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**“Does the Right to Secede Exist under International Law?  
An Analysis of the Conditions and Limits of Secession”**

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*“La natura de' populi è varia;  
et è facile a persuadere loro una cosa,  
ma è difficile fermarli in quella persuasione.”*

*(Niccolò Machiavelli, *Il Principe*)*

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## LIST OF ABBREVIATIONS

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|                  |  |
|------------------|--|
| ACHPR            | African Charter on Human and Peoples' Rights   |
| CIS              | Commonwealth of Independent States   |
| CPA              | Comprehensive Peace Agreement  |
| CSP              | Comprehensive Proposal for the Kosovo Status Settlement                              |
| CRC              | Convention on the Rights of the Child  |
| EPLF             | Eritrean People's Liberation Front   |
| EC               | European Community   |
| EU               | European Union   |
| EUJUST<br>THEMIS | European Union Rule of Law Mission to Georgia  |
| EUMM             | European Union Monitoring Mission in Georgia   |
| EULEX            | European Union Rule of Law Mission in Kosovo   |
| FRY              | Federal Republic of Yugoslavia   |
| FYROM            | Former Yugoslav Republic of Macedonia  |
| GTEP             | Georgia Train and Equip Program  |
| HRC              | Human Right Committee  |
| ICCPR            | International Covenant on Civil and Political Rights                                 |
| ICJ              | International Court of Justice   |
| ICERD            | International Convention on the Elimination of All Forms of Racial<br>Discrimination |
| ICESCR           | International Covenant on Economic, Social and Cultural Rights                       |
| KFOR             | Kosovo International Security Force  |
| KLA              | Kosovo Liberation Army   |
| KPC              | Kosovo Protection Corps  |

|        |  |
|--------|--|
| NATO   | North Atlantic Treaty Organization                       |
| OSC    | Organization for Security and Cooperation in Europe      |
| PCIJ   | Permanent Court of International Justice                 |
| SFRY   | Socialist Federal Republic of Yugoslavia                 |
| SGRS   | Special Representative of the Secretary-General          |
| SPLA   | Sudan People's Liberation Army                           |
| SSR    | Soviet Socialist Republic                                |
| USSR   | Union of the Soviet Socialist Republics                  |
| UAR    | United Arab Republic                                     |
| UN     | United Nations   |
| UNGA   | United Nations General Assembly                          |
| UNHCR  | United Nations High Commissioner for Refugees            |
| UNAMET | United Nations Mission in East Timor                     |
| UNMIK  | United Nations Mission in Kosovo                         |
| UNMISS | United Nations Mission in South Sudan                    |
| UNOMIG | United Nations Observer Mission in Georgia               |
| UNSC   | United Nations Security Council                          |
| UNTAET | United Nations Transitional Administration in East Timor |
| US     | United States  |
| UPU    | Universal Postal Union                                   |
| WIPO   | World Intellectual Property Organization                 |
| WMO    | World Meteorological Organization                        |

# INTRODUCTION

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In the wake of the recent developments in the world arena concerning territorial modifications and States secessions, a specific urgency to address a research on this matter is particularly felt. Therefore, the scope of this work is to provide a thorough analysis, from an international law perspective, of the recent and most significant cases of secession. In particular, this work focuses on the need to establish whether secession could exist as a qualified right, subjected to precise limits and conditions. Furthermore, in the light of the verdict of the Supreme Court of Canada, which stated that international law is neutral in respect of secession, utmost consideration is to be given to State practice, in order to assess how effectively States have dealt with this pronouncement.

Chapter 1 introduces the two main principles of international law affected by secession: self-determination of people and territorial integrity. After a historical background of the formation and recognition of both, how these tenets are able to coexist in cases of secession is examined. The former is deeply considered in relation with its ‘internal’ and ‘external’ aspects and the consequent impact on the rights of peoples and minorities. The analysis of the latter, instead, is pivoted on the principle of *uti possidetis* and the respect of the intangibility of frontiers by both State and non-State actors. Finally, the question of the relevance of referenda and declarations of independence is addressed, together with a final attempt to find an equitable balance between the two principles to which the Chapter is dedicated.

Chapter 2 introduces the concept of secession and compares it with that of dissolution of States. Furthermore, it takes into account all the necessary steps for a secessionist group to achieve independence: remarkable obstacles, such as the violation of norms of *jus cogens* in



general and the breach of the prohibition of use of force in particular, are considered. Nevertheless, the eventual existence of a right to secede following episodes of massive violations of human rights is examined. Several aspects of this theory, including its application and its drawbacks are addressed. Then, particular attention is drawn upon the standards recognized by the international community for an entity to attain the status of 'State' and the different value they have acquired throughout history. The most disputed element, the recognition by other States, is examined in the light of several theories. Finally, all the regulations concerning States succession are contemplated, with specific regard to treaties, public assets and membership of international organizations.

Chapter 3 is dedicated to case studies. Different degree of success characterize the secession of South Sudan, Kosovo, Abkhazia and South Ossetia, and Crimea. These particular examples have been selected for their importance in the current international scenario and are those that raise the major concerns in this domain. Each case enormously contributes to the assessment of the practice of states vis-à-vis secessions. The strengths and the weaknesses of the different approaches in relation with the cases are analyzed in depth.

On the basis of the study exposed throughout the four chapters, some conclusions are drawn at the end.

# 1 SELF-DETERMINATION AND TERRITORIAL INTEGRITY

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## 1.1 INTRODUCTION

The aim of this Chapter is to analyze the principles of self-determination and territorial integrity and their interaction. Therefore, a historical study of the right to self-determination, with a particular focus on the UN practice and its role in favoring a shift of the principle of self-determination from a political to a legal tenet is provided. Then, analyzing the conceptual differences between ‘peoples’ and ‘minorities’, it is assessed how these groups exercise self-determination. It is also necessary to consider how State practice took into account this principle in relation with cases of secession outside the context of decolonization. The respect of territorial integrity instead, is examined vis-à-vis other States, in the light of the doctrine of *uti possidetis*, and vis-à-vis non-State actors. Finally, the chapter analyses how to balance these two major principles of international law and which value is to be attributed to declarations of independence and referenda.

## 1.2 SELF-DETERMINATION OF PEOPLES

In one of its most neutral definition, self-determination is “a community’s right to choose its political destiny”.<sup>1</sup> However, despite this apparent simplicity, its meaning has

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<sup>1</sup> ‘Wolfgang Danspeckgruber and Anne-Marie Gardner ‘Self-determination’ in *Encyclopedia Princetoniensis*, available at: <<http://pesd.princeton.edu/?q=node/266>> accessed 21 April 2015.

frequently been reconsidered and adapted to different contexts throughout history, generating not much certainty about its application and its limits.<sup>2</sup>

The first cause of ambiguity about self-determination concerns its beneficiaries: although it is widely recognized that this right is to be granted to peoples only, a common agreement on a legally-binding definition of peoples has never been reached. Doctrine has traditionally been divided on the matter: eminent scholars<sup>3</sup> agree that the status of people is conferred to the population living in a political unit: consequently, it applies both to independent and non-self-governing territories and is defined by the territory where the population lives in. Other authors<sup>4</sup> instead, defines the people on the basis of ethnicity: Dinstein,<sup>5</sup> for instance, affirms that a people can be classified on the ground of “ethnic link in the sense of past genealogy and history” and in its self-identification as such. For Brownlie,<sup>6</sup> what a people is should be assessed with regard to nationality, manifested through a common language, religion and culture, while for the 1972 International Commission of Jurists on the Events in East Pakistan<sup>7</sup> the common features of a people acquire relevance not *per se*, but only when they act as a bond among the members of the community. In order to put remedy to the lack of a definition, a UNESCO International Meeting of Experts on further study of

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<sup>2</sup> Joshua Castellino and Jérémie Gilbert, ‘Self-Determination, Indigenous Peoples and Minorities’ (2003) 3 *Maquarie Law Journal* 155.

<sup>3</sup> Antonio Cassese, *UN Law, Fundamental Rights* (Sijthoff & Noordhoff 1979) 150; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 119; James Crawford, ‘Aboriginal Self-Government in Canada’ (1988) *Canadian Bar Association* 52.

<sup>4</sup> Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question (1920) LNOJ 3 (Commission of Jurists on the Aaland Islands); Alfred Cobban, *The Nation State and National Self-Determination* (Collins 1969) 107; Robert Redslob, ‘Le Principe Des Nationalites.’ (1931) 25 *American Journal of International Law* 15.

<sup>5</sup> Yoram Dinstein, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25 *International and Comparative Law Quarterly* 104.

<sup>6</sup> Ian Brownlie ‘The Rights of Peoples in Modern International Law’, in James Crawford (ed) *The Rights Of Peoples* (Clarendon Press 1988) 5.

<sup>7</sup> International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study* (1972) 49.

the concept of the rights of peoples was convened in Paris in 1989. The Final Report<sup>8</sup> in a very detailed way affirms that a people is:

1. [A] group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life; 2. The group must be of a certain number which need not 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 - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly, 4. The group must have institutions or other means of expressing its common characteristics and will for identity.

Moreover, in *Kevin Mgwanga Gunme et alii v Cameroon*,<sup>9</sup> the African Commission on Human and Peoples Rights put emphasis on the need of a “separate and distinct identity”,<sup>10</sup> an “innate characteristic”<sup>11</sup> that distinguishes people from each other. This is the latest opinion of an international body on the matter, particularly relevant because it admits that it is possible to have more than one people living in the territory of the same State, in opposition with the view that considers only the hegemonic group of persons as ‘people’, while all the others are to be relegated to the role of ‘minorities’.<sup>12</sup>

However, as already anticipated, despite today the principle of self-determination is no more questioned, its recognition process has been long and difficult. The right to self-determination has first been acknowledged in the Modern Era by Hugo Grotius in his *De Jure Belli ac Pacis*, in which such a right extended up to a *jus resistendi ac secessionis* that

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<sup>8</sup> UNESCO, “International Meeting of Experts on Further Study of the Concept of the Right of the Peoples” (22 February 1990) SHS-89/CONF 602/7.

<sup>9</sup> *Kevin Mgwanga Gunme et al v Cameroon* (2009) 26th Annual Activity Report of the ACHPR (*Mgwanga v Cameroon*).

<sup>10</sup> *Ibid* para 179.

<sup>11</sup> *Ibid*.

<sup>12</sup> James Summers, *Peoples and International Law* (Martinus Nijhoff 2013) 52.

justified the resort to war by peoples oppressed by foreign domination.<sup>13</sup> The same concept was further developed during the Enlightenment, when its application field was extended to the domestic plane. In the Revolutionary France of the end of the eighteenth century, self-determination was used to overthrow the monarchy and secure freedom, justice and equality for all citizens. Meanwhile, on the other side of the Atlantic Ocean, the newborn United States of America, mindful of the repression suffered by the colonists both in England and then in the so-called New World, decided to set strong limits to the exercise of State authority against citizens.<sup>14</sup> Accordingly, the 1776 Declaration of Independence of the United States of America proclaimed that governments derived “their just powers from the consent of the governed” and that “whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it”.<sup>15</sup> The 1787 Constitution reiterated: “The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence”.<sup>16</sup> Guided by the ideals of the French and American Revolutions and taking advantage of the collapse of their motherlands due to the Napoleonic Wars in Europe, between 1810 and 1825, most of the Spanish and Portuguese colonies in Latin America appealed to self-determination to establish new independent States. The territorial definition of these new States relied on the boundary regimes drawn in the Spanish ecclesiastical law (also known as *uti possidetis* principle).<sup>17</sup>

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<sup>13</sup> Rosalyn Higgins ‘Grotius and the Development of International Law in the United Nations Period’ in Bull, Kingsbury and Roberts (eds) *Hugo Grotius and International Relations* (Clarendon Press 1992).

<sup>14</sup> Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1998) 92 *American Journal of International Law* 46.

<sup>15</sup> The Declaration of Independence of the United States of America (4 July 1776).

<sup>16</sup> The Constitution of the United States (adopted 17 September 1787, entered into force 21 June 1788) art IV, s 4.

<sup>17</sup> Alejandro Alvarez, ‘Latin America and International Law’ (1909) 3 *AJIL* 269. See Chapter 2.3.2 for an analysis of the *uti possidetis* principle.

At the beginning of the twentieth century, the concept of self-determination was once again restyled to meet the needs of a more complex world. In the aftermath of World War I, the President of the United States (US), Woodrow Wilson, strongly influenced the conditions of the treaties signed at the Paris Peace Conference, calling for a redefinition of the European borders according to the nationality principle, as enshrined in his famous Fourteen Points.<sup>18</sup> Explaining his theory to the US Congress, President Wilson stressed the utmost relevance of self-determination with these words: “National aspirations must be respected; peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase”.<sup>19</sup> Despite the political strength of his message and the broad application of this rule to Europe, the international community did not enthusiastically welcome these provisions. Even Wilson’s closest allies were reluctant: it is said that France’s Clemenceau emphatically criticized the Fourteen Points by saying: “Fourteen? The good Lord had only ten!”.<sup>20</sup> Moreover, the US Secretary of State Lansing underlined the ambiguity of the Wilson’s political doctrine:

When the President talks of 'self-determination' what unit has he in mind? Does he mean a race, a territorial area, or a community? It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until it was too late to check those who attempt to put the principle into force.<sup>21</sup>

Given the different views on the matter, the victorious powers decided not to apply uniformly the right to self-determination. In the now defunct Austro-Hungarian Empire, new States were carved out according to ethnic boundaries: the Kingdom of the Serbs, Croats and

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<sup>18</sup> President Woodrow Wilson's Fourteen Points (8 January 1918) (Wilson's Fourteen Points) pts V, VII-XIII.

<sup>19</sup> President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances (11 February 1918) (President Wilson's Address to Congress).

<sup>20</sup> William R Inge, *The End of an Age, and Other Essays* (Macmillan 1948) 139.

<sup>21</sup> Margaret MacMillan, *Paris 1919: Six Months That Changed the World* (Random House 2002) 213.

Slovenes, Czechoslovakia, Hungary and Poland emerged. In evident contradiction of this general principle, Austria and other German-speaking communities were prevented from constituting a single, ethnically homogeneous State.<sup>22</sup> In fact, both the treaties of Versailles<sup>23</sup> and Saint Germain-en-Laye<sup>24</sup> provided for an express ban on a Pan-Germanic State, a measure possible to justify only as part of a containment strategy against Germany, the country held responsible for the war.<sup>25</sup> A different treatment instead was reserved to the non-Turkish territories of the dismembered Ottoman Empire and to the German colonies: the Allied Powers deemed those people not yet politically mature to afford independence and therefore a system of Mandates under the aegis of the League of Nations was established.<sup>26</sup> Under Article 22 of the Covenant of the League of Nations,<sup>27</sup> the remainder of the Ottoman Empire, classified as ‘Mandate A’ was devolved upon France and the United Kingdom, while the German colonies in Africa (Mandate B) and in the Pacific (Mandate C), were subjected to the authority of the United Kingdom, Australia, New Zealand and Japan, with a lesser degree of autonomy. Accordingly, the Covenant<sup>28</sup> protected “the territorial integrity and political independence of all Members of the League”.<sup>29</sup> Despite his strong influence in the Paris negotiations, Wilson was not successful in making the Parties incorporate in the final version of the Charter his Draft Article 3, which recognized self-determination as a fundamental principle of international law.<sup>30</sup> No reference of the self-determination was even made in Article 22, which governed the functioning of the Mandate system that exclusively applied to the colonies of the defeated countries.

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<sup>22</sup> Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford University Press 1997) 24-26.

<sup>23</sup> Treaty of Peace between the Allied and Associated Powers and Germany (adopted on 28 June 1919, entered into force 10 January 1920) 1919 UKTS 4 (Treaty of Versailles), art 80.

<sup>24</sup> Treaty of Peace between the Allied and Associated Powers and Austria (adopted 10 September 1919, entered into force 16 July 1920) 1919 UKTS 11 (Treaty of St. Germain-en-Laye), art 88.

<sup>25</sup> Treaty of Versailles (n 23) art 231.

<sup>26</sup> Musgrave (n 22) 28.

<sup>27</sup> Covenant of the League of Nations (adopted 29 April 1919, entered into force 10 January 1920) 1919 UKTS 4, art 22.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* art 10.

<sup>30</sup> David H Miller, *The Drafting of the Covenant* (GP Putnam's Sons 1928) 111.

In 1920, the International Committee of Jurists entrusted by the Council of the League of Nations on the Aaland Islands,<sup>31</sup> which were trying to join Sweden after the recently acquired independence of Finland from Soviet Russia, recognized that self-determination was not a part of international law. The lack of mention in the Covenant of the League had been decisive in this respect.<sup>32</sup> Nevertheless, in the light of the specific dispute, the Committee maintained that:

From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law. (...) Under such circumstances, the principle of self-determination of peoples may be called into play.”<sup>33</sup>

This view was also confirmed by the Commission of Rapporteurs, which was appointed to make recommendations to the Council of the League in 1921: self-determination, at that time, was no more than “a principle of justice and liberty, expressed by a vague and general formula”.<sup>34</sup> Moreover, the Commission expressed itself in favor of the territorial integrity of Finland and just recognized to the Aaland Islanders the status of minority, allowed to separate themselves from the host State only as a measure of “last resort when the State lacks either the will or the power to enact and apply just and effective guarantees”.<sup>35</sup> However, Rapporteurs found that this was not the case.

In the period between the two World Wars, the groups whose claims were not taken into consideration at the Paris Peace Conference, namely Germans, Italians, Hungarians and

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<sup>31</sup> Commission of Jurists on the Aaland Islands (n 4). The Åland Islands are an autonomous, demilitarised, monolingual Swedish-speaking region of Finland that consists of an archipelago of 300 small islands lying at the entrance to the Gulf of Bothnia in the Baltic Sea.

<sup>32</sup> Musgrave (n 22) 37.

<sup>33</sup> Commission of Jurists on the Aaland Islands (n 4).

<sup>34</sup> The Aaland Islands Question, Report by the Commission of Rapporteurs (1921) LN Doc B7.21/68/106 (Commission of Rapporteurs on the Aaland Islands).

<sup>35</sup> Ibid.



Bulgarians, started manifesting their disappointment concerning the new boundaries and causing increasing tensions with their neighbors. This phenomenon is depicted with the term ‘Irredentism’.

At the end of World War II, self-determination issues were taken in great consideration, in order to prevent future conflicts and the United Nations (UN) were created to watch over the establishment of the new world order. The Conference of Dumbarton Oaks in 1944 and that of San Francisco in 1945 set out the Charter<sup>36</sup> of the newborn organization. In the intra-conference period, the Soviet Union put pressure on the Allies in order to insert the principle of self-determination in the treaty. As a result of these negotiations, expressed reference to the principle was made in Article 1(2) and 55.

Article 1, among the Four Purposes of the United Nations includes: “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 to strengthen universal peace”.<sup>37</sup> Simma affirms that, in accordance with the objective interpretation that exclusively focuses on the scopes at the time of the law’s application, the legally binding value of the Purposes is sanctioned by the protection granted to them by Article 2(4)<sup>38</sup> of the Charter.<sup>39</sup> On the other hand, Partsch, who decided to choose a different approach, arrived at the same conclusion basing their judgment on the subsequent practice of the UN organs and members.<sup>40</sup>

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<sup>36</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter).

<sup>37</sup> Ibid art 1(2).

<sup>38</sup> UN Charter (n 36) art 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

<sup>39</sup> Bruno Simma and others, *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) 54.

<sup>40</sup> Karl Joseph Partsch, ‘Self-determination’ in Rüdiger Wolfrum (ed) in *United Nations: Law, Policies And Practice* (Martinus Nijhoff, 1995) 1171.

Specific mention of the principle of self-determination was also made in the Chapter IX of the UN Charter, which deals with International Economic and Social Cooperation. Precisely, Article 55 affirms that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>41</sup>

The wording of this provision recognizes self-determination not only as a Purpose,<sup>42</sup> but also as a Principle, confirming its legal relevance, in opposition to the mere political status recognized to it until 1945. The reference to this principle strongly influences the functions of the UN toward the realization of its goals. Article 55 binds the development of peaceful and friendly relations to the respect of the equality of States and the right to self-determination of peoples.

As the system of the League of Nations completely flowed into the United Nations, the Mandate System, as well, was revised. Dominions of the defeated States of World War II and territories voluntarily placed under the new system by the States responsible for their administration were added to the former Mandate countries in the new framework of supervision under the aegis of the United Nations Trusteeship Council. The remaining non-self-governing territories were subjected to the provisions of Article 73 that protects the culture and development of the peoples in those colonies, without any mention of self-

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<sup>41</sup> UN Charter (n 36) art 55.

<sup>42</sup> Cfr Ibid art 1(2).

determination, nor of independence. The attempt of the Soviet Union to make reference to these important tenets was instead successful in the drafting of Article 76: through the connection with Article 1 of the Charter, all the Purposes were recalled as a guidance for the realization of the objectives of the Trusteeship system. In addition, one of the aims of the UN Administration include the one: “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned”.<sup>43</sup> In the end, the UN Charter envisaged the concept of self-determination, but did not define it. Despite it was the first multilateral treaty to encompass this principle, it did not translate it into the right for colonial people to achieve independence or for peoples to separate from the parent State. Nevertheless, it was “an important turning point” for the “maturing of the political postulate of self-determination into a legal standard of behavior”.<sup>44</sup>

Despite no additional reference to self-determination was made in the Charter, this subject continued to be vested of great importance in the international arena. During the two decades following the signature of the Charter, the UN General Assembly was very active on the topic. After the adoption of significant Resolutions<sup>45</sup> in the Fifties, which proposed a draft for an International Covenant on Human Rights with specific reference to self-determination, the Assembly approved in 1960 a groundbreaking document: the Declaration on the Granting of Independence to Colonial Countries and Peoples, included in Resolution 1514(XV).<sup>46</sup> The paramount innovation of the Declaration consists in the fact that it was the first legal document in which the two dimensions of self-determination were defined. By the

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<sup>43</sup> Ibid art 76(b).

<sup>44</sup> Antonio Cassese, *Self-Determination of Peoples* (Cambridge University Press 1995) 43.

<sup>45</sup> UNGA Res 421(V) (4 December 1950) UN Doc A/RES/5/421; UNGA Res 545(VI) (5 February 1952) UN Doc A/RES/6/545.

<sup>46</sup> UNGA Res 1514(XV) (14 December 1960) UN Doc A/RES/15/1514.

condemnation of “the subjection of peoples to alien subjugation, domination and exploitation”<sup>47</sup> the Resolution outlined the precise cases in which the external self-determination, up to full independence, can be invoked. Moreover, it clarified that only peoples, and not the other groups of individuals, are entitled to self-determination.<sup>48</sup> Finally, it also outlined internal self-determination of peoples by stating that: “by virtue of that right [of self-determination] they freely determine their political status and freely pursue their economic, social and cultural development”.<sup>49</sup> This view has also been confirmed by the Supreme Court of Canada in the *Quebec* case.<sup>50</sup> Moreover, Resolution 1541<sup>51</sup> sets a threshold for considering a non-self-governing territory politically mature when: it emerges as a sovereign State; associates with an independent State on the basis of the free and voluntary choice of the people; integrates with an independent State on the basis of complete equality. In the wake of these developments, the International Covenant on Civil and Political Rights (ICCPR)<sup>52</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>53</sup> were finally signed in 1966.

Article 1, common to both the Covenants, recognizes the right to self-determination: “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”.<sup>54</sup> The Human Right Committee (HRC) explains in its General Comment no. 12 the preeminent position given to this right, as it is “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those

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<sup>47</sup> Ibid pt 1.

<sup>48</sup> Ibid pt 2: “All peoples have the right to self-determination”.

<sup>49</sup> Ibid pt 2.

<sup>50</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217.

<sup>51</sup> UNGA Res 1541(XV) (15 December 1960) UN Doc A/RES/15/1541.

<sup>52</sup> International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>53</sup> International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>54</sup> ICCPR (n 52) art 1; ICESCR (n 53) art 1.

rights”.<sup>55</sup> The HRC also stated that Article 1 is so paramount that reservations to this would be incompatible with the object and purpose of the treaty.<sup>56</sup> From the full exercise of this right, indeed, stem all the other provisions concerning economic, social and cultural development, with particular reference to natural resources and means of subsistence of people.<sup>57</sup> Finally, Paragraph 3 of the General Comment entails the duty of States to promote the achievement of self-determination: it imposes “specific obligations on States Parties, not only in relation to their own peoples, but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination”.<sup>58</sup>

After the adoption of the Covenants, other documents tried to clarify the application field of the principle that, still in the wording of the aforementioned treaties, lacked limits and definitions. The 1970 Declaration on Friendly Relations<sup>59</sup> makes clear that: “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”.<sup>60</sup> It also reiterated that:

[E]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples (...) bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.<sup>61</sup>

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<sup>55</sup> UN Human Rights Committee, CCPR General Comment No 12 (13 March 1984) UN Doc HRI/GEN/1/Rev 9 (HRC No 12).

<sup>56</sup> Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 14.

<sup>57</sup> ICCPR (n 52) art 1(2); ICESCR (n 53) art 1(2).

<sup>58</sup> HRC No 12 (n 55).

<sup>59</sup> UNGA Res 2625(XXV) (24 October 1970) UN Doc A/RES/25/2625.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

Moreover, affirming the prohibition of any forcible external actions to deny self-determination, the Declaration outlawed foreign assistance to the repression of secessionist groups. In opposition, it authorized self-determination movements to “seek and receive”<sup>62</sup> support in case of violent denial of self-determination, although the customary value of the admission of military support is questioned.<sup>63</sup> An important, discussed clause was also inserted in order to balance self-determination with the principle of territorial integrity:<sup>64</sup>

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>65</sup>

Finally, by the interpretation of this Declaration it is to be considered that no automatic right to self-determination arises, and in any case, that the exercise of this right is not controversial only in cases of decolonization.<sup>66</sup>

Five years after these Resolutions, with the Helsinki Final Act,<sup>67</sup> a non-binding declaration of the newborn Organization for Security and Cooperation in Europe (OSCE), thirty-five States recognized that:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full

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<sup>62</sup> Ibid.

<sup>63</sup> Saul (n 56) 20.

<sup>64</sup> The interpretations of this clause and the conflict between these two principles are further analyzed in Chapter 2.4.

<sup>65</sup> UNGA Res 25/2625 (n 59).

<sup>66</sup> Cassese (n 44) 123-124; James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 601-602.

<sup>67</sup> Final Act of the Conference on Security and Cooperation in Europe (1 August 1975) 14 ILM 1292 (Helsinki Final Act).

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>68</sup>

Despite the limited number of signatories,<sup>69</sup> this document was considered highly valuable as it represented a common basis for the dialogue between the Western and the Communist blocs, and allowed OSCE to become the world's largest regional security organization. The major development due to the Helsinki Final Act is the recognition that two forms of self-determination exist: the internal and external ones.<sup>70</sup> Moreover, it constituted an important evidence of the fact that States were starting recognizing the ICCPR and ICESCR principles as binding even before the entry into force of the Covenants in 1977. Another remarkable regional treaty on the matter is the African Charter of Peoples' and Human Rights that expressly recognizes the principle of self-determination in its Article 20.<sup>71</sup>

More recently, in 1993, the Vienna Declaration and Programme of Action,<sup>72</sup> adopted by consensus by the World Conference on Human Rights and instituting the Office of the United Nations High Commissioner for Human Rights, reiterated that the denial of self-determination amounts to a violation of human rights and recognized "the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination".<sup>73</sup>

Today, after more than 70 years from the foundation of the United Nations system, it is still debated whether the right to self-determination can automatically amount to the right to secede in any case, whether it is applicable to non-colonial contexts and whether it is granted

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<sup>68</sup> Ibid pt VIII.

<sup>69</sup> Being OSCE a regional organization, the thirty-five States which signed the Final Act are exclusively representative of Europe and North America.

<sup>70</sup> See Chapter 2.2.2.

<sup>71</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) art 20.

<sup>72</sup> Vienna Declaration and Programme of Action (13 October 1993) UN Doc A/CONF.157/24.

<sup>73</sup> Ibid pt I.2.

indiscriminately to any group of persons. By the wording of the aforementioned treaties, it is possible to understand that, peoples are the beneficiaries of many of the rights enshrined in these documents. Indeed, according to the *travaux préparatoires* of the UN Charter and the subsequent interpretation of its Principles contained in the UNGA Resolution 2625,<sup>74</sup> peoples have to be considered as a different entity than States. Unfortunately, the very same States that conceded rights to peoples, avoided giving precise definitions in order to characterize a group of persons as such. In the same way, States never agreed on a common definition of minority.<sup>75</sup> Despite the lack of characterization however, UN documents,<sup>76</sup> treaties<sup>77</sup> and jurisprudence<sup>78</sup> have made an extensive use of these terms.

In the light of the precedent of the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>79</sup> it is possible to assume that the right to self-determination enshrined in Article 1 of the Covenants certainly refers to colonial peoples. By the literal reading of the provision of Article 1(3), it is undeniable that peoples under foreign or alien domination are as well entitled to that right. However, it is excluded that the term ‘people’ is to be referred only to the populations living in these cited situations: support to this opinion is given by the Declaration on Friendly Relations when it mentions “a government representing the whole people belonging to a territory”<sup>80</sup> and by the practice of the UN General Assembly (UNGA) that in several Resolutions used the term ‘people’ referring to South Africa or

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<sup>74</sup> UNGA Res 2625(XXV) (n 59) para 1.

<sup>75</sup> See Chapter 2.2.1.

<sup>76</sup> UNGA Res 1514(XV) (n 46); UNGA Res 2625(XXV) (n 59); UNGA Res 128(XXXI) (4 December 1986) UN Doc A/RES/41/128.

<sup>77</sup> American Convention on Human Rights, (adopted 22 November 1969, entered into force 22 November 1969) 1144 UNTS 123; ACHPR (n 71); Helsinki Final Act (n 67).

<sup>78</sup> *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 (*Western Sahara Advisory Opinion*); *Case Concerning East Timor (Portugal v Australia)* (Merits) (Judgment) [1995] ICJ Rep 90 (*East Timor*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Palestinian Wall Advisory Opinion*); *Reference re Secession of Quebec* (n 50).

<sup>79</sup> UNGA Res 1514(XV) (n 46).

<sup>80</sup> UNGA Res 2625(XXV) (n 59).



Palestine, which cannot be deemed as colonized States.<sup>81</sup> Nevertheless, these two last cases are useful to analyze the other circumstances in which the right to self-determination can be invoked: the establishment of a racist regime that prevents the access to government to the other racial groups and occurrence of a foreign military occupation. According to relevant doctrine, these are the only two occasions in which self-determination can emerge outside of the context of colonization as long as the beneficiaries can be considered ‘a people’.<sup>82</sup>

Therefore, it is today undoubted that the majority of international law scholars considers self-determination as part of *jus cogens*;<sup>83</sup> support to this view is also provided by State practice.<sup>84</sup> Despite little help comes from the *travaux préparatoires* of the UN Charter, where it is just specified that equal rights and self-determination of peoples are “two complementary parts of one standard of conduct” and that an “essential element” of the principle is “a free and genuine expression of the will of the people”<sup>85</sup>, some scholars have further defined the limits of this right. Today, authors like Cassese, explicitly affirm that self-determination is “firmly entrenched in the corpus of international law” only in three occasions: “as an anti-colonialist standard, as a ban on foreign military occupation, and as a requirement that all racial groups be given full access to government”.<sup>86</sup> Moreover, according to Simma, there is also general agreement concerning the belief that a treaty concluded by two States with the aim of preventing the exercise of self-determination by another entity is illegal

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<sup>81</sup> UNGA Res 2396(XXII) (2 December 1968) UN Doc A/RES/22/2396; UNGA Res 2672(XXV) (8 December 1970) UN Doc A/RES/25/2672.

<sup>82</sup> Antonio Cassese, *International Law* (Oxford University Press 2005) 61.

<sup>83</sup> Simma (n 39), Hector Gros Espiell, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (1977) UN Doc E/CN.4/Sub.2/390, 17; Rafael Nieto-Navia, ‘International Peremptory Norms (Jus Cogens) and International Humanitarian Law’ in Antonio Cassese and Lal Chand Vohrah, *Man's Inhumanity To Man* (Kluwer Law International 2003) 595; Jochen A Frowein, ‘Jus Cogens’ (1984) 7 *Encyclopedia of Public International Law* 329. Matthew Saul, ‘The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?’ (2011) 11 *Human Rights Law Review* 609.

<sup>84</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 (*Kosovo Advisory Opinion*) (Written Submission of Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia and Switzerland).

<sup>85</sup> Musgrave (n 22) 39.

<sup>86</sup> Cassese (n 44) 61.

and invalid, as well as the attempt of a State to prevent the bearer of this right from exercising it.<sup>87</sup>

### **1.2.1 Minorities under International Law**

Minorities are extremely relevant to the scope of this chapter as they are the best indicators of the politics of exclusion practiced by States, the very same States that emerged by virtue of the principle of self-determination. Although minorities were the main object of the protection set out by the ideals of Woodrow Wilson, it is not possible to deem them as fully entitled to the right to self-determination, or at least to its ‘external’ dimension. Otherwise, the indiscriminate granting of the right to secession to even the smallest ethnic group would unleash separatist forces that would disrupt the international order and internally destroy the States that allowed them to do so. For this reason, minorities in the current legal order are exclusively entitled to ‘internal self-determination’.

History of migrations is as old as mankind and since time immemorial groups of persons sharing the same language, religion and traditions have co-existed with a larger autochthonous group. In Europe, this phenomenon interested especially religious minorities, with the first forms of protection promulgated in France, the 1598 Edict of Nantes, and in the Holy Roman Empire, the 1606 Treaty of Vienna. Similar agreements, both nationally and internationally were concluded even following the establishment of the principle of ‘*cuius regio, eius religio*’.<sup>88</sup> In the aftermath of World War I, the situation had dramatically changed.

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<sup>87</sup> Simma (n 39) 53.

<sup>88</sup> Joshua Castellino, ‘Self-Determination and Secession in International Law’ in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds) *Self-Determination and Secession in International Law* (Oxford University Press 2014)

After the secularization of the continent, religion was no more the feature to be considered in assessing the identity of a people and the conferral of independence to some nations had triggered a long series of recriminations: emblematic is the Aaland Island case.<sup>89</sup>

Confirmation of the obligation to protect minorities also came from the Permanent Court of International Justice (PCIJ) that was presented with many cases concerning this subject determined by disputes arising from the application of minority treaties. In *German Settlers in Poland*, the Court affirmed the need for “the respect for the rights of minorities and to prevent discrimination against them by any act”.<sup>90</sup> In *Minority Schools in Albania*,<sup>91</sup> a minority was defined as a “population which differs [by the permanent residents] in race, language or religion”, entitled to “the possibility of living peaceably (...) while at the same time preserving the characteristics which distinguish them from the majority”.<sup>92</sup> In the cases concerning the *Acquisition of Polish Nationality*<sup>93</sup> and the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*,<sup>94</sup> the PCIJ protected the German settlers in Poland from being deprived of the Polish citizenship and prevented the achievement of a privileged treatment for the Poles in Danzig. That the belonging to a minority has to be evaluated objectively and that it constitutes a “question of fact” was recognized by the PCIJ in *Rights of Minorities in Upper Silesia*.<sup>95</sup> In the *Greco-Bulgarian Communities*<sup>96</sup> case, the Court defined what a community, vested of an “exclusively minority character”, is:

[T]he ‘community’ is a group of persons living in a given country or locality, having a race, religion, language and traditions of

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<sup>89</sup> See Chapter 1.2.

<sup>90</sup> *German Settlers in Poland* (1923) PCIJ Rep Series B No 6.

<sup>91</sup> *Minority Schools in Albania* (1935) PCIJ Rep Series A/B No 64.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Acquisition of Polish Nationality* (1923) PCIJ Rep Series B No 6.

<sup>94</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932) PCIJ Rep Series A/B No 44.

<sup>95</sup> *Rights of Minorities in Upper Silesia* (1928) PCIJ Rep Series A No 15.

<sup>96</sup> *Greco-Bulgarian Communities* (1930) PCIJ Rep Series B No 17.

their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.<sup>97</sup>

However, despite this definition was very detailed, it was referred to the word ‘community’. The first attempt in the UN era to define the term “minority” was made by Francesco Capotorti, appointed Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977, according to whom a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>98</sup>

Two important new elements are introduced with this definition: the non-dominant position of the group, regardless of its numerical size, and the requirement of nationality for those in the minority group. This last character has been taken into account mainly in Europe, while in the rest of the world it has been criticized on the basis that national minorities are often as discriminated as non-national ones and, therefore, a broader dimension is to be preferred.<sup>99</sup> Despite criticism, Capotorti’s definition is today the most accepted one on minorities and it also served as the basis for the 1992 Declaration on the Rights of Persons

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<sup>97</sup> Ibid.

<sup>98</sup> Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations 1991) 96.

<sup>99</sup> Joshua Castellino and Elvira Dominguez Redondo *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford University Press 2006); Joshua Castellino and David Keane, *Minority Rights in the Pacific: A Comparative Legal Analysis* (Oxford University Press 2009) and Joshua Castellino and Kathleen A Cavanaugh, *Minority Rights in the Middle East: A Comparative Legal Analysis* (Oxford University Press 2013); Joshua Castellino (n 88).

Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>100</sup> approved by consensus by the UN General Assembly, that first recognized the duty of States to protect minorities with “appropriate legislative and other measures”.<sup>101</sup>

It is considerable how minority protection standards have advanced in the last fifty years: the ICCPR exclusively bound States not to deny to minorities the rights to “enjoy their own culture, to profess and practice their own religion, or to use their own language”.<sup>102</sup> Additional, more specific obligations are set out by regional organizations: OSCE has been a frontrunner in this field. Its Concluding Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE<sup>103</sup> of 29 June 1990 has been the first international instrument explicitly granting participatory rights to persons belonging to minorities. In particular it entitles minorities to the right to “participation in the affairs relating to the protection and promotion of the identity of such minorities” to be carried out “by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances”.<sup>104</sup> Other important legally binding treaties were signed in the framework of the Council of Europe: with the 1992 European Charter for Regional or Minority Languages<sup>105</sup> and the 1995 Framework Convention for the Protection of National Minorities<sup>106</sup> States accept the obligation to ensure substantive equality, even encompassing the possibility to adopt special legislation on minority rights.

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<sup>100</sup> UNGA Res 135(XXXXVII) (18 December 1992) UN Doc A/RES/47/135.

<sup>101</sup> Ibid art 1.

<sup>102</sup> ICCPR (n 52) art 27.

<sup>103</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (29 June 1990) (Document of Copenhagen).

<sup>104</sup> Ibid para 35.

<sup>105</sup> European Charter for Regional or Minority Languages (adopted 5 November 1992, entered into force 1 March 1998) ETS 148.

<sup>106</sup> Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157.

Support to minority protection also came from the International Court of Justice (ICJ).<sup>107</sup> Indeed, remarkable are the cases in which the Court recognized the status of customary law to the protection of minorities against genocides,<sup>108</sup> also entailing the obligation *erga omnes* to prevent the perpetration of such a crime<sup>109</sup> and against racial discrimination and apartheid regimes.<sup>110</sup> On this matter, the Opinion of the Badinter Commission was also helpful in claiming a customary obligation towards minorities, affirming that: “peremptory norms of international law require States to ensure respect for the rights of minorities”.<sup>111</sup> It also added that States:

[M]ust afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality.<sup>112</sup>

## 1.2.2 External and internal self-determination

Having ascertained the differences between peoples and minorities, it is now examined how these concepts are related with self-determination. The mainstream opinion of the United Nations in its first twenty years of work has been that only ‘peoples’ were entitled to the right of self-determination, broadly deemed as the right to acquire independence from the colonial

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<sup>107</sup> Gentian Zyberi, ‘The International Court of Justice and the Rights of Peoples and Minorities’ in Christian J Tams and James Sloan (eds) *The Development Of International Law By The International Court Of Justice* (Oxford University Press 2013) 335.

<sup>108</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15, 23.

<sup>109</sup> Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 26; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43 para 277 (*Genocide Case Bosnia and Herzegovina v Yugoslavia*).

<sup>110</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 (*Namibia Advisory Opinion*) para 131.

<sup>111</sup> Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 2’ (1992) 31 ILM 1497 (Badinter Opinion No 2).

<sup>112</sup> *Ibid.*

powers. This view showed its limits during the Seventies, when decolonization was considered (virtually) ended, while at the same time the principle of self-determination had obtained a strong legal recognition. Then, world's attention focused on the remaining cases of peoples deprived of self-determination, namely those subjected to foreign occupation and to racial discrimination. This principle was therefore reshaped as the right to take part to the political decisions affecting the future of the concerned population and a major difference between external and internal self-determination was introduced.

By 'external self-determination' is meant "the right to freely determine their political status and freely pursue their economic, social and cultural development"<sup>113</sup> for the people subjected to "alien subjugation, domination and exploitation".<sup>114</sup> The ICJ in the *Namibia Advisory Opinion* held that all non-self-governing territories were entitled to this right.<sup>115</sup> With regard to the people in the concerned territory, external self-determination is conceded to the whole population, regardless of any ethnic division and in compliance with the former administrative borders. No procedural provision affects the means of acquisition of independence for a colonial territory, as confirmed by the ICJ *Western Sahara Advisory Opinion*.<sup>116</sup> Otherwise, in the cases of association or integration into another independent State, it is prescribed by Resolution 1541(XV) that "an informed and democratic process" is necessary to assess "the free and voluntary choice"<sup>117</sup> of the people. Treaties concerning this principle have strongly contributed, although indirectly, to the acquisition of the value of customary law. Article 1(2) of the UN Charter and Article 1 of the ICCPR and ICESCR, together with the subsequent practice of the United Nations, mainly General Assembly

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<sup>113</sup> UNGA Res 1514(XV) (n 46).

<sup>114</sup> UNGA Res 2625(XXV) (n 59).

<sup>115</sup> *Namibia Advisory Opinion* (n 110) para 52.

<sup>116</sup> *Western Sahara Advisory Opinion* (n 78) paras 70, 72, 162.

<sup>117</sup> UNGA Res 1541(XV) (n 51).

Resolutions,<sup>118</sup> generated much debate on the topic, which led to the gradual acceptance of this tenet by the overwhelming majority of States. Although the cited Resolutions did not represent neither *usus* neither *opinio juris per se*, according to Cassese,<sup>119</sup> the political will expressed therein triggered a series of pronouncements of States that constituted important elements of state practice. Statements in international fora and judgments of international courts added up *opinio juris* to the extent to make the customary value of self-determination be recognized by the ICJ in the *Namibia Advisory Opinion*.<sup>120</sup> The development of the right to self-determination in this sense entailed the recognition of a special status to those fighting for the achievement of independence against foreign and racist regimes. By virtue of their political goals aimed at the self-determination of the oppressed people, the movements of national liberation were granted a double advantage. Indeed, under international law these movements are not prohibited to receive humanitarian, economic and military help by third countries, while instead this ban is effective for States that deny self-determination to peoples entitled to it.<sup>121</sup> The only requirements set forth for liberation movements in order to be recognized as international subjects are the representativeness of a people, the claim over a territory and the presence of an organization or apparatus.<sup>122</sup>

Despite the strong favor encountered in the international community (seventy territories achieved independence between 1945 and 1979), some drawbacks were present in the application of the principle of self-determination, mainly concerning the ‘internal’ side of this right. The emergence of new States, based on the boundaries drawn by the colonial powers, prevented the ethnic groups classifiable as ‘people’ living within them to achieve

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<sup>118</sup> UNGA Res 1514(XV) (n 46); UNGA Res 2625(XXV) (n 59).

<sup>119</sup> Cassese (n 44) 69.

<sup>120</sup> *Namibia Advisory Opinion* (n 110) para 52.

<sup>121</sup> Cassese (n 44) 141.

<sup>122</sup> International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 96.3.



independence. Indeed, the defense of the territorial integrity of the newborn States relegated them to the only internal exercise of self-determination. Moreover, the actual application of internal self-determination was often denied as the local political class was unable to guarantee democratic institutions to its people: in fact, in many cases, decolonization only amounted to the replacement of a foreign dominator with a local tyrant.<sup>123</sup>

After the Seventies, the cases in which self-determination interested peoples victim of colonization and foreign occupation gradually decreased, allowing the possibility to take into greater consideration its internal aspect, more focused on the participation of peoples to the political life. According to this latter vision, internal self-determination would imply the “right to democratic governance”<sup>124</sup> within the constitutional framework of a State. Although this ‘softer’ form of self-determination does not envisage the possibility to amount to the right to secession, in normal conditions, it should not be underestimated: according to Klabbers, this is a “right to be taken seriously”,<sup>125</sup> characterized by a procedural nature. The ICJ in *Western Sahara* expressed the same view: the term ‘principle’ replaced the ‘right’ to self-determination that had been affirmed few years before:<sup>126</sup> the strength of which self-determination was vested vis-à-vis decolonization was then reduced and balanced with other principles of international law. In front of a possible series of States break-ups, the Court separated self-determination from the right to secede and reshaped it in a non-judicially enforceable right: a procedure capable to protect ethnic groups, even in democratic States, from the tyranny of the majority.<sup>127</sup> In its *Separate Opinion on Western Sahara* Judge Dillard made clear the weight carried by the will of the people in self-determination processes: “It is

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<sup>123</sup> Cassese (n 44) 74.

<sup>124</sup> Franck (n 14).

<sup>125</sup> Jan Klabbers ‘The Right to be Taken Seriously: Self-Determination in International Law’ (2006) 28 Human Rights Quarterly 186.

<sup>126</sup> *Namibia Advisory Opinion* (n 110).

<sup>127</sup> Klabbers (n 125).

for the people to determine the destiny of the territory and not for the territory the destiny of the people”.<sup>128</sup>

### 1.2.3 Self-determination in non-colonial cases

As it emerges from the previous pages, the right to external self-determination and, consequently, to secession has been privileged in the first part of the UN history, while after decolonization major emphasis has been put on its internal character. Nevertheless, the resurgence of external self-determination became an issue in the Nineties following the break-ups of the USSR and Yugoslavia and the two decades-long war for the independence of Eritrea. What was thought to belong to the past, in the lapse of just three years was suddenly brought back and put at the center of the international arena. Is it possible to envisage claims of self-determination now that all the colonial empires have been dismantled?

Concerning the situation in the USSR, it is important to separate the destiny of Latvia Lithuania and Estonia, from those of the remaining republics. The process of self-determination of these three States in effect, originated from the recognition, made by the Congress of USSR People’s Deputies on 24 December 1989 that their annexation in the Union was contrary to international law.<sup>129</sup> In the following months, the three republics approved declarations of independence, on the ground of the unlawful forcible annexation of 1940 and without mentioning Article 72 of the USSR Constitution that concerned secession. Therefore, preference was given to the *de jure* continuity of the pre-1940 States, with the support of the Western States that had never recognized the annexation. Referenda were

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<sup>128</sup> *Western Sahara Advisory Opinion* (n 78) (Separate Opinion of Judge Dillard) 122.

<sup>129</sup> Cassese (n 44) 260.

carried out with the assent of the USSR and their results were considerably in favor of secession, although no international supervision was allowed by the Federal Government. This entire process was handled as the re-establishment of a legal situation, rather than as a real case of secession. On the other hand, the other Republics faced a stronger opposition to the dissolution of the Union. A new law aimed to discipline secession was passed in 1990, after the Baltic States independence: nevertheless, the remaining Republics did not follow its procedure, following the chaos originated from the 1991 coup d'état.<sup>130</sup> Deemed an insurmountable hurdle to the implementation of external self-determination, the legal provisions were superseded by the course of the events, giving rise to a new *de facto* situation. Referenda took place only in some of the newly independent States, as a form of *ex post* legitimization of an illegal act under both international and municipal law. An important role in the management of the crisis was conducted by the European Community (EC) that linked the recognition of the new entities to the guarantee of democracy, rule of law and minorities protection, assuring in this way the achievement of both internal and external self-determination.<sup>131</sup>

Following the same script was more difficult few years later, in Yugoslavia. Here, the Constitution did not provide for any reference to secession and required the consent of all the republics to modify the borders. Moreover, the Serbian struggle to concentrate powers in a centralized form of government triggered the holding of referenda and subsequent declarations of independence in four out of the six republics, to which the Serbians answered with the use of force. The secession of Slovenia and Croatia, followed by Bosnia-Herzegovina and Macedonia in 1991, had shown that dissolution rather than secession was the issue at stake. The European Community, in the framework of the Peace Conference on

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<sup>130</sup> Théodore Christakis, *Le Droit à l'Autodétermination en dehors des Situations de Décolonisation* (CERIC 1998) 200.

<sup>131</sup> Cassese (n 44) 266.

Yugoslavia, established the Badinter Commission to address legal problems. The Committee recognized in fact the dissolution as:

[T]he composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal state.<sup>132</sup>

The emphasis put on the dissolution process by the political solution advocated by the Arbitration Committee, together with the EC and the North Atlantic Treaty Organization (NATO), overshadowed the State practice of Slovenia and Croatia that had enacted a secessionist policy long before the other Republics followed their steps.<sup>133</sup>

In the case concerning Eritrea instead, it would be more difficult to conduct an analysis on the basis of ‘dissolution’. In 1950 in fact Eritrea, had been subjected to the sovereignty of Ethiopia, under the UN auspices,<sup>134</sup> without the direct consultation of its population. The Eritrean People’s Liberation Front (EPLF) had fought since 1971 to gain independence, but its efforts were of no avail in achieving international recognition. Things changed in 1991: the EPLF decided to support the Ethiopian opposition against the military junta of Menghistu Haile Mariam that in the period known as ‘Red Terror’ had exterminated political opponents, fellow militaries, students, members of the former imperial establishment and of the Christian Orthodox Church,<sup>135</sup> receiving in change the chance to exercise the right to self-determination. The Menghistu regime had had also an important role in destabilizing

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<sup>132</sup> Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 1’ (1992) 31 ILM 1494 (Badinter Opinion No 1) para 2(b).

<sup>133</sup> Barbara Delcourt and Olivier Corten, *Ex-Yougoslavie Droit International, Politique et Ideologie* (Bruylant 1997) 23.

<sup>134</sup> UNGA Res 390 (V) (2 December 1950) UN Doc UNGA/RES/5/390.

<sup>135</sup> Christopher M Andrew and Vasili Mitrokhin, *The World Was Going Our Way: The KGB and the Battle for the Third World - Newly Revealed Secrets from the Mitrokhin Archive* (Basic Books 2006) 457.

the region, hosting training camps for the movements of liberation of the bordering Somalia and South Sudan.<sup>136</sup> The EPLF's offensive was successful and a plebiscite on independence followed in April 1993, resulted in a 99.8 per cent vote in favor.<sup>137</sup> Although it is evident that Eritrea was not an Ethiopian colony and that its right to self-determination cannot be considered in the framework of a dissolution, many authors<sup>138</sup> still claim that this case does not show sufficient evidence of practice in favor of external self-determination in non-colonial contexts. Their arguments mainly exclude this eventuality by virtue of the fact that the express consent to secession had been given by Ethiopia (although after more than twenty years of war) and that, in any case, the fault of the lack of referendum in Eritrea relapsed on the UN, not on the parent State.

### 1.3 TERRITORIAL INTEGRITY

According to Judge Huber, territorial integrity “involves the exclusive rights to display the activities of a State”.<sup>139</sup> It protects the territory of a State, including its land, subsoil, territorial sea and airspace. This principle, pillar of the Westphalian State, was not completely safeguarded until the signature of the Kellogg-Briand Pact, which sanctioned the renunciation of war as a national policy instrument. Article 10 of the Covenant of the League of Nations expressly encompassed this concept, burdening Member States with the duty to both “protect and preserve”<sup>140</sup> territorial integrity, as well as the political independence of the other

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<sup>136</sup> See Chapter 3.2.

<sup>137</sup> Minasse Haile, ‘Legality of Secession: The Case of Eritrea’ (1994) 8 *Emory International Law Review* 479.

<sup>138</sup> Cassese (n 44); Christakis (n 130); James Crawford, *The Creation of States in International Law* (Clarendon Press 2006).

<sup>139</sup> *Island of Palmas case (Netherlands v United States of America)* (1928) 2 RIAA 829.

<sup>140</sup> Covenant of the League of Nations (n 27) art 10.

Members, in full compliance with the Fourteenth of the Wilson's Point<sup>141</sup> that envisaged the establishment of an association of States to serve this scope.

After World War II, the concept was reiterated in both the Preamble and Chapter I of the Charter of the United Nations. The former indirectly protects States, especially the smaller ones, from eventual aggression through the reaffirmation of “the faith in (...) the equal rights of (...) nations large and small”.<sup>142</sup> Moreover, Article 2(4) provides for the duty for all Member States to refrain “in their international relations from the threat or use of force against the territorial integrity or political independence of any state”.<sup>143</sup> From the observations of Sir Hersch Lauterpacht on the matter, who noted that “territorial integrity, especially where coupled with political independence, is synonymous with territorial inviolability”,<sup>144</sup> it is possible to deduce that the UN legal framework strongly protects this principle from both forcible aggressions and threats directed to influence the internal decision-making process of a State. The Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>145</sup> clarified that not only States, but also peoples “have an inalienable right to complete freedom, the exercise of their sovereignty, and the integrity of their national territory”<sup>146</sup> and that these principles are to be enabled through the cessation of “all armed action or repressive measures of all kind directed against dependent peoples”.<sup>147</sup>

The Declaration on Friendly Relations<sup>148</sup> reaffirmed the value of territorial integrity as a general principle of international law and pushed for the codification and progressive development of this principle, including the prohibition of the threat or use of force so to

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<sup>141</sup> Wilson's Fourteen Points (n 18) pt XIV.

<sup>142</sup> UN Charter (n 36) Preamble.

<sup>143</sup> Ibid art 2(4).

<sup>144</sup> Lassa Oppenheim (Robert Jennings and Arthur Watts eds) *Oppenheim's International Law* (9th edn Longman 1996) 152.

<sup>145</sup> UNGA Res 1515(XV) (15 December 1960) UN Doc A/RES/15/1515.

<sup>146</sup> Ibid Preamble.

<sup>147</sup> Ibid para 4.

<sup>148</sup> UNGA Res 2625(XXV) (n 59).

promote the realization of the purposes of the United Nations. The linkage with the sovereign equality of States has permitted to define this principle as an ‘affirmative’ duty, rather than the ‘negative’ one related to the prohibition of use of force. Moreover, in 2011 the ICJ recognized the customary value of this latter Declaration in the *Kosovo Advisory Opinion*.<sup>149</sup> Again, in 1974, the UNGA Resolution 3314(XXIX) recurred to territorial integrity in order to set out a definition of aggression: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.<sup>150</sup> Moreover, being territorial integrity related to the criterion of effectiveness, any violation of this tenet is prohibited, regardless of whether the violation is based upon a mere lack of legal titles or upon the establishment of a *de facto* situation.<sup>151</sup> As a consequence, the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*<sup>152</sup> held that “the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States”.<sup>153</sup> Therefore, both the direct intervention, namely the occupation of a State’s territory, and the indirect one, such as the aid of rebels by a third State or requests associated with the element of ‘coercion’, are prohibited under customary international law. The UN practice on the topic has further developed with the admission to the organization of the ex-colonial States, particularly concerned about defending their new borders both externally, from other States, and internally, from eventual separatist movements.<sup>154</sup> This address has also been confirmed by the works of the UN Security Council (UNSC) that,

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<sup>149</sup> *Kosovo Advisory Opinion* (n 84) para 80.

<sup>150</sup> UNGA Res 3314(XXIX) (14 December 1974) UN Doc A/RES/29/3314 art 1.

<sup>151</sup> Samuel K N Blay, ‘Territorial Integrity and Political Independence’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

<sup>152</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 (*Military and Paramilitary Activities*).

<sup>153</sup> *Ibid* para 205.

<sup>154</sup> Gregory H Fox, ‘Self-Determination in the Post-Cold War Era: A New Internal Focus’ 81995) 16 *Michigan Journal of International Law* 733.

dealing with the situation of Nagorno-Karabakh,<sup>155</sup> Kosovo<sup>156</sup> and the Democratic Republic of Congo,<sup>157</sup> took in utmost consideration the principle of territorial integrity expressed with the *uti possidetis* formula.

### 1.3.1 The *uti possidetis* principle

The doctrine of *uti possidetis* traces its roots to the formula used by the Praetor under Roman Private Law. “*Uti possidetis, ita possideatis*” was the interdict of this high magistrate when he assigned temporarily to the individual who possessed a property a favorable position in the ownership action, in order to prevent “disturbance of the existing state of possession of immovables as between two individuals”.<sup>158</sup> This concept, as already mentioned,<sup>159</sup> was translated into public international law when the Spanish and Portuguese colonies in Latin America acquired independence. Through the resort to this principle, the colonial administrative borders were upgraded to the status of international frontiers. At the same time, this norm prevented the possibility that territories not effectively controlled by any State would be considered *terra nullius* and therefore susceptible to the acquisition by other States, giving rise to new territorial disputes.<sup>160</sup> Only the Brazilian doctrine distanced itself from the majoritarian concept of *uti possidetis juris*, claiming that the principle was to be better considered as *uti possidetis de facto*:<sup>161</sup> according to this view, the principle would have given “priority to conquest or settlement over treaties or legal documents to determine the

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<sup>155</sup> UNSC Res 822 (30 April 1993) UN Doc S/RES/822, UNSC Res 853 (29 July 1993) UN Doc S/RES/853; UNSC Res 874 (14 October 1993) UN Doc S/RES/874; UNSC Res 884 (12 November 1993) UN Doc S/RES/884.

<sup>156</sup> UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

<sup>157</sup> UNSC Res 1297 (12 May 2000) UN Doc S/RES/1297.

<sup>158</sup> Joshua Castellino, *International Law and Self-Determination* (Martinus Nijhoff 2000) 111.

<sup>159</sup> Chapter 2.2.

<sup>160</sup> Giuseppe Nesi, *L'Uti Possidetis Iuris nel Diritto Internazionale* (CEDAM 1996) 1-3.

<sup>161</sup> *Ibid* 51-54.



boundaries”,<sup>162</sup> nullifying the needs of boundary protection at the basis of this choice. However, this theory did not encounter the favor of the academic community. In short, the tenet of *uti possidetis* has been widely recognized as:

(i) a sui generis instrument covering the succession of new States to colonial powers; (ii) a derogation to effectiveness as a condition for acquiring territorial sovereignty; (iii) a means of promoting the defence of the continent against further colonization attempts; (iv) a principle concerning the determination of boundaries between States arising from the decolonization process.<sup>163</sup>

The first quasi-judicial recognition of *uti possidetis juris* was rendered in the arbitral award of the Swiss Federal Council on the frontiers dispute between Colombia and Venezuela in 1922.<sup>164</sup>

The decolonization of Africa and Asia in the second half of the twentieth century opened the path for the application of this principle outside Latin America.<sup>165</sup> The ICJ, in the *Temple of Preah Vihear*<sup>166</sup> recognized the need for frontiers stability in the international legal order affirming that:

“[W]hen two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question”.<sup>167</sup>

Moving from this assumption, rather than jeopardizing the borders existing at that time in the whole continent, the *uti possidetis* approach was applied to the frontiers that the 1884

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<sup>162</sup> Carlos A Parodi, *The Politics of South American Boundaries* (Praeger 2002) 6.

<sup>163</sup> Giuseppe Nesi, ‘Uti Possidetis Doctrine’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011).

<sup>164</sup> *Affaire des Frontières Colombo-vénézuéliennes (Colombie contre Vénézuéla)* (1922) 1 RIAA 223.

<sup>165</sup> Castellino (n 158).

<sup>166</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6.

<sup>167</sup> *Ibid* 34.

Berlin Conference had established in Central and Western Africa. The Organization of the African Unity, in its first session held in Cairo in 1964, sanctioned this decision and solemnly declared: “that all Member States pledge themselves to respect the borders existing on their achievement of national independence”.<sup>168</sup> Judicially, the shift from regional customary law to the status of ‘international principle’ was finally defined in the *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*<sup>169</sup> before the ICJ:

[*uti possidetis*] is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.<sup>170</sup>

In this way, the Court affirmed the applicability of the principle wherever independence occurs and accepted the *uti possidetis juris* doctrine, giving precedence “to legal title over effective possession as a basis of sovereignty”.<sup>171</sup> The ICJ confirmed its opinion in the *Case Concerning the Land, Island and Maritime Frontier Dispute* and clarified that the application of this principle may not be determinative, but also subjected to modification by mutual agreement of the parties.<sup>172</sup>

However, the utmost relevance of this principle to the scope of this work emerges from its application in non-colonial contexts. Indeed, the maintenance of the administrative

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<sup>168</sup> Organization of African Unity, ‘Border Disputes among African States’ AHG/Res/16(I) (17-21 July 1964) (Cairo Declaration).

<sup>169</sup> *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554 (*Frontier Dispute (Burkina Faso v Republic of Mali)*).

<sup>170</sup> *Ibid* para 20.

<sup>171</sup> *Ibid* para 23.

<sup>172</sup> *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351.

borders in respect of the States that emerged from the dissolution of the USSR and Yugoslavia caused problems in the cases of Kosovo, Abkhazia and South Ossetia.<sup>173</sup> The Badinter Commission first mentioned the principle of *uti possidetis* in its Opinion No. 2<sup>174</sup> and then provided a deeper analysis in Opinion No. 3.<sup>175</sup> In this last document the so-called ‘Badinter Principles’ were enunciated: recalling what was stated by the ICJ in *Burkina Faso v Mali*,<sup>176</sup> the Arbitral Committee sanctioned that all external frontiers must be respected and that the former internal borders cannot be altered except by agreement freely arrived at.<sup>177</sup> Despite this approach was agreed and applied by the new States, some critiques were raised by part of the doctrine,<sup>178</sup> which mainly alleged that the case of Yugoslavia cannot be considered as a precedent for the general application of *uti possidetis*, as it was adopted in violation of the Yugoslav Constitution<sup>179</sup>. Moreover, it is adduced that the choice to maintain the existing borders was a merely political choice, dictated by the influence of the other regional powers,<sup>180</sup> rather than a duty deriving from a legal obligation. According to Delcourt, the character of customary law of *uti possidetis* in non-colonial contexts was not recognized yet and more importantly, the case at hand did not constitute a precedent for the development of international law in this sense.<sup>181</sup>

The same approach, based on *uti possidetis juris* was followed by the twelve Republics of the USSR when they convened in Minsk and Alma Ata in 1991. Despite it has been noted that the two agreements do not expressly recognize the former USSR frontiers as

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<sup>173</sup> See Chapter 4.3 and 4.4.

<sup>174</sup> Badinter Opinion No 2 (n 111).

<sup>175</sup> Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 3’ (1992) 31 ILM 1499 (Badinter Opinion No 3).

<sup>176</sup> *Frontier Dispute (Burkina Faso v Republic of Mali)* (n 169) para 20.

<sup>177</sup> Joshua Castellino and Steve Allen, *Title to Territory in International Law* (Ashgate 2003) 179-181.

<sup>178</sup> Barbara Delcourt, ‘L’application de l’*Uti Possidetis* au Démembrement de la Yougoslavie: Règle Coutumière ou Impératif Politique?’ in Olivier Corten (ed) *Démembrements D’Etats et Délimitations Territoriales* (Editions Bruylant 1999).

<sup>179</sup> Constitution of the Socialist Federal Republic of Yugoslavia (21 February 1974) art 5 (1974 SFRY Constitution).

<sup>180</sup> In particular, Germany and the United States.

<sup>181</sup> Delcourt (n 178) 121.

international ones as they exclusively mention the protection of the territorial integrity,<sup>182</sup> it has been argued that it is surely possible to deduce “the intention to assert and reinforce the *uti possidetis* doctrine, in order to provide international, regional and national legislation for the new borders”.<sup>183</sup> Therefore, it is possible to affirm that the maintenance of the existing frontiers was dictated by the need to secure peace and stability in the region and to avoid that such a situation of chaos and governmental weakness could give rise to further separatists pushes.<sup>184</sup> In conclusion, the assertion that States do not feel legally bound to the application of this principle evidently conflicts with the fact that the old borders drawn in the federal period were kept for these two cases. The consequences of such a doctrinal debate will be further analyzed later in this work.<sup>185</sup>

### **1.3.2 Territorial integrity and non-State actors**

From the exam of the provisions of the UN Charter, it is possible to understand that the duty to refrain from violating the territorial integrity of States relies upon States only. Therefore, what happens when threats to a State’s inviolability come from non-State entities?

The ICJ in its *Kosovo Advisory Opinion*<sup>186</sup> held that the principle of prohibition of the threat or use of force and territorial integrity are exclusively applicable in inter-State relations. In support to this thesis, precedent decisions, such as the *Palestinian Wall Advisory*

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<sup>182</sup> Laurence Weerts, ‘Heurs et Malheurs du Principe de l’*Uti Possidetis*: la Cas du Démembrement de l’URSS’ in Corten (n 178) 79.

<sup>183</sup> Malcom N Shaw, ‘Peoples, Territorialism and Boundaries’ (1997) 8 *European Journal of International Law* 499.

<sup>184</sup> Nesi (n 160).

<sup>185</sup> See Chapter 3.

<sup>186</sup> *Kosovo Advisory Opinion* (n 84) para 403.

*Opinion*<sup>187</sup> and *Armed Activities on the Territory of the Congo*,<sup>188</sup> were recalled. Accordingly, the most significant UNGA Resolutions<sup>189</sup> on the matter exclusively impose duties on States, neglecting any reference to different subjects. Nevertheless, the Court did not exclude to apply *jus contra bellum* in total against non-State actors: these judgments only referred to the exercise of self-defense in case of an armed attack.<sup>190</sup> The practice of the UN Security Council confirms this opinion and defends the use of the measures of Chapter VII of the UN Charter, even against private actors in the absence of an inter-State conflict.<sup>191</sup>

Hence, how is it possible to solve the apparent contradiction that emerges from the *Kosovo Advisory Opinion*? The most plausible option is that the ICJ, in the fragile situation of the post-independence Kosovo, had restricted on purpose the object of its analysis, excluding from its *dictum* the violation of the principle of territorial integrity by non-State actors. Otherwise, it admitted that the prohibition of use of force remains valid as well for these subjects despite, in the case at hand, no violation of such a type occurred. Evident is the link between the silence of the Court on this matter and the lack of a conclusion over the legality or illegality of Kosovo's secession, given that it was not achieved through the use of force. Paragraph 81 of the Advisory Opinion confirms this view,<sup>192</sup> stating that there are circumstances which may render unilateral declarations of independence unlawful, namely "unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character".<sup>193</sup>

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<sup>187</sup> *Palestinian Wall Advisory Opinion* (n 78) para 136.

<sup>188</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities on the Territory of the Congo*).

<sup>189</sup> UNGA Res 2625(XXV) (n 59); UNGA Res 3314(XXIX) (n 150).

<sup>190</sup> Christian Walter 'The Kosovo Advisory Opinion' in Walter (n 88).

<sup>191</sup> UNSC Res 1127 (28 August 1997) UN Doc S/RES/1127; UNSC Res 1173 (12 June 1998) UN Doc S/RES/1173; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373; UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

<sup>192</sup> Walter (n 88)

<sup>193</sup> *Kosovo Advisory Opinion* (n 84) para 81.

## 1.4 THE VALUE OF DECLARATIONS OF INDEPENDENCE AND REFERENDA

In order to consider complete a process of secession, it is necessary that the movement or government that led to this event issues a declaration of independence. In many cases, before this step, referenda have been held in order to assess the will of the concerned people and consequently legitimize (or justify) the occurred secession.

Through the adoption of a declaration of independence, a territory affirms its sovereignty and claims for itself all the State prerogatives. An extensive analysis of declarations of independence is provided in the *Kosovo Advisory Opinion*: the ICJ recognized that a consistent State practice, beginning in the eighteenth century and increasing over time, has developed and that, although in history not every declaration amounted to the creation of a new State, no general prohibition is contained in international law.<sup>194</sup> Therefore, and this is confirmed also by eminent scholars<sup>195</sup> and State practice,<sup>196</sup> declarations of independence are neutral under international law. Indeed, the precedent declarations considered unlawful by the Security Council<sup>197</sup> were not illegal *per se*, according to the Court, rather they became contrary to international law because connected with violations of *jus cogens*.<sup>198</sup> An additional requirement for an acceptable declaration concerns its authors. Peters maintains that not every citizen is authorized to issue a declaration relevant under international law, rather “[e]ffective control or simply actual power or practice figure as a condition for a rule or

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<sup>194</sup> Ibid para 79.

<sup>195</sup> Crawford (n 138) 215; Hurst Hannum, 'The Advisory Opinion On Kosovo: An Opportunity Lost, Or A Poisoned Chalice Refused?' (2011) 24 *Leiden Journal of International Law* 155; Jure Vidmar, 'Conceptualizing Declarations of Independence in International Law' (2011) 32 *Oxford Journal of Legal Studies* 15.

<sup>196</sup> *Kosovo Advisory Opinion* (n 84) (Oral Statement of Burundi, 4 December 2009); (Oral Statement of Croatia, 7 December 2009); (Oral Statement of the United States, 8 December 2009); (Oral Statement of the United Kingdom, 10 December 2009).

<sup>197</sup> UNSC Res 216 (12 November 1965) UN Doc S/RES/216 and UNSC Res 217 (20 November 1965) UN Doc S/RES/217, on Southern Rhodesia; UNSC Res 541 (18 November 1983) UN Doc S/RES/541, on the Turkish Republic of Northern Cyprus; UNSC Res 787 (16 November 1992) UN Doc S/RES/787, on Republika Srpska.

<sup>198</sup> *Kosovo Advisory Opinion* (n 84) para 81.

entitlement”.<sup>199</sup> The ICJ was called to assess the effectiveness of the authority exercised by the authors of the declaration of independence in the case of Kosovo. The Court found that those who issued the Declaration were “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”,<sup>200</sup> highlighting on one hand that those people derived the representativeness from the posts they held in the Kosovo Assembly, while on the other hand it is established that they acted outside the constitutional framework. Nevertheless, the ICJ considered in whole sufficient the degree of representativeness displayed by the authors of the declaration of independence, as they were not random individuals, but members of the Kosovo’s effective government, and recognized that it was free of illegality.<sup>201</sup>

As in the post-World War I period, the problem to ascertain the ‘will of the people’ is still today inseparable from the questions posed earlier of what a people is and what such definition may determine. Although plebiscites had already taken place in Europe in some occasions before, it was only with the foundation of the League of Nations that this practice consolidated. The opinion of Wilson, according to whom “peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game”,<sup>202</sup> had had a great impact on the world leaders. The plebiscites in Klagenfurt (1920), Sopron (1921), and Saar (1935) led the way in the intra-war period towards a dramatic increase of public consultations in the UN era.<sup>203</sup> No uniform requirements were set out for referenda under the UN aegis, as the opinion of the General Assembly and of the International

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<sup>199</sup> Anne Peters, ‘Statehood after 1989: *Effectivités* between Legality and Virtuality’ (2010) 3 Proceedings of the European Society of International Law 8.

<sup>200</sup> *Kosovo Advisory Opinion* (n 84) para 109.

<sup>201</sup> Jure Vidmar, ‘The Kosovo Advisory Opinion Scrutinized’ (2011) 24 *Leiden Journal of International Law* 355.

<sup>202</sup> President Wilson’s Address to Congress (n 19).

<sup>203</sup> Yves Beigbeder, ‘Referendum’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011).

Court of Justice<sup>204</sup> viewed independence as a *summum bonum*, regardless of the means used to achieve it. However, in some specific cases connected with racial or ethnic issues, such as Southern Rhodesia or the Fiji, the United Nations expressly pushed for the application of the ‘one man, one vote’ principle.<sup>205</sup> Stricter provisions set out in Resolution 1541(XV) exclusively applied to integration<sup>206</sup> and association agreements.<sup>207</sup>

Until the late Eighties, the UN did not directly engage in organizing elections; it only observed, supervised and sometimes certified elections through the activities of the Trusteeship Council. At the end of the Cold War, the UN Security Council began to mandate UN peacekeeping missions to support national authorities with the task of implementing elections. Today, although international standards on referenda management do not exist, it is possible to draw a legal framework thanks to various regional documents and practices on the matter. Although reference to free and fair elections was already made in a wide variety of treaties,<sup>208</sup> the first organization to outline a pure set of electoral standards has been the OSCE with the 1990 Document of Copenhagen.<sup>209</sup> In addition to reiterating the principles of democracy and respect for the rule of law, and the right to peaceful assembly and demonstration, it introduces far-reaching provisions regarding national minorities, and broadens the scope of human rights to include election commitments.<sup>210</sup> In particular, this document recognizes that “observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place”<sup>211</sup> and sanctions electoral observation as one of the main tasks of the OSCE. Other instruments, although not focusing exclusively on

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<sup>204</sup> *Western Sahara Advisory Opinion* (n 78).

<sup>205</sup> Michla Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff 1982) 32.

<sup>206</sup> UNGA Res 1541(XV) (n 51) pt IX.

<sup>207</sup> *Ibid* pt VIII.

<sup>208</sup> UNGA Res 217 (III) (10 December 1948) UN Doc A/RES/3/217 (Universal Declaration of Human Rights); European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; ICCPR (n 52); American Convention on Human Rights (adopted 22 November 1969, entered into force 22 November 1969) 1144 UNTS 123; ACHPR (n 71).

<sup>209</sup> Document of Copenhagen (n 103).

<sup>210</sup> *Ibid* pts 5.1, 7,

<sup>211</sup> *Ibid* pt 8.



elections, concern the protection of electoral rights. For instance, the Convention on the Elimination of All Forms of Discrimination against Women guarantees equal right to vote and to be eligible for elections between men and women;<sup>212</sup> the Convention on the Rights of Persons with Disabilities calls on States to protect the rights of persons with disabilities to vote by secret ballot in elections and public referenda without intimidation, facilitating the use of assistive and new technologies;<sup>213</sup> the General Comment No. 25 to the ICCPR expands the wording of ICCPR Article 25 stating that “the right to vote at elections and referenda must be established by law”<sup>214</sup> and that “any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced”.<sup>215</sup> Other important legal standards<sup>216</sup> complement this general framework at a regional level.

However, it seems that, at least in some contexts, declarations of independence are not recognized as having a substantial value in the absence of a previous assessment of the will of the people. Exemplary is the practice of the European Community and the United States in refusing to recognize Bosnia-Herzegovina in 1992, which had declared independence from Yugoslavia without holding a referendum.<sup>217</sup> In that case, given the fragile process of dissolution Yugoslavia was undergoing, the international pressure on Bosnia was such to compel the political leaders to call for a referendum and issuing a new declaration of independence following the positive outcome of the consultation. For these

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<sup>212</sup> The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 7.

<sup>213</sup> UNGA Res 106(LXI) (24 January 2007) UN Doc A/RES/61/106 (The Convention on the Rights of Persons with Disabilities) art 29(a)(II).

<sup>214</sup> UN Human Rights Committee, General Comment No 25 (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, pt 10.

<sup>215</sup> *Ibid* pt 11.

<sup>216</sup> Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Commonwealth of Independent States (adopted 7 October 2002, entered into force 24 November 2003); African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 January 2012); Venice Commission (European Commission for Democracy through Law) Code of Good Practice in Electoral Matters ‘Opinion no 190’ (2002) 13.

<sup>217</sup> Cassese (n 44) 272.

reasons, secessionist movements in Europe nowadays strongly push for public consultations as a way to legitimize their claims. Nevertheless, only Scotland was successful in negotiating an agreement with which the UK central government bound itself to the recognition of the outcome of the 2014 referendum on the independence of the region, whose result was, however, negative.<sup>218</sup> Lacking any similar agreement, the referenda called for by other movements in Europe were declared without ‘any legal value’, regardless of their result, as it happened in Alto Adige<sup>219</sup> in 2013 and in Catalonia<sup>220</sup> and Veneto<sup>221</sup> in 2014.

## **1.5 THE STRUGGLE BETWEEN SELF-DETERMINATION AND TERRITORIAL INTEGRITY**

In the light of the analysis provided in the previous pages, it appears that self-determination (in its ‘external’ acceptation) and territorial integrity irreparably conflict. In the actual world order, the emergence of new States cannot happen without the violation of the territorial sovereignty of other States.

Although treaties and resolutions on the matter leave little space to different solutions, a loophole can be found, indeed, in the so-called ‘safeguard clause’ contained in the

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<sup>218</sup> Scottish Independence Referendum Act 2013 (17 December 2013).

<sup>219</sup> Cristiano Galli, ‘Provocazione in Alto Adige: Referendum sulla Secessione’, *Il Giornale* (12 October 2013) available at: <<http://www.ilgiornale.it/news/interni/provocazione-alto-adige-referendum-sulla-secessione-957759.html>> accessed 30 May 2015.

<sup>220</sup> María Fabra, , ‘El Constitucional Suspende la Consulta tras Admitir los Recursos de Rajoy’, *El País* (29 September 2014) available at: <[http://politica.elpais.com/politica/2014/09/29/actualidad/1412005295\\_056524.html](http://politica.elpais.com/politica/2014/09/29/actualidad/1412005295_056524.html)> accessed 30 May 2015.

<sup>221</sup> Fabio Turato, ‘Indipendenza del Veneto: La Giusta Distanza tra Realtà e Immaginazione’, *Limes* (27 March 2014) available at: <<http://www.limesonline.com/indipendenza-del-veneto-la-giusta-distanza-tra-realta-e-immaginazione/59741>> accessed 30 May 2015.

Declaration on Friendly Relations.<sup>222</sup> This provision, according to the interpretation of Cassese,<sup>223</sup> allows peoples to claim the right to self-determination whenever their government is no more representative of the whole population and does not grant equal access to political institution on the ground of racial discrimination. In this view, a lack of appropriate representation as a violation of internal self-determination is thus understood to be a catalyst for the right to secession. Moreover, this provision should be taken in particular consideration, as it has also been included in the Vienna Declaration and Programme of Action<sup>224</sup> and in the Declaration on the Occasion of the 50th Anniversary of the United Nations.<sup>225</sup>

In the wake of this opinion that throughout the years has found increasing consensus, the Supreme Court of Canada, presented with the question of a possible secession of the Province of Quebec, clarified the connection between self-determination and territorial integrity in a landmark judgment. The Supreme Court set out three possible events that can give rise to the right to secede: colonization,<sup>226</sup> “alien subjugation, domination or exploitation outside a colonial context”<sup>227</sup> and “when a people is blocked from the meaningful exercise of its right to self-determination internally, (...) as a last resort”.<sup>228</sup> Putting aside the cases of colonization and foreign occupation, most of the disputes nowadays concern the right to secession when peoples are denied to actively take part to the political life of their State. Although the Court did not find applicable any of these cases to Quebec, it clarified that Quebecers had been well represented in the Canadian government over the last 50 years and moreover, they were not the target of massive human rights violation, nor victims of physical

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<sup>222</sup> UNGA Res 2625(XXV) (n 59): “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>223</sup> Cassese (n 44) 112.

<sup>224</sup> Vienna Declaration and Programme of Action (n 72) s 1 para 2.

<sup>225</sup> UNGA Res 6(L) (9 November 1995) UN Doc A/RES/50/6.

<sup>226</sup> *Reference re Secession of Quebec* (n 50) para 132.

<sup>227</sup> *Ibid* para 133.

<sup>228</sup> *Ibid* para 134.

attacks.<sup>229</sup> *A contrario*, it is possible to infer that the denial of “meaningful access to government to pursue their political, economic, social and cultural development”,<sup>230</sup> together with human rights violations, is necessary for the right to secede to arise.<sup>231</sup> In this way, the Supreme Court of Canada left space for a possible support of the so-called ‘remedial secession’ theory that will be further analyzed later in this work.<sup>232</sup>

## 1.6 CONCLUDING REMARKS

From this Chapter emerges a defined framework concerning the right to self-determination and territorial integrity. It has been analyzed how self-determination shifted from being a political ideology to a principle of international law. The UN system helped crystallizing this value until, with the end of decolonization, it veered to stressing the internal character of this right. The existence of external self-determination in non-colonial contexts is still questioned and deemed to be assessed case by case. The particular reluctance in accepting this possibility is dictated by the need for existing States to protect their territorial integrity, both from other States and non-State subjects. Some scholars and relevant jurisprudence have finally selected situations in which the right to self-determination could supersede the necessity of maintaining stable frontiers. As a consequence, the success of the secessionist process heavily relies on the capacity of the seceding government or movement to convince the international community that that specific case exactly falls within the range of allowed

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<sup>229</sup> Ibid 135.

<sup>230</sup> Ibid 138.

<sup>231</sup> Roya M Hanna, ‘Right to Self-Determination in In Re Secession of Quebec’ (1999) 23 Maryland Journal of International Law 213.

<sup>232</sup> Chapter 3.4.

situations. Although legally non-questionable, declarations of independence are recognized a different value, according to the righteousness of the actions carried out to arrive to them.

## **2 ACHIEVING INDEPENDENCE**

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### **2.1 INTRODUCTION**

After having analyzed the principles that move peoples in the quest for independence, this Chapter is devoted to the study of the mechanisms that make the creation of new States possible (or impossible). At the beginning, the differences between the cases of secession and dissolution of States are analyzed. Following, the relation between secession and the peremptory norms of international law is considered, followed by a specific study on the prohibition of use of force in secessionist processes. It is then addressed the question of the admissibility of a 'remedial secession' theory and its application fields in the practice of States. The rest of the Chapter focuses on State creation: from the analysis of the evolution of the criteria of the Montevideo Convention to the role of State recognition. Finally, the provisions of the most relevant treaties on State succession are examined.

### **2.2 SECESSION AND DISSOLUTION OF STATES**

The struggles of peoples for self-determination, if successful, can result in the establishment of a new State. The different ways in which this new State affects the predecessor can lead to a simple secession or even to a dissolution. The extent of its consequences depends not only on the capacity of the movement to impair the sovereignty of the existing State, but also on the reception of the fact that other States of the international community might have.

Although no authoritative definition has been set out in international legal documents, secession is generally agreed to be “the separation of a discrete portion of territory and of the people living therein from an established State and the creation of a new State”.<sup>233</sup> Other possible outcomes of the breakaway of a territory from an existing State can be its integration into another already-established State or its union with another State in order to create a new one.<sup>234</sup> Although the possibility of a secession can be included in the legal order of a State, at present, only few constitutional charters of federal States explicitly include the possibility of ‘piloted’ breakaway. Each State has differently determined the issue according to its own peculiarities and tried to set out specific provisions in order to avoid easy secessions. A mistake, in this respect, might be considered the provision included in the 1977 Constitution of the Union of the Soviet Socialist Republics (USSR), which recognized the right for “each Union Republic (...) to secede from the USSR”,<sup>235</sup> but that did not further clarify its conditions. Instead, the 1983 Constitution of Saint Kitts and Nevis highlights the dual character of that State, outlining in Article 113 the conditions for the separation of the only island of Nevis.<sup>236</sup> Mindful of the civil struggle that violently shook the country for thirty years, Ethiopia pinpoints in its Constitution of 1994 the right to secession for “every Nation, Nationality and People in Ethiopia”.<sup>237</sup> However, in both cases a parliamentary super-majority of two-thirds is required, plus a two-reading procedure with a minimum interval of ninety days. At the conclusion of the procedures in Parliament, a confirmative referendum, open for the seceding people only, is required to enact the separation.<sup>238</sup>

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<sup>233</sup> Bahruz Balayev, *The Right to Self-Determination in the South Caucasus* (Lexington Books 2013) 143.

<sup>234</sup> *Ibid.*

<sup>235</sup> Constitution of the Union of Soviet Socialist Republics (7 October 1977) art 72.

<sup>236</sup> Constitution of Saint Kitts and Nevis (adopted on 22 June 1983, entered into force on 23 June 1983) art 113.

<sup>237</sup> Constitution of the Federal Democratic Republic of Ethiopia (adopted on 8 December 1994, entered into force on 21 August 1995) art 39.

<sup>238</sup> *Ibid* art 4(b); Constitution of Saint Kitts and Nevis (n 236) art 113(2)(b);

Nevertheless, the constitutionalization of the right to secede has also been questioned: the critics, in particular, maintain that such a practice might inhibit the formation of a united and effective State in two ways: on one side, any long-term regional engagement could be blocked by the (concrete) risk that the results of that action might benefit an eventual new State; on the other side, any State action might be jeopardized by the risk of lack of cooperation between regions.<sup>239</sup> At the same time, such a possibility would condemn the central State to an ever-present risk of breakaway and confer a blackmailing power to the regions.

When not constitutionalized, the assent of the host State can also be expressly given on the basis of an agreement with the secessionist forces. Consequent to this act, the secession can be achieved directly or through a public consultation. These events are much more frequent than ‘constitutionalized secession’ and have more often led to the dissolution<sup>240</sup> of the territorial State. Some examples represent the withdrawal of a State by a federation made up by former colonies: these are the case of Senegal, which withdrew from the Mali Federation on 22 September 1960 and that of Singapore, which separated from Malaysia signing the 1965 Independence of Singapore Agreement.<sup>241</sup> In Africa, notwithstanding harsh conflicts protracted for many years, two countries managed to achieve secession on a consensual basis. This is the case of the secession of Eritrea from Ethiopia, occurred in 1993 and that of South Sudan from Sudan,<sup>242</sup> which in 2011 gave birth to the youngest State in the international community. In both these cases, a referendum was held.

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<sup>239</sup> Cass Sunstein, 'Constitutionalism and secession' (1991) 58 *University of Chicago Law Review*.

<sup>240</sup> See Chapter 1.3.

<sup>241</sup> Agreement relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State (adopted 7 August 1965, entered into force 9 August 1965).

<sup>242</sup> Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (31 December 2004) (Comprehensive Peace Agreement).



Consensual separations are those that pose least problems from an international law perspective, and that in some cases might imply a lower rate of violence. In reverse, unilateral secessions constitute a never-ending source of debate among political bodies, courts and scholars, as in most cases both secessionist and unionists movements resort to force in defense of their rights, causing useless bloodsheds. Given its unilateral character, this type of secession has generally encountered the skepticism and opposition of the international community that still plays a paramount role in the safeguard of the existing order, as it is explained *infra*.<sup>243</sup>

The main post-1945 practice limited to recognizing only restricted cases of unilateral secession: that of Bangladesh, from Pakistan in 1971; Latvia, Lithuania and Estonia, all three in 1991, from the USSR; Croatia and Slovenia, in 1991 from the Socialist Federal Republic of Yugoslavia (SFRY). In the cases concerning Bangladesh, Croatia and Slovenia the separation and recognition process was carried out quite smoothly, as the secession constituted the only way to put an end to the atrocities committed in those territories. Meanwhile, Latvia, Lithuania and Estonia had been granted independence, counting on the political weakness of the USSR in that moment, on the basis of the fact that their States had been illegally occupied and annexed by Stalin in 1940.<sup>244</sup> However, other attempts of secession did not share this same destiny.

In the most fortunate cases, the territorial integrity of the host State has been preserved peacefully, with the legislative bodies dissolved and new elections called, as it happened in the Faroes Islands in 1946.<sup>245</sup> A stronger and more violent opposition, exercised by the respective host States, has blocked the aspiration of independence of Tibet and Kurdistan, whilst in other cases the intervention of the international community has resulted decisive to

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<sup>243</sup> See Chapter 3.6.

<sup>244</sup> Crawford (n 138) 382.

<sup>245</sup> *Ibid* 415.

reestablish the order: it is the case of Katanga and Republika Srpska.<sup>246</sup> Some others entities, like Chechnya, have managed to exercise full control on their territory for a significant span of time, and in the case of Biafra, they even managed to be recognized by a handful of countries, but later collapsed and returned to their host State.<sup>247</sup> Finally, other governments have acquired the status of *de facto* regimes and still exercise their full powers on the territory, despite the absence of an international recognition, as in the case of the Turkish Republic of Northern Cyprus, Nagorno-Karabakh, Abkhazia, South Ossetia and Transnistria.

Whenever instead the disruptive power of secession undermines the very essence of State authority to the extent not to make possible for the predecessor State to carry out its obligations, that State dissolves. According to Tancredi, the dissolution of a State “takes place when its territory becomes the territory of two or more new States”<sup>248</sup> and as a consequence, the juridical personality of the predecessor State ceases to exist, whilst those of the successor States are born. According to the 1978 Vienna Convention on Succession of States in respect of Treaties, new States start with a clean slate,<sup>249</sup> with the only exception of the respect of the external boundaries established by a treaty and the related rights and obligations.<sup>250</sup> The Convention makes other distinctions that are later analyzed in a dedicated Chapter.<sup>251</sup> In order to apportion the internal frontiers instead, the principle of *uti possidetis*<sup>252</sup> has been frequently applied.

Abundant examples of States dissolutions can be found in history: the most famous are the dismemberment of the Austro-Hungarian and Ottoman Empire at the end of World War I

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<sup>246</sup> In this case the foreign military intervention was not directed exclusively against the Bosnian Serbs of Republika Srpska, but also against Milosevic’s Serbia.

<sup>247</sup> Crawford (n 138) 388.

<sup>248</sup> Antonello Tancredi, 'Dismemberment of States', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2007).

<sup>249</sup> Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3 (VCSST) art 16.

<sup>250</sup> Ibid art 11.

<sup>251</sup> See Chapter 3.7.1.

<sup>252</sup> See Chapter 2.3.2

or that of the German Third Reich after World War II. However, it is not always easy to determine the dissolution of a State when it is related to many, subsequent secessions. A clear example of this argument is the dismemberments of the USSR and the SFRY. In both cases, the spiral of separations had been triggered by only some of the federated units: Latvia, Lithuania and Estonia in the first case, Slovenia and Croatia in the second one. Therefore, it is not possible to define a dissolution *ex ante*: it is only when the series of secessions impair the very existence of the State that the break-up can be defined as occurred. The practice of States shows that the break point is often recognized in a treaty. In the post-World Wars cases of the Austro-Hungarian and Ottoman Empire and of the German Third Reich, the provisions that led to the dissolutions were included in the peace treaties, while for the dismemberment of USSR an agreement involving all the remaining republics was reached in Alma Ata<sup>253</sup>. In the dissolution of Czechoslovakia,<sup>254</sup> it was a Constitutional Act of the Czechoslovakian Parliament that on the basis of the consent of the Parties put an end to the existence of the State.<sup>255</sup>

While it should be accepted, in theory, that at the dissolution of a State its juridical personality ceases to exist, the reality shows that in some instances certain States have claimed to be the successors of the dismantled country. In the aftermath of the USSR's dissolution for example, continuation was granted to the Russian Federation by virtue of its political and economic power and with the consent of the majority of the new States.<sup>256</sup> More interestingly, it was even a third-party organ to declare the extinction of the SFRY and the Federal Republic of Yugoslavia's<sup>257</sup> non-continuation of the SFRY's juridical personality. In

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<sup>253</sup> Alma Ata Declaration, (1992) 31 ILM 148.

<sup>254</sup> As already mentioned in Chapter 1.2.1

<sup>255</sup> Czechoslovakian Constitution Act No 542 (adopted 25 November 1992, entered into force 31 December 1992).

<sup>256</sup> The question was crucial in respect of the succession to the USSR as a permanent member of the United Nations Security Council.

<sup>257</sup> Constituted by Serbia and Montenegro.

its Opinion No. 8<sup>258</sup> of 27 April 1992, the Arbitration Commission of the Conference on Yugoslavia<sup>259</sup> (also called “Badinter Arbitration Committee” after his President) declared that the SFRY had dissolved and that no emerging State had to be deemed its successor. To this topic is dedicated a deep analysis later in this work.<sup>260</sup>

## 2.3 SECESSION AND THE VIOLATION OF THE *JUS COGENS* RULES

When facing the event of a secession of a piece of territory from a State, the main concern for the international community is whether that detachment is lawful or unlawful. Accordingly, States (not unaffected by other considerations of political, economic and strategic nature) will lean either toward the acceptance of the new entity as sovereign and equal to them or toward its rejection and isolation. In order to address this important and delicate issue, it is recalled that the ICJ in the *Kosovo Advisory Opinion* highlighted that the emergence of new States through secession is not *per se* unlawful as long as it happens in compliance with international peremptory norms (*jus cogens*).<sup>261</sup> Therefore, the assessment, case by case, of the compliance with these fundamental rules is crucial in determining the success of a secessionist attempt. The respect of these norms, in relation with secession, lies upon the two constitutive elements of sovereignty: territory and population. As it has been examined in the previous pages, from these characters derive two major principles, respectively the ones of territorial integrity and respect for human rights (that include, in

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<sup>258</sup> Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 8’ (1993) 92 ILR 199.

<sup>259</sup> Established by the European Communities Declaration of 27 August 1992. For its analysis of the effectiveness of the exercise of federal authority, the compositions and workings of the common federal bodies and the subsequent declarations of independence of the remaining territories, the “dissolution test” carried out by the Commission represented a milestone in this field.

<sup>260</sup> See Chapter 2.8.3.

<sup>261</sup> *Kosovo Advisory Opinion* (n 84) para 81.

particular, the right to self-determination). Hereafter, it is analyzed how to balance different norms of *jus cogens* and what an impact can the violation of these two tenets have on already established States and new ones.

According to article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.<sup>262</sup> The principle of territorial integrity is negatively protected by the prohibition of threat or use of force enshrined in Article 2(4) of the UN Charter. Beyond the customary value previously taken in consideration, the ICJ has recognized in *Military and Paramilitary Activities* that it enjoys the status of “fundamental or cardinal principle”<sup>263</sup> of international law. This character was also reiterated in *Palestinian Wall Advisory Opinion* by Judge Elaraby, who considered the prohibition of use of force “universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted”<sup>264</sup>. Moreover, according to Koskenniemi,<sup>265</sup> it is possible to trace the *jus cogens* value of such a prohibition back to the ILC Draft Articles on State Responsibility,<sup>266</sup> in their 1980 version. Critiques made by several authors<sup>267</sup> on the peremptory value of a prohibition that entails so many exceptions<sup>268</sup> have firmly been rejected by the ICJ. Indeed, the Court managed to solve the apparent contradictions evidenced by the scholars affirming that:

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<sup>262</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53.

<sup>263</sup> *Military and Paramilitary Activities* (n 152) para 190.

<sup>264</sup> *Palestinian Wall Advisory Opinion* (n 78) (Separate Opinion of Judge Elaraby) 254.

<sup>265</sup> Martti Koskenniemi, 'National Self-determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241.

<sup>266</sup> UN International Law Commission, Draft Convention on State Responsibility (1980) 11 *Yearbook of the International Law Commission Vol II*, 34 art 19(3)(b).

<sup>267</sup> Gordon A Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society' (1987) 28 *Virginia Journal of International Law* 585; Mark Weisburd, 'The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 *Michigan Journal of International Law* 1.

<sup>268</sup> UN Charter (n 36) arts 42, 53.1, 106, 107.

If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>269</sup>

In this way, it was emphasized that the *jus cogens* value is reinforced even when the rule is violated, as long as the breaching State recognizes the paramount importance of this tenet and invokes justifications. Despite some authors claim that the territorial integrity, together with the role of States, is destined to become an obsolete principle as international organizations gain importance and globalization advances, in many parts of the world there are still people struggling for securing a representative government in their territory.

Having ascertained the status of peremptory norm of the prohibition of the threat or use of force, it is now examined how this cornerstone of international law can be balanced with the respect of human rights, nowadays worldwide recognized as paramount. International<sup>270</sup> and domestic<sup>271</sup> jurisprudence confirms this view. As it emerges by the wording of Article 1 of the ICCPR and ICESCR and by the HRC General Comment No. 12, self-determination is the basis for the exercise of any other human right. The position according to which the political structure of States and people's participation to the government falls within the concept of domestic jurisdiction (or *domaine réservé*) is to be deemed outdated. Fundamental corollary of the principle of sovereignty of States, the *domaine réservé* "describes areas where States are free from international obligations and regulation, with its content varying over time according to the development of international

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<sup>269</sup> *Military and Paramilitary Activities* (n 152) para 186.

<sup>270</sup> *South West Africa Case (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase, Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 298; *Michael Domingues v United States*, Inter-American Court of Human Rights, Rep 62 (22 October 2002) paras 85-86.

<sup>271</sup> *Roper, Superintendent, Potosi Correctional Center v Simmons* 543 US 1 (2005) 13.

law”.<sup>272</sup> This concept, outlined for the first time by the PCIJ in *Nationality Decrees Issued in Tunis and Morocco*,<sup>273</sup> has been constantly questioned and its power gradually eroded. Globalization, the establishment and enforcement of an international legal order, together with the proliferation of regional integration organizations, have further contributed to this process. Accordingly, the UN Secretary-General Boutros Boutros-Ghali maintained in a 1996 Report that international customary law has progressively developed to the extent that human rights are no more under the exclusive jurisdiction of States, rather all actors on the global scene, including the UN, are called upon to protect and enforce the enjoyment of such rights.<sup>274</sup> Less than ten years later, Boutros-Ghali’s successor Kofi Annan tied human rights protection to the prohibition of use of force, stating that “if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to protect human rights and well-being of civilian population”.<sup>275</sup> Bearing in mind Judge Dillard’s declaration<sup>276</sup> it appears evident that in balancing norms vested with the same *jus cogens* value, particular consideration is due to people.<sup>277</sup> Consequently, the breach of the right to self-determination entails that the State is consequently deprived of the protection afforded by the principle of non-intervention and it is exposed to the action of the other States that can act directly or indirectly to protect the fundamental values.<sup>278</sup>

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<sup>272</sup> Katja S Ziegler, ‘Domaine Réserve’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013).

<sup>273</sup> *Nationality Decrees Issued in Tunis and Morocco* (1923) PCIJ Rep Series B No 4.

<sup>274</sup> Report of the Secretary-General, ‘On the United Nations Operations in Cyprus’ (10 December 1996) UN Doc S/1996/1016, 3.

<sup>275</sup> Report of the Secretary-General, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 March 2005) UN Doc A/59/2005 (In Larger Freedom) para 135.

<sup>276</sup> *Western Sahara Advisory Opinion* (n 78) (Separate Opinion of Judge Dillard).

<sup>277</sup> *Kosovo Advisory Opinion* (n 84) (Separate Opinion of Judge Caçado Trindade)

<sup>278</sup> Valentina Grado, *Guerre Civile e Terzi Stati* (CEDAM 1998) 243-244. Cfr Chapter 1.2.2.

From these considerations stem two main subjects that will be analysed hereinafter: what tools can a State use to react to a secessionist attempt and what protection is a non-represented people entitled to?

## 2.4 SECESSION AND THE PROHIBITION OF USE OF FORCE

Taking in consideration the case of a State, victim of a violent secessionist movement while at the same time respectful of the rights of the peoples living in it, which options are viable in order to counteract the separatist phenomenon?

According to the principle '*ex injuria jus non oritur*',<sup>279</sup> which is "well recognized in international law"<sup>280</sup>, any fact originating from an illegal act is null and void and banned from "becoming a source of advantages, benefits or rights for the wrongdoer".<sup>281</sup> This tenet was also reiterated in the Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>282</sup> drafted by the International Law Commission and included in UNGA Resolution 83(LVI).<sup>283</sup> From the wording of article 41(2)<sup>284</sup> the application of *ex injuria jus non oritur* appears inclusive not only of a duty not to recognize the fact, but also not to contribute in maintaining the unlawful status of the situation. Therefore, when an entity proclaims itself a

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<sup>279</sup> *Factory at Chorzów* (1925) PCIJ Rep Series A No 9; *Namibia Advisory Opinion* (n 110) paras 46-47; *Arbitral Tribunal for Dispute over the Inter-entity Boundary in Brcko Area (Republika Srpska v Bosnia-Herzegovina)* (14 February 1997) para 77; *Case of Cyprus v Turkey* App No 25781/94 (Judgment) (ECHR, 10 May 2001); Hersch Lauterpacht '*Règles Générales du Droit de la Paix*' (1937) 62 *Recueil des Cours de l'Académie de Droit International* 287; Ti-Chiang Chen, *The International Law Of Recognition: With Special Reference to Practice in Great Britain and the United States* (Stevens & Sons 1951) 411; Gaetano Arangio-Ruiz, 'Seventh Report on State Responsibility' (1995) 2 ILC Yearbook 4.

<sup>280</sup> *Palestinian Wall Advisory Opinion* (n 78) (Separate Opinion of Judge Elaraby) 254.

<sup>281</sup> *Kosovo Advisory Opinion* (n 84) (Separate Opinion of Judge Cançado Trindade) para 132.

<sup>282</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts in 'Report of the International Law Commission on the Work of Its Fifty-third Session' (2001) Supplement No 10 (A/56/10) (Articles on State Responsibility).

<sup>283</sup> UNGA Res 83(LVI) (28 January 2002) UN Doc A/RES/56/83.

<sup>284</sup> Articles on State Responsibility (n 282) art 41(2): "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation".



State, having independence been achieved through the violation of *jus cogens*, that entity is exposed to the rejection of this status by other States.<sup>285</sup> On this topic, eminent scholars<sup>286</sup> maintained that in order to evaluate the creation of a new State, the four requirements set out in the Montevideo Convention<sup>287</sup> should be joined by a fifth element: the lawfulness of the process of State creation. Another part of the doctrine,<sup>288</sup> instead, does not question the existence of the secessionist entity, rather it consider this fact as ‘null and void’ due to the disregard of the peremptory norms. Finally, according to a third group of authors,<sup>289</sup> it is impossible to doubt the existence of a State. In this case instead, the profile to be assessed is how the violation of *jus cogens* affects State’s operability and perception vis-à-vis third parties as a legal person. However, in all these cases the scholars have construed with different means the unlawfulness of secession, sanctioning the *de facto* entity with non-recognition.

The practice of international organizations is coherent with this view. Back in 1933 the Assembly of the League of Nations recommended to Member States not to recognize the Manchukuo<sup>290</sup> regime because it had been established in violation of the prohibition of use of

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<sup>285</sup> See Chapter 3.5.

<sup>286</sup> Christakis (n 130) 262; Crawford (n 138) 77, 103-106 James E S Fawcett, *The Law Of Nations* (Basic Books 1968) 38; Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999); Hersch Lauterpacht, *Recognition In International Law* (2013 Cambridge University Press) 409; Oppenheim (n 144) 137.

<sup>287</sup> Montevideo Convention on the Rights and Duties of States (1933) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 art 1: “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>288</sup> John Dugard, *Recognition and the United Nations* (Grotius Publications 1987) 147; John Dugard, ‘Collective Non-Recognition: The Failure of South Africa’s Bantustan States’ in Boutros Boutros-Ghali (ed), *Boutros Boutros-Ghali Amicorum Discipulorumque Liber* (Bruylant 1998) 400; Vera Gowlland-Debbas, *Collective Responses To Illegal Acts In International Law* (Martinus Nijhoff 1990) 237.

<sup>289</sup> George Abi-Saab ‘The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law’ in Anne F Bayefsky (ed) *Self-Determination In International Law: Quebec and Lessons Learned* (Kluwer Academic 2000); Isaak Dore, ‘Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems’ (1980) 13 *Vanderbilt Journal of Transnational Law* 25.

<sup>290</sup> Assembly of the League of Nations, (1932) *League of Nations Official Journal*, Special Supplement No 101, 87; Assembly of the League of Nations, (1933) *League of Nations Official Journal*, Special Supplement No 112, 76.

force.<sup>291</sup> The United Nations organs followed these steps in the case of South-West Africa<sup>292</sup>, the Turkish Republic of Northern Cyprus,<sup>293</sup> Southern Rhodesia<sup>294</sup> and the South African Bantustan States.<sup>295</sup> The violation of the prohibition of military intervention, in the first two cases, and the establishment of discriminatory regimes, in the second two examples, were straightforwardly declared unlawful by the United Nations and unanimously non-recognized. Other instruments sanctioned the prohibition of threat or use of force at the regional level.<sup>296</sup>

Having acknowledged that an entity emerging through an unlawful process is not considered a State, it is now examined with which legal protection secessionist movements fight their battle. The ICJ has held on this matter that the prohibition of use of force under Article 2(4) of the UN Charter exclusively applies in inter-State relations.<sup>297</sup> Consequently, domestic law and international human rights apply intra-State. It is questioned whether quasi-States fall within the first or the second category: jurisprudence and doctrine<sup>298</sup> are divided on the matter. The ICJ, when it was requested, has first stuck to the wording of the UN Charter<sup>299</sup> and then avoided addressing the problem directly<sup>300</sup>. Crawford,<sup>301</sup> analyzing State practice

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<sup>291</sup> Covenant of the League of Nations (n 27) art 10.

<sup>292</sup> UNSC Res 276 (18 March 1970) UN Doc S/RES/276; *Namibia Advisory Opinion* (n 110) para 126.

<sup>293</sup> UNSC Res 541 (n 197); UNSC Res 550 (11 May 1984) UN Doc S/RES/550; UNGA Res 253 (XXXVII) (13 May 1983) UN Doc A/RES/37/253.

<sup>294</sup> UNSC Res 216 (n 197); UNSC Res 217 (n 197); UNSC Res 277 (18 March 1970) UN Doc S/RES/277; UNSC Res 288 (17 November 1970) UN Doc S/RES/288; UNSC Res 328 (10 March 1973) UN Doc S/RES/328; UNSC Res 423 (14 March 1978) UN Doc S/RES/423; UNSC Res 445 (8 March 1979) UN Doc S/RES/445; UNSC Res 448 (30 April 1979) UN Doc S/RES/448; UNGA Res 2012 (XX) (12 October 1965) UN Doc A/RES/20/2012; UNGA Res 2022 (XX) (5 November 1965) UN Doc A/RES/20/2022.

<sup>295</sup> UNSC Res 402 (22 December 1976) UN Doc S/RES/402; UNSC Res 407 (25 May 1977) UN Doc S/RES/407; UNGA Res 2923 (XXVII) (15 November 1972) UN Doc A/RES/27/2923; UNGA Res 3151 (XXVIII) (114 December 1973) UN Doc A/RES/28/3151; UNGA Res 3324 (XXIX) (16 December 1974) UN Doc A/RES/29/3324; UNGA Res 3411 (XXX) (28 November 1975) UN Doc A/RES/30/3411.

<sup>296</sup> Charter of the Organization of the American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 art 18; Charter of the Organization of African Unity (25 May 1963, entered into force 13 September 1963) 479 UNTS 39 art 3(2); Pact of the League of Arab States (adopted 22 March 1945, entered into force 10 May 1945) 70 UNTS 237 art 8; Helsinki Final Act (n 67) pt VI.

<sup>297</sup> *Kosovo Advisory Opinion* (n 84) para 80.

<sup>298</sup> Nicholas Tsagourias, 'Non-State Actors in International Peace and Security: Non-State Actors and the Use of Force' in Jean d'Aspremont (ed) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 326; Colin Warbrick, 'States and Recognition in International law' in Malcolm D Evans, *International Law* (Oxford University Press 2006) 205.

<sup>299</sup> *Palestinian Wall Advisory Opinion* (n 78) para 139.

<sup>300</sup> *Armed Activities on the Territory of the Congo* (n 188) para 147.

maintains that such a prohibition exists. Evidences are found in the fact that the attack carried out by the then non-recognized North Korea against the Republic of Korea in 1950 was specifically sanctioned by the UN Security Council<sup>302</sup> as a ‘breach of the peace’ instead of ‘aggression’, because this latter term implies the use of force by States. More recently, the Independent International Fact-Finding Mission on the Conflict in Georgia, solicited by the European Union (EU) in 2008, reported that “the use of force by secessionist groups is in any case illegal under international law”.<sup>303</sup> It has also been argued that by virtue of its *jus cogens* status the prohibition of use of force is valid *erga omnes*.<sup>304</sup> Therefore, the only exception admitted is that concerning national liberation movements in cases of decolonization or alien occupation.<sup>305</sup>

On the other side instead, States do not stand idly by and in respect of international humanitarian law take appropriate steps to defend their territorial integrity “by all legitimate means”.<sup>306</sup> Moreover, it has been stated that a positive obligation for States to reestablish control over its territory does exist.<sup>307</sup> To borrow the words of Frankel, “military success is not the only path to independence, but it may also be the only way for a parent State to maintain its territorial integrity”.<sup>308</sup> According to the different degree of violence exercised by the separatist movement, the territorial State can resort to different measures. In the case of

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<sup>301</sup> Crawford (n 138) 470.

<sup>302</sup> UNSC Res 82(25 June 1950) UN Doc S/RES/82; UNSC Res 83 (27 June 1950) UN Doc S/RES/83; UNSC Res 84 (7 July 1950) UN Doc S/RES/84.

<sup>303</sup> Heidi Tagliavini (ed) ‘Independent International Fact-Finding Mission on the Conflict in Georgia’ (Report, The Council of the European Union 2009) 279 (Tagliavini Report).

<sup>304</sup> Yael Ronen, ‘Entities that Can Be States, but Do not Claim to Be’ in Duncan French, *Statehood and Self-Determination* (Cambridge University Press 2013) 34.

<sup>305</sup> See Chapters 1.2.2 and 1.3.2.

<sup>306</sup> International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Geneva Protocol II) art 3(1).

<sup>307</sup> *Ilaşcu and Others v Moldova and Russia* App No 48787/99 (ECHR, 8 July 2004), paras 331–333; *Ivanțoc and Others v Moldova and Russia* App No 23687/05 (ECHR, 15 November 2011) paras 105–106; *Catan and Others v Moldova and Russia* App Nos 43370/04, 8252/05 and 18454/06 (ECHR, 19 October 2012) paras 109–10.

<sup>308</sup> Lawrence Frankel, ‘International Law of Secession: New Rules for a New Era’ (1992) 14 *Houston Journal of International Law* 539.

internal tensions and disturbances, the situation completely falls within its domestic jurisdiction, as the Geneva Convention thresholds<sup>309</sup> for international conflicts are not met. Third States are under the obligation to refrain from any direct or indirect intervention against the territorial integrity of the incumbent State, while the latter can adopt forcible means to suppress the uprising, in full respect of human rights.<sup>310</sup> Instead, when the rate of violence and organization of the parties increases, the situation qualifies as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”;<sup>311</sup> if the secessionist party can exercise control over part of the territory of the State, the whole set of norms of *jus in bello* for non-international conflicts is applicable.<sup>312</sup> Whether the respect of *jus ad bellum* is imposed to the State as well, it is decided by agreement, as in the case of the Georgian-Ossetian conflict.<sup>313</sup> However, in the absence of a contractual disposition between the parties, it is more and more frequently advocated by the doctrine<sup>314</sup> that the post-Cold War State practice and the *Kosovo Advisory Opinion*<sup>315</sup> push for extending the prohibition of use of force to non-international conflicts as well. Other authors instead, do not recognize State practice on the matter as general, uniform and consistent and thus affirm that such a development in international law has not occurred yet.<sup>316</sup>

While secessionist movements are prevented from taking advantage from the help of foreign States, such a prohibition does not exist for States. Despite State practice on the

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<sup>309</sup> Geneva Protocol II (n 306) art 1(2).

<sup>310</sup> Antonello Tancredi, ‘Secession and Use of Force’ in Walter (n 88).

<sup>311</sup> *Prosecutor v Tadic* (Jurisdiction) ICTY-94-1-T (2 October 1995) para 70.

<sup>312</sup> Geneva Protocol II (n 306) art 1(1).

<sup>313</sup> Agreement on the Principles of the Settlement of the Georgian-Ossetian Conflict by Georgia, the South Ossetian ‘Separatist Forces’ and the Russian Federation (24 June 1992) (1992 Sochi Agreement).

<sup>314</sup> Anne Peters, ‘Does Kosovo Lie in the Lotus-Land of Freedom?’ (2011) 24 *Leiden Journal of International Law* 95.

<sup>315</sup> *Kosovo Advisory Opinion* (n 84) para 81.

<sup>316</sup> Georg Nolte, ‘Secession and External Intervention’ in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2012) 80; Tancredi (n 310); Oliver Dörr, ‘Use of Force, Prohibition of’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011).

matter is rather scant, some authors<sup>317</sup> strongly sustain this possibility. The only examples of intervention by invitation in the framework of a secessionist process took place in the Congo (carried out by the UN, in 1960), in Sri Lanka (by India, in 1987) and in Mali (by France and the African-led International Support Mission in Mali, in 2013). In all these cases, the use of force was well tolerated by the international community because of the recognized need to protect sovereignty and territorial integrity of States and because of the nature of the act at the basis of the intervention – namely, UNSC resolutions for the Congo and Mali and a treaty of military assistance for Sri Lanka. On the contrary, secessionist groups cannot benefit from the direct<sup>318</sup> or indirect<sup>319</sup> support of third States outside a context of colonization or foreign occupation.

In this framework, States are allowed to use even forcible means in order to protect their territorial integrity, while the will and the well-being of the people concerned are usually overlooked. Nevertheless, in some cases, these latter subjects were taken in particular consideration. Although States can legitimately use force in order to suppress threats to the national unity, it is also true that some constraints apply to the exercise of this right. In carrying out such operations in fact, utmost respect for the people involved shall be guaranteed. Otherwise, whenever a State failed in such a task, the support of the international community could be withdrawn, in accordance to the UN practice.<sup>320</sup> In these cases, foreign States would be prevented from assisting a persecutor government.<sup>321</sup> Noteworthy is the forcible displacement and the subsequent death for starvation and diseases of a consistent part

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<sup>317</sup> Théodore Christakis and Karine Bannelier, '*Volenti non Fit Injuria?* Les Effets du Consentement à l'Intervention Militaire' (2004) 50 *Annuaire Français de Droit International* 133.

<sup>318</sup> UN Charter (n 36) art 2(4); UNGA Res 2131(XX) (21 December 1965) UN Doc A/RES/20/2131; UNGA Res 3314 (n 150) art 3(g); UNGA Res 103(XXXVI) (9 December 1981) UN Doc A/RES/36/103.

<sup>319</sup> UN Charter (n 36) art 2(4); *Military and Paramilitary Activities* (n 152) para 247.

<sup>320</sup> In *Larger Freedom* (n 275).

<sup>321</sup> Gaetano Arangio-Ruiz, '*Autodeterminazione (Diritto dei Popoli alla)*', *Enciclopedia Giuridica Treccani* (Treccani 1988) 10.

of the population of Biafra, due to the Nigerian operation to retake that land in 1967.<sup>322</sup> Major steps toward the establishment of this practice were made in the Georgian theatre, where the UN Security Council requested “all parties [including States] to refrain from the use of force”<sup>323</sup> and in the Republic of Serbian Krajina<sup>324</sup> and Kosovo.<sup>325</sup> Additional measures in order to maintain regional peace and security and preventing civilian casualties can also amount to military embargoes, concerning the sale of arms, ammunitions and vehicles, as it occurred for the struggles in Yugoslavia<sup>326</sup> and Kosovo.<sup>327</sup> Condemnations of the means used in anti-secession operations, with particular regard to human rights and humanitarian law, were also expressed<sup>328</sup> against the indiscriminate bombings carried out by Russia with the intent to suppress the secessionist aspirations of Chechnya: tens of thousands of civilian casualties were reported in 1994-1995 and in 1999-2000.<sup>329</sup> Similar concerns were issued in occasion of the Sri Lankan intervention against the Liberation Tigers of Tamil Eelam in 2009.<sup>330</sup> The use of “excessive force by Serbian police forces against civilians and peaceful

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<sup>322</sup> Aleksandar Pavkovic, ‘By Force of Arms’ in Don H Doyle (ed) *Secession as an International Phenomenon From America's Civil War to Contemporary Separatist Movements* (University of Georgia Press 2010) 266.

<sup>323</sup> UNSC Res 876 (19 October 1993) UN Doc S/RES/876; UNSC Res 881 (4 November 1993) UN Doc S/RES/881; UNSC Res 1225 (28 January 1999) UN Doc S/RES/1225; UNSC Res 1311 (28 July 2000) UN Doc S/RES/1311.

<sup>324</sup> UNSC Res 959 (19 November 1994) UN Doc S/RES/959.

<sup>325</sup> UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203.

<sup>326</sup> UNSC Res 713 (25 September 1991) UN Doc S/RES/713.

<sup>327</sup> UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160.

<sup>328</sup> Jean Charpentier, ‘Pratique des Faits Internationaux’ (1995) 41 *Annuaire Français de Droit International* 911 reporting the words of the French Minister of Foreign Affairs Hervé de Charette: “les méthodes et les moyens militaires employés vont bien au-delà des règles générales fixées pour l’usage des forces armées dans les conflits internes”; UN Commission on Human Rights (3 March 1995) UN Doc E/CN4/1995/Sr44, which deplored: “the disproportionate use of force by the Russian armed forces”; Declaration on Chechnya, Presidency Conclusions, Annex II, European Union Council, Helsinki (11 December 1999): “The European Council does not question the right of Russia to preserve its territorial integrity nor its right to fight against terrorism. However this fight cannot, under any circumstance, warrant the destruction of cities, nor that they be emptied of their inhabitants”.

<sup>329</sup> Pavkovic (n 322) 263; Richard Sakwa ‘Chechnya: A Just War Fought Unjustly?’ in Bruno Coppieters and Richard Sakwa (eds) *Contextualizing Secession: Normative Studies in Comparative Perspective* (Oxford University Press 2003); Tancredi (n 310).

<sup>330</sup> Joint Press Conference held by UN Secretary-General and World Health Organization Director-General, Margaret Chan (19 May 2009) Secretary-General Ban Ki-moon stated: “I am relieved by the conclusion of the military operation, but I am deeply troubled by the loss of so many civilian lives. The task now facing the people of Sri Lanka is immense and requires all hands. The legitimate concerns and aspirations of the Tamil people and other minorities must be fully addressed.”

demonstrators in Kosovo”<sup>331</sup> was also sanctioned by the UN Security Council. A specific referral to the respect of ‘rule of law’ was made in the case of the secessionist conflict that occurred in the Former Yugoslav Republic of Macedonia (FYROM) in 2001.<sup>332</sup> More recently, although no armed attack occurred, the adoption by the People’s Republic of China National Congress of an Anti-Secession Law<sup>333</sup>, which expressly provides for the possibility to use force against Taiwan,<sup>334</sup> determined anxiety among the Asia-Pacific countries because it hindered any future move toward a peaceful solution of the dispute.<sup>335</sup> This is to say that, even though authorized by international law, a military intervention, with all the wake of death and destruction that it implies, could not always result in the ‘best option available’. In support of this view, it is remarkable what Julius Nyerere, President of Tanzania, said with regard to the secession of Biafra:

The basis of statehood, and of unity, can only be general acceptance by the participants. When more than twelve million people have become convinced that they are rejected, and that there is no longer any basis for unity between them and other groups of people, then that unity has ceased to exist. You cannot kill thousands of people, and keep on killing more, in the name of unity. There is no unity between the dead and those who killed them; and there is no unity in slavery or domination.<sup>336</sup>

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<sup>331</sup> UNSC Res 1160 (n 327).

<sup>332</sup> UNSC Res 1345 (21 March 2001) UN Doc S/RES/1345.

<sup>333</sup> Third Session of the Tenth National People's Congress, Anti-Secession Law, Law 34/2005 (adopted 14 March 2005).

<sup>334</sup> Ibid art 8: “In the event that the “Taiwan independence” secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity”.

<sup>335</sup> Chunjuan Nancy Wei, ‘China’s Anti-Secession Law and Hu Jintao’s Taiwan Policy’ (2010) 5 Yale Journal of International Affairs 112.

<sup>336</sup> Julius K Nyerere, ‘Why We Recognized Biafra’ (13 April 1968).

## 2.5 THE REMEDIAL RIGHT ONLY THEORY: APPLICATION AND LIMITS

The previous Chapter has shown that States are ready to use force in order to defend their territorial integrity. However, it is possible that such States use violence for other unlawful scopes. Unfortunately, history has provided us with a discrete number of cases in which State violence was used to discriminate ethnic or religious groups. Would such a context entail the right to secede for the subjected people in order to escape the atrocities committed by the parent State?

In this regard, the first to theorize the concept of ‘remedial secession’ was Lee Buchheit<sup>337</sup> in 1978, in the wake of the secession of Bangladesh. Since then, the literature on the topic has developed, involving an increasing number of eminent scholars.<sup>338</sup> Among these, fundamental is the contribution of Allen Buchanan,<sup>339</sup> who describes ‘remedial secession’ as “the right which groups come to have if seceding is the remedy of last resort for serious injustices perpetrated against them by the state”.<sup>340</sup> Therefore, from Buchanan’s wording it is possible to understand that several factors contribute to the emergence of the right to secede. First, the addressee of this right has to be “a group forming its own independent political unit”.<sup>341</sup> In this phrase, the concept of people is completely unhooked from any national or

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<sup>337</sup> Lee C Buchheit, *Secession* (Yale University Press 1978) 222.

<sup>338</sup> Thomas M Franck, ‘Postmodern Tribalism and the Right to Secession’ in Rosalyn Higgins (ed) *Themes and Theories* (Oxford University Press 2009) 13; Karl Doehring ‘Self-Determination’ in Bruno Simma (n 39) 56; Hurst Hannum ‘Rethinking Self-Determination’ (1993) *Virginia Journal of International Law* 34; Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff 2000) 290; Dietrich Murswiek, ‘The Issue of a Right to Secession – Reconsidered’ in Christian Tomuschat (ed) *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 21; Musgrave (n 22) 209; Jane Stromseth, ‘Self-Determination, Secession and Humanitarian Intervention by the United Nations’ (1992) *Proceedings of the American Society of International Law* 370; Christian Tomuschat ‘Self-Determination in a Post-Colonial World’ in Christian Tomuschat (ed) *Modern Law Of Self-Determination* (Martinus Nijhoff 1993) 1.

<sup>339</sup> Allen E Buchanan ‘Theories of Secession’ (1997) 26 *Philosophy & Public Affairs* 31.

<sup>340</sup> Allen E Buchanan ‘Democracy and Secession’ in Margaret Moore (ed) *National Self-Determination and Secession* (Oxford University Press 1998).

<sup>341</sup> Allen E Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford University Press 2004).



ethnic connotation. Second, while other scholars<sup>342</sup> contend that secession is a ‘primary right’<sup>343</sup> innate in the will of the people, according to Buchanan instead, it is exclusively a ‘remedial right’, analogous to Locke’s theory of the right to revolution,<sup>344</sup> that can be activated only as a remedy of last resort for persistent and grave injustices.

This leads us to the analysis of how serious such breaches ought to be in order to trigger the right to secession. In an early work,<sup>345</sup> Buchanan took in consideration only cases of genocide or massive violations of the most basic individual human rights (with reference to the Bengali case) and those of unjust annexation (as for the Baltic Republics). More recently, the cases of Chechnya, Sudan, Eritrea, the Kurdish region of northern Iraq, and Kosovo, encouraged the author to expand the Remedial Right Only Theory in order to encompass the State's persistence in violations of intra-State autonomy agreements as one of the required violations. Buchanan also clarified that secession is admissible in the case of the dissolution of a failed State (as it happened for Slovenia and Croatia), while the same is not true whenever a rights-respecting and functioning government is in charge. The merit of this theory lies in the fact that precise and significant constraints are put on unilateral secessions in order not to foster indiscriminate attempts and political instability. Moreover, as it is highlighted by this author, a major role is played by the possible secession in incentivizing governments to respect human rights:

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<sup>342</sup> Harry Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987); Harry Beran, ‘A Democratic Theory of Political Self-Determination for a New World Order’, in Percy Lehning (ed) *Theories of Secession* (Routledge 1998) 32-59; Avishai Margalit and Joseph Razl ‘National Self-Determination’(1990) 9 *The Journal of Philosophy* 439.

<sup>343</sup> Andrew Altman and Christopher Heath Wellman, *A Liberal Theory Of International Justice* (Oxford University Press 2009); Donald L Horowitz, ‘A Right to Secede?’ in Stephen Macedo and Allen E Buchanan (eds) *Secession and Self-Determination* (New York University Press 2003).

<sup>344</sup> Margaret Moore, *The Ethics of Nationalism* (Oxford University Press 2001).

<sup>345</sup> Allen E Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press 1991).

On the one hand, States that protect basic human rights and honour autonomy agreements are immune to legally sanctioned unilateral secession and entitled to international support for maintaining the full extent of their territorial integrity. On the other hand, if, as the theory prescribes, international law recognizes a unilateral right to secede as a remedy for serious and persisting injustices, States will have an incentive to act more justly.<sup>346</sup>

The Remedial Right Only Theory stems from the already mentioned ‘safeguard clause’ included in the Declaration on Friendly Relations<sup>347</sup> and in the Vienna Declaration.<sup>348</sup> The authority of this proviso is reinforced by the fact that a similar opinion had already come from the Commission of Rapporteurs on the Aaland Islands Question<sup>349</sup> and that Declaration on Friendly Relations has acquired the status of international customary law.<sup>350</sup> In addition, the viability of remedial secession has also been recognized by the African Commission on Peoples’ and Human Rights,<sup>351</sup> by eminent judges of the European Court of Human Rights<sup>352</sup> and by the highly respected opinion of the Supreme Court of Canada in *Reference re Secession of Quebec*.<sup>353</sup> In particular, this last case, although not finding the remedial secession applicable to the case concerned, indirectly showed that secession could constitute a remedial right of last resort:

“There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a ‘people’ to achieve a full measure of self-determination. A State whose government represents the whole of the people or peoples resident within its territory, on a basis of equality

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<sup>346</sup> Buchanan (n 341).

<sup>347</sup> UNGA Res 2625(XXV) (n 59).

<sup>348</sup> Vienna Declaration and Programme of Action (n 72) s 1 para 2.

<sup>349</sup> Commission of Rapporteurs on the Aaland Islands (n 34): “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 solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees”.

<sup>350</sup> *Kosovo Advisory Opinion* (n 84) para 80.

<sup>351</sup> *Katangese Peoples’ Congress v Zaire* (1995) 8th Annual Activity Report of the ACHPR (*Katangese v Zaire*) para 6; *Mgwanga v Cameroon* (n 9) para 199.

<sup>352</sup> *Loizidou v Turkey* App No 15318/89 (Concurring Opinion of Judge Wilhaber, joined by Judge Ryssdal) (ECHR, 18 December 1996).

<sup>353</sup> *Reference re Secession of Quebec* (n 50).

and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity”.<sup>354</sup>

However, despite this theory is very effective in justifying some of the recently-occurred secessions, many are the scholars that do not see it as a panacea. The Supreme Court of Canada itself affirmed that “it remains unclear whether this (...) proposition actually reflects an established international law standard”.<sup>355</sup> Major critiques concern, for example, the fact that such “a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law”<sup>356</sup> or that “the relevant judicial decisions and academic writings do not provide sufficient evidence to suggest that in international legal doctrine, remedial secession is a universally-accepted entitlement of oppressed peoples”.<sup>357</sup> Other scholars observe that remedial secession does not necessarily ensure regional peace and stability as claimed by its supporters.<sup>358</sup> It is also affirmed that remedial secession lacks sufficient State practice and that, even when there had been the bases for its application, it was neglected, as in the case of Biafra.<sup>359</sup> Horowitz instead overturns the ‘incentives aspect’ laid down by Buchanan stating that the possibility of remedial secession would ignite or exacerbate conflicts, rather than constituting a reason for settling them down.<sup>360</sup> He reiterates the fact that there will always be members of an ethnic group who find

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<sup>354</sup> Ibid para 130.

<sup>355</sup> Ibid para 135.

<sup>356</sup> Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2006) 483.

<sup>357</sup> Jure Vidmar, ‘Remedial Secession in International Law: Theory and (Lack of) Practice’ (2010) 1 St Antony’s International Review 6.

<sup>358</sup> James Ker-Lindsay, *The Foreign Policy of Counter Secession* (Oxford University Press 2012); Grace Boulton and Gezim Visoka, ‘Recognizing Kosovo’s Independence: Remedial Secession or Earned Sovereignty?’ (2010) South East European Studies at Oxford (SEESOX), Occasional Paper 11/10, 19.

<sup>359</sup> Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford University Press 2010). However, this author fails in recalling that at that time the legal framework of secession was considerably different, as precedent to the 1970 Declaration on Friendly Relations and its developing practice.

<sup>360</sup> Horowitz (n 343) 58.

themselves on the ‘wrong side of the border’, as it happened in Kashmir, Bosnia or Ethiopia and that remedial secession would give rise to a vicious circle of revenges.<sup>361</sup>

Bearing in mind that secession is today an extremely rare and questioned event, in relation to which it is hardly possible to distinguish the merely legal aspect from the political, economic and strategic interests involved, it would be advisable that a unitary view is developed on the matter. Agreed that the indiscriminate call for the secession of each political unit calling for it in the world would imply the ‘mass suicide’ of States as we know them today, it is also extremely urgent to provide a viable ‘emergency exit’ to those people who are victim of grave and persistent human rights violations. On the matter, the opinion of the International Court of Justice has been considerably evasive. Well-aware of the dangers that it might have encountered, when it was presented with the request for an Advisory Opinion on the declaration of independence of Kosovo, the ICJ decided to adopt a restrictive interpretation of the General Assembly request and avoided addressing any opinion on the legality of secession.<sup>362</sup> This choice drew criticism from some of the Judges and from many scholars. Judge Simma, for example, underlined that: “the relevance of self-determination and/or remedial secession remains an important question in terms of resolving the broader dispute in Kosovo and in comprehensively addressing all aspects of the accordance with international law of the declaration of independence”.<sup>363</sup> His colleague Sepúlveda-Amor stressed that the Court should have considered remedial secession, together with all the other peculiarities of the case at hand, in order to provide a more expansive response.<sup>364</sup> On the same issue, Burri argued that “one cannot credibly avoid dealing with the legality of secession, when asked to assess the legality of a declaration of independence in the circumstances of this case. It is artificial to separate secession and the declaration of

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<sup>361</sup> Ibid 55-56.

<sup>362</sup> *Kosovo Advisory Opinion* (n 84) paras 82-83.

<sup>363</sup> Ibid (Declaration of Judge Simma) para 6.

<sup>364</sup> Ibid (Separate Opinion of Judge Sepúlveda-Amor) para 35.

independence in the given case”.<sup>365</sup> Harsh critiques also came from Arp,<sup>366</sup> Pippan<sup>367</sup> and Hannum.<sup>368</sup>

However, despite its restricted approach, the ICJ noted that different views exist among States on whether self-determination accords upon part of the population of an existing State a right to secede, outside the context of non-self-governing territories and peoples subject to alien subjugation.<sup>369</sup> In the written proceedings, many States took the chance to affirm their opinion on the matter, varying from States that totally favored remedial secession<sup>370</sup> to those that were openly hostile to it.<sup>371</sup> Accordingly, some Judges individually felt the necessity to provide their opinion on such a delicate matter. Judge Yusuf affirmed his support for remedial secession in case of egregious violation of human rights and went on clarifying that:

To determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be considered, such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government (...). All possible remedies for the realization of internal self-determination must be exhausted before the issue is removed from the domestic jurisdiction of the State”.<sup>372</sup>

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<sup>365</sup> Thomas Burri, ‘The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links’ (2010) 11 German Law Journal 881.

<sup>366</sup> Bjorn Arp, ‘The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities’ (2010) 11 German Law Journal 847: “The present Advisory Opinion might not enter into the judicial history of the Court for its answer to this question, but rather for what it did not say.”

<sup>367</sup> Christian Pippan, ‘The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: An Exercise in the Art of Silence’ (2010) 3 European Journal of Minority Issues 145: “Remedial secession was effectively taken off the radar of the Court in the present case”.

<sup>368</sup> Hannum (n 195): “Given the majority's conservative approach, the Advisory Opinion will have minimal legal significance either for the status of Kosovo or for our understanding of state formation and self-determination in the twenty-first century”.

<sup>369</sup> Tams (n 107) 151.

<sup>370</sup> Albania, Estonia, Finland, Germany, Ireland, Netherlands, Norway, Poland, Russia, Slovenia, Switzerland..

<sup>371</sup> Argentina, Azerbaijan, Brazil Bolivia, China, Cyprus, Egypt, Iran, Libya, Romania, Serbia, Slovakia, Spain, Venezuela.

<sup>372</sup> *Kosovo Advisory Opinion* (n 84) (Separate Opinion of Judge Yusuf) para 16.

Judge Cançado Trindade noted how the concept of self-determination evolved since the end of decolonization:

[T]o face nowadays new and violent manifestations of systematic oppression of peoples (...) It is immaterial, whether in the framework of these new experiments, self-determination is given the qualification of 'remedial,' or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.<sup>373</sup>

He also argued that “the government of a State which incurs grave and systematic violations of human rights ceases to represent the people or population victimized”.<sup>374</sup>

In conclusion, the picture emerging from this Advisory Opinion is not the clearest: only some Judges have expressed their view, while the majority remained silent. Little help also comes from State practice: at the moment, the most-widely recognized example of remedial secession occurred is that of Bangladesh.<sup>375</sup> The suspension of the Parliament and the introduction of the martial rule in East Pakistan, which involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India, were seen by the international community as a ‘just cause’ for secession, especially after the military success achieved with the intervention of India.<sup>376</sup> Remedial secession opponents instead, considered that the Pakistani withdrawal “merely produced a *fait accompli*, which in the circumstances other States had no alternative but to accept”,<sup>377</sup> in the light of the fact that Bangladesh was universally recognized only after Pakistan’s consent. Nevertheless, this affirmation could also be interpreted in favor of remedial secession, claiming that Pakistan was pushed to give its consent, given that the international community already saw the

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<sup>373</sup> Ibid (Separate Opinion of Judge Cançado Trindade) para 175.

<sup>374</sup> Ibid para 180.

<sup>375</sup> Crawford (n 138) 141.

<sup>376</sup> Aleksandar Pavković and Peter Radan, *Creating New States* (Ashgate 2007) 102.

<sup>377</sup> Crawford (n 138) 393.

occurred secession as an entitlement for statehood, regardless of any opposition of the territorial State.

Apart from Bangladesh, it is hard to find other cases where remedial secession was recognized as applicable. Many purport that Kosovo also falls within this *species*, but no clarification on this matter has been provided, as already illustrated. To this end, it will be of utmost relevance how the international community and relevant judicial institutions will act in relation with eventual new cases of human rights violations connected with secessions.

## 2.6 THE STATEHOOD TEST

As it has already been anticipated, the violation of *jus cogens* rules is not exempt from consequences on both the legal and political planes. Therefore, can entities arising from secession become full-fledged States?

According to the overwhelming majority of authors<sup>378</sup> the best known formulation of the basic criteria for statehood lies in Article 1 of the Montevideo Convention on the Rights and Duties of States.<sup>379</sup> A permanent population, a defined territory, a government and the capacity to enter into relations with other States are what is needed to achieve the status of 'State'. These provisions have been recognized as established international customary law.<sup>380</sup> It is generally agreed that no minimum quantitative requirement is set concerning the population or the surface of the territory. Qualitatively instead, the population is needed to

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<sup>378</sup> Ibid; Cassese (n 44); Martin Dixon, *Textbook On International Law* (Oxford University Press 2007); Dugard (n 288); Grant (n 286); Higgins (n 338); Lauterpacht (n 286); Oppenheim (n 144).

<sup>379</sup> Montevideo Convention (n 287).

<sup>380</sup> David J Harris, *Cases and Materials on International Law* (Sweet & Maxwell 2010) 92; Ruth Lapidoth, 'When is an Entity Entitled to Statehood?' (2012) 6 *Israel Journal of Foreign Affairs* 78.

permanently inhabit the territory and this latter is described as 'defined', meaning that it has to be "sufficiently consistent".<sup>381</sup> The presence of a government is deemed "the most important single criterion of statehood, since all the other depend upon it"<sup>382</sup> and needs to operate independently from foreign authorities.<sup>383</sup> On this matter, the Commission of Jurists on the Aaland Islands had already arrived to the same conclusions affirming that the Finnish Republic could not become a State "until the public authorities had become strong enough to assert themselves throughout the territories of that State without the assistance of foreign troops".<sup>384</sup> The capacity to enter into relation with other States is said to be more "a consequence of statehood",<sup>385</sup> rather than a criterion: it is the indispensable "corollary of a sovereign an independent government, which exercises jurisdiction on the territory of the State".<sup>386</sup> Moreover, article 11 of the Montevideo Convention states that:

The contracting States definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a State is inviolable and may not be the object of military occupation nor of other measures of force imposed by another State directly or indirectly or for any motive whatever even temporarily.<sup>387</sup>

From this provision, it is clear that the emergence of States is indissolubly linked to the legality of its process. The signatories in 1933 were audacious in binding themselves to the prohibition of use of force before any international organization recognized it. Today, it also

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<sup>381</sup> *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 International Law Reports 11. See also *Question of the Monastery of Saint-Naoum (Albanian Frontier)* (1924) PCIJ Rep Series B No 9. Cfr *North Sea Continental Shelf (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Judgment) [1969] ICJ Rep 3 para 46; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 60; Jure Vidmar, *Democratic Statehood in International Law* (Hart Publishing 2013) 40.

<sup>382</sup> Crawford (n 138) 56.

<sup>383</sup> Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005) 136-137.

<sup>384</sup> Commission of Jurists on the Aaland Islands (n 4) 8-9.

<sup>385</sup> Crawford (n 138) 61.

<sup>386</sup> Vidmar (n 381) 41.

<sup>387</sup> Montevideo Convention (n 287) art 11.



could be argued that the same respect paid to the prohibition of use of force should be due to the observance of human rights, as with the development of international law this subject has become crucial in the assessment of the lawfulness of the secessionist attempts.<sup>388</sup>

Despite the Montevideo Convention provisions are very specific and exhaustive, still it is not possible to objectively apply its criteria to sanction the birth of a new State.<sup>389</sup> In fact, it is generally recognized that the creation of a State is a ‘primary fact’, regardless of any juridical connotation.<sup>390</sup> As international law is neutral vis-à-vis declarations of independence,<sup>391</sup> in the same way it is incapable to *directly* create or dismantle States from the world map. Its task is limited to indicating a (just) mode of action to be followed by subjects (as it happened in the case of Namibia<sup>392</sup> or Southern Rhodesia<sup>393</sup>). Consequently, the mere fact of the birth or death of States is not questionable by international law, which can only examine the acts used to justify such facts (e.g. treaties, resolutions, declarations of independence, etc.).<sup>394</sup> Christakis affirms that in addition to the Montevideo criteria, it is necessary to take into consideration the effectiveness of the sovereignty exercised.<sup>395</sup> In respect of an eventual secession of Quebec for example, it has been noted that: “the secession would be considered successful if, during a sufficiently long period of time, the Quebec authorities managed to exclude the application of Canadian law on their territory and, on the contrary, managed to make the juridical order resulting from their laws and decisions

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<sup>388</sup> Rein Mullerson, ‘Sovereignty and Secession: Then and Now, Here and There’, in Julie Dahlitz (ed) *Secession And International Law* (TMC Asser Press 2003) 138.

<sup>389</sup> Vidmar (n 381) 48-50.

<sup>390</sup> Théodore Christakis, ‘L’Etat en tant que “Fait Primaire”: Réflexions sur la Portée du Principe d’Effectivité.’ in Kohen (n 316) 153.

<sup>391</sup> *Kosovo Advisory Opinion* (n 84).

<sup>392</sup> *Namibia Advisory Opinion* (n 110).

<sup>393</sup> UNSC Res 216 (n 197).

<sup>394</sup> George Abi-Saab, ‘The Effectivity Required of an Entity That Declares Its Independence in Order for It to Be Considered a State in International Law’ in Bayefsky (n 289) 69-73.

<sup>395</sup> Christakis (n 390) 145.

prevail”.<sup>396</sup> This vision collides with the ‘ultimate success’ theory advanced by some Common Law courts<sup>397</sup> that refuses to recognize a State until all the opposition attempts have failed, being effectiveness not sufficient *per se*. In the light of the evident *lacunae* on the matter, the solution proposed by part of the doctrine is that, in the hypothesis of a legal vacuum, *ex factis jus oritur*.<sup>398</sup> Adapting this concept to secession, the resulting picture shows two options: the anarchy dictated by the ‘survival of the fittest’ or a major focus on the process of secession, rather than on the fact. Accordingly, as suggested by Tancredi, the object of this study should shift from the analysis of the mere emergence of a new State to a normative ‘due process’ used to arriving at that stage.<sup>399</sup>

The procedure proposed hereinafter is based upon three pillars. In order to deem a secession as lawful, the separation is required to take place without direct or indirect military support of foreign States, as secessionists are not allowed to seek and receive external aid.<sup>400</sup> Secondly, the separatist attempts is required to be founded on the will of the majority of the population concerned, expressed through a referendum or plebiscite.<sup>401</sup> Moreover, the secession must respect the existing borders in accordance with the *uti possidetis* principle.<sup>402</sup> Although this theory would appear clear enough in drawing the borders between a lawful and unlawful secession, it gives the impression of not taking into account that there is no universal

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<sup>396</sup> Factum of the Grand Council of the Crees, intervened in Reference in Re Secession, in Bayefsky (n 289) 365: “La sécession serait considérée comme réussie si, Durant un temps suffisamment long, les autorités québécoises parvenaient à exclure l’application du droit canadien sur leur territoire et, au contraire, réussissaient à faire régner l’ordre juridique découlant de leur lois et décisions” .

<sup>397</sup> *Williams v Bruffy*, 96 US 176 (1877); *Madzimbamuto v Lardner-Burke* [1969] UKPC 2.

<sup>398</sup> Charles de Visscher, *Les Effectivités Du Droit International Public* (Pédone 1967) 11; Christakis (n 390) 156; Monique Chemillier-Gendreau, ‘A Propos de l’Effectivité en Droit International’ (1975) *Revue Belge de Droit International* 38.

<sup>399</sup> Antonello Tancredi ‘A Normative “Due Process” in the Creation of States through Secession’ in Kohen (n 316) 171-207.

<sup>400</sup> Thomas M Franck ‘Opinion Directed at Question 2 of the Reference’ in Bayefsky (n 289) 75; Alain Pellet, ‘Avis Juridique sur Certaines Questions de Droit International Soulevées par le Renvoi’ in Bayefsky (n 289) 85; James Crawford, ‘Response to Experts Reports of Amicus Curiae’ in Bayefsky (n 289) 153.

<sup>401</sup> Antonello Tancredi, *La Secessione del Diritto Internazionale* (CEDAM 2001) 378. Cfr Chapter 2.4.

<sup>402</sup> See Chapter 2.3.1.

or natural judge invested with the power to adjudicate according to these criteria. Indeed, it seems that the ultimate decision over statehood lies in States themselves.

State practice shows that *de facto* entities act in a legal limbo in which their powers are not recognized by States, but at the same time, the display of effective control over some areas of the life of the population implies that some obligations relapse on them.<sup>403</sup> Moreover, in some occasions other States are forced not to ignore the existence of such entities for the sake of people, in application of the ‘doctrine of necessity’. Already in 1865 indeed, the Supreme Court of the United States had recognized that acts of private law emanated by an unlawful government had to be considered valid.<sup>404</sup> On this point the ICJ held in the *Namibia Advisory Opinion* that: “while official acts performed by the Government of South Africa (...) are illegal and invalid, this invalidity cannot be extended to those acts, such as the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the territory”.<sup>405</sup> The same happened in respect of the Turkish Republic of Northern Cyprus: the Court of Appeal of London<sup>406</sup> first, and then the European Court of Human Rights<sup>407</sup> confirmed the need to consider such acts as valid “to avoid the existence of a vacuum in the protection of human rights”.<sup>408</sup> In this regard, the most shared view is that acts adopted in a *de facto* entity are not null nor void, but deprived of their effectiveness against non-recognizing States: only the resort to necessity, dictated by prevailing reasons (e.g. human rights) can exceptionally make them effective.<sup>409</sup> Therefore, it is possible to affirm that *de facto* entities are qualitatively equal to any other States, while their non-

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<sup>403</sup> Ronen (n 304) 30.

<sup>404</sup> *Texas v White*, 74 US 700 (1869)

<sup>405</sup> *Namibia Advisory Opinion* (n 110) para 125.

<sup>406</sup> *Hesperides Hotels Ltd & Another v Aegean Turkish Holidays Ltd & Another* [1977] EWCA Civ 3 The Weekly Law Reports 656; *Polly Peck International Plc v Nadir and Others* [1992] EWCA Civ 4 All England Law Reports 769.

<sup>407</sup> *Loizidou v Turkey* (n 352) (Individual Dissenting Opinion of Judge Pettiti) 2252-2253; *Loizidou v Turkey* (n 352) (Individual Dissenting Opinion of Judge Jambrek) 2231; *Cyprus v Turkey* (n 279).

<sup>408</sup> *Cyprus v Turkey* (n 279) para 91.

<sup>409</sup> Stefan Talmon, 'The Cyprus Question before the European Court of Justice' (2001) 12 European Journal of International Law 727; Tancredi (n 399) 204.

recognition factually limits their legal capacity.<sup>410</sup> This inevitably leads to the necessity to provide an in-depth analysis of recognition.

## 2.7 RECOGNITION: THE RISK OF A LEGAL LIMBO

It has already been examined that recognition plays a major role in case of violations of *jus cogens* rules, as it has the power to legalize an unlawful situation in accordance with the “*ex factis jus oritur*”<sup>411</sup> principle. For this reason, the international community has put some constraints to any ‘easy recognition’ policy through the adoption of the ILC Articles on State Responsibility that sanction the primacy of the “*ex injuria jus non oritur*”.<sup>412</sup> Moreover, the obligation not to recognize unlawful situations has also been confirmed by the ICJ in two landmark opinions<sup>413</sup>. However, the line between the right to recognize and the duty not to recognize has not always been so clearly drawn.

The practice to confer official recognition to States appeared for the first time in modern history in the eighteenth century. Before that date indeed, the divine right of kings and consequently the very existence of States had never been questioned. The international community of that time was called upon to decide new rules for admitting newcomer States within its ranks, once the disruptive action of the American Revolution and the Napoleonic

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<sup>410</sup> Tancredi (n 399) 205.

<sup>411</sup> Chapter 3.3. See also Stefan Talmon, ‘The Duty “Not to Recognise as Lawful” a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?’ in Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 99; Martin Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’ in James Crawford and others (eds) *The Law of International Responsibility* (Oxford University Press 2010) 677.

<sup>412</sup> Articles on State Responsibility (n 282) art 41(2).

<sup>413</sup> *Namibia Advisory Opinion* (n 110); *Palestinian Wall Advisory Opinion* (n 78).

Wars threatened the formerly established order.<sup>414</sup> These two events were remarkable for constituting the first examples of premature recognition and collective non-recognition.<sup>415</sup> In fact, the creation of the United States of America was recognized by France on 6 February 1778, after the Americans had shown the ability to defend their territory in the battle of Saratoga and even before the British Crown admitted its surrender on those lands.<sup>416</sup> On the contrary, the Congress of Vienna was considerably effective in declaring void all the conquests made by Napoleon before his defeat and sanctioned the restoration of the legitimate sovereigns over the numerous satellite State<sup>417</sup> created by France. Since then, for over two-hundred years, recognition has conditioned the destiny of States, at least until the end of decolonization.<sup>418</sup>

From the aforementioned episodes, it is evident that the act of recognizing another State is an exquisitely political matter.<sup>419</sup> With regard to bilateral relations, it is excluded that recognition can be tacitly granted:<sup>420</sup> according to Hall, States can concede recognition with any act as long as it “clearly indicates intention”.<sup>421</sup> The several means of expression of such an intention encompass: express declarations, whether rendered directly to the recognized State, or publicly, or to a third country; bilateral agreements; the exchange of diplomatic representatives; the appointment of consuls and exequaturs.<sup>422</sup> Whichever act a State decides

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<sup>414</sup> Ker-Lindsay (n 358).

<sup>415</sup> Fabry (n 359).

<sup>416</sup> Jonathan Dull, *A Diplomatic History of the Revolution* (Yale University Press 1985) 165-169.

<sup>417</sup> The Rauracian Republic; the Batavian Republic; the Transpadan Republic; the Lombardian Republic; the Ligurian Republic; the Anconitan Republic; the Helvetic Republic; the Lemanic Republic; the Piedmontese Republic; the Roman Republic; the Cisalpine Republic; the Parthenopean Republic; the Kingdom of Etruria; the Republic of Valais; the Kingdom of Italy; the Confederation of the Rhine; the Kingdom of Holland; the Kingdom of Westphalia; the Grand Duchy of Warsaw; the Illyrian Republic. See Fabry (n 359).

<sup>418</sup> John Dugard and David Raič, ‘The Role of Recognition in the Law and Practice of Secession’ in Kohen (n 316) 94.

<sup>419</sup> Lauterpacht (n 286) 5: “Recognition is not a function consisting in the fulfilment of an international duty, but an act of national policy independent of binding legal principle”.

<sup>420</sup> Ibid 405.

<sup>421</sup> William E Hall, *International Law* (Oxford University Press 1924) 108.

<sup>422</sup> Chen (n 279) 189-201.

to adopt, recognition is to be considered as a “question of policy”<sup>423</sup> and granted in full, although it has also been contended that its effect could be limited to some matters only.<sup>424</sup>

Moreover, recognition acts assume particular importance with regard to the achievement of statehood. In the absence of any superior jurisdiction, States through their practice might claim whether other entities have their same status or not. Accordingly, two main theories have been conceived, each of them attributing to recognition a different value, each of them with its strengths and flaws.

### 2.7.1 The constitutive and declaratory theories

The German positivists<sup>425</sup> of the nineteenth century are reputed the fathers of the constitutive theory of recognition. Their view was taken in utmost consideration for all the first half of the twentieth century, when it started showing its defects. Eminent authors<sup>426</sup> adopted this theory to explain the creation of States in a relatively small international community and in the total absence of international organizations capable to limit States’ prerogatives. On the matter, Oppenheim maintains that:

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<sup>423</sup> Lauterpacht (n 286) 1.

<sup>424</sup> Ibid 375: the author maintains that a new entity may be permitted to enjoy rights “to the extent to which they are conceded by other States”.

<sup>425</sup> Georg W F Hegel, *Enzyklopädie der Philosophischen Wissenschaften im Grundrisse* (Rosenkranz 1870) 331; Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Haering 1882) 92-99; Georg Jellinek, *Die Rechtliche Natur der Staatenverträge* (Hölder 1880) 48.

<sup>426</sup> Heinrich Triepel, *Droit International et Droit Interne* (Pédone 1920) 101; René Le Normand, *La reconnaissance International et ses Diverses Applications* (Camis 1899) 9; Thomas J Lawrence, *Principles of International Law* (Macmillan 1937) 82; Dionisio Anzilotti, *Corso di Diritto Internazionale* (Athenaeum 1928) vol. I, 192; Hans Kelsen, ‘Recognition in International Law: Theoretical Observations’ (1941) 35 *American Journal of International Law* 605; Robert Redslob, ‘La Reconnaissance de l’Etat comme Sujet de Droit International’ (1934) 13 *Revue de Droit International* 429; Oppenheim (n 144) 130; Lauterpacht (n 286) 75.

The grant of recognition establishes that the new State, in the opinion of existing recognizing States, fulfils the conditions of statehood required by international law, so that the new State can be regarded, *quoad* the recognizing States, as an international person possessing the rights and duties which international law attributes to States.<sup>427</sup>

Therefore, according to this eminent scholar, a State becomes a State only when recognized by other ones. Critics<sup>428</sup> did not take much to address problems such as the recognition of the first State on Earth, the legal effectiveness of an act performed by an entity that lacks the juridical personality, or the disputed status of a State recognized only by some countries. In the light of these remarks, some of the supporters of this thesis tried to find justification; Lauterpacht for instance, attributed the major flaw to the lack of legal binding principles:<sup>429</sup> in case States were obliged to recognize new States, had certain conditions been met,<sup>430</sup> the constitutive theory would have perfectly worked. Nevertheless, State practice<sup>431</sup> showed that no country felt itself bound to such a duty and this became even more evident after the foundation of the United Nations. The United States Ambassador to the United Nations, for example, affirmed in 1948 that “the high political act of recognition is one which no country on Earth can question”.<sup>432</sup>

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<sup>427</sup> Oppenheim (n 144) 130-131.

<sup>428</sup> Hans Kelsen, ‘Théorie Générale du Droit International Public: Problèmes Choisis’ (1932) 42 *Recueil des Cours de l’Académie de Droit International* 117; Santi Romano, *Corso di Diritto Internazionale* (2nd edn, Milani 1929) 59.

<sup>429</sup> Lauterpacht (n 286) 41.

<sup>430</sup> *Ibid* 6: “To recognise a community as a State is to declare that it fulfils the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition”.

<sup>431</sup> *Madzimbamuto v Lardner-Burke* (n 397): “Few nations (and certainly not the United Kingdom) apply the idealistic ‘Lauterpacht theory’ of recognition, a theory which presupposes that recognition must always depend on an objective legal appraisal of true facts”.

<sup>432</sup> Warren Austin, quoted in Philip M Brown, ‘The Recognition of Israel’ (1948) 42 *American Journal of international Law* 620.

Therefore, the declaratory theory was considered more appropriate to the post-1945 era. Scholars<sup>433</sup> proposing this theory profess that “the State has capacity in international law as soon as it exists in fact”,<sup>434</sup> according to the criteria of the Montevideo Convention. Consistent support has also been shown by judicial decisions.<sup>435</sup> The Badinter Commission endorsed this view as well, declaring that “the existence or disappearance of the State is a question of fact; that the effects of recognition are purely declaratory”.<sup>436</sup> Therefore, if a State is a State before the issuing of a declaration of recognition by others, the legal effectiveness of such declaration is null, confirming its exclusively political nature. In this regard, other authors<sup>437</sup> maintain that the role of recognition is limited to establishing diplomatic relations between the recognizing and recognized State. However, the declaratory theory also has its weaknesses. Firstly, it is entirely based upon the fulfilment of the Montevideo criteria, but it is left to each State to decide whether and when such requirements are met. Moreover, it is questioned whether such standards are still valid or have evolved in a different manner.<sup>438</sup> In conclusion, to borrow the words of Kelsen: “The problem of recognition of States and governments has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial, or leads in the practice of States to such paradoxical situations”.<sup>439</sup>

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<sup>433</sup> John Bassett Moore and Francis Wharton, *A Digest of International Law* (Government Print Office 1906) 18-19; James L Brierly, *The Law of Nations* (Clarendon Press 1928) 123; Jean Charpentier, *La Reconnaissance Internationale et L'Evolution du Droit des Gens* (Pedone 1956) 15-68; Chen (n 279) 14; John Fischer Williams, *Aspects of Modern International Law* (Oxford University Press 1939) 104; James Lorimer, *The Institutes of the Law of Nations* (Blackwood and Sons 1883) 26-27; Georges Scelle, *Précis de Droit des Gens* (Recueil Sirey 1932) 98; John Westlake, *International Law* (University Press 1910) 49-50; James L Brierly, ‘Règles Générales du Droit de la Paix’ (1936) 58 *Recueil des Cours de l’Académie de Droit International* 1.

<sup>434</sup> Daniel P O’Connell, *International Law* (2nd edn, Stevens 1970) 129.

<sup>435</sup> *Deutsche Continental Gas-Gesellschaft v Polish State* (n 381); *Cyprus v Turkey* (n 279); *S v Banda and Others* (1989) (4) *South African Law Reports* 519(B).

<sup>436</sup> Badinter Opinion No 1 (n 132).

<sup>437</sup> Romano (n 428) 98; Alfred Verdross, *Völkerrecht* (Springer 1964) 114-116.

<sup>438</sup> See Chapter 3.6.3.

<sup>439</sup> Kelsen (n 426).



## 2.7.2 The collective recognition in the practice of States

The foundation of the United Nations and the progressive development of international organizations have considerably contributed to the adoption of a different model of recognition. The admission of a State (the last one was South Sudan in 2011) to the United Nations might be considered as a proof of its statehood.<sup>440</sup> Despite some scholars are still skeptical about the total effectiveness of this process, claiming for instance that admittance “does not imply recognition”<sup>441</sup> or that it is just an “evidence of statehood”,<sup>442</sup> the “existence of the admitted State as international legal person is secure”.<sup>443</sup> In this regard, many proposals to clarify the question have been made: Jessup, for example, requested the General Assembly to adopt a declaration that expresses the essential characteristics a State must have before being admitted to the UN.<sup>444</sup> Lauterpacht, instead, suggested to take into account the existing rules<sup>445</sup> (recommendation of the Security Council and favor of the two-thirds majority of the General Assembly) to draw a general law that equates UN admission to State recognition.<sup>446</sup> Kelsen argued *a contrario* that “it hardly can be denied that admission to the United Nations of a community not yet recognized by a Member means that the United Nations (...) has recognized this community as a State, since according to article 4 of the Charter only ‘States’ can be admitted to membership”.<sup>447</sup> In conclusion, it seems that the UN role in State recognition could remedy the flaws of the constitutive theory, eliminating the problem of States recognized only by some States, and those of the declaratory theory concerning the exact moment when a State achieves statehood.

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<sup>440</sup> John Dugard, ‘The Secession of States and Their Recognition in the Wake of Kosovo’ (2011) 357 *Recueil de l’Académie de Droit International* 9.

<sup>441</sup> Henry G Schermers and Niels Blokker, *International Institutional Law* (Martinus Nijhoff 2003) 1185.

<sup>442</sup> Shaw (n 356) 466.

<sup>443</sup> Dugard (n 440) 58.

<sup>444</sup> Philip C Jessup, *A Modern Law of Nations* (Macmillan 1948) 49.

<sup>445</sup> Lauterpacht (n 286) 403.

<sup>446</sup> UNGA, Rules of Procedure of the General Assembly (2008) UN Doc A/520/Rev.17, arts 134-138.

<sup>447</sup> Hans Kelsen, *The Law of Nations: A Critical Analysis of Fundamental Problems* (Stevens & Sons 1951) 947.

While in the first years from its creation the United Nations appeared as an optional international organization, its role today is fundamental in international relations and its membership almost universal. From the 51 founders, Member States have increased up to 76 in 1955 and more than doubled thirty years later. Today, the organization counts 193 Member States, with many quasi-States still not sitting at the General Assembly, namely Taiwan, Palestine, Northern Cyprus, Kosovo, Abkhazia, South Ossetia and Somaliland. These controversial absences are part of the “grotesque spectacle”<sup>448</sup> described by Lauterpacht: it happens that some entities are recognized as full-fledged States by only a part of the international community, generating total uncertainty regarding their status. This legal limbo is due to the political will of some States to recognize or not entities, in disagreement with the rest of the community. Indeed, it seems that the UN system has been as effective in establishing collective recognitions, as establishing collective non-recognitions. This latter is the gravest sanction adopted against peoples not complying with UN standards (e.g. entities born from violations of international law or lack of statehood requirements).<sup>449</sup>

Fundamental role in assessing whether such entities can claim statehood is played by the International Court of Justice and by the UN Security Council. The former has recognized that declarations of independence are illegal, when “connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of peremptory character”.<sup>450</sup> The latter instead has sanctioned the illegality of the formation process of States, has exhorted Member States not to recognize them and eventually achieved their *debellatio*. Although necessary, however, non-recognition does not have a “status-destroying”<sup>451</sup> effect, as inferred by Talmon: therefore, while in some cases quasi-States were

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<sup>448</sup> Lauterpacht (n 286) 78.

<sup>449</sup> Ibid 81.

<sup>450</sup> *Kosovo Advisory Opinion* (n 84) para 81; see Chapter 3.2.

<sup>451</sup> Stefan Talmon, ‘The Constitutive versus the Declaratory Theory of Recognition: *Tertium non Datur?*’ (2004) 75 *British Yearbook of International Law* 101.

suppressed (Southern Rhodesia,<sup>452</sup> the Bantustan States,<sup>453</sup> Republika Srpska,<sup>454</sup> etc.), others still survive in their illegality, with the complicity of some friendly States (Northern Cyprus, Abkhazia, South Ossetia).

### **2.7.3 Recognition and secession: premature recognition and new democratic standards**

For over two centuries recognition has been fundamental in the validation of claims to statehood. It has already been stressed that States can use recognition as an instrument of foreign policy, as a way to gratify another government or denying it to sanction a violation of international law. Moreover, Lauterpacht added in his analysis another species of recognition, vested of a “tortious and delictual aspect”,<sup>455</sup> that is premature recognition. This feature directly links recognition to the main subject of this work: secession. Therefore, what is the legal value of a declaration of recognition issued before the territorial State gives its assent to secession? In the light of the famous *Kosovo Advisory Opinion*, which refuses to ascertain the lawfulness of that secession, which role can States claim in the settlement of secessionist issues?

Scholars mainly refer to the incident of the recognition granted by France to the United States within the framework of the protracted rivalries with England.<sup>456</sup> Nevertheless, the issue of premature recognition has acquired great importance since the beginning of the twentieth century, with the secession of Panama from Colombia. In that case, the recognition

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<sup>452</sup> UNSC Res 216 (n 197); UNSC Res 217 (n 197); UNSC Res 277 (n 294).

<sup>453</sup> UNSC Res 402 (n 295); UNSC Res 407 (n 295).

<sup>454</sup> UNSC Res 787 (n 197).

<sup>455</sup> Lauterpacht (n 286) 7.

<sup>456</sup> See Chapter 3.6.

issued by the United States few days following Panama's rebellion was generally seen as dictated by the US interests in the Canal construction and labeled as premature. Accordingly, part of the doctrine supporting the legal duty to recognize have considered such declarations as "more than unfriendly" and "acts of intervention and international delinquency";<sup>457</sup> otherwise, scholars who propound recognition as a political act have asserted that "international law does not comprehend cases in which recognition is licit or illicit, forbidden or compelled".<sup>458</sup> The same criticism concerning premature recognition was drawn to Germany in occasion of the recognition of Croatia, on 23 December 1991. In that context, the Badinter Commission had already held on 20 November 1991 that the Socialist Federal Republic of Yugoslavia was "in the process of dissolution",<sup>459</sup> but that process had not concluded yet. In this case, it has been affirmed that Germany had interfered with the internal affairs of Yugoslavia, violated its sovereignty and that its recognition was "an act of irresponsible diplomacy".<sup>460</sup> Nevertheless, other scholars, as well as the majority of States of the international community, did not see any breach in Germany's behavior: in fact, less than a month later the other EC members followed recognizing Croatia, on the basis of the fact that the Belgrade government had lost any chance to reassert its domination over the seceded territory.<sup>461</sup>

While *prima facie* it would seem impossible to qualify an act of recognition as an unlawful intervention because of the lack of coercion<sup>462</sup> or of "dictatorial interference",<sup>463</sup> some authors have argued the contrary. Corten, for instance, maintains that an act of recognition has effects that go well beyond the simple manifestation of the will to enter into

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<sup>457</sup> Lauterpacht (n 286) 8.

<sup>458</sup> Anzilotti (n 426) 93, translated by the author.

<sup>459</sup> Badinter Opinion No 1 (n 132).

<sup>460</sup> Carl Cavanagh Hodge, 'Botching the Balkans: Germany's Recognition of Slovenia and Croatia' (1998) 12 *Ethics and International Affairs* 1.

<sup>461</sup> Christian Tomuschat, 'Recognition of New States – The Case of Premature Recognition' in Peter Hilpold, *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Martinus Nijhoff 2012) 34.

<sup>462</sup> See Chapter 2.3.

<sup>463</sup> Oppenheim (n 144) 305.

relations. It indeed questions the very existence of the territorial State, denies its jurisdiction over the rebellious territory and opens the doors to third States interventions.<sup>464</sup> According to this view, this act is certainly unlawful and permits to realize the worst scenarios linked to the constitutive theory, where the exclusive will of States is capable to create new ones arbitrarily.

From these last conclusions stems the necessity to investigate whether today the statehood requirements set by the Montevideo Convention are still valid and if they are the only ones applicable. As it appears, the collective recognition carried out by the UN has not been effective in every single circumstance. Considering the statehood requirements, it is to be noted that some problems had already emerged at the moment of the signature. The United States for example, added a reservation which deplored the lack of any definition or interpretation clauses that instead would have been capable “to enable every government to proceed in a uniform way without any difference of opinion or interpretations”,<sup>465</sup> In the light of this *lacuna*, even the US policy was ambivalent: in the intra-war period in fact, recognition was granted to a large range of States, on the only basis of a *de facto* control of the land.<sup>466</sup>

More recently instead, attempts to develop a more modern practice have been made, in order to give importance to other factors in addition to the Montevideo criteria. Major progresses resulted from the will of the European Community to adopt a common recognition policy vis-à-vis the creation of new States in Europe occurring in 1991. Both the dismemberment of the USSR and of the SFRY were interested by this approach, that culminated with the issuing of the EC Guidelines on the Recognition of New States in Eastern

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<sup>464</sup> Olivier Corten, ‘Déclarations Unilatérales d’Indépendance et Reconnaissances Prématuurées: du Kosovo à l’Ossétie du Sud et à l’Abkhazie’ (2008) 112 *Revue General de Droit International Public* 721.

<sup>465</sup> Manley O Hudson, *International Legislation* (Carnegie Endowment for International Peace 1937) 622-623.

<sup>466</sup> Lauterpacht (n 286) 130-140.

Europe and in the Soviet Union<sup>467</sup> and the EC Declaration on Yugoslavia.<sup>468</sup> It is remarkable how the instability at its boundary was an occasion for the European Community to test the prototype of the Common Foreign and Security Policy that the following year would have become the second pillar of the Union. In fact, both the EC Guidelines and Declarations were not simple Council *communiqués*, rather the core of a detailed State-building road map. The EC Guidelines for instance, bearing in mind “the normal standards of international practice”,<sup>469</sup> set several additional requirements for recognition. Among others, the EC expressly demanded the respect of “the principle of self-determination”,<sup>470</sup> of “the rights of ethnic and national groups and minorities”,<sup>471</sup> and of “the inviolability of all frontiers which can only be changed by peaceful means and by common agreement”.<sup>472</sup> It also clarified that “the Community and its Member States will not recognize entities which are the result of aggression”.<sup>473</sup> Observance of human rights and democracy was demanded through the direct reference to the Charter of the United Nations<sup>474</sup>, the Helsinki Final Act<sup>475</sup> and the Charter of Paris.<sup>476</sup> In particular, the requirement of being “constituted on a democratic bases”<sup>477</sup> precisely expanded the concept of self-determination, linking the emergence of new States to the assessment of a specific will of the concerned people through open and public consultations. Although the reference to a multi-party democracy enshrined in the Charter of Paris<sup>478</sup> is generally deemed beyond the simplest acceptance of democratic rights,<sup>479</sup> the

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<sup>467</sup> Declaration of the Extraordinary European Political Cooperation Ministerial Meeting on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’, Brussels (16 December 1991) 31 ILM 1486 (EC Guidelines).

<sup>468</sup> Declaration on Yugoslavia, Extraordinary European Political Cooperation Ministerial Meeting, Brussels (16 December 1991) (1992) 31 ILM 1485 (EC Declaration).

<sup>469</sup> EC Guidelines (n 467) para 2.

<sup>470</sup> Ibid.

<sup>471</sup> Ibid para 3.

<sup>472</sup> Ibid.

<sup>473</sup> Ibid para 4.

<sup>474</sup> UN Charter (n 36).

<sup>475</sup> Helsinki Final Act (n 67).

<sup>476</sup> Charter of Paris for a New Europe (21 November 1990) 30 ILM 190.

<sup>477</sup> EC Guidelines (n 467) para 3.

<sup>478</sup> Charter of Paris (n 476) Annex 1 art 7.

<sup>479</sup> Vidmar (n 381) 85.

European Council insisted on this point, setting the bases for this institutional system in Eastern Europe. A high standard was also adopted concerning human rights: also in this case, the reference to the Charter of Paris involves the compliance with a broad range of civil and political rights, with little reference to economic, social and cultural rights as well. The link to the Helsinki Final Act compels emerging States to commit to peace, to solve inter-State disputes with peaceful means and prohibits the establishment of States through the use of force.<sup>480</sup>

The EC Declaration, instead, was exclusively addressed to the SFRY. More specifically, the EC Member States bound themselves to recognition of those countries that would have expressed their independence; accepted the EC Guidelines; supported the UN Secretary-General, UN Security Council and the Conference on Yugoslavia. According to some authors,<sup>481</sup> the EC policy adopted in this context can be seen as a case of collective State creation. Other scholars highlight that, despite not being a body able to create States or to grant recognition, the role of the Badinter Commission was fundamental in influencing the practice of the EC Member States.<sup>482</sup> Finally, the right to recognize completely relapsed on States that through a particularly strong coordinated diplomacy managed to make the new States comply with their standards. Today, after more than twenty years, it is possible to affirm that this non-institutional collective approach has been effective in conducting those countries to a period of relative peace and to higher democratic standards.

In conclusion, it is to be recognized that in the creation of new States the compliance with the Montevideo Convention criteria is indispensable. Nevertheless, other States definitely play an important role in the management of secessionist process in order to prevent

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<sup>480</sup> EC Guidelines (n 467) para 3.

<sup>481</sup> Richard Caplan, *Europe and the Recognition of New States in Yugoslavia* (Cambridge University Press 2005) 15-16.

<sup>482</sup> Grant (n 286) 168.

them to create regional instability. Moreover, it seems by now impossible to neglect the foundational values of the UN and a minimum degree of respect of human rights as necessary for avoiding unlawful secessions. On the contrary, it is generally recognized at present that the EC criteria were far beyond the minimum standards provided for by international law: therefore, though the European practice is extremely relevant, it is still insufficient to mark a customary obligations for the new States to come.

## 2.8 SUCCESSION OF STATES

Secessions have constituted in the past the most egregious example of State succession, in a broad range of situations from the United States to South Sudan. Nevertheless, still today it is dubious whether general rules of succession are indistinctly valid for secessions, separations and dismemberments or whether succession is always valid, regardless of the legality of the secessionist process.

According to general practice, by ‘State succession’ is meant “the replacement of one State by another in the responsibility for the international relations of territory”.<sup>483</sup> Moreover, the use of the term ‘secession’ is frequently replaced by the more legal acceptations of ‘separations of parts of a State’, ‘dismemberment’ or ‘newly independent States’.<sup>484</sup> This last term has been especially used for describing States emerging from decolonization, while drawing a line between separations and dismemberment has not always been easy, as in the

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<sup>483</sup> VCSST (n 249) art 2(1)(b); Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 8 April 1978, not yet in force) (VCSST) art 2(1)(a); ILC, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States in ‘Report of the International Law Commission on the Work of Its Fifty-first Session’ (1999) (Draft Articles on Nationality) art 2(a); *Arbitral Award (Guinea-Bissau v Senegal)* (31 July 1989) 83 International Law Reports 1; Badinter Opinion No 1 (n 132).

<sup>484</sup> Andreas Zimmermann, ‘Secession and the Law of State Succession’ in Kohen (n 316) 209.



case of Yugoslavia.<sup>485</sup> Concerning the lawfulness of secession, both the Convention on Succession in respect of Treaties and in respect of Property, Archives and Debts, as well as the ILC Articles on Nationality of Natural Persons in Relation to the Succession of States limit their applicability to those “occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”<sup>486</sup> Therefore, some scholars<sup>487</sup> have argued that illegal secessions cannot be considered as a valid case of State succession, also supported by part of the jurisprudence<sup>488</sup>. On the contrary, the *travaux préparatoires*<sup>489</sup> of the Vienna Convention on Succession of States in respect of Treaties and the last clause of its Preamble<sup>490</sup> envisage a different outcome. This latter position has also been confirmed by the ICJ, which held that:

The Court notes that Bosnia and Herzegovina became a Member of the United Nations (...). Article XI of the Genocide Convention opens it to "any Member of the United Nations"; from the time of its admission to the Organization, Bosnia and Herzegovina could thus become a party to the Convention. Hence the circumstances of its accession to independence are of little consequence.<sup>491</sup>

### 2.8.1 In respect of treaties

The Vienna Convention on Succession of States in respect of Treaties adopts two different regimes, depending on whether the successor State is a ‘newly independent’ one or is the result of a separation. Considering the first case, the State in question is “not bound to

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<sup>485</sup> Chapter 1.3.

<sup>486</sup> VCSST (n 249) art 6; VCSSPAD (n 483) art 3; Draft Articles on Nationality (n 483) art 3.

<sup>487</sup> Brownlie (n 66) 654.

<sup>488</sup> *Genocide Case Bosnia and Herzegovina v Yugoslavia* (n 109) (Preliminary Objections, Dissenting Opinion of Judge ad hoc Kreca) [1996] ICJ Rep 595, para 83.

<sup>489</sup> Zimmermann (n 484) 212.

<sup>490</sup> VCSST (n 249) Preamble: “Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”.

<sup>491</sup> *Genocide Case Bosnia and Herzegovina v Yugoslavia* (n 109) (Preliminary Objections, Judgment) para 19.

maintain in force, or to become a party, to any treaty”<sup>492</sup> that was in force for the colonial State. For what concerns situations outside the colonial context, State practice is less uniform. Although Article 34 establishes that treaties in force for the territorial State remain binding for the secessionist State,<sup>493</sup> some new States such Eritrea or those emerging from the dismemberment of the USSR, have occasionally acceded to treaties ratified by their predecessor State<sup>494</sup>. Therefore, despite general agreement on the automatic succession in respect of treaties, it is not possible to claim that an international custom has yet developed on the matter.

Nevertheless, some particular categories enjoy a different status. The so-called ‘localized treaties’, for example, have always been considered as automatically devolving upon the seceding State. Accordingly, all treaties concerning boundary regimes, river navigation, demilitarization and transit areas – since they apply to specific portions of the territory - continue to be in force for the successor States.<sup>495</sup> The 1978 Vienna Convention<sup>496</sup> and the Badinter Commission<sup>497</sup> have shared this view. In this way it has been reiterated the principle of the intangibility of the frontiers and stressed the importance of the preservation of territorial integrity.<sup>498</sup> Other treaties as well recognize the automatic devolution upon the successor State, as the case of the treaties *in rem*. This provision, enshrined in Article 12,<sup>499</sup> is part of customary law.<sup>500</sup> More dubious is the permanence of the obligations deriving by the ratification of human rights treaties. Considering the frequent violations related to this subject during secessionist struggles, it is important to ascertain whether the new States is bound or

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<sup>492</sup> VCSST (n 249) art 16.

<sup>493</sup> Ibid art 34.

<sup>494</sup> Zimmermann (n 484) 214.

<sup>495</sup> Boleslaw A Boczek, *International Law* (Scarecrow Press 2005) 138.

<sup>496</sup> VCSST (n 249) art 11.

<sup>497</sup> Badinter Opinion No 2 (n 111): “Whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence”; Badinter Opinion No 3 (n 175).

<sup>498</sup> See Chapter 2.3.

<sup>499</sup> VCSST (n 249) art 12.

<sup>500</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7, para 123.

not to these obligations. This question has not been answered by the ICJ.<sup>501</sup> An automatic succession approach has been instead adopted by many treaty bodies,<sup>502</sup> including in particular the Human Rights Committee, which stated that: “successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State”.<sup>503</sup> Nevertheless, also in this field, State practice is not uniform, having most successors of Yugoslavia and Czechoslovakia notified their succession in treaties, while States succeeded to the USSR have acceded again or taken no action on the matter.

## **2.8.2 In respect of public assets, archives and public debts**

The legal framework on the succession of States in respect of public assets, archives and debts is even vaguer than the provisions regarding treaties. In fact, so far the dedicated Vienna Convention signed in 1983 has been ratified by seven States<sup>504</sup> only. Other additional eight ratifications are necessary for its entrance into force. Moreover, State practice is rather scant, as States born from secession usually have difficulties in entering into negotiations with their respective territorial States. Nevertheless, some general principles have been outlined by the Badinter Commission, in particular with reference to an equitable agreement, shared by all

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<sup>501</sup> *Genocide Case Bosnia and Herzegovina v Yugoslavia* (n 109) (Judgment) para 23; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412 para 117.

<sup>502</sup> Zimmermann (n 484) 219.

<sup>503</sup> Human Rights Committee, CCPR General Comment No 26 (8 December 1997) UN Doc CCPR/C/21/Rev1/Add8/Rev1.

<sup>504</sup> Croatia, Estonia, Georgia, Liberia, Slovenia, the Former Yugoslav Republic of Macedonia and Ukraine.

the successor States.<sup>505</sup> By now, all States emerged from dismemberment have reached such an agreement.<sup>506</sup> However, lacking any pact between States, the Badinter Commission has clarified that the equitable division of assets must not concern every single activity, but the overall outcome.<sup>507</sup> Finally, it is to be remarked that private and third States properties are not affected by the agreements, according to the 1983 Vienna Convention.<sup>508</sup>

Additional distinctions concern immovable and movable properties. The former ones, for instance, become automatically part of the assets of the succeeding State, without compensation.<sup>509</sup> Movable properties, instead, pass to the successor States only if “connected with the activity of the predecessor State”<sup>510</sup>, according to the Convention. The Badinter Commission has otherwise simply maintained that “public property passes to the successor State on whose territory it is situated”.<sup>511</sup> In the light of these contrasting interpretations of the law, States in practice prefer to solve their divergences with *ad hoc* agreements.

In relation to State archives (that according to the Convention comprise “all documents of whatever date and kind, produced or received by the predecessor State in the exercise of its functions (...) preserved by it or under its control”<sup>512</sup>), their transfer must occur without compensation,<sup>513</sup> on the day of the succession of States.<sup>514</sup>

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<sup>505</sup> Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 9’ (1992) 31 ILM 1523; Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 14’ (1992) 31 ILM 1593 (Badinter Opinion No 14).

<sup>506</sup> Guido Acquaviva, ‘The Dissolution of Yugoslavia and the Fate of its Financial Obligations’ (2002) 30 Denver Journal of International Law and Policy 173; Carsten Stahn, ‘The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia’ (2002) 96 American Journal of International Law 379.

<sup>507</sup> Arbitration Commission of the Peace Conference on Yugoslavia, ‘Opinion No 13’ (1992) 31 ILM 1591.

<sup>508</sup> VCSSPAD (n 483) arts 6, 12.

<sup>509</sup> Ibid arts 17(1)(a), 18(1)(a); Badinter Opinion No 14; Agreement on Succession Issues of the former Socialist Federal Republic of Yugoslavia (adopted 29 June 2001, entered into force 2 June 2004) 2262 UNTS 251, Annex A, art 8.

<sup>510</sup> VCSSPAD (n 483) art 17(1)(b).

<sup>511</sup> Badinter Opinion No 14.

<sup>512</sup> VCSSPAD (n 483) art 20.

<sup>513</sup> Ibid art 23.

<sup>514</sup> Ibid art 22.

State debts broadly include “any financial obligation of the predecessor State”.<sup>515</sup> Their passage from the territorial State to the successors implies the extinction of the obligations of the former and the arising of the same ones for the latter.<sup>516</sup> It shall happen without affecting the rights and obligations of the creditors.<sup>517</sup> In case of the separation of a part of the territory of a State or of dissolution, the debts pass to the successor States “in an equitable proportion, taking into account, in particular, the property, rights and interests”.<sup>518</sup>

### **2.8.3 In respect of the membership of international organizations**

The question of State succession in the membership of international organizations has been mostly neglected during the codification process that led to the adoption of the Vienna Conventions on succession of States. For this reason, the analysis of the practice of international organizations plays a particularly important role in this field. In general, the doctrinal debate focuses on the possibility for a State to continue the obligations of the predecessor State or to start from a clean slate. The first case is usually envisaged in occasion of secessions or mergers of States, meanwhile the second one is applied in dissolution contexts. In both cases, the obligation to communicate the status to the international organization relapses upon the State that affirms its continuity or the succession to the predecessor. This willingness is usually manifested through *notes verbales* or letters addressed to the Secretariat of the organization. Once the statement is forwarded to the other members, these can oppose the decision to recognize the declared status.

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<sup>515</sup> Ibid art 33.

<sup>516</sup> Ibid art 34.

<sup>517</sup> Ibid art 36

<sup>518</sup> Ibid arts 40, 41.

With regard to the UN history, the case of the acquired independence of British India, which had already signed the UN Charter in 1945 although not fully sovereign, and the contemporary partition of some of its territories to form Pakistan constituted the first time that a succession issue arose within this organization.<sup>519</sup> The Indian Independence Act made clear that India did not change its international status and maintained the obligations and the membership of British India, while Pakistan was created with a clean slate approach.<sup>520</sup> Nevertheless, Pakistan tried to challenge this decision alleging that British India had dissolved and that Pakistan and India were, on the same level, its legal successor. Negotiations were carried out between the two countries and on 30 September 1947 Pakistan was admitted as a new member of the UN, as it was found that the legal personality of British India had not been impaired, rather a change of Constitution happened.<sup>521</sup> In order to find a solution to future similar disputes, the UNGA First Committee asked clarifications to the Sixth Committee. The guidance provided by the Legal Committee stated that, as a general rule, Member States do not lose their membership in occurrence of Constitution or frontiers modifications. Secondly, it stressed that no new State can claim the status of Member State unless formally admitted.<sup>522</sup> However, it is added that each case must be judged according to its merits, and therefore exceptions are allowed.<sup>523</sup>

Less problematic were the several cases of union of States, in which the State resulting from the merger was considered the only successor. This is the case of the union of Syria and Egypt to form the United Arab Republic (UAR), of Tanganyika and Zanzibar to form Tanzania, of North and South Vietnam, North and South Yemen and East and West Germany.

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<sup>519</sup> Konrad G Bühler, *State Succession and Membership in International Organizations* (Kluwer Law International 2001) 44.

<sup>520</sup> Indian Independence Act (18 July 1947) available at: [www.legislation.gov.uk/ukpga/Geo6/10-11/30#commentary-c593075](http://www.legislation.gov.uk/ukpga/Geo6/10-11/30#commentary-c593075) accessed 29 May 2015.

<sup>521</sup> UNGA Res 108(II) (30 September 1947) UN Doc A/RES/108/2.

<sup>522</sup> Letter from the Chairman of the Sixth Committee to the Chairman of the First Committee (8 October 1947) UN Doc A/C.1/212 pts 1-2.

<sup>523</sup> *Ibid* pts 3.

Considering instead the circumstance of the secession of Syria from the UAR and of the Baltic states from USSR, it is to be noted that these States were considered the continuators of the pre-UAR Syria and the pre-1940 Estonia, Latvia and Lithuania therefore they simply reacquired the membership they had lost or renounced to before.

While in the aforementioned instances the other members did not manifest opposition to the succession process, this resistance was noteworthy in two cases: the dissolution of the USSR and of the SFRY. Indeed, after the 1991 *coup d'état*, all the USSR Member States, except Russia, declared their independence and the cessation of the existence of the USSR was officially recognized at the Alma Ata summit later that year.<sup>524</sup> With a common declaration all the Soviet republics, except Georgia, agreed on the “Russia’s continuance of the membership of the Union of the Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council”.<sup>525</sup> The decision was promptly notified to the UN Secretary-General.<sup>526</sup> Despite the wide agreement on this matter, two States expressly objected to Russia’s claims. Ukraine opposed Russia as the continuator State of the USSR because of the disputes between the two States concerning the apportionment of assets and properties of the Soviet Union. Austria instead, rejected the Russian claims with the intention “to find ways and means enabling Austria to qualify the State Treaty of 1955 as no longer applicable in relation with the Russian Federation”,<sup>527</sup> as the treaty strongly impacted on Austria’s permanent neutrality. Nevertheless, Austria progressively reviewed its positions, adjusting its resistances to the common line determined by the European Union after its accession in 1995.<sup>528</sup> On the legal plane, several authors tried to justify this

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<sup>524</sup> Alma Ata Declaration (n 253).

<sup>525</sup> Ibid pt 1.

<sup>526</sup> Letter to the Secretary-General of the United Nations from the President of the Russian Federation (24 December 1991) UN Doc S/RUSSIA.

<sup>527</sup> Gerhard Hafner, *The Austrian Practice of State Succession in Treaties – An Austrian Perspective* (ILA National Report 1996) 7.

<sup>528</sup> Gerhard Hafner and Elisabeth Kornfeind, 'The Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist?' (1996) 1 *Austrian Review of International and European Law* 17.

innovative practice, which considers what is a *de facto* dismemberment of a State entailing the succession of the new States as a mere series of secession that do not impair the legal personality of the main State.<sup>529</sup> The major loophole is based upon the fact that the continuity theory is admissible when the other successor States agree on it, even only by acquiescence. This approach is also supported by the welcoming approach followed by the other permanent members of the Security Council in respect of the Russian Federation, recognizing its inherited status. Moreover, had these States acted otherwise, it would have been hardly possible for Russia to acquire a permanent seat, as in case of succession of States it would have lost its status of founding member. This episode testifies, once again, the privileged regime the permanent members of the Security Council have established for themselves.

Indeed, the concurrent issue of the dismemberment of the SFRY was treated in a considerably different way. Serbia and Montenegro, after the subsequent secession of the other Yugoslav republics, constituted on 27 April 1992 the Federal Republic of Yugoslavia that stressed in its Constitution the continuity of this State with the Socialist Yugoslavia.<sup>530</sup> Nevertheless, the great majority of States was skeptical about the application of the continuity approach. The European Community and Austria strongly criticized this choice, followed by the other former Yugoslav republics. The UN Security Council adopted a resolution on the matter, recognizing that no general agreement was ascertained concerning the continuation.<sup>531</sup> UNSC Resolution 777 ultimately recommended that the Federal Republic of Yugoslavia had to apply to the United Nations as a new State.<sup>532</sup> Therefore, the delegation of FRY was

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<sup>529</sup> Theodor Schweisfurth, "Vom Einheitsstaat (UdSSR) zum Staatenbund (GUS)" (1992) 52 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 541; Wladyslaw Czapinski, 'La Continuité, l'Identité et la Succession d'Etats: Evaluation de Cas Récents' (1993) 26 Revue Belge de Droit International 374; Anatolii Kolodkin, 'Russia and International Law: New Approaches' (1993) 26 Revue Beige de Droit International 552.

<sup>530</sup> Constitution of the Federal Republic of Yugoslavia (27 April 1992), Preamble.

<sup>531</sup> UNSC Res 757 (30 May 1992) UN Doc S/RES/757.

<sup>532</sup> UNSC Res 777 (19 September 1992) UN Doc S/RES/777.



forbidden to participate to the works of the UN bodies and was admitted as a new member only in 2000.

Finally, despite it is clear that every international organizations has its own procedural rules concerning the succession of members, it is to be remarked that the choice between new admission or continuation is highly dependent on the status the applying State enjoys at the level of the United Nations. The only exceptions are made in the domain of the so-called ‘technical international organizations’, whose mission is to establish common global standards in specific fields, as for example the World Intellectual Property Organization (WIPO), the Universal Postal Union (UPU) and the World Meteorological Organization (WMO). These bodies are also classifiable as ‘open organizations’ because it is possible to acquire their membership by a mere unilateral act expressing the willingness of a State to join the organization. Moreover, the analysis of their practices shows that these bodies are generally more prone to allow the succession of Member States, as this recognition has little impact on the pursuit of the non-political goals of the organization.<sup>533</sup> For the same reason, many of these science-related international organizations also allow the admission of entities other than States, as countries and dependent territories, for a more comprehensive participation and sharing of their results.<sup>534</sup>

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<sup>533</sup> Bühler (n 519) 295.

<sup>534</sup> For example the WMO accepted the admission of two countries, Cook Islands and Niue, and of six territories: the British Caribbean Territories; French Polynesia; Hong Kong; Macao; Aruba, Curaçao and Sint Maarten; New Caledonia. Similarly, the UPU recognized its membership to: Aruba, Curaçao and Sint Maarten; the British Overseas Territories.

## 2.9 CONCLUDING REMARKS

From the analysis conducted in this Chapter, it emerges that a certain degree of uncertainty remains on secessionist processes. While it is true that specific provisions of international law concerning inter-State and intra-State conflict exists, it is still vague how importantly the protection of self-determination should be considered vis-à-vis the need to protect territorial integrity. The ICJ has not unanimously expressed its view on this matter. Similarly, the question of whether secession is allowed under international law under the exercise of a remedial right is still contested. The blind reliance on fixed statehood standards seem to be weak as well. While in the past the collective recognition appeared having remedied to other theories' flaws, the recent practice shows that even broadly-recognized nations as Kosovo<sup>535</sup> are prevented from acceding to the UN, due to a bloc of countries that oppose secessions led by Serbia in the General Assembly and because of the Russian veto power in the Security Council.

Until now, the only elements of clarity seem to be the provisions of treaties concerning State succession and the recognized need of negotiations between the secessionist and the territorial State. The process through which it is possible to arrive to such a dialogue is still in large part dictated by the force of events, as it is examined in the following Chapter that takes into consideration specific case studies.

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<sup>535</sup> At present 110 out of 193 UN Member States recognize Kosovo.

## 3 SECESSION IN STATE PRACTICE

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### 3.1 INTRODUCTION

This final Chapter focuses on specific recent cases of secession. The object of this analysis is the secession of South Sudan, Kosovo, Abkhazia and South Ossetia, and Crimea. All these have been selected for the international attention they recently received and for their peculiarities. South Sudan is famous for being the most recent example of consensual separation; Kosovo represents instead a *sui generis* instance, with only a part of the international community recognizing its status; the destinies of Abkhazia and South Ossetia are considered together because they are strictly linked in claiming independence from Georgia; the secession of Crimea and its subsequent annexation into Russia constitute an *unicum* in the UN era.

In analyzing all these cases a common approach is adopted: after a brief historical background, a legal analysis of the acts leading to secession and some considerations about the impact each secession may have at regional and international level are provided. Interestingly, from each of these cases it is possible to infer States policies and attitudes toward other peoples' needs. The entire process contributes to the development of a common international view on the matter or, in case of conflict between States' positions, it leads to the development of new international law theories (and practices).

### 3.2 SOUTH SUDAN

South Sudan is the youngest member of the international community. It has been admitted to the United Nations on 14 July 2011, following the declaration of independence

issued on 9 July of the same year. Nonetheless, the achievement of the membership to the ‘Club of Nations’ is just the last step of a fifty-years-long process that began with the decolonization process affecting the Anglo-Egyptian protectorate on Sudan in 1955, which had ruled the country as two distinct entities, with the North advancing politically and economically, while the South remained isolated and undeveloped. Under the united Sudan, the dualistic administration was centralized in a North-dominated unitary system, which carried out an Arabization policy in the Christian and animist South. Since then, the influence of Christianity and elements of Western culture had reinforced a distinct Southern identity that led the South to seek either autonomy or independence from the Arab, Muslim North. The Khartoum-based government of Sudan instead, struggled to maintain control over the South in a fight that, only in its latest outbreak, lasted 21 years.<sup>536</sup>

Sudan, indeed, experienced peace only from 1972 to 1983, in the period between the First and the Second Sudanese Civil Wars, which cumulatively caused more than three million deaths.<sup>537</sup> When the autonomy established with the 1972 Addis Ababa Agreement was revoked, the Sudan People's Liberation Army (SPLA) led by John Garang de Mabior took the chance for creating a multi-ethnic Sudan. Garang's fight, in fact, was not aimed at breaking the country, rather at constituting a democratic, unified State.<sup>538</sup> The conflict received major media attention after US President George W. Bush, pressed by North American Christian groups, lifted the economic sanctions imposed under the Clinton administration and directly engaged in the peace process.<sup>539</sup> Despite the internal struggles after the Ethiopian coup that overthrew Mengistu Haile Mariam, SPLA's strongest ally, Garang's efforts finally achieved

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<sup>536</sup> Francis M Deng, 'Sudan: A Nation in Turbulent Search of Itself' (2006) 603 *Annals of the American Academy of Political and Social Science* 155.

<sup>537</sup> Andrew S Natsios and Michael Abramowitz, 'Sudan's Secession Crisis: Can the South Part from the North without War?' (2011) 90 *Foreign Affairs* 19.

<sup>538</sup> Gian P Calchi Novati, 'In Africa è Nato un Nuovo Stato: Il Sud Sudan e l'Esperienza dell'Eritrea' (2012) 68 *Ponte* 26.

<sup>539</sup> Daniela Nascimento, 'Sudão: Entre a Promessa de Paz no Sul e a Incerteza da Guerra no Darfur' (2009) 31 *Contexto Internacional* 429.

the desired goal of autonomy for South Sudan. The long-negotiated Comprehensive Peace Agreement (CPA)<sup>540</sup> put an end to Africa's longest conflict and sanctioned an interim period at the end of which Southern Sudanese would have chosen between autonomy within a unitary Sudan or independence. Garang was appointed Sudan's vice-President and South Sudan's Premier. In the exercise of his functions, he passed away few months after the signature of the agreement in a mysterious plane crash. Nevertheless, the peace process proceeded.<sup>541</sup>

The Comprehensive Peace Agreement is in reality the result of a long series of negotiation rounds carried out since 2002 in Karen, Machakos, Nairobi, Nukuru, Nanyuki and Naivasha, in Kenya under the auspices of the Inter-Governmental Authority on Development and with the mediation of Italy, Norway, the United States and the United Kingdom. This treaty has been of key importance for the stability of the entire Eastern Africa region constituting "not only hope but also a concrete model for solving problems and other conflicts in the country".<sup>542</sup> The first part of the Agreement focuses on the principles: self-determination is mentioned with explicit reference to the holding of a referendum; democracy is stressed in relation to the ethnic, racial, religious and linguistic equality and to social, political and economic justice. It is stressed that the Peace Agreement is conceived "to make the unity of the Sudan an attractive option especially to the people of South Sudan".<sup>543</sup> A new Constitution for Sudan was included in the treaty, as well as serious commitments to respect the most important human rights conventions<sup>544</sup> (e.g. ICCPR,<sup>545</sup> ICESCR,<sup>546</sup> ICERD,<sup>547</sup>

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<sup>540</sup> Comprehensive Peace Agreement (n 242).

<sup>541</sup> Natsios and Abramowitz (n 537) 21.

<sup>542</sup> Ibid, Chapeau.

<sup>543</sup> Ibid, the Machakos Protocol pt A art 1.5.5.

<sup>544</sup> Comprehensive Peace Agreement (n 242) ch II art 1.6

<sup>545</sup> ICCPR (n 52).

<sup>546</sup> ICESCR (n 53).

<sup>547</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

ACHPR,<sup>548</sup> CRC,<sup>549</sup> the Slavery Convention<sup>550</sup>). Important clauses were added concerning the development of the oil industry and the sharing of its profits in order to “balance the needs for national development and reconstruction of South Sudan”,<sup>551</sup> where more than 80% of Sudan’s oil extraction was concentrated.<sup>552</sup> However, while the vast majority of Sudan's oil reserves are located in the South, most of the infrastructure necessary for the export, especially pipelines and ports, are in the North.<sup>553</sup> Moreover, the appetites of world’s great powers for crude reserves in Sudan add instability to the region.<sup>554</sup> In the security field, the Agreement established the creation of two distinct armies<sup>555</sup> for the North (Sudanese Armed Force) and the South (which kept the name of Sudan People’s Liberation Army) and the presence of mixed battalions in the most sensitive areas (Abyei, Blue Nile and Nuba Mountains).<sup>556</sup>

Although the CPA was conceived as a transitional phase toward a unitary Sudan, the issuing of an arrest warrant by the International Criminal Court against Sudan’s President Omar al-Bashir for crimes against humanity and war crimes in 2009,<sup>557</sup> followed by another in 2010,<sup>558</sup> together with the lack of credibility associated with the elections of 11–15 April 2010, put an end to any dreams for a greater southern participation in a national unity

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<sup>548</sup> ACHPR (n 71).

<sup>549</sup> The Convention on the Rights of the Child (adopted 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3.

<sup>550</sup> Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

<sup>551</sup> Ibid ch III art 5.1.1.

<sup>552</sup> Carole Stora-Calté, 'Pétrole dans les Deux Soudan: Production, Répartition et Exploitation Des Champs Pétroliers' (2013) 246 *Afrique Contemporaine* 119; Carole Stora-Calté, 'Quelle Répartition de la Rente Pétrolière entre le Soudan et le Sud-Soudan ?' (2013) 246 *Afrique Contemporaine* 121.

<sup>553</sup> Natsios and Abramowitz (n 537); Luke A Patey, 'Crude Days Ahead? Oil and the Resource Curse In Sudan' (2010) 109 *African Affairs* 435.

<sup>554</sup> Luke A Patey, *The New Kings Of Crude: China, India, and the Global Struggle for Oil in Sudan and South Sudan* (Hurst 2014).

<sup>555</sup> Comprehensive Peace Agreement (n 242) ch VI art 1(a).

<sup>556</sup> Nascimento (n 539).

<sup>557</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber, Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009).

<sup>558</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-95 (12 July 2010).

government and the maintenance of a unified State. Therefore, despite it was expressly agreed that at the end of the Interim Period of six years beginning in 2005 a referendum would have been held, the changing approaches to negotiations<sup>559</sup> and the reciprocate violations of the agreement seemed to seriously jeopardized any peaceful outcome. In fact, worried by the possibility to lose his power following a South's secession, President al-Bashir first tried to postpone the referendum date and then deployed the army, with newly purchased heavy weaponry, along the disputed North-South border triggering a series of threat from the South.<sup>560</sup> Nevertheless, the pressure of the international community managed to have the referendum held on schedule and its outcome sanctioned the secession of South Sudan with a 98.83% consensus.<sup>561</sup>

However, the way that led to this historical step was paved with harsh criticism. Indeed, not only it was contested that the CPA had been signed by two non-democratic factions, but also that it completely disregarded any autonomy claim expressed by the Darfur, Kassala and Red Sea Hills regions that had been fighting Khartoum since 2003.<sup>562</sup> One of the main opponent of the secessionist process was the African Union that feared that any new separation would trigger an endless series of territorial claims in a continent deeply marked by the application of the *uti possidetis* rule.<sup>563</sup> Already in 1994, the Secretary-General of the Organization of African Unity Salim Ahmed Salim, recalling the Cairo Declaration,<sup>564</sup> had declared that after Eritrea no other secessionist attempt would have been supported nor

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<sup>559</sup> Keisha S Haywood, 'Comparing the SPLA'S Role in Sudan's 1997 and 2005 Comprehensive Peace Agreements: To Spoil or not to Spoil' (2014) 57 African Studies Review 143.

<sup>560</sup> Natsios and Abramowitz (n 537).

<sup>561</sup> Southern Sudan Referendum Commission, Southern Sudan Referendum Final Results Report (7 February 2011).

<sup>562</sup> Khalid Mustafa Medani, 'Strife and Secession in Sudan' (2011) 22 Journal of Democracy 135.

<sup>563</sup> Ian Brownlie and Ian R Burns, *African Boundaries, A Legal and Diplomatic Encyclopaedia* (Hurst 1979) 11-12; Malcolm N Shaw, *Title to Territory in Africa* (Clarendon Press 1986) 182; Pierre Englebert and Rebecca Hummel, 'Let's Stick Together: Understanding Africa's Secessionist Deficit' (2005) 104 African Affairs 399. See also Chapter 2.3.1.

<sup>564</sup> Cairo Declaration (n 168)

allowed.<sup>565</sup> It is clear that the rigid application of this post-colonial principle makes “African borders sacrosanct not because they made good sense, but precisely because they did not”.<sup>566</sup> Moreover, the contemporary developments in Yugoslavia made some authors fear that that scheme could have been applied to Africa.<sup>567</sup> However, once again, the greatest majority of States of the international community limited themselves to make an exception, declaring the situation as *sui generis* because of the protracted civil strife and enthusiastically accepting the new State.<sup>568</sup>

Today, although four years might not be sufficient to assess the outcome of the secession, the fears of some opponents of an independent South Sudan seem to be confirmed. Has the international community created just another failed State? The data collected by the international organizations present in the country are worrying.<sup>569</sup> South Sudan's health and education indicators are extremely poor, even compared to other troubled States in Africa and its economic development is still tied to a necessary infrastructural cooperation with Sudan and to international aid.<sup>570</sup> Moreover, any attempted development of the judicial system toward a modern model has clashed with the tribal and ethnic legacies.<sup>571</sup> In an in-depth study of South Sudan's customary law, Deng has held that: “The social consciousness of the traditional society expressed in customary law is so deeply ingrained that any developmental scheme which disregards it cannot find its way into the hearts of the people”.<sup>572</sup> Moreover, the SPLA's internal conflicts re-ignited in late 2013 in the framework of a power struggle

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<sup>565</sup> David A Lake and Donald S Rothchild, *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation* (Princeton University Press 1998) 323.

<sup>566</sup> Gwynne Dyer, ‘Sudan Deal, a Pandora's Box on Borders’ (18 January 2005) *The Canberra Times*.

<sup>567</sup> John Dugard, ‘Secession: Is the Case of Yugoslavia a Precedent for Africa?’ (1993) 5 *African Journal of International and Comparative Law* 163.

<sup>568</sup> South Sudan is nowadays recognized by 123 UN Member States.

<sup>569</sup> United Nations Mission in Sudan, ‘Scary Statistics – Southern Sudan, November 2010’ (2010).

<sup>570</sup> Natsios and Abramowitz (n 537).

<sup>571</sup> Tiernan Mennen, ‘Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan’ (2010) 2 *Hague Journal on the Rule of Law* 218.

<sup>572</sup> Aleu Jok and others, ‘A Study of Customary Law in Contemporary Southern Sudan’ (2004) *World Vision International and the Southern Sudan Secretariat of Legal and Constitutional Affairs* 25.



between the two leaders who succeeded to Garang: Salva Kiir Mayardit, the South Sudanese President and Riek Machar, former vice-President dismissed by Kiir in July 2013. Riek was also accused of an attempted coup carried out on 16 December 2013, allegedly in opposition to the administration change that Kiir was pursuing, in order to make the government less dependent from the SPLA. Since then, the strife has evolved into a proper civil war, with both factions seeking help abroad, as their national reputation is severely endangered by the human rights violations attributable to them. So far, tentative US and EU sanctions against individuals have had little effect.<sup>573</sup> Nevertheless, the IGAD launched a mediation initiative in January 2014 and even other actors such as South Africa have dispatched envoys to put pressure on both sides. The AU has established a commission to probe the origins of the violence. The parties signed a ceasefire agreement in January 2014 that was supposed to form the basis for negotiations for a durable political settlement, but a stalemate ensued as both sides accused each other of breaching the agreement. South Sudan's challenges are not different from those faced by other States after decolonization, although it started indeed with a favorable position gifted by the presence of abundant natural resources and conspicuous international donations.<sup>574</sup>

However, despite these problems that are quite common to deal with in young nations, it is possible to express a relatively positive judgment on the occurred secession. After all, it is undeniable that this process led to the independence of a people heavily discriminated under the previous regime and specifically distinct from the rest of the population by religious and traditional characters. Despite the attempts of Omar al-Bashir to escalate the conflict and postpone the referendum, the consultation took place without vote riggings and with a strong participation. The pressure of the international community for a peace and power-sharing agreement made possible to the other African countries to accept the

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<sup>573</sup> Douglas H Johnson, 'The Political Crisis in South Sudan' (2014) 57 *African Studies Review* 167.

<sup>574</sup> Gilbert M Khadiagala, 'South Sudan: The Perils of New States' (2014) *E-International Relations*.

creation of a new State in derogation to the *uti possidetis* principle. Additionally, international surveillance and assistance in the State building process, provided through the establishment of the United Nations Mission in South Sudan (UNMISS)<sup>575</sup>, permitted the respect of the internal frontiers, contributed to the stabilization of the region and limited the occurrence of further struggles.

### 3.3 KOSOVO

Kosovo is a territory of 10,887 square kilometers in the heart of the Balkans. Passed several times from the rule of the medieval Kingdom of Serbs (who witnessed the creation of their nation with the 1389 Battle of Kosovo) to the Ottoman Empire and *vice versa*, the region has always hosted both ethnic Serbs (Orthodox Christians) and Albanians (Muslims). With changing fortunes, both peoples were discriminated and repressed by the ruling power. When the Ottomans withdrew from the Balkans at the end of the nineteenth century, the Kingdom of Serbia, encompassing Kosovo, was soon established. As a consequence, the Albanian aspirations of independence led the whole region to the First Balkan War in 1912. Despite the Ottoman and Albanian forces were defeated, the great European powers gathered in London<sup>576</sup> accorded a State for Albanians, while Kosovo remained to Serbia.<sup>577</sup> The fact that Kosovo's incorporation happened in the absence of any legal title or constitutional reference is an important loophole for those who today support Kosovo's independence.<sup>578</sup> The Albanians in the region were the target of an atrocious ethnic cleansing committed by the

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<sup>575</sup> UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996.

<sup>576</sup> Treaty of Peace between Greece, Bulgaria, Montenegro, Serbia on the one part and Turkey on the other part (adopted 30 May 1913) in Robert B Mowat, *Select Treaties and Documents to Illustrate the Development of the Modern European States System, 1815-1916* (Clarendon Press 1916) 120-121.

<sup>577</sup> Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press 2009).

<sup>578</sup> Noel Malcolm, *Kosovo* (New York University Press 1998) 264.

Serbs in the period between 1913 and the end of World War I.<sup>579</sup> The fierceness and foolishness of this policy was reflected by the words of Vaso Cubrilovic, who was to become in 1937 a leading member of the Serbian Academy: “at a time when Germany can expel tens of thousands of Jews and Russia can shift millions of people from one part of the continent to another, the shifting of a few hundred thousand Albanians will not lead to the outbreak of world war”.<sup>580</sup> Instead, war did break out and this time it was the Kosovars who massacred the Serbs.<sup>581</sup>

With the advent of Tito, despite having been promised a certain degree of autonomy, Albanians in Kosovo continued being discriminated and persuaded to leave the country.<sup>582</sup> Only the 1968 uprising convinced the communist establishment to grant the same powers of the other republics to Kosovo and Vojvodina, though formally keeping the status of autonomous provinces.<sup>583</sup> Ethnic Albanian self-administration was effectively established and guaranteed at the federal level, where the province enjoyed equal representation with the republics in federal organs and was part of the rotational presidency of the Federation.<sup>584</sup> Kosovo also established important cultural and educational institutions of its own, leading to a clearer expression of ethnic Albanian identity. This, in turn, fed growing resentment in Serbia.<sup>585</sup> At Tito’s death, the aspirations to the establishment of a ‘Greater Serbia’ exacerbated after Slobodan Milosevic had managed to install a puppet government in Montenegro in 1989<sup>586</sup> and had recouped the power previously granted to the autonomous provinces.<sup>587</sup>

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<sup>579</sup> Carnegie Endowment, *Report* (1914) 151.

<sup>580</sup> Tim Judah, *The Serbs: History, Myth and Deconstruction of Yugoslavia* (Yale University Press 1997) 149.

<sup>581</sup> Stevan K Pavlowitch, *A History of the Balkans, 1804–1945* (Longman, 1999), 321.

<sup>582</sup> Viktor Meier, *Yugoslavia: A History of its Demise* (Routledge 1999) 27.

<sup>583</sup> 1974 SFRY Constitution (n 179).

<sup>584</sup> Ana S Trbovich, *A Legal Geography of Yugoslavia’s Disintegration* (Oxford University Press 2008) 234.

<sup>585</sup> Weller (n 577).

<sup>586</sup> Peter Radan, *The Break-Up of Yugoslavia and International Law* (Routledge 2002) 197.

<sup>587</sup> James Summers, ‘Kosovo’ in Walter (n 88) 235.

Few months after Slovenia and Croatia declared their independence and the Federation started falling apart, Kosovars held a referendum that resulted in a huge success for secession (99.87% in favor, with a participation of the 87.01% of the electoral body).<sup>588</sup>

A declaration of independence followed suit, though the new State was recognized by no one but Albania in the international community, because the EC Declaration<sup>589</sup> had already made clear that only Republics could have aspired to full independence. The Badinter Commission prevented any further development affirming the application of the *uti possidetis* principle.<sup>590</sup> While Serbia began a campaign of Serbianization in the province, the ethnic Albanian leadership, in turn, established parallel governing institutions.<sup>591</sup> In the following years the situation of Kosovo was overlooked by the international community, more concerned with the war going on in the neighboring Bosnia, until the fall of the Albanian government in 1997 offered a concrete chance to the Kosovo Liberation Army (KLA) to gain access to weapons depots.<sup>592</sup> Mass insurrection burst in 1998: the Security Council immediately intervened demanding the Federal Republic of Yugoslavia to enter into negotiations with the ethnic Albanians and at the same time branded the KLA as a terrorist organization.<sup>593</sup> While a Contact Group (composed by France, Germany, Italy, Russia, the UK and the US) was being established in Rambouillet, France, the Serbian army entered Kosovo and the violence used often amounted to real massacres, as it happened in Rakac.<sup>594</sup> The Serbian non-compliance with the Contact group's requests, which included the respect of the territorial integrity of the Federal Republic of Yugoslavia (FRY), a larger degree of self-

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<sup>588</sup> 'Central Board of Kosova for the Conduct of the Referendum, Result, 7 October 1991' in Marc Weller (ed), *The Crisis in Kosovo 1989-1999* (Documents and Analysis Publishing 1999) 72.

<sup>589</sup> EC Declaration (n 468).

<sup>590</sup> Badinter Opinion No 2 (n 111).

<sup>591</sup> Robert D Caplan, 'International Diplomacy and the Crisis in Kosovo' (1998) 74 *International Affairs* 751.

<sup>592</sup> Chris Hedges, 'Kosovo's Next Masters?' (1999) 78 *Foreign Affairs* 3.

<sup>593</sup> UNSC Res 1160 (n 327).

<sup>594</sup> Marc Weller, 'The Rambouillet Conference on Kosovo' (1999) 75 *International Affairs* 219.

determination for Kosovo and a NATO military presence in the region<sup>595</sup>, triggered a NATO air campaign against Serbia.<sup>596</sup> Although not authorized by the Security Council due to Russian and Chinese vetoes, the operation was justified as “necessary to avert a humanitarian catastrophe”<sup>597</sup> following Yugoslavia’s refusal to accept the Rambouillet Accords and its disproportionate use of force. The US President Bill Clinton, who was among the main supporters of the operation, explained the goals of the intervention in a TV speech on 24 March: to demonstrate the seriousness of NATO's response to aggression, to deter Milosevic's escalating attacks in Kosovo, and seriously to damage Serbia's military capacity to wage war in the future. At the start of the NATO “humanitarian intervention”,<sup>598</sup> the Yugoslav armed forces enjoyed a clear advantage with 40,000 combat troops, a unified police and paramilitary task force, 300 tanks, and anti-aircraft and ground artillery units available in Kosovo or at its borders; the KLA instead could count on 10,000 men only. While the NATO air forces prepared to bomb Yugoslavia, the Serbian army had already intensified attacks against the Albanians causing the displacement of 1.3 million people.<sup>599</sup> ethnic cleansing and tortures.<sup>600</sup>

The 78-days-long NATO campaign put the desired pressure on Milosevic, finally forcing him to negotiate. On June 3, the Serbian Parliament formally approved a peace plan based on the principles established by the G8 Summit in Cologne and modeled after the Rambouillet draft. On 10 June NATO suspended its air attacks, FRY forces withdrew from the region and the UN Security Council passed Resolution 1244,<sup>601</sup> which established the

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<sup>595</sup> Letter Dated 4 June 1999 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, UN Doc S/1999/648, Annex I ch 7 art 1.

<sup>596</sup> Judah (n 580) 87.

<sup>597</sup> Press Statement of the NATO Secretary General Javier Solana (23 March 1999), available at: <[http://www.nato.int/cps/en/natolive/opinions\\_27615.htm](http://www.nato.int/cps/en/natolive/opinions_27615.htm)> accessed 17 April 2015.

<sup>598</sup> Paul C Latawski and Martin A Smith, *The Kosovo Crisis and the Evolution of Post-Cold War European Security* (Manchester University Press 2003).

<sup>599</sup> Eric Herring, ‘From Rambouillet to the Kosovo Accords: NATO’s War against Serbia and Its Aftermath’ (2000) 4 *International Journal of Human Rights* 228.

<sup>600</sup> Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press 2000).

<sup>601</sup> UNSC Res 1244 (n 156).

framework for the UN civil administration of the province and the establishment of an international military presence.

The adoption of Resolution 1244, with 14 votes in favor and China's abstention, was crucial for the future of Kosovo. After the failed attempts made with the disregarded resolutions 1160,<sup>602</sup> 1199,<sup>603</sup> 1203,<sup>604</sup> and 1239,<sup>605</sup> the surrender of Serbian forces permitted the establishment of a peace-enforcement mission.<sup>606</sup> The preamble of the resolution reiterates both the needs for FRY's territorial integrity and Kosovo's self-determination. Moreover, Yugoslavia is requested to "put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military"<sup>607</sup> while an international civil and security force<sup>608</sup> takes control of the region with the aim to "deter renewed hostilities", "demilitarizing the Kosovo Liberation Army", "establishing a secure environment in which refugees and displaced persons can return home in safety" and "ensuring public safety and order"<sup>609</sup> In particular, concerning the civil development and institutions-building process of the province, the United Nations Mission in Kosovo (UNMIK)<sup>610</sup> is established under the direction of a Special Representative of the Secretary-General (SGRS). In the exercise of its duties, UNMIK is flanked by other international organizations, each of them with a special competence: the UN High Commissioner for Refugees (UNHCR) for the humanitarian affairs, the OSCE for the institutions building and

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<sup>602</sup> UNSC Res 1160 (n 327).

<sup>603</sup> UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199.

<sup>604</sup> UNSC Res 1203 (n 325).

<sup>605</sup> UNSC Res 1239 (14 May 1999) UN Doc S/RES/1239.

<sup>606</sup> Enrico Milano, 'The Security Council and Territorial Sovereignty: The Case of Kosovo' (2010) 12 *International Community Law Review* 171.

<sup>607</sup> UNSC Res 1244 (n 156) art 3.

<sup>608</sup> *Ibid* art 5.

<sup>609</sup> *Ibid* arts 9(a), 9(b), 9(c), 9(d).

<sup>610</sup> *Ibid* art 10.

the EU for economic reconstruction, while the Interim Civil Administration is reserved to the UN.<sup>611</sup>

While at the very first stage UNMIK essentially cared about guaranteeing the peaceful co-existence between the several ethnic groups in Kosovo (Serbs, Albanians, Roma, Ashkali and Balkan Egyptians), its medium-termed goal focused on the establishment of the institutions of an effective, autonomous administration and the democratic governance of the province.<sup>612</sup> The key role of the Mission is assumed by the SGRS, who has maintained a powerful control function even after the institutions-building process was completed.<sup>613</sup> Some critiques on the legal plane were drawn against the SGRS' role, as the UNSC Resolution did not put limits to his activity.<sup>614</sup> How was legally-admissible the establishment of a "State-in-the-State"<sup>615</sup> untied from any strict legislation? To remedy this problem, an Ombudsperson office was created which was then transformed in an internal Human Rights Advisory Panel after its scarce results and finally suppressed in 2010, after the independence.

For what concerns instead the security aspect, the UNSC Resolution expressly provided for the deployment of "an international security presence with substantial North Atlantic Treaty Organization participation"<sup>616</sup> with the objective to establish and maintain a security environment for Kosovars and international personnel and to control the borders with Albania and the FYROM. On 12 June 1999, the Kosovo International Security Force (KFOR) is deployed in the framework of the NATO Joint Guardian Operation, with 39 participating

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<sup>611</sup> Hilpold (n 461) 13.

<sup>612</sup> Ben Crampton, 'Kosovo' in Richard Caplan, *Exit Strategies and State Building* (Oxford University Press 2012) 113.

<sup>613</sup> Rebecca Everly, 'Reviewing Governmental Acts of the United Nations in Kosovo', (2007) 1 German Law Journal 8.

<sup>614</sup> Mariano J Aznar-Gómez, 'Some Paradoxes on Human Rights Protection in Kosovo' and Georg Nolte, 'Human Rights Protection against International Institutions in Kosovo: The Proposals of the Venice Commission of the Council of Europe and their Implementation' in Pierre-Marie Dupuy (ed), *Völkerrecht als Wertordnung: Liber Amicorum Christian Tomuschat* (Engel 2006) 15, 245.

<sup>615</sup> Hilpold (n 461) 14.

<sup>616</sup> UNSC Res 1244 (n 156) Annex II art 4.

States.<sup>617</sup> Despite the massive presence of troops (30,000)<sup>618</sup> the KFOR was not able to prevent revenge attacks against Serbs and Roma during the first months of operations, as it was also engaged in normal police duties, due to the delay of the UN police officers' arrival. The scarce communication between the civil and military mission, as well as the Kosovars' lack of cooperation were the main obstacles to the success of the mission.<sup>619</sup> Nevertheless, KFOR proved more effective in the KLA's demilitarization: after the signature of the "Undertaking of Demilitarization of the Kosovar Albanian force",<sup>620</sup> it was transformed into a civilian agency, the Kosovo Protection Corps (KPC), charged with providing emergency response and reconstruction services. As a result of the newly established order, political elections were held in October 2000, with a high level of participation among Albanians and the non-participation of Serbs.<sup>621</sup> On 15 May 2001, the Special Representative of the Secretary-General promulgated the Constitutional Framework on Interim Self-Government in Kosovo,<sup>622</sup> which established the institutions of self-government, including the Kosovo Assembly, Government, and Presidency. The Framework defined Kosovo as an "entity under interim international administration which, because of its people, had unique historical, legal, cultural and linguistic attributes".<sup>623</sup> Basic minority rights were also established: "communities of inhabitants belonging to the same ethnic or religious or linguistic group shall have the rights set forth in this Chapter in order to preserve, protect and express their ethnic, cultural and religious identities".<sup>624</sup> Although a gradual transfer of competencies occurred, a certain degree of discretion and related powers were maintained by the SGRS, as already mentioned. Among others he continued to enjoy final authority over financial and monetary

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<sup>617</sup> Independent International Commission on Kosovo (n 600).

<sup>618</sup> Ibid.

<sup>619</sup> Ibid.

<sup>620</sup> Undertaking of Demilitarization and transformation by the UCK (20 June 1999).

<sup>621</sup> Report of the Secretary-General, 'On the United Nations Interim Administration in Kosovo', (15 December 2000) UN Doc S/2000/1196 paras 2, 4.

<sup>622</sup> Constitutional Framework for Provisional Self-Government, UNMIK Regulation 2001/9 (15 May 2001) ch 9.

<sup>623</sup> Ibid ch 1 art 1.1.

<sup>624</sup> Ibid ch 4, art 4.1.



policy and budget approval; the dissolution of the Assembly and the call for elections; the appointment, removal and disciplining of judges and prosecutors; the control over law enforcement institutions and correctional facilities; the external relations.<sup>625</sup>

With Kosovo under international administration, a general sense prevailed among international actors to postpone as much as possible the issue related to the status. Instead, among all the issues exposed so far, the unsolved question of the final status of Kosovo was the most felt one by Kosovars. In order to better understand how sensitive this issue was, it is possible to compare it with the analogous case of the Indonesian invasion of East Timor and the consequent genocide targeting the local population, ethnically and religiously distinct from the Indonesian one. For twenty-four years the Indonesian government subjected the people of East Timor to extrajudicial executions, routine and systematic torture, massacres and deliberate starvation.<sup>626</sup> The Santa Cruz massacre and the awarding of the Nobel Peace Prize to the Timorese bishop José Manuel Ramos-Horta, for his efforts in seeking a just and peaceful solution, encouraged the international community to put major pressure on the Indonesian regime of Suharto. Through the mediation of the United Nations and Portugal, the East Timorese people were granted the opportunity to hold a referendum for independence, while the province was temporarily administered by the United Nations Mission in East Timor (UNAMET).<sup>627</sup> After the vote manifested a strong favor for independence, the UN Security Council unanimously established the United Nations Transitional Administration in East Timor (UNTAET), responsible for the peacekeeping and State building operations until the country formally acquired independence in 2002.<sup>628</sup> The evident difference with the case of Kosovo is that while the UNSC Resolution on East Timor provided for a specific status and

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<sup>625</sup> Ibid ch 8.

<sup>626</sup> Crawford (n 138) 616.

<sup>627</sup> UNSC Res 1246 (11 June 1999) UN Doc S/RES/1246; UNSC Res 1257 (3 August 1999) UN Doc S/RES/1247.

<sup>628</sup> UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272.

a precise interim administration timeframe, the Rambouillet Agreement and the UNSC Resolution 1244 had been more than vague on this issue. Consequently, the 2001 power transfer marked a turning point in Kosovo's recent history. Introducing his report to the Security Council, the Special Representative Michael Steiner, defended the significant progresses Kosovo had made and with regard to its status affirmed: "The road is not endless. We have a vision of how to finish our job".<sup>629</sup> On that occasion, a proposal for the drafting of standards was submitted and it constituted the core of the following status settlement process. The eight benchmarks to be taken into consideration in pursue of the 'standard before status' policy were: the existence of effective, representative and functioning institutions; the reinforcement of the rule of law; the freedom of movement for all; the respect for the right of all Kosovans to remain and return; the development of a sound basis for a market economy; clarity of property title; a normalized dialogue with Belgrade; the reduction and transformation of the Kosovo Protection Corps in line with its mandate.<sup>630</sup> In 2004, riots in Kosovo accelerated the international decisions on the matter. In August of the same year Ambassador Kai Eide, the Permanent Representative of Norway to NATO presented a first Report to the UN Secretary-General, to which Kofi Annan answered stating that: "the conditions are in place to enter into a political process to determine the future status of Kosovo, in accordance with Security Council Resolution 1244 (1999) and relevant Presidential statements".<sup>631</sup> In 2005, the Secretary-General and Security Council moved towards the final status negotiations with the appointment of a Special Envoy, the former Finnish President Martti Ahtisaari. With the support of the Contact Group, a declaration of ten

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<sup>629</sup> UNSC, 4518th Meeting (24 April 2002) UN Doc S/PV/4518.

<sup>630</sup> Weller (n 577).

<sup>631</sup> Letter Dated 7 October from the Secretary-General Addressed to the President of the Security Council, UN Doc S/2005/635, 7 October 2005.

Guiding Principles<sup>632</sup>, stricter than the standards advanced before, was issued. The goals in question were the following: a democratic Kosovo complying with European standards on human rights and the rule of law; sustainable multi-ethnicity; the return of refugees and the displaced; the integration into Euro-Atlantic institutions; the prohibition to return Kosovo to its pre-March 1999 status; no partition or union with another State, against the purported project of a Greater Albania; the respect for the territorial integrity of neighbors; the continued presence of international civil and military forces. The first outline of a Comprehensive Proposal for the Kosovo Status Settlement (CSP),<sup>633</sup> drafted after fifteen negotiations rounds, was rejected by Serbia, which meanwhile had agreed to the consensual separation of Montenegro. As a consequence, the Special Envoy saw no other possibilities but independence and made his recommendations to the UN Security Council.<sup>634</sup> As foreseeable, any development in this sense were blocked by the Russian veto and by the opposition of some other States represented in the Security Council,<sup>635</sup> as it would have indirectly meant an endorsement of the requests of other groups of people claiming independence.

The 2007 G8 Summit in Germany tried to unlock the situation, but it only resulted in a prolongation of negotiations for other 120 days. During this period, Kosovo would have adopted its constitution and if no development would have intervened at its end, it was presumed Kosovo would have been free to declare its independence.<sup>636</sup> Negotiations led by the German Ambassador Wolfgang Ischinger followed with unsatisfactory results: the reciprocal attempts to come to a shared agreement failed. The conclusions<sup>637</sup> presented by

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<sup>632</sup> Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, available at: <<http://www.unosek.org/docref/Contact%20Group%20-%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf>> accessed 17 April 2015.

<sup>633</sup> Comprehensive Proposal for the Kosovo Status Settlement, UN Doc S/2007/168/Add.1 (26 March 2007).

<sup>634</sup> Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, UN Doc S/2007/168 (26 March 2007) paras 1 and 3.

<sup>635</sup> In particular China, because of its disputes on the claimed independence of Tibet and Taiwan.

<sup>636</sup> Weller (n 577) 234.

<sup>637</sup> Letter Dated 10 December 2007 from the Secretary-General to the President of the Security Council, UN Doc S/2007/723, Annex VI, Principal Conclusions.

the negotiators on 10 December 2007 made clear to both parties that no return to the pre-1999 status quo was possible: Kosovo's autonomy in financial matters was non-negotiable, the international military presence was to be maintained, while the Serbs would have benefited from a fast-tracked and shared EU-NATO admission. Despite the late concessions made by Serbia, the Kosovars, with the Ahtisaari Plan at hand, refused any agreement. The UN Secretary-General warned the international community about the perils of the impasse and alerted about the possibility that events could take on "a momentum of their own, putting at serious risk the achievements and legacy of the United Nations in Kosovo." He also added that: "Moving forward with the process to determine Kosovo's future status should remain a high priority for the Security Council and for the international community".<sup>638</sup> In the following days, the Serbian Parliament adopted a resolution that threatened the review of the diplomatic relations with States recognizing an independent Kosovo and reiterated that "the Republic of Serbia cannot accept any request for secession by any of the twenty-seven national minorities",<sup>639</sup> equating the two-million Kosovar population to the other less relevant minorities in the country.

All the warnings that a unilateral recognition of Kosovo's independence would have created a precedent, causing unforeseeable consequences for other regions, were of no avail: Kosovo declared independence on 17 February 2008. The ICJ found in its Advisory Opinion that the issuing of the declaration of independence did not exceed the authority conferred to the Assembly of Kosovo by the Constitutional Framework, as the Assembly was not acting as one of the Provisional Institutions of Self-Government, though maintaining the representativeness of the people of Kosovo.<sup>640</sup> In this document, it is stated that Kosovo

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<sup>638</sup> Report of the Secretary-General, 'On the United Nations Interim Administration Mission in Kosovo' (3 January 2008) UN Doc S/2007/768.

<sup>639</sup> Letter Dated 4 January 2008 from the Permanent Representative of Serbia to the United Nations Addressed to the President of the Security Council, UN Doc S/2008/7.

<sup>640</sup> *Kosovo Advisory Opinion* (n 84) para 109.

shows itself “grateful that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration” and proud that Kosovo has since developed functional, multi-ethnic institutions of democracy that express freely the will of [its] citizens”.<sup>641</sup> It reaffirms the extraordinariness of its State building process “observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation”.<sup>642</sup> Through the adoption of the declaration, the Kosovo Assembly, with 109 votes in favor and in the absence of the 11 Serbian representatives, remarks the importance of the will of its people and shows compliance with the Ahtisaari Plan.<sup>643</sup> Utmost importance is also given to minorities' protection, recalling the principles of non-discrimination and equal protection under the law and stressing the will to “create the conditions necessary for their effective participation in political and decision-making processes”.<sup>644</sup> Despite not being a signatory, the Declaration claims that Kosovo is to be bound by the United Nations Charter, the Helsinki Final Act and other acts of the Organization on Security and Cooperation in Europe, proving its commitment to participating in inter-State relations.<sup>645</sup> By declaring that “all States are entitled to rely upon this declaration and appeal to them to extend [to Kosovo] their support and friendship”,<sup>646</sup> the Assembly solicited the other States to recognize this decision.<sup>647</sup> The reaction of the international community ranged from the warm welcome expressed by the United States and most EU countries to the harsh condemnation of a group of States led by Russia and Serbia.<sup>648</sup> The question, indeed, was all but free from controversies. After having failed in making the Security Council declare Kosovo's independence null and void, Serbia

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<sup>641</sup> Kosovo Declaration of Independence (17 February 2008) Preamble.

<sup>642</sup> *Ibid.*

<sup>643</sup> *Ibid* arts 1, 3, 12.

<sup>644</sup> *Ibid* art 2.

<sup>645</sup> *Ibid* art 8.

<sup>646</sup> *Ibid.*

<sup>647</sup> Weller (n 577).

<sup>648</sup> Jure Vidmar, ‘International Legal Responses to Kosovo's Declaration of Independence’ (2009) 42 *Vanderbilt Journal of Transnational Law* 779.

turned to the General Assembly, where it presented a request for an Advisory Opinion before the International Court of Justice. With seventy-seven votes in favor, the demand was approved.<sup>649</sup>

Despite the *Kosovo Advisory Opinion* has already been object of study in the previous parts of this work, the most specific issues dealing with Kosovo's declaration of independence are now analyzed. First of all, it is important to remark that the precise wording of the question was the following: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?". As it appears, Serbia's request was very narrow: it did not present the Court the necessity to address the 'legal consequences' as it had happened in the case of *Namibia*<sup>650</sup> or *Palestine Wall*.<sup>651</sup> In addition, the ICJ did not take the chance to go beyond the question presented, as many States expected, rather it abided by the letter of the request avoiding clarifying the matters that resulted as direct implications of its opinion.<sup>652</sup>

When it rendered its Advisory Opinion on 22 July 2010, the ICJ unanimously found that it enjoyed competence over the matter because of its "legal character",<sup>653</sup> that the political aspects involved did "not suffice to deprive it of its character as a legal question"<sup>654</sup> and that therefore there were no reasons to decline its office.<sup>655</sup> With respect to the lawfulness of the unilateral declaration of independence, the Court held that it did not violate any general rule of international law,<sup>656</sup> nor the *lex specialis* established through the adoption of the UNSC Resolution 1244,<sup>657</sup> nor the UNMIK Constitutional Framework.<sup>658</sup> Applying the so-called

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<sup>649</sup> UNGA Res 3(LXII) (8 October 2008) UN Doc A/RES/63/3.

<sup>650</sup> *Namibia Advisory Opinion* (n 110).

<sup>651</sup> *Palestinian Wall Advisory Opinion* (n 78).

<sup>652</sup> Dugard (n 443) 177.

<sup>653</sup> *Kosovo Advisory Opinion* (n 84) para 25.

<sup>654</sup> *Ibid* para 27.

<sup>655</sup> *Ibid* para 24.

<sup>656</sup> *Ibid* paras 79, 84.

<sup>657</sup> *Ibid* paras 118, 119.

*Lotus*<sup>659</sup> principle, which considers lawful and permitted any act not expressly prohibited, the Court concluded that the declaration of independence was in accordance with international law. This approach, together with the failure in addressing the essential questions related with the Advisory Opinion, were not exempt from critiques. Judge Simma, for instance, condemned the *Lotus* principle as “old and tired”,<sup>660</sup> the reflection of an “anachronistic, extremely consensualist vision of international law”.<sup>661</sup> Nevertheless, the ICJ, adopting the *Lotus* approach, clearly admitted any possible outcome and reinforced its opinion affirming that the analysis of the precedents shows that “sometimes a declaration resulted in the creation of a new State, at others it did not”.<sup>662</sup> Moreover, it indicated that being the authors of the declaration “persons who acted together in their capacity as representatives of the people of Kosovo”,<sup>663</sup> the ethnic Albanians in Kosovo represented a people under international law and therefore they were fully legitimated to claim self-determination.<sup>664</sup> Nevertheless, it is to be noted that the ICJ did not express its judgment over whether the Kosovars constitute a people or not. Finally, the ICJ Opinion did neither resolve the dispute over the legal status of Kosovo, nor over the effects of its statehood’s recognition.<sup>665</sup> Its reasoning, described by Judge Simma as a mere “exercise in mechanical jurisprudence”,<sup>666</sup> did not lead to a major settlement of the Serbia-Kosovo tensions, but it left room for any other political agreement.<sup>667</sup> The relative non-influence of this Advisory Opinion has also been stressed by the fact that

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<sup>658</sup> Ibid paras 120, 121.

<sup>659</sup> *Lotus Case (France v Turkey)* (1927) PCIJ Rep Series A No 10.

<sup>660</sup> *Kosovo Advisory Opinion* (n 84) (Declaration of Judge Simma) para 2.

<sup>661</sup> Ibid para 3. Cfr Jochen A Frowein, ‘Kosovo and Lotus’ in Ulrich Fastenrath and others, *From Bilateralism To Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011); Alexandros X M Ntovas, ‘The Paradox of Kosovo’s Parallel Legal Orders in the Reasoning of the Court’s Advisory Opinion’ in French (n 304) 139-140; Peters (n 314).

<sup>662</sup> *Kosovo Advisory Opinion* (n 84) para 79.

<sup>663</sup> Ibid para 109.

<sup>664</sup> Dugard (n 443) 188.

<sup>665</sup> *Kosovo Advisory Opinion* (n 84) para 51.

<sup>666</sup> Ibid (Declaration of Judge Simma) para 10.

<sup>667</sup> Richard Falk, ‘The Kosovo Advisory Opinion: Conflict Resolution and Precedent’ (2011) 105 *American Journal of International Law* 50.

only one State<sup>668</sup> recognizing Kosovo after its release has explicitly referred to it.<sup>669</sup> Nevertheless, it is to be recognized that despite the ICJ moved in a very insidious path, it managed to give a balanced answer and avoided giving judgments that could have been disruptive of the international legal order.

In the absence of a specific pronouncement over the status of Kosovo, many States have asserted that Kosovo represents a *sui generis* situation. A very convincing explication was given by the US Secretary of State Condoleezza Rice:

The unusual combination of factors found in the Kosovo situation - including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration - are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today.<sup>670</sup>

The majorities of the EU countries and many recognizing States generally conformed to this vision. However, despite the absence of a Court's *dictum* concerning its status, Kosovo proceeded in its State building process. As of April 2015, the country is recognized by 110 UN Member States and other several entities.<sup>671</sup> On 29 June 2009, Kosovo was also admitted to the World Bank<sup>672</sup> and to the International Monetary Fund.<sup>673</sup> The memberships of these two international organizations enabled Kosovo to show its economic capabilities and to

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<sup>668</sup> Oman Recognizes Kosovo, Letter of the Sultanate of Oman addressed to the Ministry of Foreign Affairs of Kosovo (4 February 2011), available at: <<http://www.mfa-ks.net/?page=2,4,629>> accessed 20 April 2015.

<sup>669</sup> Jessica Almqvist, 'The Politics of Recognition: The Question about the Final Status of Kosovo' in French (n 304) 184.

<sup>670</sup> The United States Recognizes Kosovo as Independent State, Statement of the US Secretary of State (18 February 2008), available at: <<http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>> accessed 21 April 2015.

<sup>671</sup> Republic of China (Taiwan), Sovereign Military Order of Malta.

<sup>672</sup> International Monetary Fund, 'Kosovo Becomes the International Monetary Fund's 186th Member', Press Release No 09/240 (29 June 2009) available at: <<http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>> accessed 21 April 2015.

<sup>673</sup> World Bank, 'Kosovo Joins World Bank Group Institutions', Press Release No 2009/448/ECA (29 June 2009), available at: <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22230081~pagePK:34370~piPK:34424~theSitePK:4607,00.html>> accessed 21 April 2015.



present itself to the world community as a reliable partner. It also allowed Kosovo to attract international investments, which are particularly needed to reinvigorate one of Europe's poorest economies. However, among the several causes of Kosovo's stagnation individuated by the World Bank, a major one is the lack of credible institutions.<sup>674</sup>

In this regard, already before the issuing of the declaration of independence, the EU had decided to play a more decisive role in Kosovo's reconstruction. On 4 February 2008 the European Union Rule of Law Mission in Kosovo (EULEX) was adopted.<sup>675</sup> The EU's biggest-ever mission (1,900 international officials and 1,100 local staff), financed by the US in a quarter of its budget, gradually substituted UNMIK in the management of current civil affairs. This move was not seen with favor by Russia and Serbia, which questioned the legality of the establishment of the mission, claiming it was in disregard of UNSC Resolution 1244.<sup>676</sup> A compromise was in the end found, with the mediation of the UN Secretary-General, leaving to UNMIK the competence over Northern Kosovo (especially the ethnic Serbian enclave of Mitrovica) and some residual domains in the rest of the country.<sup>677</sup> Scheduled to last twelve months, the mission has been renewed three times and extended until June 2016.<sup>678</sup> Today, despite the international support, Kosovo's ability to exercise State functions remains questioned. Many authors doubt that Kosovo could effectively assert its authority, whenever UNMIK, KFOR and EULEX will be dismantled.<sup>679</sup> Meanwhile, despite well-received by the population in the post-independence period, the international missions

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<sup>674</sup> *Kosovo - Unlocking Growth Potential: Strategies, Policies, Actions - A Country Economic Memorandum* (World Bank 2010) V; Cfr *The World Bank Group in Kosovo: Country Snapshot* (World Bank 2015) 6.

<sup>675</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo [2008] OJ L 42/92.

<sup>676</sup> Robert Elsie, *Historical Dictionary of Kosovo* (2nd edn, Scarecrow Press) 96.

<sup>677</sup> Labinot Greiçevci, 'EU Actorness in International Affairs: The Case of EULEX Mission in Kosovo' (2011) *Perspectives on European Politics and Society* 283; Spyros Economides, 'The Making of a Failed State: The Case of Kosovo' (2011) *European View* 195.

<sup>678</sup> Council Decision 2014/349/CFSP of 12 June 2014 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo [2014] OJ L174/42.

<sup>679</sup> Milena Sterio, 'The Case of Kosovo: Self-Determination, Secession and Statehood under International Law' (2010) *Proceedings of the American Society of International Law* 361.

face today some critiques: concerns about EULEX's transparency and effectiveness in establishing the rule of law have been frequently drawn.<sup>680</sup> More recently, former EULEX officials have denounced cases of corruption within the mission and forced the EU High Representative for Foreign Affairs and Security Policy Federica Mogherini to appoint Jean Paul Jacqué as independent expert to review EULEX Kosovo mandate implementation.<sup>681</sup>

However, the international support and presence in Kosovo have also led to some positive accomplishments. Noteworthy is the process of normalization of the Kosovo-Serbia relations that culminated with the signature of the Brussels Agreement in 2013, under the aegis of the EU. Both countries have therefore been admitted to the enlargement policy program of the EU: the Stabilisation and Association Agreement of Serbia is actually in force,<sup>682</sup> while Kosovo's one has only be initialled and will be open for signature in 2015.<sup>683</sup> Indeed, it seems that the EU membership is an attractive goal, capable to influence the policies of both States and it is expected to bring peace and stability to the whole region on the long run. Nevertheless, this path remains still insidious because of the lack of recognition of Kosovo by two permanent members of the UN Security Council (Russia and China), because of the narrow ties between Russia and Serbia and because of the dormant rivalries existing in the Balkans. The last of these provocations came from Albania's Prime Minister Edi Rama, who declared that Kosovo's integration into Albania is inevitable and it is expected that this statement will have repercussions in the long term.<sup>684</sup>

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<sup>680</sup> Andrew Radin, 'Towards the Rule of Law in Kosovo: EULEX should go' (2013) *Nationalities Papers: The Journal of Nationalism and Ethnicity* 181.

<sup>681</sup> Statement by EU High Representative/Vice-President Federica Mogherini on the appointment of legal expert to review EULEX Kosovo mandate, Press Release No EU14-408EN (10 November 2014).

<sup>682</sup> Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, on the other part (adopted 29 April 2008, entered into force 1 September 2013).

<sup>683</sup> 'Stabilisation and Association Agreement is Initialled', Press Release of the Kosovo Ministry of European Integration, available at: <<http://mei-ks.net/?page=2.5.1011>> accessed 21 April 2014.

<sup>684</sup> Fatos Bytyci and Matt Robinson, 'Albania and Kosovo to Unite, inside EU or not: Albanian PM', Reuters (7 April 2015).

### 3.4 ABKHAZIA AND SOUTH OSSETIA

As already mentioned, many similarities can be found in the contexts of Abkhazia and South Ossetia and, for this reason, they are generally analyzed together. Among others, they share the same strategic position in the Caucasus, the secessionist claims against Georgia, the idyllic relations with Russia and an uncertain status as *de facto* States. The recent history of these two provinces begins in the first years of the nineteenth century, when they were taken away from the Ottoman Empire and annexed to the Tsarist Russia. During the Turkish rule, Abkhazians had converted to Islam, while South Ossets and Georgian had remained faithful to the Christian Orthodoxy. While the former were discriminated and persuaded to migrate to the Ottoman Empire, the latter saw the annexation as an opportunity to join their brothers of North Ossetia, which at that time was integral part of Russia and maintained this status until today.<sup>685</sup> A major development in the region's events happened when in 1917 Menshevik governments installed in both Sukhumi and Tskhinvali, the respective capital cities and declared independence. Nevertheless, their statehood dreams ended shortly after: Abkhazia and South Ossetia were re-conquered by the Georgian Bolsheviks by 1921 and integrated in the Georgia-led Transcaucasian Federation, which entered the USSR the following year. During this brief period, Abkhazia was accorded substantial autonomy and South Ossetians lived peacefully with Georgians, with a high rate of interaction and intermarriages.<sup>686</sup>

Things once again changed when in 1931 Stalin reduced Abkhazia to an Autonomous Republic within Georgia (with less competences than the other Soviet Socialist republics), enacted a Georgianization policy and promoted immigration in the region with the aim to

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<sup>685</sup> Angelika Nußberger, 'South Ossetia' and 'Abkhazia' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013).

<sup>686</sup> Milena Sterio, *The Right to Self-Determination under International Law: 'Selfistans', Secession and the Rule of the Great Powers* (Routledge 2013) 145-146.

dilute the Abkhazian presence.<sup>687</sup> At Stalin's death, discriminatory measures gradually abated and some additional powers were devolved to the republic. Ethnic tensions raised again during the Eighties and exploded in the dramatic and chaotic context of the USSR dismemberment.<sup>688</sup> Also in this occasion, as in many precedents already examined, State administrative subdivisions were crucial in determining the realization of any self-determination aspiration: indeed, under the USSR Constitution only the Soviet Socialist Republics were allowed to secede and the *uti possidetis* principle adopted with the Alma Ata Declaration<sup>689</sup> reinforced this view.<sup>690</sup> South Ossetia unilaterally declared independence on 20 September 1990, triggering the revocation by Georgia of its autonomous status and the invasion of the province by both Russian and Georgian forces. A brutal war, characterized by the total disrespect for humanitarian law rules protracted until Georgia accepted to sign a ceasefire in Sochi in 1992.<sup>691</sup> Commonwealth of Independent States (CIS) and OSCE peace-keeping forces were deployed in the province in application of the Agreement.<sup>692</sup> Meanwhile, Abkhazia supported Gorbachev's proposal for a new Union Constitution and expressed its favor to Russia with an overwhelming consensus in the 1991 referendum, which was instead boycotted by Georgia.<sup>693</sup> Negotiations for a more autonomous status culminated in the adoption of a new ethnic-based electoral law, that soon led the Parliament to the paralysis.

The coup of 21 February 1992 that ousted President Zviad Gamsakhurdia in Georgia paved the way for the restoration of the 1921 Constitution; in turn, Abkhazia took the chance to ask for more competences. This new round of negotiations concluded in just two days, when the new Georgian President Shavardnadze sent the army to Abkhazia to put an end to

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<sup>687</sup> Grace Bolton, 'International Responses to the Secession Attempts of Kosovo, Abkhazia and South Ossetia 1989-2009' in French (n 304) 123.

<sup>688</sup> Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia* (Kluwer Law International 2001) 10-13.

<sup>689</sup> Alma Ata Declaration (n 253).

<sup>690</sup> Corten (n 178) 128-133.

<sup>691</sup> Ibid 133.

<sup>692</sup> 1992 Sochi Agreement (n 313) art 3(3).

<sup>693</sup> Sterio (n 686) 147.

the region's secessionist attempts. The conflict lasted until September 1993, when Abkhazians managed to expel the Georgian forces and a ceasefire<sup>694</sup> was signed. The Agreement was followed by the enforcement of a UN Security Council Resolution,<sup>695</sup> which added UN forces under the United Nations Observer Mission in Georgia (UNOMIG) to the CIS peace-keepers, and by the signature of the Moscow Agreement<sup>696</sup> that temporarily settled the question, with a view to additional negotiations.<sup>697</sup> Nevertheless, allegations of massive human rights violations and ethnic cleansing were drawn to both sides. Concerning South Ossetia, sources of the Georgian Government claim that the displaced amounted to 60,000 among the Ossets<sup>698</sup> and to 23,000 among the ethnic Georgians.<sup>699</sup> On the Abkhazian front, the refugees totaled 350,000<sup>700</sup> and evidence of "gross intimidation by Georgian forces for the purpose of terrorizing, robbing and driving the Abkhaz population out of their homes,"<sup>701</sup> were found by several NGOs. Violence against civilians was identified on both parties by a UNSC fact-finding mission.<sup>702</sup> Other reports specifically mentioned cases of ethnic cleansing.<sup>703</sup>

The negotiations carried out in the following years were not particularly fruitful. Abkhazians, in particular, were suspicious of the UN-led dialogue, as the UNSC adopted a resolution<sup>704</sup> in protection of the Georgian territorial integrity. With the aim to speed up the process, Abkhazia unilaterally declared independence from Georgia in October 1999,

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<sup>694</sup> Agreement on a Ceasefire in Abkhazia and on a Mechanism to Ensure its Observance (27 July 1993) (1993 Sochi Agreement).

<sup>695</sup> UNSC Res 858 (24 August 1993) UN Doc S/RES/858.

<sup>696</sup> Agreement on a Cease-fire and Separation of Forces (14 May 1994).

<sup>697</sup> Potier (n 688) 14.

<sup>698</sup> Neil S Macfarlane, 'On the Front Lines in the Near Abroad: The CIS and the OSCE in Georgia's Civil Wars' (1997) 18 *Third World Quarterly* 512.

<sup>699</sup> Human Rights Watch, 'Russia: The Ingush-Ossetian Conflict in the Prigorodnyi Region' (1996).

<sup>700</sup> UNHCR, Information Bulletin (July 1994) 4.

<sup>701</sup> Human Rights Watch, 'Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict' (1995) 20.

<sup>702</sup> Report of the Secretary-General's Fact-Finding Mission to Investigate Human Rights Violations in Abkhazia, Georgia (17 November 1993) UN Doc S/2679S.

<sup>703</sup> UNHCR, Operational Experience with Internally Displaced Persons (1994) 39.

<sup>704</sup> UNSC Res 1255 (30 July 1999) UN Doc S/RES/1255.

following a referendum.<sup>705</sup> OSCE reaffirmed its support for Georgia's unity<sup>706</sup> and the UN intensified its efforts for the brokerage of a serious power-sharing agreement with the appointment of a Special Representative of the Secretary-General. The election of President Mikheil Saakashvili in Georgia in 2003 facilitated the peace process. Meanwhile, Russian influence on the two Georgian provinces grew stronger with the adoption of the Russian ruble as *de facto* currency and with the issuing of Russian passports to Abkhazians.

Since 2006, indeed, the Russian operability in the region had increased and quarrels between Georgia and Russia were frequent. Moreover, the approval of the US post-2001 anti-terrorism Georgia Train and Equip Program (GTEP), which deployed 200 trainers on Georgian soil, had been seen by Moscow as a direct threat to its influence and a concrete opportunity for a Georgian military development.<sup>707</sup> Western presence in Georgia was also reinforced with the establishment of the EU Rule of Law Mission to Georgia (EUJUST THEMIS),<sup>708</sup> which helped with the planning and enacting of the criminal justice system reform.<sup>709</sup>

When Kosovo declared independence in 2008, the supporters of the provinces' independence immediately drew a parallel between the two situations.<sup>710</sup> In March, Abkhazia and South Ossetia issued statements requesting international recognition and anti-Georgian sentiment exacerbated. Saakashvili offered Abkhazia unlimited autonomy within a federal State, but his proposal was rejected. The perspective admission of Georgia to NATO increased Russia's concern on the region. The skirmishes culminated in a five-days war

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<sup>705</sup> Act of State Independence of the Republic of Abkhazia (12 October 1999).

<sup>706</sup> OSCE, Istanbul Declaration (19 November 1999).

<sup>707</sup> Rick Fawn, 'Russia's Reluctant Retreat from the Caucasus: Abkhazia, Georgia and the US after 11 September 2001' (2007) 11 *European Security* 131.

<sup>708</sup> Council Joint Action 2004/523/CFSP of 28 June 2004 Extending and Amending the Mandate of the Special Representative of the European Union for the South Caucasus [2004] OJ L 234/16.

<sup>709</sup> Maria Julià Barceló, 'La Misión de Observación de la UE en Georgia: Instrumento para el Reconocimiento de Territorios Secesionistas?' (2009) 18 *Revista Electrónica de Estudios Internacionales* 1.

<sup>710</sup> Sebastian Schäffer, 'The Kosovo Precedent - Directly Applicable to Abkhazia and South Ossetia' (2009) 3 *Caucasian Review of International Affairs* 108.

between Georgia on one side and Russia, Abkhazia and South Ossetia on the other. It is still questioned who triggered the escalation, as “facts are shrouded by the fog of war and contradictory claims”,<sup>711</sup> but it seems that the shelling of Tskhinvali by the Georgian forces during the night of 7 to 8 August was the *casus belli*. The attempt to re-gain control of South Ossetia was repulsed by Ossetian forces, meanwhile a second front was opened at west, where Abkhazians, supported by 9,000 Russian soldiers easily advanced toward Tbilisi.<sup>712</sup> Only the EU intervention, realized through the brokerage of a ceasefire agreement by France’s President Nicolas Sarkozy, put an end to the conflict.<sup>713</sup> As part of the six-point agreement, the European Union Monitoring Mission in Georgia (EUMM) was established, though Abkhazia and South Ossetia repeatedly denied the Mission access to their respective territories. Instead, a military presence of 7,600 Russian ‘peace-keepers’ was maintained in those domains.<sup>714</sup> On 26 August 2008, the Russian Federation formally recognized the independence of the two breakaway republics.<sup>715</sup> This move was later explained before the UN Security Council as “Russia’s responsibility for ensuring the survival of their brotherly people in the face of the aggressive and chauvinistic policy of Tblisi”.<sup>716</sup> Moreover, comparing the situation to Kosovo, Russia maintained the applicability of the remedial secession theory alleging first that “Gamsakhurdia (...) annulled the existence of entities on Georgian territory”,<sup>717</sup> and then that “Saakashvili left [Abkhazia and South Ossetia] no other choice but to provide for their own security”.<sup>718</sup> The United States criticized the Russian and

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<sup>711</sup> Christopher Borgen, ‘The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia’ (2009) 10 Chicago Journal of International Law 1; Cfr Nußberger (n 685).

<sup>712</sup> Paula Garb, ‘The View from Abkhazia of South Ossetia Ablaze’ (2009) 28 Central Asian Survey 235.

<sup>713</sup> Kornely K Kakachia, ‘A Guerra dos Cinco Dias’ (2008) 20 Relações Internacionais 33.

<sup>714</sup> Michael Toomey, ‘The August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?’ (2009) Temple International and Comparative Law Journal 443.

<sup>715</sup> Statement by the Ministry of Foreign Affairs of the Russian Federation (26 August 2008).

<sup>716</sup> Statement of Russia, UN Security Council Meeting Record (28 August 2008) UN Doc S/PV.5969 (UNSC 28 August 2008).

<sup>717</sup> Ibid.

<sup>718</sup> Ibid.

Abkhazian intervention declaring that “Abkhazia does not border South Ossetia”<sup>719</sup> and reiterating that “there was no humanitarian crisis to address”.<sup>720</sup>

On the matter, many commentators condemned the illegality of the Russian participation to the conflict. The argument that Russia was acting as a guarantor of peace in the region and had intervened to protect both South Ossetian civilians from the Georgian military and ethnic Georgians from South Ossetian reprisals seems not very convincing, from a legal point of view. Nothing prevented Russia from calling an emergency UNSC meeting and approving a UN authorized intervention. On the other side, it is to be admitted that the precedents of US-led interventions in Kosovo, Iraq and Afghanistan without a UN mandate have opened a perilous path to world chaos. However, even the alternative argument of an intervention aimed at protecting Russian citizens in South Ossetia would not seem to be bearable. First, because the Russian Federation had massively distributed Russian passports to Russophone Ossets and Abkhazians in the previous years, according to a scheme that repeated itself in Ukraine in 2014.<sup>721</sup> Second, even if eventually legitimated under this aspect, the operation would have been disproportionate, as it was found by the Independent International Fact-Finding Mission on the Conflict in Georgia in 2009.<sup>722</sup> Moreover, whenever one would equate the violations of human rights happened in the Caucasus to those in Kosovo and the ‘humanitarian intervention’ outside the UN framework in both the theatres, another element would be crucial for determining Abkhazia’s and South Ossetia’s claims for statehood: recognition. So far in fact, while Kosovo has been recognized by 110 States, the two Caucasian republics are exclusively recognized by the Russian Federation, Nicaragua,

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<sup>719</sup> Ibid Statement of the United States.

<sup>720</sup> Ibid.

<sup>721</sup> Vincent M Artman, ‘Documenting Territory: Passportisation, Territory, and Exception in Abkhazia and South Ossetia’ (2013) 18 *Geopolitics* 682.

<sup>722</sup> Tagliavini Report (n 303) 275.



Venezuela, Nauru and Vanuatu<sup>723</sup>. While it is easy to understand Russia's interest in recognition and it is presumed the Venezuelan and Nicaraguan ones are moved by anti-US sentiments, it is hardly conceivable which benefit can the two micro-States of Nauru and Vanuatu receive from such an act.<sup>724</sup> It seems quite evident that to the Lauterpacht's 'grotesque spectacle'<sup>725</sup> it has been added an additional feature that directly invests economic interests: in fact, it has been reported that Nauru received 50 million dollars in change of recognition.<sup>726</sup> Evidences that some recognition acts were not genuine and that money-for-recognition agreements could have been brokered is inferred by the ambivalent position took by Tuvalu, which first granted and then retracted its support.<sup>727</sup>

Today, Abkhazia's and South Ossetia's destiny seem to remain trapped in the legal limbo that affects those entities that have not been recognized as States by the international community as a whole or at least by a great part of its members. With this come isolationism and economic stagnation, only partially modified by the limited Russian investments.<sup>728</sup> Nevertheless, these territories preserve their importance as transport and energy crossroads and are also valuable under the military and strategic aspect, especially for Russia that after the USSR dismemberment and the EU and NATO enlargement feels encircled by Western powers.<sup>729</sup> On the other hand, Georgia believes to captivate its breakaway regions with a

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<sup>723</sup> Vanuatu recognizes Abkhazia only.

<sup>724</sup> Mikulas Fabry, 'The Contemporary Practice of State Recognition: Kosovo, South Ossetia, Abkhazia, and their Aftermath' (2012) 40 Nationalities Papers: The Journal of Nationalism and Ethnicity 661.

<sup>725</sup> See Chapter 3.6.

<sup>726</sup> Luke Harding, 'Tiny Nauru Struts World Stage by Recognizing Breakaway Republics', The Guardian (14 December 2009), available at: <<http://www.theguardian.com/world/2009/dec/14/nauro-recognises-abkhazia-south-ossetia>> accessed 22 April 2015.

<sup>727</sup> 'Tuvalu Retracts Abkhazia, South Ossetia Recognition', Civil Georgia(14 March 2014), available at: <<http://civil.ge/eng/article.php?id=27093>> accessed 22 April 2015.

<sup>728</sup> Vladimir Kolossov and John O'Loughlin, 'After the Wars in the South Caucasus State of Georgia: Economic Insecurities and Migration in the "De Facto" States of Abkhazia and South Ossetia' (2011) 52 Eurasian Geography and Economics 631.

<sup>729</sup> Alexander Cooley and Lincoln A Mitchell, 'Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia's Unrecognized States' (2010) 33 The Washington Quarterly 59.

‘strategic patience’ attitude, driven by economic progress and development.<sup>730</sup> Russia, from its point of view, has enacted a policy that increasingly favors the tightening of relations with the two quasi-States up to envisaging an annexation, especially after the precedent of Crimea.<sup>731</sup> In pursuit of these objectives, Russia signed on 15 September 2009, a military cooperation treaty with Abkhazia that enables the Russian army to use, build and upgrade military infrastructure and bases in that territory.<sup>732</sup> This strategies has been further widened with the signature of the Russian-Abkhazian Agreement on Alliance and Strategic Partnership<sup>733</sup> on 24 November 2014, which established a common foreign policy<sup>734</sup>, reinforced economic<sup>735</sup> and military cooperation<sup>736</sup> and mutual defense.<sup>737</sup> A mixed Russo-Abkhazian task force is also created with borders protection aims.<sup>738</sup> Furthermore, the Treaty extends to Abkhazia the Russian regime concerning salaries<sup>739</sup> and retirement funds<sup>740</sup> and it eases the granting of the Russian citizenship to Abkhazians.<sup>741</sup> The very same obligations are included in the Alliance and Integration Agreement with South Ossetia<sup>742</sup> signed in March 2015, which also provides for the incorporation of Ossetian army and customs services into

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<sup>730</sup> John O’Loughlin, Vladimir Kolosov and Gerard Toal, ‘Inside Abkhazia: Survey of Attitudes in a De Facto State’ (2011) 27 *Post-Soviet Affairs* 1.

<sup>731</sup> See Chapter 4.5.

<sup>732</sup> O’Loughlin (n 730) 6.

<sup>733</sup> Russian-Abkhazian Agreement on Alliance and Strategic Partnership (24 November 2014); Cfr Luke Harding, ‘Georgia Angered by Russia-Abkhazia Military Agreement’, *The Guardian* ( 25 November 2014), available at: <<http://www.theguardian.com/world/2014/nov/25/georgia-russia-abkhazia-military-agreement-putin>> accessed 22 April 2015.

<sup>734</sup> Russian-Abkhazian Agreement on Alliance and Strategic Partnership (n 733) art 4

<sup>735</sup> *Ibid* art 11.

<sup>736</sup> *Ibid* art 5.

<sup>737</sup> *Ibid* art 6.

<sup>738</sup> *Ibid* art 7.

<sup>739</sup> *Ibid* art 14.

<sup>740</sup> *Ibid* art 15.

<sup>741</sup> *Ibid* art 13.

<sup>742</sup> Treaty on Alliance and Integration between the Russian Federation and the Republic of South Ossetia (18 March 2015); Cfr Colin Freeman, ‘Russia Signs Integration Deal with South Ossetia’, *The Telegraph* (19 March 2015), available at: <<http://www.telegraph.co.uk/news/worldnews/europe/georgia/11484030/Russia-signs-integration-deal-with-South-Ossetia.html>> accessed 22 April 2015.

the Russian ones and commits Russia to pay South Ossetia's civil servants. All these agreements have been condemned and non-recognized by the EU<sup>743</sup> and the US.<sup>744</sup>

### 3.5 CRIMEA

Crimea is a peninsula of 26,200 square kilometers in the Northern Black Sea region. Conquered by Catherine the Great in 1783, it remained to the Tsarist Empire even after Russia's defeat in the 1853-1856 Crimean War. After the establishment of the Soviet Union, the peninsula joined the Soviet Socialist Republic (SSR) of Russia. The Crimean *oblast* was transferred to the SSR of Ukraine, on 19 February 1954, by the decision of the First Secretary of the Communist Party of the Soviet Union Nikita Khrushchev. When the USSR collapsed, the Russian Federation and Ukraine signed on 19 November 1990 a Friendship Treaty that safeguarded the territorial integrity of both States and the respect of the USSR former administrative borders.<sup>745</sup> Crimea was upgraded to an Autonomous Republic within Ukraine on 12 February 1991, following a local referendum which changed the status of the peninsula. Nevertheless, in 1992 the Russian Parliament claimed Crimea back, alleging the unconstitutionality of the 1954 decision.<sup>746</sup> In May 1992, the Crimean Parliament voted for the independence from Ukraine, but its outcome was not recognized. Tensions temporarily de-escalated with the signature of the Act on the Division of Power between Authorities of

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<sup>743</sup> Statement by High Representative/Vice-President Federica Mogherini on the announced signature of a "Treaty on Alliance and Integration" between the Russian Federation and Georgia's breakaway region of South Ossetia (17 March 2015).

<sup>744</sup> Colin Freeman, 'Russia Signs Integration Deal with South Ossetia', The Telegraph (19 March 2015).

<sup>745</sup> Treaty on Friendship, Good Neighborliness and Cooperation (19 November 1990) art 6. Cfr Romain Yakemtchouk, 'Les Conflits de Territoires et de Frontières dans les Etats de l'Ex-URSS' (1993) 39 *Annuaire Français de Droit International* 393.

<sup>746</sup> Weerts (n 182) 124.

Ukraine and Republic of Crimea.<sup>747</sup> Between 1994 and 1997, Crimea accepted its final status of Republic within the Ukrainian borders and the Russia-Ukraine relations were regulated with the Budapest Memorandum:<sup>748</sup> the transfer of its third-largest nuclear weapon system would have assured Ukraine's territorial integrity protection.<sup>749</sup> As a corollary of these agreements, the USSR Black Sea Fleet anchored in Sebastopol, Crimea was apportioned between the two States and a military base leasing was concluded for twenty years.<sup>750</sup>

In the wake of the USSR dismemberment, many former satellite States looked at the West and in February 1991 Poland, Hungary and Czechoslovakia formed the Visegrád Group to push for European integration under the European Union and NATO. The engagement in closer ties with these organizations had a major development in 1999 when Czech Republic, Hungary and Poland joined NATO. Bulgaria, Estonia, Latvia, Lithuania, Romania and Slovakia followed in 2004 and in the same year, all these States acceded to the European Union. The other post-Soviet States of Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine maintain privileged relations with the European Union in the framework of the Eastern Partnership initiative, though not being members. While during the last years of the millennium Russia seemed unable to counteract this process, from the early 2000s its assertiveness has increased and its opposition was decisive in making the Ukraine admission – sought in 2008 - into NATO postponed indeterminately.<sup>751</sup> From Russia's point of view, the EU and NATO enlargement operations were seen as a direct threat to its hegemonic sphere. In less than fifteen years in fact, Russia assisted to the progressive erosion of the buffer zone of

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<sup>747</sup> Emmanuel Karagiannis, 'The Russian Interventions in South Ossetia and Crimea Compared: Military Performance, Legitimacy and Goals' (2014) 35 *Contemporary Security Policy* 400.

<sup>748</sup> Budapest Memorandums on Security Assurances (5 December 1994).

<sup>749</sup> Weerts (n 182) 124.

<sup>750</sup> Partition Treaty on the Status and Conditions of the Black Sea Fleet (adopted May 28 1997, entered into force 12 July 1999) (Black Sea Fleet Treaty).

<sup>751</sup> Adam Taylor, 'That Time Ukraine Tried to Join NATO — and NATO Said No', *The Washington Post* (4 September 2014).

dependent States it had created in order to prevent invasions from the West.<sup>752</sup> Nevertheless, thanks to its role of Europe's largest energy-supplier and to its cultural affinity with the Eastern States, Russia managed to maintain a considerable amount of soft power in the region, and especially in some areas such as Crimea, where the use of the Russian language is widespread.<sup>753</sup> In 2001, Crimea was inhabited by 58.5% ethnic Russians, 24.4% Ukrainians and 12.1% Crimean Tatars, descendants of the pre-eighteenth century Ottoman rulers.<sup>754</sup> Russian influence was confirmed with the establishment of the Black Sea branch of the Moscow State University, the common use of Russian media and the presence of the Russian fleet in Sebastopol.<sup>755</sup> The situation changed in favor of Russia, after the Western States demonstrated in the 2008 Russo-Georgian War that they were not willing to directly engage in a conflict in the region. The development of the Russian Army, supported by the largest funds allocation since the end of the Cold War (an 11% increase per year from 2011 to 2002), a better resources management and the creation of a Rapid Reaction Forces Command, considerably augmented Russia's military firepower and influence over 'NATO-friendly' partners.<sup>756</sup> By virtue of the Russian assertiveness, Ukraine's President Viktor Yanukovich, with the Kharkiv Pact, extended the lease of the Black Sea Fleet base of Sebastopol until 2042, receiving in change a 30%-discount on natural gas imports.<sup>757</sup>

In November 2013, when Yanukovich backed away from the signature of the EU Association Agreement, mass protests exploded in the country and protracted for many months. The suppression by the security forces failed and the 'revolution' culminated with

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<sup>752</sup> John J Mearsheimer, 'Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions That Provoked Putin' (2014) 93 *Foreign Affairs* 77.

<sup>753</sup> Lada L Roslycky, 'Russia's Smart Power in Crimea: Sowing the Seeds of Trust' (2011) 11 *Southeast European and Black Sea Studies* 299.

<sup>754</sup> State Statistics Committee of Ukraine, 'All-Ukrainian Population Census' (2001) available at: <<http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea>> accessed 23 April 2015.

<sup>755</sup> William Varettoni, 'Crimea's Overlooked Instability (2011) 34 *The Washington Quarterly*' 87.

<sup>756</sup> Charles K Bartles and Roger N McDermott, 'Russia's Military Operation in Crimea' (2014) 61 *Problems of Post-Communism* 46.

<sup>757</sup> Black Sea Fleet Treaty (n 750) Kharkiv Pact (adopted 21 April 2010, entered into force 27 April 2010).

Yanukovych fleeing the country on 21 February 2014. Ukraine's Government was replaced with an interim, pro-West Council, which soon distinguished for a legislation draft that removed Russian as official language. Being the executive unable to successfully control its territory, an undefined number of allegedly Russia-waged 'masked men' entered the country, with a great surprise of the Ukrainian Security Service. On 27 February 2014, the Crimean Parliament announced plans to hold a referendum to expand the autonomy of Crimea, setting the date for holding it on 25 May 2014. On the same day, the unknown masked gunmen, commonly referred to as 'polite people' in the Russian media, seized key government buildings and access points to the peninsula. In the following days, also infrastructures such as airports, television stations and military bases were placed under pro-Russian control, while Russian troops' presence at the borders dramatically intensified.<sup>758</sup> On 3 March 2014, the Crimean Parliament anticipated the referendum from 25 May to 16 March. Meanwhile, Western States condemned the operation and OSCE declined to send its observers to the vote, as held in violation of the Ukrainian Constitution.<sup>759</sup> Despite not recognized by any State of the international community, the outcome of the referendum favored the re-unification of the region with the Russian Federation, with an overwhelming 97.32% consensus on a total turnout of 83.01%.<sup>760</sup> Crimean Tatars openly boycotted the vote.

On 17 March 2014, the Supreme Council of Crimea declared independence, which was promptly recognized by Russia. After just one day, representatives of Crimea and Russia agreed on the Treaty on Accession of the Republic of Crimea to Russia<sup>761</sup> and sanctioned the sovereignty transfer. While the Western States and the UN General Assembly<sup>762</sup> condemned

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<sup>758</sup> Bartles (n 756).

<sup>759</sup> OSCE, Statement of the Chairperson (11 March 2014).

<sup>760</sup> Direct Democracy, Referendum in Crimea (2014) available at:

<<http://www.sudd.ch/event.php?lang=it&id=ua012014>> accessed 23 April 2015.

<sup>761</sup> Treaty on Accession of the Republic of Crimea to Russia (adopted 18 March 2014, entered into force 21 March 2014) (Russia-Crimea Treaty).

<sup>762</sup> UNGA Res 282(LXVIII) (27 March 2014) UN Doc A/RES/68/282.

the entire process, Russian troops continued to arrive via aircraft and ship. As a result of the annexation, Crimea adopted the ruble and the Moscow time zone and all the Crimean citizens were automatically granted Russian citizenship<sup>763</sup> and conscripted.<sup>764</sup> Moreover, Russia unilaterally terminated the 2010 Kharkiv Pact. Starting from March 2014, the European Union and the United States, followed by many other countries,<sup>765</sup> issued sanctions against hundreds of individuals and businesses linked with the Russian and Crimean regimes, including assets freezing and visa bans.<sup>766</sup> Russia retaliated adopting its own package of sanctions against European and US business sectors. Despite criticism was drawn to the sanctions approach by the right-winged parties of the European Parliament, EU and US leaders have always defended them. US vice-President Joe Biden, for instance, declared:

Throughout we've given Putin a simple choice: Respect Ukraine's sovereignty or face increasing consequences. That has allowed us to rally the world's major developed countries to impose real cost on Russia. It is true they did not want to do that. But again, it was America's leadership and the President of the United States insisting, oft times almost having to embarrass Europe to stand up and take economic hits to impose costs. And the results have been massive capital flight from Russia, a virtual freeze on foreign direct investment, a ruble at an all-time low against the dollar, and the Russian economy teetering on the brink of recession. We don't want Russia to collapse. We want Russia to succeed. But Putin has to make a choice. These asymmetrical advances on another country cannot be tolerated. The international system will collapse if they are.<sup>767</sup>

From the legal point of view, Russia's rhetoric mainly focused on the necessity to right an ancient wrong (Khrushchev's overnight transfer of Crimea), to react to the

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<sup>763</sup> Russia-Crimea Treaty (n 761) art 5.

<sup>764</sup> Ibid art 7.

<sup>765</sup> Albania, Australia, Canada, Japan, Montenegro, New Zealand, Norway, Switzerland.

<sup>766</sup> Council Regulation (EU) No 833/2014 of 31 July 2014 concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine [2014] OJ L 229/1; Council Regulation (EU) No 1351/2014 of 18 December 2014 amending Regulation (EU) No 692/2014 concerning Restrictive Measures in Response to the Illegal Annexation of Crimea and Sevastopol [2014] OJ L 365/46.

<sup>767</sup> Remarks by the Vice-President at the John F Kennedy Forum (3 October 2014), available at: <<https://www.whitehouse.gov/the-press-office/2014/10/03/remarks-vice-president-john-f-kennedy-forum>> accessed 23 April 2015.

“Nationalists, neo-Nazis, Russophobes and anti-Semites [who] executed this coup [in Ukraine]”<sup>768</sup> and to the protection of Russian nationals abroad. Russia repulses any allegation of forcible intervention, stating that its operation was triggered after President Yanukovich had appealed “to protect the lives, freedom and health of the citizens of Ukraine”.<sup>769</sup> Moreover, it often claimed that after all the Western humanitarian interventions, such as those in Kosovo or East Timor, even Russia was legitimated to intervene against the illegality of a change of government in Kiev.<sup>770</sup> With the Crimea annexation, Russia took the chance to assert itself again as a hub for a particular interpretation of international law, capable to challenge the post-WWII US-led order. Russia cleverly exploited the US precedent of the support to Nicaraguan Contras and in particular the ICJ judgment that declared that: “For this conduct to give rise to the legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations”<sup>771</sup> and that therefore, the United States’ participation, even if preponderant or decisive, in the financing, organizing, training and equipping of the Contras was insufficient to attribute the acts to the US.<sup>772</sup>

Furthermore, the violence suffered by the Kosovars or the people in East Timor is undoubtedly incomparable with that in Crimea or the Eastern regions of Ukraine, where the central government simply threatened to revoke the status of official language to Russian. Apart from this, there is neither evidence that ethnic Russians’ human rights were violated to the extent of triggering an external right to self-determination nor to a still disputed remedial right to secede. Moreover, despite it is possible to trace back a precedent in the States that

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<sup>768</sup> Address by President of the Russian Federation (18 March 2014) available at: <<http://en.kremlin.ru/events/president/news/20603>> accessed 23 April 2015.

<sup>769</sup> Vladimir Putin, Press Conference (4 March 2014) available at: <<http://eng.kremlin.ru/transcripts/6763>> accessed 23 April 2015.

<sup>770</sup> Rein Müllerson, ‘Ukraine: Victim of Geopolitics’ (2014) 13 Chinese Journal of International Law 133.

<sup>771</sup> *Military and Paramilitary Activities* (n 152) 116.

<sup>772</sup> William W Burke-White, ‘Crimea and the International Legal Order’ (2014) 56 *Survival: Global Politics and Strategy* 65.



today compose the United Arab Emirates, which became independent from the United Kingdom and two days after decided to unite in a federation, it is not possible to seriously take into consideration that Crimea had attained statehood and freely decided to relinquish it immediately. This circumstance resemble more the case of a puppet State; after all, it is not the first breakaway government that Russia manages to install to destabilize a neighboring country, as already happened in Georgia and Moldavia. Indeed, this kind of operation worryingly looks like the USSR incursions in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979).<sup>773</sup> Indeed, it is to be noted that this case is not very different from the Turkish unlawful occupation of Northern Cyprus and the subsequent establishment of a State that is exclusively recognized by the occupying country and totally dependent on it, despite a merely formal autonomous status.<sup>774</sup>

Finally, the least convincing argument seems to be the invoked protection of nationals abroad. In the first place, there is no international agreement over the lawfulness of such an operation, as testified by the critiques moved by the UN Secretary-General to Israel in the occasion of the much more limited Entebbe Operation.<sup>775</sup> Secondly, even before the annexation and in pursuance of the famous ‘passportization policy’,<sup>776</sup> Russian citizenship had already been indiscriminately granted to Ukrainians, with the support of covert organization such as the People’s Front Sevastopol-Crimea-Russia and in blatant breach of Ukrainian law which, prohibits double citizenship.<sup>777</sup>

In the light of the current events, Crimea seems today destined to the fate of the Baltic Republics under USSR occupation after World War II: it will be necessary an internal uprising or a foreign liberation in order to *de facto* restore its recognized legal status (as part

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<sup>773</sup> Anatoly Pronin, ‘Republic of Crimea: a Two-Day State’ (2015) 3 Russian Law Journal 133.

<sup>774</sup> Crawford (n 138) 156.

<sup>775</sup> UNSC, 1939th Meeting (9 July 1976) UN Doc S/PV.1939.

<sup>776</sup> Russian Federal Law on Russian Federation Citizenship, No 62-FZ (31 May 2002).

<sup>777</sup> Law on Citizenship of Ukraine (18 January 2001) art 2.

of Ukraine). Necessary but not sufficient is Ukraine's approach, which continues declaring the region as an "inalienable part"<sup>778</sup> of its territory and will probably have to continue to do so for many years to come. After all, two conflicts in the Black Sea region have shown that no State is willing to risk World War III against Russia in name of the Crimean or Georgian territorial integrity. The economic sanctions approach is a weapon that only shows its results on the long term, and bears with it the possibility to exacerbate nationalist sentiment in the addressed State. Nevertheless, Iran's or Cuba's latest openness demonstrate that sanctions are rather influential and successful in bringing States back to negotiations.

The most probable scenario for Crimea from now on, is to suffer increased isolationism by the international community, although its position is relatively better than other secessionist entities. The fact of having being integrated in such a powerful State as Russia, makes virtually impossible a liberation war at reasonable costs for any State in the world.<sup>779</sup> A political solution is frequently invoked by international actors, though it is dubious whether such an agreement could be reach with the actual Russian leading class.<sup>780</sup> However, Crimea's annexation is nothing but the latest confirmation that in the actual UN system the permanent members of the Security Council can block any action by this body with their veto power, as including any meaningful sanction. Moreover, the risk to engage in a nuclear war with Russia makes any option involving the use of force, even under the UN mandate, extremely expensive and unsure.

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<sup>778</sup> 'Poroshenko, "La Crimea è Inalienabile"', ANSA (22 April 2015) available at: <[http://www.ansa.it/sito/notizie/mondo/europa/2015/04/22/poroshenko-la-crimea-e-inalienabile\\_ae6f189a-4472-40ab-b011-61fada144528.html](http://www.ansa.it/sito/notizie/mondo/europa/2015/04/22/poroshenko-la-crimea-e-inalienabile_ae6f189a-4472-40ab-b011-61fada144528.html)> accessed 23 April 2015.

<sup>779</sup> Cornelia Navari, 'Territoriality, Self-Determination and Crimea after Badinter' (2014) 90 *International Affairs* 1299.

<sup>780</sup> Cfr Tony Paterson, 'Ukraine Crisis: Angry Angela Merkel Questions whether Putin is "in Touch with Reality"' *The Telegraph* (3 March 2014) available at: <<http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10673235/Ukraine-crisis-Angry-Angela-Merkel-questions-whether-Putin-is-in-touch-with-reality.html>> accessed 23 April 2015.

### 3.6 CONCLUDING REMARKS

What appears from the examined cases is that, still after the establishment of the United Nations system, States, also individually, bear heavy responsibilities in shaping international law. The importance of State practice should not be overlooked as it contributes to the formation of *opinio juris*. At the beginning of this work, it has been observed that States' competences and influence on the world stage are facing new challenges and are generally leaving more leeway to other actors. Probably, the only inverted trend is represented by States' behavior in war, territory modifications and humanitarian crisis management. Although it is proved that their action is more effective when acting together, as through international organizations, history shows that these bodies often lack the capacity and the unity to provide successful solutions. Instead States, each of them with a different degree of initiative according to their influential power, are crucial in taking individual responses in the waiting of concerted choices and are decisive (some more than others) in unlocking wearing negotiations in those environments. The multi-polar structure of the world today, with judges wary of considering a case a precedent for others and with so many peoples that fraudulently claim their uniqueness, needs a shared plan aimed to avoid additional humanitarian catastrophes. It is hard to say how long the sense of justice will prevail over political and economic interests in the world governance.

## CONCLUSION

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As it is possible to infer from this work, State secession is a very ambivalent matter, in which politics can shape different interpretations of established principles of international law and determine different outcomes.

One of the most interesting aspects concerns the balancing of *jus cogens* norms, such as territorial integrity and self-determination, the prohibition of use of force and human rights. With all these apparently conflicting tenets to evaluate, it is difficult to assess when a secessionist attempt is justified or not from the point of view of international law. The resort to theories such as the remedial secession would decisively unlock the situation, but no effectiveness is assured until all States are willing to abide by specific, binding rules. Meanwhile, interests linked with different needs further contribute to the ambiguity of States policy. Clear evidences of this fact can be found in the different approaches exercised in States' recognition processes.

The same vagueness is used by the UN Security Council when it is unable to offer a univocal approach to secessions. The national interests at stake in this important issue and the risk of establishing precedents testify the limits the Council encounters with these delicate matters, able to disrupt the balance between the permanent members. In these circumstances, though harshly affecting the UN reputation worldwide, the stalemate in the UNSC is the only alternative to a military escalation. Therefore, under these conditions, the international community can only accept the current situation, recognizing that some States are entitled greater powers and greater responsibilities, at least until a frequently-invoked reform of the Council will be adopted. In the light of these considerations, it is important to remark how strong is the echo that characterizes the breaches of international law when compared with the

daily respect of practices: the fragile international equilibrium is constantly in danger and the effort of all actors is needed to preserve it against continuous threats. In this context, the role of international law is to offer guidance to States in their international relations and to repel the risks of creating a more anarchic world. The success of this task only lies in the hands of States.

In conclusion, in order to answer to the research question concerning the existence of a qualified right to secede, it is possible to affirm that it does exist. Undoubtedly, it exists for peoples subject to colonial domination and for the unlawfully occupied territories. Debate in doctrine and courts makes impossible to assert today the same existence in non-colonial contexts, but a favorable trend in this sense cannot be easily overlooked. The opinion of many scholars, as well as that of the author of this work, is that with the progress in terms of protection of human rights, it will be more difficult to deny such rights to people suffering grave and systematic violations. Nevertheless, as already stated, a major responsibility still relapses upon States to develop, with their acts, the basis for a more precise legal framework provided with assessment, decisional and enforcement mechanisms.

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