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Submitted: 20/09/2020

Accepted: 07/01/2021

## The Right to Self-Determination of Modern Secessionist Movements under International Law

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### Abstract

States' boundaries have changed to a large extent over the course of time, in fact, the world has not always been the same as nowadays. In place of archaic forms of social organisation, the universal order has appeared where determinate and inviolable borders play a crucial role in ensuring the stability of states and resisting separatist movements. At the same time, secessionist movements throughout the world continually aim to gain independence from the 'parent' state invoking the right to self-determination. In this paper, the researcher will examine whether a part of the population of a state or a sub-unit of that state has a right to secede and create a new state and/or integrate into another. The article consists of a strong theoretical part dealing with statehood, self-determination and secession with a view of the dynamic development of these notions since the rapid birth of many new states as a result of decolonization. Thereafter, the validity of the gathered results will be verified by a comparative analysis of the cases of Kosovo, Crimea and Catalonia with regard to the historical background of these secessionist entities.

**Keywords:** State; Self-determination; International law; United Nations; Kosovo; Crimea and Catalonia

Cite this article as: Al Sabbagh, J. "Mohammad Khair"., "The Right to Self-Determination of Modern Secessionist Movements under International Law" *International Review of Law*, Volume 10, Issue 1, 2021

<https://doi.org/10.29117/irl.2021.0163>

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## الحق في تقرير المصير للحركات الانفصالية الحديثة بموجب القانون الدولي

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### ملخص

على مدار الوقت تغيرت حدود الدول، ولم يعد العالم مرسومًا بذات الحدود السابقة. انطلاقًا من التجمعات المجتمعية، ظهر النظام العالمي الجديد والذي تشكّل الحدود الفاصلة فيه دورًا حاسمًا في ضمان استقرار الدول ومقاومة الحركات الانفصالية. وفي ذات الوقت، ما زالت الحركات الانفصالية في جميع أنحاء العالم تحاول باستمرار الحصول على الاستقلال عن الدولة "الأم" مطالبة بحقها في تقرير مصيرها. في هذه الورقة، سيقوم الباحث بدراسة أحقية قيام جزء من سكان دولة أو وحدة فرعية من تلك الدولة في الانفصال وإنشاء دولة جديدة و/أو الاندماج مع دولة أخرى. يتكون المقال من قسم نظري يتناول مفهوم الدولة وتقرير المصير والانفصال في ضوء التطور الديناميكي لهذه المفاهيم منذ نشأة العديد من الدول الجديدة التي ظهرت نتيجة لانتهاج حقبة الاستعمار. وبعد ذلك سيتم التحقق من صحة النتائج عن طريق التحليل المقارن لقضية كوسوفو والقرم وكتالونيا ودراسة الخلفية التاريخية لكل منها.

**الكلمات المفتاحية:** الدولة، تقرير المصير، القانون الدولي، الأمم المتحدة، كوسوفو، شبه

جزيرة القرم، كتالونيا

للاقتباس: الصباغ، جعفر "محمد خير". "الحق في تقرير المصير للحركات الانفصالية الحديثة بموجب القانون الدولي"، المجلة الدولية للقانون، المجلد العاشر، العدد المنتظم الأول، 2021

<https://doi.org/10.29117/irl.2021.0163>

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## 1. Introduction

A state is commonly defined as "a community which consists of a territory and a population subject to an organized political authority"<sup>1</sup>. Forming a state has been linked with people who share common history, language, ethnicity, culture as well as territory<sup>2</sup>. This is what is known as 'self-determination'.

The principle of self-determination is the right of "All peoples...[to] freely determine their political status and freely pursue their economic, social and cultural development"<sup>3</sup>. Self-determination is a "legal right, which evolved from an historical anti-colonialist claim to a broader human-rights based claim"<sup>4</sup>. It was first introduced in the purposes of the United Nations (UN)<sup>5</sup> and subsequently has been announced in numerous international instruments<sup>6</sup>. The inclusion of this principle in several instruments made some scholars believe that self-determination is a "rule of customary international law"<sup>7</sup>. Although self-determination is an existed legal right under international law for the colonised states, the implication of this right in modern days is disputed. Whereby the restricted practice of recognising self-determined states has been the result of the conscious subordination to the principle of territorial integrity.

This study will consider the implication of the right to self-determination in modern times. It will focus on the non-consensual external self-determination, where a group of people separate a part of the territory from an existing state to form a new state or to incorporate with another, without the consent of the parent country, on the basis of the self-determination right. Thereafter, the article will consider whether the external self-determination in the cases of Kosovo, Crimea and Catalonia are legitimate in light of international law. The author will argue that although unilateral secession is not restricted by international law, it is clearly not practised due to its conflict with the concept of territorial integrity, hence will only be permitted in exceptional circumstances.

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1 Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 *EJIL* 178, 182.

2 Zeinullah Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possidetis, the Ethnic Principle, and Self-Determination' (2005) 80 *Chi.-Kent. L. Rev.* 353.

3 Article 1(1) of both: *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and *The International Covenant of Economic, Social and Civil Right* (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR).

4 *Case Of Chiragov and Others v. Armenia* App no. 13216/05 (ECtHR 16 June 2015) p. 159.

5 Article 1(2) *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945).

6 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res 1514 (XV) (14 Dec 1960); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA Res 2625 (XXV) (24 October 1970); ICCPR; ICESCR and *Vienna Declaration and Programme of Action*, UNGA Res (12 July 1993).

7 Michael Scharf, 'Earned Sovereignty: Judicial Underpinnings' (2003) 31 *DENy. J.INT'L L.& POLY* 373, 378.

## 2. Self-determination

Self-determination is a fundamental right under international law. This is confirmed by the International Court of Justice (ICJ) in the case of *Portugal v. Australia*, that noted "*right of peoples to self-determination as right erga omnes and essential principle of contemporary international law*"<sup>8</sup>. Similarly, by the Supreme Court of Canada in which it was stated that the right to self-determination is "*considered a general principle of international law*"<sup>9</sup>. While the existence of the right is indisputable, the application of such a right could raise controversy.

Although this right has emerged with an aim to establish independent states from the colonised context, the right has been drafted to include "*all people*" with no limitation to the colonised situation<sup>10</sup>. According to the European Court of Human Rights, "*Like colonised populations, non-colonised populations have a right to self-determination*"<sup>11</sup>.

Self-determination applies to a group that qualifies as a '*people*' which are established over a defined territory<sup>12</sup>. There is an argument that self-determination applies only to whole nations, as the ICCPR locates a different set of rights for people to self-determination (art.1) and rights for minorities to enjoy only certain religious, cultural or linguistic rights (art.14)<sup>13</sup>. However, the dominant current meaning according to the Supreme Court of Canada provides that self-determination applies to "*a portion of the population of an existing state*"<sup>14</sup>. This was concluded after noting that self-determination is a human right notion and giving it the meaning of entirety of a state's population would be found somehow unfair and would frustrate its remedial purpose<sup>15</sup>. Since human rights violations are usually perpetrated against a group of individuals situated in a state, it cannot be said that the right of self-determination is a general right, but a right that can be exercised by a portion of the population<sup>16</sup>.

Although there is no determined definition of what constitutes a '*people*', several characteristics are generally regarded as guiding in this respect. According to the International Meeting of Experts on further study of the concept of the rights of peoples<sup>17</sup>, the term '*people*' should first include a group of individuals who share common features such as racial background, religion, history, ethnicity, language, cultural heritage as well as

8 *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, 102.

9 Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 114.

10 See n(3) Article 1 of the ICCPR.

11 See n(4) 152.

12 See n(7) 379.

13 Helen Quane, 'A right of Self-Determination for the Kosovo Albanians' (2000) 13 *LJIL* 219, 222.

14 See n(9) 124; United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

15 *Ibid.*

16 Allen Buchanan, 'Theories of Secession' (1997) 26 *Philosophy and Public Affairs* 31.

17 United Nations Educational, Scientific and Cultural Organization: International Meeting Of Experts On Further Study Of The Concept Of The Rights Of Peoples (27 November 1989) <[https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/819-UNESCO\\_-\\_Rights\\_of\\_Peoples\\_Official\\_Report.pdf](https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/819-UNESCO_-_Rights_of_Peoples_Official_Report.pdf)> [accessed 12/08/2020] p. 7.

territorial integrity of the area under such a claim. Secondly, the group must be collectively distinct from the majority state<sup>18</sup>. This suggests that there should be an objective standard, where group possess external differences from other groups and subjective standards, where individuals within the group find themselves distinct people.

## 2.1 Internal Self-determination

Self-determination is the right to determine the affairs of the people. In contemporary practice, self-determination has been viewed as the right to representative democratic government<sup>19</sup>. This is what is normally referred to as internal self-determination. Internal self-determination is commonly established by having either a democracy or an autonomous status within a state<sup>20</sup>. The Supreme Court of Canada seems to agree on this point, as the court stated: "*the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state*"<sup>21</sup>. Therefore, it can be easily concluded that the majority of states in the modern world do satisfy the requirement right of self-determination in having a democratic system.

## 2.2 External Self-determination

Self-determination in the colonised context was understood as "*the establishment of a sovereign and independent State, [or] the free association or integration with an independent State...freely determined by a people*"<sup>22</sup>. This is normally referred to as external self-determination or state secession, where a part of the population of a state secede from their parent state and form a new original state or integrate with another state. Secession can be either '*unilateral*' or '*consensual*'. Consensual secession demonstrates no international law issues. It is granted by the domestic law or through negotiation with the parent state. For instance, the secession of Singapore presented no international issues as independence happened upon the consent of Malaysia<sup>23</sup>. However, the lack of consent in the unilateral secession is the one that reveals disputes in international law.

In either a unilateral or consensual secession, to establish a sovereign and independent state, the international law provides minimum requirements for states to be established. According to the *Montevideo Convention*, a state should possess: (i) permanent population; (ii) defined territory; (iii) government; and (iiii) the capacity to enter into relations with

18 Ibid.

19 Hurst Hannum, *Autonomy Sovereignty and Self-determination* (UPP, 1996) 30.

20 David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law, 2012).

21 See n(9) 126.

22 See n(6) UNGA Res 2625 (XXV).

23 Mikulas Fabry, 'The contemporary practice of state recognition: Kosovo, South Ossetia, Abkhazia, and their aftermath' (2012) 40 *Nationalities Papers* 661, 663.

other states<sup>24</sup>. Although these standards are not strictly followed by the international community, however, it does provide a starting point that must be considered<sup>25</sup>. However, it is worth noting that the fact that the convention has been inconsistently applied in practice, stress on the importance of having clear and distinct requirements<sup>26</sup>.

### 2.3 Self-determination as a Right

Self-determination is the right for people to determine their political, cultural and economic status. According to the Helsinki Final Act, adopted by the Organization on Security and Cooperation in Europe (OSCE) agreement in 1975 and signed by 35 nations: "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status"<sup>27</sup>. This suggests that self-determination is an ongoing right that needs to be provided all the time.

As has been noted, self-determination is normally provided internally by either having a democratic system or by allocating some autonomy power to the people. However, what if the people are excluded from any kind of political representation within a state? Would they be allowed to unilaterally secede under the right of self-determination? International law seems to provide very limited information in regard to secession outside the colonial context. Scholars seem to have a split argument between claiming that (i) unilateral secession is a right if it is considered as a remedy and (ii) unilateral secession is not a right under international law and it is an issue of the domestic law of the country<sup>28</sup>.

It has been argued by some scholars that external self-determination is considered a right if it has been considered the last remedial action to achieve self-determination<sup>29</sup>. Therefore, remedial secession applies when "*people forming a numerical minority in a State, but a majority within the particular part of the State, are denied the right of internal self-determination or subjected to the serious and systematic suppression of human rights*"<sup>30</sup>. Ryngaert and Griffioen state four conditions before external self-

24 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933).

25 Milena Sterio, 'On The Right To External Self-Determination: "Selfistans," Secession, And The Great Powers' Rule' (2010) 19 *Minnesota Journal Of Int'l Law* 137,169.

26 Ibid.

27 Conference on Security and Cooperation in Europe, *Final Act of Helsinki* (adopted 01/08/1975) 7.

28 Radan Peter, "Secession in constitutional law". In: Pavković Pavković (eds.) *The Ashgate Research Companion to Secession*, (Ashgate 2011), 333-343; Cedric Ryngaert and Christine Griffioen, 'The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers' (2009) 8 *Chinese Journal of International Law*, 3; Micheli Quadros, 'Secession: The Contradicting Provisions of the United Nations Charter - A Direct Threat to the Current World Order' (2016) 14 *Santa Clara J. Int'l L.* 461.

29 Allen Buchanan, *Justice Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP, 2004) 229.

30 John Dugard and David Raic, "The role of recognition in the law and practice of secession" in Marcelo Kohen (ed.),



determination may be invoked under remedial secession. First, the group must be 'people'; with a distinct identity from the majority and represent a majority within a given territory. Second, there must be gross violations of basic human rights. Third, the people are not able to prevent the violations due to exclusion from political participation, without internal self-determination. Finally, negotiations between the 'people' and the repressive regime lead nowhere<sup>31</sup>. By satisfying these conditions, the group of people would have a right to unilaterally secede from the parent state under remedial secession as it is considered the last resort solution<sup>32</sup>.

Further, ICJ in Namibia noted that secession exists as a "*last resort when a State lacks either the will or the power to enact and apply just and effective guarantees*"<sup>33</sup>. Also, the Supreme Court of Canada stated that secession arises if parent state "*denied any meaningful exercise of its right to self-determination within the state*"<sup>34</sup>. Moreover, it is argued that the ICJ in Kosovo Advisory Opinion recognised the existence of remedial secession by not finding Kosovo unilateral declaration of independence to be illegal<sup>35</sup>. All these authoritative references share the perspective that unilateral secession might be allowed in limited circumstances where violations of human rights occur with no possibility to the group to represent themselves internally.

On the end of the spectrum, it must be noted that while many scholars support and argue that there is a positive remedial secession right which exists outside colonial context, however, there is neither a treaty nor a customary international law that provides positive right of remedial secession<sup>36</sup>. The conventions merely state an ambiguous right of self-determination, leaving no enough evidence to support the legitimacy of unilateral secession outside decolonisation<sup>37</sup>. Considering the current state practice there is no support for the right of secession<sup>38</sup>. Since the Second World War, there have been at least twenty-three attempted secessions<sup>39</sup>, arguably only one out of them is considered a successful attempt<sup>40</sup>.

*Secession: International Law Perspective* (CUP, 2006) 134.

31 Cedric Ryngaert and Christine Griffioen, 'The Relevance of the Right to Self-determination in the Kosovo Matter' (2009) 8(3) *Chinese Journal of International Law* 573.

32 Antonio Cassese, *Self-determination of people* (CUP, 2008).

33 League of Nations, 'Report of the International Committee of Jurists Entrusted by the Council of League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspect of the Aland Islands Questions' (October 1920) *League of Nations Official Journal* vol.1 Special Supplements No.3.

34 See n(9) 154.

35 Christopher Borgen 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' (2015) 91 *Int'l L.Stud.* 216, 230.

36 Ibid.

37 See n(23).

38 See n(35) 231.

39 James Crawford, *The Creation Of States In International Law* (2<sup>nd</sup> Edn, OUP, 2006) 403.

40 Stefan Wolff and Annemarie Rodt, 'Self-Determination After Kosovo' (2013) 65 *Europe-Asia Studies* 799.

Therefore, in practice, there is very little support of remedial secession outside the colonial context. Further, there is no clear statement of '*opinio juris*' to support unilateral secession outside the colonial context. As if there was a clear '*opinio juris*', then the ICJ in Kosovo Advisory Opinion would have not written: "*differences [in the views] existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances*"<sup>41</sup>. In addition, the Committee on the Elimination of Racial Discrimination reported that "*international law has not recognized a general right to peoples unilaterally to declare secession from a State*"<sup>42</sup>. Hence, there is neither an adequate state practice nor a clear '*opinio juris*' to support a claim that remedial secession outside colonisation is a customary international law.

All international instruments that support the right to self-determination also contain a parallel statement supporting the territorial integrity principle<sup>43</sup>. Territorial integrity is considered an essential principle of the security and stability of the world. This is one of the main reasons why states have shown themselves to be "*allergic*" to the concept of secession<sup>44</sup>. For example, the only successful unilateral secession was Bangladesh which seceded from Pakistan in 1971. However, Bangladesh was not admitted to the UN until and after it was recognised by Pakistan in 1974<sup>45</sup>.

Most recently, the International Court of Justice (ICJ) delivered its advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965<sup>46</sup>. The Court considers the right to self-determination as a customary norm. They affirmed that "*[a]ll peoples have the right to self-determination.*" As such, the court confirmed the right to self-determination as one of the "*basic principles of international law.*" Although the opinion of the ICJ is of advisory nature, hence, not binding, the opinion is provided by an authoritative and prestigious judicial body. Interestingly, ICJ concluded that because "*respect for the right to self-determination is an obligation erga omnes, all States have a legal interest in protecting that right*" and accordingly "*all Member States must cooperate*"<sup>47</sup>. Therefore, concluding a proactive duty upon nations to establish the principle of self-determination.

41 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, (Advisory Opinion, ICJ) 2010, 403, [438].

42 Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (Forty-eighth session, 1996) <<http://www1.umn.edu/humanrts/gencomm/genrexxi.htm>> [accessed on 20/08/2020]; see n(6) for further examples.

43 See n(9) 127.

44 See n(27).

45 Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (OUP, 2010) 5.

46 Samuel Bashfield, 'Mauritian sovereignty over the Chagos Archipelago? Strategic implications for Diego Garcia from a UK-US perspective' (2020) 16 *Journal of the Indian Ocean Region* 2.

47 Ibid.



Not undermining the importance of the decision, it seems that the ICJ did not establish the manner in which the people of Mauritius could have freely exercised their right to self-determination (when they consented to the separation of the Chagos Archipelago). As even though the ICJ most clearly stated that the Mauritian decolonisation was not lawfully completed, the court has not explained whether the UK was under an obligation to conduct a referendum in Mauritius on this issue<sup>48</sup>. The court leaves open the possibility for resorting to self-determination outside the decolonisation context, as a 'fundamental human right' to be relied on in times of great despair<sup>49</sup>.

Therefore, it is argued that secession is recognised as a remedy only in case of decolonization<sup>50</sup>. Self-determination outside the colonial context has been about right of self-administration within an existing state rather than the right of independence<sup>51</sup>. Many former colonies gained their independence in the twentieth century, and this seems to have solidified the right to self-determination. In other cases, it has proven to be less successful. This is noted in recent examples with respect to Kosovo and to a lesser extent Quebec and Catalonia, all suggest that it may be easier to achieve self-determination due to colonisation. Scholars seem to agree with this analogy. Frank argues that self-determination is transforming into an emerging right to democratic governance<sup>52</sup>. Crawford further agrees with Franck, as he notes that self-determination is an internal affair outside colonial context<sup>53</sup>.

While there is wide support by scholars to remedial right, the theory lacks sufficient basis in state practice. The present author believes that international law does not provide a right of remedial secession, rather it provides grey authorities that could be used to authorise unilateral remedial secession only in exceptional circumstances. The implication of unilateral secession is heavily depended upon the strength of the political support the seceded country has from the powerful nations. The present author agrees with Professor Michael argument that great powers are an essential factor of succeeding the secession<sup>54</sup>.

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48 Victor Kattan, 'The Chagos Advisory Opinion and the Law of Self-Determination' (2020) 10 *Asian Journal of International Law*, 1.

49 Jan Klabbers, 'Shrinking Self-determination: The Chagos Opinion of the International Court of Justice' (2019) 8 *ESIL Reflections* 2.

50 Thomas Franck, Rosalyn Higgins, Alain Pellet, Malcolm Shaw and Christian Tomuschat, 'The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty' National Assembly of Quebec, Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty (1992) 1 *Presentations and Studies* para. 2.46.

51 Daniele Archibugi 'A Critical Analysis of the Self-Determination of Peoples: A Cosmopolitan Perspective' (2003) 10 *Constellations* 488.

52 Thomas Franck, 'the emerging right to democratic governance' (1992) 86 *The American Journal of International Law* 46.

53 See n(39) 415.

54 Michael Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"? Revolutionary International Legal Theory or Return to Rule by the Great Powers?' (2005) 10 *UCLA J. Int'l L. & Foreign Aff.* 361.

They are the ones that permit military intervention or international administration in the region and ultimately accept the request to join the UN. Therefore, people would be permitted to unilaterally secede if they had the support of great powers whilst also had suffered from exceptional circumstances.

### 3. Application of Self-determination

#### 3.1 Kosovo

Kosovo has declared their independence from Serbia on February 2008. This was the result of the 1998-1999 Kosovo War<sup>55</sup>. The war initially started because of the abolishment of the autonomy of Kosovo. During the war the Serbians were cleansing the identity of Kosovar Albanians, forcing more than ninety per cent of Kosovar Albanians population to suffer from the displacement of their homes<sup>56</sup>. Due to the gross violations of human rights conducted by *Milos ˇević* government<sup>57</sup>, the NATO military intervened in 1999, then a UN administration was established, and lastly, when negotiation broke off Kosovo declared their independence.

Although Kosovo has signed a Stabilisation and Association Agreement with the EU on the 27<sup>th</sup> of October 2015, as a first contractual relationship between the EU and Kosovo<sup>58</sup>, the international status of Kosovo Republic is still disputed. According to the ministry of foreign affairs of Kosovo, there are only 108 countries that recognised Kosovo<sup>59</sup>. The crux of the dispute is not whether Kosovo is an effective state rather whether their secession was legal. Opinions about Kosovo independence were split into two sides.

On the first hand, it was argued that Kosovo represents a clear example of remedial secession and a potential legal precedent<sup>60</sup>. As they satisfy all the requirements of remedial secession. Firstly, they satisfy the meaning of '*people*' as the majority population of Kosovo are ethnic Albanians, predominantly Muslims and have developed their own Albanian language<sup>61</sup>, whereas the majority population of Serbia are ethnically Slav, predominantly

55 Robert Muharremi, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited' (2008) 33 *Review of Central and East European Law* 401, 406.

56 U.S. Department of State, 'Ethnic Cleansing in Kosovo: An Accounting' (December, 1999) <[https://1997-2001.state.gov/global/human\\_rights/kosovoii/homepage.html](https://1997-2001.state.gov/global/human_rights/kosovoii/homepage.html)> [accessed on 20/08/2020] p. 3.

57 European Parliament, 'Kosovo: a special case say MEPs' (20/2/2008) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20080219IPR21734+0+DOC+XML+V0//EN>> [accessed on 20/08/2020].

58 European Commission, Kosovo 2015 Report, (10/11/2015) <[http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_kosovo.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_kosovo.pdf)> [accessed on 15/08/2020].

59 Republic of Kosovo Ministry of Foreign Affairs, Countries that have recognized the Republic of Kosova, available at: <<http://www.mfa-ks.net/?page=2,33>> [accessed on 21/08/2020].

60 Ioana Cismas, 'Secession in Theory and Practice: the Case of Kosovo and Beyond' (2010) 2 *Goettingen J. Int'l L.* 531.

61 Noel Malcolm, *Kosovo: A Short History* (NYUP, 2002).

Serbian Orthodox, and speak the Serbian Language<sup>62</sup>. It was evidential that for the last 200-300 years there has been a strong presence of Albanians in Kosovo, hence they have a strong link with the territory<sup>63</sup>. Therefore, it can be concluded that Albanians satisfy the requirement of being 'people'. Secondly, the internal self-determination has been ignored, and gross violations of human rights have occurred, leaving Kosovo Albanians with no alternative other than seceding

One the second hand, although remedial secession is the logical first glance perspective about Kosovo, however, the remedial argument is hardly applicable. In 2008, Serbia was ready to offer autonomy for Kosovar; Serbia was willing to give Kosovo significant external relations, including membership with IMF and World Bank as well as a separate representation in sporting and cultural bodies<sup>64</sup>. Further, the president that led the war, *Milos̃evic*, was no longer in power, and it was highly unlikely that Serbia wanted to provoke another conformation with NATO or to create any problems with the EU<sup>65</sup>. Thus, claiming remedial secession in 2008 is arguably invalid, as at that time there were no violations of human rights, neither denying of internal self-determination. Remedial secession should be a defence for the present exploitation rather than the past<sup>66</sup>. Arguably remedial secession had a better ground to succeed in 1999 when the human rights violations reached its highest<sup>67</sup>.

It was further argued that Kosovo is not a remedial secession example, rather a 'sui generis' case in international politics<sup>68</sup>. There is no official statement concluding that Kosovo has seceded as a matter of right<sup>69</sup>. The dominant argument was that Kosovo is a 'unique case' hence not capable of setting a precedent for the future. This has been shared by the UK Ambassador, Sir John Sawers<sup>70</sup>, the Council of the European Union<sup>71</sup>, and the US Secretary of State, Condoleezza Rice<sup>72</sup>. It can be noted that this clear avoidance of using

62 Tim Judah, *Kosovo: What Everyone Needs to Know* (OUP, 2008) 9.

63 Ibid.

64 James Ker-Lindsay, 'Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo 'Unique Case' Argument' (2013) 65 *Europe-Asia Studies* 837.

65 Ibid, 848.

66 Anne Peters, 'Does Kosovo lie in the Lotus-Land of Freedom?' (2011) *Leiden Journal of International Law* 95,103.

67 Eric Jansson, 'The Wages of War as Waged by Wimps' (2007) *Balkan Insight* 6.

68 See n(66).

69 Christopher Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *Chi. J. Int'l L.* 1.

70 'Ban Ki-moon urges restraint by all sides after Kosovo declares independence' *UN News Centre* (18/2/2008) <<http://www.un.org/apps/news/story.asp?NewsID=25659&Cr=Kosovo&Cr1#.VpfKj7aLTIU>> [accessed on 14/08/2020].

71 Council of EU, Press Release General Affairs and External Relations (18 February 2008) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/98818.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/98818.pdf)> [accessed on 14/08/2020].

72 Ian Bancroft, 'After Kosovo, the deluge' *The Guardian* (17/3/2008) <<http://www.theguardian.com/commentisfree/2008/mar/17/afterkosovothedeluge>> [accessed on 14/08/2020].

remedial secession right to legitimise Kosovo independence is clear evidence of the non-existence of such a right.

Questioning the satisfaction of the Montevideo Convention for statehood seems irrelevant, as even though when Kosovo was recognised by major states immediately after claiming independence, they hardly fulfilled the four requirements for statehood at that time. Kosovo borders were disputed and the population was not permanent due to the significant refugees' flow throughout the conflict<sup>73</sup>. Moreover, despite the apparent illegality of the remedial secession claim, the Supreme Court of Canada stated that "*The ultimate success of such a secession would be dependent on recognition by the international community*"<sup>74</sup>. The fact that Kosovo has more than half of the international community support, deems to present a strong success of its secession from Serbia, regardless to the fact that they practice their self-determination right, or have been an exceptional case.

### 3.2 Crimea:

Crimea was considered a Russian land since 1783<sup>75</sup>. It was transferred by the Russian Soviet Federative Socialist Republic to Ukrainian Soviet Socialist Republic in 1954<sup>76</sup>. However, upon a majority approval on a referendum to annex Crimea by Russia, Crimea declared independence on 17 March. Then on 18 March, an agreement was signed between the Russian Federation and Crimea which provided the accession of Crimea to Russian Federation. Thereafter, Ukrainian military units were forced by the Russian troops to surrender and leave the peninsula<sup>77</sup>.

Many arguments were then presented by Russia to legalise this annexation. Putin argues that the ICJ stated that '*international law contains no prohibition on declarations of independence*'<sup>78</sup>. He further notices the majority population of Crimea 1.5 million out of 2.2 million are ethnic Russians, and many others are actually Russian citizens or dual passport holders. He highlighted the oppression they suffered by a draft law to revise the language policy in the whole of Ukraine. Lastly, he stressed upon the Crimean peoples' wish to join Russia that received the acceptance of 95 per cent from the referendum<sup>79</sup>.

73 Milena Sterio, 'The Case of Kosovo: Self-Determination, Secession, and Statehood Under International Law' (2010) 104 *American Society of International Law*, 361, 365.

74 See n(9) 155.

75 Anderson, 'The Great Powers and the Russian Annexation of the Crimea, 1783-4' (1958) 37 *The Slavonic and East European Review* 17, 18.

76 Angelika Nußberger, 'Russia' (2009) *MPEPIL* 1, para.43.

77 David Herszenhorn, Atrick Reevell and Noah Sneider, 'Russian Forces Take Over One of the Last Ukrainian Bases in Crimea' *The New York Times* (22/3/2014) <[http://www.nytimes.com/2014/03/23/world/europe/ukraine.html?\\_r=0](http://www.nytimes.com/2014/03/23/world/europe/ukraine.html?_r=0)> [accessed on 23/08/2020]

78 See n(41) 346.

79 Vladimir Putin, 'Address by President of the Russian Federation' *President of Russia* (18/3/2014) <<http://en.kremlin.ru/>>

All these grounds were rejected by the majority of the international community<sup>80</sup>. The deterrent rejection of the annexation of Crimea was because all the grounds provided by Russia to legitimate their action lack appropriate legal standing. For protecting Russian nationals there must be evidence of serious human rights abuses or international crimes<sup>81</sup>. However, none has existed. In fact, Russians in Crimea enjoyed the same protection as the rest of the citizens of Ukraine. As stated by the Norwegian Helsinki Committee, "*Russia could in no way invoke a doctrine of humanitarian intervention in order to justify its intervention*"<sup>82</sup>.

The referendum is neither legal as per the Ukrainian constitution nor by the international law. The Ukrainian constitution requires a referendum to territorial change from the whole of Ukraine, not merely the secession of an area<sup>83</sup>. Also, According to the Venice Commission's Code of Good Practice, the referendum should only address one question, which would then have been answerable with yes or no<sup>84</sup>. Therefore, the fact that the Autonomous Republic of Crimea held two different options to choose from also shake the legality of the referendum<sup>85</sup>. Further, the existence of the Russian troops at Crimea at time of the referendum and the lack of supervision, question the validity of the referendum in terms of the international requirements<sup>86</sup>. Therefore, the referendum had '*no validity*' in eyes of the international community<sup>87</sup>. Even arguing that Crimea is restored to its historic Russian right seems illegitimate<sup>88</sup>, as the territory was confirmed by the 1997 Treaty of Friendship, Cooperation, and Partnership. Therefore, it can be seen that although Putin has raised some legal argument, yet none of them actually provide accurate grounds over the annexation of Crimea.

In addition, even though Putin cited the ICJ Kosovo Advisory Opinion case, as he agrees with, Russia has not yet recognised Kosovo independence and has still been the only obstacle

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events/president/news/20603> [accessed on 20/08/2020].

80 Ryan Goodman, 'How "Overwhelming" was the UN General Assembly Vote on Crimea?' *Just Security* (24/4/2014) <<https://www.justsecurity.org/9809/overwhelming-general-assembly-vote-crimea/>> [accessed on 23/08/2020].

81 World Summit Outcome, UNGA Res. 60/1. 2005 (24 October 2005) para.139.

82 Norwegian Helsinki Committee, 'Ukraine, Russia crisis: breached of international law and human rights issues' (20/3/2014)<[http://www.nhc.no/filestore/Publikasjoner/Policy\\_Paper/NHC\\_PolicyPaper\\_1\\_2014UkraineQA.pdf](http://www.nhc.no/filestore/Publikasjoner/Policy_Paper/NHC_PolicyPaper_1_2014UkraineQA.pdf)> [accessed on 20/08/2020].

83 Ukrainian Constitution Art.73 as cited in Christopher Borgen 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' (2015) 91 *INT'L L. STUD.* 216, 250.

84 Venice Commission's Code of Good Practice the referendum (2007) available at: <[http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDCD-AD\(2007\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDCD-AD(2007)008-e)> [accessed on 20/08/2020].

85 Christian Marxsen, 'An International Law Perspective' (2014) 74 *ZaöRV* 367.

86 See n(86).

87 Territorial Integrity of Ukraine, UNGA Res. 68/262. (27 March 2014).

88 Anton Moiseienko, 'What Do Russian Lawyers Say About Crimea?' *Opinio Juris* (2014) <<http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/>> [accessed on 21/08/2020].

to Kosovo for joining the UN. Further, the proposed use of force by Russia conflicts with the requirement of achieving external self-determination. According to ICJ opinion on Kosovo "the illegality attached to the declarations of independence thus stemmed... from the fact that they were...connected with the unlawful use"<sup>89</sup>. Therefore, the fact that Russia broke an international legal norm of using armed forces seems to classify Crimea secession as illegal. Russian position seems also to conflict with their previous opinion on Kosovo independence. As stated in the Written Statement by the Russian Federation in regard to Kosovo, secession "should be limited to truly extreme circumstances, such as an outright attack by the parent State, threatening the very existence of the people in question," otherwise things need to be resolved internally<sup>90</sup>. Therefore, the fact that Russia using this case as proof does not seem to fit well.

Furthermore, even if remedial secession existed in international law, it is impossible for Crimea to rely on such a right for two obvious reasons. First, there was no evidence of violations or threats to the rights of Russian speaker's or violations of human rights<sup>91</sup>. Secondly, it is indisputable that Crimea enjoyed internal self-determination. Hence remedial secession cannot be granted, nor should be considered. As have been discussed before, the only potential ground for external self-determination in modern law lies with remedial grounds. As these grounds are not satisfied, self-determination needs to be resolved through peaceful internal methods. The contemporary self-determination has no links to merely proclaiming independence<sup>92</sup>. While none of the above has been achieved, it can be concluded that Crimean secession is illegal as it does conflict with both domestic and international law<sup>93</sup>.

### 3.3 Catalonia

At the north-east of Spain, Catalans have been demanding their autonomy for decades. After the defeat of Catalonia (1714) in the War of the Spanish Succession, the successive kings forced the Spanish laws and language on the region, including Catalonia. Catalonia's autonomy was then reinstated in 1932 via Statute of Autonomy in 1932 but shortly thereafter, this was abolished in the Spanish Civil War whereby not only Catalan language and culture

89 See n(41) 347.

90 Ambassador of the Russian Federations, 'Written Statement of the Russian Federation, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' (16/4/2009) <<http://www.icj-cij.org/docket/files/141/15628.pdf>> [accessed on 21/08/2020] para.88.

91 OSCE, 'Developing situation in Crimea alarming, says OSCE High Commissioner on National Minorities' (6/3/2014) <<http://www.osce.org/node/116180>> [accessed on 21/08/2020].

92 Gaetano Pentassuglia, 'Putin should know that Crimea is not Kosovo when it comes to self-determination' *The Conversation* (31 March 2014) <<http://theconversation.com/putin-should-know-that-crimea-is-not-kosovo-when-it-comes-to-self-determination-24916>> [accessed on 22/08/2020].

93 William White, 'Crimea and the International Legal Order' (2014) *Faculty Scholarship*, Paper 1360, p. 7.



were forbidden, but also, were ceased from the educational system<sup>94</sup>. Thereafter, Catalonia was granted a new Statute of Autonomy in 1979<sup>95</sup>. This provided Catalonia with wide autonomy with respect to the political organization, the economic policy, regional planning, energy and environment, culture, media, education, public health and social services. This Statute was modernised by a law in 2006, granting Catalonia wider powers within the fiscal and judicial competences as well as control over airports, ports and migration<sup>96</sup>. Although initially approved by Spanish Parliaments, the Spanish Constitutional Court in 2010 rejected and amended most of its provisions<sup>97</sup>.

Initially, Catalans demands were partial autonomy as well as cultural and language respect. Over the time, these demands started to be become absolute independence. Catalonians felt they are being exploited as they pay "*at least \$15 billion more in tax revenues than it receives back in social spending or investments in infrastructure*"<sup>98</sup>. Due to the disproportionate distribution of the country wealth, Catalans felt undermined. Catalonia, therefore, held a number of referendums on independence from Spain. Despite the lack of constitutional support, the supporters of the independence were around 90% of the turnout voters<sup>99</sup>. However, the Spanish constitution guarantees the integrity of the country's territory and clearly stipulates that only the central government in Madrid can initiate a referendum<sup>100</sup>. As such, due to the provisions opposing secession in the Spanish constitution, Catalans seem unable to derive a right to external self-determination domestically.

From an international law perspective, one has to assess firstly whether the Catalans can be considered as "*people*". On that note, the Catalans undeniably share a number of characteristics, such as history, language and culture, which makes them different from the rest of Spain<sup>101</sup>. They further have established roots to Catalonia as a unified territory. Therefore, they would most likely satisfy the need of being "*a people*." The second important

94 Anne Verhelst, Remedial Secession for Economic Harm in International Law: the Catalan Case, (2018) 202 *Leuven Centre for Global Governance Studies Working Paper*.

95 Ibid.

96 Ibid.

97 Ivan Serrano, "Just a Matter of Identity? Support for Independence in Catalonia" (2013) 23 *Regional & Federal Studies* 5; Constitutional Court Judgment No. 31/2010, of June 28 (Unofficial translation) <<https://www.tribunalconstitucional.es/ResolucionesTraducidas/31-2010,%20of%20June%2028.pdf>> [accessed on 24/12/2020].

98 RT News, "Madrid seeks talks with Catalonia to avoid independence referendum" *RT News* (15/09/2013) <<https://www.rt.com/news/spain-catalonia-independence-talks-886/>> [accessed on 23/12/2020].

99 Jaume López and Marc Sanjaume-Calvet, "The case of Catalonia: understanding the political use of de facto independence referendums" *Democratic Audit* (07/05/2020) <<https://www.democraticaudit.com/2020/05/07/the-case-of-catalonia-understanding-the-political-use-of-de-facto-independence-referendums/>> [accessed on 24/12/2020].

100 Tom Burridge, "Spain to block Catalonia independence referendum" *BBC News* (12/12/2013) <<https://www.bbc.co.uk/news/world-europe-25353086>> [accessed on 25/12/2020].

101 Josep Colomer, "The venturous bid for the independence of Catalonia" 45 *Nationalities Papers* 5.

criterion that must be satisfied is that Catalans should be subject to "*serious violations of human rights*" to justify secession. This can be in the form of discrimination and the denial of autonomous political structures and government access<sup>102</sup>. In here, the question that arises is whether alleged economic harm resulting from Spain's redistributive system suffice to justify secession?

Catalonia is considered as one of the wealthiest regions in Spain. However, in 2012 for example, Catalonia received 57% to spend in the region for every paid euro in taxes<sup>103</sup>. Catalans, therefore, hold an element of economic grievance<sup>104</sup>. From a legal perspective, it is hard, if not impossible, to identify the boundary between real economic exploitation and redistribution that is disadvantageous to Catalonia.

Considering the previous cases related to self-determination, it can be hardly argued that economic harm suffered by Catalans translates to "*human rights abuses*"<sup>105</sup>. Further, the international community is not sympathetic to economic arguments<sup>106</sup>. Add to this the clear preference of international law for the internal exercise of self-determination, which seems to exist within Spain. The reality is that Catalonians are not deprived from their affairs internally, in fact, they have more autonomy than most places in Europe; they have autonomy over regional planning, transportation, energy, media, public health, education, and police<sup>107</sup>. Seeing the considerable degree of autonomy already granted to Catalonia, one could easily argue that there exists "*another remedy*": a potential further decentralisation of fiscal and economic competencies from Madrid to the *Generalitat*. All of these factors pour down to suggest that Catalonia hardly meets the remedial succession threshold.

As Catalonia seems not to meet the remedial threshold, the success of the Catalan attempt at unilateral secession will largely depend on whether international recognition will be granted<sup>108</sup>. As the political decision of recognition is what will ultimately determine

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102 See n(41).

103 Carmen Gonzalez, 'The Catalan National Identity and Catalonia's Bid for Independence' (2016) *Connecticut Journal of International Law*, 115, 126.

104 Chris Harris, "Catalonia: why do some want independence from Spain?" *Euro News* (05/10/2017) <<https://www.euronews.com/2017/10/05/catalonia-why-do-some-want-independence-from-spain>> [accessed on 25/12/2020].

105 Anne Peters, "Populist International Law? The Suspended Independence and the Normative Value of the Referendum on Catalonia" *EJIL Talk* (12/10/2017) <<https://www.ejiltalk.org/populist-international-law-the-suspended-independence-and-the-normative-value-of-the-referendum-on-catalonia/>> [accessed on 25/12/2020].

106 Ibid; Jure Vidmar, "Catalonia: The Way Forward is Comparative Constitutional rather than International Legal Argument" *EJIL Talk* (24/10/2017) <<https://www.ejiltalk.org/catalonia-the-way-forward-is-comparative-constitutional-rather-than-international-legal-argument/>> [accessed on 25/12/2020].

107 Al Goodman, "Catalans to link up in human chain today in their call for secession from Spain" *CNN News* (11/09/2013) <<https://edition.cnn.com/2013/09/11/world/europe/spain-human-chain/index.html>> [accessed on 25/12/2020].

108 Linda Hamid and Jan Wouters, "We the People: Self-Determination v. Sovereignty in the Case of De Facto States" (2015) *Leuven Centre for Global Governance Studies* 166.

the success of unilateral secession, it is important to consider Catalan claim from a practical recognition perspective. Furthermore, where a claim for independence is unilateral, recognition is much more important, since the only way to achieve this goal is through international recognition<sup>109</sup>.

It is understood that recognition is a political and entirely voluntary decision that belongs to every nation. This is a difficult question without any guaranteed results. As noticed, although Kosovo was under a severe humanitarian crisis, nevertheless, many countries until this day still refuse to recognise its independence. Furthermore, to maintain its importance, Catalonia would need to be recognised and later be able to join the European Union. Being excluded from the Union would provide for a chaotic legal landscape, Catalans would lose their EU citizenship, freedom of goods, capital, services and labour<sup>110</sup>. Therefore, if Catalonia wants to have meaningful interactions as a state after independence, membership of the European Union should be sought. However, in the accession process to the European Union, Spain can pose its veto. As such, without Spain's consent, Catalonia would hardly be able to establish meaningful recognition.<sup>111</sup> As Spain does not and seems not willing to consent to the Catalan independence, the Catalan claim for recognition seemed also to be ruled out from a recognition perspective.

#### 4. Conclusion:

To sum up, the right of self-determination in the modern world is preserved internally within a state. The present author believes that to have a successful secession, a group of people need to either take the permission of the parent state or present exceptional circumstances with the existence of great powers support. Similarly, to the Kosovo case, they had the support of the UK and the US the moment they declared their independence. The reluctance from states and the ICJ to announce that Kosovo practised their remedial secession is understandable considering the potential threat upon international stability. Kosovo's case is a clear case where the court had a chance to justify unilateral secession outside colonial context but it has deliberately avoided the acknowledgement of any right. In terms of Crimea, it is argued that there is a clear violation of the principle of territorial integrity. As all the argument over the independence of Crimea were rejected, Crimea is not recognised as a state, by this, it cannot choose to join Russia. However, it should be noted that in practice Crimea will most probably stay under Russia governance, as Northern

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109 Jure Vidmar, 'States, Governments, and Collective Recognition' (2014) 31 *Chinese (Taiwan) Yearbook of International Law and Affairs*, 136, 137.

110 Ibid 149; Paul Dermine, 'Succession and EU Treaty Obligations', in C. Brölmann and T. Vandamme (eds.), *Secession within the Union*, (UoA, 2014), 46.

111 Catherine Brölmann and Thomas Vandamme (Eds), "*Secession within the Union: intersection points of international and European law: collected think pieces*" (Amsterdam Centre for European Law and Governance, 2014).

Cyprus has stayed illegally under the Turkish governance for more than 30 years. With respect to Catalonia and in light of Spain's refusal, the only possibility for Catalonia to be unambiguously created is by becoming internationally recognised. Since the Catalan claim does not reach the remedial threshold, universal recognition is unlikely achieved.