegal under customary international law, gross violations of human rights are also prohibited. <...> Justifying secession by a "nation" or "people" in response to anything less than the most serious human rights violations assumes a principle to which there has never been agreement".<sup>192</sup> This position logically-systemically explains the possible scope of human rights violations that could render right to secession and is consistent with the current international law norms.

The author of this thesis submits that such human right violations like apartheid, genocide, torture, and slavery can certainly be considered as violations of fundamental human rights. The prohibitions of apartheid, genocide, torture and slavery are *jus cogens* norms and whole international community is bound by them.

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<sup>189</sup> Buchanan, "Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession," p. 83.

<sup>190</sup> Murswiek, "The Issue of a Right to Secession - Reconsidered," p. 26.

<sup>191</sup> Hannum, "Rethinking Self-Determination," p. 47.

<sup>192</sup> Ibid., p. 46.

### 2.4.2. *Ultima ratio*

Right to remedial secession proponents strongly argue that unilateral secession must be the ultimate remedy, only when other remedies are exhausted. As Cassese noted - “any licence to secede must be interpreted very strictly”.<sup>193</sup> Right to secession must be conferred to peoples only in exceptional situations.<sup>194</sup> “It is one thing to draw the logical conclusion from a permanent and gross misuse of its powers by a state against its citizens; it is quite another thing, however, to encourage the ultimate step when other remedies are still available.”<sup>195</sup>

There can be various international and domestic remedies. The normal remedy for denial of self-determination is a given chance for people to exercise internal self-determination – be it autonomy or other forms of self-determination within existing state. For example, in reaction to denial of autonomy and violations of human rights in Kosovo, Security Council in its Resolution 1244 has introduced international administration of the territory, where international civilian and military presence has to ensure “substantial autonomy and meaningful self-administration” for Kosovo.<sup>196</sup> As for gross human rights violations, one of the remedies could be cessation of the violations and restoration of the previous status. The state must ensure that the massive human rights violations would not be achieved. Secession has to be *ultima ratio* remedy, when there are no available options to exercise right to self-determination internally.

In order to determine whether all remedies were exhausted remedies, several factors must be taken into account:

1. Availability of remedies. There has to be real options how to redress the denial of self-determination. These options could be, for instance, constitutional processes (referendum, constitutional amendments, special legislation for minority rights, etc.), judicial

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<sup>193</sup> Cassese, *Self-Determination of Peoples*, p. 112.

<sup>194</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 27.

<sup>195</sup> Tomuschat, “Self-determination in a post-colonial world,” p. 11.

<sup>196</sup> UN Security Council Resolution 1244 (1999)

means (to challenge the state behavior in domestic courts, including supreme/constitutional courts), other dispute settlement mechanisms, negotiations with the state authorities, etc. The remedies have to be not formally available, but also accessible to peoples.

2. Effectiveness of remedies. The remedy must effectively end the violations of human rights and guarantee the genuine exercise of self-determination of peoples. The remedy has to be sufficient – simply a cessation of hostilities with no insurance from reoccurrence of human rights violations in future cannot be considered an effective remedy. Some transitional justice mechanisms may be appropriate remedies in a post-conflict society to redress past violations of human rights.

If the other remedies are not available or effective, only then right to secession can be exercised as a last resort remedy. If secessionists secede from existing states while having alternative remedies for a conflict, such secession does not have legitimacy under remedial secession theory.

### ***2.4.3. Timing for secession***

The issue of timing, although neglected by right to remedial secession proponents (and opponents), adds controversy to the remedial secession theory. The three commonly agreed criteria *ex facie* do not distinguish the moment of the appearance of the right to secede and the moment of the exercise of that right. It is unclear when should the people exercise its right to secession. Does acquisition of a legal right to secede at certain moment means that the right must be realized (effected) immediately, or does the acquired right remain in the disposition of the right holder (a people) who may use it as a trump in the future? In other words, is the right to secede perennial?

If a right to remedial secession is perennial (has characteristic of continuity since its acquisition), this would mean that a people could secede from the state even if currently there

are no ongoing gross human right violations conducted by the “parent” state. Peters accurately noted that “although it can well be argued that grounds for a secession are still present, but merely dormant, this statement is in scientific terms improvable, but remains a policy assessment. Secession would not be ‘remedial’, but rather ‘preventive’.”<sup>197</sup>

If one of the conditions for right to secession ceases to exist, it should be logically concluded that the acquired right to secession is no longer valid. This happens because of the inherent “remedial purpose” of the secession – secession must be defence to an existing (not past!) denial of self-determination and human rights violations. Moreover, secession must be *ultima ratio* remedy, however if the human rights violations are halted and alternative remedies are available, secession is no more considered to be remedy of last resort. “If the criteria mentioned previously are not met, and a certain people would nevertheless secede, this would be an “abuse of right” and a “violation of the law of self-determination”, which consequently would make the secession unlawful.”<sup>198</sup> In order for secession to be legitimate, a people can secede from the abusive state only until the legal right to secession is in effect. This means that once appeared, a right to secession must be exercised immediately.

The contrary interpretation (that right to secession is perennial) would frustrate the remedial secession theory.

## 2.5. GENERAL REMARKS

International law does not regulate secession as such because secession is a fact. However, the academicians tend to neglect distinction between secession and right to secession. While secession falls in the “international law-free zone”<sup>199</sup>, international legal order is not neutral to causes and legal consequences of secession. The illegality connected to

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<sup>197</sup> Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” p. 103.

<sup>198</sup> Ryngaert and Griffioen, “The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers,” para. 13.

<sup>199</sup> Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” p. 98.

secession might qualify secession as “unlawful”. Moreover, international law might be rejecting neutrality to secession by authorizing “right to secede”. If there is a “right to secede” in international law, this would imply that the legitimacy of secession could be verified.

An emerged “remedial secession” doctrine claims that international law authorizes a special right to secede under the principle of self-determination. Secession is understood as an exercise of the right to self-determination. The doctrine is based on *ubi jus ibi remedium* principle. The doctrine claims that if the existing state is violating people’s right to self-determination and there are no alternative remedies to redress that situation, people can exercise their right to self-determination “externally” in the form of secession.

However, right to secession comes into existence only if all strict special conditions are met:

1. Secessionists qualify as “people”;
2. There is denial of self-determination of the people (gross human rights violations);
3. Secession is a final remedy (of last resort).

The remedial right to secede is not perennial. Once the conditions are met, the people must effect secession immediately as long as the special conditions exist. If the gross violations are halted and alternative remedies appear, the special right to secede expires because secession would not retain its remedial character.

## Part III. Status of the right to remedial secession in international law

### 3.1. LEX LATA OR LEX FERENDA?

Although remedial secession theory has significant support in academia, scholars do not have consensus on the legal status of the right to remedial secession in international law. Paradoxically, the scholars that in principle sympathize for remedial secession doctrine, but argue that right of remedial secession is still in the stage of development (*de lege ferenda*) and is not yet part of “hard law”, might be classified as “opponents” by those “proponents” that consider the right to remedial secession to be an established law.

The pioneer of the theory Buchheit had long before stated that “remedial secession seems to occupy a status as the *lex lata*”<sup>200</sup>. Tomuschat argues that remedial secession has empirical basis in practice, although it is fairly thin, it is not totally lacking – the events that lead to the establishment of Bangladesh and the events that gave rise to Kosovo as autonomous entity under international administration could “both be classified as coming within the purview of remedial secession”.<sup>201</sup> According to him it is sufficient to acknowledge that remedial secession is “part and parcel of positive law”.<sup>202</sup> Cassese is also one of the authors who tend to support position that right to remedial secession is reflected in existing law.<sup>203</sup>

Simpson argues for broadening “the possible meaning of self-determination”<sup>204</sup>, grounding this argument on moral-philosophical justifications: “any system premised on the

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<sup>200</sup> Buchheit, *Secession: The Legitimacy of Self-Determination*, p. 222.

<sup>201</sup> Tomuschat, “Secession and self-determination,” p. 42.

<sup>202</sup> Ibid.

<sup>203</sup> Cassese, *Self-Determination of Peoples*, 118–119.

<sup>204</sup> Simpson, “Diffusion of Sovereignty,” p. 258.

suppression of all claims to self-determination is likely to fail.”<sup>205</sup> In addition, Buchanan – one of the most famous remedial secession theorists – also acknowledges the *lex ferenda* status of a remedial right to secession. He offers a “proposal to reform” international law, a “guidance for international law” that is “morally progressive” and “realistic”.<sup>206</sup> While Hannum involves in discussion whether secession **should** be recognized<sup>207</sup>, he concludes that a right to secession does not yet exist.<sup>208</sup>

Tancredi also acknowledges *de lege ferenda* of remedial secession.<sup>209</sup> He submits that “international law, as it now stands, recognizes neither general nor remedial right to secede in oppressive contexts. According to practice the consequence arising from the type of unlawful acts contemplated by the “remedial” theory remains duty to cease wrongful conduct and, where possible, to restore *status quo ante*”.<sup>210</sup>

Canadian Supreme Court has considered that “it remains unclear whether [remedial secession] proposition actually reflects an established international law standard.”<sup>211</sup>

Franck argues that self-determination is now properly transforming itself into an emerging right to democratic governance<sup>212</sup> Hannum agrees as well that democratic governance is emerging norm of customary international law.<sup>213</sup> The *lex lata* continues to exclude right to secession and only intra-state solutions are acceptable:

[T]he expansion of rights designed specifically to minorities and indigenous peoples to maintain their identity and participate effectively in the political process offers new opportunities for redressing minority grievances without secession. Responding to authoritarian or discriminatory governments requires establishment of democratic

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<sup>205</sup> Ibid., p. 263.

<sup>206</sup> Buchanan, “Theories of Secession,” p. 41–42.

<sup>207</sup> Hannum, “Rethinking Self-Determination,” p. 47.

<sup>208</sup> Hannum, *Autonomy, Sovereignty, and Self-Determination*, p. 49.

<sup>209</sup> Antonello Tancredi, “A normative ‘due process’ in the creation of States through secession,” in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge University Press, 2006), p. 184.

<sup>210</sup> Ibid., p. 188.

<sup>211</sup> *Reference re Secession of Quebec*, para. 135.

<sup>212</sup> Franck, “The emerging right to democratic governance.”

<sup>213</sup> Hannum, “Rethinking Self-Determination,” p. 34.

institutions, real guarantees of non-discrimination, and the assurance that people have a meaningful degree of control over their affairs.<sup>214</sup>

Crawford also sides the opinion of Franck and Hannum. He concludes that “outside colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States. Self-determination outside colonial context is primarily a process by which the peoples of the various States determine their future through constitutional processes without external interference.”<sup>215</sup>

There might be some explanation offered concerning this “schism” among legal scholars. Peters separates two paradigms of legal schools that have different view on existence of right to remedial secession. Legal-positivist outlook would have to support idea that secession is not regulated by international law, because (1) legal-positivist perspective sees the state as a matter of fact (and facts are not regulated by law) and (2) legal-positivist vision of international legal order distinguishes “realm of morality” and “realm of international law”. However, natural-law-followers should favour secession because remedial right to secession constitutes “a kind of higher law” and complies with “classical natural right to resistance” concept.<sup>216</sup> The different schools of law have different interpretations of international law and this may have influenced why right to remedial secession is considered to be *lex ferenda* by some scholars, but *lex lata* by another scholars.

In order to ground remedial secession doctrine as an emerged international customary rule, empirical basis should be found in international practice. The following chapters will review institutional and states’ practices toward secessions.

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<sup>214</sup> Ibid., p. 64.

<sup>215</sup> Crawford, *The Creation of States in International Law*, p. 415.

<sup>216</sup> Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” p. 104.

## 3.2. SUBSTANTIATION OF THE DOCTRINE IN INTERNATIONAL PRACTICE

Remedial secession proponents pinpoint certain institutional practice, states' practice and *opinio juris* of the states that reflects the existence of right to remedial secession as *lex lata* norm. For convenience, the author chose to divide up-to-date the practice and *opinio juris* into two groups: institutional practice before Kosovo secession and after Kosovo secession in 2008. Besides heavily reliance by theorists on "safeguard clause" as a proof of existence of customary rule, the most referenced institutional practice related to secessions before 2008 is Aaland islands dispute, Katanga independence case in African Commission on Human and Peoples' Rights and Quebec hypothetical secession considered by the Supreme Court of Canada. These cases will be overviewed in the subsequent subchapters.

The Kosovo secession from Serbia in 2008 has poured fresh discussion on the right to secede from existing state. Short after Kosovo unilateral declaration of independence (and the following recognitions) the UN General Assembly passed a resolution<sup>217</sup> (sponsored by Serbia) that initiated advisory proceedings in the ICJ. Many participating states expressed their *opinio juris* on the right to self-determination and right to (remedial) secession. The advisory proceedings will be reviewed in the separate chapter.

### 3.2.1 Aaland islands dispute in the League of Nations

Secession as a remedial right of last resort is traced from the Aaland islands dispute in 1920s. The case concerned the Swedish population in Aaland islands that sought to secede from newly proclaimed independent state Finland and accede to their "kin State" Sweden. The secession by Aalanders was motivated as exercise of self-determination. The issue was

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<sup>217</sup> 8 October 2008 UN General Assembly Resolution A/RES/63/3,

brought to the first session of the recently newly created organization – the League of Nations.

The League of Nations have appointed two bodies to examine Aaland islands question – Committee of Jurists and Committee of Rapporteurs. The Committee of Jurists had concluded that no legal principle on self-determination yet existed in the international law<sup>218</sup>:

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.

<...> Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.<sup>219</sup>

The subsequently appointed Committee of Rapporteurs conceived of three situations: “(1) where a State recognizes a population's claim of self-determination in the form of autonomy within the State; (2) where the State does not recognize a right to self-determination but instead provides the claimant with sufficient minority protections; and (3) where the State neither recognizes self-determination nor extends minority protections.”<sup>220</sup>

According to the Committee of Rapporteurs, if the third situation emerges (if the State engages in oppression and persecution of a particular group seeking to recognize a right to self-determination), there is an open possibility that secession could be the proper remedy<sup>221</sup>:

The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional

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<sup>218</sup> Cassese, *Self-Determination of Peoples*, p. 123.

<sup>219</sup> Report of International Committee of Jurists (1920) as quoted in Hannum, “Rethinking Self-Determination,” p. 9.

<sup>220</sup> Fierstein, “Kosovo’s declaration of independence: an incident analysis of legality, policy and future implications,” p. 426.

<sup>221</sup> Ibid.

solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.<sup>222</sup>

The report by Commission of Rapporteurs does not exclude possibility of secession as a remedy from state abuses. “The commission of Rapporteurs in the Aaland dispute denied the existence of any absolute entitlement to secession by a minority, but it did not rule out a right of secession under all circumstances”.<sup>223</sup> In their report, committee in particular underlined that “the Aalanders have neither been persecuted nor oppressed by Finland”<sup>224</sup> Crawford concludes that both reports admit the possibility that the principle of self-determination would be applicable to territories that are so badly misgoverned that they are in effect alienated from their “parent” state.<sup>225</sup>

Remedial secession theory proponents consider that already at that time jurists admitted the remedial purpose of secession in the extreme case of state’s persecution and oppression of part of its population. The position of the jurists totally complies with remedial secession theory. The autonomy or minority rights guarantees mentioned by the Committee are interpreted as simply a default preference for internal self-determination, while secession (external self-determination) could be possible only in exceptional cases as a last resort remedy.

### 3.2.2. *Katangese Peoples’ Congress v. Zaire*

The Katanga case in the African Commission on Human and Peoples' Rights is considered another example of international institutional practice that grounds remedial secession doctrine.

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<sup>222</sup> The Aaland Islands Question (On the Merits), *Report by the Commission of Rapporteurs*, League of Nations Council Document B7 21/68/106 (1921) (excerpted and reprinted)

<http://www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf>

<sup>223</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 107.

<sup>224</sup> The Aaland Islands Question (On the Merits), *Report by the Commission of Rapporteurs*, League of Nations Council Document B7 21/68/106 (1921) (excerpted and reprinted)

<sup>225</sup> Crawford, *The Creation of States in International Law*, p. 111.

A secessionist regime in the Belgian Congo province of Katanga declared its independence 11 days since Congo itself became independent. Despite the claim to self-determination, Katanga was not recognized by any state and eventually Congo effectively suppressed secession.<sup>226</sup>

This, however, did not prevent the Katangese people to continue ascertain their right to self-determination and seek for independence. In 1992 the president of Katangese Peoples' Congress submitted communication to the African Commission on Human and Peoples' Rights under Article 20(1) of the African Charter on Human and Peoples' Rights<sup>227</sup> and asked to support the independence movement of Katangese people under the right of self-determination and to recognize the independence from Zaire.<sup>228</sup> The African Commission *inter alia* concluded that:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>229</sup>

It can be seriously argued that the Commission's conclusion was based on remedial secession doctrine premises. "A *contrario* reading of this decision makes it clear that the Commission was of the opinion that in the case of serious violations of human rights a denial of internal self-determination the Katangese people would be entitled to exercise a form of self-determination which would lead to disruption of the territorial integrity of Zaire."<sup>230</sup> This decision is widely referred to ground remedial secession theory.

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<sup>226</sup> Ibid., p. 405.

<sup>227</sup> *African Charter on Human and Peoples' Rights* (1982)

<sup>228</sup> At that time the Congo state had been renamed to Zaire.

<sup>229</sup> *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995). Available at: <http://www1.umn.edu/humanrts/africa/comcases/75-92.html>

<sup>230</sup> Dugard and Raič, "The role of recognition in the law and practice of secession," p. 108.

### 3.2.3. Reference re Secession of Quebec

The Canada Supreme Court's interpretation of external self-determination and secession in the famous *Reference re Secession of Quebec* decision is also considered an example of institutional practice that supports idea of secession as a remedial right.

In 1995 referendum held in the province of Quebec the population was asked whether Quebec should secede from Canada. The initiative for independence was defeated by a very narrow margin of 49.42% voting "in favour" and 50.58% "against". The referendum results triggered huge public debates what would happen if the majority of Quebec population eventually would vote "in favour". The government of Canada submitted referral to the Supreme Court of Canada asking for court's opinion *inter alia* whether there is a right to secession for Quebec under international law.

The Supreme Court of Canada in its opinion concluded:

[A] right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.<sup>231</sup>

"By no stretch of the imagination could it be said that the people of Quebec were oppressed or that Canada was not governed by a constitutional system 'representing the whole people belonging to the territory without distinction of any kind. <...> Government of

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<sup>231</sup> *Reference re Secession of Quebec*, para. 154.

Canada relied on the obverse of the safeguard clause: without actually committing itself to the idea of remedial secession, it argued that the safeguard clause was a safeguard against secession for those States that complies with it".<sup>232</sup> Although the court neither confirmed nor rejected the idea that right to secession is an existing law, it, however, accepted the premises of remedial secession theory that in case of denial of internal self-determination under exceptional circumstances, a right to external self-determination (in the form of secession) arises.

### 3.3. ICJ ADVISORY PROCEEDINGS IN KOSOVO CASE

The province of Kosovo has declared independence from Serbia in February 2008. The secession prompted Kosovo recognition worldwide and Serbia insisted on respect for territorial integrity and protested on purported independence of Kosovo. In October 2008 the UN General Assembly requested the ICJ to render an advisory opinion on the following question:

Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?<sup>233</sup>

The question itself has caused some controversy. The question posed asked whether a **declaration** of independence is in accordance with international law. *Prima facie* international law does not regulate declarations of independence. It rather seemed that in fact the legitimacy of Kosovo secession was at stake, or the evaluation of legal consequences of that secession was the object of the debate. Does international law authorizes external self-determination? Does international law gives right to secession? Does right to self-determination grants right to secede? Did Kosovo people had right to secede under international law? Most UN member states that voted in favour to request advisory opinion in

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<sup>232</sup> Crawford, *The Creation of States in International Law*, p. 119.

<sup>233</sup> 8 October 2008 UN General Assembly Resolution A/RES/63/3

General Assembly expected the ICJ to clarify this point of law in its advisory opinion. The advisory opinion was also highly anticipated by legal scholars.

However, “due to the diplomatic ineptitude or the cowardice of the General Assembly”,<sup>234</sup> the question did not explicitly asked whether Kosovo has legal right to secede or whether secession (or its legal consequences) is “in accordance with international law”.

### 3.3.1. ICJ Advisory Opinion

Regretfully for those which expected, the ICJ did not consider that issue of self-determination or secession is necessary to be addressed in this particular case<sup>235</sup>. ICJ did not take into account that majority of participants in the advisory proceedings, including Serbia and authors of the declaration of independence of Kosovo, considered the issue of self-determination (and secession) very relevant and thus in their pleadings invoked arguments relating to the right of self-determination.

The ICJ chose to issue “minimalist opinion on a legally complicated and politically loaded issue”.<sup>236</sup> In response to a question, Court concluded that general international law does not contain prohibitions on issuance of declaration of independence, and *lex specialis* in Kosovo respect also did not prevent Kosovo to unilaterally declare independence. According to Hannum, “this conclusion is hardly surprising, since international law is completely silent on most such domestic issues – it has never been illegal for a group or region of any country to revolt, declare independence, or seek to separate from that country”.<sup>237</sup>

In response to such constrained ICJ approach, Judge *Simma* stated that “the Court could have delivered a more intellectually satisfying Opinion” which could have included analysis of “whether the principle of self-determination or any other rule (perhaps expressly

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<sup>234</sup> Hurst Hannum, “The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?,” *Leiden Journal of International Law* 24, no. 1 (2011): p. 158.

<sup>235</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 51, 56, 83

<sup>236</sup> Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” p. 107.

<sup>237</sup> Hannum, “The Advisory Opinion on Kosovo,” p. 155.

mentioning remedial secession) permit or even warrant independence (via secession) of certain peoples/territories”,<sup>238</sup>.

### 3.3.2. States’ *opinio juris* on secession

Although the ICJ Opinion adds nothing to the debate on “the right to remedial secession” and its status in international law, the pleadings of participating states adds a lot to the debate. Despite that advisory proceedings were concerned with specific case of Kosovo, many participating states have expressed their general views (*opinio juris*) on the right to self-determination and attempted to determine the content of the right.

The variety of positions expressed by the states in their pleadings can be summarized in the words of the ICJ:

Whether, outside the context of non-self governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing state a right to separate from the state is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so in what circumstances.<sup>239</sup>

The variety of “radically different” views could be illustrated with Chinese position at one edge and the German position on the other edge.

The Chinese position strongly rejects any interpretation of law of self-determination as conferring right to secede. According to this position, the application of the principle of self-determination is limited and primarily restricted with situations of decolonization and foreign occupation<sup>240</sup>. It can be inferred that out of colonial and occupation context China only recognizes the “internal” right to self-determination – exercise of that right cannot

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<sup>238</sup> Declaration of Judge Simma, para. 7

<sup>239</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 82

<sup>240</sup> Written statement of China p. 3

undermine the sovereignty and territorial integrity of the state concerned.<sup>241</sup> For the support China is citing “a series of important international and regional documents” that “while reaffirming the right to self-determination, all provide for respect for State sovereignty and territorial integrity”,<sup>242</sup>. However the reasoning that these documents clearly subordinate principle to self-determination to the principle of territorial integrity is not persuasive enough – the Chinese state is citing the “safeguard clauses” of UN GA resolutions 1514 and 2625<sup>243</sup> and Helsinki Final Act<sup>244</sup> but surprisingly ignores the conditional language in these clauses<sup>245</sup> which is the main basis used in attempt to ground right to secession. Moreover, China seems to interpret these clauses protecting not only territorial integrity, but also state sovereignty, what is not explicitly mentioned in the text (unless “national unity” is understood as sovereignty).

Azerbaijan claims that “international law is unambiguous in not providing for a right of secession from independent States” – had the right been recognized by international law then the territorial integrity of states would have “little value”<sup>246</sup>. Arguing that international law “does not create grounds” and does not “confer any right” of unilateral or non-consensual secession<sup>247</sup>, Azerbaijan takes position that what is not permitted in international law – that is prohibited. Such “radical” Azerbaijani interpretation of silence in general international law is not very surprising given the fact that Azerbaijan has to deal with a secessionist entity of Nagorno-Karabakh in its own territory and suggested legal interpretation would be very favourable to effectively end the claims to any secession.

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<sup>241</sup> Written statement of China. p.4

<sup>242</sup> Ibid. p.5

<sup>243</sup> It is worth to note that none of the participating states contested the binding effect of UN GA resolution 2625 as a reflection of customary international law. Rather the states differently interpreted the content of provisions regulating the right to self-determination.

<sup>244</sup> Written statement of China, p. 5-6

<sup>245</sup> See subchapter 2.3.1.

<sup>246</sup> Written statement of Azerbaijan, para. 24

<sup>247</sup> Ibid. para. 24

However, it appears that the ICJ has taken an opposite “radical” approach towards silence in general international law: if an act is not prohibited in the general international law – it is permitted.<sup>248</sup>

Cyprus is also joining the group of China, Azerbaijan and other states denying the right to secession. However, Cyprus in its statement is carefully avoiding any discussion of a right to secession within context of self-determination. It rather discusses the right of secession as a separate right, which is non-existent and contradicting the principle of territorial integrity of the states. Cyprus goes on to state that “the instability which would result from concession of a **general** right to secession to **any** group proclaiming its ambition to create a new state is obvious ”.<sup>249</sup> Such argument is interesting because it seems that Cyprus is trying to avoid remedial secession proponents’ counterarguments by including words “general” and “any” which makes the statement acceptable for the proponents who support **special** (remedial) right to secession to **certain** groups. It can be logically inferred from the statement that Cyprus could agree that instability would not necessary result if the right to secession is not general right and not conferred to any group.

The Cypriot position is ambiguous due to ongoing negotiations with secessionist entity “Turkish Republic of Northern Cyprus” (“TRNC”). Hardly could Cyprus deny that Cypriot Turkish community constitutes a people having right to self-determination. In addition to 1974 coup and atrocities committed, the secessionist aspirations by Cypriot Turks could possibly fall under the framework of remedial secession theory.

In an extensive written statement Serbia also sides with previously mentioned states in denying right to external self-determination (secession) outside colonial context or foreign occupation due to prevailing principle of respect to territorial integrity. It is especially interesting to note that Serbia, being the main sponsor and drafter of UN GA resolution to

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<sup>248</sup> See *Accordance with International Law of Declaration of Independence of Kosovo*, para. 84

<sup>249</sup> Written Statement of Cyprus, para 153 (emphasis added)

request advisory opinion on Kosovo independence, held that issue of self-determination and its relationship with territorial integrity should be addressed in the ICJ's opinion.<sup>250</sup> Serbia expected the ICJ to adjudicate that there is no right to secession in international law.

While analyzing states' arguments in favour of prohibition on external self-determination due to subordination of the principle of self-determination to the principle of territorial integrity, it is important to note that all countries (mentioned above and others, like Brazil, Argentina, etc.) assumed that peoples – just like states – were bound by this principle of territorial integrity. However, after advisory opinion was delivered, the ICJ did provide interpretation on this aspect. The ICJ in its advisory opinion clearly stated that “the scope of the principle of territorial integrity is confined to the sphere of relations between states”<sup>251</sup>. Such interpretation denies the assumption that the territorial integrity principle is applicable for the non-state actors, e.g. secessionist entities, peoples, etc. A question arises whether all reasoning that principle of territorial integrity precludes people from exercising right to external self-determination has become void. Taking in account the position of the UN court, which authoritatively interprets what the law is, such arguments presented by the states are no more relevant to the discussion of peoples' right to external self-determination (secession).

Even if the right to secession is strictly separated from the context of self-determination, the territorial integrity still cannot be invoked (of course, provided that secessionist movement is internal process not involving interference of other states that are bound by that principle). Are there any other left legal arguments not in favour for people's right to secession in general international law if we exclude the trump of territorial integrity? The question remains open.

Continuing the analysis of state positions relating self-determination in the ICJ advisory proceedings, Germany and the Netherlands take the opposite edge. Both strong

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<sup>250</sup> See Written statement of Serbia

<sup>251</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 80

proponents of right to remedial secession, they carefully define the situation when the right to secession exists in international law.

Germany quickly reaffirms (on behalf of all “right to remedial secession” supporters) that “no-one claims that any group which is able to show some difference <...> between itself and the majority has the right to secede”.<sup>252</sup> Germany calls the latter situation as “broad right to secession” or as “liberal right to secession” which would “clearly endanger international peace by encouraging groups of all kinds and sizes, whether enjoying autonomy and participation or not, to break away from their mother states”.<sup>253</sup> Thus Germany concludes that international law neither totally excludes secession, nor confers a liberal right to secession to all and every group. Self-determination “should normally be enjoyed and exercised inside the existing framework of states”, however self-determination may “exceptionally legitimize secession” if it is the only remedy against “a prolonged and rigorous refusal of internal self-determination”.<sup>254</sup> According to German position, in this exceptional case a remedial right would not endanger international stability (as opponents of right to secession usually argue). Furthermore, Germany claims that two conditions must be met in order to appear for right to secession:

1. An exceptionally severe and long-lasting refusal of internal self-determination.

- 2 *Ultima ratio* – the secession is an ultimate remedy to persistent denial of internal self-determination.<sup>255</sup>

If the conditions are met, then right to external self-determination comes into being. Moreover, Germany further continues to argue that, once this right has appeared, it is not temporary and may continue to exist even if one of the two conditions are not met

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<sup>252</sup> Written Statement of Germany, p. 34

<sup>253</sup> Ibid. p. 34

<sup>254</sup> Ibid.

<sup>255</sup> Ibid. p. 35

anymore<sup>256</sup>. But such argumentation is hardly persuasive. It may imply that the right holders, once having acquired the right to secede, may not exercise the right immediately and always use it as a trump against the existing “parent” state even after many years since the abuses occurred and “parent” state went into democratic transition.

It seems that Germany is contradicting itself by requiring secession to be ultimate remedy for **persistent** denial of internal self-determination (which logically implies to be ongoing) and claiming that right to secession still exists even if denial of internal self-determination was in the past and currently is not ongoing. In conclusion, while in principle German position reflects the classical view of remedial secession doctrine, the suggested ongoing existence of right to secession rather seems to be invented by Germany for a particular situation of Kosovo as a reply to severe criticism by remedial secession opponents: whether Kosovo in 2008 still satisfied the criteria for right to secession – in particular, whether Serbia was still denying internal self-determination for Kosovo in the year of 2008 (as Serbia had been offering autonomy for Kosovo at the negotiations table past few years before Kosovo seceded).

The Netherlands position is similar to Germany’s views. It also agreed that “a people must, *in principle*, seek to exercise the right to political self-determination with respect for principle of territorial integrity and thus exercise its right within existing international boundaries”. The right to external self-determination can appear only in exceptional circumstances and as an *ultimum remedium* resort<sup>257</sup>. The Netherlands base its theory on the UN GA Resolution 2625 “safeguard clause” which if read *a contrario* provides condition for a state to respect right to self-determination in order to invoke territorial

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<sup>256</sup> Ibid. p. 35

<sup>257</sup> Written Statement of the Netherlands para 3.6 (original emphasis)

integrity.<sup>258</sup> The Netherlands, similarly to Germany, states that right to external self-determination must meet two conditions:

1. Substantive condition – serious breach of obligation to respect self-determination by the state
2. Procedural condition – all effective remedies must have been exhausted.<sup>259</sup>

Despite a clear position of supporting remedial secession in its interpretation of self-determination, the Netherlands seems to cast some doubt on legal status of external self-determination as an emerged rule of customary law. In its written statement the Netherlands admits that “the emergence of the right to self-determination has not been without controversy” and is indirectly asking the ICJ to provide the final interpretation of the law of self-determination.<sup>260</sup>

In the range of interpretations of the law of self-determination and secession, the UK takes a more balanced position. The UK is avoiding associate the right to secession with the right to self-determination. The UK argues that the principle of respect to territorial integrity of states is not “a guarantee of the permanence of a state as it exists at any given time”, but merely a protection in international relations between states and therefore it does not apply to secessionist movements within the territory of a State.<sup>261</sup> The ICJ has endorsed such interpretation<sup>262</sup>. The UK states that international law does not confer right to secede outside the context of self-determination, but on the other hand, international law neither in general prohibits secession nor guarantees the unity and territorial integrity for states against internal movements leading to separation.<sup>263</sup> This position implies that UK chose a position to support that self-determination does not imply the right to secession, but right to secession

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<sup>258</sup> Ibid. para 3.7

<sup>259</sup> Ibid., para 3.9-3.11

<sup>260</sup> Written Statement of the Netherlands para 3.16-3.22

<sup>261</sup> Written Statement of the United Kingdom para 5.9.

<sup>262</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 80.

<sup>263</sup> Written Statement of the United Kingdom para 5.33

can also be distinguished from the context of self-determination and general international law does not prohibit secessions.

Perhaps the most interesting position is that of the Russian Federation. While the Russian Federation was expected to be supporter of strong emphasis of territorial integrity (especially in the case concerning its close ally Serbia), its position seems to be more favourable to the doctrine of remedial secession. Russian Federation openly admits the *a contrario* reading of the “safeguard clause” – “it is also true that the clause may be construed as authorizing secession under certain conditions”<sup>264</sup> – but then Russia argues that these certain conditions “should be limited to truly extreme circumstances, such as an outright armed attack by the present State, threatening the very existence of the people in question”.<sup>265</sup>

This reflects similar approach to Dutch and German first substantive condition (just Russia limits the human rights violation only to a question of survival of the people). Furthermore, the Russian Federation claims that otherwise (if there are no extreme circumstances) all conflicts should be settled within the framework of existing state – this is somewhat relating to the procedural condition for remedial secession (just Russian Federation carefully limits the conflict settlement only within state framework).

Such Russian approach is not a big surprise bearing in mind the 2008 Russia-Georgia war that resulted in two secessionist entities – Abkhazia and South Ossetia – proclaiming independence from Georgia. It seems that Russian Federation crafted the conditions for secession just to create basis for justification of secessions of these two entities. All in all, it is significant to say that in interpreting the contemporary law of self-determination Russian Federation does not rule out possibility for external self-determination in the form of secession.

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<sup>264</sup> Written Statement of Russian Federation, para 88

<sup>265</sup> Ibid. para 88

### 3.3.3. *Separate opinions of judges on remedial secession*

While majority of the judges in the ICJ chose not to provide an official interpretation on the contemporary law of self-determination and secession in Kosovo case, couple judges considered it was very relevant to address the international law norms on self-determination. Judge Trindade and Judge Yusuf comprehensively interpreted the law of self-determination in their separate opinions.

Judge Trindade in his long separate opinion claims that “the principle of self-determination has survived decolonization, in order to face nowadays new and violent manifestations of systematic oppression of peoples”<sup>266</sup>. In his opinion, it is irrelevant whether self-determination is given various qualifications, such as “remedial”. He further argues that no state can invoke territorial integrity or state sovereignty in order to commit atrocities.

Having extensively argued that humanist argument plays a key role in international legal order, he concluded that “the government of a state which incurs into grave and systematic violations of human rights **ceases** to represent the people or population victimized”<sup>267</sup>. Therefore the victimized people have entitlement for self-determination (which can be exercised in disruption with state’s territorial integrity – that is in the form of secession).

While the judge’s reasoning that self-determination is still relevant and applicable in the new challenges in international legal order is quite persuasive, the argument about cessation to represent the people is pretty ambiguous. Ambiguity arises from a question – what government then has the right to represent the victimized population? The logical reading of Trindade’s conclusion clearly indicates that it is not the state, but only the abusive government, loses its right to represent the people. External self-determination (secession) is, however, directed towards the state but not only towards the certain government. Trindade

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<sup>266</sup> Separate Opinion of Judge A.A. Cancado Trindade, para. 175

<sup>267</sup> Ibid. para. 180 (emphasis added)

has not denied that, if abusive government is replaced with the new human rights respecting government, the latter government has the right to represent the people and so it follows that this is merely a usual exercise of internal self-determination.

Therefore it is unclear whether Trindade meant that the people could be represented only by people's self-government or that the new government of the existing state can resume to represent part of its population (the people). The government replacement could be effective remedy. In such way Trindade failed to address the "ultimate remedy" criteria crafted by proponents of remedial secession theory.

Judge Yusuf has taken a slightly different approach while addressing the self-determination compared to Judge Trindade. Analysis of Yusuf argumentation suggests that he chose to take a perspective from the "law of secession" in international law. He "surely" admits that "there is no **general positive right** under international law which entitles all ethnically or racially distinct groups within existing states to claim separate statehood", but he further argues that there is an existing **specific right** of external self-determination recognized by the international law in favour of the peoples of non-self governing territories and peoples under alien subjugation, domination and exploitation <sup>268</sup>. Outside the context of the specific right, the ethnically or racially distinct group do not have right to unilateral secession simply because its wish to have its own state.

However, Yusuf is of opinion that in case such group is denied internal right to self-determination and subjected to "discrimination, persecution and egregious violations of human rights or humanitarian law" – right to self-determination may support a claim to separate statehood in exceptional circumstances.<sup>269</sup> According to the judge, such exceptional situation is mentioned in the "safeguard clause" of Declaration on Principles of International Law (that is the reflection of customary international law). The judge arrives to similar

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<sup>268</sup> Separate Opinion of Judge Yusuf. para.10 (emphasis added)

<sup>269</sup> Ibid. Para 11

conclusions to those of the proponents of right to remedial secession – the criteria for such exceptional right is that people have to be denied internal self-determination and all possible remedies for internal self-determination must be exhausted. Moreover, judge Yusuf considers that UN Security Council's decision to intervene could be additional criteria assessing the exceptional circumstances in given cases<sup>270</sup>.

Both ICJ judges took a position that international law recognizes the right to external self-determination outside colonial and foreign occupation context under carefully defined circumstances. While other judges (who submitted declarations, dissenting or separate opinions in the Kosovo case) did not analyze the law of self-determination, it can only be speculated whether majority in the ICJ would support the interpretation of self-determination provided by judges Trindade and Yusuf.

It could be suggested that the profound disagreement on existence of the right to secession among the judges led them to opt for a very formalistic approach in advisory opinion on Kosovo issue and avoid deliberation on the question of secession – can today fifteen judges undoubtedly declare a new emerged right to secession in customary international law or can they undoubtedly declare that international law prohibits the right to secession?

### **3.4. A DEVELOPING CUSTOMARY RULE?**

It may seem that currently the customary law of self-determination is undergoing evolution with regard to right to secession and it has not reached the point yet to clearly declare the existence or non-existence of right to secede. It can be logically implied that any change of customary rule will undergo few stages:

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<sup>270</sup> Separate Opinion of Judge Yusuf. Para 16

1. A small-scale dissent from existing customary rule. The new customary rule is in the process of formation. The states that reject the existing customary rule will be considered as violating the rule.

2. A widespread dissent from existing customary rule and changing it with a new customary rule. There are still a number of states that still adhere to the old customary rule.

3. Overwhelming agreement on a new customary rule. The few states that adhere to old customary rule will be considered violating the new customary rule with one reservation. The reservation means that states will not be bound by the newly formed customary rule, if they, while the custom was in process of formation, unambiguously and persistently registered their objection to the recognition of the practice as law.<sup>271</sup>

In author's opinion, the current situation in the modern law of self-determination regarding the right to secession is in the evolution process in no higher than in the stage two. Therefore, author considers that perhaps the ICJ made a good choice avoiding to interpret the content of self-determination in *Kosovo* advisory opinion. On the other hand, Peters has made a good point on a legal paradox regarding customary law on right to secession: "such a customary rule could only emerge out of the practice and *opinio juris* of **states**".<sup>272</sup>

### 3.4. GENERAL REMARKS

Remedial secession theory is a progressive interpretation of law of self-determination; however its status in international law remains unclear. Some scholars argue that right to remedial secession is *de lege lata* and others say it is *de lege ferenda*.

There is some institutional practice that indicates the existence and applicability of remedial secession doctrine in practical situations. However, the ICJ – a body that has

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<sup>271</sup> Damrosch et al., *International Law: Cases and Materials*, p. 100.

<sup>272</sup> Peters, "Does Kosovo Lie in the Lotus-Land of Freedom?," p. 104. (emphasis added)

authority to interpret what the law is – so far has declined to deliberate on the right to remedial secession or the right to self-determination in the post-colonial context.

The *opinio juris* of states indicate a half-half split in the international community. A number of states have already embraced remedial secession doctrine as existing law. On the other hand, there are states that persistently reject any motion to recognize the right to secession (or external self-determination) as part of international law.

It may be suggested that we are witnessing a formation of a new customary rule in international law. Such rule is recognizing remedial secession as an exercise of the right to self-determination of peoples. However, as the customary rule is still in the process of formation, there is uncertainty in the international legal order with regard to law of self-determination.

## Part IV. Remedial secession theory in practice: case studies

Several examples of secessions could be evaluated in the light of remedial secession doctrine. These secessions are about seceding from existing state possibly due to human rights abuses, but not connected to decolonization, occupational regimes or dissolutions of the states.

Although initially author planned to group example secessions into “lawful” and “unlawful”, it is inaccurate to use this ambiguous grouping – as it would imply that lawfulness of secession can be verified in international law.<sup>273</sup> Therefore author chose to group secessions into “successful” and “unsuccessful”. However, this grouping is relative and does not take into account the *de facto* success of secession. The successfulness rather depends on the recognition and international community support for secession.

The further chapters will discuss “successful” secessions that are used as proof by remedial secession doctrine proponents: Bangladesh secession from Pakistan, Eritrea secession from Ethiopia and Kosovo secession from Serbia.

For comparative analysis “unsuccessful” secessions of “TRNC” and Abkhazia will be reviewed in the light of remedial secession doctrine. Both secessions are effectively completed and both Cypriot Turks and Abkhaz ascertain their right to self-determination, however the secessions did not attract support from international community.

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<sup>273</sup> See subchapter 2.1.2.

## 4.1. “SUCCESSFUL” SECESSIONS

### 4.1.1. *Bangladesh secession from Pakistan*

Bangladesh is usually used as a prime example of remedial secession. Established in 1947 as independent state, Pakistan consisted of two geographically separate provinces: West Pakistan and East Pakistan (East Bengal). In 1971 East Pakistan seceded from Pakistan and established a new independent state – Bangladesh. The secession in 1971 does not fall under colonial self-determination, because Pakistan already in 1947 exercised its colonial self-determination externally.

It is not disputed that Bengalis constitute people. They were not only geographically separated from Urdu speaking western Pakistanis, but were racially and culturally distinct from them. Bengalis spoke different language, shared common historical tradition, shared common economic life (that was separate from West Pakistan) and were territorially connected with East Pakistan. If to put them in the modified UNESCO definition of people – Bengalis met all the set out criteria.

Despite that East Pakistan was smaller territory; it had nearly twice more population than West Pakistan. However, West Pakistan was traditionally dominant in governance and administration of the whole country. In 1970's the political crisis emerged as democratically elected representatives of East Bengal demanded constitutional rearrangement and sought for confederation of the two units, giving East Bengal more self-governance.

West Pakistan launched a military operation to suppress the political movements in East Bengal. “The atrocities committed during the military operation by Pakistani Army are a matter of common knowledge and have been documented elsewhere”<sup>274</sup>. “The people of East Pakistan were exposed to serious harm in the form of denial of internal self-determination and widespread violations of fundamental human rights. Moreover, all realistic options for

<sup>274</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 121.

the realization of internal self-determination were exhausted.”<sup>275</sup> In the light of ongoing denial of self-determination and gross human rights violations, East Pakistan seceded. The humanitarian crisis has escalated (including millions refugees that sought refuge in India) and India’s army intervened into the territory of East Bengal and defeated Pakistani army. “Indian intervention was criticized by many governments as a violation of the charter, but that illegality was not regarded as derogating from the status of East Bengal, or as affecting the propriety of recognition.”<sup>276</sup> Bangladesh was recognized by many countries and eventually admitted to the United Nations.

According to Crawford, East Bengal qualified as a self-determination unit within exceptional category to exercise external self-determination.<sup>277</sup> Tomuschat also argues that the events leading to the establishment of Bangladesh can be classified as coming within the purview of remedial secession.<sup>278</sup>

However, it is relevant to mention that Pakistan eventually consented to secession of Bangladesh and only after that consent (in 1974) the Bangladesh was admitted to the United Nations organization. Thus, some may argue that the secession was consensual, not unilateral (therefor the remedial secession theory is not applicable here). However, it should be agreed with Bayefsky that “many situations may display both unilateral and consensual elements in the process culminating in a successful secession” as it was with Bangladesh secession.<sup>279</sup> Moreover, remedial secession theory proponents may rebut the “consensual secession” argument claiming that Pakistan did not consent, but in fact eventually admitted that Pakistan lost its claim for territorial integrity and therefore admitted *post factum* that Bangladesh had right to secede due to Pakistan’s perpetuated denial of self-determination.

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<sup>275</sup> Ibid., p. 123.

<sup>276</sup> Crawford, *The Creation of States in International Law*, p. 140.

<sup>277</sup> Ibid., p. 142.

<sup>278</sup> Tomuschat, “Secession and self-determination,” p. 42.

<sup>279</sup> Anne F. Bayefsky, *Self-determination in international law: Quebec and lessons learned: legal opinions* (Martinus Nijhoff Publishers, 2000), p. 221.

#### 4.1.2. Eritrea secession from Ethiopia

In 1952 a former non-self-governing territory Eritrea was federated with Ethiopia. Eritrea since 1952 referred to its right of self-determination; however in 1962 the federal arrangement was abolished unilaterally by Ethiopia.<sup>280</sup> The denial of self-government erupted in the decades-long independence war by Eritreans against all successive oppressive Ethiopian government. Eventually the Eritrean insurgency ousted the repressive regime from Eritrea in 1991 and gained effective control over the territory (effecting secession). According to Tomuschat, “the whole process of secession was oriented towards remedying the wrong suffered by the population as a consequence of the Ethiopian decision to do away with the autonomy they had been promised to enjoy.”<sup>281</sup>

Again, it is generally not disputed that Eritreans constitute a people – they satisfied criteria of territorial connection, were culturally and linguistically distinct from Eritreans. Moreover, Eritreans invoked their right to self-determination already since unification with Ethiopia. Moreover, Ethiopia have been persistently denying the right to self-determination of Eritrean people and there were no effective remedies for internal self-determination.

However, similarly as to Bangladesh, it is important to mention that Eritrean secession also had consensual elements. The new transitional government of Ethiopia agreed to renegotiate relations between Ethiopia and Eritrea and in 1993 the UN sponsored referendum was held, where people of Eritrea overwhelmingly voted for independence. Therefore although *de facto* seceded in 1991, Eritrea is considered *de jure* as state established in 1993 – after the referendum of 1993 and subsequent formal declaration of independence. The international recognition and admission to the United Nations also followed the 1993 referendum.

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<sup>280</sup> Crawford, *The Creation of States in International Law*, p. 402.

<sup>281</sup> Tomuschat, “Secession and self-determination,” p. 28.

### 4.1.3. Kosovo secession from Serbia

The Kosovo secession from Republic of Serbia is a prominent and most recent example of possible remedial secession. This example is of particular interest for academia because although there is clearly no consensual elements of secession, Kosovo secession has gained a widespread international recognition<sup>282</sup>.

Kosovo was autonomous province within Serbia in Socialist Federal Republic of Yugoslavia. The 1974 federal constitution has granted wide autonomy rights for Kosovo. 1974 SFRY Constitution confirmed the dual status of Kosovo – it is part of Serbia but at the same time also a constituent unit of the federal Yugoslavia. Kosovo enjoyed a status equivalent to that of the six constituent republics<sup>283</sup> with direct representation in main federal bodies. Kosovo had equal status with the republics in economic and social policy. It was also separately represented in the Federal Court and the Constitutional Court. The 1974 Constitution prohibited Serbia from intervening in provincial affairs against the will of the Kosovo Assembly. Kosovo had its own National Bank, Supreme Court, independent administration and right to adopt its own Constitution.<sup>284</sup>

The autonomy accorded by 1974 constitution lasted until 1989, when Serbian authorities (under Milosevic regime) took actions to remove autonomy and regain direct control over the provinces. In response to loss of autonomy and removal from governing of the province, Kosovo Albanian replied with civil disobedience by creating parallel institutions next to official Serbian-controlled institutions. In the face of Yugoslavia dissolution, Kosovo parliament declared Kosovo as constituent republic within Yugoslavia and later in 1991 after unofficial referendum (in which absolute majority of Kosovo

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<sup>282</sup> As of 28 November 2011, Kosovo is recognized by 85 UN member states.

<sup>283</sup> The six constituent republics were Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, Montenegro. The 2 autonomous provinces were Kosovo and Vojvodina.

<sup>284</sup> Written Contribution of the authors of the unilateral declaration of independence in the ICJ Kosovo advisory proceedings, 17 April 2009, para. 3.19

Albanians voted in favour of independence) announced Republic of Kosovo declaration of independence.<sup>285</sup> The only state to recognize it was Albania.

“After years of peaceful resistance to Milosevic’s policies of oppression – the revocation of Kosovo’s autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life – Kosovo Albanians eventually responded with armed resistance”.<sup>286</sup> This developed into an armed conflict in 1998-1999 between Kosovo Albanian military partisan group “Kosovo Liberation Army” (KLA) and Serbian forces. During the conflict Republic of Serbia employed “ethnic cleansing” policy in Kosovo – mass killings of Kosovo Albanian civilians were carried out, villages burned and destroyed, Kosovo Albanian were banished from their home and deported from Kosovo, war crimes, crimes against humanity took place and there were gross violations of other human rights and humanitarian law norms.<sup>287</sup> Situation in Kosovo caused humanitarian crisis in the Balkans region and took attention of international community.

In response to humanitarian crisis, NATO launched a military operation to stop grave human rights violations perpetrated by Serbian authorities in Kosovo. Although the military intervention is of doubtful legality, it effectively halted the atrocities and Serbia lost its control of the territory. The UN Security Council in its resolution 1244 established international administration of Kosovo with the view to provide “substantial autonomy and meaningful self-administration”<sup>288</sup> According to Tomuschat, “autonomy for a given human community cannot be invented by the Security Council without any backing in general international law”.<sup>289</sup> He claims that Security Council Resolution 1244 may be deemed “to constitute the first formalized decision of international community recognizing that a human

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<sup>285</sup> Fierstein, “Kosovo’s declaration of independence: an incident analysis of legality, policy and future implications,” p. 421.

<sup>286</sup> *Report of the Special Envoy of the Secretary-General on Kosovo’s future status S/2007/168*, available at <http://www.unosek.org/docref/report-english.pdf>

<sup>287</sup> See more: 26 February 2009 ICTY Judgment in case IT-05-87-T *Milutinovic et al*

<sup>288</sup> UN Security Council Resolution 1244 (1999), preamble

<sup>289</sup> Tomuschat, “Secession and self-determination,” p. 34.

community within a sovereign State may under specific circumstances enjoy a right to self-determination".<sup>290</sup> The resolution envisioned status settlement talks between Kosovo Albanians and government of Serbia, however the status negotiation process has failed due to lack of agreement who has sovereignty over Kosovo. Eventually, in 2008 Kosovo unilaterally proclaimed independence from Serbia.

In the case of Kosovo, it has been established that internal self-determination was denied to ethnic Albanians after 1989 and gross human rights violations took place – the circumstances that arguably make remedial secession justifiable.<sup>291</sup> Remedial secession doctrine proponents claim that secession was a remedy to denial of internal self-determination by state of Serbia and Kosovo people exercised their right “externally”. This was expressed not only in the academia, but by a number of states in the Kosovo advisory proceedings.<sup>292</sup> It is considered that secession was *ultima ratio* mean because there were no alternative effective remedies and the status talks have repeatedly failed. Tomuschat submits that Kosovo situation falls under purview of remedial secession.<sup>293</sup>

However, there is critique added whether Kosovo Albanians indeed satisfied criteria of remedial secession. "It is difficult to perceive Kosovo's secession in 2008 as a last resort for preventing oppression"<sup>294</sup>. Vidmar agrees that there is "a tenable argument that the entitlement of Kosovo Albanians to remedial secession was born in the years of oppression but was exercised with a delay. However, even with this interpretation the crucial element of remedial secession – the last resort – seems to be missing"<sup>295</sup>. A lack of last resort is grounded by the facts that:

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<sup>290</sup> Ibid.

<sup>291</sup> Jure Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence,” *Vanderbilt Journal of Transnational Law* 42 (2009): p. 817.

<sup>292</sup> See chapter 3.3.

<sup>293</sup> Tomuschat, “Secession and self-determination,” p. 42.

<sup>294</sup> Vidmar, “International Legal Responses to Kosovo’s Declaration of Independence,” p. 817.

<sup>295</sup> Ibid.

1. That fall of Milosevic regime and democratic change in Serbia since 2000 made impression that 1998-1999 events are not likely to be repeated.

2. At the time of secession, there were no ongoing human rights violations from Serbian side.

3. In the status talks Serbia has been willing to accept substantial autonomy of Kosovo and this could be a remedy in the form of internal self-determination.

Tancredi also argues that the reintroduction of autonomous regime would have been appropriate remedy for Kosovo.<sup>296</sup> On the other hand, it may be argued that the fact that Serbia had a new democratic government and at the time of secession there were no ongoing human rights violations does not provide sufficient guarantees that Kosovo Albanian right to self-determination is redressed. A clear settlement and/or constitutional rearrangements were necessary to remedy the conflict in Kosovo. The debate on “failed talks” is also rather factual evaluation if there was indeed remedy available and would it be effective. But who should evaluate if the availability and effectivity of remedies in this particular situation?

In addition, this critique of “lack of last resort” also arises from a general discussion about “timing of secession” that is not widely debated among scholars – can the exercise of remedial secession be delayed? Should have Kosovo Albanians proclaimed independence immediately in 1999 when the special conditions existed without involving themselves in a status talks that had possibly no perspective for conflict resolution?

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<sup>296</sup> Tancredi, “A normative ‘due process’ in the creation of States through secession,” p. 188.

## 4.2. “UNSUCCESSFUL” SECESSIONS

### 4.2.1. *Turkish Republic of Northern Cyprus*

The North Cyprus secession is a worthy example to analyze in the view of remedial secession doctrine. An island of Cyprus that consisted of mainly two communities – Greek and Turkish – was a non-self-governing territory administered by the United Kingdom. In 1960 the independence of Republic of Cyprus was proclaimed and constitution was negotiated that provided guarantees of power-sharing among both communities in the newly established state. Both communities are considered as co-founders of Cypriot state and they share sovereignty over it.

However, soon after independence in 1963 there was a deadlock in the government and inter-communal clashes erupted. The Cypriot Greek community – comprising the majority of the population – had favoured for the union with Greece (*enosis*), but the constitutional rights accorded to the Turkish Community – comprising the minority of the population – prevented to realize that idea. The president Makarios had tried to amend the constitution and to remove various constitutional guarantees for Cypriot Turkish community. The Turkish leadership rejected these proposals and in response the Cypriot Greek officials prevented Turks from participation in the government. The ethnic violence escalated and the vulnerable Cypriot Turkish community was forced into enclaves.

In 1974 military junta of Greece sponsored *coup d'état* in Cyprus that aimed to annex the island to Greece. The killings of the civilians (not only of Cypriot Turks, but also of Cypriot Greeks that opposed *enosis*) and other severe human rights abuses were perpetrated. In response to violence and killings Turkey had intervened to the island and deployed its army in the Turkish predominant North. Turkey effectively took the northern part of Cyprus territory over its control. Turkey invoked its right to military intervention under the Treaty of

Guarantee<sup>297</sup>. Consequently in 1975 the Cypriot Turkish community declared “Turkish Federative State of Cyprus” with a view of future constitutional rearrangement of Cyprus that would establish a federal state. Eventually, in 1983 Cypriot Turks proclaimed “Turkish Republic of Northern Cyprus”. However, until now Cypriot Turkish community continues negotiations with Republic of Cyprus for reunification of the island and power-sharing.

There is little doubt that Cypriot Turkish community constitutes a people for the purpose of self-determination. In the decolonization process the Cypriot Turks and Cypriot Greeks were considered to be peoples having right to self-determination.

With regard to TRNC “independence”, Turkish population of Cyprus asserts its right to external self-determination (colonial self-determination) rather than right to secession. “The Turkish population views the Proclamation of the Turkish Republic of Northern Cyprus in 1983 in this *sui generis* situation to be a continuation of the original right of the Turkish community to self-determination, not a real secession.”<sup>298</sup> On the other hand, the Cypriot Turks are not unconditionally insisting on independent sovereign state of their own.

In author’s opinion, the fact that Cypriot Turkish community is involved for unification talks since the events of 1974 indicates that secession is rather a “temporary” remedy for the violation of their rights to self-determination. As soon as Cypriot Turkish community will have effective internal self-determination (perhaps in the forms of devolutionary or federal self-determination<sup>299</sup>) within Cyprus, the secession will be revoked.

Due to doubtful legality of Turkish intervention<sup>300</sup> the TRNC is not recognized by any state, except Turkey. Dugard and Raic argues that there exists duty of non-recognition on the basis of aggression<sup>301</sup> for the states. The main reason for non-recognition of TRNC is not the

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<sup>297</sup> Treaty of Guarantee (1960), that designated Turkey, Greece and the UK as guarantors of Cyprus constitutional framework.

<sup>298</sup> Hannum, “Rethinking Self-Determination,” p. 50.

<sup>299</sup> See chapter 1.3.

<sup>300</sup> The legality of Turkish military intervention of 1974 is not the subject-matter of this thesis

<sup>301</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 101.

secession *per se*, but the fact that TRNC is founded on Turkey's illegal use of force against Cyprus in 1974.<sup>302</sup>

However, despite non-recognition as a consequence of Turkey's actions, question arises whether Turkish Cypriot community **possessed** a right to external self-determination in the light of denial to internal self-determination perpetrated by the state. Crawford argues that "the status of local entity and the legality of the use of force ought to be regarded as separate issues so that the illegality of the intervention should not prejudice the pre-existing right of the local unit to self-determination."<sup>303</sup> It may argued that like in Bangladesh or Kosovo situations, Turkish community could choose to effect secession as an exercise of remedial secession. There was evidence of state abuse of Cypriot Turks' human rights already since 1963 and indication of denial for self-government.

If Turkish Cypriots had right to remedial secession, could a third State (Turkey) assist a people in their quest for secession and dismember the territory of Republic of Cyprus? Was secession a final remedy, if the constitutional order of Cyprus was soon restored after the coup, and in 1975 (or in 1983) until now there is a functioning democratic government of Cyprus and the repetition of 1963-1974 events seem to be highly unlikely?

Furthermore, in the theoretical plane, a question arises how the "continuing and not once-for-all"<sup>304</sup> right to internal self-determination can be exercised in practice. Can a people that already have one form of internal self-determination (for example, autonomy) later decide that they want another form of internal self-determination (for example, federal arrangement)? It seems that Cypriot Turkish community considers that constitutional arrangements of 1960s are not anymore sufficient and they want to have a different form of self-government. The question gives food for thought not only for remedial secession theorists, but generally for all scholars that research on the Law of Self-determination.

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<sup>302</sup> Ibid., p. 133.

<sup>303</sup> Crawford, *The Creation of States in International Law*, p. 140.

<sup>304</sup> Ibid., p. 126.

### 4.2.2. Abkhazia

Abkhazia was an autonomous region within Soviet Republic of Georgia. The dissolution of Soviet Union caused internal unrest in Georgia and rise of Abkhaz secessionism. After Georgia declared restoration of its independence in 1991, Abkhaz sought federal arrangements with Georgia but Georgian authorities ignored such requests. In response, Abkhazian Supreme Council declared “Republic of Abkhazia” in 1992. In 1992 armed-conflict broke out between Georgian army and Abkhaz militia. This ended with Abkhazia obtaining *de facto* control of the territory.<sup>305</sup> Abkhazians consider that their right to self-determination was forcibly suppressed by Georgia that tried to “a unitary and mono-ethnic state”.<sup>306</sup>

It is crucial to mention that “ethnic Abkhaz accounted for only 17 percent of the territory they now control, prior to the outbreak of fighting in 1992-1994.”<sup>307</sup> The subsequent events of deportation of Georgians and expulsions of refugees led to big shift of demographics of Abkhazia. The UN Security Council in its several resolutions has condemned “ethnic killings” and human rights violations committed in Abkhazia and expulsion of peoples by Abkhaz forces.<sup>308</sup> Since Abkhazia gained effective control in the territory, it shifted its demands for full independence from Georgia and proposals for federal arrangements were no more acceptable for Abkhaz side. The Georgia-Russia war in 2008 did not change the situation on ground – Abkhazia remained *de facto* independent from Georgia, only Russia extended recognition to Abkhazia.

<sup>305</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 114–115.

<sup>306</sup> Unrepresented Nations and Peoples Organization 22-23 January 1993 conference report “Self-Determination In Relation To Individual Human Rights, Democracy And The Protection Of The Environment”, Abkhazia comment, available at:

<http://www.unpo.org/downloads/Self-determination%20conference%201993.pdf>

<sup>307</sup> Hannum, “Self-Determination in the Twenty-First Century,” p. 68.

<sup>308</sup> See UN Security Council Resolutions 1036(1996) and 1065(1996).

It is important to examine the Abkhazia secession in the light of remedial secession doctrine. In order for Abkhazia to acquire right to remedial secession, it must meet all three conditions set out by the doctrine.

Firstly, it is highly disputed whether Abkhazians qualify as a people for the purpose of right to self-determination. If the modified UNESCO definition is applied it is clear that Abkhazians did not constitute majority within the given territorial unit. Thus, Abkhazian cannot qualify as people and secession violates the right of self-determination of the people of that territory. Secondly, there was no evidence of widespread and serious violations of Abkhazian human rights perpetrated by Georgia, therefore the second criteria is not satisfied. And finally, Abkhazians were “not prepared to exhaust effective and peaceful remedies before claiming secession”<sup>309</sup> – the secession was not *ultima ratio* remedy. In conclusion, Abkhazians did not possess a right to remedial secession and their unilateral secession was in violation of the law of self-determination.<sup>310</sup> Remedial secession theory proponents consider that precisely this nonconformity with remedial secession requirements led to non-recognition of this secession.

### 4.3. GENERAL REMARKS

The appliance of remedial secession theory in practice suggests that some “successful” secessions gained international recognition because people obtained had a right to secede in particular situations. These secessions were last resort remedies for persistent denial of self-determination by the existing states and they complied with international law standards, namely law of self-determination. Although “successfulness” of Bangladesh and Eritrea secessions were influenced by “consensual elements” in the secession, a Kosovo secession has even stronger basis to substantiate the theory.

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<sup>309</sup> Dugard and Raič, “The role of recognition in the law and practice of secession,” p. 118.

<sup>310</sup> *Ibid.*, p. 119.

On the other hand, remedial secession theory cannot avoid critique related to empirical evaluation in each particular case of such legal constructions as “last resort remedy”, “effective remedy”, “denial of self-determination”, “gross human rights violations”. Moreover, the debate on “timing of secession” might cause significant modifications in the doctrine of remedial secession. While Kosovo has satisfied all the three criteria to obtain right to remedial secession, it seems that secession is executed with delay and possibly lost its remedial character.

The effective secessions that established states should normally deserve recognition as they factually meet the statehood criteria. However the international community seems to be searching for additional criteria before granting recognitions to *de facto* independent states that came into existence through secession. Does “legitimacy of secession” is this criteria? If remedial secession doctrine is guide for legitimacy of secession, then non-recognition of Abkhazia clearly resulted from non-compliance with right to remedial secession. On the other hand, if international community does not extend recognition due to secessions connection to violation of international norms (e.g. non-use-of-force), it remains unclear if that surrounding illegality prejudices the people’s remedial right to secession.

The TRNC is pretty interesting example of secession – where the people is in the *status quo* of secession but pending internal self-determination. The law of self-determination should clarify how a “continuing” right of internal self-determination can be exercised, especially when a people seek rearrangement due to unworkable model of internal self-determination.

## Conclusion

Self-determination has undergone fundamental evolution in the 20<sup>th</sup> century. Emerged as a political idea in post-World War I era, it was indirectly reflected in the League of Nations mandate system. Only in the UN era self-determination was recognized as legal principle. -determination had been flourishing in the context of decolonization where it evolved into status of legal right. Right to self-determination becomes an essential norm of international law, which is reflected both in treaty law and international customary law and in the ICJ jurisprudence. Self-determination enjoys its status as a human rights standard and *erga omnes* norm. Although, decolonization processes are virtually over, the self-determination was understood to retain its continuity through right to “internal” self-determination. This means that right to self-determination should be exercised “internally” within the framework of existing state.

However, self-determination suffers from degree of uncertainty. Firstly, it is confusing to determine the subject of the right. While self-determination in colonial context concerned territories, the logical conclusion from sources presupposes to conclude that "peoples", not territories, hold the right to self-determination. Furthermore, even the world "people" is suffering from unclarity. It is submitted that a two-prong test based on UNESCO definition<sup>311</sup> could be used to define the "people":

1. Objective test – the group lives in a distinct territory where it constitutes a clear majority and the group possesses external differences from other groups of individuals.

2. Subjective test:

- a) Self-consciousness – individuals within the group perceive collectively themselves as distinct people.

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<sup>311</sup> 1990 February 22 Final report and recommendations, UNESCO International Meeting of Experts on further study of the concept of the rights of peoples, available at <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

b) Representation – individuals within the group have political/social structures through which they can be represented.

c) Viability - the group can form a viable entity.

It is also worthy to note, that terms "people" and "minority" are not contradictory, but even might be overlapping. It may be possible that a group of individuals possess at the same qualify as "a people" and qualify as "a minority".

*Ex facie*, the right to self-determination conflicts with principle of territorial integrity”.<sup>312</sup> This tension arises due to external aspect of self-determination, where peoples are entitled to establish sovereign independent state and thus alter the boundaries of the “parent” state. Many authors are of opinion that principle of territorial integrity is slowly eroding.<sup>313</sup> The developed human rights standards have imposed many obligations on states and states cannot anymore invoke sovereignty as justification for various human rights violations inside the state.

It can be easily argued that the “safeguard clause” of the Declaration on Principles of International Law imposes requirement for states to comply with internal self-determination of peoples and therefore to possess representative government, by making territorial integrity a rebuttable presumption which can be invoked only by states who act in accordance with the principle of self-determination.<sup>314</sup> Therefore there possibility for external self-determination (in the form of secession) is not excluded and may be possible.

In academia a movement of “re-self-determination” has emerged that tries to redress the theoretical vacuum in the concept of self-determination. “Re-self-determination” describes the ongoing processes in the academia that try to “reconsider”<sup>315</sup>, “rethink”<sup>316</sup>,

<sup>312</sup> Simpson, “Diffusion of Sovereignty,” p. 283.

<sup>313</sup> Simpson, “Diffusion of Sovereignty,” p. 263.

<sup>314</sup> Simpson, “Diffusion of Sovereignty,” p. 283.

<sup>315</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered.”

<sup>316</sup> Hannum, “Rethinking Self-Determination,” p. 1.

“reconceptualize”<sup>317</sup>, “reapproach”<sup>318</sup>, “reconceive”<sup>319</sup>, “redefine”<sup>320</sup>, “reinterpret”<sup>321</sup>, “reform”<sup>322</sup> or in other ways to revisit the law of self-determination. While some legal scholars claim that self-determination is transforming into right to democratic governance, others argue for possibility of “external” self-determination in exceptional situations. Such “external” self-determination could be exercised through secession. The debate arises in the scholarly whether international law authorizes secession from existing sovereign states.

It is submitted that academicians tend to neglect distinction between secession and right to secession. While secession falls in the “international law-free zone”<sup>323</sup>, international legal order is not neutral to causes and legal consequences of secession. The illegality connected to secession might qualify secession as “unlawful”. Moreover, international law might be rejecting neutrality to secession by authorizing “right to secede”. If there is a “right to secede” in international law, this would imply that the legitimacy of secession could be verified.

An emerged “remedial secession” doctrine claims that international law authorizes a special right to secede under the principle of self-determination. Secession is understood as an exercise of the right to self-determination. Secession would be a last resort remedy to violations of the right to self-determination and gross human rights abuses by the “parent” state.

The doctrine is based on *ubi jus ibi remedium* principle. The doctrine claims that if the existing state is violating people’s right to self-determination and there are no alternative remedies to redress that situation, people can exercise their right to self-determination

<sup>317</sup> Simpson, “Diffusion of Sovereignty,” p. 261.

<sup>318</sup> McCorquodale, “Self-Determination: A Human Rights Approach.”

<sup>319</sup> Lee Seshagiri, “Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law,” *Harvard International Law Journal* 51 (2010).

<sup>320</sup> Hannum, “Rethinking Self-Determination,” p. 67.

<sup>321</sup> Murswiek, “The Issue of a Right to Secession - Reconsidered,” p. 35.

<sup>322</sup> Allen Buchanan, “Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession,” in *Negotiating Self-Determination*, ed. Hurst Hannum and Eileen F. Babbitt (Lexington Books, 2005), p. 81.

<sup>323</sup> Peters, “Does Kosovo Lie in the Lotus-Land of Freedom?,” p. 98.

“externally” in the form of secession. Legal interpretation that authorizes secession is also derived from the “safeguard clause” of the Declaration of Principles of International Law that provides the “rebuttable presumption” on territorial integrity.

Although the ICJ has deliberated that the principle of respect to territorial integrity is applicable for states<sup>324</sup>, this has not weakened “remedial secession” doctrine. On the contrary, the ICJ has abolished theoretical obstacle – the territorial integrity – that was used as counterargument for remedial secession by a number of the states (in advisory proceedings) and by remedial theory opponents. If safeguard clause is applicable only for states, that means “secessionists” are not bound by the territorial integrity and this reaffirms the neutrality of international law toward “secessionary independence”. However, secessionists should still be interested to secede only as last resort remedy, because secession that would be incompatible with right to self-determination (as defined in the “safeguard clause”) would prevent assistance from other states and would cause non-recognition of the seceding entity.

According “remedial secession” theory, the right to unilateral secession comes into existence only if all strict special conditions are met:

1. Secessionists qualify as “people”;
2. There is denial of self-determination of the people (gross human rights violations);
3. Secession is a final remedy (of last resort).

All these three criteria have two-fold uncertainty. First, it is unclear: what is “a people”; what constitutes “denial of self-determination” or “gross human rights violations”; and what can be considered a “remedy”. Second, even if the former are clarified and established, it is unclear who has in particular case to determine: that the secessionists constitute people; that certain situation on ground amounts to denial of self-determination, and that the other remedies given are unavailable or not effective.

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<sup>324</sup> *Accordance with International Law of Declaration of Independence of Kosovo*, para. 80.

It is submitted that remedial right to secede is not perennial. Once the conditions are met, the people must effect secession immediately as long as the special conditions exist. If the gross violations are halted and alternative remedies appear, the special right to secede expires because secession would not retain its remedial character.

Remedial secession theory is a progressive interpretation of law of self-determination; however its status in international law remains unclear. Some scholars argue that right to remedial secession is *de lege lata* and others say it is *de lege ferenda*.

There is some institutional practice that indicates the existence and applicability of remedial secession doctrine in practical situations. However, the ICJ – a body that has authority to interpret what the law is – so far has declined to deliberate on the right to remedial secession or the right to self-determination in the post-colonial context.

The *opinio juris* of states indicate a half-half split in the international community. A number of states have already embraced remedial secession doctrine as existing law. On the other hand, there are states that persistently reject any motion to recognize the right to secession (or external self-determination) as part of international law.

It may be suggested that we are witnessing a formation of a new customary rule in international law. Such rule is recognizing remedial secession as an exercise of the right to self-determination of peoples.

. It can be logically implied that any change of customary rule will undergo few stages:

1. A small-scale dissent from existing customary rule. The new customary rule is in the process of formation. The states that reject the existing customary rule will be considered as violating the rule.

2. A widespread dissent from existing customary rule and changing it with a new customary rule. There are still a number of states that still adhere to the old customary rule.

3. Overwhelming agreement on a new customary rule. The few states that adhere to old customary rule will be considered violating the new customary rule with one reservation. The reservation means that states will not be bound by the newly formed customary rule, if they, while the custom was in process of formation, unambiguously and persistently registered their objection to the recognition of the practice as law.<sup>325</sup>

In author's opinion, the current situation in the modern law of self-determination regarding the right to secession is in the evolution process in no higher than in the stage two. While the customary rule is still in the process of formation, there is uncertainty in the international legal order with regard to law of self-determination.

The analysis of case studies indicates that remedial secession theory is already working in practice. The Bangladesh and Eritrea examples may be considered a manifestation of the remedial secession doctrine, because the both secessions were defence to persistent and gross human rights violations conducted respectively by Pakistan and Ethiopia on parts of their populations.

The example of Kosovo has also substantiated the remedial secession doctrine. Kosovo had clearly met the three criteria, secede and gained the widespread international recognition<sup>326</sup> and international support<sup>327</sup>.

On the other hand, remedial secession theory cannot avoid critique related to empirical evaluation in each particular case of such legal constructions as "last resort remedy", "effective remedy", "denial of self-determination", "gross human rights violations". Moreover, the debate on "timing of secession" might cause significant modifications in the doctrine of remedial secession and influence the formation of customary rule. While Kosovo has satisfied all the three criteria to obtain right to remedial secession, it seems that secession is executed with delay and possibly lost its remedial character.

<sup>325</sup> Damrosch et al., *International Law: Cases and Materials*, p. 100.

<sup>326</sup> As of 28 November 2011, Kosovo is recognized by 85 UN member states.

<sup>327</sup> E.g. by NATO or the EU

The “unsuccessful” secession may as well indicate that remedial secession theory is already working in practice. The non-recognition of Abkhazia indicates that states are searching for additional criteria before granting recognitions to *de facto* independent states that came into existence through secession. There might be customary rule formatting which will introduce additional “legitimacy of secession” criteria for recognizing seceding entities.

It can also be submitted that the violations of *jus cogens* norms might frustrate otherwise a credible right to remedial secession from an existing state as in the case of North Cyprus. However, the Cypriot case poses more general questions for the self-determination theory and for “remedial secession” doctrine, namely (1) how a “continuing” right of internal self-determination can be exercised, especially when a people seek rearrangement due to unworkable model of internal self-determination and (2) can remedial secession be a “temporary” remedy lasting until the alternative remedies become available.

All in all, whatever the content of the law of self-determination may be in the future, it is obvious that mid-twentieth century approach is no more feasible to realities in the world and self-determination (or another institutes of international law) must comprehensively address all related matters – *inter alia* who is the subject of the right, how the right to internal self-determination is exercised, under what circumstances and criteria the right to external self-determination (right to secession) can be exercised, how to determine if the criteria is met, what if certain circumstances cease to exist, how can the denial/violations of right to self-determination can be remedied and what constitutes an effective remedy. All these matters are currently debated among the state officials and academia but the outcome of this debate will contribute to the clarification of modern law of self-determination and indicate a consensus of newly formatting customary rule.

The author recommends to develop an institutional framework that would ensure state compliance with self-determination and would provide a possibility to adjudicate self-

determination disputes. As people itself cannot bring the case against a sovereign in the International Court of Justice, there still should be possibility for peoples to refer a dispute to a national court or international institution. The peaceful settlement of the disputes would prevent peoples from violent “independence wars” and the “parent” States would feel motivated to solve all the disputes and agree on the internal forms of self-determination before the secessions impair their territories.

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- Written statement of Azerbaijan
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- Written Statement of the Netherlands
- Written Statement of the United Kingdom
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- Separate Opinion of Judge Yusuf
- Declaration of Judge Simma

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