J U R I D I C U M

Unilateral Secession v. Territorial Integrity of States

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Abstract

The concept of self-determination of peoples, whether as a principle or right, has been appealed to for the consideration of peoples' wishes to rule themselves, for the protection the oppressed and for the preservation of collective identities. It has been claimed to include a right for peoples to withdraw territory and population from the jurisdiction of the predecessor State. The absence of the consent of the predecessor State creates tension in relation to the principle of territorial integrity of States; *unilateral* secession is therefore laden with controversy. This study examines whether there is a right to *unilateral* secession under public international law. To be able to answer the aforementioned question it is inevitable to determine whether self-determination of peoples is a right of subgroups within a national population. The evidence of subgroups being subjects to the right is considerable.

On the matter of secession it is argued that the principle of territorial integrity of States does not contain an implicit prohibition on secession, neither is a prohibition to be found elsewhere in international law. The territorial integrity of States is limited by self-determination of peoples if the State does not conduct itself in compliance with the latter. Not the opposite.

The current balance between the two concepts appears to result in the denial of a right to *unilateral* secession which is based on the pure wish of a people. If a right to secession, without the consent of the former sovereign, exists under international law, it seems to arise if the subgroup is denied their right to *internal* self-determination through systematic discrimination perhaps in combination with other gross human rights violations; a right to *remedial* secession. Although there is support for the alleged right to *remedial* secession in soft law and some secondary sources, the evidence of such a right is found to be insufficient.

Abbreviations

African Charter	African Charter of Human and Peoples' Rights
Commission of Jurists	Report submitted to the Council of the League of Nations by the International Commission Jurists
Commission of Rapporteurs	Report submitted to the Council of the League of Nations by the International Commission of Rapporteurs
Commission of Jurists on the events in East Pakistan	The Secretariat of the International Commission of Jurists
Fiftieth Anniversary Declaration	Declaration on the Occasion of the Fiftieth Anniversary of the United Nations
Friendly relations Declaration	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
GA	United Nations General Assembly
Helsinki Final Act	Conference on Security and Co-operation in Europe Final Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICJ	International Court of Justice
KLA or UCK	Kosovo Liberation Army
SC	United Nations Security Council
UN	United Nations
1993 Vienna Declaration	Vienna Declaration and Programme of Action

1. INTRODUCTION

1.1. Background

In 2014 Ukraine´s Autonomous Republic of Crimea claimed independence to rejoin with Russia[1] and just last year, 2017, the autonomous region of Catalonia held a referendum on its independence.[2] These are just some of the claims of independence maid by parts of nations in the 2000s. The stability of States and the international order is challenged as subgroups within nations declare the wish to be independent or to join with another State. The right of self-determination of peoples is of highest relevance today as centuries ago. The need for clarity on the subject is apparent as international law seem to have avoided to resolve the issue of secession in a clear and satisfactory manner.

All peoples have the right of self-determination, which includes a right to freely determine their political status.[3] The *internal* aspect of the right to self-determination generally refers to the peoples' relationship with the government. It is a right of peoples to govern themselves, to participate in the process of decision-making of the State.[4] Implementation of the *internal* aspect of self-determination does not lead to the State´s international status and boundaries changing. As a consequence of exercise of the *external* aspect of the right the boundaries of the territory will necessarily be modified.[5] The *external* aspect contains a right of peoples to be free from external interference and to exercise self-determination through peaceful dissolution, merger or union.[6] The exercise of self-determination through the means of dissolution, union or merger does not create conflict with the principle of territorial integrity of the State, since it is conducted by the population at large. Contrarily, the alleged right of self-determination through the means of secession is more problematic. The alleged right for a part of the population to separate and secede from the territory of a State, without prior consent of the previous sovereign, to become independent (*unilateral* secession), creates tension in relationship to the interest of States to maintain their territorial integrity.[7]

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[1] See e.g. *UN Security Council action on Crimea referendum blocked*, available from news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked, retrieved on 14 May 2018.

[2] See e.g. *UN human rights chief urges probe into violence during referendum in Catalonia*, available from news.un.org/en/story/2017/10/567542-un-human-rights-chief-urges-probe-violence-during-referendum-catalonia, retrieved 14 May 2018.

[3] See e.g. Art. 1 (2) of the Charter of the United Nations (adopted 26 June 1945 and entered into force 24 October 1945) 1 UNTS XVI (UN Charter); Art. 1 (2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[4] Demir, Ebru, *The Right to Internal Self-Determination in Peacebuilding Processes: A Reinterpretation of the concept of Local Ownership from a Legal Perspective*, issue 8, pp. 18-48, The Age of Human Rights Journal, 2017, p. 23.

[5] Raič, David, *Statehood and the Law of Self-Determination*, volume 43, Kluwer Law International, The Hague, The Netherlands, 2002, pp.237-239. [cit. Raič].

[6] Cassese, Antonio, *Self-Determination of Peoples: A Legal Reappraisal*, Press Syndicate of the University of Cambridge, Cambridge, England,… 1995, p. 144. [cit. Cassese].

[7] Mursweik, Dietrich, *The Issue of a Right of Secession*, Tomuschat, Christian, (Ed.) Modern Law of Self-Determination, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1993, p.35.

1.2. Purpose and research questions

The focus of the study is the concept of "political self-determination"; the right of peoples to determine their political status[8] and more specifically the *external* aspect of such a right. The purpose of this study is to examine if a right to *unilateral* secession exists under international law, and if it does under what circumstances. The principle of territorial integrity of States is under the loupe for the purpose of determining whether it limits the right to self-determination and to determine the scope of an eventual right to secession. Because secession naturally cannot be exercised by the whole population of a State, but only a smaller entity, the right of subgroups to exercise self-determination is examined. In other words, the question of what collective constitute "peoples" is inevitable for the object of this paper. To fulfill the purpose of the study the following questions has to be answered: Are subgroups of nations subjects of the right to self-determination? Does the principle of territorial integrity of States contain an implicit prohibition on secession? Does international law provide for a right to *unilateral* secession?

1.3. Delimitations of the study

The criteria of statehood is not examined in this study and consequently neither the question of whether a succeeding entity fulfills those criteria. The focus of the study is to examine the alleged right to *unilateral* secession, whereby the right to self-determination of peoples and the principle of territorial integrity of States is of highest concern. The latter principle is not examined to any larger extent than what is necessary to determine whether it contains a prohibition on secession and what relation it has to the right of self-determination of peoples. Other principles concerning boundaries and international relations is delimited from the study. The object of the paper concerns *external* self-determination. Hence, the meaning of *internal* self-determination is only specified as much as is necessary for the purpose of the study and not described thoroughly. No examination is made of at what point a State is considered not to comply with the right to *internal* self-determination, even if this point may be connected to the revival of a right to *external* self-determination.

1.4. Method and material

In consideration of the object of this study the legal dogmatic method has been found suitable, as the study involves determining whether a right to *unilateral* secession exists under international law and under what circumstances. The legal dogmatic method is used to establish what constitutes applicable law (lex lata) and is one of a range of methods within the wider legal scientific method. The method includes describing and systemizing the law whereby identification of similarities and congruity within the system of law is a part of the undertaking. Coherence of the legal system is of significant importance. Because the object is to describe lex lata, the interpretation of statutes, resolutions, declarations, judicial decisions etc. is a prominent

[8] The term "political" denotes "government or public affairs of a country". Political, Oxford Living Dictionaries, Oxford University Press, 2018, available from en.oxforddictionaries.com/definition/political, accessed 9 April 2018.

feature of this method.[9] As the subject of self-determinations of peoples concerns public international law, the valid material to use is predetermined and stated in Art. 38 of the Statute of the International Court of Justice (hereafter ICJ Statute), namely conventions, international customary law, general principles of law (primary sources), judicial decisions and opinions and scholarly contributions (secondary sources).[10] Other material may be used to some extent for the purpose of enriching the analysis although these, in addition to the secondary sources, are not sources of law.[11]

The sources of law within the international legal system is not assigned a certain position in a hierarchical order other than the distinction between primary and secondary sources, contrary to national legal systems. In case of conflicting norms the situation is resolved by determining which of the norms will prevail in the particular case. For instance, treaty law is usually, but not always, given priority over customary international law.[12] Whether a source of law is legally binding or not depends on the intention of the parties; so called "hard law" is legally binding, while "soft law" (of more political character, "norms of behavior") is not. For instance, treaties are legally binding "hard law" while resolutions or interpretative declarations are considered "soft law". The sources below are used in the attempt of identifying the content of the right in customary international law and UN treaties, for instance the Charter of the United Nations[13] (hereafter UN Charter), the International Covenant on Civil and Political Rights[14] (hereafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights[15] (hereafter ICESCR), as these instruments are silent on definitions and expressive content. The interpretative weight that some resolutions have been given, in combination with the lack of definitions and expressive substance to the right of self-determination and territorial integrity of States in treaty law, results in a great use of soft law in the study. Especially General Assembly resolutions are used, as they constitute a substantial source for interpretation within the law

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[9] Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare*, edition 3:2, Norstedts Juridik, Stockholm, 2016, p.42-44. [cit. Sandgren].

[10] The Statute of the International Court of Justice (adopted 26 June 1945 and entered into force 24 October 1945) 1 UNTS XVI (ICJ Statute). Albeit addressed to the Court, the article is considered of general relevance. Henriksen, Anders, *International Law*, Oxford University Press, Oxford, United Kingdom, 2017, p.23. [cit. Henriksen].

[11] Sandgren, p.44.

[12] Henriksen, pp.34-36. There are three exceptions to the normative equality in practice: *jus cogens* (peremptory norms) may not be subject of derogation (Art.53 VCLT); *erga omnes* obligations (because they are owed to the "international community as a whole"); obligations under the UN Charter will prevail in a conflict with obligations under other international instruments (se Art.103 of the Charter), with the exception of peremptory norms. Henriksen pp.34-36. The right of self-determination of peoples is considered a peremptory norm (*jus cogens*), although this is denied by some. It is also a norm *erga omnes*, granting that there might be certain limitations to this characteristic in the case of self-determination of peoples, for instance, whether it is a right that can be consumed etc. Doehring, Karl, *Self-Determination*, Simma, Bruno (Ed.), The Charter of the United Nations: A Commentary, Oxford University Press, Oxford, United Kingdom,…, 1995, paragraph 14, p.70. [cit. Doehring]. A discussion of whether or not self-determination of peoples is of *jus cogens* and *erga omnes* character is delimited from this study. The factor of its position of hierarchical precedence is not considered because the principle of territorial integrity is also of such ranks. Doehring, p.48.

[13] Art. 1 (2) of the Charter of the United Nations (adopted 26 June 1945 and entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[14] Art. 1 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[15] Art. 1 of the International Covenant of Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

of self-determination.[16] General Assembly resolutions are generally considered to impact the formation of customary international law and some are recognized to constitute customary international law (primary source).[17] Regional instruments are used when they are more detailed, precise, or contain a definition of the right to self-determination of peoples in order to identify a potential content of customary law rather than the existence of the latter. Although judicial decisions and opinions referring to the right of self-determination are relatively scarce and often lack apparent expression of content of the right, these are used as indicators of the content of the right of self-determination. Judicial decisions and opinions by the ICJ have a privileged position, as the principal judicial organ of the United Nations, and may be of significant importance for the interpretation of international law.[18] The ICJ Advisory Opinion in the Kosovo case[19] is thereby used as much it allows. Although the case of Bangladesh seceding from Pakistan never was the subject of a court trial, its reactions from the international community is used as an indicator of the existence or non-existence of customary international law on the matter. Additionally, as the right to self-determination of peoples is very vague in its formulation, scholarly contributions are used to identify and clarify the law and its obscurities.

1.5. Outline

In the second chapter the reader is introduced to the concept of self-determination through a historical perspective. The values and function of the concept, deduced from its history and summed up in the following subsection, is of value for the understanding of the right of self-determination of peoples of today. The right to self-determination of peoples is prominent in several international instruments today, although never defined in treaty law. Hence, chapter two contains an analysis of the term "peoples", in other words an answer to the question of who is subject to the right of self-determination. A short description is also made of the means of exercising the *external* aspect of the right. One mean by which a people can exercise *external* self-determination is through secession. Only if "peoples" are established to mean subgroups of a nation can secession be exercised; only a subgroup can separate from the State (not a whole population of a State). The reader is introduced to the concept of secession, its different definitions and its controversy. In chapter three, the eventual right to secession is examined as well as the conflicting principle of territorial integrity of States. In particular, the chapter involves the intricate question of whether a right to secession includes a right to *unilateral* secession – a right for a subgroup to separate from the State without its consent. Finally, in chapter four, the legality of a right to *unilateral* secession is summarized. Finally, a brief observation of the legitimacy of an eventual right to *unilateral* and *remedial* secession as well as the principle of territorial integrity is made.

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[16] Doehring, p.60.
[17] Henriksen, p. 37; *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, paragraph 188, p.100. [Nicaragua v. United States].
[18] Henriksen, p.31.
[19] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p.403. [cit. Kosovo case].

2. THE RIGHT TO SELF-DETERMINATION

2.1. Function of the right of self-determination of peoples

2.1.1. Historical background

In order to identify and define the core values and function of the right to self-determination it is necessary to analyze its background and development. The underlying values are of importance in the interpretation of the substance of the right.[20] The background and development from the French and American revolutions to the post-colonial era is therefore described under the following section to serve as basis for the analysis.

An influential factor to the development of self-determination was the French and American revolutions in the late 1700s. Communities repudiated the authority of an elite or detached people to determine their future without their consent or consultation. The communities claimed the right to govern themselves and that the government was legitimate only if chosen by the people and represented their will.[21] Self-determination by plebiscite for the purpose of determining the political status of a territory was introduced after and as a result of the French revolution. The concept was used by France as a means of aiding other countries in Europe to pursuit freedom and justice by applying the concept against their "oppressor". Plebiscites were held for the people in question, especially in those territories surrounding France, to determine whether or not they desired to join France.[22] The empires of Europe was threatened but the idea of nations to rule themselves was established. This development illustrates some core aspects of self-determination, namely a reaction against domination by "others" and the value of freedom.

Nationalism was developing alongside and strongly influenced by the French revolution. The theory of nationalism broadened the concept of the "State" by perceiving it not only as a juristic, territorial and historical fact. The theory based its ideology on the idea that States could, and should be composed by their "natural" cultural and political units, forming ethnically homogenous national States. For adherents of the nationalist theory nationalities were subject to the right of *external* self-determination, it was nationalities that had a right to independent statehood.[23] The view of nationally delimited regions having a right to self-determination was shared by Lenin and the Bolseviks in the 1900s. Although this was a right of nations consisting of proletariat to free themselves from the oppression of national regions consisting of bourgeois.[24] The oppression and antagonism caused by the bourgeoisies nations was explained by the different stages of capitalism that the nations were in.[25] The Bolsheviks, in particular Lenin, developed their own theory of "national self-determination". The oppression was the constitutive

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[20] Raič, p. 172.
[21] Raič, pp. 173-174.
[22] Although, the results were valid only if in favor of France. Johanson, C, Märta, *Self-Determination and Borders: The Obligation to Show Consideration for The Interest of Others*, Åbo Akedemi University Printing House, Åbo, Sweden, 2004, p.30. [cit. Johanson].
[23] Buchheit, Lee C, *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven,… England, 1978, p.4; Raič, p. 176.
[24] "Nations" or "national" is referring to ethnical units and is different from the term "nation State" in which ethnicity and government coincide.
[25] Lenin, Vladimir Iljitj, *The Right of Nations to Self-Determination*, Foreign Language Publishing House, Moscow, Union of Soviet Socialist Republics, 1947, pp. 15-18. [cit. Lenin].

factor for a right to self-determination.[26] A right for nations to secede from their oppressor and the liberation of peoples was to serve as means for the realization of the socialist revolution. Self-determination of a collective, a nation, was a remedy of last resort but a strategic concept in the integration of nations in the socialist community.[27]

Meanwhile Lenin was advocating self-determination for the integration of a socialist community US president Wilson developed his own understanding of the concept. Wilson´s idea of self-government corresponded with the *internal* aspect of self-determination advocated in the American and French revolutions; emphasis lied on the "consent of the governed", the right of (ethnically identifiable) peoples or nations to choose their government. Hence, self-government was primarily a right to exercise within a State.[28] Self-government was a right to choose a democratic government seeing that democracy was the only guarantee against oppression and conflict. In the end of World War I there was a need to lay down guidelines for the rearrangement of boundaries in Europe. Wilson´s theory of self-determination then altered to include an *external* dimension. In his view the main purpose of self-determination in the sense of self-government was the protection of peoples' well-being through the right of ethnically identifiable peoples to choose their own government. As a result of self-governing of peoples, intra-State conflict evolving to inter-State conflict would be avoided. The absence of self-determination of peoples, not just in Europe, was one of the largest causes and threats to world peace. Wilson saw self-determination as a way to break down the "unnatural" empires and dividing Europe in to "natural" nations for the purpose of lasting world peace.[29] The idea of "nationalities" was in this period of time collectives consisting of an ethnic group and thus the subject of self-determination.[30] In the aftermath of the war Wilson came to realize that there were more "nationalities" than he first knew of and that these had been dissatisfied when they had realized they were not granted self-determination.[31]

The League of Nations was established after the war, in 1919. The principle of self-determination was not included in the Covenant; on the contrary, it emphasized territorial integrity of the members of the League.[32] Shortly after the establishment of The League of Nations the Council appointed two commissions (the Commission of Jurists and the Commission of Rapporteurs) to examine whether the inhabitants of Åland Islands were free to secede from Finland to adhere to Sweden. The dispute arose after the Russian revolution and the collapse of the monarchial power common to Russia and Finland in 1917. The inhabitants of Åland had rejected an offer of autonomy and claimed independence to subsequently join Sweden. Both of

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[26] Lenin, pp. 24-26.
[27] See e.g. Lenin, p. 39 "[t]hey will, therefore, resort to secession only when national oppression and national friction make joint life ab absolutely intolerable and hinder all economic intercourse. In that case, the interests of capitalist development and of the freedom of the class struggle will be best served by secession".
[28] Cassese p.19.
[29] Raič, p.178-183.
[30] Doehring, paragraph 28, p.64.
[31] Raič, p.189.
[32] The Covenant of the League of Nations, 28 April, 1919, available from unispal.un.org/DPA/DPR/unispal.nsf/0/6CB59816195E58350525654F007624BF, accessed 20 April 2018. In Art. 10 of the Covenant it is stated that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.

the Commissions underlined the fact that the principle of self-determination had not been included in the Covenant of the League and that it had not yet become customary international law. The Commissions emphasized stability and the sovereignty and unity of States and the principle of self-determination was only to apply as an exceptional solution.[33] The Commission of Jurists stated that the principle of self-determination "must be brought into line with that of the protection of minorities; both have a common object—to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics"[34].

The principle of self-determination was included in the Charter of United Nations (1945) and explicitly referred to twice, in the Chapter of Purposes and Principles, Art. 1 and in the Chapter of International Economic and Social Co-operation, Art. 55 (c).[35] Self-determination was referred to as a principle and not a right but signaled that self-determination was changing from a political postulate into a legal standard of behavior, thus, its inclusion in the Charter has had an important impact for the development into a positive right.[36] The principle was identified as one of the "major objective[s] of the new world organization"[37].

The two Human Rights Covenants, ICCPR and ICESCR, were adopted as a result of the Member States of the UN wanting to specify the general principle of human rights stipulated in Art. 1 (3) of the UN Charter. By the time of adoption of the conventions the majority of States agreed that the right to self-determination was not limited to colonial situations and that the right did not apply to minorities. The adoption of the common Art. 1 of the Covenants was "a step designated to upgrade peoples to the status of co-actors in the world community"[38].

In 1955 the emphasis on peace among States changed to self-determination as means for independence from the colonial empires. The most prominent advocates for anti-colonialism were the socialist States taking Lenin´s view of self-determination primarily as a way for peoples to gain independence from their oppressor. As Cassese points out the development of decolonization could not have been foreseen by the Committee drafting the principle of self-determination of the UN Charter.[39] Neither did the majority of the parties who agreed to include the principle of self-determination have this evolution in mind at the time.[40] The scope of the concept of self-determination was broadened in comparison to the time of League of Nations through Chapter XI (Declaration Regarding Non-Self-Governing territories) of the UN Charter giving self-determination applicability on territories where peoples not yet were self-governing. There was an emergence of an anti-discrimination doctrine.[41] Eventually the gradual development of these territories (referred to in chapter XI UN Charter) gaining self-government was

[33] Report submitted to the Council of the League of Nations by the International Commission Jurists, League of Nations Official Journal, No. 3 (1920). [cit. Commission of Jurists]; Report submitted to the Council of the League of Nations by the International Commission of Rapporteurs, League of Nations Council Doc. B.7. 21/68/106 (1921). [cit. Commission of Rapporteurs].
[34] Commission of Jurists, paragraph 3.
[35] The principle of self-determination implicitly underlies chapter XI Declaration of Non-Self-Governing Territories and chapter XII International Trusteeship System but these will not be addressed specifically.
[36] Raič, p. 200.
[37] Cassese, p. 38.
[38] Cassese, p.144 and 51-52.
[39] Cassese, p.44.
[40] Johanson, p.44.
[41] Raič, p. 201-203.

replaced with a policy of immediate independence of colonial territories.[42] Despite the fact that the resolutions refers to "all peoples" and the UN Charter to "peoples" the application of self-determination was in the 1960s mainly confined to decolonization.

Today, several international instruments contain the right to self-determination of peoples. Foremost it is prominent in the Charter of the United Nations, Art.1 and Art.55 (c). The fact that the right has been included in the UN Carter can be regarded as a universal recognition of its fundamental significance for friendly relations between States.[43] Furthermore, the right of self-determination is recognized in the two human rights covenants, ICCPR and ICESCR. There are several other international and regional instruments in which the right to self-determination of peoples is recognized, for instance the General Assembly resolution Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States (hereafter Friendly Relations Declaration), 1993 Vienna Declaration and Programme of Action (hereafter the 1993 Vienna Declaration), the African Charter of Human and Peoples' Rights (hereafter African Charter) and the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe 1975 (hereafter Helsinki Final Act).[44]

2.1.2. The values constituting the function of self-determination

Throughout times self-determination has been argued for as means to free peoples from their oppressor. In regards to the *external* dimension of the principle of self-determination this has been exercised through plebiscites, peace agreements or decolonization. The "oppressor" has taken the shape of empires, nations and colonies. To Lenin the main constitutive factor for *external* self-determination was to free the working class under the bourgeoisie's oppression. Subsequently the Soviet Union took on Lenin´s view with the difference that the peoples to be freed was the colonies under the oppression of the colonial powers. To Wilson *external* self-determination meant the right for people to be considered, both for moral reasons and for the sake of avoiding conflict – for the sake of peace. As Raič points out, self-determination could then "constitute a counterforce against the almost unbridled power of States to formulate their international policies without paying regard to the wishes of the peoples"[45]. The Commission of Jurists stated in their report concerning the Åland Islands case that the object of the principle of self-determination was "to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics"[46].

The principle have thus been appealed to for the protection and preservation of certain groups, "peoples" whether this has been nations or other collectives. The principle have been

[42] UNGA 'Declaration on the Granting of Independence to Colonial Countries and Peoples' Res. 1514 (XV) (14 Dec 1960) 15th Session UN Doc. A/L.323.
[43] It is in Art. 1 (2) of the UN Charter stipulated that the member States are "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples […]" and in Art. 55 to create conditions for stability necessary for "[…] friendly relations among nations based on respect for the principle of equal rights and self-determination […]".
[44] Thirty-five States, including the US, Canada, and all European States except Albania and Andorra, signed the declaration.
[45] Raič, p.221.
[46] Commission of Jurists, paragraph 3.

used to guarantee their existence. Consideration for peoples' wishes and the application of the principle of self-determination has been based "upon respect for those who are not in a position to claim, or enforce, such respect" and thus "protecting the interest of the most vulnerable, oppressed or exploited"[47]. This must constitute the core values and function of the principle of self-determination.

The core values and function of the principle of self-determination does not give an answer to the question of who is the subject of self-determination; what collectives are "peoples"? The function of self-determination analyzed above is of relevance in the attempt to identify the collectives subject to self-determination and for the interpretation of the scope and content of the right.

2.2. Subject of the right of self-determination: "Peoples"

As noted above, after World War I *external* self-determination was applied to (more or less homogenous) ethnical groups. During the decolonization self-determination was applied foremost to nations, entire population without distinguishing ethnicity.[48] For the purpose of examining whether the principle of self-determination includes a right to secession it is necessary to determine if "peoples" constitute subgroups of a nation. Nations as subjects of a right of self-determination has not caused much controversy. This can be explained by the fact that the situation where the entire population of a State wishes to exercise its right to *external* self-determination can only result in dissolution, union or merger – not secession. An analysis whether "peoples" comprises nations[49] and goes beyond a colonial context is excluded from this study.[50] The focus in this study is to examine if the right to self-determination is a right of subgroups.[51] For the purpose of this study it is sufficient to define subgroups as a group existing as units (not merely aggregations of individuals), distinct from the larger community and with group characteristics which are non-reducible;[52] for instance (a); a common historical tradition (b); racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life.[53]

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[47] Johanson, p. 52.

[48] Doehring, paragraph 28, p. 64.

[49] It is evident that nations are subject to the right of self-determination. See e.g. UNGA 'The right of peoples and nations to self-determination' Res. 637 (VII) A-C (16 December 1952) 7th Session UN Doc. A/2309, paragraph 1.

[50] The discussion of whether the right to self-determination of peoples in of continuous character is delimited from the study due to the amount of subsequent treaties and resolutions adopted. For similar reasoning see Doehring paragraph 18, p.61.

[51] An examination of whether minorities are subjects of self-determination of peoples is excluded from this study. Although this have been argued, they may only be subjects of self-determination of peoples if they fulfill the criteria in the definition of subgroups, not merely because they are numerically inferior to the rest of the population. Minorities as subjects of self-determinations is therefore excluded from the study. For similar reasoning see e.g. Van den Driest, Simone, *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, volume 62, issue 3, pp.329-363, Netherlands International Law Review, 2015, pp.339-340. [cit. Van den Driest].

[52] Raič, p.260.

[53] United Nations Educational, Scientific and Cultural organization, *UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations*, Paris, 22 February 1990, SHS-89/CONF.602/7, paragraph 22 (1).

At this point it should be noted that the definition of "peoples" does not equal an absolute right to *externa*l self-determination. An absolute right of peoples to exercise the right to *external* self-determination through secession for instance, would be not be in line with the values and function of self-determination.[54]

The International Court of Justice (ICJ) has pointed out the value of General Assembly resolutions for the interpretation of obligations under the UN Charter and the authoritative position of the Friendly Relations Declaration[55] regarding the substance of basic principles of international law.[56] The Court states that **"**[t]he effect of consent to the text of such resolutions cannot be understood as merely that of a ´reiteration or elucidation´ of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"[57]. Resolutions constitute "soft law" and are not legally binding.[58] However, the Friendly Relations Declaration have come to constitute customary international law.[59] Cassese underlines that it is through this document that the *right* to self-determination has occurred.[60] In Principle V, §§ 1, 2, 4 and 5 of the Friendly Relations Declaration there is a use of both of the terms "people/-s" and "State" which indicates that they are two different concepts, or in other words that there can be more than one people within a State. The State is not constituted by one people but of peoples. Furthermore, in Principle V, §1, it is stipulated that "[…a]ll peoples have the right freely to determine […] their […] cultural development […]" and in Principle III, § 3 it is stipulated that "[t]he use of force to deprive peoples of their *national identity* […]". The term "cultural development" forms only a part of "national identity", and they are not synonymous.[61] The chosen expression is that peoples have a right to determine their cultural development, not to determine the development of their national identity. Most nations are comprised of many ethnical subgroups with different cultures. This indicates that "peoples" can in fact be subgroups and not only consist of an entire population of a nation.

The paragraphs of Principle V refers to both the singular term, "people", and to the plural form of the term, "peoples". "People" is used in § 6 and clearly seem to indicate that only one people can exist in a colony or other Non-Self-Governing Territory. This might be explained by the mode of implementation of the decolonization which was the right to *external* self-determination by the entire population and the fact that the international community did not accept the fragmentation of the colony before the realization of independence. The use of the singular form, "people", does not correspond with the plural form used in the General Assembly resolution Declaration on the Granting of Independence to Colonial Countries and Peoples, 1514

[54] See section 2.1.2.
[55] UNGA 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' Res. 2625 (XXV) (24 October 1970) 25th Session UN Doc. A/8082 (Friendly Relations Declaration).
[56] Nicaragua v. United States, p. 100.
[57] Nicaragua v. United States, p. 100.
[58] Henriksen, pp. 37-38.
[59] Kosovo case, paragraph 80.
[60] Cassese, p.108.
[61] "The term "culture" denotes "the way of life, especially the general customs and beliefs, of a particular group of people at a particular time". Culture, (2018), Cambridge Dictionary, Cambridge University Press, available from dictionary.cambridge.org/dictionary/english/culture, accessed 15 April 2018, or "[t]he ideas, customs, and social behavior of a particular people or society", Culture, (2018), Oxford Living Dictionaries, Oxford University Press, available from en.oxforddictionaries.com/definition/culture, accessed 15 April 2018.

(XV) of 14 December 1960. Neither does it correspond with the General Assembly Resolution defining the three options for self-determination 1541, Principle II, in which it is stipulated that "[a]s soon as *a territory and its peoples* attain full measure of self-determination […]".[62] Anderson points out that the use of "people" in § 6 probably constitutes a drafting error.[63] An interpretation that "peoples" refers to both nations and subgroups may further be supported by the expression used in § 7, Principle V in the Friendly Relations Declaration, in which is stated that the territorial integrity of States "[…] conducting themselves in compliance with […] self-determination of peoples […] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." On one hand, the expression "the whole people" refers to the entire population and thus may suggest that there is only one people within a State. On the other hand, it could simply mean that the State grants equal access to the *internal* dimension of self-determination of peoples representing the "whole people" and that the expression "without distinction as to race, creed or colour" suggests the possibility of a State being comprised of subgroups. Cassese argues that the reference "race, creed and colour" refers to the right of racial and religious groups and is not a right of linguistic or national groups.[64] Raič on the other hand, argues that the expression is not meant to "provide for a carte blanche for excluding other groups"[65] but rather to emphasize acts of discrimination. He argues that a government cannot be representative of the people as a whole if excluding linguistic or national groups from political decision-making. According to the author the latter interpretation seem to be the only sensible and in line with the values and function of self-determination – the protection of collective identities are not confined to only two non-reducible characteristics among groups existing as units distinct from the larger community. Anderson concludes that the expression "race, creed or colour" is to interpret as subgroups of a nation and underlines that such an interpretation is in line with other UN instruments including the UN Charter; he argues that "race" should be interpreted as "connoting other factors associated with nations, such as language, culture and customs"[66]. Support for the latter interpretation can be found in the *travaux préparatoires* of the UN Charter, in which the term "race" and "peoples" were used interchangeably. For instance it is stated that "[n]othing in the Charter should contravene the principle of the equality of all races; and their right to self-determination, whether

[62] Emphasis added. UNGA Res. 1541 (XV) (15 December 1960) 15th Session UN Doc. A/4651, Principle II.
[63] Anderson, Glen, *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects*, volume 41, issue 1, pp. 1-98, Brooklyn Journal of International Law, 2013, p.352. [cit. Anderson].
[64] Cassese, pp. 112, 114. Cassese asserts that "race" and "colour" refers to the same concept: race. His use of the term "national" groups generates some uncertainties regarding his definition of the terms. Webster´s Dictionary defines race as "[a] group of people identified as distinct from other groups because of supposed physical or genetic traits shared by the group" and the term ethnic as "[…] subgroup having a common cultural heritage or nationality, as distinguished by customs, characteristics, language, common history, etc." It seems as Cassese uses the term "national" in the sense of ethnicity. Race, (2018), Webster´s Dictionary, available from www.yourdictionary.com/race#websters?direct_search_result=yes, accessed 17 April 2018; Ethnic, Webster´s Dictionary, (2018) available from www.yourdictionary.com/ethnic#websters?direct_search_result=yes, accessed 17 April 2018.
[65] Raič, p.250.
[66] Anderson, p. 353, 358.

it resulted in independence or not, should be recognized"[67]. "Race" is in this draft used synonymously with "peoples". Anderson argues that this notion of the term is further supported by Art. 1 (1) of the General Assembly resolution International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1966, in which "racial discrimination" is defined as "[…] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin […]". "Race", according to Anderson, connotes to factors such as language, culture and customs, associated with nationality and ethnicity.[68] The 1993 Vienna Declaration reinforces the position that "peoples" mean the entire population as well as subgroups which are not limited to racial or religious collectives. The phrasing is very similar to the wording in Friendly Relations Declaration but instead of the phrasing "without distinction as to race, creed or colour", Principle V, § 7, the phrasing used in Art. 1 (2) of the 1993 Vienna Declaration is "without distinction *of any kind*"[69]. The statement clearly supports Anderson´s wider interpretation of which entities are subjects of self-determination.

The view that self-determination is a right of the entire population and of subgroups is further supported by the General Assembly resolution The right of peoples and nations to self-determination, 16 December 1952, referring to Art. 1 and Art.55 of the UN Charter, in which it is stated that "[t]he States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations"[70] which undoubtedly stipulates that the right to self-determination is one of both nations and subgroups.

The African Commission on Human and Peoples' Rights have issued guidelines on the interpretation of the African Charter. According to these guidelines "*Peoples* are […] any groups or communities of people that have an identifiable interest in common, whether this is from the sharing of an ethnic, linguistic or other factor" and then continues …"peoples are therefore not to be equated solely with nations or states" [71]. This statement refers to both nations and subgroups in the interpretation of "peoples". Subgroups as subjects of the right of self-determination, in application of Art. 20 (1) of the African Charter, is reaffirmed by the Commission in their decision regarding Katangese people´s claim of recognition of independence of Katanga, and thereby a request of succession from Zaire. The Commission confirmed the applicability of *external* self-determination of ethnic subgroups,[72] however, the claim could not be affirmed for other reasons.

In principle VIII of the Helsinki Final Act it is stipulated that

> […] self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating

[67] United Nations Conference on International Organization, 1945, *Summary Report of the Sixth Meeting of Committee II/4*, San Francisco 18 May, 1945, volume 10, Doc. 404, II/4/17, p.453, available from https://digital-library.un.org/record/1300969/files/UNIO-Volume-10-E-F.pdf.
[68] Anderson, p.356-357.
[69] Emphasis added.
[70] UNGA 'The right of peoples and nations to self-determination' Res. 637 (VII) A-C (16 December 1952) 7th Session UN Doc. A/2309.
[71] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, November 2010, Banjul, The Gambia, part 1, paragraph 1 (c).
[72] *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. 75/92, Decision taken at its 16th Session, Banjul, The Gambia, 1994, paragraph 3 and 6. [cit. Katanga case].

> States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States.[73]

The instrument is not legally binding and only meant to establish a political commitment, which explains it´s braver and more verbose approach.[74] The emphasis on "peoples, *all* peoples" seem to either reaffirm the position that self-determination of peoples goes beyond the colonial context or to reaffirm the position that subgroups are subjects of the right to self-determination. The emphasis would seem redundant if the wording was simply meant to stipulate a right of the entire population of nations. The fact that there were no situations of colonialism in Europe of northern America in 1975 when the act was adopted[75] may imply that the emphasis was made to reaffirm the position of including subgroups in "peoples".

Territorial integrity is referred to in connection the principle of self-determination in many of the international instruments.[76] The repeated emphasis on territorial integrity of the State would be also be redundant if the nation was the only collective subject to self-determination because there is in such a situation no conflict between the two principles. Moreover, Raič argues that an interpretation which includes subgroups as subjects of self-determination is a necessary consequence of the values and function of self-determination. He asserts that protection of the collective identity of a group which is numerically inferior to the rest of the population is more substantial than the protection of entire populations of nations.[77]

2.3. Exercise of external self-determination and the definitions of means of implementation

It has already been mentioned in the introduction that the means of implementing the *external* aspect of self-determination are through dissolution, merger, union or secession.[78] The right to *external* self-determination have been expressed in different manners either through expressly referring to the right of peoples to determine their *external* political status[79] or through giving examples of the modes of implementation of the *external* aspect of self-determination.[80] The aforementioned means of exercising *external* self-determination are uncontroversial – aside from secession.[81]

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[73] Conference on Security and Co-operation in Europe Final Act, Helsinki, 1 August 1975, 14 ILM 1292 (1975), Principle VIII. (Helsinki Final Act).
[74] Hannum, Hurst, (without year), Legal Aspects of Self-Determination, *Encyclopedia Princetoniensis*, available from https://pesd.princeton.edu/?q=node/254, accessed 9 April 2018.
[75] Raič, p.231.
[76] See e.g. Principle V, § 7 of the Friendly Relations Declaration, Principle I, § 2 of the 1993 Vienna Declaration and Principle VIII of the Helsinki Final Act.
[77] Raič, p. 248.
[78] One might add re-establishment of occupied territory and the right to self-determination in case of annexed territory.
[79] See e.g. Helsinki Final Act, Principle VIII.
[80] See e.g. "free association or integration with an independent State or the emergence into any other political status" Friendly Relations Declaration, Principle V, § 4.
[81] Raič, pp. 289, 293.

There is no generally accepted definition of the term secession and different authors may use the term differently.[82] Secession may be defined as the "withdrawal or detachment of territory and its population from the jurisdiction of an established state"[83] or "the separation of part of the territory of a State carried out by the resident population with the aim of creating a new independent State or acceding to another existing State"[84]. More restrictive definitions such as Crawford´s: "the creation of a State by the use or threat of force without the consent of the former sovereign"[85], is not preferable for this study because it limits the cases studied to the ones where force or threat of force was involved. A more permissive definition allows more exploration on the subject. Pavković highlights that because there is no definition of the right of self-determination and the means of how it may be applied, "it has been left to scholars to debate […] what detachments counts as secession"[86]. The legal outcome of a classification as secession may be drastically different from a classification of dissolution. With a restrictive definition of secession, one that confers secession to the lack of consent of the predecessor State, the question whether secession or dissolution has taken place is determined by the continuity of the former host State. In other words, if there is no State to give its consent at the time, the emerging State is created by dissolution. Correspondingly, if the definition of secession is limited to situations of lacking consent, the situations will also be confined to the continuity of predecessor States.[87] The scholars who chose a restrictive definition will thus minimize the number of cases of secession found. Pavković points out that the definitions we choose affects our assessment of the moral consequences of secession.[88] If one see the case of Singapore withdrawing from Malaysia as a case of consensual secession the evaluation of the consequences of secession will drastically differ from the evaluation of a case of non-consensual secession, for instance Bangladesh withdrawing from Pakistan. The evaluation of the situation of Yugoslavia in 1991-1992 will be very different depending on if one classifies it as dissolution or secession of the five Republics of former Yugoslavia. If one classifies a situation as dissolution because there is no longer a host State to give its consent, then at what point is there no more a host State?

The views on the possibility of a legal regulation of secession may differ depending on the definitions of it. In order to regulate secession under international law it will necessarily need to be defined.

The main reason for the controversy following the alleged right of secession is that it may create tension in relation the principle of territorial integrity.[89] The content of the principle of territorial integrity is discussed in the next chapter, as well as the eventual right to secession.

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[82] Thürer, Daniel., Burri, Thomas, (2009). Secession. In *Max Planck Encyclopedia of Public International Law*, paragraph 5. [cit. Thürer, Burri].

[83] Pavković, Aleksandar, (2015), *Secession: a much contested concept*, ReaserchGate Macquarie University, available from file:///C:/Users/Root/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/SecessionaMuchContestedConcept1.pdf, accessed 18 April 2018, p. 3. [cit. Pavković].

[84] Raič, p. 308.

[85] Crawford, James, *The Criterion of States in International Law*, second edition, Oxford University Press, New York, USA, 2006, p. 375.

[86] Pavković, p. 15.

[87] Pavković, p. 15.

[88] Pavković, p. 19.

[89] Henriksen, p. 71; Raič, p. 293.

2.4. Conclusion

The use of the term “people/-s” in the instruments above and the absence of a definition in both primary and secondary sources have caused confusion and debate. Although it is difficult to determine the certain content or meaning of the term, one can find clues by examining the use of other terms in the same instrument and by comparing the use of “people/-s” in other instruments referring to self-determination of peoples and other terms. The examination seem to suggest that not only nations are subject to self-determination of peoples, but also subgroups. There is considerable evidence indicating that ”peoples” and “State” are used as different concepts. The term “peoples” is used for the protection of a group, to guarantee their right to self-determination. *Internal* self-determination is not complied with if discriminating a collective denying them representation. These collectives are thereby guaranteed a right to *internal* self-determination. Subgroups of nations is thus subjects of self-determination. These subgroups cannot be limited to racial and religious groups as Cassese suggests. The expression “without distinction as to race, creed or colour”[90] in Principle V, § 7 of the Friendly Relations Declaration must be an exemplification of discrimination rather than the exclusion of other groups. This is further supported by the expression “without distinction of any kind” in (Art. 1(2) of the 1993 Vienna Declaration and the definition of peoples formulated in the guidelines for the interpretation of the African Charter issued by the African Commission on Human and Peoples’ Rights. These groups must as a minimum be units smaller than the larger community with characteristics that are non-reducible, for instance language, culture, customs.

The means through which *external* self-determination can be exercised is dissolution, merger, union or secession, whereas the latter is controversial as to whether it is included in the right to self-determination of peoples. Depending on the definition chosen for secession, the evaluation of the balance between the alleged right to secession and the principle of territorial integrity of States may be affected. A more permissive definition of secession, which is not limited to the absence of consent from the host State, is chosen for this study.

3. SECESSION AND TERRITORIAL INTEGRITY OF STATES

3.1. Territorial integrity

The concept of territorial integrity is sometimes referred to as a right of States to maintain their territorial integrity, whether it is against other States or from the threat of broken unity from within the State. It is referred to as being inviolable and a right of States to preserve their territorial status quo. It is argued that there is an implicit prohibition of *unilateral* secession inherent in the principle of territorial integrity. [91] The aim is under this section to give an idea of the concept of territorial integrity, and to determine whether the principle implicitly prohibits secession, not to provide an exact definition of it.

The concept of territorial integrity has its origins in the early 1800s and was used for the purpose of guaranteeing neutrality and peace between States.[92] In 1918, during World War I, President Wilson used the term in his famous "Fourteen points" in which it is stated that "[a] general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike"[93]. During the drafting of the League of Nations Covenant Wilson emphasized his notion of the purpose of territorial integrity, namely to protect States from acts of aggression and use of force by other States.[94] As mentioned above, Wilson saw *external* self-determination of peoples, and thereby boundary changes, as a necessary mean to avoid further war. The drafting of the Covenant took place at the same time as the borders of Europe was rearranged, new States being born and territories being reduced. The purpose of including territorial integrity in the Covenant was not primarily to maintain the new State´s territorial boundaries, but for the protection from acts of aggression of States, large or small.[95]

The final text of Art. 10 of the Covenant in which the concept on territorial integrity is included provides that

> [t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.[96]

As Akweenda points out, the language of Art. 10 of the Covenant is "echoed" in Art. 2 (4) of the UN Charter. The article provides that the Member States "shall refrain in their *international relations* from the *threat or use of force* against […] territorial integrity"[97]. In the drafting of the latter article, no attempts were made to define the concept of territorial integrity.[98] *Prima*

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[91] Johanson, p. 61.
[92] Akweenda, Sakeus, *Territorial Integrity: A Brief Analysis of a Complex Concept*, volume 1, issue 3, pp. 500-506, The African Society of International Comparative Law, London, 1989, p. 500. [cit. Akweenda].
[93] Fourteen Points United States Declaration, *Encyclopædia Britannica*, available from www.britannica.com/event/Fourteen-Points, accessed 4 April 2018, point 14.
[94] Akweenda, p. 501.
[95] Johanson, p.64.
[96] The Covenant of the League of Nations, 28 April, 1919, available from unispal.un.org/DPA/DPR/unispal.nsf/0/6CB59816195E58350525654F007624BF, accessed 20 April 2018.
[97] Emphasis added.
[98] Akweenda, p.502.

facie is seems clear that the concept of territorial integrity is connected to the ban on "threat or use of force" and that is in the inter-national context.

The articles concerning territorial integrity in both the Covenant of the League of Nations and the UN Charter are directed to inter-State relations. The concept of territorial integrity is relevant in connection to the "threat or use of force" among States. It is therefore only States that can violate the territorial integrity of other States, not a secessionist people.
The concept is referred to in the Friendly Relations Declaration defining Principle I, V and VI. In Principle I, § 1 the concept of territorial integrity is used in the same way as in Art. 2 (4) of the UN Charter, that is the prohibition on "threat or use of force against territorial integrity". The principle of equal rights and self-determination of people, Principle V, is more confusing. What subjects are "equal rights" referring to? The UN Charter lays down the principle of sovereign equality between States (Art. 2 (1)) which consequently means that the member States do not have unlimited sovereignty.[99] If it is a correct interpretation that the concept of territorial integrity is directed to inter-State relations, and the principle of equal rights likewise, then the paragraph may provide that States are prohibited to dismember or impair the territorial integrity or political unity of other sovereigns that are conducting themselves correspondingly and in compliance with self-determination of peoples. The idea of territorial integrity is to protect States from illegal use of force conducted by other States. This is an interpretation in line with Wilson´s idea of changeable boundaries but protection of states, "large or small".[100] It would also seem to cohere with the following paragraph, § 8, in which it is stated that "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any *other* State or country"[101]. Crawford also suggests that "equal rights and self-determination" refers to the sovereign equality between States, but only with respect to the right of peoples of a State "to choose their own form of government without external intervention"[102]. The principle of territorial integrity of States is also referred to in the Helsinki Final Act Principle IV, which provides that "[t]he participating States will respect the territorial integrity of each of the participating States". It is clear that the scope of the concept of territorial integrity of States is confined to the relationship among States. This conclusion has also been made by the ICJ in respect to the unilateral declaration of independence of Kosovo in 2008.[103]

3.2. Acknowledgement of a right to secession

3.2.1. With the consent of the predecessor State

Before World War II it was seen as a possible mean for groups of people to gain independence of a territory through secession, either as a result of war or plebiscite.[104] Following the two World Wars *unilateral* secession was used for the fractioning of the empires of the defeated

[99] Mursweik, p.35; Johanson, p.140.
[100] See e.g. Fourteen Points United States Declaration, *Encyclopædia Britannica*, available from www.britannica.com/event/Fourteen-Points, accessed 4 April 2018, point 14; Cassese, p. 20; Raič, p. 182-183.
[101] Principle V, § 8 of the Friendly Relations declaration. Emphasis added.
[102] Crawford, p. 114.
[103] Kosovo case, paragraph 80.
[104] Crawford p. 388.

Central Powers and the dismantling of the colonial empires.[105] Secession was never, though, a legal right under international law.[106] Neither was it prohibited under international law.[107] Crawford points out that the language occasionally used characterizing secession as illegal in a specific case does not imply that secession is prohibited under international law. This conclusion is made based on two reasons; the first is that if condemning a claim of secession as illegal, then consequently the secessionist group are subjects of international law, contrary to the aim of denying them international status. The second reason is that there is no prohibition on secession to be found under international law; instead reference is made to the national law of the *metropolitan State*[108]. It is up to the *metropolitan State* to apply national law in a situation where a group claims independence from the territory.[109] In the Åland Islands case, the Commission of Jurists stated that "[g]enerally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted"[110].

Since the end of World War I "no State which has been created by *unilateral* secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State"[111]. Although the creation of a new State is not dependent on the recognition by other states,[112] and admission to UN membership does not mean collective recognition of the new State,[113] the admission to UN membership does provide the benefit that statehood cannot be questioned.[114] The States that have emerged through secession or dissolution after 1945 and outside a colonial context have been admitted to the UN after the *metropolitan State* has given its approval of secession or recognized its independence.[115] A conclusion that can be drawn from admission to UN membership is that a right to secession is undisputed in the case where the *metropolitan State* approves the secession or recognizes such a right through national legislation.[116] This can be explained by the fact that there is no tension created between the seceding entity and the territorial integrity of State in such a situation. Contrarily, in the case of *unilateral secession,* i.e. without approval, there is an apparent tension in relation to the territorial integrity of the *metropolitan State* and which legal status is highly contested.

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[105] Raič, p.98.
[106] Buchanan, Allen, *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law*, Oxford University Press, Oxford, United Kingdom, 2004, p. 333. [cit. Buchanan].
[107] Kosovo case, paragraph 79; Oeter, Stefan, *Secession, Territorial Integrity and the Role of the Security Council*, Hilpold, Peter (Ed.), Kosovo and International Law: The Advisory Opinion of 22 July 2010, pp.109-138, Brill, 2012, p.114. [cit. Oeter].
[108] *Metropolitan State* refers to "the State on whose territory the new State is to be created, and in terms of the manifestation of consent, to the government of that State", Crawford p.330.
[109] Crawford, pp.389-390.
[110] Commission of Jurists, paragraph 2.
[111] Crawford, p.390.
[112] The legal effect of recognition by other States is disputed but contemporary international law is based on the view that recognition is of declaratory meaning. Thus, the creation of States does not depend on the recognition of other states. Henriksen, p.64.
[113] Raič, p. 47.
[114] Hillgruber, Christian, *The Admission of New States to the International Community*, volume 9, issue 3, pp.491-495, Journal of International Law, 1998, p. 492.
[115] Crawford, p. 416.
[116] See e.g. Raič, pp. 293, 313-314; Crawford pp. 415-416.

3.2.2. A right of unilateral secession?

While secession with the consent of the *metropolitan State* is a right rarely challenged, the alleged right of *unilateral* secession under international law is laden with controversy. In the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960, § 6, it is stated that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". This paragraph undoubtedly rejects a right of secession,[117] but the formulation is subsequently restricted in the Friendly Relations Declaration adopted by the General Assembly in 1970. Principle V, § 7 of the Friendly Relations Declaration protects the territorial integrity of States "[…] conducting themselves in compliance with the principle of equal rights and self-determination of peoples […] representing the whole people belonging to the territory without distinction as to race, creed or colour". The aforementioned formulation is basically repeated in Art. 1 (2) of the 1993 Vienna Declaration[118] and in Art. 1 (3) of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations adopted in 1995,[119] (hereafter Fiftieth Anniversary Declaration). An obvious conclusion drawn from the provision is that territorial integrity is not guaranteed in a case in which a State does not respect the right to self-determination of peoples, discriminating a subgroup through denying its right to *internal* self-determination. The territorial integrity of States is limited through its own non-compliance with the right to self-determination of peoples. As determined above, the provision is directed towards States, which means that the dismemberment or impairment of State territorial integrity refers to actions of other States. The international community could thereby legally take action if a State grossly violates the *internal* dimension of self-determination. Such action taken by the international community can be aid,[120] or recognition of independence of the discriminated seceding entity, which would otherwise be perceived as illicit.[121] An act of secession may then be "authorized or encouraged"[122] by other States. Numerous scholars have argued that the provision entails a right for so called *remedial* secession; a right for peoples to secede under certain circumstances as a last resort, as an *ultimum remedium*.[123] In a situation in which a State deliberately and sustainably discriminates a part of the population, and does thus not represent the whole population, the right to self-determination would, if not *remedial* secession was included, be a "hollow shell" for the entity in question.[124] The possibility of a right to *remedial* secession implicitly been acknowledged in several judicial decisions which are explored below.[125]

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[117] Mursweik, p. 24.
[118] World Conference on Human Rights 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc. A/CONF.157/23; 32 ILM 1661. (1993 Vienna Declaration).
[119] UNGA 'Declaration on the Occasion of the Fiftieth Anniversary of the United Nations' Res. 50/6 (9 November 1995) 50th Session UN Doc. A/50/48 (Fiftieth Anniversary Declaration).
[120] Johanson, p. 70. It cannot be use of force other than through the decision of the UN Security council. See Johanson p.123.
[121] Oeter, p. 114.
[122] Principle V, § 7 Friendly Relations Declaration, Art. 1 (2) 1993 Vienna Declaration and Art. 1 (3) Fiftieth Anniversary Declaration.
[123] See e.g. Buchheit pp. 221-223; Cassese p. 118; Anderson pp. 358-368.
[124] Mursweik, p. 26.
[125] It is clear and "practically beyond dispute" that the right to self-determination of peoples does not contain an unconditional right of secession. Oeter s.115.

The provision limiting the territorial integrity of States is preceded by a statement in 1993 Vienna Declaration and the Fiftieth Anniversary Declaration which reaffirms the right to self-determination, "[…] taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the *right of peoples to take legitimate action* in accordance with the Charter of the United Nations to realize their inalienable right of self-determination"[126]. The ultimate and legitimate action for an entity denied *internal* self-determination must necessarily be a right to *remedial* secession, to be able to realize their inalienable right to self-determination and in order for the right of self-determination not to be a hollow shell.

The Commission of Jurists in the Åland Islands case in 1921 first concluded that "[p]ositive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation"[127]. However, the Commission seem to recognize the possibility of a right to *remedial* secession by the following statement:

> The Commission […] does not give an opinion concerning the question as to whether a *manifest and continued abuse of sovereign power*, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is *not confined to the domestic jurisdiction of the State concerned* […].[128]

The Commission of Rapporteurs was of a similar opinion; first rejecting an absolute right to secession based on the wish of the seceding entity if the State "[…] gives it the guarantees which it is within its rights in demanding, for the preservation of its social, ethnical or religious character […]"[129], and subsequently acknowledging the possibility of a right to *remedial* secession by stating that "[t]he separation of a minority from the State of which it form a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees"[130].

A conclusion deduced from the opinions above is that intra-State disputes between subgroups of a State may assume character of an international dispute in the case of "manifest and continued abuse of sovereign power" and that a right to *remedial* secession may arise in such circumstances.[131] The Commission of Rapporteurs was of the opinion that a minority which is not guaranteed the "preservation of its social, ethnical or religious character" by the State may secede as a last resort if the "State lacks either the will or the power to enact and apply just and effective guarantees".

Cassese asserts that the Friendly Relations Declaration, Principle V, § 7 does acknowledge a right to *remedial* secession when it is apparent that "internal self-determination is absolutely beyond reach" and there is no "likelihood for possible peaceful solution within the

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[126] Emphasis added. Art. 1 (2) of the 1993 Vienna Declaration and Art. 1 (3) of the Fiftieth Anniversary Declaration.
[127] Commission of Jurists, paragraph 2.
[128] Emphasis added. Commission of Jurists, paragraph 2.
[129] Commission of Rapporteurs, p. 318.
[130] Commission of Rapporteurs, p. 318.
[131] Anderson, p. 361.

existing State"[132]. Albeit contending that the resolution links the right to *internal* self-determination to the *external* aspect of the right, it is not sufficient with a basic denial of the right to representation but has to include great violations of fundamental human rights for a right to secession.[133]

The qualification of a right to *remedial* secession implicit in Principle V, § 7 of the Friendly Relations Declaration have been argued by Anderson to likely implicitly contain several criteria, namely; (1) deliberate, sustained and systematic discrimination. This criteria excludes isolated instances of discrimination or undeliberate applications of discriminatory norms; (2) A sufficient conjunction between the discrimination and the claim of secession, which excludes a right to secession based on discrimination that occurred centuries prior to the claim. The asserted time period is a minimum of ten to fifteen years from the abuse of sovereign power against the entity before the right to claim secession expires; (3) The seceding entity must ensure the protection of human rights of minorities in the newly established independent State, especially a minority that prior to the secession was part of the oppressive majority. This criteria is aimed to ensure that the right to self-determination is not "utilized to foster or perpetuate human rights violations"[134]; (4) The final criteria is the attainment of statehood based on effectiveness, namely: a permanent population, a defined territory, a government and the capacity to enter into relations with other States. An exception is made of the criteria of an effective government. [135] Anderson highlights that the criteria additionally includes "statehood based on compliance with peremptory norms, in particular, the prohibition of illegal use of force"[136].

Other scholars have refused such an interpretation of the provision. Van den Driest considers the conclusion that § 7 of the Friendly Relations Declaration entails a right to *remedial* recession is highly problematic. She regards it as a "[…] sweeping entitlement on the basis of an inverted reading […]" and finds the theoretical foundation of such arguments noticeably weak.[137] She points out that a general right to *unilateral* secession is not to be found in international treaty law. She highlights that the "soft law" instruments where reference is made to self-determination of peoples also encompasses a so-called "safeguard clause" emphasizing that this right "should be limited to prevent threats to the territorial integrity of States"[138]. It is clear that scholars hold opposite views on what the content of the so-called "safeguard clause" or the "saving clause". For instance, Shaw and Van den Driest perceives the right to self-determination to be limited by the territorial integrity of States to the extent that the latter concept has an absolute precedence,[139] and to the point that there is in practice no way for a discriminated

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[132] Cassese, p. 120.
[133] Cassese p.120.
[134] Anderson, pp. 359-360.
[135] Anderson, p. 360. The aforementioned exception has been made in several cases in the colonial context for the enabling of the exercise of *external* self-determination. See Raič, pp.95-104.
[136] Anderson, p. 360. See e.g. "[…] the development of the concept of peremptory norms in the Vienna Convention confirms this conclusion: norms that are […] peremptory cannot be violated by State-creation any more than by treaty-making", Crawford p.107.
[137] Van den Driest, Simone, *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, volume 62, issue 3, pp.329-363, Netherlands International Law Review, 2015, pp.341-342. [cit. Van den Driest].
[138] Van den Driest, p. 338.
[139] Shaw, Malcom N, *Peoples, Territorialism, and Boundaries*, volume 8, issue 2, pp. 478-507, European Journal of International Law, 1997, p. 483; Van den Driest, pp. 340-341.

entity to realize their right to self-determination. For the aforementioned entity, the right to self-determination becomes a hollow shell. Through excluding a right to *remedial* secession the right to self-determination for the discriminated entity loses its effect and becomes non-existent. Such an interpretation appear inconsistent with general principles of interpretation.[140] In contrast to this view, numerous scholars perceive the "saving clause" to entail a limitation of the territorial integrity of States by the right to self-determination of peoples in a situation when the State discriminates an entity and denies them the right to *internal* self-determination.[141] Self-determination through secession is thereby the only remedy and mean for the realization of their right. The concept of territorial integrity of States and the self-determination of peoples may have been skillfully balanced in this manner.

On the issue of *remedial* secession the ICJ had the opportunity to clarify the legality of such claims in its Advisory Opinion of 2010 concerning Kosovo. The request involved the lawfulness of Kosovo´s claim of independence in 2008, inquired by the UN General Assembly.[142]

The legal status of Kosovo is recognized by Serbia and some other States as an autonomous area of Serbia.[143] In mid-2009 there were about 60 UN member States that recognized Kosovo as an independent State.[144] The declaration of independence from Serbia in 2008 can partly be explained by the racially discriminatory policies against Albanians in Kosovo implemented by Milošević, the president of the Federal Republic of Yugoslavia,[145] and the revocation of the regions autonomy.[146]

A crucial event for the development of the Kosovo Liberation Army (KLA or UCK) was the State repression of demonstrators in the 1968 student demonstration in Kosovo. The Serbian authorities arrested and banned many Albanians taking part in the demonstration from studying or working.[147] The violent development of KLA was responded to with brutal countermeasures by State military forces. As the situation worsened in 1998 the UN made efforts to regain stability.[148] Negotiations were mediated by EU, Russia and USA between Serb and Kosovar delegations resulting in an 'Interim Agreement for Peace and Self-Government in Kosovo', though the document was never signed by the Serb delegation. Instead, the Serb military activities

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[140] In case of norms conflicting, neither "should be interpreted in a way that the other one loses its actual effect". Mursweik, p. 35.
[141] See e.g. Buchheit p. 221; Cassese, pp.118-120; Anderson, p.363.
[142] Kosovo case, paragraph 1.
[143] International Commission of Jurists, *Uncharted Transition: the "Integration" of the Justice System in Kosovo A briefing paper*, Geneva, Switzerland, 24 February 2016, p. 3.
[144] The United Nations, *Kosovo: The untold story of a diplomatic breakthrough*, Ten Stories the World Should Hear More About, 2008, available from www.un.org/en/events/tenstories/08/printable/kosovo.shtml, accessed 18 April 2018.
[145] Yugoslavia was dissolved between the years of 1991-1992, whereby Serbia eventually formed a State. See e.g. Crawford pp. 395-399.
[146] Kubo, Keiichi, *Why Kosovar Albanians Took Up Arms against the Serbian Regime: The Genesis and Expansion of the UC¸ K in Kosovo*, volume 62, issue 7, pp.1135-1152, Europe-Asia Studies, 2010, p. 1139. [cit. Kubo]; The legal status as an autonomous region was declared by Tito in 1974 to try and prevent secessionist tendencies. Hilpold, Peter, *Self-Determination and Autonomy: Between secession and Internal Self-determination*, volume 24, issue 3, pp.302-335, International Journal on Minority and Group Rights, 2017, p.3120. [cit. Hilpold].
[147] Kubo, p. 1140.
[148] Webber, Mark, *The Kosovo war: a recapitulation*, volume 85, issue 3, pp.447-459, International Affairs, 2009, p. 449. [cit. Webber].

escalated which resulted in massive expatriation of Kosovo Albanians seeking refuge.[149] In 1999 the UN Security Council adopted a resolution "determined to resolve the grave humanitarian situation in Kosovo"[150] under Chapter VII of the UN Charter, through which it authorized to establish "[…] international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy […]"[151]. By the time of the declaration of independence in 2008, the Security Council had been involved with the situation in Kosovo for more than a decade.[152]

In its Advisory Opinion the ICJ concluded that international law does not contain a prohibition of declarations of independence[153] and that it was no need to resolve the question whether the population of Kosovo had a right to *remedial* secession because this question was "beyond the scope of the question posed by the General Assembly"[154]. Despite a number of participants argued for a right to *remedial* secession in the present case[155] the Court avoided to deliver an answer to this question. By interpreting the question asked restrictively the ICJ avoided having to express the legal consequences of the claim of independence by the population of Kosovo. The Court noted that "[…] it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second"[156]. It is clear that neither this Advisory Opinion gives any clarity on the alleged right to *remedial* secession.

The intricate issue of *remedial* secession is commented in the Separate Opinion of Judge Yusuf. He states that Principle V, § 7 of the Friendly Relations Declaration:

> […] makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State's territorial unity and sovereignty.[157]

Judge Yusuf makes a similar interpretation of the provision as some of the scholars mentioned above, linking the right to *internal* self-determination to the *external* aspect of the right. He concludes that the exercise of *external* self-determination may be utilized through *unilateral* secession as a last resort when an entity is denied the right to *internal* self-determination, in other words a right to *remedial* secession. However, in its Advisory Opinion, the Court notes that the States participating in the proceedings were taking very different views on whether a

[149] Webber, p. 450.
[150] UNSC Res. 1244 (10 June 1999) UN Doc. S/RES/1244, paragraph 4 of the preamble. (SC 1244).
[151] SC 1244, paragraph 10.
[152] Kosovo case, paragraph 37.
[153] Kosovo case, paragraph 79.
[154] Kosovo case, paragraph 83.
[155] Kosovo case, paragraph 82.
[156] Kosovo case, paragraph 56.
[157] Kosovo case, Separate Opinion of Judge Yusuf, paragraph 12.

right to *remedial* secession exists under international law.[158] Altogether, the ICJ did not do much to elucidate the legal status of *remedial* secession.

Often asserted to support the existence of a right to *remedial* secession is the case of Bangladesh, formerly known as East Pakistan, claiming independence from Pakistan in 1971. Although the majority of the population, predominantly Hindu, lived in East Pakistan, it was dominated by the central authorities in West Pakistan, predominantly of Muslim population.[159] The International Commission of Jurists noted in their 1972 study, *The events in East Pakistan 1971*, that "[…] East Pakistan came to experience what seemed to them to be a colonialist domination […]"[160] by the Muslim province. The East Pakistani attempts to attain autonomy was met with hard resistance. The elections for the National Assembly in 1970 led to an unexpected and outstanding victory of the Bengali Awami League with an absolute majority in the Assembly.[161] Autonomy of East Pakistan was within reach. The central government responded by postponing the Assembly´s opening session indefinitely which was met by a strike throughout East Pakistan.[162] This resulted in large scale military actions and inter alia the "attempt to exterminate or drive out of the country a large part of the Hindu population of approximately 10 million people"[163]. The oppression of the population in East Pakistan and the civil war eventually ended when India intervened in 1971 and defeated Pakistan.[164]

Crawford holds that the case of Bangladesh is the only clear example of *unilateral* secession since 1945.[165] The *unilateral* secession of Bangladesh (East Pakistan) from Pakistan may be said to have served a remedial purpose because of the oppression, violations of human rights and crimes against humanity that the Bengali population had to persevere.[166] Although it served an actual remedial purpose it is not necessarily to say that the population of Bangladesh in fact had an eventual legal right to *remedial* secession. Even though the situation of gross human rights violations between March and December in 1971 generated sympathy of the Bengalis in the international community, it did not lead to the recognition of the emerged State on a wide scale.[167] Some States had individually recognized its independence after the surrender[168] of Pakistan but only India was prepared to do so prior to the defeat of Pakistan.[169] It was not until 1974, shortly after Pakistan had recognized Bangladesh as independent, that the latter was admitted to the UN. The General Assembly recognized in its resolution, adopted in 1971 requiring India to withdraw its forces, "the need to deal appropriately, at a subsequent stage, within the framework of the Charter of the United Nations, with the issues which have given rise to the

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[158] Kosovo case, paragraph 82.
[159] The Secretariat of the International Commission of Jurists, *The Events in East Pakistan, 1971*: *A legal Study*, Geneva, Switzerland, 1 June 1972, pp.7-9. [cit. Commission of Jurists on the events in East Pakistan].
[160] Commission of Jurists on the events in East Pakistan p. 10.
[161] Commission of Jurists on the events in East Pakistan pp. 11-12.
[162] Commission of Jurists on the events in East Pakistan pp. 14-15.
[163] Commission of Jurists on the events in East Pakistan p. 97.
[164] Commission of Jurists on the events in East Pakistan pp. 31, 43-44.
[165] Crawford, p. 391.
[166] Commission of Jurists on the events in East Pakistan, p. 97.
[167] Van den Driest, pp. 345-346.
[168] After the defeat of Pakistan in December 1971, there were 30 States, including India, which had recognized Bangladesh until 7 February 1972. United States Congressional Record, Senate (9 February 1972), Doc. 3396, available from cbgr1971.org/files/Recognition_of_BD_Files/List_of_Countries_FULL.pdf, accessed 29 April 2018.
[169] Crawford, p. 393.

hostilities", but made no reference to self-determination of peoples.[170] Altogether, it seems as the international community was not prepared to recognize Bangladesh until the defeat of Pakistan which in turn indicates that a right to *remedial* secession was not acknowledged as customary international law at the time. In the study of 1972 by the International Commission of Jurists special examination was made on the right of self-determination. In its interpretation of Principle V, §7 of the Friendly Relations Declaration, Commission concluded that the territorial integrity of States is given primacy in relation to self-determination. On the other hand, it concluded that "[i]f one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive"[171].

A much cited judicial decision referring to *remedial* secession is one by the Supreme Court of Canada, when asked for an Advisory Opinion[172] in regards to *unilateral* secession of Quebec. Although this decision is of national level it may be enlightening on the view on an eventual right to *remedial* secession under international law. The Court stated that:

> […] the international law right to self-determination only generates, *at best*, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[173]

The Court is cautious it its reference to an eventual right to *remedial* secession adding that "it remains unclear whether this third proposition actually reflects an established international law standard"[174] and that the right to self-determination "at best" generates a right to *remedial* secession. Albeit not denying a right to *remedial* secession, neither does the Court acknowledge it. The advisory opinion of the Canadian Supreme Court is sometimes used to support the position that a right to *remedial* secession exists under international law. The author holds that the formulation chosen by the Court does neither support nor deny the existence of a right to *remedial* secession. This is worth noting since the case is sometimes brought into the debate of an eventual right to *remedial* secession under international law.[175]

3.3. Conclusion

It is suggested that the obligation to respect territorial integrity of States is directed towards other States, not to peoples within the State. Hence, it is an obligation that can only be violated by States not by peoples within a State. Because the prohibition refers to the "threat or use of

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[170] UNGA Res. 2793 (XXVI) (7 December 1971) 26th Session UN Doc. A/L.647/Rev.1.
[171] Commission of Jurists on the events in East Pakistan, p. 69.
[172] The federal Government of Canada raised questions to the Court after two referendums had been held by the province Quebec in regards to an eventual claim of independence, one conducted in 1980 and the other in 1995, see Crawford p.411.
[173] Emphasis added. *Reference re Secession of Quebec*, Supreme Court of Canada, Case No. 25506, 20 August 1998, paragraph 138. [cit. Reference re Secession of Quebec].
[174] Reference re Secession of Quebec, paragraph 135.
[175] See e.g. Raič, pp. 318-319.

force" in inter-State relationships, the concept can consequently not prohibit secession. There is no implicit prohibition on secession inherent in the concept of territorial integrity. It is thereby also reasonable to conclude that the principle does not guarantee the status quo of State borders. As to the content of the concept of territorial integrity, it may, as a minimum, be concluded that it entails non-interference of State territory as long as the State does not grossly violate self-determination of peoples.[176] It is sufficient to limit the study to the interpretation of treaty provisions which refer to the concept of territorial integrity and not to examine whether the concept hold additional legal dimensions under customary law.

In regards to secession, it is undisputed that such a right exists if exercised with the approval of the predecessor State. Secession in absence of approval (*unilateral* secession) is highly contested. In the case of an entity seceding unilaterally, the territorial integrity of the *metropolitan State* is strained. Trough the examination of the relevant provisions in the Friendly Relations Declaration, the 1993 Vienna Declaration and the Fiftieth Anniversary Declaration, it appears obvious that the territorial integrity of States is limited by self-determination if the State does not conduct itself in compliance with the latter. Not the opposite. The right to *external* self-determination through the means of secession seem to arise in the case of denied *internal* self-determination. There is thus no support for a right to *unilateral* secession in the sense that it is based on the pure wish of peoples. However, in order for the balance between the aforementioned concepts to be kept, there must be a certain threshold to meet before a right to secession revives. Non-compliance with the *internal* aspect of self-determination cannot be perceived to be isolated instances of discrimination for instance, or discrimination that occurred to long ago. It must be the last resort; *remedial* secession when realizing the right to self-determination is not possible through any other means. As suggested above, a right to *remedial* secession have support in "soft law". There is additionally some, but very limited support in judicial opinions. In fact, it is only the Commission of Rapporteurs in the Åland Islands case where *remedial* secession has been recognized as a right if as last resort. In others it has been recognized as a possible right. A conclusion that can be drawn by the case of Bangladesh seceding from Pakistan is that the response from the international community seem to indicate that there was not right to *unilateral (remedial)* secession by customary international law. It is held that the Friendly Relations Declaration reflect customary international law, but as for *remedial* secession, on the contrary, the Bangladesh case seem to indicate, at least, the lack of *opinion juris*[177]. As might be held, so does ICJ Advisory Opinion in the Kosovo case indicate, as it points out the vast different views whether such a right exists under international law held by the participating States.[178] In sum, there is not enough evidence to conclude that a right to *remedial* secession exists under international law. However, as Hilpold points out, there seem to be growing support for a right to secede as a last resort remedy.[179]

[176] Johanson, p. 70.
[177] The subjective element of customary international law requires the belief that a behavior is a legal obligation. See e.g. p.27 Henriksen.
[178] Kosovo case, paragraph 82.
[179] Hilpold, p. 322.

4. UNILATERAL SECESSION V. TERRITORIAL INTEGRITY OF THE STATE

4.1. Concluding thoughts on the issue of unilateral secession and territorial integrity of States

To conclude the findings of this study, the subject of the right to self-determination, hence the term "peoples" have been found to include subgroups of a nation. Examining the term and comparing the use of it with other terms both within sources as well as with other international instruments has resulted in the conclusion that these subgroups are not confined to racial and religious groups. This conclusion is supported by viewing the system of norms in international law; the principle of territorial integrity of States would be redundant in connection to self-determination of peoples if the subject of the latter was confined to nations. If this was the case, there would be no conflict between the two. In addition, this conclusion is supported by the function and values of self-determination of peoples, guaranteeing the existence of subgroups. The subject in greater need of protection of collective identity are subgroups, not nations. Peoples have a right to determine their cultural development[180] and most nations are comprised of several ethnical subgroups with different cultures. The reference to "race, creed or colour" in Principle V, § 7 of the Friendly Relations Declaration is not to interpret as an exhaustive list of groups subject to self-determination but rather an exemplification of grounds of discrimination. In line with the values and function of self-determination is the protection of collective identities not confined to only two non-reducible characteristics (as argued by Cassese) among groups existing as units distinct from the larger community. A government is thereby not respecting the *internal* self-determination of peoples, and not representing the "whole people" if discriminating ethnic groups distinguished by a common history, language or cultural heritage etc. from political decision-making.

As subgroups has been determined to constitute subjects of self-determination the possibility of self-determination to include a right of secession could be examined. It is undisputable that such a right exists if the subgroup has the consent from the *metropolitan State*. There is no prohibition of secession under international law and it has been left to the *metropolitan State* to apply national law and determine whether it consents to a secessionist claim. The issue of whether a right to *unilateral* secession exists under international law or if it is implicitly prohibited through the principle of territorial integrity of States is much contested. In the study *unilateral* secession is distinguished from *remedial* secession. The former being based on the will of the peoples making a secessionist claim and their wish to determine their own destiny externally while the latter is based on discrimination of a subgroup and the denial of the right to *internal* self-determination. It is often argued that there is a certain threshold of the level of discrimination that has to be met for an eventual right to *remedial* secession to revive, often systematic oppression, serious and systematic discrimination or other gross violations of human rights with any likelihood of a peaceful solution within the State excluded. *Unilateral* secession as defined in this study is argued not to constitute a right under international law, albeit not implicitly prohibited through the principle of territorial integrity of States. Territorial integrity of States refers to inter-State relations, and can thus only be violated by States, not peoples making secessionist claims. Although there is support for the view of *remedial* secession being

[180] Principle V, paragraph 1 of the Friendly Relations Declaration.

a right under international law, mostly through an inverted reading of the Friendly Relations Declaration, the evidence does not seem to be sufficient. The territorial integrity of States is clearly restricted by the compliance with self-determination of peoples suggesting that non-compliance with the *internal* self-determination results in the right of peoples to secede as a last resort, to be able to "realize their inalienable right to self-determination"[181]. A different reading of the interpreted instruments would lead to the right to *internal* self-determination being a hollow shell for the entity in question, an interpretation not in line with basic principles of interpretation.[182] Even though this conclusion is made, it is said not to be sufficient to determine a right to *remedial* secession. This conclusion has been drawn with the consideration that General Assembly resolutions have been given considerable importance in the interpretation of obligations under the UN Charter. As mentioned above, the ICJ has stated that "[t]he effect of consent to the text of such resolutions [like the Friendly Relations Declaration] cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"[183]. Surely, resolutions are generally considered to impact the formation of customary international law or constitute the latter.[184] But on the other hand, for a norm to constitute customary international law, it must in addition to State practice on the matter, reflect *opinion juris.*[185] The case of Bangladesh seceding from Pakistan seem to suggest that there was no *opinion juris* at the time. Although there might be growing *opinion juris* of a right to *remedial* secession,[186] there is inadequate evidence of the substantiation of such a right for the time being. International law currently gives precedent to the territorial integrity of States and presumes the existence of States which already are recognized.

The interpretation of General Assembly resolutions suggests that the current regulation on self-determination of peoples appear to contain a right to *remedial* secession. This is what seemingly has been agreed upon through an interpretation of these resolutions. But on the issue of a right to *remedial* secession *opinio juris* appear to be lacking. The international community did not react to the case of Bangladesh seceding from Pakistan in a way that suggests the belief that it was legally required of them. Other cases of repression that has triggered individual States and the UN Security Council to act have been acted upon on the basis of territorial integrity of States.[187]

It has been pointed out that *opinion juris* on a right to *remedial* secession might be growing, but it seems as if a reason for the inconsistent reactions and views within the international community may be the ambiguity of the current legal system. On one hand States are required to not recognize illicit claims of statehood but on the other hand the adopted resolutions seem to suggest that such a reaction is not illicit. On the contrary, it appears to be adequate to acknowledge a right to *remedial* secession; when a State denies a subgroup their right to *inter-*

[181] Art. 1 (2) of the 1993 Vienna Declaration and Art. 1 (3) of the Fiftieth Anniversary Declaration.
[182] Mursweik, p. 35.
[183] Nicaragua v. United States, p. 100.
[184] Henriksen, p. 37; Kosovo case, paragraph 80.
[185] Henriksen, p. 25-27.
[186] Hilpold, p. 322.
[187] Crawford, pp.403-404.

nal self-determination to a degree which is a threat to international stability, the balance between territorial integrity of States and self-determination of peoples shifts to the advantage of the latter. The current regulation of self-determination of peoples is obscure and causes an ambiguity in what is legally required by States. The balance between territorial integrity of States and self-determination of peoples may be skillfully managed through acknowledging a right to *remedial* secession when the *metropolitan State* has caused its own loss of guaranteed territorial integrity. In this way, all peoples are guaranteed their inviolable right to self-determination and the subgroups victims of discrimination and oppression are no exception. The balance between territorial integrity of States and self-determination of peoples is then interpreted in a way that neither loses its actual effect in a concrete situation. Such an understanding of the legal order may work as a strong incitement for States to strengthen the *internal* self-determination of peoples granting self-determination of subgroups to a larger extent in order to avoid secessionist claims. Although it might be argued that the effect of granting a right to *remedial* secession may be that there is an increase of illicit claims causing instability within the States and in the international community. What can be said with certainty is that a legal order in which some groups are denied the right to self-determination as a whole is unacceptable. A future content of the right to self-determination hopefully does not de facto exclude some discriminated subgroups in need of *remedial* secession to be able to realize their right. As stated already in 1921 by the Commission of Jurists in the Åland, the protection of minorities must be in coherence with self-determination of peoples as both have the same object – to assure the protection and maintenance of subgroups with for instance ethnic, religious, linguistic characteristics.[188] The exceptional solution of *remedial* secession would do just that.

4.2. A Short Comment on the Issue of Legitimacy

It might be argued that legality and legitimacy is more of an amalgamation in the issue of secession than in other fields of international law. In other words, normative arguments blend with legal reasoning to a larger extent.[189] Legality can be defined as "[t]he quality or state of being in accordance with the law"[190] and legitimacy as the "[a]bility to be defended with logic or justification; validity"[191].

The legitimacy of territorial integrity of States is inter alia the protection of States against the intervention, threat or use of force by other States – the protection of the peoples to choose governmental authority without external interference through the threat or use of force. It must logically be the peoples within the States that the principle ultimately is to protect. The legitimacy of territorial integrity is much connected to the stability of the State which in turn is to a large extent legitimized by the interest of international stability and order.[192] One might con-

[188] Commission of Jurists, paragraph 3.
[189] Thürer, Burri, paragraphs 6 and 7.
[190] Legality, (2018), Oxford Dictionaries, available from en.oxforddictionaries.com/definition/legality.
[191] Legitimacy, (2018), Oxford Dictionaries, available from en.oxforddictionaries.com/definition/legitimacy.
[192] See for similar reasoning e.g. Eide, Asbjørn, *In Search of Constructive Alternatives to Secession*, Tomuschat, Christian, (Ed.) Modern Law of Self-Determination, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1993, p. 147. [cit. Eide]; Thürer, Burri, paragraphs 9 and 10.

clude that the principle of territorial integrity protects the peoples within the State and the stability of the international order, which are the reasons for the principle´s legitimacy. The validity or legitimacy of *unilateral* secession could be said to be the interest of taking the wishes of the population into account; the right for a subgroup to self-determinate its own destiny externally.[193] The validity or legitimacy of *remedial* secession must be said to be the protection of subgroups[194] against denial of their right to *internal* self-determination, serious and systematic discrimination and other gross violations of human rights, and ultimately to guarantee "[…] the preservation of its social, ethnical or religious character […]"[195].

The current balancing between interests of peoples, States and the international community has resulted in a non-recognition of a right to *unilateral* secession and *remedial* secession, to the advantage of territorial integrity of States and international stability and order. At least this is the idea. As stated above, the interest of the territorial integrity of States and in extension the stability of States, is mainly for the ultimate reason of international stability. Hence, the main reason for the non-recognition of a right to *remedial* secession is the view that all secessionist claims are a threat to international stability. A framework which is clear and provides the requisites of when a claim is legitimate or illegitimate would seem to be beneficial to avoid illicit claims causing the international stability to be challenged, at the same time as it could admit the right of self-determination of *all* peoples. Claims of independence based on pure wish may be legitimate, but not enough in relation to the interest of international stability, while a claim of *remedial* secession is; in the latter situation the international stability has already been challenged.

[193] See similar reasoning Thürer, Burri, paragraph 8.
[194] See similar reasoning Thürer, Burri, paragraph 8.
[195] Commission of Rapporteurs, p.318.

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