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THE RIGHT OF SELF-DETERMINATION AS A NON-VIABLE
GROUND IN ITSELF FOR SECESSION

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ABSTRACT

The international community is facing separatist conflicts. The status quo contributes to these conflicts as the concept of self-determination in international law is unclearly defined and outdated. Internal self-determination is unquestionably guaranteed as a human right whereas the existence of external self-determination is contested. The idea of external self-determination of “peoples” is expressly in contradiction with the territorial integrity of states. The thesis begins with the history of the political concept of self-determination and the progress towards an internationally recognized right. The author proceeds by portraying the right of self-determination in the present and the problems that it is facing. Next, the author discusses theories on secession which function as a sign as to what thought-process the future law on secession should be built upon. Lastly, the author of this thesis proposes development towards a legal framework on secession to combat the abuse of self-determination.

Keywords: Self-determination, Secession, Territorial Integrity, Minorities, Oppression

INTRODUCTION

The universal right to self-determination belongs to everyone. However, the content of this right lacks clarity even in the eyes of scholars who battle with difficult topics on a daily basis. How can this right belong to us when we don't even know what it entails? Once a tool for decolonization, the right of self-determination has evolved into a weapon in the hands of separatists who misuse it for their claims of independence.

The goal of this thesis is to find reasonable boundaries for the principle of self-determination in order to solve the legitimate grounds for secession. However, it is of utmost importance to highlight the last resort nature of secession.¹ Secession is a process where territory and its population withdraw from an already existing state and form a new state on that territory.² The author of this thesis seeks to unriddle the circumstances where a group of people in a territory gain the right to secede. In order to do this, we have to analyze the contemporary legislation on the topic and the theories around formation of new states.

The hypothesis of this thesis is that there is a gap in international law regarding secessions and an international legal framework must be constructed to guarantee legal certainty to States and sub-state-groups. The author uses the correlational research method in an attempt to find an explanation to the present gap in international law relating to secessions where sub-state-groups strive to exercise their right of self-determination. Do these groups have to suffer human right violations to justify their claims or do they have the right to secede simply based on their cultural cohesion?

In the first section of the thesis, the author defines the right of self-determination by going through the history of the right and by addressing the various legal documents that govern the right. He then compares the interpretations of the ambiguous right by using among other documents and opinions of scholars, the Advisory Opinion of the International Court of Justice in the case of Kosovo, as a tool.

¹ Rothchild, D. (1997). Secession is a last resort. *Politics and the life sciences*, Vol. 16, No. 2, 270-272.

² Pavkovic, A., & Radan, P. (2007). *Creating new states: Theory and practice of secession*. Hampshire: Ashgate Publishing,

In the second part, the author evaluates the various theories on secession from the perspective of international law. During this process, the author addresses the widely discussed Remedial Right Theory and the questionable Primary Right Theory, whilst contemplating the morality of secessions. It is essential to find justification in a form of valid territorial claim in order to take a part of the current state's territory which the secessionist movement occupies for the right to secession to even be considered.³ In the third part, the author seeks to offer a solution to the gap in International law regarding secessions. He introduces a legal framework on secession formulated by Professor of law, Milena Sterio. This is followed by an analysis of the framework and an alternative option. Lastly, the text ends with a conclusion.

³ Catala, A. (2013), *Secession and Territorial Justification*. *J Soc Philos*, Vol. 44, No. 1, 74-94.

1. PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW

Despite being one of the cornerstones of International law, the right of self-determination remains confusing with its ambiguous construct in legislation.⁴ To understand the teleologic meaning of the principle, we have to understand history around the principle first. Self-determination evolved critically during the 20th century. Does the “right to secede” apply beyond colonial circumstances?

1.1. From a political concept to an internationally recognized legal right

Arguably the very first notions of self-determination were introduced in the sixteenth century in the Revolt of the Netherlands.⁵ Self-determination is similarly apparent in the American Declaration of Independence and the French Revolution. However, the slow transmission of the concept to a universal legal right began after World War I. The President of the United States of America, Woodrow Wilson, gave a speech for peace called “Fourteen Points” to the United States Congress on January 8th in 1918.⁶ In this speech, Wilson laid down the ingredients for a peace treaty and requested a permanent international organization, the League of Nations.⁷

The concept was connected to the dissolution of empires and redrawing of state boundaries. Woodrow Wilson had introduced self-determination in universal terms. However, self-determination did not affect globally beyond the peacemaking process at the end of the war. In fact, the Covenant of the League Nations did not even have a mention of self-determination even though it was supposed to be aligned to help the development of colonial peoples. Multiple treaties for the protection of minorities were signed after World War 1. Still, neither the Covenant, nor these treaties for the protection of minorities, offered democracy for all minorities.⁸ Only the new

⁴ Gareau, J. (2005). Shouting at the wall: Self-determination and the legal consequences of the construction of wall in the occupied palestinian territory. *Leiden Journal of International Law*, Vol. 18, No. 3, 491.

⁵ Hazelwinkel, H. J. (2007). Self-determination, territorial integrity and the OSCE. *Helsinki Monitor*. Vol. 18, No. 4, 290.

⁶ Hannum, H. (1993). Rethinking self-determination. *Virginia Journal of International Law*, Vol. 34, No. 1, 3

⁷ Lorca, A. B. (2014). Petitioning the International: A Pre-History of Self-determination. - *European Journal of International law*, Vol. 47, No. 3, 500

⁸ Epps, V. (1997). The new dynamics of self-determination. *ISLA Journal of International Comparative Law*, Vol. 3, No. 2, 433-442.

states formed after World War 1 were obliged to assure protective clauses for minorities and to limit their sovereignty.⁹

The first document with global significance to point out the right to self-determination¹⁰, the Atlantic Charter, was issued on the 14th of August 1941. It consists of eight different points, from which point number three is relevant to self-determination. It addresses “the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them”.¹¹ This universal language caused anti-colonialists to interpret the Charter as a basis for their countries’ claims for independence. Franklin D. Roosevelt, one of the signatories of the Charter and the President of the United States of America at the time, declared that “the Atlantic Charter applies not only to the parts of the world that border the Atlantic but to the whole world” in response to anticolonial anxiety.¹²

1.2. United Nations and Self-determination

The Atlantic Charter was followed by Declaration of the United Nations at the beginning of 1942. It was an important document where the signatories agreed to invest full resources against the Axis Powers. The declaration vowed to uphold the principles in the Atlantic Charter, including the principle of self-determination.¹³ In 1945, the United Nations was created by the ratification of the United Nations Charter. The UN Charter emphasized the respect for human rights as a crucial part for lasting global peace.¹⁴ Article 1 paragraph 2 of the UN Charter states that one of the purposes of the United Nations is “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures

⁹ Mancini, S. (2008). Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination. *International Journal of Constitutional Law*, Vol. 6, No. 3-4, 556.

¹⁰ Ibhawoh, B. (2014). Testing the Atlantic Charter: linking anticolonialism, self-determination and universal human rights. *The International Journal of Human Rights*, Vol. 18, No. 7-8, 843

¹¹ The Atlantic Charter. Accessible: <https://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Atlantic-Charter.pdf>, 4 March 2019

¹² Reeves, M. (2018) Free and Equal Partners in Your Commonwealth’: The Atlantic Charter and Anticolonial Delegations to London, 1941–3, *Twentieth Century British History*, Vol. 29, No. 2, 263.

¹³ 1942: Declaration of The United Nations. Accessible: <http://www.un.org/en/sections/history-united-nations-charter/1942-declaration-united-nations/index.html>, 5 March 2019

¹⁴ Mahalingam, R. (1997) Self-determination in the UN era: A response to Peter Sproat. *Terrorism and Political Violence*, Vol. 9, No.1, 112.

to strengthen universal peace”.¹⁵ The UN Charter protects both principles, territorial sovereignty and self-determination, which contradict each other.¹⁶ I will discuss the tension between the two later in part 1.3. Regardless of the fact that self-determination was not recognized as a right, but a principle in the Charter, this was a huge step towards a transformation into a positive legal right under international law.¹⁷

Additionally, the UN Charter imposed the new concepts of Non-Self-Governing Territories and Trust Territories. Chapters XI and XII of the UN Charter expressed the aim of gradual development of Non-Self-Governing Territories and Trust Territories, towards self-government for the former, and independence for the latter. However, during the 1950s, the policy of gradual development was increasingly pressured which led into the new lining from the General Assembly, noting that colonial territories should immediately be granted independence. The United Nations adopted several resolutions which took into account the right of self-determination of peoples in the 50s. By 1960, somewhere around thirty Non-Self-Governing and Trust Territories had gained independence through the exercise of self-determination in international law.¹⁸

The United Nations adopted International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR) in General Assembly on the 19th of December 1966. Article 1 of both of these Covenants defines self-determination as belonging to all peoples.¹⁹ In addition, as belonging to self-determination, it contains the important right for peoples to “freely determine their political status and freely pursue their economic, social and cultural development”.²⁰ The Covenants obliged the member states to respect a people’s right to form democratic self-governance. They expressed this right as

¹⁵ Charter of The United Nations and Statute of The International Court of Justice. Accessible: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>, March 5 2019

¹⁶ Galbreath, D. J. (2005) Dealing with diversity in international law: Self-determination and statehood. *The International Journal of Human Rights*, Vol. 9, No.4, 541.

¹⁷ Raic, D. (2002) *Statehood and the Law of Self-Determination*. Hague: Kluwer Law International.

¹⁸ Ibid.

¹⁹ International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. Accessible: <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>, March 20 2019

²⁰ International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. Accessible: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>, March 5 2019

belonging to both, colonized and non-colonized peoples according to many scholars.²¹ However, there are distinct interpretations of the common Articles since the term “peoples” is not defined in either of the Covenants. There was a great concern that these articles could be interpreted broadly to permit secession.²² One of the reasons for the establishment of self-determination in both of these Covenants was the effect of decolonization. The efforts to acknowledge self-determination as a right had been rejected by various Western States until the 50s with the reminder that Hitler had abused self-determination, thus, dismembering central Europe during the second World War.²³

In addition to Treaties, international law of self-determination is built on customary international law in form of UN General Assembly resolutions and declarations. The most famous are the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), the 1960 Resolution 1541 and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.²⁴ The first two portray the theme and the purpose of self-determination in the 50s and 60s as a tool for decolonization.

Article 2 of the Resolution 1514 states the right to self-determination of all peoples. The most empowering article, however, is Article 5, which states that: “Immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom”.²⁵ This article calls for immediate action to grant independence to colonized territories according to the will of the people. It is a powerful and practical statement on behalf of equality and self-determination.

²¹ Sterio, M. (2012) *The Right to Self-Determination under International Law: Self-determination, (tm) Secession, and the Rule of the Great Powers*. Routledge

²² Coleman, A. (2013) *Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice?* Routledge

²³ Burke, R. (2010). *Decolonization and the evolution of international human rights*. Philadelphia: University of Pennsylvania Press

²⁴ Coulter, R. T. (2010). The law of self-determination and the united nations declaration on the rights of indigenous peoples. *UCLA Journal of International Law and Foreign Affairs*, Vol. 15, No. 1, 5-7

²⁵ United Nations Declaration on the Granting of Independence to Colonial Countries and People (Resolution 1514). Accessible: <http://www.publicinternationallaw.in/sites/default/files/salient/01-General/11-Independence%20to%20Colonial%20Countries%20and%20peoples%20Declaration.pdf>, March 12 2019

Resolution 1541, on the other hand, conveys that independence was not the only potential outcome of decolonization. Colonization may also lead to free association and integration with another state. The emphasis was on the will of the people as a basis for the outcome.²⁶ Another interesting and very important declaration on self-determination is the United Nations General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. It has an article regarding self-determination and a so-called "safeguard" article which limits self-determination with the concept of territorial integrity.

The "safeguard" article is an interesting one from the perspective of secession. It states that: "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".²⁷ This implies that States are not protected by the principle of territorial integrity unless they respect the self-determination of peoples regardless of their race, creed or colour. Therefore, it is open to the interpretation in support of secession in case the concept of internal self-determination is not respected by the parent State.²⁸

Other remarkable mentions of self-determination in international legal documents include the Helsinki Final Act (1975), the Charter of Paris (1990) and the Vienna Declaration and Programme of Action (1993). All of these three instruments have their respective self-determination provisions that recognize self-determination as it is covered in the UN Charter respecting the territorial integrity of states.

²⁶ Marks, S. (1991-1992). Self-Determination and Peoples' Rights. *King's College Law Journal*, Vol. 2, 88.

²⁷ 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of The United Nations. Accessible: <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1970-Declaration-on-Principles-of-International-Law-Concerning-Friendly-Relations.pdf>, March 12 2019

²⁸ Nanda, V. P. (2001). Self-determination and secession under international law. *Denver Journal of International Law and Policy*, Vol. 29, No. 4, 310.

1.3. Interpretations of the right in contemporary legislation

The right of self-determination has been tested in the recent history in the form of successful and unsuccessful separatist claims. The unilateral declaration of independence of Kosovo and the support from the international community were a turning point from the perspective of nationalist aspirations. How is the right interpreted today?

There is a common understanding within international law scholarship that the right of self-determination can be divided into two different segments: internal- and external self-determination. Internal self-determination refers to the political participation of a group within the borders of an existing State. This can be understood as the relationship between peoples within a State and the State. External self-determination, on the other hand, is linked to separation from an existing State, secession. Therefore, it revolves between peoples and the international community. External approach to self-determination was typical during the decolonization period when colonized countries achieved independence from their colonizers.²⁹ Internal self-determination is easier to justify through the various international legal documents, as it does not endanger the balance between self-determination and territorial integrity as opposed to external self-determination.

When the UN general Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, the right of self-determination was finally explained in a more detailed manner in an international context. In addition, it is the first document to express the right belonging to sub-national groups of people. To calm the tempers of sovereign states, Article 46 of the declaration sets a limit to the right by stating that self-determination should only be exercised in a manner that does not violate the territorial integrity or political unity of States. UNDRIP does not confer the right to independence to sub-national groups. However, numerous scholars say that UNDRIP should not be interpreted in a way that would prevent secession claims.³⁰ By reading UNDRIP, it is clear that it focuses on granting internal self-determination as opposed to the external dimension of the right.

²⁹ Senaratne, K. (2013). Beyond the internal/external dichotomy of the principle of self-determination. *Hong Kong Law Journal*, Vol. 43, 463-496

³⁰ Cambou, D. (2019) The UNDRIP and the legal significance of the rights indigenous peoples to self-determination: a human rights approach with a multidimensional perspective. *The International Journal of Human Rights*, 2-3

The focus on this text is, however, the external aspect of self-determination. Does such right even exist? The Advisory Opinion by the International Court of Justice (ICJ) on the unilateral declaration of independence of Kosovo suggests that it does, at least as a remedial last resort. The main conclusion of the Opinion was that “Adoption of the declaration of independence did not violate any applicable rule of international law”.³¹ Therefore, unless the domestic law of a State prohibits the act of secession, a declaration of independence, it is lawful. We have to pay attention to the non-binding nature of the Advisory Opinions of the ICJ. Given the non-binding nature of the Opinions, governments whose national policies clash with the outcomes of the ICJ will most likely refuse to respect these official assessments.³²

On the other hand, this lining could be interpreted in a way that would exclude the external part of self-determination from international law and leave the responsibility in its entirety to the States to decide whether secession is possible under their domestic law or not. ICJ refused to give an answer in the Opinion, whether international law provides for a right to separate from an existing state outside the context of “non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation”. At the same time, it refused to answer the question of remedial secession.³³

Martti Koskenniemi, a Finnish professor of International Law, stated in his speech regarding the legality of the unilateral declaration of independence of Kosovo in the public hearings of ICJ, that “self-determination has always implied the possibility of secession in case the parent state is unable or unwilling to give guarantees of internal protection”.³⁴ This seems to be the case since international institutions have been avoiding the question of secession. The lack of clarity in international law concerning secession and the different interpretations of the right to self-determination appear to strengthen my claim that there is a gap in international law. Indigenous

³¹ Accordance with international law of the unilateral declaration of independence in respect of Kosovo: Advisory Opinion of 22 July 2010. Accessible: <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

³² Falk, R. (2011). The Kosovo advisory opinion: Conflict resolution and precedent. *American Journal of International Law*, Vol. 105, No.1, 53

³³ Shelton, D. (2011). Self-determination in regional human rights law: From Kosovo to Cameroon. *American Journal of International Law*, Vol. 105, No.1, 63

³⁴ Martti Koskenniemi, professor of International Law in University of Helsinki. Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion) - public hearings. 11 December 2009

peoples who seek secession deserve to know whether they have a legitimate claim and the international community has to have legal certainty regarding self-determination, in order to maintain global peace in the long term. Especially the concept of remedial secession seems interesting and arguably justifiable under strict requirements. There needs to be a law for secession. The issue around secession is far too complex to be left without a notion in legislative documents and interpreted from vague articles of self-determination or merely determined by politics.

1.4. Self-determination versus Territorial Integrity

While self-determination is one of the main principles of international law, and according to the ICJ, an *erga omnes*-principle, the already existing states have right for the protection of their statehood. In fact, international law appears to favor territorial integrity over self-determination due to the potential destabilization of global order. Therefore, internal self-determination is the preferred interpretation of the right to self-determination. However, there lies the question, whether the principle of territorial integrity applies to non-state actors. International law seems to have varying answers to this question.³⁵

Professor Koskenniemi argues that non-state actors are not bound by the principle of territorial integrity, and the ICJ followed along the same line in the Advisory Opinion, by stating that territorial integrity is only “confined to the sphere of relations between States”. ICJ referred to the judgment in *Nicaragua v. United States of America* and to the Helsinki Final Act, which both indicate the objective of the principle as to control the conduct of States.³⁶ Classically territorial integrity has only been a concept that concerns States alone. Nevertheless, there has been a development towards the protection of territorial integrity from non-state actors. There are numerous legal documents by General Assembly, which suggest that non-state actors ought to respect the territorial integrity of States.³⁷

³⁵ Klabbbers, J. (2013) *International Law*. Cambridge: Cambridge University Press

³⁶ International Court of Justice (2010) *Supra nota* 30, para 80

³⁷ Marxsen, C. (2015) *Territorial Integrity in International Law – Its Concept and Implications for Crimea*. Heidelberg Journal of International Law, Vol. 75, No. 1, 13-14

UNDRIP directly expresses in its Article 46 that “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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”.³⁸ Since Article 46 applies to the right of self-determination expressed in the Declaration, it can be derived that the principle of territorial integrity does not only apply to States but to any people, group or person as well. Yet, due to the non-legally-binding nature of UNDRIP, we could hardly refer to it as a *Lex posterior*-rule in a hypothetical case where the application of territorial integrity would be challenged. In addition, multiple legally binding documents, including the UN Charter, indicate territorial integrity as a principle that merely obliges states to act in a certain way. Therefore, the aforementioned interpretations of territorial integrity by ICJ and Koskenniemi are not unfounded. The application of the principle remains to be a contested topic among scholars.³⁹

³⁸ United Nations Declaration on the Rights of Indigenous Peoples. Accessible: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf, 11 March 2019

³⁹ Cambou, D. (2019) *Supra nota* 29, p. 15

2. NORMATIVE SECESSIONIST THEORIES AND RECENT CONFLICTS

There are numerous different theories regarding secession crossing various fields of science. What has led to the creation of endless theories is the lack of laws governing the topic. If we were to adopt a new international law on secession, we wouldn't need the theories to contemplate whether the right exists or not. However, theories can give us guidance as to what grounds the future law on secession should be built upon.

2.1 Primary Right Theory

Primary right theories are mainly divided between plebiscitary and nationalistic theories of secession. Both categories of these theories mostly include the idea that a group inherently has a right to secede if certain requirements are met. However, primary right theories fail to legitimately justify external self-determination.⁴⁰

Despite differences between plebiscitary theories on the right to secession, these theories agree that self-determination is a part of the freedoms of all individuals. Some of these theorists even seem to use self-determination as a synonym with secession without the division between internal and external parts of self-determination. Plebiscitary theories generally state that any group of persons may democratically secede, and they do not need a moral justification to unilaterally secede from the parent state.⁴¹

Nationalistic theories tend to point the right to secession for certain groups based on their cultural or ethnical attributes. They do not agree with the main idea of plebiscitary theories that the right belongs to everyone. Instead, they suggest that the right to self-determination is connected to the distinct collective identity of a group. There are different approaches regarding secession between

⁴⁰ Brando, N., & Morales-Gálvez, S. (2019). The Right to Secession: Remedial or Primary? *Ethnopolitics*, Vol. 18, No.2, 110.

⁴¹ Seshagiri, L. (2010). Democratic disobedience: Reconceiving self-determination and secession at international law. *Harvard International Law Journal*. Vol. 51, No.2, 569.

the nationalistic theories, some more friendly to the idea of secession, and others that emphasize secession to be appropriate in only exceptional circumstances.⁴² David Miller approaches self-determination with a more delicate version of the nationalistic theory where he does not consider secession as the only reasonable outcome. Instead, he suggests that the strength of the secession claim needs to be measured by looking at how far have groups with different national identities evolved within a state. In addition, he highlights the living conditions of minorities and the potential effects of minorities relying merely on internal self-determination.⁴³

2.2 Remedial Right Only Theory

The Remedial Right Only Theory was developed by Allen Buchanan who has written several books on self-determination and secession. The main argument within the theory is that unilateral secession can be justified only where the seceding group of people has suffered injustice from behalf of the parent State.⁴⁴

Buchanan states that the right to determine the political development of peoples in the UN documents can be interpreted as the “Nationalist Principle”. This means in the broadest sense that every “people” has a right to a sovereign state. However, he argues that the Nationalist Principle is neither morally nor practically acceptable since it would endanger the global order. According to him, it is of utmost importance to recognize the difference between self-determination and political autonomy where self-determination in its simplest perspective is the “freedom of the group to lead its own distinctive common life, to express its constitutive values through its own social practices and cultural forms”. At the same time, political autonomy consists of many rights which may assist a group in achieving self-determination. Self-determination is the freedom from nonconsensual domination in the form of disposal of cultural practice and values within the practice of a distinctive group.⁴⁵ Therefore, in addition to the right of a group to lead its own distinctive life, self-determination imposes a negative obligation to States not to interfere with this distinctive life of groups according to the theory.

⁴² Brando, N., & Morales-Gálvez, S. (2019) *Supra nota* 39, p.113

⁴³ Miller, D. (1997) *Secession and the Principle of Nationality*. *Canadian Journal of Philosophy*, Vol. 22, 282

⁴⁴ Seymour, M. (2007) *Secession as a Remedial Right*. *Inquiry*. Vol. 50, No. 4, 395

⁴⁵ Buchanan, A. E. (1991). *The right to self-determination: Analytical and moral foundations*. *Arizona Journal of International and Comparative Law*, Vol. 8, No. 2, 4

The Remedial Right Only Theory requires a moral justification for secession. Buchanan addresses the most convincing justifications for this “highly qualified and limited right”. He acknowledges the fact that each of the justifications may also justify lesser radical forms of political autonomy. Firstly, he mentions a groups necessity to protect itself from destruction such as the Kurds. Secondly, he talks about discriminatory redistribution which is the result of economic policies of the state that “systematically disadvantage the group for the benefit of others in the state” without justification. Lastly, he mentions the groups’ necessity to recover a territory which they previously had control of, and which has been unjustly taken from them.⁴⁶ How do the contemporary self-determination conflicts seem in the light of this theory?

2.3 Application of the theories and international law

Catalonia is an autonomous community in Spain that seeks independence. If we assess the Catalonian secession claim in the broadest sense of the nationalistic theory, they have a legitimate right to secede due to their cultural attributes and history. However, following the Miller theory, we would have to compare Catalans to the Spanish people. In fact, Miller points out among other reasons when analyzing the Catalan claim, that since there is “considerable cultural overlap” between the two and Catalonia is one of the wealthiest areas in Spain, the claim for independence is weak. Catalans are living and have been able to live in similar conditions as Spanish people despite being a minority.⁴⁷

Catalans argue that they have a right to secede according to international law. The Spanish Constitution does not guarantee external self-determination within Spain, but only refers to internal self-determination.⁴⁸ Is there a moral justification for secession with regards to Catalonia? Back in the era of dictatorship under General Franco, the political, cultural and linguistic identity of Catalans was suffocated. However, after Franco died in 1975, Catalonia earned back its self-government and Catalans were yet again able to cherish their own practice and values.⁴⁹ Therefore,

⁴⁶ Ibid., p. 48

⁴⁷ Supra nota 42, p. 266-267

⁴⁸ Blanke, H.; Abdelrehim, Y. (2015) Catalonia and the Right of Self-Determination from the Perspective of International Law. *Max Planck Yearbook of United Nations Law. Vol. 18, No. 1, 532*

⁴⁹ Ibid. p. 538

Spain does not violate the negative obligation to abstain from interfering with the cultural, political and linguistic practice of Catalonia in the present age which could have possibly acted as a moral justification for secession in the Franco-era along with the Remedial Right-theory.

An interesting interpretation of the right to secede came from the Supreme Court of Canada in 1998 when it was asked whether international law gives Quebec the right to affect the secession of Quebec from Canada unilaterally. In the same instance, the Supreme Court was asked which would take precedence in Canada if there was a conflict between domestic and international law on the right to secede.⁵⁰ The Supreme Court first determined that it had jurisdiction, in fact, a duty to give an advisory opinion on the questions. The conclusion was that there is no right for Quebec to unilaterally secede under Canadian law. For separatists, the good part of the assessment occurred when the Supreme Court evaluated secession under international law. It stated that the right of self-determination may be generally exercised within the framework of existing states. However, it admitted the possibility to infringe the territorial integrity of a state in unconventional circumstances where the right of self-determination should be given priority over territorial integrity. This refers to circumstances where internal self-determination of peoples is not respected.⁵¹

In the conclusion of the assessment, the Supreme Court stated that external self-determination could potentially be interpreted from international law for peoples if a group is oppressed. It mentioned as an example, foreign military occupation and denial of the group's access to government for political, social and cultural development.⁵² Hence, the Supreme Court of Canada has recognized that the international law of self-determination is open to interpretations of remedial secession as a last resort where the territorial integrity of the parent state would have to be infringed as a result. How does the statement from ICJ in the Advisory Opinion regarding Kosovo that territorial integrity is only "confined to the sphere of relations between States" alter the situation? One could argue that since territorial integrity seemingly does not apply to peoples, the existence of the right to external self-determination is even more plausible.

⁵⁰ Leslie, P. (1999) Canada: The Supreme Court Sets Rules for the Secession of Quebec. *The Journal of Federalism*, Vol. 29, No. 2, 138

⁵¹ Hanna, R. M. (1999). Right to Self-Determination in In Re Secession of Quebec. *Maryland Journal of International Law and Trade*. Vol. 23, 223-224

⁵² Ibid. p. 225

The temporary occupation of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine by the Russian Federation since 2014 depicts shameless abuse of the right of self-determination. The Ukrainian Constitution does not allow secession and it highlights the territorial integrity of Ukraine.⁵³ Does Crimea meet the requirements of remedial secession? Studies say that the people of the Crimean Peninsula have not experienced oppression or any form of human right violations. In fact, no evidence of violations or threats to the Russian speaking population has been found to support secession claims. Apparently, the only factor that could suggest that the human rights of Crimean people have been violated on behalf of the government of Ukraine is the abolition of 2012 Language Act which was set to extend among other regional languages, the use of Russian. Yet, this is an isolated action which does not specifically target the Russian speaking population and can't objectively be perceived as oppression.⁵⁴

Numerous groups of Russian troops took control over Ukrainian local authorities and strategic targets in Crimea on the 27th of February 2014. Few weeks after this the Autonomous Republic of Crimea held an illegal referendum on independence from Ukraine. Most of the international community have opposed the referendum as illegitimate and UN General Assembly Resolution A/RES/68/262 precisely states that the referendum is not valid while supporting the territorial integrity of Ukraine.⁵⁵ This is an exceptional circumstance compared to the other separatist movements mentioned in this chapter since, in this case, one state has intervened in the affairs of another state in an attempt to annex a part of it. Russia as a state is bound by the territorial integrity of Ukraine.

In 1997, the use of *uti possidetis*-doctrine was confirmed between Ukraine and Russia when the parties signed the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation.⁵⁶ The Treaty reminded about the inviolability of the borders between the

⁵³ Gdalina, A. (2016). Crimea and the right to self-determination: Questioning the legality of Crimea's secession from Ukraine. *Cardozo Journal of International and Comparative Law*, Vol. 24, No.3, 542-544

⁵⁴ Ibid. p. 560

⁵⁵ Sayapin, S., & Tsybulenko, E. (2018) *The Use of Force Against Ukraine and International Law: Jus Ad Bellum, Jus in Bello, Jus Post Bellum*. The Hague: T.M.C. Asser Press. 278-279

⁵⁶ Geifs, R. (2015). Russia's Annexation of Crimea: The Mills of International Law Grind Slowly But They Do Grind. *International Law Studies Series*. Vol. 91, p. 443.

parties and the territorial integrity of both States.⁵⁷ The Treaty expired on the 1st of April 2019 as it was originally signed for 10 years and it entered into force on the 1st of April 1999. Ukraine decided not to extend the validity of the Treaty.⁵⁸ In addition, numerous legal documents indicate that the actions by Russia are grave violations of international law and considered as acts of military aggression.⁵⁹ The UN Charter Article 2.4 affirms that states must refrain from using force against the territorial integrity or the political independence of another state.⁶⁰

Even without the Russian interference, there would be no potential basis for Crimean independence and annexation to Russia. Russian leaders have claimed that the independence referendum was an exercise of the right of self-determination of Crimean people. They also stated that the governmental change in Kiev posed a threat to the Russian speaking population in Crimea. However, the Autonomous Republic of Crimea and its people have had access to internal self-determination and have not suffered human rights violations prior to the temporary occupation by Russia. There is no concrete evidence that the Russian speaking population in Crimea would have endured any sort of oppression, had Crimea not been temporarily occupied by Russia.⁶¹ Therefore, there is no justification for the secession of Crimea according to the Remedial Right Only Theory nor international law. If the secession is analyzed with Primary Right theories, the Crimean secession could potentially be legitimized. However, those theories are not realistic and fail to justify secessionist claims in the contemporary state system.

⁵⁷ Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation. Accessible: <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52240/Part/I-52240-08000002803e6fae.pdf>, 6 April 2019

⁵⁸ Law on non-prolongation of Treaty of Friendship with Russia enters into force in Ukraine. Accessible: <https://www.unian.info/politics/10373223-law-on-non-prolongation-of-treaty-of-friendship-with-russia-enters-into-force-in-ukraine.html>, 6 April 2019

⁵⁹ Sayapin, S., & Tsybulenko, E. (2018) *Supra nota* 55 p. 280-281

⁶⁰ The United Nations (1945) *Supra nota* 15

⁶¹ Cavandoli, S. (2016) The unresolved dilemma of self-determination: Crimea, Donetsk and Luhansk, *The International Journal of Human Rights*, Vol. 20, No. 7, 884

3. TOWARDS A PRACTICAL SOLUTION

What are the obstacles that hinder movement towards a law on secession? In order to achieve this objective, we need to combat the fears of established states and convince the international community that fair and justified objective criterion on secession can be constructed. Sub-states shall not endure human right violations or oppression without equal consequences and support stemming from international law. The acquisition of the concept of remedial secession would not only act as a tool for the communities that endure violations but also undermine non-justified separatist claims.

3.1 What needs to be settled

The goal of the implementation of a new law on secession is not to abruptly the current world order. On the contrary, despite different interpretations of the relationship between territorial integrity and self-determination, the tension between the two rights embodies the uncertainty around the issue in a way which appears to be a threat to global peace. The United Nations has failed to resolve the tension with its vague and outdated provisions on self-determination.⁶² This has been shown recently with the abuse of self-determination in the temporary occupation of Crimea by Russia where Putin has consistently referred to the example of Kosovo as a justification.⁶³

It is hard to see that the acquisition of a new law on secession as a remedial possibility would cause a change in the current legal environment of the West due to the respected status of human rights in most countries. In fact, the states that are involved with separatist movements ought to support the extraction of the concept of remedial secession from the right of self-determination. Once a well-built international agreement on remedial secession is introduced to the global stage, one can draw a contrary inference that other forms of secession are not options under international law. Furthermore, states that respect international human rights, including internal self-determination

⁶² Quadros, N. (2016). Secession: The contradicting provisions of the United Nations Charter- direct threat to the current world order. *Santa Clara Journal of International Law*, Vol. 14, No. 2, 462

⁶³ Bering, J. (2017). The prohibition of annexation: Lessons from Crimea. *New York University Journal of International Law and Politics*, Vol. 49, No.3, 815

which is portrayed in numerous sources of international law, would not be vulnerable to secessionist claims given that objective criteria on remedial secession can be established. Therefore, there should be no incentive to oppose the development.

3.2 International law on secession

Discussion on the existence of a right to secession outside of the colonial context or foreign occupation has been going on for years. Opinions are divided on whether the right already exists or not. To strengthen the human rights of minorities, the contemporary status of secessions has to be clarified. However, it is not an easy task.

Professor of law, Milena Sterio, has examined the topic and argued on behalf of developing a legal framework on secession. Firstly, she argues that, primarily, secessions should only be legal with the consent of the mother states. However, when the separatist minority faces oppression from the mother state or when the mother state does not have a democratic constitutional structure, the minority would not need the consent of the mother state. Here one would have to assess whether the minorities have internal self-determination rights in the mother state, for example, the right to form a provincial government or a right to be adequately represented in the central government of the mother state.⁶⁴

Secondly, she states that one needs to analyze the territorial claims of the secessionist minorities compared to the claims of the mother state. Furthermore, when evaluating the territorial claim, one needs to examine how long have the minorities lived in the area and does the minority constitute a significant majority in the area. Therefore, territorial claims on highly minority based and historically contested areas are more likely to meet this criterion. Lastly, there should be a fairness-criteria where one would evaluate the fairness of the claim as a whole. Sterio acknowledges that this criterion would be hard to define. All in all, where a minority meets all the aforementioned

⁶⁴ Sterio, M. (2015). Self-determination and secession under international law: The new framework. *ILSA Journal of International and Comparative Law*, Vol. 21, No. 2, 303

criteria, it should be able to exercise its right to secession. The new states that would gain independence with this procedure, should be recognized as sovereign states.⁶⁵

Whether or not the new framework on secession should follow the preliminary remedial structure proposed by Sterio, the procedure needs to be accurately developed by avoiding vague concepts in order to build a practical solution unlike the portrayal of self-determination in international law. The most important questions that need to be answered are: who are the peoples that have the right to secession and in what circumstances do they gain this right? We need to define “peoples” and the situational requirements and create an objective criterion on the remedial procedure that will be implemented.

There is another option to clarify the current status of the right of self-determination and secession in international law which could be the stepping stone for the development. It includes the ICJ and its stance on secession which it declined to present in the Advisory opinion on Kosovo. If the ICJ would speak on the topic and state that the right of self-determination may entitle to a right to secession in some exceptional circumstances, the status of secession as a limited right would be recognized internationally. This would strengthen human rights globally. We need to fulfil our duty to ensure the protection of human rights to prevent events such as the oppression of Kosovo Albanians and the genocide of Rwanda.⁶⁶ At the same time, we have to protect the current state structure and territorial integrity of states in order to retain peace. We can only profit from a balanced legal framework on secession which weighs the interests of states with the interests of sub-national groups.

⁶⁵ Ibid. p. 303-305

⁶⁶ Fisher, S. R. (2015-2016). Towards Never Again: Searching for Right to Remedial Secession under Extant International Law. *Buffalo Human Rights Law Review*, Vol. 22, 296

4. CONCLUSION

This research sought to find boundaries for the right to self-determination which has been a contested topic for decades. The ultimate goal was to clarify legitimate grounds for secession. Since the first international legal mention of the right to self-determination in the Atlantic Charter, there has been a lack of consensus on the content of the right. The ambiguous nature of self-determination has partly inspired independence movements from the colonial context to modern separatist groups in recent years. Internal self-determination of peoples is ensured in international law whereas the external dimension of the right is not directly expressed in any international legal document outside non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation. Tension can be seen between the right to self-determination and the territorial integrity of states.

Further analysis of the different normative theories of secession during the research has supported remedial secessions as the most legitimate form of separation. Where Remedial Right theory justifies unilateral secession where the seceding group of people has suffered injustice, the main idea of Primary Right theories is that groups of people inherently have the right to secede.

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations implies the possibility of remedial secession. The Supreme Court of Canada stated in 1998 that the international law on self-determination in its ambiguity may be interpreted to grant the right to secession for peoples if a group is oppressed. The International Court of Justice refused to answer whether secession can be derived from the right to self-determination in its Advisory Opinion on the unilateral declaration of independence of Kosovo in 2010. Russia justified the secession of Crimea with the exercise of the right to self-determination of Crimean people. However, the Crimean people were not oppressed prior to the temporary occupation and their right to internal self-determination was respected as an autonomous republic.

With the wake of contemporary separatist conflicts, we need a legal framework for secession. International law on secession would eliminate the abuse of the right to self-determination. At the same time, it would support sub-states against oppression and strengthen the respect for internal self-determination globally. Only sub-states that have endured human right violations would have

the opportunity to form new states unilaterally. The procedure would be remedial and only used as a last resort where the human right violations of the mother state against “peoples” are consistent and coexistence is no longer an option. However, we need an objective criterion that emphasizes the last resort nature of secession. ICJ could assess its stance on remedial secession as the first step towards the law on secession.

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