THE RIGHT TO SECEDE: A COMPARATIVE ANALYSIS

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ACADEMIC YEAR
2014-2015
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ACKNOWLEDGMENTS

Firstly, I would like to thank my supervisor, Professor Giovanni Rizzoni, for his help in the drafting of this Thesis. His advises on how to conduct the research and on how to improve my analysis have been an indispensable guideline. Secondly, I would like to thank all the Professors that during these years of studies have inspired me and guided me into the world of Political Science. I am grateful also to my university colleagues. The discussions with them was surely a source of inspiration and way to expand my desire to better comprehend and understand the complex world on which we live. A special mention goes to my friends and colleagues Felice and Arturo. Thirdly, I would like to thank my family for its moral support. Special thanks goes to my parents, Marco and Gisella, for their support in each step of my academic career, but also to my brother Michele and my sisters Silvia, Sabrina and Isabella and their families. To possess a family so numerous is like to live every day in a multicultural and international environment, a source of different experiences and knowledges. Finally, very special thanks goes to Domiziana, to remind me always of my talents and to be always a light in the darkest moments of life.
INTRODUCTION

The main purpose of this Thesis is to analyze the nature of the right to secede and how it has been treated by different systems of Public Law and by the International Law. Its purpose is to answer to these questions: is the legitimization or constitutionalization of the right to secede in the Public Law of the States an advantage or a threat for democracies, and, more broadly, to the nature of the State itself? Is the creation of new States, through the right to secede, a threat to the Westphalian conception of the State or will it just create new Westphalian States? As it touches the foundation of the modern State and of modern Public law then the analysis of the right to secede brings in the question: on what the modern democratic States are based? Instead regarding International Law the main questions that arise, in relation to the right to secede, are: who bears the right to self-determination? How can the principle of self-determination be conciliated with the right to the Territorial Integrity of the existing States? Is the principle *uti possidetis iuris* a useful tool to handle secessions? The use of a comparative analysis, to study something so strongly related to nature of the state itself, is essential to understand how a such contested right was and how it could be treated in the future by Public and International Law.

Recent events have given to this topic a high level of relevance, both in its political that in the legal aspects. After the numerous secessionist crises in the 1990s, the independence of Kosovo, the secession of Crimea and Donbass from Ukraine, and eventually, the attempted secession of Scotland and Catalonia have raised once more the importance of this topic for both Public and International Law. Even the EU after the Lisbon Treaty has eventually legalized the right to secede. The existence of this right brings into question the own nature of the Union, that recently has been shaken by strong secessionist feelings. These feelings regard both the EU as a whole or only the Euro zone, especially after the explosion of the Greek economic crisis. The large amounts of votes casted in favour of the eurosceptics parties in the last election for the European Parliament clearly prove the presence of these secessionist feelings in
the Union. All these facts combined make an analysis of the right to secede important and necessary to understand and to comprehend these contemporary issues.

The Thesis has been structured in four chapters. In the first one, it is given a general analysis of the right to secede. The first paragraph analyzes the etymology and then the meaning of the word secession. The second one makes a fundamental comparative analysis between the political theory on secession, and then on the nature of the States, of three authors of the 16th-17th: Johannes Althusius, Thomas Hobbes and Jean Bodin. The different approach between the Althusian and the Bodinian/Hobbesian approaches will be taken into consideration while analyzing the different cases taken into account. After an analysis on how International Law has dealt with secession in paragraph three, analyzing most of all the principle of self-determination of peoples and that of *uti possidetis iuris*, using the Margiotta’s classification there have been analyzed the main theories on secession: 1) National self-determination theories, 2) Choice theories, 3) Just-cause theories. These theories will be useful to classify the different cases into a theoretical framework. Chapter two covers two cases, the secession attempts in the United States of America and that in Switzerland during the 19th century. These two cases will be an interesting historical background to analyze the close relationship between a Federal Constitutional system and the possibility of the member States to exercise the right to secede. The debate on the existence (even implicitly) of the right to secede in both the US and the Swiss Constitution will be of particular importance. Especially, this stays in line with the debate on the limit between a confederation and a federation in Public Law. For both reasons of historical importance and for the existing literature on the two cases, three paragraphs deal with the USA and one with Switzerland. Chapter three analyses the right to secede in the Socialist Public Law, and then it analyses the secession that have happened in both the former Yugoslavia and the former USSR. On the case of the former Yugoslavia of particular relevance will be the opinion of the Badinter commission on the secession in the former Yugoslavia, and the Kosovo’s secession case (most of all the opinion of the International Court of Justice)
as a possible precedent for the legitimization of the right to secede in both Public and International Law. About the former USSR, it will be analyzed, briefly, seven different cases of secession that have influenced the political and legal life of the former Soviet Republics and that of the International Community, and they will be compared to the case of the former Yugoslavia (especially the case of Kosovo). Finally, chapter four deals with the democratic or bilateral attempts to handle secessionist feelings. It will be analyzed, in comparison, the two different approaches taken by the United Kingdom and by Spain in relation to the right to secede. The former regarding the Scottish case, the latter regarding the Catalan case. The last paragraph deals with the right to secede inside the European Union, asking how the presence of this right in the Lisbon Treaty can influence the nature of the Union itself and its future. Regarding the recent economic crisis in Greece, a small part will deal with the possibility for a member state to secede only from the Eurozone.
CHAPTER 1
Historical and Theoretical Framework of the Right to Secede

1.1 The origin of the term Secession

The first step to analyze the right to secede should be to find out the etymology of the term secession (and its verb to secede) to better comprehend its meaning in modern law. To do this an historical analysis, on how the term originated and evolved, is required. To clarify the approach of this analysis is also necessary to distinguish between two terms that nowadays are often used with the same meaning: secession and self-determination (Margiotta 2005, page 21) in its internal conception.

When people think about secession, they think about detachment of something from something else of which it was part. Today this something is a territorial unit, a region or a State inside a federation. However, in its origin the term secession had not this meaning. While, as it will be analyzed further, the term self-determination was born in the 19th century, the term secession is quite old. It comes from the Latin word secessio (Oxford Dictionaries), and is the action of those people who separate or withdraw from something. Furthermore, the verb to secede, from the Latin secedere (Ibid.), was used to mean to distance or be distant. Using the Latin terminology, there is no connection between the word secession and a given geographical territory (Margiotta 2005, page 23). It used to be connected with the spiritual world, such as when the monks retreated into the hermitages, rather than the political one.

The non-political meaning of secessio lies in the individual will of the single person to emerge over the community, which has been analyzed by Louis Dumont: “from the holistic societies, a new kind could have developed which put deeply in discussion the common conception… Society imposes on everyone a tight interdependence which substitute from the binding relationships of the individual such as we knew it, but on the other hand the institution to renounce the world allows
the full independence for all those who chose this way” (Dumont 1983, page 35). What Dumont describes is the way of living that characterized the Anchorites, the first form of hermitic life in Europe. It was a form of individual secession or withdrawal from the society: “the Church recognizes the eremitic or anchoritic life by which the Christian faithful devote their life to the praise of God and the salvation of the world through a stricter withdrawal from the world” (Canon Law, Can. 603). Became an Anchorites means “the definitive separation (secessio) from the family and the life in common” (Baus and Ewig 1971, page 373). With this form of life, the Anchorites secede definitely from the body of the society, both in a geographical way (going into the desert) than in a more spiritualistic way. Paradoxically this case of individual secession, which should broke every link between the eremite and society, made the Anchorite completely dependent from others generosity: “Unless he enters into a congregation, to the laic is teach only a relative ethic: to be generous towards the monks” (Dumont 1983, page 36). What it is possible to see here is an individual territorial secession that does not break the dependency link between the individual and the society. The monk was independent, or seceded, only on the moral side, and not on the material one.

The first time the word secessio took a political connotation was in 494 B.C., when the plebs of Rome decided to issue a secessio plebis (a secession of the plebs) in order to safeguard their interest from the patrician, and left Rome for the nearby Mons Sacer (the Sacred Mountain) (Livy 2006). However, in this case, there is not a connection to the territory, only to the political community, from which the plebs seceded in order to have “the recognition of the popular rights and the progressive reestablishment of the same” (Delfico 1791). The roman society should have function such as a human body, from which a part cannot detach without hurting the others. Each part is necessary to make the body functions, or using the words of Paul of Tarsus: “For just as each of us has one body with many members, and these members do not all have the same function, so… we, though many, form one body, and each member belongs to all the others” (Romans 12:4-5, BibleGateway). When Agrippa
Menenius spoke to the secessionist plebs used this parable to explain the same concept: “In the days when all the parts of the human body were not as now agreeing together, but each member took its own course and spoke its own speech, the other members, indignant at seeing that everything acquired by their care and labour and ministry went to the belly, whilst it, undisturbed in the middle of them all, did nothing but enjoy the pleasures provided for it, entered into a conspiracy; the hands were not to bring food to the mouth, the mouth was not to accept it when offered, the teeth were not to masticate it. Whilst, in their resentment, they were anxious to coerce the belly by starving it, the members themselves wasted away, and the whole body was reduced to the last stage of exhaustion. Then it became evident that the belly rendered no idle service, and the nourishment it received was no greater than that which it bestowed by returning to all parts of the body this blood by which we live and are strong, equally distributed into the veins, after being matured by the digestion of the food.” (Livy, 1905, Book 2, Chapter 32). In this case it is possible to see a secession with a social, rather than territorial meaning, but which, in opposition to the Anchorites case, tries to break the dependency link between one community and another.

The idea of secession that people commonly have in mind today is a mixture of this two different kind of secession. On the one hand, the individual secession with a link to the territory, but which does not broke the dependency connection. On the other hand the secessio of the plebs, with a breakage of the dependency link of two communities but without a direct linkage to the territory (even if the plebs moved to the sacred mountain, they did not built up a new town, they wanted to secede in order to get more benefits inside the Roman society). When people think of secession today, they think about a political community, inside a given territory, which tries to break every link from another political community from which it is dependent (may it be a state, a federation, a confederation or something special such as the EU). Taking a more individualistic view to the term secession (such as in the case of the hermits, but opposite to this in purpose) it is even possible to include the modern problem of
the migrants: they exercise a right of secession, of escape, from the social, political and economic community from which they come from (Mezzadra 2000).

The term “self-determination” instead is a product of the 19th century and of the rise of the idea of nations as a homogeneous group of people, which share a common language, history, culture, traditions etc. The first time it is possible to find this term in history is on the Proclaim on the Polish question of 1865, approved by the First International at the London conference (De Fiore 1996, page 92). It was an attempt to connect individual and collective freedom: “the exposition to the arbitrary will of others, or live at the mercy of someone else, is the maximum evil” (Pettit 1997 page 44) so “own or lose freedom has the same meaning in this case… of a free republic or a free state” (Skinner 1998 page 46). The key concept behind self-determination is freedom, and the subject of this freedom is a political community. The freedom has two sides: an internal and an external one. The internal freedom means that “all the single members of the political body – rulers and citizens – remain subject, in an equal way, to any law chose to impose to themselves” (Skinner 1998, page 36). Internal self-determination means rule of law for Skinner. The key concept behind the external freedom, so the freedom of one political community from other political communities (Margiotta 2005, page 95), is dependence and the constriction it causes. The American Revolution was aimed to break this dependence through an act of independence. King George III was accused of trying to enslave the American (Bonazzi 2003) and take away from them their fundamental freedom.

As it is possible to see, both the concepts of secession and self-determination originally were conceived to express the freedom of the individual (Anchorite) or of the community to which they belong (the cases of the Roman plebs and that of US independence). However, behind the idea of freedom implied in the concept of self-determination there is not an imply attachment to the territory. What matter is do not loose freedom, but the external side is just one and enter into the field when the internal one no longer works. The US war of independence took that move only when it loosed, in the eyes of the Americans, the connotation of a civil war. In fact, in the
US declaration of independence, it is possible to read “Nor have we been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.” (US Declaration of Independence, 1776). The reference in this way to the “British brethren” means that in the case of self-determination, independence become the goal of a political community only when every other road has been tried. Instead in the case of secession to detach from another community (geographically, such as the Anchorite, or socially such as the Roman plebs) is implied into the concept. Secession and self-determination should then coincide in the cases of external self-determination, and not, as in the early stage of the US war of independence, of self-determination as self-governing. In this analysis, external self-determination and secession will be considered as synonymous.

After the analysis of the origins of the terms secession and self-determinations, and their comparison, it is possible to move to the second paragraph of this chapter. It will be analyzed how the term secession has evolved in the 16th and 17th century, and how it has assumed a connotation always more similar to the one known today. This part is of pivotal importance for an analysis on the right to secede.

1.2 Political philosophy, federalism and secession in the 17th century. Althusius, Hobbes and Bodin compared.
The 16th century was the heyday of the Renaissance and the Humanism thought. It is possible to see a complete detachment from the ascetic view that the idea of secession had assumed with the Anchorite and with the medieval thought: “The individual is now in the world, and the individualistic value rules without restriction or limitations. We are in front of the individual dans-le-monde” (in the world) (Dumont 1983, page 60). The rising importance of the individual means also the increasing importance of the social-political community where he lives. To secede from society and go into the desert became inconceivable in the 16th century. Society must be changed from inside. It is possible to find for the first time the idea of resistance to a tyrannical power in Calvin. According to him, lower magistrates, or a manifest hero clearly send by God, could resist a tyrannical power (Testoni Binetti 1988, 1994). During the religious wars of the 16th and 17th century the resistance of a group, or a class, was seen as necessary to restore an order that has collapsed (Margiotta 2005, page 39). This was a complete revolution from the Pauline conception of politics which had characterized the middle ages, clearly expressed in the letter to Romans: “Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and you will be commended. For the one in authority is God’s servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God’s servants, agents of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience.” (Romans 13:1-5, BibleGateway). No resistance was allowed in the Pauline conception, since only the citizens, and not the rules who were chosen by God, could do something wrong.
In Calvin, instead, resistance is legitimate when the King brakes the fiduciary pact between himself and the people (Calvin 1559). It is the beginning of a contractual view of political power, transferring the idea of the private contract into the public sphere, creating rights and duties for both parts, the rulers and ruled, and not only to the latter such as in the Pauline view. The main theorists of this idea were the Monarchomachs, political writers who fought against the rise of absolutism in Europe, that conceptualized a contractual view of political power and the theory of resistance against unjust rulers (Dunn 1992). If, behind the political power, lies a contract between the rulers and the ruled, this contract can be broken when one of the parts do not follow what the contract says. A way to break this contract would be through secession, as it will be analyzed especially in the US secession war.

It is in the 16th century that it is possible to find the first theorization of the term secession that people commonly known today. The term secession is strictly linked to resistance from an arbitrary power. A form of resistance, of the peoples and of those who held the ancient medieval privileges, against the concentration power in the hands of the monarch. It a form of secession surely more similar to the behavior of the Roman plebs, than not to the medieval conception which was linked to asceticism (Margiotta 2005, page 41). According to Calvin and the Monarchomachs the power of the King must be subject to a more important form of sovereignty, that of the communities which form the Kingdom.

In this context, the most important political philosopher to take into account is Johannes Althusius (1563 – 1638) who it is possible to consider “the intellectual father of modern federalism” (Encyclopedia Britannica, Johannes Althusius). He conceived a sort of social federalism, which resembles more the modern idea of subsidiarity, in which decentralization is the source of guarantees for civil and social rights from a tyrannical authority. In Althusius, is still strong the idea of the corporate bodies typical of the middle Ages but, in opposition to the Pauline doctrine “while the medieval construction proceeded from above to below here [in Althusius], the building is constructed from below to above” (Gierke 1880, page 177). As the
medieval corporate and intermediate bodies remain central for Althusius, his federalist structure is functional to give autonomy to the intermediate communities and various classes. This federalist structure is the product of a collective contract. Each step in the collective aggregation of political authority comes from below, not above. Family, corporations, cities, provinces and finally the state are the product of a contract, which has compacted a lower level of society. Each of this level for Althusius is subject to natural law (Margiotta 2005, page 44). This means that nature has predetermined some rights to these groups, that these rights are universal and that they precede any other social formation (the families, the province’s, the states etc.) (Strauss 1968). How much this structure resembles the modern idea of subsidiarity (inside a state, a federation or the EU) is clearly expressed by Gierke: “The universal association constitute just the cupola surrounding a complex social building… Everywhere the unitary collective bodies have as their members other bodies, and each one of them cannot do without the bond with the superior complex, and nevertheless constitutes for its own a totality with a particular purpose and organized internally according to the principle of the unit which generates and rules the multiplicity” (Gierke 1880, page 178).

In Althusius’s view, which imply both contractarianism and federalism, the right to secede from the contract that originated the social order (when its premises are no longer valid), is not a right of the people. He clearly stated that “even if the peoples himself have established it [the contract] nevertheless they do not have the power to judge it or punish it” (Althusius 1614, page 85). The reason behind this is that sovereignty does not lies in the individuals but to all the members of the contract, to the entire group that has associated to form a state. So the rights of resistance, and one of these rights is secession, is exercised by the Ephors, those which have been delegated by the people to serve them such as controllers of the King and of public powers, which can better represent the entire body of the people (Margiotta 2005, page 45). The Ephors, as individuals, are authorized to protect the province against a tyrant King and, if necessary, to declare themselves independent (Althusius 1614,
Each part of the state is beneath natural law and should be safeguarded from a tyrannical power, but only the provinces and their representatives, those that have signed the contract that formed the state, have the right to broke the contract itself and secede. The Althusian theory was used to interpret the constitutional pact as a contract inside federal states, especially by the southern US States and by the Swiss League of Sarnen and by the Sonderbund (separate league), as analyzed in chapter two. When the reasons behind the original contract are gone each member of this contract should have the ability to take back its sovereignty, which was just delegated to another authority, but it is something that belong to the provinces and not the state (or to the State and not to the federal structure or the EU in modern terms).

According to Mesnard at the time of Althusius: “no French or Spanish theorist would have dared, in this period, to support coolness a doctrine such as this” (Mesnard 1936, page 355). The Althusian “gamble”, in a period when the unitary and absolutistic state was in formation, was surely influenced by the Netherland war of independence against Spain. Using Gierke’s words “The most wonderful example apt to demonstrate actually and validly the truth of his thought, was given by the peoples of the United Provinces, with their glorious liberation from the Spanish yoke” (Gierke 1880, page 35). With the act of Abjuration of 1581, the United Provinces declared the sovereignty of Philip II of Spain null, as he had violated the rights of the provinces and of the inhabitants of the same provinces (Gachard 1890). His theory was also inspired by the way of functioning of the Holy Roman Empire, where regional and corporative freedom of feudal style were still in place at the time (Mesnard 1936). It is for these reasons that Althusius dared to give to the provinces a right so strong such as the one to secede, which was inconceivable in the unitary states such as France or Spain.

All these philosophical-juridical theories of the 16th-17th century, supported by the Monarchomachs, have always in common the fact that, after a successful secessionist movement, what emerges is always a state and not something new. Secession does not create something different form the Westphalian state. The right of secession does
not pass over the Westphalian conception of the state that is behind the modern conception of international order and stability, and the base for modern international law. Using Gierke’s words the rights to secede “strength the power of the state, contain it [the right of secession] inside the limit of law” (Gierke 1880, page 49).

According to Livingston the connection between natural law and secession declines at the end of the 17th century, when the Hobbesian view of a unitary state (Hobbes 1998) prevails over the Althusian view of a federative one: “Secession is not legitimate in Leviathan [Hobbes]: it is in Politica [Althusius]. The eventual victory of the Hobbesian idiom of a unitary state meant that either secession would not appears in thought at all or, if it does, it would be demonized. This victory, however, did not occur without violent resistance, and even now its tenure is being challenged” (Livingston 1998, page 38). According to Livingston, with the French revolution and the rise of the nation state the unitary state became so strong, linking the unity of the state with its peoples, that the idea of secession becomes inconceivable. The unitary state theorized in the Leviathan, and even before by Jean Bodin, is THE conception of the modern State in which all the States of the world, and especially those in Europe, have born and grow. The right to resist, and then the right to secede, is unimaginable in the Hobbesian conception of the Leviathan. Looking at the front page of the Hobbes’s book, The Leviathan is in continuation with the view of Agrippa Menenius and Saint Paul. A body from which secession is impossible, because it will destroy it, bring society into chaos, into the state of nature. Only the Unitary State can guarantee peace and stability for Hobbes.

Another important author to take into account, as one of the founding fathers of the concept of the unitary State, is the French Jean Bodin. The political thought of Bodin was inspired by the religious wars in France in the 16th century between Catholics and Protestants, that reached its climax with Saint Bartholomew night of 1572 (Telò 2013, page 25). The Monarch, for Bodin, was the only supreme authority, super partes, on the religious issues. In the same way as Thomas Hobbes in the Leviathan, Bodin refuses to use the Divine rights theory to justify the absolutistic power given to
the monarch. The Monarch incarnates the State, and the State, as the bearer of sovereignty, is the only authority able to guarantee peace. In his masterpiece *Les six livres de la République*, printed in 1576, he explained that sovereignty means the “unlimited and perpetual power to make laws and applied them” (Ibid. page 26). Bodin argues against democracy, that would generate disorder, or any form of mixed government, such as the Althusian federalism, because it would denied the true meaning of sovereignty (Ibid.). Nonetheless, Bodin analyzed also if the absolute power should have some limits. Zarka has analyzed the contradiction in Bodin’s analysis, which tried to conciliate the absolute powers with the limits to tyranny (Zarka 1998, page 112 – 120). The only limit for the bearer of sovereignty are the “divine and natural laws. All the princes of the earth are subject to them, and cannot contravene them without treason and rebellion against God” (Bodin 1576, page 29).

The conception of Bodin on resistance does not move very far from the Medieval Pauline conception, but he was surely able to theorize the Unitary Westphalian States that would took place in Europe in the following centuries. The fact that today the conception of sovereignty theorized by Bodin and Hobbes is largely uncontested does not mean that it is the only one, as the theory of Johannes Althusius has shown (Demelemestre 2011).

Still today, the Althusian view of secession echoes in the community of jurists. The former Italian senator Gianfranco Miglio speaks about a pre-political right of secession, which is on the same level of the right of resistance. The right of resistance and the right of secession, as natural rights, are two essential pre-political capacities on which all-institutional systems based. A region or a province can separate itself from a state according to the principle of convenience. It is possible to secede when, for a political community, is no longer convenient to be part of a larger state (Miglio 1997). Secession become a tool in the hands of sub-state units against misbehavior from the central government. Secession is “the tool to finally arrive to that “diffuse federalism” which should construct the set of rules of the civilized countries at the beginning of the 21st century” (Miglio 1997, page 183). For Miglio, when a unitary
state does not want to change into a federal structure the only solution is secession. In this contrast between Althusius and Hobbes/Bodin lies the different attitude against secession in a unitary state or in federative-confederative union. The centralized Hobbesian/Bodinian state cannot tolerate secession for its own nature. It is possible to take as example the modern Italian Constitution “The Republic, one and indivisible, recognizes and promotes local autonomies; implements in those services that depend on the State the fullest measure of administrative decentralisation; and accords the principles and methods of its legislation to the requirements of autonomy and decentralisation.” (Italian Constitution, art. 5). Even recognizing local autonomies, the Italian Republic remains indivisible. Taking into account the French Constitution is possible to see that “France shall be an indivisible, secular, democratic and social Republic” (French Constitution, art. 1). In a state so centralized as France, the word indivisible is the fifth of the first article. Alternatively, in Spain it is possible to find something similar to the Italian Constitution: “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.” (Spanish Constitution, Section 2). Inside these Hobbesian/Bodinian constitutional frameworks there cannot be space for the idea of secession. Instead, with Edinburgh Agreement of 2012 the United Kingdom took a decisive step in toward the Althusian-Miglian position on secession: “The United Kingdom Government and the Scottish Government have agreed to work together to ensure that a referendum on Scottish independence can take place.” (Edinburgh Agreement, 2012). Finally also the EU, which cannot be clearly defined as a federation or as a confederation (Fabbrini defines the EU and the US as Compound Democracies) (Fabbrini 2010), has moved in the same direction: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” (Lisbon Treaty 2009, art 49A, par. 1). The view of socialist confederation on secession will be analyzed in chapter three, while the British and Spanish view is the topic of the fourth chapter. Miglio has
been criticized because its way to see the right to secede (as a tool against the central government) would not make it a universal right (Margiotta 2005, page 52). The so-called dispersed minorities (Tamir 1991) would not have the same contractual power of a concentrated group. It is then important to analyze the impact of a general right, such as the right to secede, on groups and on the individuals that form them. Margalit and Raz (Margalit and Raz 1990) have analyzed the importance of the respect for collectivities and group identities from a state, and the effects it has on the individual well-being.

1.3 The Right to Secede and International Law

After this theoretical-historical analysis on how the term secession was born, how it has evolved, and how it has been interpreted, it is time to see how the right to secede is, and was, taken into account by international law. To help the comparative analysis that will be done in the following chapters, it is essential to analyze first the international law. International law, which is the sum of the behaviors of all states, and rules the international society in a way conform to the will of all states, so it is essential to understand in a comparative way the problem of secession. The main source of international law is the customary practice of the states, which is formed by two parts: *diuturnitas* and *opinio juris sive necessitatis* (Conforti 2010 page 36). The former is the objective element, the constant repetition of a practice from the states. The latter is the subjective element, to believe that a behavior is, or that is should be, legally binding. These two elements highlight how international law is important to analyze the common behavior of the states towards the issue of the right to secede. Three case studies will be essential to understand how the right to secede was interpreted by international law: the Åland Islands Question, the UN opinions toward self-determination and colonialism, and the secession of Quebec from Canada. The
comparison of these three cases is essential to understand how international law has interpreted the right to secede.

The Åland Islands Question was born after a popular referendum in the islands (situated between Finland and Sweden) in 1919, in which the local population wished to secede from Finland and to be annexed by Sweden, as the overwhelming majority of the population was (and is) ethnically Swedish. Finland, which had recently seceded from the Russian Empire, refused to transfer the island to Sweden and instead offered to the island large degree of autonomy (Barros 1968). In this is a case the secessionist threat urged the central government to move towards autonomy for the interested population, a level of autonomy that would have been inconceivable without the secessionist tool. As the local population and the Finnish government were unable to find a solution, the dispute was submitted to the recently founded League of Nations. Two commissions were formed by the League to give an opinion: one in 1920 and one in 1921.

The first commission (1920) affirmed that: the principle of self-determination was not included in the League Covenant (just one time it is possible to find the term self-ruling with regard to the admission to the League) (Report of the International Committee of Jurists, page 3); that the right to secede has no international connotation since it touches state sovereignty which, except for the cases of revolutions and war (such as the collapse of the Austro-Hungarian or Ottoman Empire), is a pillar of international stability. Nevertheless the Åland islands question felt into the League jurisdiction since Finland had only recently acquired independence and “had not yet acquired the character of a definitively constituted State” (Ibid. page 14). So in the end of the Report is affirmed that: “The Council of the League of Nations, therefore, is competent, under paragraph 4 of Article 15, to make any recommendations which it deems just and proper in the case.” (Ibid. page 14). Article 15 concerns not settled disputes (Covenant of the League of the Nations, Art. 15).
The second and most important commission (1921), nominated by the first to trace a plan of action, confirmed this opinion. It affirmed that “To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life” (Commission of Rapporteurs 1921, page 4). Self-determination and secession were conceived in the same way as a tool for international instability. Even if it was encouraged at the end of WWI in the fourteenth points of US President Woodrow Wilson (Wilson 1918) to handle the end of the Austro-Hungarian and Ottoman Empire, it could not become a norm in international law. Despite this, the Commission arrived to affirm, at the end of its opinion, that: “In the event that Finland, contrary to our expectations and to what we have been given to understand, refused to grant the Aaland population the guarantees which we have just detailed, there would be another possible solution, and it is exactly the one which we wish to eliminate. The interest of the Aalanders, the interests of a durable peace in the Baltic, would then force us to advise the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite” (Commission of Rapporteurs 1921, page 13). Then the 1921 Commission recognized that the principle of territorial integrity comes after the interests of a given population in given territory, so when the rights of this population are not guaranteed by the state of which the population is part. The right to secede is in the opinion of the 1921 Commission “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.” (Ibid. page 4). However, this was not the case of the Åland islands, since Finland granted to the local population a large degree of autonomy.

The second case study to take into account is the UN opinions towards the principle of self-determination and towards colonialism. The term secession completely disappears from the UN Charter and from any international act after 1945 (Margiotta
2005, page 140). In its place, it is possible to find “the principle of equal rights and self-determination of peoples” (UN Charter, art.1 par.2). Even if ostracized by the group of the colonial powers, the principle found its way into the UN Charter thanks to the USSR approach toward the concept of secession and independence (this concept will be analyzed in Chapter 3). Many states also feared that self-determination would mean to legitimize the idea of secession. The Colombian delegate at the San Francisco Conference declared: “If it [self-determination] means self-governing, the right of a country to provide its own government, yes, we would certainly like it to be included; but if it were to be interpreted, on the other hand, as connoting withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy and we should not desire that it should be included in the text of the Charter” (Cassese 1995, page 40). According to this vision, self-determination is a right of the states not of the peoples. Only internal self-determination or self-ruling is taken into account, not the external formula (even if only in last resort) of the 1921 Commission of Rapporteurs. The principle of self-determination that won at the San Francisco Conference in 1945 did not have any anti-colonial connotation (Pellet 1995, page 256). The colonial principle was even legitimized by the UN Charter as it is possible to see in Article 73: “Members of the United Nations… have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government” (UN Charter, Art. 73) and by the existence of the Trusteeship System (Ibid. Chap. XII). Secession and external self-determination acquired a negative connotation. They were seen as elements of instability in the international system. Then the right to external self-determination and that to secession in 1945 clearly came after the right of territorial integrity, and so were impossible in practice. Very interesting, in this regard, is the opinion of Kelsen on the Article 1, paragraph 2 of the UN Charter. He affirms that: “The term nations in the formula of the Preamble means probably states; the term peoples in Article 1, paragraph 2, may have a different meaning; for its connection with self-determination it may mean not the state, but one of the elements of the state:
the population. Self-determination of the people usually designates a principle of internal policy, the principle of democratic government. However, Article 1, paragraph 2, refers to the relations among states. Therefore the term peoples too – in connection with equal rights – means probably states, since only states have equal rights according to international law.” (Kelsen 1950, page 51-52)

Even if this part of the UN Charter was never emended, things began to change in practice with the preparatory work on the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Karns and Mingst 2005, page 429). They were approved in 1966, but were in the pipeline since February 5 1952 in the Economic and Social Council (UN GA Res. 543 VI). Yet in 1950, the UN General assembly declared that “to ensure the right of peoples and nations to self-determination” (UN GA Res. 421 V) is a necessary condition to enjoy fundamental human rights. The decision to put a collective right in documents finalized to guarantee individual rights, was backed by the idea that any individual right should had no meaning if the population was under foreign domination, as expressed by the delegates of the USSR, Syria, Ukraine and Poland (Palmisano 1997, page 110). In any case, the UN hastened to declare that self-determination “could hardly deal with such questions as the secession and the reunion of peoples”. Furthermore the “implementation of the principle of self-determination had to be considered in the light of the Charter provisions” (UN GA Official Records 1955, page 86) so in the light of the principle of territorial integrity. The principle of external self-determination was conceived only for the colonial peoples and not for national minorities, which does not have any right to self-determination inside the ICCPR or the ICESCR. In article 1 paragraph 3 of the ICCPR, it is possible to read “those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination” (ICCPR Art 1, 1966). Instead article 27, the one dedicated to national minorities, states: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the
other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language” (Ibid., art 27). No mention to the principle of self-determination exists in the entire article 27, and this was done to avoid any connection between the process of decolonization and internal secessionist movements. An interesting case in this regard would be that of Algeria, which departments “were considered integral parts of the national territory of France” (Withuis and Mooij, 2010), and that was treated as a colony only for political and not legal reasons, by Charles De Gaulle with the 1962 Évian Accords. It is possible to ask if the case of Algeria was, legally speaking, a case of secession treated as a case of decolonisation for political reasons. The reason behind this is that, when a territory is an integral part of another state, there is not a return of sovereignty to a previous existent authority such as in the case of a protectorates (Morocco and Tunisia) or colonies, but something which resembles more the case of secession.

Finally, for what concerns the UN, a fundamental principle that characterized decolonisation and in the future (especially in former Soviet Republics) many cases of secession it that of *Uti possidetis juris* (as you possess under law). This principle guarantees that the administrative boundaries of the state that relinquishes its control (a colonial power) or of a state that collapses (the USSR or Yugoslavia) are still the same after independence has been achieved (Hensel, Allison and Khanani 2006, page 1). This principle comes “from the Latin phrase “*uti possidetis, ita possideatis,*” or “as you possess, so may you possess” (Shaw 1996 page 98). The Roman conception was connected to individual property rights. The modern was born from the South America decolonization process: “When the Spanish colonies of Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name of *uti possidetis juris* of 1810. The principle laid down the rule that the boundaries of the newly established republics would be the frontiers of the Spanish provinces which they were succeeding. This general principle offered the advantage of establishing the general rule that in law no territory of old Spanish America was
without an owner. (...) The principle also had the advantage, it was hoped, of doing away with boundary disputes between the new states.” (Scott 1922, page 428-429). This principle was used as a guarantee for peace and stability at the end of colonization, and to oppose any possible secessionist movement (as it has been analyzed in the Åland islands questions) hoping that the stability of the frontiers would mean peace. It was a way to create new international subjects without changing “the geographical map, but the political situation of the world” (Tancredi 2001, page 204). However, history has shown how this principle is fragile when different ethnic groups or nations found themselves in a single state (Nigeria and the secession of Biafra, Congo and Katanga, etc.) or when a united ethnic group becomes separated by international borders (that former were only administrative borders). Examples of that are Transnistria, the Serbs and Croatian in Bosnia and Herzegovina or Russians in Crimea and eastern Ukraine today. In these circumstances the principle *uti possidetis juris* was not a supreme guarantee for peace, and its recognition in international law it today is even challenged by some states (e.g. Russia), which would prefer a less rigid legal interpretation of the concept. The existence of the state should be necessary to guarantee the security of the people, or to save them from the state of nature for Hobbes. However, this is not always true for those who support the idea of resistance, even throughout secession. When the rights of the people are infringed by the state itself, then secession becomes possible, because the legal pact behind the state (the Constitution) is broken (Calvin 1559).

The third and last case to be taken into account is both domestic and international at the same time: it is the judgement of the Supreme Court of Canada on the secession of Quebec (Loprieno 2002). The Supreme Court of Canada was called in 1996 by the Canadian government to judge the Quebecers will to secede, according to article 53 of the Supreme Court Act: “The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact” (Supreme Court Act, art. 53). The government asked to the court to give an opinion in the following matters: 1) “Under the Constitution of Canada, can the National Assembly,
legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?” 2) “Does international law give… the right to effect the secession of Quebec from Canada unilaterally?” 3) “In the event of a conflict between domestic and international law… which would take precedence in Canada?” (Canadian Supreme Court Judgment 1998). Even if the amicus curiae, that represented the French-speaking province of Quebec, expressed in its opinion that a national court could not judge international law, the Supreme Court affirmed that: “In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law” (Ibid.) and that “any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law” (Ibid.). To take into account international law in a national case was unavoidable since the province of Quebec wished to form a new state, and so, to enter into the international community. Furthermore “In Canada as in Australia and the United Kingdom, there is a long tradition of the courts applying international law not as a foreign law but as part of the lex fori, once it has been duly ascertained” (Crawford 2000, page 165).

Answering to the first question, the one referred to the Canadian constitution, the Court answered negatively: “the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada” (Canadian Supreme Court Judgment 1998, par. 104). No legal right of secession exists in the Canadian
Constitution, even if a majority of people democratically decides in this way. A clear victory of Hobbes and Bodin over Althusius? The answer is to this question is no, because even if the court denied the right to unilateral secession, it stated that the Quebecers wish to secede must be taken into consideration by the central government. According to the court, with the 1982 constitution, the Constitution itself, and no longer the parliament, is the supreme authority in Canada (Ibid. par 72). A secession would mean to change the constitutional rule, and a constitution can be emended but only “but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.” (Ibid. par. 76). The right to secession is recognized only inside a “Constitution's amendment process in order to secede by constitutional means” (Ibid. par. 87). A secessionist process must be taken into account by a central government, but this does not give the province the right to secede unilaterally, but gives to the province the right to initiate a negotiation to change the constitution and then to secede.

Answering to the second question, if in international law there is a recognized right to secede, the Canadian Supreme Court stated that “yes, there is no right to secession, nevertheless secession is in no sense unlawful per se. It occurs frequently, succeeds often, and is usually recognized by state and international institutions with alacrity (… Bosnia and Herzegovina) (Crawford 2000, page 181). The court made an important distinction between a “positive legal entitlement” that legitimate “ex ante” facto the right to secede and the legitimization ex post facto (Margiotta 2005, page 248). An ex post facto “recognition, even if granted, would not, however, provide any retroactive justification for the act of secession” (Canadian Supreme Court Judgment 1998, par. 155). Furthermore, the court explained the distinction between external self-determination and secession. It stated that :“a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any
meaningful exercise of its right to self-determination within the state of which it forms a part” (Ibid. par. 154). Only in these three cases, self-determination means independence and secession. So a right to secede exists in international law in the case of colonization, domination by a foreign power (as in the Occupied Palestinian Territories), or where the right to self-governing inside a state is denied, “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession” (Ibid. par 134). Only when internal self-determination is impossible the external one is possible (as it has been analyzed in the case of the US war of independence), but this was not the case of Canada, that was a democratic and federal state. The court, finally, does not exclude that an illegal *ex-ante facto* secession could be legitimized *ex-post facto* by the international community. “Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states.” (Ibid, par. 142). This paragraph underlines how much the right to secede in international law is politically sensitive, and that even if a unilateral secession is unlawful, it could be legitimized ex-post by the international community (such as in the case of former Yugoslavia, especially, as it will be analyzed in the third chapter, in the Kosovar case). As the court found no substantial differences between the first and the second question, is not necessary to analyze the third one.

These three cases have underlined how international community have tried to manage two discording principles: external self-determination or secession, and territorial integrity. While in the case of colonialism the states eventually accepted unanimously to consider secession legal, when a secession occurs in the homeland the situation is more problematic. Both in the Åland islands question and in the case of Quebec is it possible to see a recognition that self-determination, in a secessionist form, remains possible only when all the other “internal remedies” are exhausted. The right to secede (from Finland or Canada in the cases analyzed) has supremacy over the right of territorial integrity only when it is the only possible option available for a given
population. Is there a lack of logic between the concept of self-determination in the case of colonialism and that of self-determination “at home”? Why the colonial people should achieved independence immediately (according to the principle *utis possidetis iuris*) and try not to become an active part of an already independent state (before try to achieve secession) like the secessionist groups at home are encourage to do? The analysis of the right to secede will help us to answer to these questions. A necessary step now is to analyze the different theoretical approaches to secession. To do this the final part of this chapter will analyze and compare the main theories of secession in the legal doctrine.

1.4 Theories of Secession in comparison

To analyze the juridical theories around the right to secede, firstly it is necessary to distinguish between different kinds of secession. A secession could be bilateral when both parties (the state and the secessionist region) agree that secession is possible and legitimate (as in the case of Scotland in 2014). A second case could be the unilateral secession, the one that the Canadian Supreme court stated to be unlawful, except in extreme circumstances. As unilateral secession is the one that rises more legal and moral problem, the contemporary debate has focused mainly on it (Seleme 2014, page 11). Another classification is between those secessionist groups that wish to found a new independent state (E.G. Quebec) or those who wish to join an already existing state (E.G. the Åland Islands or today Crimea). In these cases is the former that arose more debates. Than the major focus in legal doctrine has been around unilateral secession that achieved, or tried, to create a new state. (Ibid.) Secondly, as the Canadian Supreme Court has already done, international and national law, concerning secession, must be analyzed differently. Nationally, apart from the socialist law on secession that will be analyzed in the third chapter, only few constitutions today explicitly legitimate the right to secede unilaterally. There are two
noteworthy examples. Firstly, the Constitution of the Federation of Saint Kits and Nevis (two small islands in the Caribbean) “If, by virtue of a law enacted by the Nevis Island Legislature under section 113(1), the island of Nevis ceases to be federated with the island of Saint Christopher, the provisions of schedule 3 shall forthwith have effect” (Saint Kits and Nevis Constitution, art. 115). Secondly, the Constitution of Ethiopia, where the right to secede unilaterally is guaranteed and regulated by Article 39: “The right to self determination up to secession of nation, nationality and peoples may be exercised: (a) where the demand for secession is approved by a two thirds (2/3rds) majority of the legislature of the nation, nationality or people concerned… (c) where the demand for secession is supported by a simple majority vote in the referendum.” (Ethiopian Constitution, article 39). Even if the aforementioned Canadian Constitution do not allow unilateral secession, there are constitution which do that and that would arise an interesting problem for the third question of the Canadian Supreme Court (“the event of a conflict between domestic and international law”) (Canadian Supreme Court 1998). The approach of international law and its contrasting principles (territorial integrity according to the utis possidetis juris principle, and self-determination only for colonial people) has already been analyzed in the previous paragraph and its analysis will be retaken in the third chapter.

More difficult is to define when the right to secede becomes a necessity for a given population, nation or people. To better analyze this necessity we will use Margiotta’s classification, according to which there are three main theoretical approaches to secession in modern legal doctrine: the national self-determination theory of secession, the choice theory of secession and the just-cause theory of secession (Margiotta 2005, page 209). Analyze them in a comparative way is necessary, because each theory can change the legal system in which it is applied, through the legitimization of the right to secede. An important question in this regard should be: with a possible proliferation of States thanks to a legitimization of the right to secede, is there a critical point after which the structure of the state itself should lose its
meaning in a Hobbesian/Bodinian/Westphalian conception? For practical reasons, the Westphalian state can never be eliminated by such kind of proliferation. Only a limited numbers of states can practically exist on earth, but this does not means that this number coincides with the states that nowadays exits. The right to secede can generate an erosion of state sovereignty and a process of devolution of power, but never the complete disappearance of the state itself. Gottlieb has explained how in the age of globalization “paradoxically, the struggle for the creation of new states is taking place at a time when older states are moving toward broader associations and when the very notion of statehood has lost substance. Both phenomena are aspects of the eroding sovereignty of states: an erosion that reflects the declining utility of borders in an era of missile technology and of unstoppable flow of ideas and capital. Yet… [Many ethnic groups] are currently consumed by cruel wars to realize national aspirations” (Gottlieb 1993, page 1). New nations are willing to emerge while the old ones reduce their sovereignty to give more room to local communities.

Now it is possible to move to the analysis of the three aforementioned theories. According to the national self-determination theory, secession is an extension of the self-determination principle on non-colonial peoples. All peoples (intend as nations, so as culturally homogeneous groups) should bear this right. To recognize a legitimate secession for all nations means that the nation itself is moral value (Margalit and Raz 1990, page 144). Secession then implies “the importance of national identity and national membership for individuals” (Moore 1998, page 7). Gellern has criticized this theory supporting the idea that “there is a very large number of potential nations on earth. Our planet also contains room for a certain number of independent or autonomous political units. On any reasonable calculation, the former number (of potential nations) is probably much, much larger than that of possible viable states… not all nationalism can be satisfied, at any rate at the same time” (Gellner 1983, page 2). The problem is the impossible universalization of the right to secede. Nevertheless, in our modern global society even for scattered people and dispersed minorities is easy to organize and concentrate efforts to threat, at least,
a right to secede and obtain more rights or autonomy. There are many examples of small and scattered ethnic groups that were capable to make hear their voice and be recognized (especially linguistically) by the state in which they live. Some examples are the Romansh people in Switzerland (80,000 people) (CIA WF, Switzerland) the Ladin people in the Italian region of south Tyrol and Veneto, and some municipalities of Brazil were the German (in its Pomeranian dialect) is considered an official language (the municipalities are: Domingos Martins, Laranja da Terra, Pancas etc.) (Tressmann 2009). These examples shows how also small and scattered communities and ethnic minorities can guarantee their rights using the right to secede or more specifically the threat to use it. A weak point of the theory is to consider nations or cohesive ethnic group as a fixed entity, without consider how much mixed marriages, bilingualism, migration and intergenerational assimilation change it in time (Brubaker 1998).

The choice theory of secession is analogues to the national self-determination theory, but it moves even further. It not necessary that the group that wishes to secede is a nation or an ethnic group. The choice of some given people (even ethnically patchy) to have their own state is enough to guarantee them the right to secede. According to Wellman “political abilities rather than cultural attributes are the primary feature that can qualify a group for the right to secede” (Wellman 1995, page 168). The right to self-determination means right to political association. Following Althusius’s reasoning, the supporters of the choice theory believe that consensus is a necessary component of each political institution, and that when it lacks it is possible to secede. According to Beran, the secessionists should not only be able to redefine political borders (acting against the principle utis possidetis juris) but also the area in which a secessionist referendum should be voted (Beran 1984, page 27). Once more, even with this theory, we find the problem of the universalization of the right to secede. Given that “any group may secede as long as it and its remainder state are large, wealthy, cohesive, and geographically contiguous enough to form a government that effectively performs the functions necessary to create a secure political environment”
(Wellman 1995, page 161-162) then “the costs of altering international borders may only limit the number, rather than completely preclude the possibility, of permissible secessions” (Ibid., page 159). Nonetheless, even if inapplicable for material reasons, the threat of secession is nonetheless a great political instrument, and it has been used to defend minorities, and the rights of the individuals who belong to them. It is possible to consider this theory as complementary to the national self-determination theory, but with a limited approach in reality. The majority of secessionist groups are bound to an ethnicity. Nevertheless, a concrete case of the applicability of the right to secede to non-homogenous groups will be analyzed in chapter two (the Confederate State of America).

The third and last theory is the just-cause theory of secession. In this case, secession is possible only when a state does not recognize the identity of a people or its internal self-determination. “A right to external self-determination [is possible] in the cases of systematic violation committed from the state in regard to the rights of a part of the population” (Milano, 2014). It is a theory that considers secession only as a “last resort” option (Margiotta 2005, page 256). According to this theory, territorial integrity must always be safeguarded, while a secessionist movement can only take place after a gross violation of the people rights is already in act. Among the theories of secession, this is the weakest, giving to the people the right to secede only when they are already being slaughter or at least repressed by the state of which they are part (the Bosnian between 1992 and 1995). This theory does not consider that “the final aim of territorial integrity is to safeguard the interests of the people of that territory… the concept of territorial integrity has… a meaning only until it fulfills this purpose for all the sections of a population” (Umozurike 1972, page 236). This statement highlights that the people and not the state are those that should be safeguarded by the right of territorial integrity. When this right no longer safeguards the people, secession has become and will become in the future a possible political instrument to use. According to the just-cause theory of secession, a given population could already be near extermination when it is legally granted to it the right to secede
(a clear example could be the genocide of the Tutsi in Rwanda, in which 800,000 Tutsi were killed in less than 100 days) (BBC News 2014).

In conclusion, the comparison of the general theories of the right to secede have highlighted how different the various legal views on secession are. The right to secede could be able to guarantee the democratic rights of a given population, may it be an ethnic group (such as in the national self-determination theory), a group with no specific ethnic identification (such as in the choice theory), or finally a group which its own existence is threatened (just-cause theory). It has been briefly analyzed (the main study on that will be in chapter three) that principle of territorial integrity and that of utis possidetis juris have been many times a source of intrastate conflicts more violent than many interstate conflicts (Posen 2008). The possibility to guarantee democratically a right to secede to an ethnic group of a specific region, such as with the referendum in the Schleswig or in East Prussia after WWI (Keynes 2006, page 8) seems sometimes a better option to guarantee peace and security, which is theoretically the base for the principle of territorial integrity. After this general introduction regarding the theorization both in political philosophy and in the constitutional theory of the right to secede, it is time to move to two concrete cases: the American and Swiss secessions of the 19th century. These two cases will provide an historical background to analyze how similar constitutions and political system, even if situated on different continents, have handled the right to secede.
CHAPTER 2
Secessions in the 19th century. US and Switzerland: a comparison

2.1 The US Constitutional Debate. State Rights vs Federalism

The analysis of these two historical case studies carried on in this chapter starts with the analysis of the one most known: the US Secession or Civil War. In this analysis, it will always be used the term US secession war to refer to this conflict, as it is improper to speak about a civil war in this case. In a civil war, there is a conflict between two parts to control the power in state, in a secession war there is an attempt of a part of the state to secede (Livingston 1998, page 45). It is with this bloody war, that many historians define the first modern war (Zanelli 2006), that the term secession acquired the negative connotation that still characterizes it today. This negative connotation is linked to the issue of slavery. The secession of the Confederate State of America is seen by many just as an act to defend slavery in the southern territories. While the issue of slavery was surely one of the many reasons behind the secession of the Southern US State, it was not the main one. Four states that remained in the Union, often called Border States, also had slavery legalized (Delaware, Maryland and Missouri and Kentucky) (Jones 1995, page 685). This means that the secession of the south was driven by something else: a contractual view of the US Constitution of 1787. If the Constitution was a contract between the States that had signed it, it is then possible for a state to withdraw from the contract (as we have seen Althusius theorized this view of the Constitutions as public contracts in the 17th century). This is the theory of State Rights (McDonald 2000). What was truly in debate both in the Nullification Crisis (1832-3) (Jones 1995, page 142) and in the Secession Crisis (1860-1) (Ibid. Chapter 11) was to determine how the political power should be distributed between the federation and the member
states. The Secession war further highlights the connection between a federal structure and secession (something that Althusius had foresaw more than two centuries earlier). In each federal Constitution, sovereignty is not a monopoly of the federation. The fourth US president James Madison stated in 1788 “Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution” (Federalist Papers, N°39). The phrase “only to be bound by its own voluntary act” especially expresses what the State Rights theorists uphold. The theorists of the State Rights were against, before 1861, the group generally defined as the Federalists. Among them, it is possible to see figures such as George Washington, Alexander Hamilton and John Adams, who united, directly or indirectly, around the Federalist Party (Chambers, 1963). The Federalists believed that the US Constitution had established the supremacy of the Federal Organs (the Congress, the President and the Supreme Court) over the States. The dispute around the US Constitution of 1787 between the State Right and the Federalist theorists is what will be called the US Constitutional debate.

To analyze how this debate was generated it is essential to analyze the document on which both parts based their theories, even if using different interpretation: the aforementioned US Constitution of 1787. The US Constitution was the product of the Philadelphia convention, where the delegates of the US States (except Rhode Island) (Amar 2005, page 5) met to create something to substitute the Articles of the Confederation of 1777. Define what the creators of the US Constitution had in mind in 1787 is a quite difficult task. Surely, we can see at the time of declaration of independence each State was recognized by name as a sovereign State. This is clearly shown by this phrase “That these United Colonies are, and of Right ought to be Free and Independent States” (US Declaration of Independence), and by the 56 signatures of the representatives of each State. Interesting in this regard is a special feature of the Constitutional drafting, which provided that the Constitution would have entered
into force only if approved by nine of the thirteen states of the US (US Constitution, Article VII). This clearly distinguishes how the EU treaty approval works (which requires unanimity) from that of the US Constitution. However, this does not mean that the US Constitution was designed to overcome state sovereignty. The states that decided to do not be part of the Union, North Carolina and Rohde Island, were left to follow their own path as independent States. This means that what had the primacy in the US Constitution is State sovereignty and not the sovereignty of the Federation. When these two state joined the US they did it by their own will “in late 1789 and mid-1790” (Amar 2005, page 7) two years after the approval of the Constitution. Even if unanimity is not required, as for the EU Treaties, this did not mean that the state sovereignty was infringed in anyway. Only that the other states were not bound by the minority of the States. Using always the EU example, it is something more similar to the Two-Speeds Europe concept (Piris 2011) quite popular nowadays.

It has been analyzed how the sovereignty of the States was not infringed by the drafting of the US Constitution. Nevertheless, an analysis of the preamble it is more important to understand why this Constitutional debate originated. The preamble, often discarded by many scholars (Amar 2005), stated that “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” (US Constitution, Preamble). According to Amar, and the Federalist/Linconian attitude towards the US Constitution, the phrase “to form a more perfect Union” prohibited unilateral exit (Amar 2005 page 21). However, this phrase cannot be sufficient to justify the Federalist theory. Firstly, Amar contradicted itself stating: “No liberty was more central than the people’s liberty to govern themselves under rulers of their own choice” (Ibid. page 10). A right of the people “to govern themselves” should not also include a Right to secede? Secondly, in the US Constitution the right to secede for a member state is never forbidden (Carpenter 1930). Thirdly, those who form a “more
perfect Union’ is not the Federation, but the people. The people in the US Constitution are the bearer of sovereignty, as the same Amar noticed. However, as Althusius has explained centuries earlier, sovereignty is for the people considered not as individual but as a collectivity. Therefore, in the US case, the representatives of the States, the Governors and the State legislatures are the Ephors, those who have signed the Constitutional contract and held the Right to secede from it. Another argument in favor of a Right to secede was the US annexation of the Republic of Texas in 1845 (Fenhrenbach, 2000). Las siete leyes that formed the Mexican Constitution of 1836 (the year of the Texan secession) clearly affirmed that Mexico was a centralized state. The sixth law (Mexican Constitutions) created Departments instead of States, whose governors was appointed by the Mexican President. The Mexican anti-federalist constitution was clearly against the right to secede from any of its departments. Nevertheless, as already stated, in 1845 the US annexed Texas, that Mexico considered a rebel province still part of the Mexican territory. This lead to the Mexican-American War (Weinberg 1935). The US government posed no problem into annexing a secessionist province of another state, which for its own decided to join the US. Why then to the same State (Texas) the US government denied the right to secede in 1861 from the US, while recognized as legitimate, annexing Texas, the Texan secession of 1836? Even if the admission of new States was legitimimized by Article IV, section 3 of the US Constitution (US Constitution, Article IV), the answer to this is question lies in the great constitutional debate that divided the country with the federal theorists against the State rights theorists. Examining the behavior of the US with the annexation of Texas (something not so much different from what Russia has done with Crimea in 2014), it is possible to ask if the Federalist’s theory was stronger in the political rather than in the legal field. In fact, only the US Secession War was able to prove definitively the “righteousness” of the Federalist view. Amar describes the US Constitutional debate with these words “United States…United how? When? Few questions have cast a longer shadow across American history.
Jefferson Davis had one set of answers, Abraham Lincoln another. And then the war came” (Amar 2005 page 21).

Very interesting is also the idea that the 1787 Constitution was not designed to create a State in the Westphalian sense, but something unique, which Deudney calls “Philadelphian System” (Deudney 1995). It is a third way between a Westphalia system and the confederation system (such as the Swiss case that will be further analyzed on this chapter). These features designed the US (between 1787 and 1861) as a unique political system. According to Livingston, the US in its first period realized the Althusian idea of the State. The State Rights to nullification (so to repeal the act of the Federal government such as in 1831-1832) and then to secede would be “the kind of corporative resistance theorized by Althusius against the tyranny of the central powers” (Livingston 1998, page 40). This unique system, that Fabbrini has defined correctly Compound Democracy (Fabbrini 2007), has exacerbated even further the debate around the meaning of the US Constitution. For the Federalist it was a unitary state, while for the theorist of the State Rights it was a confederation. It is interesting to see that similar debates take place in the European Union since its foundation (Telò 2013). It is probably that the Founding fathers of the US Constitutions left this issue unsettled for political reasons. It was a compromise, the only way to make the Union possible in 1787, but this structure could not survive forever, especially to the chaos that followed Lincoln’s election in 1860-1861.

The base behind this unsettled issue, the US Constitutional debate, is to determine if the States created the Constitution or the Constitution created the States. Historically it is possible to determine that the North American States existed as separate and well-defined entities long before 1787, and had their citizens a sense of statehood already under the British rule. Jones explained “The inhabitants of the separate colonies had not yet begun to think themselves as one people. The word American was mainly a geographical expression… There was a good deal of intercolonial jealousy and constant intercolonial squabbles over boundaries and land claims.” (Jones 1995, page 24). Surely, in 1787 the American Colonies did not perceived to be
part of nations and did not desired to renounce to their sovereignty. In fact, the representatives of each colony signed the US Constitution, as we can see at the end of it (US Constitution). These representatives, that decided to put the sovereignty of their State in the hand of the Federation in 1787, why should not have the Right to secede in 1861? Why they should not be able to take back what rightfully belongs to them? These reasoning around the US Constitution constitutes the base thought of the State Rights theorists and of the Secessionist States in 1861.

Another aspect that is very interesting to analyze about the US Constitutional debate, is that many theorists of the Federal view and some Northern States, were not able to hold a firm position in the debate Unitary vs Federal State. James Madison himself stated that “it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong” (Federalist Papers, N°39). Madison’s opinion on the US Constitution tries to stay in the middle on the US Constitutional debate without answering to the most important question: who generated the Federation? The States or the Constitution? We find a more firmly opinion on this topic in John Caldwell Calhoun. Fritz has very well explained Calhoun position on the US Constitution: “Proponents of the state veto, such as Calhoun, argued that the sovereign for purposes of the Federal Constitution was the people in each individual state. As he explained, the Constitution, “when formed, was submitted for ratification to the people of the several States; it was ratified by them as States, each State for itself; each by its ratification binding its own citizens.” Although each state independently bound itself to the Union, that did not mean that it lost its independence” (Fritz, 2012). Calhoun position is quite clearer, and stay in line with the preamble of the US Constitution (“We the People of the United States…”) (US Constitution, Preamble), asserting that the people formed the Union, and not vice versa. For what concerns the Northern States it is interesting to see that during the
ratification of the Constitution the New York State’s Convention affirmed that “in the very articles of ratification declared explicitly and expressly that they reserved the right to reassert the powers therein delegated whenever it should be necessary to their happiness” (Carpenter 1930, page 213). The New York Convention then tried to affirm the view that the US Constitution was a compact between states and that this Compact could always be broken using the Right to Secede. The State Rights approach was then not peculiar of the Southern US States. After this brief analysis on the long debate that characterized the political and legal history of the US from its foundation until the end of the Secession War, it is time to analyze which moves the US Government and the US Supreme Court took, concerning the issue of secession after 1787.

2.2 US Policies and Jurisprudence on Secession before 1861

This second paragraph will analyze first the moves of the US Government (the President, the Congress and especially the States) and then that of the US Supreme Court concerning the issue of secession. The analysis of the policies and the jurisprudence of the US before the Secession war of 1861-1865 is essential to analyze how the right to secede was interpreted in this unique time in American history. The US modern political structure, that configures the US as an indivisible State, was born after the secession war (Livingston 1998, page 42). The political structure that existed before 1861 was indeed State-centered and not federation-centered. Alexis de Tocqueville exquisitely analyzed this, in his masterpiece De la démocratie en Amérique (Democracy in America) “It has been remarked that the American Government does not apply itself to the States, but that it immediately transmits its injunctions to the citizens, and compels them as isolated individuals to comply with its demands. But if the Federal law were to clash with the interests and the prejudices of a State, it might be feared that all the citizens of that State would conceive
themselves to be interested in the cause of a single individual who should refuse to obey. If all the citizens of the State were aggrieved at the same time and in the same manner by the authority of the Union, the Federal Government would vainly attempt to subdue them individually; they would instinctively unite in a common defence, and they would derive a ready-prepared organization from the share of sovereignty which the institution of their State allows them to enjoy. Fiction would give way to reality, and an organized portion of the territory might then contest the central authority. The same observation holds good with regard to the Federal jurisdiction. If the courts of the Union violated an important law of a State in a private case, the real, if not the apparent, contest would arise between the aggrieved State represented by a citizen and the Union represented by its courts of justice” (Tocqueville Democracy in America Volume I, 1839). The US citizens were represented by their Ephors, the representative of each State. The sovereignty of the States was the true instrument to safeguard the interests of the citizens of the United States.

In this regard, two important acts to take into account are the Virginia and Kentucky resolutions of 1798-1798. They are two fundamental documents to analyze, to see how much widespread the State Right theory was in the period 1787-1861. These two resolutions, drafted respectively by James Madison and Thomas Jefferson (4th and 3rd US presidents), were adopted by the legislature of two states. There were done to nullify the effects of two acts of John Adams administration, the Alien and Sedition Acts (Jones 1995, page 87) stating that they were unconstitutional. The Alien Act gave the US presidents an unlimited power to expel any alien with complete discretionary powers, and then to act like a despot (Alien and Sedition Acts 1798). But it was the Sedition Act of 1798 which enflamed the States, as it affirmed that “if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States”… “shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than
six months nor exceeding five years” (Alien and Sedition Acts 1798). For the States these Acts were a clear violation of the First Amendment of the US Constitution, approved in 1791 and that, with the first Ten Amendments, constitutes the US Bill of Rights (Berkin 2015). The first Amendment states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (US Constitution, Amendment 1). The Alien and Sedition Acts clearly violated the freedom of expression of the US citizens, and the States itself moved to defend their citizens against an oppressive Act, such as good Althusian Ephors. The State-centric approach of the US in period 1787-1861 left the States as the ultimate guardians of the citizens, a duty which they shall exercise until the extreme point to guarantee the Right to Secede.

Very interesting is that James Madison, the same author of many Federalist papers that supported the 1787 Constitution, wrote the Virginia resolution, one of the bulwark of the State Rights theory. A fact that stress even more how the US Constitution was perceived as a contract or compact between states. Madison stated in the Virginia Resolution that “the powers of the federal government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting the compact; as no further valid that they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.” (Virginia Resolution 1798). Madison’s statement strongly confirmed the State Rights theory. The States not only “have the right” but are also “in duty bound” to act to guarantee the liberty of their citizens. According to this viewpoint, the Right to secede in extreme circumstances is not only a Right, but also a duty for the State, the Province or the
part of the Country that wishes or, in this case, must secede. The Kentucky Resolutions, drafted by Thomas Jefferson, further highlights the fact that “That the several States composing, the United States of America, are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States” and declared the Alien and Sedition Acts “altogether void, and of no force; and that the power to create, define, and punish such other crimes is reserved, and, of right, appertains solely and exclusively to the respective States, each within its own territory” (Kentucky Resolutions 1798). Great importance is given, in the Kentucky Resolutions, to the Tenth Amendment of the US Constitution, which states the implied power principle “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (US Constitution, Tenth Amendment). The fact that the implied power are left to the States and not to the Federation is a way to say, for the State Rights theorists, that the bearer of sovereignty were the States and not the Federation. The States of Virginia and Kentucky in fact denied any applicability of the Alien and Sedition Acts with their Resolutions. Very interesting to see in this regard is also the Ninth Amendment of the US Constitution “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” (US Constitution, Ninth Amendment). This Amendment further highlights how between 1787 and 1861 no State have renounced to its sovereignty, delegating it to forever the Federation, and then why the Right to Secede was a viable legal solution. “The Virginia and Kentucky resolutions, constituted the political creed of the State rights” (Calhoun 1851) until the Secession War. The resolutions of Thomas Jefferson and James Madison were invoked frequently, every time a constitutional debate arose around the State Rights against the Federalist view. The States used these resolutions as a legal precedent to deny the validity of any Federal legislation that could infringed their interests, such as South Carolina did in 1832-1833 (Freehling, 1992). If the Constitution was a contract the States could naturally take
back those powers that they have delegated to it, and a form of this could be through Secession. The sovereignty of the Constitution comes from the States, which delegate their sovereignty. The fact that the US Constitution is a compact between states, for the State Rights theorist, is clearly visible in Tenth Amendment. The Constitution follows the “well established principle of law… that delegatus non potest delegare” (Conforti 2005, page 207). The powers not delegated to the Constitution belong to the State and to the People, which the State protects, and cannot belong to anyone else, even the Federation. If then the Constitution is made by the States, which delegate their powers and their sovereignty to it, is it clear why they can also bear a Right to Secede withdrawing the proxy from the Constitution.

The first Constitutional Crisis on the right to secede anyway was not that of 1861 in the South, but that of 1807-1812 in the northern States of New England. The Napoleonic war in Europe brought France and the United Kingdom to impose both an embargo on foreign ships and to capture neutral merchant ships that traded with the enemy, such as US ships (Jones 1995, page 98). This brought the US President Thomas Jefferson to issue the Embargo Act of 1807, forbidding any export outside the US territory, even to Canada (Del Pero 2008, page 90). Many deemed unconstitutional this Act and, among them, we find even Joseph Story, which in 1833 will write the Commentaries on the Constitution of the United States, arguing against the contractual view of the Constitution (Story, 1833) supported by the theorists of the State Rights. Story stated, in 1809, that: “if the measure [the embargo] had not been abandoned when it was, it would have overturned the Administration itself, and the Republican party would have been driven from power by the indignation of the people” (Encyclopedia of American Recession and Depressions 2014, page 717). Then even a Federalist such as Joseph Story recognized the Embargo Act of 1807 as unconstitutional. It had infringed the right of the citizens of the United States to freely trade with foreign nations. Even if, according to the Constitution, the US Congress is the organ where the States (in the Senate) and the People (in the House of Representative) have delegated their power “To regulate Commerce with foreign
Nations, and among the several States, and with the Indian Tribes” (US Constitution, Article I, Section 8.3), what happened tells us a different story. As the power to the Congress was delegated, it could not be used in a tyrannical way. In this case, the delegation could be withdraw and secession becomes possible. In fact, the embargo brought many States in the New England region, especially New York, to threat to secede from the Union. The Governor of the State of New York, George Morris, affirmed that “We cannot exits, but in poverty and contempt, without foreign commerce” (Di Lorenzo 2009, page 146) and then to secede, form a “Confederate State of New England” was the only possible way to form “a more perfect Union” (Livingston 1998, page 41). Even the Governor of Connecticut (1797-1809) Johnathan Trumbull Jr., a supporter of the federalist theory, argued that, when the central power goes behind its constitutional obligations, is a duty of the States “to insert their own protective screens between the rights and freedom of the citizens, on the one hand, and the power of the central government on the other hand” (Acton 1861, page 125). Once again, we find that the States, and not the Federation, are the guardians of the “people” of the US Constitution. Moreover, the sixth US president John Quincy Adams stated, in a speech at the US Congress, that the aim of the State legislatures and jurisprudence was to dissolve the Union and to create a separate Confederation (Ibid.). Furthermore, in 1839, in a speech for the celebration of the Jubilee of the Constitution he stated: “The indissoluble link of union between the people of the several states of this confederated nation is, after all, not in the right but in the heart. If the day should ever come (may Heaven avert it!) when the affections of the people of these States shall be alienated from each other; when the fraternal spirit shall give way to cold indifference, or collision of interests shall fester into hatred… Far better will it be for the people of the disunited states to part in friendship from each other, than to be held together by constraint” (John Quincy Adams 1839, pages 66-69). What Adams foresaw in 1839 was surely opposite to what President Lincoln applied 1861, as it is quite known and as it will be analyzed in the next paragraph. To conclude the history of the New England secession we will quote the
word of the incumbent president at the time, Thomas Jefferson. The Jeffersonian approach was completely different from that of Lincoln in 1861 as he wrote: “If any state in the Union will declare that it prefers separation… to a continuance in union ... I have no hesitation in saying, 'let us separate.'” (Thomas Jefferson, 1816). Secession was then, between 1787 and 1861, a Right that the States had, seeing how many sources recognized its existence.

Another source that proves that the right to Secede was implied in the US Constitution is a compared study of some attempted Constitutional amendments with the Jurisprudence of the US Supreme Court. For what concerns the US Jurisprudence over the right to secede, before the Secession War, and so not considering for now the famous case Texas v. White that is dated 1868 (US Supreme Court, Texas v. White 1868), it is interesting to analyze the case Gibbons v. Ogden of 1824 (Ibid., Gibbons v. Ogden 1824). This sentence is interesting, because it recognized that the rights granted to the Federation by the States “are supreme, and the State laws must yield to that supremacy” (Ibid.). The State of New York had granted to a private company “exclusive right of navigating the waters of that State” and this was against the aforementioned Section 8.3 of the First Article of the US Constitution (US Constitution, Article I, Section 8.3) that regulates commerce. The court affirmed “The power of regulating commerce extends to the regulation of navigation”. Navigation was implicitly delegated by the states to the Federation signing the Constitution, as it was part of the commerce clause. At the same time between 1787 and 1861, three amendments were proposed to make the right to Secede illegal (Livingston 1998, page 41). Comparing the Gibbons v. Ogden case with these moves inside the US congress we can see that, while the right of commerce was clearly in the hand of the Congress according to the Article I Section 8.3, the Right to Secede belonged to the States according to Tenth Amendment “The powers not delegated to the United States… are reserved to the States respectively, or to the people.” (US Constitution, Tenth Amendment). The only reason to amend the Constitution to make the Right to Secede impossible was that this right was already present, implicitly in
the Constitution, as it was the right to regulate navigation for the Federation. The Right to regulate navigation was implicitly delegated to the Congress, even if under the article regarding commerce, and the right to secede was implicitly in the hand of the States according to the tenth amendments. Another interesting case was Worcester v. Georgia of 1832 (US Supreme Court, Worcester v. Georgia 1832). Once more, in this case the Supreme Court defined the supremacy of the Federation over the States on matters that were delegated to the former. The attempt of the State of Georgia to expel the Native American Cherokee from their homeland “Interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the Government of the Union” (Ibid.). In this case, despite the Supreme Court clearly expressed its opinion, both the State of Georgia and the President Andrew Jackson ignored its ruling. It is very famous the sentence “Well: John Marshall [President of the Supreme Court at the time] has made his decision: now let him enforce it!” (Miles 1973, page 519) attributed to President Andrew Jackson. In fact, the Cherokee were deported forcibly from their homeland in Georgia to the nowadays Oklahoma through the infamous Trail of Tears (Ehle 1988), completely ignoring the Supreme Court ruling and giving precedence to the State Rights theory. Even if a power was delegated to the Federation (as the power to negotiate with the Indian tribes) it could always be withdraw in the hand of the States at any moments. Then, while the Supreme Court, especially under Judge George Marshall, was clearly trying to favor the Federalist view of the US Constitution, the behavior of the other political organs suggest that the State Rights theory was strongly shared in the US before 1861, and then how the Right to Secede was implicitly part of the US Constitutional apparatus. Now it is possible to move to the third and last paragraph on the US, regarding the US Secession Crisis of 1860-1861, its legal and political background and its consequence for the interpretation of the Right to secede in the US Constitution.
2.3 The Secession Crisis of 1860-1861. Background and Consequences

In this third paragraph, it will be analyzed the political and legal moves that brought to the Secession war of 1861 and its consequences for the Right to secede both in the US and abroad. The US Secession War produced undoubtedly stronger international consequence in the Public Law of other countries than the shorter (but also interesting for our case) Swiss Secession war of 1847.

The crisis between the South and North of the US began not on the issue of slavery, as many think, but on that of Federal tariffs. During the Jackson Administration (1829 – 1837), Federal tariffs rose tremendously to safeguard the newborn northern industries but damaging southern exportation, especially those of cotton (Jones 1995, page 142). It is interesting to see that President Andrew Jackson was not coherent on how to apply (or not) the theory of the State Rights. As we have seen, on the one hand the unconstitutional attempt, in 1832, of the State of Georgia to expel the Cherokee from their native lands found strong support from President Jackson, supporting in that case the State Right view. On the other hand, we will see that the Jacksonian answer to the Nullification crisis, always in the same year, was completely different. In 1828, the US Congress approved a new tariff that was called “Tariff of Abomination” for its disruptive effects on the Southern economy (Ibid.). In this occasion, the already mentioned John Caldwell Calhoun, vice president of the US at the time, fought strongly to defend the State Rights. For Calhoun it was possible for the States to nullify the effects of any Act of the Federal government that was unconstitutional, or tyrannical in an Althusian view. In 1828 Calhoun wrote anonymously the South Carolina Exposition and Protest where he affirmed, “The Federal Government is one of specific powers, and it can rightfully exercise only the powers expressly granted, and those that may be "necessary and proper" to carry them into effect; all others being reserved expressly to the States, or to the people. It results necessarily, that those who claim to exercise a power under the Constitution, are bound to shew, that it is expressly granted, or that it is necessary and proper, as a
means to some of the granted powers. The advocates of the Tariff have offered no such proof” (Calhoun 1828). Remembering the importance of the Tenth Amendment, Calhoun affirmed that for the Southern States the Tariff of Abomination was an unconstitutional Act. The State Right v. Federalist debate found new fuel in 1830, when a ferocious debate took place in the Senate on the nature of the Union and that of the Constitution. Senator Hayne from South Carolina was against Senator Webster from Massachusetts (Belz, 2000). The former supported the State Right, the latter the Federalist view. Senator Hayne affirmed “I am one of those who believe that the very life of our system is the independence of the States, and that there is no evil more to be deprecated than the consolidation of this Government. It is only by a strict adherence to the limitations imposed by the constitution on the Federal Government, that this system works well, and can answer the great ends for which it was instituted. I am opposed, therefore, in any shape, to all unnecessary extension of the powers, or the influence of the Legislature or Executive of the Union over the States, or the people of the States” (Ibid. page 10). Outrageous by this view of the US Constitution as a contract, the reply of Senator Webster was “I do not admit that, under the Constitution, and in conformity with it, there is any mode in which a State Government, as a member of the Union, can interfere and stop the progress of the General Government, by force of her own laws, under any circumstances whatever” (Ibid. page 125). The Hayne-Webster debate further exacerbated the discussion on the possible nullification of the tariff or other act of the Federal government, but it also reminded how, after forty years, the US Constitutional debate was still unresolved.

The tensions on the Tariff reached its climax in 1832 when the Congress approved a new tariff. This time Calhoun decide to resign as vice-President and fight the battle for the nullification of the tariff act directly in the Senate. (Jones 1995, page 144). In November 1832, a National Convention, elected by the people of South Carolina, affirmed that the act of 1828 and 1832 were null and void, and threatened to secede from the Federation if the central government have used the forced against the State
of South Carolina (Ibid.). Jackson, to answer to the National Convention, immediately prepared the troops for an invasion of South Carolina. This time Calhoun expressed personally his view on the behavior of the Jackson administration. In February 1833, in a speech in front of the US Senate, he stated that “The Constitution is a compact, to which the states are parties in their sovereign capacity; and that, as in all other cases of compact between parties having no common umpire, each has a right to judge for itself [the extent of its reserved powers]” (Tocqueville 1835 Volume 2, page 621). Nullification and Secession in 1832 became synonymous, as when the former is impossible the letter is the only solution for the States to safeguard themselves and their citizens. Surdi defines the nullification of a Law as a surrogate for secession (Surdi 1986, page 12). The Nullification crisis ended with a defeat for the State Right theorists, when the President Andrew Jackson, after having rallied the troops, declared, “The Constitution of the United States, then, forms a government, not a league, and whether it be formed by compact between the States, or in any other manner, its character is the same. It is a government in which all the people are represented, which operates directly on the people individually, not upon the States; they retained all the power they did not grant. But each State having expressly parted with so many powers as to constitute jointly with the other States a single nation, cannot from that period possess any right to secede, because such secession does not break a league, but destroys the unity of a nation, and any injury to that unity is not only a breach which would result from the contravention of a compact, but it is an offense against the whole Union. To say that any State may at pleasure secede from the Union, is to say that the United States are not a nation” (Jackson Proclamation on Nullification, December 10 1832). The problem was that for many States, Politicians and Institutions, the US before 1861 was not a nation indeed, as we have seen, or the Nullification Crisis would have not arose at all. The same president Jackson was quite ambiguous on this argument. On the same year, he supported the nullification of the US Supreme Court decision on the Worcester v. Georgia case. The US Constitutional debate continued for twenty years after the
Nullification Crisis, and only the Unionist Army at Gettysburg and Franklin was able to put finally an end on this long squabble on the interpretation of the US Constitution and on the Right to secede in the US Constitutional framework. Another brief conflict arose on the issue on secession in 1854, when, during the aforementioned annexation of Texas to the US, many northern States, and the former US President John Quincy Adams, threatened once more the secession of New England (Livingston 1998, page 41). This move was to deny the access of another slave State to the Union. Nevertheless, it further highlights how the right to secede was conceived as possible also in the Northern part of the US.

Now we can finally analyze the most known secession crisis (but which, as we have seen, was only one of many) of the US, that of 1860-1861. What finally brought the United States to collapse in 1861 was the election to the White House of Abraham Lincoln. The fear for the southern states, besides the abolition of slavery that was not in Lincoln agenda until 1863 with the Emancipation Proclamation, was that of a “sectional Northern President” (Jones 1995, page 213) that would have infringed the sovereignty of the States in favor of that of the Federation. Their fear was that the northern States led the Federation, and that the North as happened with the tariffs of 1828-1832, would tyrannically oppress the South. South Carolina, that already had treated secession in 1832, used the State Right theory and the view of the US Constitution as a compact between States to secede from the Union. The Secession happened through an elected national convention on December 20 1860 (Ibid.) respecting the democratic principle foreseen by the choice theory of secession. The convention issued a declaration stating “We, therefore, the People of South Carolina, by our delegates in Convention assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly declared that the Union heretofore existing between this State and the other States of North America, is dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State; with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and
things which independent States may of right do” (South Carolina Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union, 24 December 1860). The concept “We the People” presents in the preamble of the US Constitution is used to reaffirm that the People were the citizens of the States, which are represented and safeguarded by their own States. This States have signed a contract with the other States in 1787, which have formed a Union. Nevertheless, the membership to this Union could always be withdraw. It is the triumph of the State Right Theory. South Carolina was soon followed by other six states that issued similar acts (Jones 1995, page 213). The next step of this six independent States was to create a new compact among them that in February 1861 took the Form of the Confederate States of America (Ibid. page 214). It is interesting to analyze that the Constitution of the Confederate States of America of 1861 is very similar to that of 1787. The great difference (besides the protection of the slavery practice) (CSA Constitution, Article IV, par. 3), is that in the preamble is greatly remarked that “each State acting in its sovereign and independent character” (Ibid., Preamble). Nevertheless, to act are always “The people”. Than the CSA Constitution of 1861 was an attempt to answer to the US Constitutional debate using clearer words. Nevertheless, it is interesting to see that even in this Constitution the right to secede is not implicitly stated or denied, as it was in the US Constitution. This right is an implicit right that sovereign States maintains when the rights of their citizens, of the people, have been infringed. The secession crisis reached its apogees after Lincoln officially became President on March 4 1861 (Jones 1995, page 215). In his inaugural address, he stated, “I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments” (Lincoln Inaugural Address, March 4 1861). The two views, the State Rights and the Federal one, had come to a confrontation where no compromise, such as that attempted by Senator John J. Crittenden (Jones 1995, page 215), could have worked. This was especially true after the Union decision to supply the garrison of Fort Sumter, a Federal property
inside the, by now, independent State of the CSA. (Ibid. page 216). It is debatable if this decision, to bring military material and troops inside a former State of the Union (at least de jure, for Federalist view of the Union) is against Article IV, section 4 of the US Constitution of 1787, which states “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion” (US Constitution, Article IV, Section 4). For the State Right theorists the protection form invasion applies also to Federal troops (as it was when the Jackson threatened the invasion of South Carolina in 1832), while for the Federalist theorists it refers only to foreign invasion. After the battle of Fort Sumter four more States decided to secede (Arkansas, Tennessee, North Carolina and Virginia) (Jones 1995 page 216). The force of arms then decided in favor of the Union on the Military, and not on the Judicial, Legal and Political battlefield, which of the two view of the US Constitution of 1787 was the correct one. After the war, it was no longer questionable if secession was possible or not. The UNITED States as they are today were definitely born in 1865.

The US Secession War, besides asserting the supremacy of the federalist view of the US Constitution, making illegitimate the possibility to exercise the right to secede for the member States of the US, had also an effect on the international community. It defined what secession was and how it works. It especially linked the secessionist attempts with the federal structure of the State. Kymlicka for example argues “even where federalism has been designed… as to accommodate ethno cultural groups, it may not be a stable solution, but rather may simply provide a stepping-stone to secession” (Kymlicka 1998, page 111). This is exactly what happened in the US between 1787 and 1861. Furthermore, the fact that one of the bloodiest war in history was the product of a secessionist movement produced a general negative bias against the term secession (Margiotta 2005, page 82). Nevertheless, the fact that the US were, in their first period, a compact of states, was proved by the same secession of the South, which forced the North to “denied this theory [that of the State Rights] and to substitute it with another according to which secession was unusual, unacceptable
and unjustified” (Meadwell 2001, pages 25-26). For this reason soon after the Secession War, even if no amendment to the Constitution was applied to forbid secession, the Supreme Court hastened to declare Secession illegal. The de facto victory of the Union definitively became de jure with the case Texas v. White of 1868. (US Supreme Court, Texas v. White 1868). In this case the court jurisprudence clearly declared that “the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null” (US Supreme Court, Texas v. White 1868). Is with this sentence that secession in the US is once and for all declared illegal, but nothing similar to this kind of opinion exists before the Secession War. A similar opinion of the Supreme Court, prior to the Secession War, would have probably unleashed another Nullification Crisis.

Very interesting, concerning the international echo of the US Secession war, is the opinion of the British Lord Acton on that war. The US Constitutional history was characterized by a contraposition between a centrifugal force (the State Rights) and a centripetal one (the Federation), a contraposition that has been called the US Constitutional debate. Lord Acton “Saw in State Rights the only availing check upon the absolutism of the sovereign will, and secession filled me with hope, not as the destruction but as the redemption of Democracy. The institutions of your Republic have not exercised on the old world the salutary and liberating influence which ought to have belonged to them, by reason of those defects and abuses of principle which the Confederate Constitution was expressly and wisely calculated to remedy. I believed that the example of that great Reform would have blessed all the races of mankind by establishing true freedom purged of the native dangers and disorders of Republics. Therefore I deemed that you were fighting the battles of our liberty, our progress, and our civilization; and I mourn for the stake which was lost at Richmond more deeply than I rejoice over that which was saved at Waterloo” (Lord Acton General Lee Correspondence, November 4 1866). The Althusian view still lives in the words of Lord Acton, but the defeat of the Confederacy finally put an end to fight
around the US Constitution. With the defeat of 1865 “Lincoln opposed [to the federal interpretation] a sophisticated nationalistic theory of the Constitution not older the thirty years which turned upside down something such as eighty years of American constitutional experience with its own perverse theory that it was the Union to create the States and not the States to create the Union” (Livingston 1998, page 44). Decades later another US presidents, Woodrow Wilson, will recognize the existence of the Right to secede inside the US Constitutional framework “Wilson clearly stated as a constitutional right the concept that a State could withdraw from the federal arrangement, as she might have declined to enter it” (Thorsen 1988, page 154). The opinion of the various secessionist movements in the US (present both in the north than in the south) had a strong echo through history. They defined what secession is and its link with a federal system, but all of this was already foresaw by Althusius centuries earlier, as it has been analyzed in chapter one. It now time to move to the fourth and last paragraph of this chapter, dedicated to the secessionist attempts in Switzerland in the 19th century, the League of Sarnen and the Sonderbund.

2.4 The League of Sarnen and the Sonderbund. Secession in the Old World

In the 19th century one of the oldest federalist experiment in history, Switzerland, faced analogous events to what happened in the US in the same period. The tension between the Diet (the Federal organ) and the Cantons in the 19th century was something very similar to the conflict between the States and the Federation in the US. The only significant difference in the Swiss case is the religious element, the protestant Cantons were against the catholic ones. This kind of the religious conflict gave to Switzerland the name of the “19th century Ulster” (Kobach 1993, page 24). If the US Secessionist movements felt more into the choice theory of secession, the Swiss case fells into the realm of the national self-determination theory of secession. It is important to analyze the evolution of the Swiss political system to answer to the
question: was the 1847 attempt of the League of Sarnen, and that of the Sonderbund, to secede legitimate for the Swiss Public Law? It will now be given a very brief analysis of the Swiss Constitutional history since 1815. Then it will be analyzed the Swiss Federal Pact of 1815, and if and how the idea of the Catholic Cantons to secede under the League of Sarnen and the Sonderbund should be consider legal or not in the eyes of the Federal Treaty of 1815.

According to Gerotto, it is sufficient to look to the irregular geographical territory of Switzerland to realize that the entire nation is a consequence of many confederal agreements (Gerotto 2011, page 15). Many of the actual borders of Switzerland are not at all natural borders: a mountain, a lake or a river does not delimit them. More than in the US, the constitutional history of Switzerland highlights how each canton was a state per se, independent and sovereign. Before the Napoleonic invasion of 1798 the Cantons did not have a formal Constitution, but what kept them together since the 13th century was an agreement of common defense of international nature (Ibid.). The brief parenthesis of the Helvetic Republic of 1798-1803, which attempted to create a unitary state in Switzerland, ended in a catastrophic failure. In 1803, Napoleon himself was forced to intervene with the Act of Mediation. The Act “Already in the first article… affirm that are the Cantons, and not the Confederation, to guarantee each other’s the sovereignty” (Luminati 2003, page 21). After the defeat of Napoleon, Switzerland, as the rest of Europe, followed the principle of restoration, the cornerstone of the Congress of Vienna of 1815. The approval of the Federal Treaty of 7 August 1815 was for Gerotto a step back toward the federal path (Gerotto 2011, page 29) as the 1815 Treaty clearly restored the ancient Swiss Confederacy. This is clearly stated in the first Article of the Federal Treaty, which affirms, “The twenty-two severing Cantons of Switzerland… reunite with this Federal Treaty, to maintain their own freedom e their independence” (Swiss Federal Treaty 1815, Article 1). While the US Constitution was “unclear” and very easy to give way to different interpretations, the Swiss Federal Treaty of 1815 was extremely clear on the nature of the Union. Switzerland was a state formed by Sovereign Cantons, in the
same way as the State Right theorists interpreted the US Constitution. The 1815 Federal Treaty was adopted without a referendum, and in it the Diet recognized the Cantons as the sovereign body that created the Confederacy (Kobach 1993, page 21). As the Federal treaty was aimed “to maintain their [the Cantons] freedom, independence and security against attacks of foreign powers, and to preserve peace and order within” (Butler and Ranney 1978, page 36) the Diet could only act with the approval of a majority of the Cantons (Kobach 1993 page 21).

The problems for the survival of the Swiss State in the 19th century soon arose, as the country was fractured between the conservative Catholic Cantons, and the Radical Protestant Cantons. The formers advocated decentralization, cantonal sovereignty and popular referendum to safeguard the Catholic power in the Cantons were these were the majority (Ibid. page 23). The latter favored the centralization of power in the hand of the Confederation and the Diet, as they were the majority of the Cantons. This situation is very similar to what happened in the US before the Secession war, when the Federalist and abolitionist States became the majority of the federated States. The first crisis arose in 1830, after the July Revolution in France. The Cantons experienced large popular upheaval to change the Cantonal Constitutions in a more liberal and radical way. Very interesting for our study is what happened in the Cantons of Schwyz and Basel. Here the fight brought to an intra-cantonal secession (Oechsli 1922, page 379) carried on by popular assemblies. Basel-City and Basel-Country are still dived today while Schwyz and Outer Schwyz eventually reunited in 1833. Intra-Cantonal secession was considered possible in the Swiss Constitutional framework, as the Diet recognized legitimate the partition of the Canton of Basel (Ibid. page 381). These Cantons that have suffered secessionist movements for their Conservative position, reunited in 1832 in the League of Sarnen (Ibid.). The league was a secessionist movement that instated a rival Diet to challenge the Diet under the protestant control in Zurich. Any decision taken by the Diet in Zurich had no effects in the Cantons of the League of Sarnen (Basel, Neuchatel, Uri, Schwyz and Unterwalden) (Ibid.). The main goal of the League was to avoid any amendment to
the 1815 Constitution. The League was dissolved in 1833 by the Diet in Zurich, as contrary to the Federal Treaty (Ward 1907, page 245). The article used to contest the legality of League was the article six of the Federal Treaty “The Cantons cannot form alliances between them harmful to the Federal Pact or to the rights of other Cantons” (Swiss Federal Treaty 1815, Article 6). It appears quite instantly the anomalous behavior of the Federal Diet. The Diet at the same time legitimates the inter-cantonal secession from Basel and Schwyz (that indeed war “harmful” for them) and denied the rights of the sovereign Cantons to defend themselves when they have been damaged by the Diet itself. It is possible to see that the League of Sarnen used the right to resistance from a tyrannical power, as intended by Althusius, in its attempt to secede from the Swiss Confederacy in 1832.

However, the dissolution of the League of Sarnen did not solve the divide between the conservative Cantons and the Radical one, between the Federal and confederal approach. In 1841 tension arose once more when the Canton of Aargau closed all the convents in its territory (Ertl 2014, page 118). This act was clearly illegal under the 1815 Federal Treaty, which states “The existence of the Convents… and the conservation of their property as dependents from the Cantonal governments, are guaranteed” (Swiss Federal Treaty 1815, Article 12). In retaliation, the Conservative and Catholic Canton of Lucerne decided, in 1844 to call back the Jesuits to teach in its territory (Ertl 2014, page 119). This action brought some Radical and Protestant Cantons to act against the Canton of Lucerne, and the Liberal “Freischaren” attempted to invade Lucerne in 1844 and 1845 to overthrow the government of that Canton (Perraudin 2000, page 79). The fact that the Diet did not act to defend Lucerne or the Catholic population in Aargau, and the fear that the Protestant would attempted to change the Constitution in a more centralized way, brought to the creation of the Sonderbund (or separate league) in 1845. As in the case of the US, the fear that the Cantonal sovereignty could be limited in anyway brought a secessionist movement to rise. However, it is normal to ask what other possible solutions remained in the hand of the Conservative Cantons, when their right have been
infringed and the Diet did not do anything to help them. Subject to an arbitrary power, the members of the Sonderbund found no other way than secession to guarantee their freedom and independence, expressed by the first Article of the Swiss Federal Treaty of 1815. For the Althusian’s Ephors, incarnated in the representatives of the Cantons, the Sondebund was the only way to guarantee the rights of their citizens. For Kobach the Sonderbund of 1845-1847 was illegal as it violated the aforementioned article six of the Federal Treaty (Kobach 1993, page 24), For Gerotto instead the Sonderbund was compatible with the 1815 Federal Treaty (Gerotto 2011, page 31). Even if Gerotto, in his book, does not explain his position, it possible to say that Article six was infringed formally by the Sonderbund, as the where a minority of the Swiss Cantons, but the Protestant Cantons had already violated it de facto closing of the Convents in 1841 and with the invasions of Lucerne in 1844-1845. A formal alliance between the protestant Cantons was not necessary, as they were the majority of the Cantons, and they could simply act inside the framework of the Swiss Confederacy. The attempt of the Sonderbund to secede was then a secession aimed to avoid the tyranny of the majority, operated by the Protestant and Radical Cantons.

The Federal Diet, on July 20 1847, with a vote of 12 Canton in favor and 10 against declared the Sondebund illegal and that it should dissolve. (Ibid.). The main reason behind this decision was the attempt of the Sonderbund to get help from foreign powers, especially the Catholic and Conservative Austrian Empire (Oechsli 1922, page 391). A brief war followed between the Confederate and the Sonderbund, which was swiftly defeated. In 1848, with the collaboration of the Conservative and the Radical, a new Constitution was born. The 1848 Swiss Constitution clearly instituted a Federal State and removed the sovereignty from the Cantons. The new Constitution was imposed even to the Cantons that were against it. Furthermore, the Constitution of 1848 was amendable through legal way, a characteristic that the 1815 Constitution did not possessed. (Gerotto 2011, page 32). As in the case of the US, the war of 1847 determined the end of the squabgle between the Diet and the Canton and the rise of Switzerland as a unitary State and not as a confederation. Nonetheless, the league of
Sarnen and that of the Sonderbund showed how the Althusian concept of resistance to an arbitrary power, as the Diet was behaving before 1847, was a conceivable solution inside the Swiss Constitutional framework. The fact that secession was de facto a possible tool in the hand of the Cantons left open the debate around the interpretation of the Article Six of the Federal Treaty of 1815. Was the Sonderbund attempt to secede in a separate alliance a defense of the Cantonal rights that the Federation had already infringed? Surely, the attempt of the Sonderbund to call foreign power into the fight was a violation of the principle behind the Confederal agreement, as the Diet had the power to “take all the measures for the internal and external security of Switzerland” (Swiss Federal Treaty 1815, Article 1). But the attempt to secede in order to safeguard some rights that the Diet itself had already infringed, could be consider as to get out from a contract which conditions are no longer valid.

The similarity between the Swiss and the American case shows how the conflict between the idea of a Federative/Confederative State vs a Unitary one (theorized respectively by Althusius and by Hobbes/Bodin) was the same ideological base that brought to the secession of the CSA, of the League of Sarnen and of the Sonderbund. These theories born in the 16th-17th century, at the dawn of the modern State, guided the debate on the questions: who holds sovereignty? The Federation? The provinces? The Cantons? Is resistance possible? When? How? The American and the Swiss case have showed many answers given to these questions. The right to secede is conceivable only when to act is a sovereign entity, then to determine who hold this sovereign power was a fundamental task for the analysis of the American and Swiss Constitutions and their theorists. After the analysis of the secessionist movements in the 19th century, in the US and Switzerland, that gives an historical background to the issue of the right to secede, it is time to move to the period 1990-2015, focusing on the modern secessionist movements. In particular, we will deal with the secessionist movements in the former socialist states, and how both the Public and the International law of the States managed them.
CHAPTER 3
Secessions after the end of the Cold War. A new epoch for secession in Europe

3.1 The right to secede in socialist law

This chapter focuses on the secessionist movements that have characterized the states in the Balkan and in the former USSR in the 1990s and still today, as the crisis in Crimea firstly and in eastern Ukraine secondly have clearly showed. After the collapse of the Austro-Hungarian and Ottoman Empire at the end of WWI, the secessionist movements that were generated by the fall of Yugoslavia and the USSR have characterized, what it is possible to call, a new epoch for secession in Europe. It has been chosen to analyze only cases that have in common a background that connect them to socialist law and localized in Euro-Asian Region. The reason to choose socialist Law is that is the only law that explicitly recognized the right to secede. Europe has been chosen because the cases of Taiwan and South Korea cannot be considered as secession, but rather as civil war, as both Chinas and Koreas claim sovereignty over the entire disputed territory. Only the case of Tibet would be interesting to analyze, but the Constitution of the PRC is not inspired by the original socialist law (analyzed further) as it stated: “Any acts that undermine the unity of the nationalities or instigate their secession are prohibited” (PRC Constitution, article 4). Even if is not the main duty of this analysis, it is interesting to ask why the end of 20th and the beginning of the 21st century have witnessed a revival of the secessionist movements, especially in Europe. It is possible to ask if these newborn secessionist movements are a reaction to the modern globalization. In a world always more global, the local entities assumes paradoxically a larger importance. “This growing extensity, intensity and velocity of global interaction is associated with a deepening enmeshment of the local and global in so far as local events may come to have
profound consequences and global events can have serious local consequences” (Held and McGrew 2007, page 3). In addition, the modern globalization has been characterized, at a political level, by a great devolution of power to the local entities, and “Government[s] had quietly been transformed... The transformation has followed two courses: globalization and devolution. On the international level, state and even local governments are working directly with other nations to promote trade or attract foreign investment... On the national level, more responsibility for both implementing and making policy has flowed to state and local governments” (Kettl 2000, page 3). It is then possible that this return to the idea of secession is generated by a growing importance of the local at the global level, and by an ever-increasing power of the local entities, as stated by Held, McGrew and Kettl.

Even if the political causes of these new secessionist movements can be quite confusing, the legal one are no less. A fundamental step to analyze the secessionist movements in the former Yugoslavia and USSR, and if a right to secede was legally conceivable in these cases, is the analysis of the socialist law on secession. This step is necessary as both countries were socialist federations, and in both of them the right to secede was, at least reading literally the two Constitutions, legalized. In fact, “The first Basic Principle listed in the Constitution [of the 1974 Constitution of Yugoslavia] begins with the formulation 'the nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right of secession...’” (Rich 1993, page 38). Similarly, the 1977 Constitution of the USSR affirmed “Each Union Republic shall retain the right freely to secede from the USSR” (USSR Constitution 1977, Article 72). Confronting these Constitutions to the Constitutions of the Unitary States analyzed in the first chapter (Italy, France and Spain) or even to the Constitutions of the Federalist States such as the US or Switzerland analyzed in chapter two, it is oddly to find a clear and unequivocal recognition of the right to secede inside the Constitutions of two authoritarian States. This appear even more oddly analyzing the fact the both Yugoslavia and the USSR survived for many decades as strong unitary states, without secessionist crisis comparable to the crisis
that characterized the US and Switzerland in the 19th century. The answer to this paradox (the legitimization of the right to secede and the quiet and stable survival of a strong unitary and authoritarian state for decades) must be found in the analysis of what secession means in the socialist law.

As it has been mentioned in chapter one, it was during the First Communist International in 1865 that the term “self-determination” was conceived (De Fiore 1996, page 92). This decision was confirmed in 1896, during the Second Communist International, where “in item three of the Congress resolution concerning the political action of the proletariat one paragraph mentioned “the right to self-determination” of all the oppressed nations” (Tych 1982, page 128). The source of the socialist right to secede or external self-determination founds its roots in the Communist Manifesto of Karl Marx and Friedrich Engels. In 1848, Marx and Engels wrote: “The working men have no country… Since the proletariat must first of all acquire political supremacy, must rise to be the leading class of the nation, must constitute itself the nation, it is so far, itself national, though not in the bourgeois sense of the word. National differences and antagonism between peoples are daily more and more vanishing, owing to the development of the bourgeoisie, to freedom of commerce, to the world market, to uniformity in the mode of production and in the conditions of life corresponding thereto. The supremacy of the proletariat will cause them to vanish still faster. United action, of the leading civilised countries at least, is one of the first conditions for the emancipation of the proletariat. In proportion as the exploitation of one individual by another will also be put an end to, the exploitation of one nation by another will also be put an end to. In proportion as the antagonism between classes within the nation vanishes, the hostility of one nation to another will come to an end.” (The Communist Manifesto 1848, page 25). Marx and Engels, foreseeing modern globalization, founded the bases for the proletariat internationalism. National independence was a fundamental requirement, a first step, to create a Communist and classless society. No communist revolution was possible if the country was under foreign occupation (such as Poland at the time of Marx and Engels). Anyway, the
national aspiration must be subordinate to achieve a true communist revolution against the bourgeoisie. The national aspiration in itself is a reactionary and bourgeois act. It threatens to divide the “Worker of the World” that must “Unite” (Ibid., page 67) to fight the bourgeoisie.

Despite the importance of the Socialist International and of the works of Marx and Engels, Lenin is the father of the socialist concept of secession that influenced the Soviet and Yugoslav Constitution. According to the Lenin’s interpretation of the Marxist doctrine “Although mercilessly criticizing the reactionary nature of small states, and the screening of this by the national question in certain concrete cases, Engels, like Marx, never betrayed the slightest desire to brush aside the national question, a desire of which the Dutch and Polish Marxists, who proceed from their perfectly justified opposition to the narrow philistine nationalism of “their” little states, are often guilty” (Lenin 1917, pages 451-452). For Lenin what matters is the creation of a huge federation of workers. Then secession, as interpreted by a nationalist view, is antithetical to the cause of the global revolution for Lenin. In spite of this, is Lenin himself that stated: “From the standpoint of national relations, the best conditions for the development of capitalism are undoubtedly provided by the national state. This does not mean, of course, that such a state, which is based on bourgeois relations, can eliminate the exploitation and oppression of nations. It only means that Marxists cannot lose sight of the powerful economic factors that give rise to the urge to create national states. It means that “self-determination of nations” in the Marxists’ Programme cannot, from a historico-economic point of view, have any other meaning than political self-determination, state independence, and the formation of a national state” (Lenin 1914, page 400). Even if a bourgeoisie tool, the nation is the only way to achieve the global communist revolution. Then secession is allowed when it is part of this process, when it brings together the different workers of the world under a single state (that after Lenin’s death will became the Trotsky’s vision of the world revolution). The national causes are only a tool to achieve a greater and definite objective, the cause of a global socialism. Using Lenin’s word
“In contrast to the petty-bourgeois democrats, Marx regarded all democratic demands without exception not as an absolute, but as a historical expression of the struggle of the masses of the people, led by the bourgeoisie, against feudalism. There is not a single democratic demand which could not serve, and has not served, under certain conditions, as an instrument of the bourgeoisie for deceiving the workers. To single out one of the demands of political democracy, namely, the self determination of nations, and to oppose it to all the rest, is fundamentally wrong in theory. In practice, the proletariat will be able to retain its independence only if it subordinates its struggle for all the democratic demands, not excluding the demand for a republic, to its revolutionary struggle for the overthrow of the bourgeoisie” (Lenin 1916, page 149). The right to secede, or to independence/self-determination for Lenin, is a tool for a greater cause in the Socialist law. The right to secede in the Socialist law then “Far from encouraging the formation of petty states, leads, on the contrary, to the freer, fearless and therefore wider and mote widespread formation of very big states and federations of states, which are more beneficial for the masses and more fully in keeping with economic development” (Lenin 1915, page 316). This theory founds a practical application in the USSR and in the Socialist Federal Republic of Yugoslavia. In both of these States, the term Federation had nothing in common with the US and Swiss 19th century meaning (and then Althusian) of Federation, but it was a Federation of workers, from different nations, united forever. For Lenin the “recognition of the right to secession reduces the danger of the “disintegration of the state” (Lenin 1914, page 421). Secession is a necessary tool to form a greater Union and “To accuse those who support freedom of self-determination, i.e., freedom to secede, of encouraging separatism, is as foolish and hypocritical as accusing those who advocate freedom of divorce of encouraging the destruction of family ties. Just as in bourgeois society the defenders of privilege and corruption, on which bourgeois marriage rests, oppose freedom of divorce, so, in the capitalist state, repudiation of the right to self-determination, i.e., the right of nations to secede, means nothing more than defence of the privileges of the dominant nation and police methods of
administration, to the detriment of democratic methods.” (Ibid., page 422-423).

Secession is then a very useful tool to fight the Capitalist and Imperialist world. Freedom and independence of the oppress peoples, in Europe or in the colonies, is a blow against the Capitalist/Imperialist system. The destruction of this system, using every instrument possible, including the right to secede, will eventually end in the creation of a socialist world. The right to secede then is a means and not an end in the Socialist law.

The Lenin’s theory of the right to secede explains why in 1917 the USSR was born as a State that, at least formally, did not have any attachment to the concepts of territory, population or ethnicity. The idea to introduce the right to secede in the USSR Constitution was not intended, such as in the American or Swiss confederative view of the reciprocal Constitutions, as a way to grant to the member States a right to get out from the Union. In fact, the different Soviet Republics had already used, once and for all, the right to secede to join the USSR. Regarding this Lenin himself affirmed: “We do not at all favour secession. We want as vast a state, as close an alliance of the greatest possible number of nations who are neighbours of the Great Russians; we desire this in the interests of democracy and socialism, to attract into the struggle of the proletariat the greatest possible number of the working people of different nations. We desire proletarian revolutionary unity, unification, and not secession” (Lenin 1917, page 176). This analysis of the right to secede in the socialist law is now necessary to analyze the secessionist phenomenon that characterized the USSR and especially the Socialist Federal Republic of Yugoslavia. The next paragraph will analyze the latter, while the following the former.

3.2 Secession and self-determination for who? The collapse of the former Yugoslavia and the Kosovar secession
The collapse of the former Yugoslavia was one of the bloodiest cases of secession of our times, and the echoes of the massacres and the war crimes carried out between 1991 and 1995 are still strong in the international community. Indeed, the International Criminal Tribunal for the former Yugoslavia of the UN is still judging (in 2015) the individuals responsible for these crimes. In 2004, the Tribunal affirmed “That the killing of the Bosnian Muslim men was done with genocidal intent to destroy the Bosnian Muslims of Srebrenica” (Prosecutor v. Radislav Krstic 2004, page 11). The right to secede (or the prohibition of secession for the Serbian community outside the territory of the Serbian Republic) in this specific case have brought to terrible consequences. “The worst [crimes] on European soil since the Second World War” (UN Press Releases, SG/SM/9993, 2005) were committed to halt or permit the right to secede. This highlights why the collapse of the Socialist Republic of Yugoslavia is so important in a comparative analysis of the right to secede. In the first part of this paragraph, it will be necessary to analyze very swiftly the facts that brought to the use of the right to secede from the Republics that formed the Socialist Republic of Yugoslavia in 1990-1991.

The Socialist Federal Republic of Yugoslavia was formed after WWII as a communist state in the Balkans. Even if detached by the USSR and the Warsaw Pact, according to the doctrine of Titoism (Di Nolfo 2008, pages 727-730), was a Communist State in its action and its legal doctrine. The right to secede was, in all the Yugoslav Constitutions (1946, 1953, 1963 and 1974), recognized and legalized in the socialist version of the right. Just to remind the importance of this right in the Yugoslav Constitution is useful to quote once more the first Article of the 1974 Constitution which stated “the right of every nation to self-determination, including the right of secession” (Rich 1993, page 38). Even if the Yugoslav Republic was a cauldron of different ethnic groups, languages and religions, the right to secede, as we have seen, was not conceived as an instrument for these groups, but in the socialist conception of the term. As the peoples of the USSR in 1918, the peoples of Yugoslavia had already exercised this right in 1945 in order to form a greater
socialist State. Then the right to secede in Yugoslav and socialist Constitutional framework “require[ed] all other republics to grant a particular republic permission to secede since secession of one violates the borders of the Yugoslav Federation” (Bagwell 1991, page 522). In 1990-1991, this cauldron boiled until it exploded. On 25 June 1991, Slovenia and Croatia unilaterally declared secession (Di Nolfo 2008, page 1363). The attempt of the Federal army to reconquer Slovenia failed with the end of the ten-day war and the signing of the Brioni agreement on 7 July 1991. Anyway, the Yugoslav government hastened to declare that “The secession of the republic of Slovenia from the S.F.R. of Yugoslavia… is an anti-constitutional act and one-sided action that attempts to impose on other Yugoslav republics through the policy of a fait accompli. The Yugoslav state presidency cannot agree nor accept anybody's one-sided action which violates the constitutional legal order and integrity of the country and its interests” (Bagwell 1991, page 510). The Yugoslav government recognized, in the Slovenian secession, an attempt to impose an ex-post unconstitutional secession as a legal and constitutional act. Its opinion was reinforced by article 5 of the 1974 Constitution that stated: “The territory of the Socialist Federal Republic of Yugoslavia is a single unified whole and consists of the territories of the Socialist Republic” (Ibid. page 499). Furthermore, “Article 244 of the constitution also appears to preclude secession by guaranteeing Yugoslavia its territorial integrity” (Iglar 1992, page 219). Despite the counterproposal on the interpretation of the Yugoslav Constitution of 1974, the secession in this case succeeded. The term secession in the socialist Constitution, even if detached from its own Leninist origin, and read only literally, was surely a powerful boost for the collapse of both Yugoslavia and the USSR. Despite all of this, the fights in Slovenia ended quickly due to its ethnical homogeneity. The same was not true for Croatia and especially for Bosnia Herzegovina that had conspicuous Serb minorities and where the fights lasted four years. The violent breakup of Yugoslavia urged the international community to act. This case showed how much the presence of the term self-determination in international treaties and organizations, and the international community attitude to
preserve the territorial integrity of states (as happened in Congo or Nigeria) went one against the other in the Yugoslav case. For the international community was impossible to safeguard the rights of the various ethnic minorities in each state of the former Yugoslavia without legitimate the right to secede (even if unilateral secession was illegal for the Yugoslav law). The principles of human rights, non-interference in internal affairs and self-determination clashed strongly during the Yugoslav Crisis in 1991-1995, and in the Kosovar secession in 1999-2008.

In this regard, it very important to take into account the opinions of the Badinter Commission. It was an Arbitration Committee created by the European Community and took this name because it was “chaired by Mr Robert Badinter, President of the French Constitutional Council” (Pellet 1992, page 178). Its mandate “Was somewhat vague… It was envisaged that the Committee would rule by means of binding decisions upon request from valid Yugoslavian authorities” (Ibid.). In its first opinion, dated November 1991, the Commission answered to a letter from Lord Carrington, President of the Conference on Yugoslavia, where he asked “Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have secede or would secede from the SFRY… Other Republics on the contrary consider that there is no question of secession, but the question is one of a disintegration or breaking-up of the SFRY as the result of the concurring will of a number of Republics” (International Legal Materials, 1992, Volume 32, N°6, page 1494). The Commission answered: “That the Socialist Federal Republic of Yugoslavia is in the process of dissolution” (Ibid. page 1497). Even if speaking of dissolution was useful to keep the term secession out of the Opinions, it is interesting to see that in the Opinion N°11 the commission stated the date in which the various Yugoslav republics had become independent. The date for Croatia and Slovenia is 8 October 1991 (Ramcharan 1997, page 816). Nevertheless, on the same opinion “The Badinter Commission stated that the process of dissolution started on 29 November 1991 and ended on 4 July 1992” (Etinski 1999, page 244). Then if a dissolution was not in act when Slovenia and Croatia have become independent, it is
possible to see a clear case of secession for these two republics (Radan 2000). The attempt of the Badinter Commission to avoid in any of its opinion to speak of secession was a political and not a legal move, as the contradiction inside the Opinion N°11 shows. Only speaking of the dissolution of the Yugoslav Federation, and then considering those territories without sovereignty and then as Terra nullius, it was possible to allow the creation of new states without legitimizing the right to secede. Another contradiction of the Badinter Commission is in its Second opinion. Herein it is affirmed that “The right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise” (International Legal Materials, 1992, Volume 32, N°6, page 1498). Nevertheless, in the same document it is stated “That the Serbian population in Bosnia-Hercegovina and Croatia is entitled to… all the human rights and fundamental freedoms recognized in international law, including where appropriate the right to choose their nationality” (Ibid., page 1498-1499). Why the right to external self-determination, or right to secede, was recognized to Slovenian, Croatian, Bosnian, Macedonian, but not to the Serb that lived outside the administrative borders of the Republic of Serbia? How could this group be entitled to all the rights and freedom recognized in international law, if the right to self-determination was for them impossible, while it was available for other ethnic groups? Hannum has highlighted how much “The reaction of Europe to the break-up of Yugoslavia might be contrasted to the continued rejection of secessionist movements in other regions, even where such movements control substantial amounts of territory… While much of the world condemned the brutality of the Russian attack on Chechnya in December 1994, no official voices were raised in support of Chechnya’s right to secede from the Russian Federation; similar silence has greeted the claims of south Ossetia, Nagorno-Karabakh, Abkhazia and Crimea” (Hannum 1996, page 498). These cases, which will be analyzed in the next paragraph, have found no similar “sympathy” in the international community as the one that was guaranteed to the former Yugoslav Republics secession. It was the first non-colonial
case were the right to external self-determination or secession was internationally recognized. Moreover, the use of article 1 of the International Covenant on Civil and Political Rights to justify the secession of the Yugoslav Republics by the Badinter Commission, in its second opinion, is improper. Even if the article states “All peoples have the right of self-determination” (ICCPR, Article 1), it was also affirmed that “Much of the discussion on article 1 had related to the question of self-determination to the colonial issue, but that was only because peoples of Non-Self-Governing and Trust Territories had not yet attained independence… The dangers of including the article had been exaggerated… It was said that the article was not concerned with minorities or the right of secession, and the terms “peoples” and “nations” were not intended to cover such questions” (Bossuyt 1987, page 27). Then Article 1 of the ICCPR was concerned only with colonial peoples, and its use inside a unitary state left open the question: which peoples holds are right to secede? Until 1990, it was only the colonial peoples, but after the opinions of the Badinter Commission, it is possible to ask if there is a change in the international behavior toward the right to secede. The Badinter Commission was not able to explain why the Slovenian and the Croatian had a right to secede and the Serbs in Bosnia and Croatia, or the secessionist movements in the former USSR had not.

Continuing the analysis of the work of the Badinter Commission, in its third opinion, dated 11 January 1992, the Commission answered to the question if “The internal boundaries between Croatia and Serbia and between Bosnia-Hercegovina and Serbia be regarded as frontiers in terms of public international law” (International Legal Materials, 1992, Volume 32, N°6, page 1499). The answer was that “The boundaries between Croatia and Serbia, between Bosnia-Hercegovina and Serbia… may not be altered except by agreement freely arrived at… The former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of uti possidetis” (Ibid. page 1500). A principle that so far was utilized only to manage post-independence borders, in former colonial states, was applied to a unitary state. It
is interesting to see that, in its opinion, the commission recognized only the former republics of Yugoslavia as possible unity that could exercise the right to self-determination. This excluded the autonomous regions of Vojvodina and Kosovo from the right of self-determination for example, a right that, as it will be analyzed, will be used by Kosovo and will be recognized by many (but not all) states in the international community. The Commission in fact affirmed that “The principle [of self-determination] applies all to the more readily Republics since the second and the fourth paragraph of Article 5 of the Constitution of the SFRY stipulated that the Republics territories and boundaries could not be altered without their consent” (Ibid.). However, the same article, as it has been said, says that Yugoslavia is a “single unified whole and consists of the territories of the Socialist Republic” (Bagwell 1991, page 499). Then it is not clear how Article 5 of the Yugoslav Constitution could justify external self-determination (than means secession) for some and not for all when a state is collapsing and there is no longer a sovereign power (as assessed by the Commission in its first opinion). Another interesting point is the fact that Commission used this reasoning to justify the application of the *uti possidetis juris* principle to the Yugoslav case. For the Commission: “*Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali” (International Legal Materials, 1992, Volume 32, N°6, page 1500). The reference to the jurisprudence of the International Court of Justice must be analyzed. In the case, the ICJ stated that it “cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of decolonization and its exceptional importance for the African continent” (ICJ, Burkina Faso v. Mali, 1986, par. 20). Furthermore, the aim of the principle of *uti possidetis* “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” (Ibid.). The reference to decolonization and to an administering power that decides to withdraw leave no room for the principle of self-determination to be applied outside the issue of decolonization. Hannum has highlighted that “The special Agreement between Burkina Faso and Mali submitting their dispute to a chamber of the Court was explicitly based on “respect for the principle of the intangibility of frontiers inherited from colonization” and that “Europe’s approach to the Yugoslav conflict represents a one-time-only reaction to secessionist demands based on no discernable criteria other than the desire of some territoriality based population to secede” (Hannum 1993, page 55). The question that remains is why, in the occasion of the break-up of Yugoslavia and of the USSR, the right to secede has been granted only to some population and not to others. The reasoning of the Commission seems similar to the debate on the State Rights in the US. The Yugoslav federation was a compact between States and each one of these retains a right to secede freely, even if the Leninian interpretation of the Yugoslav Constitution answers negatively to this comparison. It seems that the Commission applied, as theoretical background, the case of the choice theory of secession to a situation so ethnically confused that required indeed the use of national self-determination theory of secession to be better analyzed and resolved.

Undoubtedly, the international recognition of the secessionist Yugoslav Republics turns a local conflict into an international one. Especially in the Croatian and Bosnian cases, there have been protected those entities as sovereign State (such as Kuwait in 1990), while they still did not have the entire requirements to be sovereign states (Tancredi 1998, page 735). It was the international recognition of the secessionist republics, and the impossibility of the Serbs who lived outside Serbia to secede too, to turn the conflict into one of the bloodiest of our time. As Ratner has analyze, the “Condemnation of force to change the status quo - clearly warranted in the context of Yugoslavia – does not coincide with a legal transformation of the status quo into a permanent solution by default” (Ratner 1996, page 614). Regarding the war crimes that occurred during the Yugoslav wars, it is interesting to see that the possibility for
the Yugoslav republics to secede with the support of the international community “not only fragmented Yugoslavia, they radicalized the anti-independence Serb minorities, particularly in Croatia and Serbia” (Reilly 2003, page 180). It is possible to affirm that the option of being part of new state, where the Serbs were a small minority, was the main reason behind the brutal escalation of the war in Croatia and especially in Bosnia. The latter in fact is still the facto split in two still today (2015), 20 years after the Dayton agreement, between the Federation of Bosnia and Herzegovina (where Bosnian and Croats are the majority) and the Republika Srpska (Serb Republic).

Moving to the Kosovar case is possible to see that this case is a quite peculiar case of secession. It is the only case where the international onion is split in half on the decision to recognize or not as legitimate the Kosovar secession. Today (2015) according to the Ministry of Foreign Affairs of Kosovo, 96 countries member of the UN have recognized the state (Ministry of Foreign Affairs of Kosovo). Serbia and many other states (such as China and Russia) continues to deny the legality of the Kosovar secession. It is another case of ethnic secession, as the 92.9% of the Kosovar are Albanians (CIA World Factbook).The Badinter Commission, as it has been analyzed, was against the possibility to guarantee any right of self-determination to the any unit except the former Yugoslav Republics. According to the 2006 Constitution of Serbia “The territory of the Republic of Serbia is inseparable and indivisible” (Serbian Constitution, article 8), and “In the Republic of Serbia, there are the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. The substantial autonomy of the Autonomous province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution.” (Ibid., Article 182). Combining these two article is clear that the independence of Kosovo, declared in 2008, was clearly an illegal act according to Serbian Law. Taking into account international law, we must take a look to the opinion given by the International Court of Justice in 2010. According to the court “No prohibition of declarations of
independence according to State practice — Contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity — Scope of the principle of territorial integrity is confined to the sphere of relations between States — No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence — Issues relating to the extent of the right of self-determination and the existence of any right of “remedial secession” are beyond the scope of the question posed by the General Assembly.” (ICJ 2010, pages 5-7). The attempt of the Court to separate the issue of independence from self-determination and secession seems to clash with the common sense (an act of independence produces a secession de facto) and with the practice of the UN in period of decolonization, where the right to self-determination was a right of independence. In addition, the ICJ does not take into consideration the General Assembly Resolution 2625 of 1970, the so-called Friendly Relations Declaration (FDR). Of particular relevance for the case of Kosovo is paragraph seven according to which “The right of self-determination shall not be construed so as to impair the territorial integrity of states” (Benedek 2008, page 398).

The Kosovo’s independence was achieved de facto after the NATO bombing of Serbia in 1999, which brought to the withdrawal of the Serb Army from Kosovo and with the UN Security Council resolution 1244, which put the region under international control. The resolution moreover expressed “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia” (UN SC Res 1244, 1999). Reading this passage of the resolution it is very difficult to affirm that no opposition to the Kosovar independent was present in the Security Council practice (as affirmed by the ICJ). It is important to remind that the acts of the Security Council require the approval of all permanent members, and then of Russia and China, which are, until now, against the independence of Kosovo. In the case of Kosovo, unlike what happened in 1991-1995, we can be sure that “There was no dissolution of a previous state, and the Republic of Serbia continues to have the same international personality. Serbia’s right to territorial integrity is thus
not removed, by analogy to the process of dissolution of the SFRY” (Vidmar 2009, page 848). It is unclear why to a unitary State, such as Serbia, was not recognized the right to territorial integrity, but it was it was de facto privileged the principle of self-determination, or the right to secede, of the Kosovar people. Nonetheless, this right is contested worldwide. What is sure is that after the 1999 a compromise between the secessionist region and the central government was impossible, as “Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept nothing short of independence” (Ibid. page 182). Kosovo finally declared independence unilaterally in 2008. It is interesting the opinion of Vidmar on the independence of Kosovo, according to which “The creation of the state of Kosovo partially followed the post-1991 pattern of collective state creations, where international involvement resulted in a removal of the claim to territorial integrity… However, in the case of Kosovo, the approval for the state creation was not universal and consent of the parent state was missing. Thus, Kosovo’s statehood was indeed collectively constituted by a number of recognizing states. However, it was not constituted merely by the acts of recognition but—even more significantly—through their involvement prior to the declaration of independence and the preliminary approval of this act” (Ibid. page 851). It is clear that firstly with the secessionist Yugoslav Republics, and secondly with Kosovo, it has been legitimized the right to secede. It has been camouflaged as self-determination as in the colonial case in the former, or as a vague concept of independence in the latter. However, both these cases were acts of secession legitimized, totally or partially, by the international community. Why the Serbs in Croatia and Bosnia, and the secessionist states analyzed in the next chapter, have received a different treatment it is still not clear. In the next paragraph will be analyzed the secessions that followed the disintegration of the USSR, that, as it has been said, received a very different treatment from that received by the secession of the Yugoslav Republics or by Kosovo.
3.3 The dissolution of the USSR and the proliferation of ethnic secession in the 1990s

The dissolution of the USSR and the formation of the various independent states, today recognized by the international community, is not an interesting case in itself. The dissolution of the USSR was not violent, and was consensual. It was dealt as a true dissolution of a state, with the Russian Federation recognizing each Republic as an independent State and, only after that, the international community has recognized the independent Republics (Margiotta 2005, page 188). The international community respected both the territorial integrity and the domestic jurisdiction of the USSR/Russia, as it was a Russian decision, and not an international one, to dissolve the USSR (Tancredi 2001, page 393). During the Alma Ata conference on December 21 1991, the independent Republics decide that with “the formation of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist” (Ala Ata Agreement, 1991). Even in this case the Leninan meaning of the term secession inside the USSR Constitution, ““Each Union Republic shall retain the right freely to secede from the USSR” (USSR Constitution 1977, Article 72), have been ignored preferring a more literal interpretation, both by Russia and the secessionist republics. As these secessions were consensual, there was no need to justify these acts by the international community under the principle of self-determination (that in international law is a right only of the colonial people) or under a vague legitimization of the act of independence as in the Kosovar case. Useful in this case is the analysis of Pellet “If international law certainly does not encourages secession in the name of the right of peoples to self-determination, it does not prohibit it either expressly. The law on this point relies on the fact. And if the aspirations of a people to independence is strong enough to lead him to found a new state… [The] new entity obtains widespread reconnaissance.” (Pellet 1995, page 264). The international community does then not ostracize a secession if the people are able to founded a new and stable state, but more important is that this state have
received recognition by the unitary state from which it withdraws. The only peculiar case in the secession former Soviet Republics have been that of the Baltic States. These countries (Lithuania, Latvia and Estonia) have been annexed by the USSR in 1940, and incorporated as Soviet Republics by force. According to Conforti, it is not possible in this case to speak of “A right of these countries to self-determination…” The Baltic States have achieved independence with the consent of the Soviet Union; their reconstruction have concretized and hypothesis of formation of new states by detachment” (Conforti 2010, page 26). For Conforti a right of external self-determination or secession can be given only to those situations of foreign occupation arose after the concept has been incorporated in the international community (Ibid., page 25) then after WWII. For Margiotta instead for the Baltic States, which have joined the Soviet Union by force and not voluntarily, it is more appropriate to speak not of secession, but of a “reinstatement of the original and legitimate sovereignty, remained quiescent” (Margiotta 2005, page 188). Nevertheless, even if for these countries it was technically harder to define what kind of right the Baltic peoples were exercising, if a right to secession, self-determination or a reinstatement of a lost sovereignty, the process was configured anyway as a consensual secession between Russia and the Baltic States.

The cases of much more interest for this analysis of the right to secede are the numerous “sub-secession” that occurred within the new-independent states. Each one of them as an ethnic origin and, as there are seven of them, it is possible to speak of a proliferation of ethnic secession. They fit naturally into the context of the national self-determination theory of secession. The secessionist movements that will be briefly analyzed in this paragraph are: Transnistria in Moldova, Chechnya in Russia, Abkhazia and South Ossetia in Georgia and Nagorno-Karabakh in Azerbaijan. In the next paragraph it will be analyzed the more recent secessionist movements in Ukraine, specifically Crimea and Donbass. For each case, it will be analyzed firstly and briefly, the political cause of the secession, then the Constitutional approach of
each State involved toward secession, and finally the approach of the international community toward the issue.

Transnistria is a secessionist region in eastern Moldova. The relation between ethnicity and secession is very strong in the region. “The issue of language and identity has been used skillfully by the Transnistrian regime to maintain their power and prolong the conflict with Moldova. In Transnistria, approximately 55% of the population are ethnic Ukrainians and ethnic Russians, and aside from Bender and a few right-bank villages, the region was never part of Romania” (Roper 2005, page 509). Moldova, as the Baltic States, was annexed by the USSR in 1940. Before it was part of Romania. The region of Transnistria was not part of the annexed territory, and it was never “part of traditional Romanian territory” (Borgen 2006, page 13) as Moldova, but was already part of the USSR. Anyway, the Soviets attached it to the newfound Moldavian Soviet Socialist Republic. Situated between the river Dniester and Ukraine, the inhabitant feared, after the collapse of the USSR and according to the principle of *uti possidetis*, that they would remained trapped in a State where they were an ethic minority, and then decided to secede in 1990. Something very similar to the behavior of the Serbs in Croatia and Bosnia. The war that followed result in stalemate that remains until today. Taking into account the Constitution of Moldova it is possible to see that “The Republic of Moldova is a sovereign, independent, unitary and indivisible state” (Constitution of Moldova, article 1). Furthermore, “The territory of the Republic of Moldova is inalienable” (Ibid. Article 3). Organized as a unitary Hobbesian/Bodinian State, the right to secede in unconceivable in the Moldavian Law. Speaking of international recognition, until now no member State of the UN has recognized Transnistria as a sovereign state (not even Russia), and it is treated as a secessionist region. Speaking about a possible right of the people of Transnistria to self-determination King has argued that, using the national self-determination theory of secession as a theoretical background, it is difficult to define a Transnistrian people. As he have stated “In Transnistria as a whole, Moldovans formed nearly 40 percent of the total population of just over 600,000. Rather,
although the Transnistrian dispute was generally portrayed as a revolt by Slavs against the nationalizing policies of Chisinau, the real source of the violence after 1990 lay in fact at the level of elite politics” (King 2000, page 187). For Borgen the secessionist “strongest argument for sovereignty is not one stemming from the doctrinal requirements of external self-determination but the argument that it was not part of Moldova historically. The MASSR was merged with Bessarabia only as part of the Molotov-Ribbentrop pact” (Borgen 2006, page 51) in 1940. This because, in his opinion, for Transnistria “There is no solid basis for a claim of secession under external self-determination” (Ibid.). Here it is possible to ask why this right have been granted to Croatia, Bosnia or Kosovo for example, which have both Serbs minorities in its territory (very conspicuous in Bosnia), and at the same time denied to Transnistria, which has a conspicuous Moldovans minority. It is interesting that, after the annexation of Crimea to Russia in 2014, the Transnistrian government attempted to use this precedent to be annexed to the Russian Federation (BBC News, 18 March 2014). Until now (2015) the region has not yet been annexed by Russia, probably because the two state have no geographical continuity.

Moving to the Caucasus it is possible to analyze the Chechnya attempt to secede from the Russian Federation, the only post-soviet conflict that was de-frozen by force of arm. To analyze briefly the ethnic and historical situation that brought to Chechnya’s secession is just useful to say that “Chechnya’s main ethnic group is the Chechens, with minorities of Russians and Ingush. The Chechens and the Ingush are both Muslim… Secessionist sentiments emerged in 1991 as the Soviet Union’s decline accelerated… [In November 1991] Chechnya’s independence from the Russian Federation [was declared]… On December 11, 1994, Russian troops invaded Chechnya” (Encyclopedia Britannica, Chechnya). The Russian troops were partially defeated but returned in 1999 and were able to pacify violently the region. “In 2003 Chechen voters approved a new constitution that devolved greater powers to the Chechen government but kept the republic in the federation” (Ibid.) closing, at least the jure, the great epic of the Chechnya’s secession. Analyzing Russian Law, we can
see that in the Russian Constitution of 1993 is stated “The Russian Federation shall ensure the integrity and inviolability of its territory” (Russian Constitution, Article 4). Article 5 is even clearer stating that “The federal structure of the Russian Federation is based on its state integrity, the unity of the system of state authority, the division of subjects of authority and powers between the bodies of state power of the Russian Federation and bodies of state power of the subjects of the Russian Federation, the equality and self-determination of peoples in the Russian Federation” (Ibid. Article 5). Any right of self-determination can be exercised only in its internal conception, autonomy and self-government, but the principle behind the Russian Federalism is the “state integrity”, leaving no room for debate on the State Rights such as in the 19th century USA or Switzerland. Article 4 furthermore seems to legalize the violent attempt of Russia to avoid the secession of Chechnya in 1994 and 1999, as the Federation has the duty to maintain the territorial integrity of its territory. The Russian Constitutional Court Jurisprudence reinforced all of this. With its judgment on July 31 1995, it stated “The constitutional goal of preserving the integrity of the Russian State accords with the universally recognised international legal principles concerning the right of nations to self-determination. It follows the Declaration of the principles of international law pertaining to friendly relations and co-operation between States in accordance with the Charter of the United Nations, adopted on October 24, 1970, that the exercise of the right to self-determination “should not be construed as sanctioning or encouraging any acts leading to the dismemberment or complete disruption of territorial integrity or political unity of sovereign independent States acting pursuant to the principle of equality and self-determination of nation” (Russian Constitutional Court, 31 July 1995). The principle of self-determination for the Court should never infringed the right of territorial integrity. What is interesting here is that Russia itself will violate this principle in 2008 in Georgia and in 2014-2015 in Ukraine, which bring to ask if Russian is today challenging the modern international law on secession, as it has been done by the States that recognize Kosovo. In general, there was no international reaction to the secession of Chechnya,
which was considered a purely internal issue of Russia. Nevertheless, according to Draganova, with the judgment of 31 July 1995 “It is indisputable, however, that the Russian Constitutional Court has promoted the application of international law and has in this way broken out of the isolationist tendency of the former Soviet society in general, and of the Soviet legal system in particular.” (Draganova 2004, page 589). Even if the Russian jurisprudence and policies was in favor of the international law principle of territorial integrity in 1994, they appear to have changed behavior with the annexation of Crimea in 2014 (that will be analyze in the next paragraph) and with the recognition of Abkhazia and South Ossetia in 2008, a fact that will be analyzed now.

Always in the Caucasus region, Georgia has not one but two secessionist regions in its territory: Abkhazia and South Ossetia. Firstly it will be briefly analyzed the history of these two secessionist States. Abkhazia is a small region located in the western part of Georgia and its western side faces the Black Sea. An ethnic group called Abkhazian, with closer historical and cultural ties to Russia than to Georgia, inhabits the area. In February 1921, just after the formation of the USSR in fact “Abkhazia was granted the status of Union Republic” (Francis 2011, page 65) and was not integrated into the Georgian SSR. “In April 1925… the Abkhaz authorities adopted a constitution whereby they asserted their independence from Georgia” (Ibid.). However, probably under the pressures of the Georgian dictator of the USSR Joseph Stalin, “In February 1931 the Abkhaz SSR was eventually turned into an autonomous republic within the Georgian SSR” (Ibid.). With the collapse of the USSR and with the administrative boundaries becoming international borders, the tension could no longer be quieten. The Abkhazian leadership see no other way to safeguard the interest of its population than to secede, and a brief war in 1992-1993 ended in a stalemate, conferring to Abkhazia a de facto independence. South Ossetia has an analogous history. Located in the Caucasus, at the border between Georgia and Russia, is inhabited by an ethnic group called Ossetians. The region, in the Soviet era, was not an autonomous republic as Abkhazia. However, “In 1989, the South Ossetian
government requested that the Georgian government upgrade the oblast to an autonomous republic. Not only did the Georgians deny this request, they established Georgian as the official language throughout the Republic of Georgia, including South Ossetia, and, in 1990, barred regional political parties from taking part in elections. This led to South Ossetia proclaiming the South Ossetian Democratic Republic” (School of Russian and Asian Studies, South Ossetia). Even here, the war that followed ended with the withdrawal of the Georgian forces and the formation of a de facto independent State. The tension in the area escalated once more in 2008, when Russia invaded Georgia in order to protect the two secessionist Republics. Even if the 1994 sentence of the Russian Constitutional Court Russia have underlined the importance of territorial integrity, for both national and international law, the 2008 war was a clear violation of Georgia’s territorial integrity, in order to protect the right to secede of Abkhazia and South Ossetia. The behavior of Russia however is not so different by that of NATO bombing of Serbia in 1999 in order to guarantee the right to secede of Kosovo. Furthermore, Russia was the first country to recognize officially the two secessionist Republics as independent States. In August 2008 “The Presidents of South Ossetia and Abkhazia, based on the results of the referendums conducted and on the decisions taken by the Parliaments of the two republics, appealed to Russia to recognize the state sovereignty of South Ossetia and Abkhazia. The Federation Council and the State Duma voted in support of those appeals” (Statement by President of Russia Dmitry Medvedev, 2008) Furthermore, the Russian president “calls on other states to follow its example. This is not an easy choice to make, but it represents the only possibility to save human lives” (Ibid.). Russia used the theoretical background of the just cause theory of secession to justify its intervention in favor of the right to secede of the Abkhazian and Ossetian. Now it is possible to take into consideration Georgia Law. Already in Article 1 it is possible to read “Georgia shall be an independent, unified and indivisible state, as confirmed by the Referendum of 31 March 1991, held throughout the territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the Former Autonomous
Region of South Ossetia and by the Act of Restoration of the State Independence of Georgia of 9 April 1991” (Georgian Constitution, Article 1). Not only the indivisibility of the State is clearly specified, but also the two secessionist regions are indicated by name as integral parts of the country in the first Article. This statement leave no room in Georgian Law for any right to secede for the two regions, and explains why the conflict remains frozen until today. The Russian intervention in 2008 nevertheless opened an interesting issue. With the Kosovar secession, recognized in the same year by many state member of the UN, and with the Russian recognition (together with other three member States of the UN) of Abkhazia and South Ossetia, it is possible to ask if the international community is moving in a different path toward the right to secede than the one that has been followed after WWII. Interesting for what concerns the link between the international community and the Abkhazian-Ossetian Case is the fact that “The standards before status adopted by the UN in relation to Kosovo… fuelled expectations that the fulfilment of criteria of statehood would be followed by recognition. This policy was seen by de facto states as all the more important as Kosovo had previously had the status of an autonomous province, and was legally not entitled to secede” (Francis 2011, page 171). Then now many secessionist movements hope that the recognition by many States and by the ICG of Kosovo opens a new way for a clear and univocal recognition of the right to secede in international law.

The final part of this paragraph will deal with the secession of the Nagorno-Karabakh region from Azerbaijan. It is another case of ethnic secession, as a majority of Armenians inhabits the region, which constitutes an enclave inside Azerbaijan, a fact that has further exaggerated the tensions in the area.
Map of Nagorno-Karabakh Republic and of the area of Azerbaijan occupied by Armenia, and that of NKR occupied by Azerbaijan\(^1\)

\(^1\)http://karabakhfacts.com/nagorno-karabakh-republic-artsakh-map/
About the history of the area, “On June 12, 1921, Alexander Miasnikyan, Chairman of the Council of People’s Commissars of the Armenian SSR, issued the following Decree: “On the basis of the Declaration of the Revolutionary Committee of the Soviet Socialist Republic of Azerbaijan, and the Agreement between the Socialist Republics of Armenia and Azerbaijan, it is declared, that from now on Nagorno Karabagh is an inseparable part of the Soviet Socialist Republic of Armenia” (Avakian 2013, page 12). Despite this decision “On July 7, 1923, the Azerbaijan SSR’s Central Executive Revolutionary Committee established the Nagorno Karabagh Autonomous Oblast/Region (NKAO) only on the Armenian populated part of its territory, thus artificially isolating NKAO from the Armenian SSR and deprived of a common border” (Ibid. page 14). Despite the fact that the borders between the different Republics of the USSR were mere administrative boundaries, the issue remain central in the Armenian-Azerbaijani relations. During a “Session Protocol of the Presidium of the Council of Ministers of the USSR of November 23, 1977, it was mentioned that: “As a result of a number of historic circumstances, Nagorno Karabagh was artificially annexed to Azerbaijan several decades ago. In this process, the historic past of the oblast [region], its ethnic composition, the will of its people and economic interests were not taken into consideration. Decades passed, and the Karabagh problem continues to raise concern and cause moments of animosity between the two peoples, who are connected with ages-old friendship. Nagorno Karabagh (Armenian name - Artsakh) should be made part of the Armenian Soviet Socialist Republic. In this case everything will take its legal place” (Ibid.). As in the other cases, the tension arose when the USSR collapsed. In 1991, the newly independent Azerbaijan decided to abolish the autonomy of Nagorno-Karabakh. This act violated the law of the Azerbaijani SSR, of which the newborn state was the de jure successor. In fact, with the “Law of June 16, 1981… prohibited infringement of Nagorno Karabagh Autonomous Oblast’s borders without the latter’s explicit consent” (Ibid. page 17). Azerbaijan then decided to break any connection between the Azerbaijani Republic and the Azerbaijani SSR. The rejection of the Soviet law for
Azerbaijan is stated clearly in the Constitutional Act of 1991, which form the basis for the modern Constitution of Azerbaijan dated 1995. Here it is possible to read: “The Republic of Azerbaijan is the heir of the Republic of Azerbaijan that existed from May 28, 1918 till April 28 of 1920” (Azerbaijani Constitutional Act, 1991, Article 2). Furthermore, “The section of the contract on the establishment of the USSR of December 30, 1922, devoted to Azerbaijan is not effective since signing of the said document” (Ibid. Article 3). According to Avakian these legal moves was necessary to preserve Nagorno-Karabakh inside the Azeri borders. Effectively “The Azerbaijan SSR was the only Soviet Republic whose borders were determined by International Treaties (the Treaty of Moscow of March 16, 1921 and the Treaty of Kars of October 13, 1921), which were never denounced by Azerbaijan. It is the only Soviet Republic whose territorial integrity loses its basis without these Treaties and outside of the Soviet legal heritage.” (Avakian 2013, page 19). Here the hostility that followed the attempt of Nagorno-Karabakh to secede from Azerbaijan, backed by the Armenian army, ended in a victory of the Armenian, which occupied the territory that divides Armenia from Nagorno-Karabakh. Anyway, until today, no peace treaty have been signed between the parties, and an armed peace is in place, with occasional border skirmishes. The modern Constitution of Azerbaijan, which is based on that of 1991, affirms: “The territory of the Azerbaijan Republic is sole, inviolable and indivisible… No part of territory of the Azerbaijan Republic may be estranged. The Azerbaijan Republic will not give any part of its territory to anybody” (Azeri Constitution 1995, Article 11). Ignoring the Soviet Law, the Azeri Constitutions deny any right to secede to the people of Nagorno-Karabakh. For what concerns the behavior of the international community toward the secession of Nagorno-Karabakh, no State member of the UN have recognized Nagorno-Karabakh so far. The General Assembly in 2008 (not by chance in the same year of the declaration of independence of Kosovo) have passed resolution 10693. In it the GA “reaffirmed Azerbaijan’s territorial integrity, expressing support for that country’s internationally recognized
borders and demanding the immediate withdrawal of all Armenian forces from all occupied territories there” (GA Resolution 10693, 14 March 2008).

As for the case of Abkhazia and South Ossetia, the independence of Kosovo has indeed created a precedent in international law. Many secessionist states, stressing the fact that many of them were former autonomous provinces as Kosovo, demand the international recognition of their right to self-determination, which have been expressed through an act of secession. Has the recognition of Kosovo independence by the ICG in 2010, together with the Russian recognition of Abkhazia and South Ossetia in 2008, opened a new interpretation of the right to secede in national and international law? This question requires a deeper analysis, taking into consideration the most recent events: the Russian annexation of the secessionist Crimea, and the secession of Donbass from Ukraine.

3.4 Secessions in the Former USSR, a never-ending story. Ukraine: Crimea and Donbass

The period that followed the collapse of the USSR did not brought to light all the ethnic tensions of the Soviet era. Some remained silent, as the one between the Russian minority in Ukraine and the central Ukrainian government. For more than 20 years, the Russian minority in Ukraine has expressed no secessionist feelings. In modern Ukraine 17.3% of the population are ethnic Russian and for 29.6% of the population Russian is the main language (CIA World Factbook, Ukraine). Even if is not the main duty of this analysis to analyze why only in 2014 the Russian ethnic minorities have decided to use the right to secede from Ukraine, a brief analysis of the theme is nevertheless interesting. It could be possible to define, using Huntington’s theory of the clash of civilization, Ukraine in 2014 as a torn country. For Huntington torn countries “have a fair degree of cultural homogeneity but are divided over whether their society belongs to one civilization or another” (Huntington
1993, page 42). With the Jevromajdan revolution of November 2013 Ukraine decided to leave the Orthodox civilization (historically led by Russia) for the Western civilization, in particular for the European Union. The revolution was unleashed by the decision of the former Ukrainian Prime Minister, Viktor Yanukovych, to suspend the trade agreement with the EU, instead “Russia wants Ukraine to join its own customs union with Kazakhstan and Belarus, which it sees as a prototype rival to the European Union” (BBC News, 21 November 2013). The Jevromajdan revolution has destroyed any closer cooperation between Russia and Ukraine, and moved the country once more in the direction of the EU. This decision has left dissatisfied all that part of the Ukrainian population that identifies more with Russia than with Europe. The only instrument for these people to maintain intact their cultural identity was to use the right to secede. Analyzing first the case of Crimea and then the one in Donbass (which are quite similar) it will be analyzed the legal issues raised by the secession of Crimea (and the following annexation by Russia) and the secession of the provinces of Donetsk and Lugansk.

Crimea is a strategical peninsula, a lighthouse on the Black Sea, with a fundamental strategic port in Sevastopol. The region was part of the Russian SSR until 1954, when Nikita Khrushchev transferred the area to Ukraine “in commemoration of the 300th anniversary of the Pereyaslav Agreement, a treaty that submitted Ukraine to Russian rule” (Encyclopedia Britannica, Crimea). Then in 1991, Crimea became part of the newborn independent Ukraine as an autonomous Republic. Since than in two occasions Russia has guaranteed Ukraine territorial integrity. In 1994, with the Budapest Memorandums, Ukraine gave to Russia all its soviet nuclear weapons in exchange Russia expressed its will “to respect the independence and sovereignty and the existing borders of Ukraine” and “reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine” (Budapest Memorandums, 1994). Furthermore, with the Treaty of Friendship, Cooperation, and Partnership, dated May 31 1997, which was aimed to settle the issue of the Black Sea Fleet, Russia and Ukraine committed to “respect
territorial integrity of each other and confirm inviolability of borders existing between them” (Treaty of Friendship, Cooperation and Partnership, May 31 1997). For what concerns Ukrainian Law, Section IX is dedicated to the Territorial Mode of Ukraine while Section X is specifically dedicated to the Autonomous Republic of Crimea. According to Article 132: “The territorial mode of Ukraine is based on bases of unity and integrity of state territory” (Ukrainian Constitution, Article 132). Furthermore, Section X states: “The Autonomous Republic Crimea is inseparable constituent part of Ukraine and decides on the issues ascribed to its competence within the limits of authority determined by the Constitution of Ukraine” (Ibid., Article 134). Moreover, “Normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea and decisions of the Council of Ministers of the Autonomous Republic of Crimea shall not contradict the Constitution and the laws of Ukraine and are adopted in accordance with the Constitution of Ukraine, the laws of Ukraine, acts of the President of Ukraine and the Cabinet of Ministers of Ukraine, and for their execution.” (Ibid. Article 135). Then for Ukrainian Law any normative act of the Autonomous Republic of Crimea must be in accordance with the Ukrainian Constitution and have the consent of the Ukrainian government. The 16 March 2014 referendum on the annexation of Crimea to Russia was clearly illegal in Ukrainian law, as none of these legal practices have been followed for its application. Unilateral secession, even if it is the willing of the people of Crimea, cannot be considered legal under this Constitutional framework. It is now interesting to look at the reaction of the international community on the secession of Crimea. The UN Security Council proposed a draft resolution that stated: “This referendum can has no validity, and cannot form the basis for any alteration of the status of Crimea; and calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status” (UN SC, D.189, 15 March 2014). The resolution was vetoed by Russia, and China abstained, but all the other members of the Security Council voted in favor. Even in
this case, as in previous secessionist cases that has been analyzed, a question remains. As Crimea inside Ukraine, Kosovo was an autonomous province inside Serbia, with analogues legal requirements for a possible (even if remote because it requires changing the Constitution) independence under the Serbian Law. Why then the western states have recognized the right of Kosovo to secede from Serbia and not that of Crimea to secede from Ukraine? Was this decision justified by the Serb violent actions in and before 1999, then charactering the Kosovar secession under the umbrella of the just-cause theory of secession? The ICG however denied to legitimize the Kosovar secession under the theoretical background of neither self-determination or remedial secession. It is possible that Russia is trying, with the annexation of Crimea, to justify in international law the national self-determination theories of secession? Confirming the ambiguity of contemporary international Law on the right to secede, the UN General Assembly passed resolution A/RES/68/262. In it, the General Assembly “Affirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders” and “Underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol” (General Assembly Resolutions, A/RES/68/262, 27 March 2014). Eleven countries voted against the Resolution and 58 abstain, while 100 voted in favor (UN Voting Record). As in the case of Kosovo, this situation highlights that the international community is fractured on the issue of right to secede, or more properly on how to conciliate the issue of self-determination and the right of the states to territorial integrity. Anyway, for Malyarenko and Galbreath, the situation in Kosovo and Crimea cannot be compared. For them “Although the Kosovo case is often used as an analogy and scenario of future radicalisation of violence and flash-point in the Crimea, these cases are rather different. Periodically raising social tension in the Crimea is more a consequence of the complex impact of state weakness, inefficient public policy towards the autonomous region, propaganda
campaigns of politicians and mass-media in Simferopol, Kiev and Moscow, than a result of deeply rooted ethnic hatreds or social inequality between two ethnic groups” (Malyarenko and Galbreath, 2013 page 21). Is the association between violence (ethnic violence in this case) and secession that has allowed Kosovo to secede in 2008 and Crimea to commit an illegal act? In the case of Crimea, they were few episodes of violence, as Russia quickly annexed the region. Nevertheless, then why all the areas that could be more easily compared to Kosovo for the level of ethnic violence reached (Transnistria, South Ossetia, Abkhazia, Chechnya and Nagorno-Karabakh) have not received an Althusian’s right to secede, in order to safeguard the population of the “province” from the “tyranny” (feared or real) of another ethnic group? Why the Ephors of these regions could not act in order to defend the local population from foreign subjection, as the colonial peoples have done since WWII?

Now it is interesting to take briefly into analysis a case, strictly attached to that of Crimea, which proves how the prediction of Malyarenko and Galbreath in 2013 on the evolution of the relations between the Ukrainian and the Russian ethnic groups would remain outside the world of ethnic hatred, and not degenerate as in Kosovo, was false. It is the war in Donbass between the Ukrainian troops and the secessionist republics of Donetsk and Lugansk, unofficially supported by Russia. The situation here is very similar to Crimea. The Russian population of the two oblast wishes to secede from Ukraine. According to the 2001, Ukrainian census the Russian-speaking population in Donetsk region is 74.9%, and in Lugansk is 68.8% (Ukrainian Census, 2001). Differently from Crimea, the two regions are not autonomous republic, but are considered oblasts, regions, (Ukrainian Constitution, Article 133), then they do not enjoy a statute of autonomy or have a separate constitution such as the Autonomous Republic of Crimea. Here the indirect, and never admitted by Moscow, Russian intervention was not able to avoid a full-scale war, that even after the Minsk agreement of February 2015, left a precarious situation in place. It is interesting to see that in the agreement, even if the secession of the two regions was not recognized, a “temporary Order of Local Self-Governance in Particular Districts of Donetsk and
Luhansk Oblasts” (Minsk Agreement, 12 February 2015), has been put in place. On 31 July 2015 the Constitutional Court of Ukraine has approved a large degree of autonomy for the two secessionist regions, in a future reunited Ukraine (BBC News, 31/07/2015). This fact goes (together with the Scottish secession that will be analyzed in the next chapter) in the direction of what it has been analyzed in the first chapter, about the theories of secession. Even when the secessionist tool is used only as a threat (armed in Donbass or peaceful in Scotland) is a powerful tool in the hand of minorities to receive those rights that were previously denied. For example, the free expression of Russian culture and language, and the use of Russian as an official language, and not only as a language of a minority group, as it is treated by Article 10 of the Ukrainian Constitution.

The analysis of these cases of secession, from both the former Yugoslavia and USSR, have been useful to scrutinize the different answers that, both the public and the international law, has given to the issue of secession. The coexistence of the right of self-determination and territorial integrity of States in international law, united with local Constitutions with a Hobbesian/Bodinian foundation, has been a recipe for conflict in the post-socialist world. Anyway, in the next chapter it will be analyzed how even peaceful and deep-rooted democratic and unitary constitutional and legal frameworks are not spared from the people will to secede.
CHAPTER 4
Democratic approaches towards the right to secede:
Scotland, Catalonia, and the EU

4.1 The Constitutionalization of the right to secede: the Case of Scotland

On Thursday 18 September 2014 the people of Scotland has been called to vote to answer to this question: "Should Scotland be an independent country?" (UK Government). The Scottish case is an interesting one to analyze. In it, the right to secede has gone through a process of Constitutionalization. The Independence referendum set out the rule on who, when and how the right to secede can be exercised by a given population which is not in a state of war (as in the previous cases of the former Yugoslavia, Kosovo, Crimea, etc.) or part of a colonial empire. The aforementioned case, together with the unjust occupation of a given territory, were the only cases that the Constitutional Court of Canada has recognized as legitimate to exercise the right to external self-determination unilaterally (see chapter one). In this first paragraph it will be analyzed how the Scottish right to secede could have been and was exercised, and the future consequences of this act for Scotland and for both Unitary States and Federations.

Firstly, we have to remind that the Scottish secession is mainly based on a political agreement, the Edinburgh Agreement of 15 October 2012. Already quoted in chapter one, the agreement set out the rule for referendum on the independence of Scotland from the United Kingdom. The four main rules behind the referendum were "That the referendum should: have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, government and people; and deliver a fair test and decisive expression of the views of
people in Scotland and a result that everyone will respect." (Edinburgh Agreement, 2012). Secondly, it must be taken into account the constitutional framework of the United Kingdom (the "legal base" of the Edinburgh Agreement) and specifically that of Scotland. This is no easy task, since the UK, as a pure common-law country, has no written Constitution. Nevertheless, the large degree of self-government granted to the three countries that with England form the United Kingdom (Wales, Scotland and Northern Ireland), is regulated by written agreements. For what concerns Scotland it must be taken into account the Scotland Act of 1998. Essential to determine if the Scottish Parliament had any constitutional legitimacy to exercises the right to secede is the Article 29 of the Scotland Act, which regulates the Legislative competences of the Scottish Parliament. It stated: “An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. A provision is outside that competence so far as any of the following paragraphs apply (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,(b) it relates to reserved matters” (Scotland Act 1998, Article 29). The reserved matters, outside the competences of the Scottish parliament, are: "(a)the Crown, including succession to the Crown and a regency, (b)the Union of the Kingdoms of Scotland and England, (c)the Parliament of the United Kingdom, (d)the continued existence of the High Court of Justifier as a criminal court of first instance and of appeal, (e)the continued existence of the Court of Session as a civil court of first instance and of appeal" (Ibid., Schedule 5). The only reserved matter that, in the Scotland Act, may make impossible the exercise of a right to secede, is the one related to the Union between the two Kingdoms. Nevertheless, it is possible to ask if Scotland could anyway exercise its right to secede and become an independent nation, while maintaining the link between the two Kingdoms remaining a Commonwealth realm, such as Canada, Australia or New Zealand. This is in line with the different application of the right of self-determination in the non-colonial world. Anyway, the pressure from a large part of the Scottish population to obtain independence was
resolved in a consensual way, with "and agreement between the Westminster Parliament and the Scottish Parliament" (Barber 2015, page 6). This was done, in the legal practice, modifying the Schedule 5 of the Scotland Act in 2013. It was affirmed that "Paragraph 1 [of Schedule 5 of the Scotland Act] does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom" (Modification of Schedule 5, Order 2013). This act was approved by the Scottish Parliament "on 5th December 2012, and the Commons and Lords gave their approval in January 2013" (Barber 2015, page 6). Anyway it is possible to ask if the 2013 amendment of the Schedule 5 was really Constitutionally necessary, as the Union between the two kingdom was intended in an Hobbesian/Bodinian meaning, or it was just a political move to avoid a unilateral (even if legitimate) Scottish secession. This means give to the union between the two Kingdoms an Althusian meaning. The members of the Scottish parliament would be the Ephors of the Scottish people for Althusius. Tomkins argues against the right of the Scottish parliament to hold an independence referendum. For him the Article 29 of the Scotland Act and that point to the reserved matters, in the specific the union between the two Kingdoms, deny to the Scottish Parliament the possibility to secede (Tomkins, 2014). This would be highlighted by the fact that "The question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined... by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances" (Scotland Act 1998, Article 29). Nonetheless, even if this passage stresses the importance of the reserved matters, it this does not clarify if the Union between the two Kingdoms is political in a Hobbesian sense or only symbolic as for the Realms of the Commonwealth. Furthermore, it is interesting to compare the Scotland Act with the Northern Ireland Act of the same year (1998). In a 2002 case, the House of Lord determined that "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be
interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody" (Robinson v Secretary of State for Northern Irelands and Others, 25 July 2002). This case compared the Status of the Acts of the different countries of the United Kingdom to actual Constitutions. Furthermore, while interpreting these Constitutions it should be used a broader (or generous) interpretation of the text. To identify the Scotland Act of 1998 as a Constitution and interpreting the union between the two Kingdoms in a broader and then symbolical sense, points in favor of a pre-existent right to secede in the Scottish Constitutional framework. This would give to the 2013 acts a mere political value. Another way to guarantee to the Parliament of Scotland the right to unilateral secession, is the fact that this parliament could always decides to issue an advisory referendum (Scottish Affairs Committee 2012, page 10). For Curtice “a referendum on independence would be “advisory in the technical sense but […] both sides would regard it as binding on them politically.” (Ibid.). Then the use of an advisory referendum in Scotland would be equal to a binding referendum, at least politically speaking. For Barber in fact "In the British system the distinction between an advisory and a binding referendum is illusory" (Barber 2015, page 8).

Anyway, despite the debates on how the Scottish Secession could have been achieved, the 2014 referendums voted against the separation of Scotland from the United Kingdom, with 55.3% of the population in favor of the Union and 44.7% for secession. (UK Government). How the political debate influenced the outcome of the referendum is out of the scope of this analysis. More interesting are the legal issues raised by the Scottish independence referendum. The most interesting is that once the right to secede to a given region has been granted, the local government could always hold a referendum for independence. In the Scottish Constitutional framework "there is no constitutional bar on a second Scottish independence referendum being held in the very near future" (Barber 2015, page 9). This means that a secessionist referendum could be held continuously until the separatist movements does not reaches a majority of the vote and independence is obtained. In Canada, this issue
was avoided by separating the two referendums on the independence of Quebec by 15 years (one in 1980 and one in 1995) (Smith, 2013). The Canadian move was done to elude the risk to fall in what many calls the "Neverendum" (Qvortrup, 2013), and endless series, in succession, of referendums on independence. Weinstock suggested that the timeframe for the secessionist referendums should be constitutionally regulated. In particular, "a ten-year waiting period" (Weinstock 1999, page 17) should separate one referendum from another. The Belfast agreement of 1998, that finally put an end to the endless religious fight in the Ulster, gives to Northern Ireland the opportunity to "cease to be part of the United Kingdom and form part of a united Ireland" (Belfast Agreement 1998, Schedule 1). Anyway, the referendum regulating this secession cannot be held "Earlier than seven years after the holding of a previous poll under this Schedule" (Ibid.). Barber instead suggests a longer period "Such as twenty or thirty years [because] this would reduce the dangers... arising out of secession rights" (Barber 2015, page 14). Whatever way the time framing for the referendum is, it could be possible, for Barber, to override the time limit with a super-majority vote in the Scottish Parliament, with "three-fifths of votes or two-thirds of votes" (Ibid. page 16). The idea to override the time limit is an interesting (even if odd) application of the Just-cause theories of secession inside a democratic framework. When the situation is critical, even the Constitutional rules that guarantee the right to secede can be ignored.

Despite the different time framing all these authors suggest that what happened in Scotland is the Constitutionalization of the right to secede and that "secession referendums are likely to become a rare, but regular, feature of British Constitutional life" (Ibid., page 1). For the authors in favor of the Scottish right to secede, this right is also in general an important tool in the hands of a minority group or a region, which feels that costs overcome the benefits of being part of a unitary state. Using Barber words: "The principal benefit of a secession right is its capacity to encourage the larger part of the state to consider the interests and wishes of a smaller region. Even without the region threatening to use the power, the bare fact of its existence
may help shape its relationship with the remainder of the state... It limits the sacrifice that the region can be asked to make for the benefit of the rest of the state. When the sacrifices outweigh the benefits, the region can leave” (Ibid. page 15). A similar theory was that of Miglio (Miglio 1997), analyzed in chapter one. This theory will be implicitly taken once more into account while analyzing the possibility of the EU member states to secede, from the Union or from the Euro zone. The Scottish Secession proves that the right to secede is not only the product of conflict and wars, as the previous chapters might have shown. Even if the right to secede in itself is disruptive for a unitary state it can be, nevertheless, handled inside a democratic framework. Despite this, many unitary states, and authors, oppose the legalization of the right to secede. For Sunstein "Constitution ought not to include a right to secede. To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance" (Sunstein 1991, page 634). What Sunstein does not consider in his analysis is that the same instrument used by a secessionist region (such as blackmail and by it exploitation) can be used without limitations by the central government, as Althusius has theorized centuries earlier. Furthermore, in the case of Scotland the right to secede is instead a useful tool to push for greater autonomy. The possibility of a new independence referendum could lead, for example, into the approval of full fiscal autonomy for Scotland (BBC News, Scottish Devolution) or something similar, which will increase the autonomy of Scotland inside the UK constitutional framework. In the next paragraph it will be analyzed the case of Catalonia, a peculiar case of a unitary state opposing in every way to the legitimization or Constitutionalization of the right to secede, seen as a threat to the very own nature of the State itself.
4.2 Catalonia: Bodinian State vs. Secession

This paragraph will concentrate on the attempts of Catalonia to secede from Spain, and the answers of the Spanish State toward both the Catalan and the Scottish secession. After a brief historical analysis of Catalonia and Spain, important to understand the background on which the Spanish Constitutional framework is based, it will be analyzed the Jurisprudence of the Spanish Constitutional Court on the Catalan case.

Catalonia is often considered a nation without a State (Mc Roberts 2001), a fact that clearly integrates this case into the National self-determination theory of secession. The presence in Catalonia of a distinct language (the Catalan) and of a strong cultural heritage derived the Kingdom of Aragon that lasted (politically) until 1714, when the Bodinian approach toward the state administration took place in Spain with the first Bourbon King. In that date, “Philip V ordered the dissolution of the Catalan institutions and Catalonia was subject to a regime of occupation. Catalan was forbidden and Castilian (Spanish) was proclaimed as the official language” (Guibernau 2007, page 2). After the War of Spanish succession, Spain incorporated the Bodidian, absolutistic kind of government, typical of the Bourbon dynasty. After years of absolutistic rules “in the 1930s, Catalonia regained a measure of self-rule. Following the Spanish Civil War, however, General Francisco Franco established a centralized dictatorship” (Connolly 2013, page 56). The already mentioned Section 2 (see chapter one) of the Spanish Constitution of 1978 was an attempt to mediate between the unitary tendencies of the Spanish State and the desire for an independent identity by the Catalans, the Basques and Galicians. In fact, it affirms: “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all” (Spanish Constitution, Section 2).
The Spanish case, however, shows very well how difficult the Bodinian/Hobbesian concept of the State and the Althusian one can coexist. Enric Fossas have explained this in his study of the Spanish Constitution and its relation to the local autonomies: “The so-called “modelo autonómico” (the current system of Spanish devolution) is not found in the Constitution because this would have “deconstitutionalised”, at least partly, the territorial organisation of the State. In reality… we are dealing with a preconstitutional model, because the generalisation of the so-called “provisional” regions before the Constitution conditioned both its writing and even its later development; and of a subconstitutional model, because the Constitution does not create the State of Autonomies: it does not constitute the Autonomous Communities, nor delimit their territory, nor yet establish their organisation, nor does it determine their powers. All these constitutional decisions are deferred to at a later time, the constitutional text limits itself to establishing procedures in which the principal players are, on the one side, the local representatives who must manifest their desire for autonomy; and, on the other side, the central institutions, specifically, the lower Chamber of the Spanish Parliament (Congreso de los Diputados), which must develop the so-called “bloque de la constitucionalidad” (the Statutes of Autonomy and laws which delimit powers), and the Constitutional Court, which —by virtue of its jurisprudence— has the role of supreme interpreter of the constitutional text.” (Fossas 1999, page 6). The creation of the autonomous regions of Spain has been always done under the watchful eye of the Bodinan conception of the State, very strong in the Spanish central government. Every step toward a greater autonomy must be detailed scrutinized by the central government. The fact that the 1978 Constitution, denying not only any possibility to exercise the right to secede but it also limited the right to autonomy, was a de facto a defeat for the minorities presents in the territory of Spain. While in the Basque Country this feeling was expressed violently by the secessionist group ETA, in the Catalan region it followed a democratic path, similar to that of Scotland.
Differently from Scotland, the Spanish Constitution clearly denies in Section 2 any possibility to exercise the right to secede. Taking into account the Statue of Autonomy of Catalonia is possible to see, on the one hand, a strong emphasis on the Catalan identity “In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality” (Catalonia Statute of Autonomy 2006, Preamble). On the other hand “Catalonia, as a nationality, exercises its self-government constituted as an autonomous community in accordance with the Constitution” (Ibid., Article 1) then under the principle of the indissoluble unity of the Spanish nation. Therefore, even the Catalonia Statue of autonomy is characterized by the same centrifugal forces that characterizes the Spanish Constitution of 1978.

The will of the Catalanian to achieve secession has grown steadily in the recent years, and it has been surely fueled by the Scottish independence referendum. The idea was that the Scottish referendum could become a precedent in Public Law to manage the case of self-determination outside the colonial framework, but that did not happened. Firstly the Spanish government hastened to declare, before the results of the Independence referendum in Scotland, that in any case Scotland (if it lefts the UK) should be kept out of the European Union, and to be considered as a country seeking to enter into the EU for the first time (The Guardian, 27/11/2013). This means that Spain could have vetoed Scotland accession to the EU, as the admission of New Member State requires the unanimity of the 28. The position of Spain, on the importance of the principle of the integrity of the frontiers, is remarked by the fact that “Spain… do not recognize Kosovo” (Tolksdorf 2009, page 105) as an independent country. These facts show how Spain has tried to do not create any precedent that could allow the Catalan people to invoke a right to secede in relation to the Spanish nation. Despite the clear opposition of the Spanish government to any legitimization of the right to secede, the Government of Catalonia decided to gather the Catalan people on a controversial referendum on the independence of Catalonia,
held on 9 November 2014, right after the Scottish referendum. The referendum, unlike the Scottish one, has no binding nature. It was composed by two questions: the first “Do you want Catalonia to be a State?” (Public Diplomacy Council of Catalonia, 9N2014 Vote) and the second one “If so, do you want Catalonia to be an independent State?” (Ibid.). The decision to hold a referendum was entirely taken by the government of Catalonia, with “107 out of the 135 Members of Parliament” (Ibid.) (79%) voting in favor of the referendum. The Catalan government attempted to make the referendum legally binding using Section 150.2 as legal basis to propose an agreement to the Spanish government. The section affirms: “The State may transfer or delegate to the Self-governing Communities, through an organic act, some of its powers which by their very nature can be transferred or delegated. The law shall, in each case, provide for the appropriate transfer of financial means, as well as specify the forms of control to be retained by the State” (Spanish Constitution, Section 150.2). It was an attempt to obtain a Constitutionalization of the right to secede, interpreting in a broad sense the Spanish Constitution. Nevertheless, the question, as in the case of Scotland, was decided eventually by political and not legal terms. In fact, on 8 April 2014, the Spanish Parliament rejected the Catalan petition with 299 against and only 47 votes in favor (BBC News, 9/04/2014). Despite this, the Catalan government decided to go on and hold, anyway, a mere consultative referendum. In the vote, “2,305,290 Catalans cast their vote, 35.81% of those who were eligible to do so. From all voters, 80.76% voted in favour of independence, 4.54% against and 10.7% in favour of a non-independent state (the federal solution)” (Public Diplomacy Council of Catalonia, 9N2014 Vote). The law turnout (35.81%) has increased the doubts on the nature of the referendum. If the aim of a consultative referendum is to show the political will of a people to exercise the right to secede (as it has been analyzed in the Scottish case), even if it is legally unable to do so, the referendum of November 2014 was not able to reach this goal. Furthermore the fact that minors (above the age of 16) and every people resident in Catalonia (so even immigrates that do not have Spanish citizenship) (Ibid.) were able to vote further increased the doubts
on the nature of the referendum. In a regular election in Spain, as in quite all the
democratic countries of the world, this is illegal. As expressed by the Constitution
“Spaniards come legally of age at eighteen years” (Spanish Constitution, Section 12),
and “Only Spaniards shall have the rights recognized in section 23” (Ibid., Section 13) that is the right to vote.

The jurisprudence of the Spanish Constitutional Court has expressed on the
Constitutionality of the Catalan referendum on 11 June 2015. The court has quoted
the Article 122 of the Statute of Autonomy of Catalonia on popular Consultation,
which express: “The Generalitat has exclusive power over the establishment of the
legal system, the modalities, the procedure, the implementation and the calling,
whether by the Generalitat or by local bodies, acting within their jurisdiction, of
public opinion polls, public hearings, participation forums and any other instruments
of popular consultation” (Catalonia Statute of Autonomy 2006, Article 122).
According to the court ruling, “This statutory provision prescribes a clear limit to the
autonomous competences on matters referendum. The referendum that falls into the
competences of the Autonomous Community of Catalonia must be bound to the
“scope of its competences” (Spanish Constitutional Court, Sentence 138/2015, Part II
Fundamentos jurídicos). The court then reminds that Catalonia has part of the unitary
state that is Spain, is competent only on the matters that the central government have
delegated to it. No delegation of the right to independence (or secession) is
conceivable under the Spanish Constitutional framework. Furthermore, according to
the Court, the Catalan government, in its referendum, has “Completely ignored the
consequences that derives from the Art. 1.2, 2 and 168 of the Spanish Constitution”
(Ibid.). Section 2 of the Spanish Constitution has already been analyzed deeply.
Section 1.2 affirms that: “National sovereignty belongs to the Spanish people, from
whom all state powers emanate” (Spanish Constitution, Section 1.2). Quoting this
Article means to deny the possibility of any form of unilateral secession, as the
Spanish people is a unique body and must decide united on the future of Catalonia.
Section 168 reaffirms the same principle of unity of the Spanish people, as it
concerns the possibility to emend the Constitution “By a two-thirds majority of the members of each House” (Ibid., Section 168). The supra majority required for any possible amendments is used to affirm both the unconstitutionality of the Catalan referendum, that did not followed these procedures, and the unity of the Spanish people in a Bodinian/Hobbesian sense. In its ruling the court has, in fact, declared that “Are unconstitutional the actions of the Generalitat of Catalonia relative to the convening of the Catalan (both men and women) and the people living in Catalonia to express their opinion on the political future of Catalonia the day 9 of November 2014” (Spanish Constitutional Court, Sentence 138/2015, Fallo). This ruling definitely denies any legality to the 9/11/2014 referendum.

Despite the ruling, the Catalan government is trying to proceed with a new independence referendum, which will be held on 27 September 2015 (Public Diplomacy Council of Catalonia, The 27S2015 Vote). To avoid any stop from the central government, the Catalan government this time will use the results of early local elections as a political symbol of the Catalan will of independence. This time, as “The vote will follow the Spanish electoral law” (Ibid.) to avoid all the doubts that the 2014 referendum had cast. Only citizens inscribed in the electoral census (so no minors or foreigners) will be able to vote (Ibid.). According to the factions that support the independence of Catalonia “If on the 27 September pro-independence parties obtain the majority at the Parliament, this will mean that the Catalan people have given a clear, democratic and unmistakable mandate for its Parliament to advance towards independence. At that point, the Parliament and the Government of Catalonia will start negotiations with Spain and the international community to achieve the best way to implement this mandate” (Ibid.). Using the choice-theory of secession as a theoretical background, the Catalan government has smartly move around the Constitutional block. The problem for the pro-independence factions is that the Spanish state is historically influenced by the Bodinian/Hobbesian theory of the unitary State (something that did not happened in the United Kingdom). It is very difficult that the Spanish government will allow any breach to the unity of the
country, creating a powerful precedent for the different minorities in State, such as Basque, Galicians and Andalusians. All the non-Castilian regions of Spain, a state, as many, founded by the aggregation of different nations, would found themselves bearer of a right to secede. With the continuous denies, from Spain, of the recognition of Kosovo independence, to do no make it an international precedent, it seems quite odd that the Spanish State will allow ever, even politically (as constitutionally it is impossible), the secession of Catalonia. The Catalan Althusian Ephors, that could in this case clearly be the members of the Catalan parliament, have been treated very differently from their Scottish counterpart by the central government. Anyway the reference to the international community (the UN or the EU mainly) left open a door for Catalonia. Could the Catalan right to secede be guaranteed in the same way as that of Kosovo? While the UN system in relation to self-determination and secession has been analyzed in the first chapter, the next and last paragraph will analyze the relationship between the European Union and the right to secede.

4.3 Secession and the nature of the State: the European Union

The European Union is a quite peculiar case in the analysis of the right to secede. The problem with it is that is not easy to fit clearly the EU into the category neither of the Westphalian/Hobbesian States nor into the one of International Organizations (such as the UN, WTO, NATO, etc.). In the International organization the right to secede, or better to withdraw, is generally the standard. “Theories that, by joining an institution, an irreversible transfer of sovereignty has taken place might apply to the very few organizations… (e.g. European Union)” (Klabbers and Wallendahl 2011, page 98). There are also “cases where the original members agreed that, in order to ensure the organization’s stability and ability to perform its tasks, the right to withdrawal has to be curtailed for a specific number of years ranging from one year (in the case of the International Maritime Organization) to six years (European Space
Agency and EUMETSAT) to 20 years (NATO) to 50 years (Western European Union). On account of the specific objective of such clauses, it should be accepted that members have undertaken a legally binding obligation not to withdraw and, were they to secede, the organization could deem it as an illegal act and proceed accordingly” (Ibid.). Another example regarding the possibility to secede from an International Organization is that “The United States has often used withdrawal from institutions belonging to the UN family as a means to show its overall dissatisfaction with developments in them” (Ibid., page 100). Even if inside the UN Charter “No… provision lays down the possibility for the individual State to unilaterally withdraw from the organization” (Conforti 2005, page 42) the practice has followed a different path. In “1965 [Indonesia] announced and put into effect its intention to withdraw from the Organization” (Ibid., pages 42-43). What followed was “The UN’s acquiescence to the withdrawal… from a series of conclusive acts of the Organization, such as the cancellation of Indonesia from the list of members” (Ibid., page 43). The “secession” from an international organization is smooth, as the State does not cede sovereignty to the Organization, then it is very easy to get out without infringing the power relations of the Organization and that of the State that decides to withdraw.

However, in the European Union, differently from all other international organizations, the States have ceded a portion of their sovereignty. The Union has the power to decide by a majority vote (simple or qualified) acts that will be binding for all the Member States, including those against the acts. In these policies, the EU behaves such as a state. These polices are: “The monetary Union, the Commercial policy, [and that] of Competition” (Telò 2013, page 248). While other sectors, especially “The fiscal policies, culture, foreign and defense polices” (Ibid.), are completely under the sovereignty of the member states, leaving no room for the Union to operate such as a State. This analysis is important to determine the nature of the EU. Furthermore it will help to understand why in its Constitutional framework, determined de facto by the treaties, is legalized the right to secede or to withdraw. As
it has been mentioned in chapter 1, the Lisbon Treaty affirms clearly: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements” (Lisbon Treaty 2009, Article 49 A, par 1). The following paragraphs of the Article defines the legal procedure for a secession from the EU. It is interesting that “A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union” (Ibid., Article 49 A, par 2). This means that even if the secession of a member State of the EU can be unilateral it must always be regulated, for the deep economic and political effects that the withdrawal of a member state would cause on the entire Union. This is a consequence of the fact that Member States have put, so far, a part of their sovereignty in the hands of the Union. The presence of the right to secede inside the Lisbon treaty, but even more important its procedural regulation, shows how the EU has assumed some (but not all) the characteristic of a State. The withdrawal from any other international organization will never be so dramatic such as the one of a State that decides to secede from the EU. So far, “The only ‘test case’ of complete ‘withdrawal’ that exists at this point is the rather special case of Greenland, which stems from the mid 1980s. When the Danish electorate decided to accede to the EU, the people of Greenland opposed that move but nevertheless had to follow because they were part of the Danish territory. Yet over the years what was to be observed was a form of devolution that took place, in which powers were transferred from Denmark back to Greenland, culminating in a 1982 referendum concerning whether Greenland was to remain within the EU. It is worth pointing out that the subsequent request to ‘withdraw’ from the EU was not made by Greenland itself but by Denmark, in order to renegotiate the application of the Treaties to its territory; needless to say Member States were rather sensitive with regard to Greenland’s wishes, given the colonial context.” (Reider 2013, page 149). The case of Greenland, even if it is the only case
of complete secession from the Union, is nevertheless a case of scarce political
importance, due to the low population of Greenland and its low economic impact on
the EU as a whole. Despite this, it was surely legally important, at least to determine
the existence of article 49A of the Lisbon Treaty, functioning as a legal precedent in
the legalization of right to secede in the EU framework. It also interesting to compare
the EU right to secede with the State Right debate of the 19th century USA and the
Cantonal debate in Switzerland. Even if these two aforementioned cases did not have
clearly stated in their constitutional framework a right to withdraw or to secede, they
were both “state under construction” such as for functionalist scholar of the EU (to
whom “the cooperation in a specific field… can stimulate a process of European
Unification extended to other scopes”) (Telò 2013, page 113) is the EU today. Is then
possible to ask if the presence of the right to secede inside the EU legal framework
will be a useful tool to advance the European integration (giving a chance for the
Eurosceptic countries to leave), or instead it will put an end to it, such as the CSA,
the league of Sarnen and the Sonderbund have tried to do in Switzerland and in the
USA. The greatest test for this question lies in the referendum that the United
Kingdom has planned for 2017. The question of the referendum will be “Should the
United Kingdom remain a member of the European Union?” (European Union
Referendum Bill, UK Parliament). After the Scottish referendum, the one on the EU
proves the commitment of the UK to interpret the right to self-determination in a
much broader way than how it has been normally done by the international
community. Furthermore, as the tension between the UK attachment to sovereignty
(such as the Southern US States or the Conservative Swiss Cantons) has been
historically a stop to the European integration process (Gifford 2009) it is possible
that the UK exit from the EU could boost once more the integration process.

The problems related to the cession of sovereignty form the Member States to the EU
are now especially acute in relation to the Eurozone. The States that belong to the
common currency have de facto completely renounced to their monetary sovereignty.
In the treaties it is not present any reference to a possible withdrawal from the
Eurozone. The only reference in the treaties is that the “European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned” (Treaty on the Functioning of the European Union, Article 140, par 3). The word “irrevocably” could mean an impossibility to get out from the Eurozone, but that would contradict the much clearer article 49 A of the Lisbon Treaty on the withdrawal of a member State. How can be legally possible for a State to get out from the EU as a whole, and not from the monetary union that is only a part of the whole Union? Question about the possible exit from the Eurozone have escalated in many States after the catastrophic failure of many countries balance sheet in the years 2009-2015. The question about the possibility of other EU member state to expel a member that has breached the Maastricht’s provision on the Euro does not concern this analysis. Instead is interesting the possibility for a Member State to withdraw unilaterally from the Eurozone. Recently the discussion has been particularly strong in relation to Greece and its deep economic crisis. According to Dammann the legal options for a country that wishes to withdraw unilaterally from the Eurozone are: “(1) a full-fledged exit from the European Union; (2) an exit via an amendment to the Treaties; and (3) an exit via the clausula rebus sic stantibus” (Dammann 2013, page 131). The first option means to get out entirely from the European Union, with the normal legal procedures already analyzed, and then came back in without reenter into the Eurozone. This option did not enjoy success among those states that wishes to get out from the Eurozone because “Member States such as Greece are unwilling to leave the Eurozone when the only way to do so is by leaving the European Union entirely: it is the European Union that grants Greece access to European markets” (Ibid.). Get out from the Eurozone is something, getting out from the strong and unified European markets means a complete crush in the export of a country member of the EU. The second option means that all the 28 Member States agree to change the European Treaty (the last one is that of Lisbon of 2009) with an amendment that allows to the States to leave only the Eurozone. The problem with this option is the difficulty to reach the unanimity among the 28 Member States
(something that could become easier if the more Euro-skeptical countries, such as the UK, decide to exercise their right to secede). The third option is based on the “Vienna Convention on the Law of Treaties from 1969” (Ibid., page 133). Article 62 of the Convention states that: “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.” (Vienna Convention on the law of treaties 1969, Article 62). This clause, better known as *rebus sic stantibus*, could be applied only if the premise that brought the Euro to exist are no longer valid for a given country (e.g. Greece), and this should be judged by the European Court of Justice, which is the only one with the authority of judging over the European Treaties. According to Dammann, it is unlikely that the clause will be applied in the EU for two reasons “First, there are good arguments against applying the doctrine of *rebus sic stantibus* to the TFEU at all. Second, there is little reason to believe that the euro crisis satisfies the various requirements of the *clausula rebus sic stantibus*” (Dammann 2013, page 133). While the second statement is today debatable, with Greece completely unable to repay its debt (BBC News, 27 January 2015), using competitive devaluation for example, it is true that is legally difficult to apply the clause to only a small part of a large treaty such as the Treaty on the Functioning of the European Union. Dammann, in its conclusion, eventually affirms “Member States that no longer meet the so-called convergence criteria should be allowed to withdraw from the Eurozone” (Dammann 2013, page 155). Without entering in the judgment of the pure economic criteria of Maastricht, it can be asked why States can automatically leave the entire Union, but must meet specific and extreme circumstances to “secede” from the Eurozone.

In conclusion, the analysis of the European Union case is useful to see how the right to secede is under debate even in a quasi-international organization or into a “State in
formation”, according to a possible interpretation of the European integration process. It has been interesting to see how, if the European Union can be deemed as the legal base for the future “United States of Europe”, the “Central” government (that is anyway formed by the same member States that singed the Treaties) has granted the possibility of a unilateral right to secede, regulated by legal means. Something very similar to what the UK has decide to do in relation to Scotland, and opposite to what Spain has done with Catalonia, a constitutionalization of the right to secede.
CONCLUSIONS

Concluding this analysis it is important to remind the questions that it has prefigured to answer. The first question to which we need to answer is: on what modern democracies are based? From this answer derives all the other questions that arise from the right to secede. Many Constitutions, the ones based on a Hobbesian/Bodinian approach, recognize in the State the only structure that can save the people from disorder and chaos, and see in the unitary State the only way for a peaceful society. However, as Althusius has theorized, and as many cases, that has been analyzed, have proved (especially those analyzed in chapter 3), the State itself can easily turn into a tyrant. The final aim of the modern Constitutions, and then of modern democracies, is to protect their citizens, and not the State which is de facto an abstract entity. Then it is possible to affirm that a legitimization or constitutionalization of the right to secede will improve the modern democratic system, and the case of the UK is one of the most important examples in this regard. The fear that the right to secede is impossible to universalize, as expressed by Margiotta, is an incorrect analysis. Even if it must be recognized that not all the nationalistic aspirations can be satisfied at the same time, the right to secede is nevertheless a useful tool in the hands of all groups. It can be used to counteract against unequal measures from an oppressive central government (see for example the case of Yugoslavia). It is interesting that, despite the important role that the right to secede could exercise in Public Law, the Internal community have always refused to legitimize, at least de jure, unilateral secession, even if de facto it did it in the cases of Yugoslavia and Kosovo. About the possible risk of never-ending secession, so the fact that a legitimization of the right to secede will brought to the destruction of the modern Westphalian State, it is possible to affirm, after analyzing the cases taken into account, that a never-ending process of secession is impossible for practical and
logical reasons. The secessionist movements are generally carried out by homogenous ethnic group, and there will be no practical or logical reason for a sub-part of these groups to secede once more. Furthermore, every State needs, at a practical level, a minimum portion of territory that allows it to survive. Nevertheless, this statement does not contradict with the importance of the right to secede as a guarantee for every individual, which could be part for example of a dispersed minority. The legitimization of the right to secede, even if materially impracticable for these minorities, is anyway a tool in the hand of these minorities, a threat, similar to the ones that the central government could exercise unilaterally to impose legislation. Then the dispersed minorities would be better guarantee inside a new (secessionist) state, which would fear that the secessionist threat would be used once more against it, in a vicious secessionist circle. The right to secede is a useful weapon for all the peoples to achieve better well-being, even when not applied but used only as a general threat (see the larger autonomy granted to the Åland islands from Finland as an example). The right to secede then enters into the democratic system of check and balance, typical of the Federal States, giving to regional and local entities a power that can match with the central one, assuring a more democratic framework for all the people within that State. If the nature of the State is then aimed to grant to its citizens the largest amount of well-being, the right to secede should be an inalienable right of every group of people. The right to secede will then bring to creation of new Westphalian State, but with a stronger democratic commitment in their Constitutions, inspired by the Althusian theory on secession.

For what concerns international law, it has been asked: who bears the right to self-determination? The most clear answer in this regard is the one given by the Supreme Court of Canada, in the sentence on the secession of Quebec: “A right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of
which it forms a part” (Canadian Supreme Court Judgment 1998, par. 154). The problem with this statement is the unequal way on which colonial and non-colonial pro-independence movements are treated. Colonial people have an immediate right to independence, while the “non-Colonial” one can use this right only when they are already persecuted. The right to secede, respecting the principle of equality, should be granted to every group that wishes to become independent or secede democratically (such as the Quebecois, the Aalanders, the Kosovar, the secessionist movements in the former USSR etc.). Even when not used it is a useful tool to obtain concessions from the central government, such as a larger degree of autonomy, as it has been already stated. How then is possible to conciliate the right to external self-determination and the principle of territorial integrity if the former is extended to every people (and not only the colonial one)? The answer is that these two principles cannot be conciliated. The cases of former Yugoslavia and that Kosovo especially have been a de facto legitimization of the right to secede, even if the term secession was always avoided in international documents. The case of Crimea and Donbass have further highlighted the blatant contradictory between this two cases, and the different treatment between the secessionist processes in the former Yugoslavia and in the USSR have proved how the right to secede is strongly influenced more by political than legal connotations. The same came be held true taking into account the two background cases of chapter two. In both the 19th century US and in Switzerland an implicit right to secede, present in both Constitutions, was denied through the force of arms and not by legal means. In the US for example, the US Constitution, with its emphasis on “the people” as bearer of sovereignty, recognized the right to secede, at least before the US Secession War. Furthermore, the fact that many member States of the US implicitly recognized the Constitution as a contract, so that the existence of the Union did not infringed State’s sovereignty, the behavior of the US with the annexation of Texas in 1845, and many other facts analyzed in chapter two, clearly point in favor of the existence of an implicit right to secede inside the US.
Constitution. This right was abolished only after the Secession War through the force of arms.

The attempt of the International Community to handle the secessionist movements behind the principle of *uti possidetis iuris* have often resulted in a complete disaster. Administrative borders, generally decided arbitrarily by authoritarian States, are not a guarantee for peace. In some circumstances, the “civil” wars that have sparked from the dissolution of a unitary state have been so cruel to justify secessions according to ethnic and not administrative boundaries, then against the legal principle *uti possidetis*. Events such as the war in Bosnia (1992-1995), in Croatia or in Kosovo would have been handled in a better way, if the *uti possidetis* principle was not applied so rigidly, as it has been analyzed in chapter four. It was the fear of been “trapped” in a foreign nation to escalate the tensions in the Balkans and in the Caucasus. The Human rights and the rights of the concerned population should come before the right of the States, as the modern constitutions (taken with an Althusian style) are designed to protect the people, and not the states or their rulers.

Then the right to secede should be legitimized by Public Law to become an effective form of devolution. It should not by limited neither by international law. If the right to secede is the expression of a democratic will, and then a necessity for the people that secede, it cannot be limited with the principle of territorial integrity; instead, it should be encouraged by the principle of self-determination of peoples. This latter principle should be interpreted in a broader Wilsonian sense, realizing that the people and not the States should exercise self-determination to protect themselves from every tyrannical power, should it come from outside or from inside the border of the State. So far, only the case of Scotland has been a clear prove of this theory in a democratic and non-violent way, so that a right to secede *ex-ante facto* (before a unilateral secession takes place) could be a strong tool in the hand of all minorities to defend themselves from the pressure of the central government. It may be a violent pressure (such as in the former Yugoslavia) or just unwanted political pressure, that
as Miglio (Miglio 1997) stated could be refused by the local authority, pushing towards a federal framework for the States and their Public Law.

Interesting, for a future comparative analysis of the right to secede, it will be the study of how Spain will react to this second independence referendum in Catalonia. Are we facing a spreading of the legitimization of the right to secede in Public Law, based on the UK model? Otherwise, will the States remain entrenched in a Hobbesian concept of how the State should be? Furthermore, how the international reaction to the Russian annexation of Crimea will develop is also an interesting case to take into account. Russia is an important international actor, and a possible legitimization of the Crimea’s annexation, based on the Kosovo precedent or on the Badinter commission’s opinion, could open a new approach towards the handling of the secessionist processes worldwide. Furthermore, this analysis has focused only on the secessionist movements in the USA, Europe and the Caucasus region. A future analysis could take into account the secessionist movements in the developing world (Eritrea, East Timor, Tibet, the Tamil Tigers in Sri Lanka, South Sudan, etc.). An interesting question should be: is there any connection between the presence of secessionist movements and the post-colonial exploitation of the developing world? Furthermore, the analysis of the application of the principle *uti possidetis iuris* in a continent so ethnically divided such as Africa will be particularly interesting to advance further the research on the topic of the right to secede.
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