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The status of the right to secession in international law within the context of the conflict between the principles of self-determination and territorial integrity

BACHELORS THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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(Signed)

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Abstract

The principles of self-determination and territorial integrity are some of the most important norms in modern international law, enshrined in the UN Charter and numerous subsequent sources of law. However, in practice, the two come in conflict when a minority group's desire for complete self-determination in the form of secession confronts the territorial inviolability of the state within which that group resides.

This paper seeks to answer how such a situation is managed by the international community through examining the status of a right to secession in international law. It is a concept surrounded by much controversy, however, in the contemporary international arena, where secessionist movements play an important role in conflicts, the right to secession cannot go unaddressed. The objective of this paper is to analyse the approach taken in international law to the right to secession and dissect which elements of this approach ought to be improved.

Summary

This paper aims to examine the status of the right to secession in international law, which in itself is a result of the clash between the established principles of self-determination and territorial integrity. The research conducted in this paper is of an interdisciplinary nature and employs the inductive method to build an analysis of the right to secession in international law.

The first part of the paper analyses the two principles and the conflict between them which forms the backdrop of the conversation around the right to secession. The first element to be discussed is the dichotomy between internal self-determination (self-government) and external self-determination (secession) as it plays an important part of the different understandings of the principle in law. Further, the role of self-determination is analysed in the UN Charter and the International Human Rights Covenants, to ascertain how these sources of international law envisioned self-determination and how, if at all, the right to secession is treated in them. The principle of territorial integrity is also examined in the UN Charter, as well as the Friendly Relations Declaration. This part of the paper introduces the interstate character of the principle of territorial integrity, which establishes the approach of international law to secessionist movements, and by extension, secession itself – essentially, international law neither prohibits, nor permits, instead choosing to simply stay mute on the matter and frame it as a domestic issue, rather than an international one.

The second part, having examined the wilful silence of sources of law, looks to normative theory. It touches upon the recent development of the discussion around a theory of secession, illustrating how "fresh" the concept of a right to secession is – only recently have scholars begun to theorize on it. The chapter outlines two main groups of theories of secession and seeks to find how elements of these theories could improve the current system of international law regarding secession.

The third part looks at the approach taken by courts. It analyses two cases, Quebec and Kosovo. Each case illustrates a different situation and a different treatment of secession. Quebec is an instance where the "hands off" approach of international law worked – the parties involved dealt with secession domestically and without any violence. Kosovo, on the other hand, is a case where the framing of secession as a purely internal issue caused the international community to stand by and look on while severe injustice was committed in Kosovo as a result of a secessionist tensions. It is a case where an active involvement of the international community would have benefited the inhabitants of both Kosovo and Serbia. Furthermore, the approach taken by ICJ to

Kosovo's declaration of independence illustrates an unwillingness to become involved with the matter of secession.

Therefore, even though secession is an issue with increasing importance on the world stage, international law refuses to admit it is so and remains entrenched in the idea that secession does not pertain to the international level. This is problematic for a number of reasons, the most pressing being that it facilitates violence both by and against secessionist movements.

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Introduction

In Monty Python's classic 1979 film Life of Brian, the titular character joins a nationalist group, the People's Front of Judea, who wish to gain independence from the Roman occupants. In one particular scene the members of the group have the following conversation:

REG: The only people we hate more than the Romans are the Judean People's Front.

P.F.J.: Splitters. Splitters...

FRANCIS: And the Judean Popular People's Front.

P.F.J.: Yeah. Oh, yeah. Splitters. Splitters...

LORETTA: And the People's Front of Judea.

REG: What?

LORETTA: The People's Front of Judea. Splitters.

REG: We're the People's Front of Judea![1]

The scene depicts in a whimsical manner a situation where numerous nationalist groups exist in one state. These groups are characterized by volatile behaviour, a desire for independence and a deep hatred not only for the perceived oppressor state, but also for one another. Though taken from a comedy, this precisely portrays why the right to external self-determination or, in other words, secession, is a deeply unacceptable concept for most states – with the existence of such a right, these groups would be able to claim their own state, and then for various reasons, secede further into several smaller states, essentially launching into endless fragmentation. The instability and conflict such a situation would undoubtedly cause is one of the arguments why external self-determination is treated with great caution by the international community and in international law.

This caution, however, has not been particularly helpful in genuinely avoiding conflicts related to self-determination. Throughout the 19th and the 20th centuries, the international community managed to reduce the number of international conflicts, a success which has been attributed to the establishment of such international law rules as the principle of territorial integrity.[2] However, non-international conflicts have become increasingly more common - during the Cold War, some 150 conflicts took place, most of which were civil wars.[3] Not all of these were concerned with self-determination of a specific ethnic or national group, but around half of

[1] "Scene 8: The Grumpy People's Front of Judea." Life of Brian Script, last accessed on 8 May 2020. Available on: http://montypython.50webs.com/scripts/Life_of_Brian/8.htm.

[2] Martin Griffiths, "Self-determination, International Society And World Order", *Macquarie Law Journal* (2003) Vol 3, p. 34, last accessed on April 2, 2020. Available on: https://www.mq.edu.au/public/download/?id=16208

[3] Ibid, p. 35.

the active non-international conflicts at the end of the 20th century were connected to this particular issue.[4] Similarly, in the 21st century, the world has also seen several high profile instances of internal conflicts dealing with self-determination, such as Crimea, South Ossetia and, to an extent, Catalonia, as well as peaceful attempts to attain external self-determination, such as Scotland. Therefore, self-determination in the form of secession plays an important role in contemporary conflicts. Its relevance certainly has not waned in the 21st century, and it is precisely this enduring relevance that makes it difficult for international law to ignore the subject of secession. Therein lies the dilemma - on the one hand, self-determination could be likened to a Pandora's box that possesses the potential to wreak havoc on the international arena, if opened. On the other hand, there is increased importance attached to self-determination and the wish for external self-determination is a crucial element in many prominent conflicts. By continuing the path of caution and not addressing the issue, the international law system risks losing relevance in the contemporary world.

This paper focuses on the status of secession in international law. Secession is the most extreme manifestation of the principle of self-determination and, as such, it lies at the very core of the conflict between two contrasting norms of international law – the principles of self-determination and territorial integrity. The concept of secession is inseparable from the conflict between these two principles; therefore, this paper seeks to answer the following **research question**:

Within the context of the conflict between the principles of self-determination and territorial integrity, how does international law approach the right to external self-determination?

In order to provide a comprehensive answer to the question, this research will consist of three parts, each consisting of two chapters. The first part of the paper shall look at each of the two principles separately, providing firstly a historical development of each principle, as it is crucial to be familiar with the different reiterations of both principles throughout history in order to fully understand their current nature. Secondly, the paper will examine the two principles as set out in sources of international law. This analysis will delve into the interpretation of each principle with regards to its scope and meaning, and relationship to each other, as well as it will seek to identify specific elements of each principle, where the law is ambivalent and clarifications are necessary.

[4] Ibidem.

The second chapter will elaborate on normative theories on secession to reflect the contemporary scholarly discussion on the subject. In contrast to international law, which adapts to a rapidly changing world rather slowly, normative theories can be quicker to develop a variety of solutions on how a particular concept should be approached, in this case, secession. These chapters will build on the analysis conducted in the first part regarding the unclarities in the law and will elaborate on the answers offered by political theorists.

The third part will consist of two case studies – the secession attempts of Quebec and Kosovo. There will be a short overview provided for each case, followed by an analysis of two different approaches taken by courts when faced with the subject of secession. Regarding the Quebec case study, the author of this paper will analyse the Reference Re Secession of Quebec judgement, to show the more liberal approach to secession that is conducted peacefully, in accordance with domestic law. In the Kosovo case study, the subject of analysis will be the International Court of Justice (ICJ) Advisory opinion on Kosovo's declaration of independence. This, in contrast, will show a different approach, illustrating a situation where secession is sought after due to injustices committed by the state against a peoples. Furthermore, it will also shed light on the hesitance of international law to address the issue of secession properly.

The author of this paper is not attempting to make the case in favour of a right to secession – only to point out the shortcomings in the approach the international community has adopted regarding this issue. A right to secession need not necessarily exist, however, in its current state, it seems to lie in the abyss of "neither prohibited, nor allowed". The author of this paper argues that by failing to provide guidelines on the relationship between the principles self-determination and territorial integrity and choosing time and time again to frame secession as a purely domestic issue, international law has thus far failed to adapt to the contemporary state of world affairs where secession plays an important role.

1. The principles of self-determination and territorial integrity

1.1. The principle of self-determination

This chapter will focus on the principle of self-determination from a legal perspective. The first section will provide an overview of the historical development of the concept of self-determination. The second section will examine how the major instruments adopted under the UN system have interpreted self-determination. The legal sources chosen for the purposes of this paper are the UN Charter and the International Human Rights Covenants – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These are of particular importance regarding self-determination as the Charter and the twin covenants were the first instances where self-determination was codified and introduced as a universal human right.

A few words should be said on the separation of self-determination into internal and external self-determination. This division is largely the foundation on which most scholarship on self-determination is built and it plays a large part in the way international law interprets the principle.[5] In accordance with internal self-determination, peoples of an independent state should be able to elect their own government, and be governed by it.[6] Internal self-determination deals with the entitlements of the peoples within a state. Cassese provided a more concise definition, saying that the right to internal self-determination is "the right to authentic self-government"[7], which gives people the ability to determine their political or economic regime. Internal self-determination is prominent in international law, as will be shown in the following analysis since it allows states to avoid any possibility of secession but is still regarded as being in line with the ideals of liberal democracy.

Opposite to internal self-determination is the other aspect, external self-determination. This, as the name suggests, deals not with the internal affairs of a state, but rather the international status of a peoples.[8] Essentially, it is the choice of peoples to determine their political status on the international arena by forming their own sovereign state or joining in union with another state. During the decolonization process, external self-determination was the

[5] Matthew Saul, "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?" *Human Rights Law Review* (2011), p. 614, last accessed on April 7, 2020. Available on: http://www.corteidh.or.cr/tablas/r27634.pdf
[6] Antonio Cassesse, Self-Determination of Peoples: A Legal Reappraisal (Cambridge: Cambridge University Press, 1995), p. 101
[7] Ibid.
[8] Saul, *supra* note 5, p. 614.

prevalent interpretation of the right to self-determination, as it allowed previously colonised peoples to gain independence – for this reason, countries in Africa and Asia pushed for this understanding of self-determination to be recognized.[9] However, once the decolonization era drew to a close, it was clear that the notion of external self-determination could not apply universally.[10] External self-determination in practice equates with an act of secession, therefore, within the non-colonial context, it is seen as an extreme form of self-determination.

The dichotomy between the two aspects of self-determination could be interpreted also as the difference between self-government and secession. It must be noted, however, that the concept of self-determination is a highly complex one and this division introduces a certain degree of simplification.[11] However, for the purposes of this paper, the division between internal and external self-determination will be accepted.

1.1.1 Historical development of self-determination

It is by no means easy to pinpoint when the ideas of self-determination first appeared.[12] The roots of the contemporary understanding of self-determination can be found in the Westphalian settlement of 1648, which set up the stage for the modern international system.[13] Further progress took place during the 18th century with the Enlightenment movement, which gave rise to the notion that if the people are not content with the existing governing system, they should be able to change it or organize their own.[14] During the latter part of the 18th century, the Western world experienced the American Revolution of 1776 and the French Revolution of 1789 – both revolutions fundamentally changed the political landscape and contributed to the development of self-determination. These two events could be said to be the first expressions of the idea of self-determination.[15]

The turning point for self-determination as a legal doctrine came in the 20th century, in the aftermath of World War I. WWI unleashed unprecedented change in all areas of Western society. During the early 20th century, Vladimir Lenin and Woodrow Wilson, the political

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[9] **.** Kalana Senaratne, "Beyond the Internal/External Dichotomy of the Principle of Self-Determination", *Hong Kong Law Journal* (2013), p. 7, last accessed on April 7, 2020. Available on: Westlaw.
[10] Ibid.
[11] Ibid, p. 1
[12] Glen Anderson, "A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession," *Vanderbilt Journal of Transnational Law* 49, no. 5 (November 2016), p. 1192, last accessed on April 4, 2020. Available on: HeinOnline.
[13] Griffiths *supra* note 2, p. 29.
[14] Griffiths *supra* note 2, p. 30.
[15] M. K. Nawaz, "The Meaning and Range of the Principle of Self-Determination", Duke Law Journal (1965) Vol 14, p. 83, last accessed on April 2, 2020. Available on: https://scholarship.law.duke.edu/dlj/vol14/iss1/6.

leaders of the then-emerging great powers, the Soviet Union and the US, sought to conceptualize self-determination and to provide a definition for it.[16] Though the two statesmen were certainly on opposite ends of the ideological spectrum, both their perceptions of self-determination proved influential over the following decades. Lenin's view was, naturally, deeply intertwined with socialist ideology. His most important contribution to the development to the concept of self-determination postulated that self-determination should be used to end the oppression of colonised nations. This interpretation manifested itself in the harsh anti-colonial stance of the Soviet Union, and had a significant impact on international law during the second half of the 20th century, during which colonialism, previously considered normal and usual, came to be viewed as shameful and illegal.[17]

In comparison, the Wilsonian understanding of self-determination was unconstrained by the ideological framework of socialism and was more deeply rooted in the ideas of Western democracy. To an extent, Woodrow Wilson's view of self-determination was that the will of the people prevails over that of the government, and in that way, existed as a direct extension of the ideas which arose during the French and American revolutions.[18] Though Wilson stopped short of providing a clear definition for the principle, he was adamant that self-determination would be crucial in restructuring central Europe following WWI.[19]

In addition to Wilson's attempts to conceptualize the principle of self-determination, he also was determined to institutionalize it. He believed that one of the major functions of the League of Nations should be ensuring the implementation of self-determination. Article 3 of the draft Wilson offered for the Covenant of the League of Nations referred to the principle, but during the Paris Peace Conference the draft was significantly changed and Wilson's original text regarding self-determination was not included in the Covenant, allegedly due to the wishes of the representatives of the British Empire.[20] The concept of self-determination was certainly an unwelcome apparition for many, including Wilson's own Secretary of State, Robert Lansing, who referred to self-determination as a "phrase loaded with dynamite". He felt that a principle of self-determination was bound to bring further conflict, rather than peace, in that it would "[...] raise

[16] Ibid.
[17] Anderson *supra* note 12, pp. 1198-1199.
[18] Ibid, p. 1199-1200.
[19] Russell A. Miller, "Self-Determination in International Law and the Demise of Democracy," *Columbia Journal of Transnational Law* 41, no. 3 (2003), p. 619. Last accessed on April 5, 2020. Available on: HeinOnline.
[20] Nawaz *supra* note 15, p. 85.

hopes which can never be realized".[21] After WWII self-determination was enshrined into the UN Charter of 1945 and appeared in many subsequent international law sources. Nevertheless, the sentiment voiced by Robert Lansing persists – giving more legal weight to the principle of self-determination has done little to make it more certain.

By following the development of the self-determination principle throughout history, one can come to several conclusions about its nature. Firstly, the principle of self-determination is incompatible with an elitist system of government, be it monarchic or authoritarian. Secondly, as is evident in the fact that the concept of self-determination was essentially developed by groups seeking political change, it inherently challenges the political status quo. Thirdly, despite being recognized as a right in the contemporary era, self-determination is still shrouded in mystery regarding its content, scope and nature. Lansing's view, expressed in the 1920s, is still relevant today – many still see the principle of self-determination as though it were a Pandora's box or a "philosophical genie which has escaped its bottle".[22]

1.1.2. Self-determination in international law

UN Charter

The United Nations Charter is notable as the first legal instrument which included the phrase "self-determination of all peoples", thus essentially establishing self-determination as an internationally recognized legal principle. Self-determination appears in the very first article of the Charter – Article 1(2) states that one of the purposes of the UN is to "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples",[23] however it does not provide a further explanation as to what that might mean exactly. The principle is also mentioned in Chapter IX, Article 55, which again refers to the "self-determination of peoples" yet fails to expand on the meaning of the term. A particularly controversial question has been the meaning of the word "peoples" – the is no explanation as to who are the "peoples" that can claim self-determination.[24] Though the word is often understood to mean groups of people linked by certain national similarities – a common language, common traditions or a common ethnic identity, – there is great uncertainty surrounding this term.

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[21] Dimitrios Molos, "Turning Self-determination On Its Head", *Philosophy and Public Issues*, Vol. 4, No. 1 (2014), p. 76. Last accessed on April 5, 2020. Available on: http://fqp.luiss.it/files/2014/10/6_Molos_Turning-Self-Determination-on-Its-Head_PPI_vol4_n1_2014.pdf

[22] Anderson, *supra* note 12, p. 1202.

[23] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, last accessed on April 6, 2020. Available on: https://www.un.org/en/sections/un-charter/un-charter-full-text/

[24] Griffiths *supra* note 5, p. 33.

Articles 73 and 76 provide a different, albeit equally uncertain, context for the word "peoples". However, at the same time, the two articles manage to illuminate slightly more as to what the principle of self-determination expresses. Article 73(b), which deals with Non-Self-Governing Territories (NSGTs), declares that member states of the UN that have assumed responsibilities over non-self-governing territories, must "develop self-government, to take due account of the political aspirations of the peoples". Several conclusions can be drawn from this statement. Firstly, as is evident here, the term "peoples" is used to refer explicitly to the population of these NSGTs. Article 73 defines NSGTs as "territories whose peoples have not yet attained a full measure of self-government", but there is no clarification provided as to what constitutes "full measure of self-government", which complicates the identification of the relevant "peoples".[25] Secondly, Article 73(b) does not mention "self-determination" as such, but substitutes it with the term "self-government". The following text of Article 73(b) elucidates what "self-government" entails: "[..] to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement". Thus, this sheds light on what "self-determination" is in the context of the UN Charter – a principle that deals with colonized territories and their self-government.[26] In Chapter XII, which concerns the international trusteeship system, Article 76(b) states that one of the purposes of the system is "to promote the [...] progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement". As in Article 73, self-determination is interpreted as self-government for colonised peoples.[27] The term "peoples" here refers to the populations of the Trust Territories. Furthermore, in Article 73 and Article 76, self-government is something states "develop" and "promote" respectively. This wording implies a level of ambiguity – it certainly does not indicate that there exists a right to self-determination in the UN Charter.[28]

During the drafting process, particularly interesting in the context of this paper, was the question of secession, which was raised by the delegates from Belgium, France, Canada, Chile

[25] Helen Quane, "The United Nations and the Evolving Right to Self-Determination", *The International and Comparative Law Quarterly*, Vol. 47, No. 3 (Jul., 1998), p. 540. Last accessed on April 6, 2020. Available on: JSTOR.
[26] Anderson, *supra* note 12, p. 1205.
[27] Ibid.
[28] Ibid.

and others.[29] So as to protect their own territorial integrity, many states were insistent on ensuring that the inclusion of self-determination in the Charter does not in any way imply the possibility of a right to secession. At the San Francisco Conference, the delegate from Colombia expressed the view that self-determination as "the right of a country to provide its own government" was an acceptable concept, but that "[...] if it were to be interpreted, on the other hand, as connoting a withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy", and this fell in line with the opinion of many states.[30] To resolve the controversy around this issue, the drafting committee made it clear that "the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of unilateral secession".[31] This further explains the role of self-determination in the UN Charter – by explicitly denying a right to secession, the intention was to strip the principle of self-determination of its radical nature, in that way ensuring that its expression in praxis is orderly and does not clash with the territorial integrity of already existing states.

Through analysing the principle of self-determination, one arrives at the following conclusion – the Charter envisions self-determination not as a right, but rather a principle which applies to "all peoples", a term that does not possess a wholly certain meaning. Though Articles 1 and 55 of the Charter mention self-determination as one of the basic principles for the development of friendly relations between all states, Articles 73 and 76 indicate that, within the context of the Charter, self-determination pertains more to the self-government of colonized territories. In addition to that, the Charter clearly interprets self-determination as a principle that enables the development of self-government amongst non-self-governing peoples, rather than a principle which allows inhabitants of an already existing state to secede and form their own.

International Human Rights Covenants

The following section will examine the role of self-determination in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), otherwise known as the Human Rights Covenants. The UN General Assembly adopted the two legal instruments in 1966, and the covenants came into

[29] Tofig F. Musayev, Rovshan Sadigbayli, "The Purposes and Principles of the un Charter Origins, Subsequent Developments in Law and Practice and (Mis)interpretation in the Context of Unilateral Secession Claims in the OSCE Area", *Security and Human Rights* 28 (2017), p. 193, last accessed on: April 6, 2020. Available on: https://brill.com/view/journals/shrs/28/1-4/article-p180_180.xml?language=en#d97660e574

[30] Anderson, *supra* note 12, p. 1207.

[31] Musayev, Sadigbayli, *supra* note 29, p. 194.

force in 1976. At the time, these were some of the most extensive treaties regarding human rights that the international community had created. To this day, the twin covenants are regarded as the very foundation of basic human rights.[32]

Regarding self-determination, the covenants are of importance. Though the right to self-determination had been enshrined in a UN document before, namely the Declaration on the Granting of Independence to Colonial Countries and Peoples, that was done against the backdrop of the decolonisation process.[33] The human rights covenants were the first instance where the right to self-determination was removed from the context of colonisation and intended to be applied universally. The beginning of Article 1(1), identical to both covenants, is as follows: "All peoples have the right of self-determination."[34] [35] It explains what this right entails by stating: "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[36] The wording and placement given to self-determination are both notable – the words "all peoples" imply that the right to self-determination is universal, while the placement, by which self-determination is stated before all other rights, suggests that this is, in a sense, the first of human rights, without which the enjoyment of all other rights is compromised.[37] Articles 1(2) and, particularly, 1(3) elaborate on the universal nature of the right to self-determination. Article 1(3) provides that "the States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination". The word "including" here is paramount, as it shows that the application of the right is not limited to inhabitants of colonised territories. It goes beyond colonial issues and is equally as relevant in a non-colonial setting.

However, similarly as with the UN Charter, the most significant controversy regarding the human rights covenants has been around the term "all peoples". The drafting history of Article 1 provides additional information as to what was intended by the UN Human Rights Committee

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[32] Abdulrahim P. Vijapur, K. Savitri, "The International Covenants on Human Rights: An Overview", *India Quarterly*, Vol. 62, No. 2 (April-June 2006), p. 15, last accessed on April 7, 2020, available on: JSTOR.
[33] Anderson, *supra* note 12, p. 1209.
[34] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, last accessed on April 7, 2020. Available on: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[35] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, last accessed on April 7, 2020. Available on: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx
[36] Ibid.
[37] James J. Summers, "The Right of Self-Determination and Nationalism in International Law", *International Journal on Minority and Group Rights*, Vol. 12, No. 4 (2005), p. 327, last accessed on April 8, 2020. Available on: JSTOR.

and the General Assembly's Third Committee. The article was drafted by the two committees during the time period from 1950 to 1955, when the process of decolonization was in full swing.[38] Arab and Asian countries, as well as the Soviet Union, due to its anti-colonial stance, were interested in pushing for the right to self-determination.[39] The consensus at the time was that the right would not be exclusive to colonised peoples, but would apply to all peoples; however, the ambiguity of that term – "peoples" – did not evade discussion. Suggestions were made as to how the term could be best defined, some of the examples including "large compact national groups" or "racial units inhabiting well-defined territories". In the end, it was settled that the term was to be understood "in its most general sense and that no definition was necessary".[40] Furthermore, the adoption of the First Optional Protocol to the ICCPR established a complaint mechanism, where the Human Rights Committee could hear communications from individuals who believed their rights, as set out in the ICCPR, were being infringed upon. On several occasions, the Human Rights Committee has been asked to consider the interpretation of Article 1, on whether particular groups constituted as a "people", but the Committee has thus far avoided having to explicitly decide on the issue.[41] A General Comment[42] exists on Article 1, but in it, the Committee refrains from providing a more certain interpretation of what is to be understood as "peoples". Therefore, though the covenants transform the principle set out in the UN Charter into a right, they provide little clarity on that right – it has a universal nature, but there are no criteria for which groups of individuals constitute a "peoples".

Another thing to note is how the covenants deal with the matter of secession. Article 1(1) states that the right to self-determination enables all peoples to determine their own "political status", amongst other elements. The term "political status" possesses a broad interpretation and can be understood to mean a variety of statuses – from a form of government to independence. Moreover, during the drafting process, some of the proposed definitions of the right to self-determination included interpretations such as the right to "establish an independent state" or "secede from or unite with another people".[43] Therefore, one could be led to think that there is

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[38] James J. Summers, "Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance?" *Finnish Yearbook of International Law* 14 (2003), p. 275, last accessed on April 7, 2020. Available on: HeinOnline.
[39] Ibid.
[40] Quane, *supra* note 25, pp. 559-560.
[41] Summers, *supra* note 38, pp. 276-277.
[42] UNHRC, *General Comment No. 12: Article 1 (The Right to Self-determination of Peoples)*, 21st session, adopted: 13 March, 1984, last accessed on: April 8, 2020. Available on: http://ccprcentre.org/page/view/general_comments/27807
[43] Quane, *supra* note 25, p. 560.

some foundation in Article 1(1) for a right to secession. However, that is not the case – in the drafting of the covenants, most participating states made it clear that the right to self-determination did not in any way entail the right to secession, but rather that it referred to self-government, or internal self-determination, similarly as in the UN Charter.[44] Furthermore, upon ratification of the covenants, several states made declarations announcing that Article 1 is not to be interpreted as referring to peoples within an existing sovereign state. India, for example, said that the right to self-determination is only applicable to peoples "under foreign domination" and not to "sovereign independent States or to a section of a people or nation".[45] Indonesia stated that the right to self-determination cannot be understood as endorsing any acts that would "dismember [...] the territorial integrity or political unity of sovereign and independent states".[46]

The human rights covenants are an important source and a turning point for the right to self-determination – with the two covenants that right became applicable universally. However, the same uncertainties which plagued self-determination in the UN Charter are also evident in these instruments – the lack of criteria regarding which groups can claim the right to self-determination and a high degree of ambiguity over what that right entails. Similarly, as in the UN Charter, the covenants seem to refer to a right to internal self-determination (self-government) rather than a right to external self-determination (secession).

1.2. The principle of territorial integrity

1.2.1. Historical development of territorial integrity

Territorial integrity, in its very essence, illustrates the wish for stability and continuance. The beginnings of the principle are generally understood to be found with the Westphalian settlement of 1648. Beforehand, during the late medieval ages and the early modern period, territory was viewed in a drastically different manner than it is now – then, territory ensured the security and wealth of a state, and, therefore, protecting land, as well as gaining new land was the main goal of most rulers.[47] It was considered normal that an exchange of territory would take place, due to the fact that it was largely seen as a commodity. Consequently, the ruling classes

[44] Anderson, *supra* note 12, p. 1213.
[45] Declaration made by India upon the ratification of ICESCR, United Nations, Treaty Series, vol. 993, p. 5, last accessed on April 8, 2020. Available on: https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf
[46] Ibid.
[47] Mark W. Zacher, "The Territorial Integrity Norm: International Boundaries and the Use of Force", *International Organization*, Vol. 55, No. 2 (Spring, 2001), p. 217, last accessed on April 14, 2020. Available on: JSTOR.

had little regard for the inhabitants of the exchanged territories, as the inhabitants were generally not perceived to be intrinsically linked with any specific territory. This was particularly the case with colonized lands, as Western settlers drew arbitrary borders with little care for the cultural and ethnic differences of the peoples within them.[48]

This continued to be the prevalent notion until the 19th and the 20th centuries, during which European scholarship began to challenge the legitimacy of territorial wars and started to view territory in a different light. This change in attitude can largely be attributed to the societal transformations Europe underwent as a result of the French Revolution and the Napoleonic era.[49] Ironically, during this time, it was the emergence of self-determination that paved the way for the modern interpretation for territorial integrity. The acceleration of nationalism and the ideas of self-determination gave rise to the notion that peoples, or nations, are inherently bound to specific territories, and they have a right to decide their political fate within the confines of their respective territory.[50] As a result, the 19th century was also the point in history when territorial integrity first became a recognized legal principle. Though it was articulated as early as 1844[51], the first case where territorial integrity was used in the context of an international agreement came in 1856, after the Crimean war, in the Paris Peace Treaty. In the Treaty, the participating parties agreed to "respect the independence and territorial integrity of the Ottoman Empire".[52] Thus, territorial integrity existed as a legal principle well before self-determination was accepted by law – however, the emergence of territorial integrity during the 19th century was significantly aided by the popularity of self-determination as a philosophical concept.

As with self-determination, interest surrounding the principle of territorial integrity increased in the aftermath of WWI. WWI was the turning point which solidified the change in the perception of territory in international relations – wars for conquest of territory, or rather, the use of force in general, were no longer seen as legitimate tools by which to conduct foreign policy.[53] Woodrow Wilson expressed the new attitude in the fourteenth point of his famous speech, saying that an association of nations must be formed, so as to ensure "[...] mutual guarantees of [...]

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[48] Ibidem.
[49] Ibidem.
[50] Ibidem.
[51] Kerstin Odendahl, "The Scope of Application of the Principle of Territorial Integrity," *German Yearbook of International Law* 53 (2010), p. 514, last accessed on April 16, 2020. Available on: HeinOnline.
[52] Christian Marxsten, "Territorial Integrity in International Law – Its Concept and Implications for Crimea", *ZaöRV* 75 (2015), p. 8, last accessed on April 16, 2020. Available on: https://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf
[53] Odendahl, *supra* note 51, p. 515.

territorial integrity to great and small states alike."[54] This sentiment was echoed in the Covenant of the League of Nations, where, unlike self-determination, the principle of territorial integrity was codified in Article 10. This article obligated the participating states to respect and preserve the territorial integrity and political independence of all members of the League.[55]

The drafting process of the Covenant was the first instance where the principle of territorial integrity and the principle of self-determination clashed in a legal context – there was friction amongst the participating states over the choice between self-determination and respect for existing borders, and territorial integrity came out the winner.[56] To an extent, the Covenant set the stage for the conflict between the two principles, as it was the first time that self-determination and territorial integrity were positioned as two opposites. During the interwar period, the principle of territorial integrity was further supported by various treaties and theories.[57] After WWII, most powers had accepted territorial integrity as one of the basic principles of international law and emphasized this in the UN Charter.

Therefore, the principle of territorial integrity is most closely bound to the perception of territory itself – during the early modern period, land was the key to a successful state, and, consequently, territory exchanges were to be expected, but that is no longer the case in the modern era. Interestingly, the development of the idea of national self-determination in the 19th century was, to a certain degree, what gave rise to the principle of territorial integrity as the link between a people and a territory was not recognized before that.

1.2.2. Territorial integrity in international law

United Nations

The following section will provide an analysis of the role of the principle of territorial integrity within the UN Charter. Territorial integrity is generally regarded as one of the key elements of the modern international system. However, the UN Charter makes a reference to the principle only once, in Article 2(4), which establishes the prohibition of the use of force. The article postulates that all UN member states agree to restrain from employing "the threat or use of force" in the conduct of their foreign policy against "the territorial integrity or political

[54] Wilson, *Fourteen Points*.
[55] Zacher, supra note 47, p. 219.
[56] Ibidem.
[57] Ibidem.

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[58] The relationship between territorial integrity and the prohibition of force is particularly interesting. Initially, during the drafting process, the first version of the UN Charter, known as the Dumbarton Oaks Proposals of 1944, did not include territorial integrity in any form – article 2(4) merely disallowed the use or the threat of force in international relations.[59] Territorial integrity was only included in the article at the request of weaker states, such as Australia, Brazil, Bolivia and others, who sought to ensure as much protection as possible from the great powers.[60] Thus, territorial integrity and the prohibition of force are closely intertwined. [61]

In the context of self-determination of peoples, the scope of territorial integrity in the UN Charter has been subject for debate amongst scholars. There are two strands of thought – the classical interpretation, according to which the inviolability of territorial integrity is only applicable in state-to-state relations, and a modern interpretation, which states that the scope of Article 2(4) should be extended to include non-state actors.[62] The traditional understanding rests on the text of Article 2(4) – it exclusively refers to the members of the UN, i.e. states, making no mention of non-state actors, such as groups who attempt to claim a territory within an existing state. According to this classical interpretation, both the prohibition of use of force and the principle of territorial integrity are only relevant to states in the conduct of their foreign policy. The scope of Article 2(4) does not include non-state actors, and, as a result, it neither disallows, nor recognizes secessionist movements, but simply leaves them as a purely domestic issue, unregulated by international law.[63] This interpretation was favoured by the ICJ in the advisory

[58] United Nations, *Charter of the United Nations*.
[59] The Dumbarton Oaks Conference (the Washington Conversations on International Peace and Security Organization), Kheel Center for Labor-Management Documentation and Archives, Cornell University Library, 1944, p. 1, last accessed on April 13, 2020. Available on: https://digital.library.cornell.edu/catalog/ss:21796682
[60] Marxen, *supra* note 52, p. 9.
[61] Odendahl, *supra* note 51, p. 516.
[62] Olivier Corten, "Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law", *Leiden Journal of International Law*, 24 (2011), p. 90, last accessed on April 16, 2020. Available on: https://dipot.ulb.ac.be/dspace/bitstream/2013/98706/4/OC.LJIL2011.pdf
[63] Georges Abi-Saab, "Conclusion" in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (New York: Cambridge University Press 2006), p. 474.

opinion on Kosovo[64] and fell in line with preceding ICJ case law, such as the Israeli Wall advisory opinion[65] and the Congo-Uganda case.[66]

The drastic political changes that took place during the late 20th century and the early 21st century, however, compelled some scholars to call for a reinterpretation of the Charter and, consequently, of Article 2(4).[67] As early as 1970 Thomas Franck declared Article 2(4) dead, writing that the UN Charter "bears little more resemblance to the modern world than does a Magellan map".[68] According to him, twenty five years after the emergence of the UN system, the world was not a better place, but, rather, just vastly different.[69] The rules as they were written in the Charter are no longer properly applicable, since the circumstances for which they were written, no longer exist. Certainly, the same can be said of the present situation, as the international arena is no longer what it was in 1945, or 1970. The early 21st century saw a significant rise in the influence of non-state actors. The devastating 9/11 attacks illuminated the fundamental differences between the world of 1945 and the modern world –the Charter had been intended to protect against state aggression, but that was no longer enough. In the 21st century non-state actors developed capabilities substantial enough to pose equally as serious threats as states.[70] Therefore, since the beginning of the 2000s, suggestions have emerged that the scope of Article 2(4) ought to be expanded beyond state-to-state relations, so that non-state actors would be bound to respect the same principles that states must respect.[71]

In the context of secession, it would mean that secessionist movements would be precluded from claiming a territory belonging to an already existing state, as that would violate the territorial integrity of that state. A notable argument favouring the internal application of the

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[64] Simone F. van den Driest, "From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law", *International Journal on Minority and Group Rights*, Vol. 22, No. 4, Special Issue: Self-determination, Resources and Borders (2015), p. 470, last accessed on April 16, 2020. Available on: JSTOR.

[65] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, para. 139, last accessed on May 4, 2020. Available on: https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf

[66] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, paras. 146-147, last accessed on May 4, 2020. Available on: https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-BI.pdf

[67] Corten, *supra* note 62, p. 90.

[68] Thomas M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States", *The American Journal of International Law*, Vol. 64, No. 5 (Oct., 1970), p. 810, last accessed on April 14, 2020. Available on: JSTOR.

[69] Ibid.

[70] Nico J. Schrijver, "The Future of the Charter of the United Nations", *Max Planck Yearbook of United Nations of Law*, Volume 10 (2006), p. 10, last accessed on April 15, 2020. Available on: https://www.mpil.de/files/pdf1/mpunyb_01_schrijver_10.pdf

[71] Corten, *supra* note 62, p. 90.

principle of territorial integrity as set out in Article 2(4) is the approach that the UN Security Council (UNSC) and the General Assembly (UNGA) adopt in practice regarding territorial integrity. This argument has been invoked by some states during the ICJ proceedings regarding the independence of Kosovo. Spain called attention to the previous practice of the UNSC in several armed conflicts involving non-state actors. It stated that in such conflicts, the UNSC has persistently held a strong "position of unequivocal support and respect for the sovereignty and integrity of the State",[72] regardless of the non-international nature of the conflicts. Serbia[73] also referred to UN practice in past internal conflicts such as Bosnia and Herzegovina and Congo. Argentina expressed this argument as well.[74]

On several occasions the UNSC has referred to the principle of territorial integrity in its resolutions condemning various secessionist movements. These cases include Bosnia and Herzegovina, Croatia, Somalia, Sudan and Congo, among others.[75] This would seemingly suggest that the UNSC finds non-state actors bound by the principle of territorial integrity in cases of secession. However, the major flaw in this argument is that the resolutions do not outright proclaim the principle applicable to non-state actors, but rather simply implore that all parties involved must respect the principle.[76] Furthermore, the resolutions do not condemn the secessionist movements purely on the basis that they violated the principle of territorial integrity – the condemnation rises due to violations of other norms of international law and the threat to international peace and security that the secessionist movements pose.[77] There has been, however, a tendency to extend the scope of the principle to secessionist movements that use force to attain their goals of independence.[78]

In addition to UNSC resolutions, the UNGA has also issued resolutions referring to the principle of territorial integrity. In the 2006 GA Resolution 60/170 on the human rights situation in Congo, the UNGA called on all parties involved to "cease immediately any action which

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[72] Written statement of the Kingdom of Spain, 14 April 2009, para. 34, last accessed on April 15, 2020. Available on: https://www.icj-cij.org/files/case-related/141/15644.pdf
[73] Written statement of the Republic of Serbia, 17 April, 2009, paras. 440-476, last accessed on April 15, 2020. Available on: https://www.icj-cij.org/files/case-related/141/15642.pdf
[74] Written statement of the Republic of Argentina, April 17, 2009, paras. 75-80, last accessed on April 15, 2020. Available on: https://www.icj-cij.org/files/case-related/141/15666.pdf
[75] Odendahl, supra note 51, p. 530.
[76] Ibid, p. 531.
[77] Ibid, pp. 531-532.
[78] Marcelo G. Kohen, "Introduction" in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (New York: Cambridge University Press 2006), p. 7, last accessed April 16, 2020. Available on: http://www.corteidh.or.cr/tablas/r32589.pdf

impedes the consolidation of the […] territorial integrity" of Congo.[79] In the 1976 GA Resolution 31/6A regarding the bantustans in South Africa, the UNGA condemned the "establishment of the bantustans as designed to […] destroy the territorial integrity of the country".[80] At first glance, the wording implies that the UNGA applies the principle of territorial integrity beyond the limits of inter-state relations. However, upon a closer inspection, it is evident that the UNGA treats territorial integrity in a similar way as the UNSC – it does not explicitly link territorial integrity to non-state actors, but rather uses the principle to maintain and protect other norms of international law. In the examples of Congo and South Africa, the aspect of international law which the General Assembly sought to strengthen was fundamental human rights.[81] Therefore, the UN praxis cannot be said to support the expansion of the scope of Article 2(4) to include non-state actors.

On the one hand, the UN Charter establishes territorial integrity as one of the main principles of the modern international system; on the other hand, it provides scarce guidelines on how to manage it. There is no framework in the Charter which would clarify the interaction between territorial integrity and self-determination. The traditional interpretation which prevails in scholarship and the ICJ jurisprudence holds that self-determination has very little to do with the prohibition to interfere with territorial integrity, due to the latter's inherent interstate character. It has even less to do with the external aspect of self-determination, which is deemed a domestic matter, governed only by domestic law. The modern vision for Article 2(4) finds a solution in a reinterpretation of this article. It is clear that non-state actors nowadays play a much more significant role in international relations than they did in 1945 – the recognition of the internal application of the principle of territorial integrity would simply mean ensuring that the rules set out in the Charter remain relevant to the contemporary world. However, neither the UN organs, nor the ICJ, nor most scholarship recognize this modern understanding of Article 2(4), choosing instead to reaffirm the interstate character of the principle of territorial integrity.

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[79] General Assembly resolution 60/170, Situation of human rights in the Democratic Republic of the Congo, A/RES/60/170, 9 March 2006, p. 3, last accessed on April 15, 2020. Available on: http://archive.iccnow.org/documents/GA60_HumanRightsDRC_16Dec05.pdf

[80] General Assembly resolution 31/6, Policies of Apartheid of the Government of South Africa, A/RES/31/6, 26 October 1976, p. 10, last accessed on April 15, 2020. Available on: https://undocs.org/en/A/RES/31/6

[81] Odendahl, supra note 51, p. 534.

The Friendly Relations Declaration

The second UN document to be analysed is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970, or, in short, the Friendly Relations Declaration. This document builds on the interpretation of the principle of territorial integrity provided in the UN Charter. The following section will analyse how the Friendly Relations Declaration broadens the principle of territorial integrity and what implications that has on the conflict between territorial integrity and self-determination, as well as the treatment of secession in international law.

Before beginning the analysis, however, an important point to discuss is the legal nature of UNGA resolutions. As a general rule, UNGA resolutions are of a recommendatory nature and do not possess binding powers.[82] However, the ICJ has, on several occasions, held that particular UNGA declarations have an impact on international law and, therefore, are reflective of customary international law.[83] This is the case with the Friendly Relations Declaration - in the 2010 Kosovo Advisory Opinion, the Court stated that the Declaration as a whole "reflects customary international law".[84]

The Declaration refers to the principle of territorial integrity several times. The very first principle deals with territorial integrity, reiterating the formulation provided in Article 2(4) of the Charter. However, the content of territorial integrity, as set out in Article 2(4), is expanded in the elaborations of the first principle – the Declaration articulates that all states should withhold from "organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State".[85] It also declares that states must refrain from "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State".[86] Both of these elaborations expand the content of the principle of territorial integrity. In the context of external self-determination, this broader interpretation means that instances where a secessionist movement receives support, directly or indirectly, from another state, also constitute a violation of the territorial integrity. Principle 6 on the sovereign

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[82] Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *The European Journal of International Law* Vol. 16 no.5 (2006), p. 883, last accessed on April 16, 2020. Available on: http://www.ejil.org/pdfs/16/5/329.pdf.

[83] Ibid, p. 903.

[84] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para 80, last accessed on May 5, 2020. Available on: https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf

[85] General Assembly resolution 2625(XXV),The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 24 October 1970, p. 122, last accessed on April 16, 2020. Available on: https://undocs.org/en/A/RES/2625(XXV)

[86] Ibid.

equality of states also makes a reference to territorial integrity, stating that sovereign equality inherently encompasses the inviolability of the territorial integrity of states.[87]

Perhaps the most interesting mention of territorial integrity can be found in Principle 5 on equal rights and self-determination of peoples. The elaboration of this principle contains what is known as the "safeguard clause",[88] a paragraph that is often highlighted for three reasons. Firstly, it extends the application of the principle of territorial integrity to non-state actors. Secondly, it is seen as potentially limiting the right to self-determination. Thirdly, it opens the door to what is known as remedial secession. The relevant provision reads:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[89]

The first element to be discussed is the extended scope of the application and the possible inclusion of non-state actors. The previous section of this paper examined the principle of territorial integrity established in Article 2(4) of the UN Charter. The article endowed the principle of territorial integrity with an interstate character, which has been strictly maintained by the ICJ and scholarship. However, Principle 5 of the Friendly Relations Declaration according to some interpretations expands on the meaning of the principle, removing it from its link with the prohibition of force, and, perhaps, more importantly, discarding its interstate character.[90] This claim stems from the fact that the clause does not clearly specify who are the actors that have the ability to "dismember or impair" the territorial integrity of a state, implying that non-state actors may have that ability, not just states alone.[91] Moreover, the paragraph uses both self-determination and territorial integrity in the same context, concerning the same subject – "peoples". If both principles are applicable to the same subject, then this further suggests that the Declaration finds the internal application of the principle of territorial integrity possible.

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[87] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Principle 6.
[88] Van der Driest, *supra* note 64, p. 475
[89] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Principle 5.
[90] Van der Driest, *supra* note 64, p. 475.
[91] Ibidem.

The extension in scope of territorial integrity gives rise to the second element – the guarantee of territorial integrity of states contained in this paragraph, otherwise known as the "safeguard clause". It is generally understood that the clause is intended to protect states from secessionist movements seeking to invoke their right to self-determination.[92] During the ICJ proceedings on Kosovo independence, states such as Russia[93] and Slovakia[94] invoked this provision, firstly, as confirming that the principles of territorial integrity and self-determination are deeply intertwined, and, secondly, that the point of the "safeguard clause" is to protect the territorial integrity of a state in cases of secessionist movements.[95] Such an interpretation would mean that states who conduct themselves in compliance with the principle of equal rights and self-determination would become "immune" to secessionist movements in the eyes of international law, as the "safeguard clause" would guarantee that the principle of territorial integrity trumps the principle of self-determination.

This, however, enables the third element – the recognition of remedial secession. The Friendly Relations Declaration is viewed as "the starting point"[96] in the development of remedial secession theory.[97] According to the "safeguard clause", states who comply with the principle of equality and self-determination, and as a result, have a government that represents the "whole people belonging to the territory" are essentially protected from secessionist movements violating their territorial integrity. In such states, the right to self-determination is limited by the principle of territorial integrity. However, by the same logic, if a state does not meet the conditions laid out in the paragraph, the territorial integrity of that state is not protected by it. For example, in states where a certain group is continuously excluded from the national government, that state has infringed upon the right to representation of the group, and, thus, the group has the right to secede.[98] This illustrates the process of remedial secession – supporters of the theory argue that a people have the right to external self-determination if the state from which they wish to secede

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[92] Odendahl, *supra* note 51, p. 536.
[93] Written statement of the Russian Federation, 16 April, 2009, para. 88, last accessed on April 16, 2020. Available on: https://www.icj-cij.org/files/case-related/141/15628.pdf
[94] Written statement of the Slovak Republic, 16 April, 2009, para. 12, last accessed on: 16 April, 2020. Available on: https://www.icj-cij.org/files/case-related/141/15626.pdf
[95] Ibidem.
[96] Theodore Christakis, "Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea", ZaöRV 75 (2015), p. 88, last accessed on: 16 April, 2020. Available on: https://www.zaoerv.de/75_2015/75_2015_1_a_75_100.pdf.
[97] Kohen, supra note 78, p. 10.
[98] Antonello Tancredi, "A Normative 'due Process' In the Creation of States Through Secession" in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (New York: Cambridge University Press 2006), p. 178.

has subjected them to persistent injustice.[99] However, this acknowledgement of remedial secession in Relations Declaration is based upon an *a contrario* interpretation, and the theory is viewed as somewhat controversial.[100]

As stated above, the Friendly Relations Declaration implies that territorial integrity is also applicable to non-state actors. But there are two points that challenge this view. Firstly, the paragraph does not refer to "non-state actors" or "secessionist movements", but it links the right to self-determination with territorial integrity. Therefore, the duty to respect territorial integrity is only applicable to the subjects of self-determination – peoples", not secessionist movements outside the scope of the right to self-determination.[101] The term "peoples" does not equate with the term "secessionist movements". Secondly, in its extended scope, the duty to respect the state's territorial integrity would not even be binding to all "peoples". If the state in question happened to promote and allow the internal self-determination of a peoples, they would be bound to respect the state's territorial integrity, and therefore, precluded from enjoying the right to external secession.[102] By that same token, if the state would not respect the internal self-determination of peoples, the peoples then would not be bound by the principle of territorial integrity. Therefore, including non-state actors would result in a "multi-scattered" duty, one that is not relevant to all non-state actors, but only to "peoples", and even then, not all "peoples", but only to specific groups.[103]

The Friendly Relations Declaration establishes an interesting expansion to the principles of territorial integrity and self-determination, and, unlike the UN Charter and the human rights covenants, offers guidelines on how the two principles interact. It elaborates on the interstate character of the principle of territorial integrity, provides guarantees to states on the inviolability of their territorial integrity, and lays the foundation of the remedial secession theory. However, much of its content is subject to debate in scholarship.

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[99] Ibid, 176.
[100] Christakis, supra note 96, pp. 88-89.
[101] Odendahl, supra note 51, p. 537.
[102] Robert Muharremi, "A Note on the ICJ Advisory Opinion on Kosovo," German Law Journal 11, no. Issues 7-8 (2010), p. 879, last accessed on April 17, 2020. Available on: HeinOnline.
[103] Odendahl, supra note 51, pp. 537-538

2. Theories of secession

The previous chapters of this paper illustrate that the contemporary discussion on secession, and on the conflict between the principles of territorial integrity and self-determination is rather lively in the field of international law, and has been that way since WWI. It is a discussion that has served as the overarching theme of the formation of the post-war international system. However, despite the relevance of the subject to the present day and the existing discourse in the field of law, normative theory on secession has been comparatively slow to form. As recently as 1991, in his essay "Towards a Theory of Secession" Allen Buchanen criticized the lack of normative theory on secession in political philosophy.[104] He pointed out the curiousness of the fact that the most influential political thinkers of the Western world, such as Hobbes, Locke, Rousseau, Hegel, Marx and others, have largely ignored the phenomenon of secession.[105] He went on to declare this absence of theory on secession "embarrassing for liberal political philosophy", particularly when taking into consideration how important a role secession played on the international arena in the late 1980s and the early 1990s.[106]

Arguments have been put forward as to why it was so. The reason which partly explains why scholars have been hesitant to theorize on secession for so long is that secession has been historically linked with two unfortunate movements.[107] Firstly, before the 20th century, the most notable and well-known attempt of secession was the American Civil War, where the claims to secession were inherently linked to the issue of slavery. Secondly, secessionist claims of ethnic Germans were an important element in the international tools Nazi Germany used before WWII to further its territorial interests in Poland and Czechoslovakia.[108] Therefore, during the post-war era, there was strong support for the territorial integrity of states, and secession was seen mostly as a dangerous instrument.[109] Therefore, political theorists were unwilling to elaborate on a concept that had no basis in international law and that was regarded essentially as a nuisance at best and a political crime at worst.

But the end of the Cold War brought significant changes upon the world stage. With the collapse of the communist system, many young states emerged, and secession was "the word on

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[104] Allen Buchanan, "Toward a Theory of Secession", *Ethics*, Vol. 101, No. 2 (Jan., 1991), p. 323, last accessed on: April 17, 2020. Available on: JSTOR.
[105] Ibidem.
[106] Ibidem.
[107] Lee Ward, "Thomas Hobbes and John Locke on a Liberal Right of Secession", *Political Research Quarterly*, Vol. 70, No. 4 (2017), p. 877, last accessed on April 17, 2020. Available on: JSTOR.
[108] Ibidem.
[109] Ibid, p. 878.

everybody's lips". Since then, theories on secession have become more widely discussed and the lack of normative theory has been rectified, as will be shown in the following sections. The theories developed as a result seek to answer the difficult questions the law and the courts are hesitant to address. These are worth examining purely for this reason – normative theory does not shy away from the question of the right to secession and is willing to offer valuable solutions as to what that right might look like and in what circumstances it should arise.

The following chapter will analyse the two main types of normative theories of secession – remedial rights theories and primary rights theories.

2.1. Remedial rights theories

The first type of theories is the so-called remedial rights theories, or just cause theories. According to these, the right to secession is permissible if a group of peoples have experienced persistent injustice at the hands of the state from which they wish to secede.[110] Buchanan, perhaps the most well-known promoter of the remedial rights theory, draws similarities between the remedial right to secession and John Locke's theory of revolution. According to the theory of revolution, if the people are continuously subjected to various injustices, they have the right to revolt and remove the government that forces them to undergo such cruelty. In the same vein, remedial right to secession allows a certain portion of the people to remove themselves from being subjected to persistent injustice, rather than removing the government.[111]

There are various interpretations of what constitutes injustice.[112] Buchanan's version of remedial secession, for example, rests on three conditions for injustice. Firstly, the survival of the particular group must be under threat by the state (for example, as it was in the case of Kurds in Northern Iraq), or secondly, its sovereign territory must have been unlawfully annexed by another state (the case of the Baltics).[113] More recently Buchanan has also introduced a third condition, which allows a group the right to secede if the state has repeatedly broken agreements to ensure internal self-determination (self-government) for that group (as in Chechnya or Kosovo).[114] Many

[110] Margaret Moore, "The Ethics of Secession and a Normative Theory of Nationalism," *Canadian Journal of Law and Jurisprudence* 13, no. 2 (2000), p. 227, last accessed on April 17, 2020. Available on: HeinOnline.
[111] Allen Buchanan, "Theories of Secession", *Philosophy & Public Affairs*, Vol. 26, No. 1 (Winter, 1997), p. 35, last accessed on April 17, 2020. Available on: JSTOR.
[112] Moore, *supra* note 110.
[113] Buchanan, *supra* note 111, p. 37.
[114] Michel Seymour, "Secession as a Remedial Right", *Inquiry*, Vol. 50, No. 4, 395–423, (2007), p. 397, last accessed on April 17, 2020. Available on:

academics support the notion that being under threat of physical harm or extermination gives a group the right to secede from the state that threatens them.[115]

Remedial rights theories are attractive because they place the concept of secession within the framework of fundamental human rights.[116] However, as already mentioned in the previous chapter, scholarship is still largely hesitant of this concept. Many academics are particularly unsure about remedial secession due to its weak legal foundation – it is merely "based on an inverted reading" of paragraph 7 of Principle 5 of the Friendly Relations Declaration, and therefore, has a weak bearing in international law.[117] Another issue regarding remedial rights theories is the difficulty of institutionalization.[118] The theory rests on the notion that if the state commits a high degree of injustice against a minority group, the minority group, which suffers from that injustice, is entitled to unilaterally secede from the state. But if the state severely infringes upon the human rights of a specific group, it is unlikely that the state would allow the minority group the ability to exercise its right to secession. Similarly, if the minority group can exercise the right to secession, it would most likely not be able to prove that the state has committed any injustices against them.[119]

Despite its weak foundation in law, remedial rights secession is the more likely candidate for institutionalisation out of the two theory groups. As will be shown in the case study of Quebec, in the Reference Re Secession of Quebec opinion, the Canadian Supreme Court spoke briefly of a remedial right to secession, and made mention of the "safeguard clause" in the Friendly Relations Declaration, thus giving rise to the suggestion that it acknowledges a remedial right to secession.

2.2. Primary rights theories

The second type of secession theories are the less restrictive primary rights theories. The common feature of these is the idea that injustice is not a necessary precondition for a group to

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https://www.researchgate.net/profile/Michel_Seymour/publication/233280097_Secession_as_a_Remedial_Right1/links/55e43bc708ae2fac472155f5.pdf

[115] Ward, *supra* note 107, p. 878.

[116] Ibidem.

[117] Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice", *St Antony's International Review*, Vol. 6, No. 1, Secession, Sovereignty, and the Quest for Legitimacy (May 2010), p. 40, last accessed on: 17 April, 2020. Available on: JSTOR.

[118] Moore, supra note 110.

[119] Moore, *supra* note 110, p. 228.

possess a right to secession.[120] Primary rights theories are further separated into two groups – Buchanan refers to these as Ascriptivist Group theories and Associative Group theories.[121]

Ascriptivist Group theories are also sometimes referred to as nationalist theories[122]. These theories state that specific groups characterized by ascriptive qualities inherently have the right to unilateral secession. Buchanan defines ascriptive qualities as features that are "ascribed to individuals independently of their choice."[123] These qualities are not political, but intrinsic, such as being a nation, or possessing a common language, culture or ethnicity.[124] Most Ascriptivist theories deal with the concept of nations, a distinct "peoples" and their ability to maintain their culture.[125] This type of theories is most often tied to the nationalist principle which holds that all nations or peoples are entitled to political independence. This group of theories is attractive to those who view it as a means through which nations can maintain their specific societal culture and identity.[126] However, the ascriptivist group theories are treated with wariness in scholarship, because the idea that every nation is entitled to the right of secession, can be very dangerous in praxis. Within multinational states, this would mean setting ethnic or cultural minorities against the majority and giving rise to violence between these different groups.[127] In addition, it could also lead to ceaseless fragmentation of the international stage in the long-term.[128] Furthermore, another issue with ascriptivist group theories is that it demands a definition of what exactly constitutes a nation.[129] Therefore, it is unlikely that this ascriptive group theories would ever be institutionalised in international law. In comparison, remedial rights theories are more attractive to legal scholars because they can be placed in an already existing framework of international law. Ascriptive group theories, however, are in a sense, far more radical.

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[120] Allan Buchanan, "Secession", Stanford Encyclopedia of Philosophy (2003), last accessed on May 3, 2020. Available on: https://plato.stanford.edu/entries/secession/#TheRigSec
[121] Buchanan, *supra* note 111, p. 38.
[122] Wayne Norman, "Domesticating Secession", *Nomos*, Vol. 45, Secession and Self-Determination (2003), p. 198, last accessed on May 1, 2020. Available on: JSTOR.
[123] Buchanan *supra* note 120.
[124] Buchanan, *supra* note 111, p. 38.
[125] Steven Weimer, "Autonomy-Based Accounts of the Right to Secede", *Social Theory and Practice*, Vol. 39, No. 4 (2013), p. 626, last accessed on May 3, 2020. Available on: JSTOR.
[126] Lee Seshagiri, "Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law", *Harvard International Law Journal* 51, no. 2 (2010), p. 569, last accessed on May 3, 2020. Available on: HeinOnline.
[127] Ibidem.
[128] Khazar Shirmammadov, "How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination: The Case of Crimea," *Russian Law Journal* 4, no. 1 (2016), p. 75, last accessed on May 3, 2020. Available on: HeinOnline.
[129] Ward, *supra* note 107.

The second type of primary right theories is what Buchanan calls the Associative Group or Plebiscitary theories. These differ from Ascriptive Group theories in that they do not require for the group who wishes to secede to have any common characteristics apart from the desire to secede. The group need not share ethnic, cultural or linguistic roots.[130] Associative group theories postulate that any group can secede if it can muster a majority in a referendum and is capable of maintaining the institutions necessary to form a state.[131] Theories of this type are formed upon the basis of majoritarian democracy.[132] However, theorists usually place specific criteria upon the seceding group. Philpott, for example, views the right to secession as contingent, and states firstly, that the seceding group must be at least as democratic and liberal as the state from which they wish to secede, secondly, that the majority of the group must favour secession, thirdly, that there is sufficient protection offered to minorities within the group and lastly, that the group meets the standards of distributive justice.[133]

The attractive aspects of the associative group lie in its liberal approach and the fact that it does not elicit the difficult question of what constitutes a peoples, as ascriptive group theories do. However, when brought to the question of institutionalization, associative group theories falter when compared to remedial rights theories. The right to secession as set out by associative group theories is arguably a very extreme form of secession, which has little to no basis within the existing international law framework.

Generally, the issue with all primary rights theories seems to be institutionalisation in international law. As Philpott points out, contrariety with international law does not necessarily in itself mean that the theories are invalid: "To reject such theories requires a demonstration that they are wrong, not merely an assertion that they contradict well entrenched principles."[134] To instil in international law the ideas expressed by primary rights theories would, to some extent, call for an overhaul of the international law system. It would demand that existing principles and precedents are re-examined in a different light, taking into account the contemporary circumstances on the world stage.[135] However, Philpott states that it is unlikely that such

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[130] Buchanan, *supra* note 111, p. 38.
[131] Eric Cavallero, "Value Individualism and the Popular-Choice Theory of Secession", *Social Theory and Practice*, Vol. 43, No. 1 (January 2017), p. 125, last accessed on May 3, 2020. Available on: JSTOR.
[132] Seshagiri, *supra* note 126.
[133] Daniel Philpott, "Should Self-determination be Legalized?" in *The Democratic Experience and Political Violence*, eds. David C. Rapoport, Leonard Weinberg, (London: Routledge, 2001), p. 108, last accessed May 3, 2020. Available on: https://www.taylorfrancis.com/books/e/9780203045558/chapters/10.4324%2F9780203045558-6
[134] Ibid, p. 124.
[135] Ibidem.

acceptance of any secession theories, remedial or primary, within the international law system would happen any time soon.[136]

3. Case studies

3.1. Quebec

3.1.1. Overview

Quebec, one of Canada's ten provinces, is inhabited mainly by French-speaking Canadians. Throughout the second half of the 20th century, Quebec began to insist on a higher degree of independence from Canada.[137] The first pro-independence efforts started in the 1960s, a period during which Quebec underwent many social, political and economic changes. As a result, the province began to move away from the conservative policies which had hitherto dominated Canadian and Quebecois politics. This change was signified by the victory of the Quebec Liberal Party (QLP) in the 1960 elections, which positioned itself as an "expression of French Canada".[138]

During the 1960s and the 1970s, Quebec nationalism became more deeply entrenched in the francophone society and Quebec began to gradually push for more autonomy, asking for more powers from the federal government.[139] Throughout the 1970s, the interests of the Canadian government and Quebec nationalists increasingly clashed with one another.[140] In hindsight, the die was cast with the election of 1976, won by the *Parti Québécois* (PQ), which ran with independence as its main platform. The first independence referendum was held in 1980, but the results brought a defeat to the PQ as nearly 60% of the electorate rejected their proposal.[141]

This was a significant blow to the nationalist movement in Quebec. The province became somewhat subdued regarding its independence aspirations until the 1990s. 1990 saw the improvement of the socio-economic circumstances of many Quebeckers, as well as the

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[136] Ibidem.
[137] Milena Sterio, Secession in International Law, (Cheltenham: Edward Elgar Publishing, 2018), p. 131.
[138] François Rocher, "Self-determination and the Use of Referendums: the Case of Quebec", *International Journal of Politics, Culture, and Society*, Vol. 27, No. 1 (2014), p. 26, last accessed on May 4, 2020. Available on: Springer.
[139] Nadine Changfoot and Blair Cullen, "Why is Quebec Separatism off the Agenda? Reducing National Unity Crisis in the Neoliberal Era", *Canadian Journal of Political*, Vol. 44, No. 4 (2011), p. 773, last accessed on May 4, 2020. Available on: JSTOR.
[140] Changfoot, Cullen, *supra* note 139.
[141] Ibid, 32.

establishment of the *Bloc Québécois*, a sovereigntist party that operated at the federal level.[142] These factors gave new impetus to the nationalist movement, prompting the federal government to create the Commission on the political and constitutional future of Quebec, in order to find solutions how to deal with the nationalist movement. The Commission found that another referendum on the independence of Quebec was necessary.[143] Thus, the second referendum was held in 1995. It brought another disappointment to the nationalists, as the population voted again to remain a part of Canada. However, this time the majority was slight – 49.4% of the population voted to secede from Canada.[144] Due to the very narrow result, the Canadian parliament made a request to the Canadian Supreme Court to provide an opinion on the legality of Quebecois independence under international and domestic law.[145]

3.1.2. Analysis of Reference Re Secession of Quebec

The following chapter will delve into deeper analysis of Reference Re Secession of Quebec, the opinion provided by the Supreme Court of Canada. Though, naturally, the opinion had no binding power on the international arena, it is worth examining for several reasons. On the one hand, this case, much like the entire process of the Quebec secession story, represents to an extent the liberal approach to secession – consensual and constitutional, with minimal threat of violence. However, it also sheds light on the weaknesses of the prevalent notion in international law that secession ought to be dealt with domestically.

The questions brought before the Court were:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

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[142] Catherine Côté, "The Scottish Referendum: the View from Quebec", in *Scotland's Referendum and the Media*, eds. Neil Blain et. al. (Edinburgh: Edinburgh University Press, 2016), p. 196, last accessed on May 4, 2020. Available on: JSTOR.
[143] Ibidem.
[144] Sterio, *supra* note 137.
[145] Ibid.

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[146]

Before answering the questions, the Court examined as a preliminary matter, its jurisdiction in the case. The Court eventually found that the Canadian Constitution does not allow Quebec to secede from Canada unilaterally.[147] It also declared that nothing in international law gives Quebec a right to unilateral secession. Regarding Question 3, the Court stated that considering its answers to the first two questions, it perceives no conflict between international and domestic law, and therefore, it is not necessary to answer the third question. The analysis will firstly elaborate on the Court's evaluation of its jurisdiction, to examine how a domestic court can respond in matters regarding secession. Secondly, since this paper exclusively deals with the treatment of secession in international law, not secession and constitutionalism, this analysis will focus on Question 2 and the Court's assessment of secession under international law. Finally, it will also touch upon the question whether domestic courts should have the ability to decide on the right of secession at all.

Regarding the first issue, jurisdiction, the *amicus curiae* brought forward a claim that the Court cannot answer Question 2, as it pertains to "pure" international law and is outside the jurisdiction of the Court.[148] It was claimed firstly, that the Court would be "purporting to "act as" an international tribunal" by giving its opinion on the matter[149], and secondly, that as a domestic court, it had no authority to provide its opinion, as the subject matter dealt with international law, rather than domestic law[150]. Thirdly, the *amicus curiae* stated that the questions presented to the Court are "speculative", "of a political nature" and not "ripe for judicial decision".[151]

The Court found that nothing precludes it from dealing with the type of questions presented in this case.[152] Regarding the issues brought forward about Question 2, the Court stated that it would not be attempting to act as an international tribunal, nor would it demand that any other state be bound by its opinion.[153] As for the second claim made about Question 2, that the Court, being a domestic court, had no competence to opine on matters that deal with international

[146] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 2, last accessed on May 4, 2020. Available on: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do
[147] Reference re Secession of Quebec, para. 150.
[148] Ibid, para. 4.
[149] Ibid, para. 20.
[150] Ibid, para. 21.
[151] Ibidem.
[152] Ibid, paras. 6-16.
[153] Reference re Secession of Quebec, *supra* note 146.

law – the Court stated rather bluntly that "this concern is groundless."[154] The Court stated that Question 2 was not an abstract question purely related to international law, but one that aims to "determine the legal rights and obligations of the National Assembly, legislature or government of Quebec."[155] Regarding the third claim, the Court stated that the questions are of a "fundamental public importance" and are not so imprecise to invalidate the possibility of a proper legal answer. Indeed, the Court declared that it is duty bound to provide an opinion on this matter.[156]

In its evaluation of secession in international law, the Court found that international law does not permit a right to unilateral secession. It stated that supporters of such a right can put forward but two arguments – first, the lack of an explicit prohibition on secession and second, the "implied duty" of states to respect secession as an expression of the right to self-determination.[157] Regarding the first argument, the Court pointed out the emphasis that the international law system places on territorial integrity and the notion that secession is a domestic matter. Therefore, in cases where the domestic Constitution allows no unilateral right to secession, as in this case, the Court stated that international law would not challenge such an outcome.[158]

With respect to the second point, the Court referred to international law instruments – the UN Charter, the Human Rights Covenants, the Friendly Relations Declaration, the 1993 Vienna Declaration on Human Rights and the Helsinki Final Act.[159] It found that these sources of international law are very specific in their expressions of the right to self-determination, in that they seek to limit the right enough so as to avoid threats to the territorial integrity of states. In particular, the Court referred to the so-called "safeguard clause" in the Friendly Relations Declaration and the Vienna Declaration on Human Rights, as well as provisions in the Helsinki Final Act and the Human Rights Covenants that express similar ideas.[160] These sources allow only the right to internal self-determination, exercised within an already existing state.[161] The right to external secession, however, only exists in very rare cases. The Court outlines three contexts which could potentially give rise to a right to external self-determination. Firstly, the colonial context – colonized peoples have an undisputed right to external self-determination.

[154] Ibid, para. 22.
[155] Ibid, para. 23.
[156] Ibid, para 31.
[157] Ibid, para. 110.
[158] Ibid, para. 111.
[159] Ibid, paras. 112-120.
[160] Ibid, para. 126-127.
[161] Ibid, para. 125.

Secondly, in cases where a people are under foreign subjugation in a non-colonial context. Thirdly, when a people are continuously denied the right to internal self-determination.[162] The Court stated that none of the three contexts are applicable to the population of Quebec and therefore, it does not possess a right to secession under international law.[163] The three contexts outlined by the Court essentially speak of a remedial right to secession, which suggests that the Court views remedial secession as a legitimate solution in cases of secession. In this case, where the group cannot claim a remedial right, the secession process, therefore, falls under the domestic law and institutions.

The case is a valuable example, one that indicates that a liberal approach to secession, one that respects both the rights of the seceding group and the state and is able to deal with secession domestically and peacefully, is indeed possible. However, it is unlikely to be replicated in countries with more volatile secessionist movements. It is important to note several reasons why the domestic jurisprudence path taken by Canada should not and cannot be the general approach to secession claims.

The Court found that it was well within its purview to deal with matters of international law, but there are several elements that complicate such a position and suggest an earlier, more active involvement of the international community would generally be preferable in cases of secession. Firstly, states, and by extension, any domestic institution of the state, will always be interested in a specific outcome – the retention of the state's togetherness.[164] It seems strange that a domestic court would be treated as an entirely neutral actor in the process of secession. Furthermore, perhaps not in Canada, but certainly in other countries, domestic courts would simply not hold enough credibility in the eyes of the secessionists, and therefore, could trigger violence or deepen already existing violence between the state and secessionists, who refuse to recognize the judgement. Secondly, as the Court stated, the emergence of a new state is very much dependent upon international recognition.[165] The recognition process, however, is usually fraught with political interests and the hesitance to become involved.[166] According to Frankel, this "hands off" approach is the greatest flaw in the international community's system for dealing with secession. It is this inattention of the international community that leads to "continued

[162] Ibid, paras. 131-133.
[163] Ibid, paras. 134-135.
[164] Roya M. Hanna, "Right to Self-Determination in In Re Secession of Quebec" *Maryland Journal of International Law* 23, no. 1 (1999), p. 242, last accessed on May 4, 2020. Available on: https://digitalcommons.law.umaryland.edu/mjil/vol23/iss1/9/
[165] Reference re Secession of Quebec, *supra* note 150, para. 141.
[166] Hanna, *supra* note 164, p. 243.

instability, violence and oppression"[167] and that active involvement of the international community would be the first step in the creation of a new system.[168] Domestic jurisdiction is a controversial subject, as most secessionist movements produce consequences that are of an international nature.[169]

The Quebec case is a good model for dealing with secessionist movements in situations where a remedial right to secession is absent. Where there are no human rights violations, the secession process can be done with the consent of all parties involved, in accordance with domestic law. However, often that is not the case – peaceful secessionist movements that experience no injustice from the state are relatively rare. The next case study will deal with Kosovo, a situation that could not be further from that of Quebec – a secessionist movement that inflicted and suffered terrible injustices which eventually demanded the attention of the international community.

3.2. Kosovo

3.2.1. Overview

The roots of the conflict between Kosovo and Serbia stretch back into medieval times, and the relations between Kosovar Albanians and Serbs have been strained for several centuries. From 1945 Kosovo had been a part of the Socialist Federal Republic of Yugoslavia (SFRY) as an autonomous province of the Socialist Republic of Serbia.[170] During the early 1990s, with the dissolution of the SFRY, Kosovo initially became a part of the Federal Republic of Yugoslavia (FRY), formed in 1992, until 2003 when the remaining FRY republics, Serbia and Montenegro, joined together in a federation. Eventually Montenegro left the union and Kosovo became a part of the independent state of Serbia.[171]

Kosovo enjoyed the status of an autonomous province until the second half of the 1980s. This status granted the region a significant degree of internal self-determination – Kosovar Albanians had access to education and media in their language, were able to freely celebrate

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[167] Lawrence M. Frankel, "International Law of Secession: New Rules for a New Era," *Houston Journal of International Law* 14, no. 3 (1992), p. 544, last accessed on May 4, 2020. Available on: JSTOR.
[168] Ibidem.
[169] Jane E. Stromseth, "Self-Determination, Secession and Humanitarian Intervention by the United Nations", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 86 (1992), p. 372, last accessed on May 4, 2020. Available on: JSTOR.
[170] Andrea Gioia, "Kosovo's Statehood and the Role of Recognition", *Italian Yearbook of International Law* 18 (2008), p. 3, last accessed on May 5, 2020. Available on: HeinOnline.
[171] Sterio, *supra* note 137, p. 155.

national holidays and generally preserve their culture and character.[172] However, throughout the 1980s, as the relations between Kosovar Albanians and Serbs living in the region worsened, Serbia under the leadership of Slobodan Milosevic took drastic measures in order to strip Kosovo of its autonomy. As a result of this, Kosovar Albanians did not have access to many political and civil rights.[173] In response, Kosovar Albanians organized a resistance movement, initially peaceful, but by 1995-96 it had merged into the Kosovo Liberation Army, an organization that conducted guerrilla attacks on Serbian security forces.[174] These attacks prompted a devastating retaliation by the Serbian leadership, causing the international community to become involved.[175] For most of the 20th century, the Kosovo issue had been viewed as a purely domestic matter, relevant only to SFRY. With the collapse of the SFRY, the international community began to pay more attention to Kosovo, as there were concerns that it could have a domino effect on other post-Soviet states.[176] Furthermore, it became clear that the conflicts in Yugoslavia could not be properly resolved without addressing the Kosovo problem.[177] Initially, the international community believed it would be possible to find a peaceful solution in the situation, but when peace talks fell through, it resorted to force – NATO states began an aerial bombardment of Serbia in 1999 which lasted for three months. This eventually forced the demise of Milosevic's regime and resulted in the withdrawal of Serbian forces from Kosovo.[178]

Following the downfall of Milosevic, Serbia began to forge stronger ties with Western countries. Its attitude toward Kosovo softened slightly, but it did not abandon the position that Kosovo ought to be an autonomous region within Serbia. Kosovo, however, with the support of Western states, declared its independence in 2008, though it is still not recognized by many states.[179]

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[172] Ibid, pp. 155-156.
[173] Sterio, *supra* note 137, p. 156.
[174] Gioia, *supra* note 170.
[175] Ibidem.
[176] Anton Bebler, "The Serbia-Kosovo conflict" in "Frozen conflicts" in Europe, ed. Anton Bebler (Opladen: Barbara Budrich Publishers, 2015), p. 157
[177] Ibidem.
[178] Gioia, *supra* note 170, pp. 3-4.
[179] Sterio, *supra* note 136, p. 157.

3.2.2. Analysis of the ICJ Advisory Opinion on Kosovo

Kosovo, in comparison with Quebec, represents entirely different circumstances. In this case the conflict between the state and the secessionists was so deep that a domestic court would not have been able to claim credibility in the matter. The international community had no choice but to become involved. However, the outcome of this involvement proved to be less elucidating than many had hoped. The ICJ only reiterated the hesitancy of international law to provide a clarification on external self-determination or the conflict between self-determination and territorial integrity.

The ICJ delivered its opinion on the case in 2010, having been requested to opine on the matter by the UNGA in 2008.[180] The question set out before the court was: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[181] In an examination of the Court's jurisdiction and discretion, it found that it had both and was able to provide an opinion in the respective matter.[182] Regarding the interpretation of the question, the Court found that the question presented to it was sufficiently narrow and specific. According to the Court, the question did not deal with the legal consequences of the act of declaring independence, nor did it ask if Kosovo has gained statehood as a result of the declaration. Furthermore, it did not inquire about the validity of the recognition of Kosovo and the legal effects emanating from that recognition.[183] It did comment on the identity of the authors of the declaration, stating that this was an issue that could affect the outcome of the Court's opinion, and therefore, the Court must be able to examine the identity of the authors itself.[184] Furthermore, it drew a clear distinction between the acts of "declaring" independence and "effecting" secession, referencing the Reference Re Secession of Quebec case. In the Quebec case the issue had been over "effecting" secession, but in this case, the issue at hand was whether the act of declaring independence was in accordance with international law.[185] Essentially, the Court remained with a very narrow interpretation of the question put forward to it by the UNGA – its interpretation was constricted to determining the legality of declaring independence, rather than examining whether international law provided Kosovo with a right to

[180] ICJ Advisory opinion on Kosovo's declaration of independence, *supra* note 84, para. 1.
[181] Ibid, para. 49.
[182] Ibid, paras. 17-48.
[183] Ibid, para. 51.
[184] Ibid, para. 52.
[185] Ibid, paras. 55-56.

unilaterally secede. This interpretation has been heavily criticized. Muharremi called the differentiating between "effecting" and "declaring" independence "artificial and not necessarily convincing".[186] He went on to say that it is not compatible with how states are formed in practice, that declaring statehood and exercising statehood cannot be treated as two separate elements.[187]

The Court did briefly touch upon the conflict between self-determination and territorial integrity, as well as the right to secede. It pointed out that the development of self-determination has created a right to independence to colonized peoples and peoples under alien subjugation. Further, it stated that nothing in international law prohibits declaring independence in such contexts, and at times, even outside of these contexts.[188] Regarding territorial integrity, the Court referred to Article 2(4) of the UN Charter, the Friendly Relations Declaration and the Final Helsinki Act to reiterate the importance or territorial integrity, and to clarify that the principle only pertains to state relations.[189] In contrast to the Quebec case, it made no mention of the "safeguard clause" in the Friendly Relations Declaration. The Court made note of the submissions made by several states regarding UNSC resolutions condemning secessionist movements for violating the territorial integrity of a state. However, it stated that the UNSC had condemned the "illegality attached to the declarations of independence", rather than the unilateral nature of the declaration.[190] The Court also mentioned remedial secession, but made a statement that it "is not necessary to resolve these questions in the present case", thus leaving the issue of remedial secession without a clarification.[191]

The Court eventually found that the Kosovo declaration of independence and the adoption of that declaration was not in violation of international law.[192] This ruling was problematic, however, largely due to the Court's interpretation of the question. The question presented to the Court asked if the declaration was "in accordance with" international law, but the Court came to the conclusion that it "did not violate" international law – Judge Simma in his Separate Opinion expressed the view that such a conclusion was contrary to the wording of the initial question and avoided a the crucial question of whether international law can "permit or even foresee an

[186] Robert Muharremi, "A Note on the ICJ Advisory Opinion on Kosovo," *German Law Journal* 11, no. 7-8 (2010), p. 873, last accessed on May 5, 2020. Available on: HeinOnline.
[187] Ibid, p. 874.
[188] Advisory Opinion on Kosovo's declaration of independence, *supra* note 84, para. 79.
[189] Ibid, para. 80.
[190] Ibid, para. 81.
[191] Ibid, para. 83.
[192] Ibid, para. 122.

entitlement to declare independence" under specific conditions.[193] He attributed this interpretation and the Court's general approach regarding the case to its implicit reliance on the *Lotus* principle, which he termed an "old, tired view of international law" originating in a 1927 judgement from the Permanent Court of International Justice.[194] According to the Lotus principle, a state has no need to show a permissive rule regarding a specific act, if there exists no prohibition of it.[195] However, it is worth noting that this claim has been questioned, as the Court's reliance upon the Lotus principle is firstly, implicit, as it never referred to it in its opinion, and secondly, inverted, due to the principle being relevant to states and the idea of state freedom. Here it is used in the opposite sense – against the state.[196] Judge Simma stated that had the Court moved away from the *Lotus* principle, it would have had the chance to opine on several important aspects of the case that were not touched upon.[197] The Court could have addressed the right to self-determination and remedial secession, as many of the participating states referred to it in their arguments, but due to the restrictive interpretation of the question, the Court chose not to examine the issue. This has given way to much confusion surrounding the issue of whether peoples have the right to secede.[198]

Simma found the Court's narrow interpretation of the question a failure to acknowledge and properly deal with "the great shades of nuance" in international law. Essentially, in his view, the Court had not managed to comprehensively answer the question presented to it. This opinion was largely echoed in scholarship, where the ICJ Advisory Opinion drew heavy criticism for the narrow interpretation of the question and the resulting lack of clarity.[199]

The two cases, Quebec and Kosovo, show two different circumstances and approaches to secession in international law. The Quebec case illuminated how secession could proceed if approached in a liberal manner – certainly not without its upheavals, but largely peaceful and in accordance with state law. However, in the context of secessionist movements, Quebec was in an

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[193] Advisory Opinion (Declaration of Judge Simma), para. 1, last accessed on May 5, 2020. Available on: https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-03-EN.pdf
[194] Ibid, para. 2.
[195] Ibidem.
[196] Anne Peters, "Does Kosovo Lie in the Lotus-Land of Freedom?", *Leiden Journal of International Law*, 24 (2011), p. 100, last accessed on May 5, 2020. Available on: https://edoc.unibas.ch/20647/1/20110215144916_4d5a845cde800.pdf
[197] Declaration of Judge Simma, *supra* note 193, para. 9.
[198] N. Micheli Quadros "Secession: The Contradicting Provisions of the United Nations Charter - A Direct Threat to the Current World Order", *Santa Clara Journal of International Law* 14 no. 2, p. 466, last accessed on May 5, 2020. Available on: https://digitalcommons.law.scu.edu/scujil/vol14/iss2/4/
[199] Miodrag A. Jovanovic, "After the ICJ's Advisory Opinion on Kosovo: The Future of Self-Determination Conflicts", *Annals of the Faculty of Law in Belgrade - International Edition* (2012), p. 293, last accessed on May 5, 2020. Available on: HeinOnline.

extremely privileged situation. The state from which it wished to secede relied on the idea that secession is a domestic matter and was willing to negotiate instead of using force to suppress any independence aspirations. The conflict between Kosovo and Serbia illustrates that this is not always the case. In this situation, the relations between the secessionist movement and the state were deeply bitter and both sides had suffered significant violence, thus, making the approach taken by Canada impossible.

The international community had to intervene, but, arguably, this intervention came too late. It was an example of what Frankel called the "hands-off" approach – the international community became involved only when it became clear that the conflicts in the Balkans cannot be brought to an end without addressing Kosovo, and when fears emerged over a possible domino-effect ripping through Eastern Europe. To paraphrase Frankel, mindless violence should not be the primary way how secessionist movements gain international attention.[200] He found that early involvement of the international community in conflicts relating to secession would be beneficial in reducing the loss of life and the suffering that these conflicts bring.[201]

The ICJ Advisory Opinion illuminated that there is a tendency in international law to avoid the question of secession, despite its burning relevance and importance. There are continued efforts to frame secession as a purely domestic issue. This pervasive notion of international law is sufficient in cases such as Quebec, where a region wishes to secede from a state that has no intention of exerting oppressive policies upon that region. However, it simply does not hold up when faced with situations such as in Kosovo, where the state is unable to deal with secession domestically and causes deep human suffering as a result. In these cases, early and active involvement of the international community could help in minimizing the violence arising from the conflict.

[200] Frankel, *supra* note 167, p. 545.
[201] Ibidem

Conclusion

This paper has sought to analyse the approach taken by international law to secession within the context of the conflict between the principles of self-determination and territorial integrity. It found that the international community persistently attempts to present secession as a domestic matter that does not pertain to international law.

The first part of the paper looked at the principles of self-determination and territorial integrity separately. Self-determination as set out in the UN Charter is vague, however, one can deduce it was intended to be a principle that ensures the self-government, thus, internal self-determination, to non-self-governing peoples, instead of a right that allows a people living in an existing state to secede from that state. Further, the International Human Rights Covenants can indeed be regarded as an important source, as these are where a universal right to self-determination appeared for the very first time. This right, however, is characterized by the same lack of clarity regarding its scope or applicability as the principle of self-determination in the UN Charter. Neither of the documents envision or even make mention of the possibility of a right to external self-determination.

The principle of territorial integrity in the UN Charter is intrinsically linked with the prohibition of force. Article 2(4) of the Charter has been the subject of much debate due to its interstate character. The UN Charter essentially does not acknowledge the principle of territorial integrity as applicable to non-state actors, an element which has been upkept by the ICJ in several of its judgements. This shows that international law neither recognizes, nor prohibits the ability of non-state actors, such as secessionist movements, to occupy and claim the territory of a state. Rather, it simply chooses to not address the issue and frame it as a domestic matter, subject to domestic law. However, the Friendly Relations Declaration provides a broader interpretation of the principle of territorial integrity and how it interacts with the principle of self-determination. Furthermore, it makes an extremely important, albeit controversial, contribution with the so-called “safeguard clause”, which has been interpreted as opening the door to remedial secession.

The second part of the paper dealt with normative theories of secession, in order to reflect more recent interpretations of the concept of secession. The author of this paper outlined two groups of theories – the remedial rights and the primary rights theories. The former, characterized by the view that a right to secession ought to exist for groups who have suffered persistent injustice at the hands of the state, seems to be the more acceptable of the two, as it can be placed within an existing framework of international law. The latter, which does not perceive injustice as

a necessary precursor for the right to secession, appears unlikely to ever be implemented as policy or in law. Though it is not necessarily morally wrong, it is simply too radical for the current situation.

The third part examined two secessionist movements and two different approaches taken by courts. The first, the case of Quebec, illustrated how the secession process takes place in a liberal democracy where the state is willing to negotiate and accommodate the peoples seeking self-determination. It showed that secession can be dealt with domestically, but by that same token, it illuminated why that should not be perceived as the general approach to secession – it simply would not work in states where the relationship between the secessionist movement and the state is volatile and violent. Kosovo proved to be an example of this.

The analysis of Kosovo brought a twofold conclusion. Firstly, it was an example of a situation where the state is unable to deal with secession on the domestic level and, thus, inflicts harm on the peoples who wish to secede. It showed that the "hands-off" approach of the international community brings human suffering to the parties involved in the conflict; had the international community involved itself at an earlier stage, it is possible that such violence could have been avoided. Secondly, the ICJ Advisory opinion on Kosovo's declaration of independence shows the reluctance of the ICJ to analyse secession. In this opinion, the ICJ drew an arbitrary line between "declaring" and "effecting" independence to avoid having to opine on the consequences of declaring independence. The opinion was met with disappointment by many who had seen the Kosovo case as a possibility for the ICJ to clarify the opaque issue of secession. Though it is clearly a controversial issue capable of evoking a fiery reaction in the international community, the failure of international law to address it will not mean that it ceases to have consequences on the international stage – the birth of a new state can hardly be categorized as solely an internal issue of an already existing state.

Throughout the process of writing this paper, the author has come to a conclusion which can be expressed in the simplest terms – the UN Charter, the very heart and soul of the current system of international law, is an unequivocally beautiful document. It sheds light on some of the best aspects of humankind - the wish to provide a better world for those who come after us, the desire to be governed by a just system that prizes peace above conquest and the will to come together in order to create that system. The UN Charter, and the international law system that arose from it, were guided by the best intentions. However, as it so often happens in praxis, those intentions take a life on their own and are substantially transformed over time. The intentions with which the principles of self-determination and territorial integrity were enshrined in

international law no longer correspond to the contemporary world. Therefore, the author of this paper holds the view that the approach to secession in international law should be revalued – it is based on vague and, to an extent, outdated definitions of both the principle of self-determination and territorial integrity.

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