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Secession of States and Self-determination in contemporary International Law

The Absence of Any Right to 'Remedial Secession' in International Law

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Abstract: The theory of remedial secession puts forward the idea of an *opinio* that considers it licit to exercise external self-determination in contexts of oppression and grave violations of human rights. This view would be supported by just a few cases in international practice. For the most part, the international community has been reluctant to recognize it, even though only Bangladesh and Kosovo came to secede in accordance with its precepts. Indeed, even the Kosovo case raises doubts about whether it should be seen as a remedial secession. In view of these facts, it becomes necessary to note the deep-rooted and unquestionable existence of just such an *opinio juris*. This requires the argumentation advanced by new entities in justifying secession to fall in line with the theory, rather than that the result achieved should match a claimed emerging right to remedial secession. In neither of the two instances did the new entities allude to exercising a right to remedial secession. International practice would appear to show that States are not convinced that such a right should be recognized.

Keywords: Remedial Secession – Secession – Self-Determination

(A) INTRODUCTION

The concept of secession lacks any precise boundaries in international law, which remains neutral on the matter, neither recognizing a right nor setting any prohibition, although unanimously considering it illicit when it is brought into play in violation of peremptory norms of international law.[1] In other words, secession is not recognized by international law, but likewise international law does not prohibit secession.[2] This is a 'deliberate silence' that

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[1] Cf. T.M. Franck, 'Report by Thomas M. Franck: 'Opinion Directed at Question 2 of the Reference', in A.F. Bayefsky (ed.) *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000), 75-84, at 83. S.F. Van den Driest, 'From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law', 22:4 *IJGR* (2015), 467-485, at 481-482.

[2] Cf. G. Abi-Saab, 'Conclusion', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 470-476, at 474 [doi: 10.1017/CBO9780511494215.017]. T. Christakis, T., 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?, 24:1 *LJIL* (2011), 73-86, at 83. J. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2007), 870, at 390. P. Hilpold, 'Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens', 63:1 *ZaöRV/HJIL* (2008), 117-141, at 117. G. Lauwers and S. Smis, 'New Dimensions of the Right to Self-determination: A Study of the International Response to the Kosovo Crisis', 6:2 *N & EP* (2000), 43-70, at 64. R. Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo', 11:7

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Judge Bruno Simma felt, when making a declaration on the occasion of the *Kosovo Advisory Opinion*, must imply that certain actions were not illegal, but also that they were not necessarily legal.[3]

Apart from this, reasons have been mooted contrary to the acceptance of a right to secession. They point to the difficulties of determining who holds such a right, in the risks for States arising from recognition of multiple minorities, and the danger of excessive and indefinite fragmentation of the international community if it were to be formed by numerous unviable micro-states.[4]

Likewise, arguments are put forward in favor of a right to secession. They are based on satisfying the will of an extensive majority of the population of a given area;[5] on rectification of situations of 'past injustice', when a geographical unit was created into which the entity desirous of secession was unjustly incorporated;[6] on the idea that it should exist in itself, without any solid justification, but demonstrated by the positive results attained in specific instances;[7] or on the protection of members of a group subjected to serious violations of human rights by State authorities.[8]

In these latter contexts of particular gravity, strong support has been given to the legitimization of secession as a 'remedy' for a group suffering grave persecution at the hands of State authorities.[9] In these circumstances, international law might admit a 'qualified' right

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German LJ (2010), 867-880, at 875. S. Oeter, 'Secession, Territorial Integrity and the Role of the Security Council', in P. Hilpold (ed.), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Leiden; Boston: M. Nijhoff Publishers, 2012), 109-138, at 114. S.F. Van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law', 62:3 *NILR* (2015), 329-363, at 354. J. Vidmar, 'Conceptualizing Declarations of Independence in International Law', 32:1 *Oxford JLS* (2012), 153-177, at 164.

3 Cf. 'Declaration of Judge Simma', *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 403-626, at 480, para. 9.

4 Cf. L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978), 288, at 14. R. Higgins, 'Postmodern Tribalism and the Right to Secession', in C. Brolmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993), 29-35, at 35.

5 Cf. A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), 162, at 29-32.

6 Cf. Id., at 29-32.

7 Cf. G. Wilson, 'Self-Determination, Recognition and the Problem of Kosovo', 56:3 *NILR* (2009), 455-481, at 474.

8 Cf. A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 365, at 327-333.

9 Cf. K. Del Mar, 'The Myth of Remedial Secession', in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge; New York: Cambridge University Press, 2013), 79-108, at 79. Oeter, *supra* n. 2, at 119.

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to 'remedial secession' aimed at putting an end to a situation of genocidal characteristics.[10] Backing for this view would be drawn from the events occurring in the case of Kosovo, which were seen by a major sector of legal opinion as completely fulfilling the postulates for 'remedial secession', even after the establishment of UNMIK.[11] Nevertheless, it is far from clear that Kosovo can be admitted as a precedent when it was considered a 'unique case'.[12]

(B) THE PRINCIPLES OF THE THEORY OF 'REMEDIAL SECESSION'

The basis for the theory of 'remedial secession' was established by authors such as Allan Buchanan, Professor of the Philosophy of International Law, who grouped views about any right to secede around recognition either of a 'remedial right only' or a 'primary right' to secession.[13] In his formulation, the theory of 'remedial secession' advocates transformation of the internal right to self-determination into a right to independent statehood for a part of a State when all attempts to achieve it have been frustrated by the authorities through a lack of representation and violation of human rights.[14] Exercise of self-determination would constitute an exceptional 'remedy' for situations in themselves extraordinary, in which carrying out legitimate humanitarian intervention might prove a difficult task.[15]

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[10] Cf. D. Raič, *Statehood and the Law of Self-Determination* (The Hague: Martinus Nijhoff Publishers, 2002), 495, at 324. J. Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', 6:1 *St. Antony's International Review* (2010), 37-56, at 40.

[11] Among others, on the previous situation and the course of the UNMIK administration: T. Baggett, 'Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing and Independent Kosovo', 27:2 *Ga.J. Int'l & Comp. L.* (1999), 457-476, at 472. J.I. Charney, 'Self-Determination: Chechnya, Kosovo, and East Timor', 34:2 *Vand. J. Transnat'l L.* (2001), 455-468. T.D. Grant, 'Extending Decolonization: How the United Nations Might Have Addressed Kosovo', 28:2 *Ga.J. Int'l & Comp. L.* (2000), 9-54, at 53. G. Seidel, 'A New Dimension of the Right of Self-Determination in Kosovo?', in C. Tomuschat (ed.), *Kosovo and the International Community. A Legal Assessment* (The Hague: Kluwer, 2001), 203-215.

Holding that this right also applied at the moment of the declaration of independence: K.W. Watson, 'When in the Course of Human Events: Kosovo's Independence and the Law of Secession', 17:1 *Tul. J. Int'l & Comp. L.* (2008), 267-293, at 281.

[12] Cf. C. Tomuschat, 'Secession and Self-Determination', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 23-45, at 38.

[13] Cf. A. Buchanan, 'Theories of Secession', 26:1 *Philosophy & Public Affairs* (1997), 31-61, at 34. A. Catala, 'Remedial Theories of Secession and Territorial Justification', 44:1 *Journal of Social Philosophy* (2013), 74-94, at 74 [doi: 10.1111/josp.12011].

[14] Cf. Buchanan, *supra* n. 13, at 35. By the same author, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (Oxford; New York: Oxford University Press, 2004), 507, at 335. Catala, *supra* n. 13, at 77. T. Jaber, 'A Case for Kosovo? Self-determination and Secession in the 21st Century', 15:6 *IJHR* (2011), 926-947, at 935. Raič, *supra* n. 10, at 368-372.

[15] Cf. W.W. Burke-White, 'Crimea and the International Legal Order', 56:4 *Survival* (2014), 65-80, at 77. J. Summers, 'Relativizing Sovereignty: Remedial Secession and Humanitarian Intervention in International Law', 6:1 *St. Anthony's International Review* (2010), 16-36, at 30.

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Although these were present in early formulations,[16] development of the theory over the course of the post-colonial period led to the explicit enumeration of a list of requirements that must be fulfilled in order to legitimize a remedial right to secede. On the basis of descriptions of circumstances, authors like Cedric Ryngaert and Simone Van den Driest have summed up the requisites generally demanded by academics as four features:[17]

(1) Claims must be made by a people constituting a majority in a given territory;[18]
(2) There must be a state of affairs involving serious, massive, systematic violations of fundamental human rights;[19]
(3) There must be persistent denial of political participation in government leading to a situation of domination, subjugation or exploitation outside a colonial context;[20] and
(4) There is a need for any process of external self-determination to be undertaken as a last resort after the failure of negotiations.[21]

(c) Remedial Secession as a Doubtful Norm in Customary International Law

(1) Uncertain Conviction of the Lawfulness of Remedial Secession

Some authors have mentioned the matter of the Åland Islands in 1921 as a precedent for the theory of remedial secession. Although considered unique at the time, this still today constitutes a benchmark.[22] The Committee of Rapporteurs of the League of Nations that examined the case held that there was no absolute right to unilateral secession but recognized

[16] Cf. Buchanan, *supra* n. 13, at 37.

[17] Cf. C. Ryngaert and C. Griffioen, 'The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers', 8:3 *Chinese JIL* (2009), 573-587, at 575-576. S.F. Van den Driest, S. *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* (Cambridge: Intersentia, 2013), 383, at 351.

[18] Cf. B. Arp, 'The ICJ Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* and the International Protection of Minorities', 11:7 *German LJ* (2010), 847-866, at 853, note 15. N.A. Ioannidis, 'Constitutional Prohibition of Secession under the Prism of International Law: The Cases of Kosovo, Crimea and Cyprus', 2:4 *Edinburgh Student Law Review* (2015), 169-180, at 178. T.D. Musgrave, *Self-Determination and National Minorities* (Oxford: Oxford University Press, 2000), 290, at 154. Oeter, *supra* n 2, at 115. Ryngaert and Griffioen, *supra* n. 17, at 575.

[19] Cf. Ioannidis, *supra* n. 18, at 178. Jaber, *supra* n. 14, at 935. Ryngaert and Griffioen, *supra* n. 17, at 576. Van den Driest, *supra* n. 17, at 351.

[20] Cf. Ioannidis, *supra* n. 18, at 178. Jaber, *supra* n. 14, at 935. Raič, *supra* n. 10, at 368-372. Ryngaert and Griffioen, *supra* n. 17, at 576. Tomuschat, *supra* n. 12, at 41. Van den Driest, *supra* n. 17, at 351.

[21] Cf. Buchanan, *supra* n. 14, at 335. Ioannidis, *supra* n. 18, at 178. Jaber, *supra* n. 14, at 935 and 942. Lauwers and Smis, *supra* n. 2, at 64. Oeter, *supra* n 2, at 119. Ryngaert and Griffioen, *supra* n. 17, at 576. Tomuschat, *supra* n. 12, at 41.

[22] Cf. T. Fleiner, 'The Unilateral Secession of Kosovo as a Precedent in International Law', in U. Fastenrath (ed.) *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 877-894, at 882.

this option as a 'last resort'.[23] However, in their conclusions they stated that this possibility did not apply to the inhabitants of the archipelago because 'Aalanders have neither been persecuted nor oppressed by Finland', and neither was any evidence of a 'policy of oppression' found.[24]

The international community reflected a certain recognition of the exception in the so-called 'safeguard clause' envisaged by the Declaration on Principles of International Law of 1970 under which the territorial integrity principle was tied to the representative nature of a government.[25] Hence, the theory of remedial secession sought its basis in an interpretation running counter to the integrity principle.[26] If a State lacked a government representing the totality of the people belonging to a territory, without distinction of race, creed or color, it could not invoke territorial integrity to limit to an internal sphere the exercise of a people's right of self-determination.[27] Apart from any controversy about determination of the units for which the territorial integrity principle was intended, it must be objected that this principle of integrity of territory constituted a core principle of international law for which no exceptions were admitted, and the drafters likewise did not accept any chance of a contrary interpretation.[28]

Over the following decades, the theory was corroborated through its incorporation into the decisions of a number of national and international legal bodies, as also those of international organizations.[29] Among the first instances of this would be the Concurring

[23] Cf. 'Report Presented to the Council of the League of Nations by the Commission of Rapporteurs', 16 April 1921 (Geneva: League of Nations, 1921), 53, at 27, League of Nations Council Doc. B7/21/68/106 (1921).

[24] Id., at 28. V. P. Nanda, 'Self-Determination under International Law: Validity of Claims to Secede', 13:2 *Case W.R.J. Int'l L.* (1981), 257-280, at 266.

[25] Cf. A. Kapustin, 'Crimea's Self-Determination in the Light of Contemporary International Law', 75:1 *ZaöRV/HJIL* (2015), 101-118, at 107. A. Tancredi, 'Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia', 18 *Italian YIL* (2008), 37-62, at 40, note 11. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), of 24 October 1970, at Annex, 'The Principle of Equal Rights and Self-Determination of Peoples', para. 7.

[26] Cf. T. Christakis, 'Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international (The Conflicts of Secession in Crimea and Eastern Ukraine and International Law)', 141:3 *JDI* (2014), 733-764, at 742. Del Mar, *supra* n. 9, at 94.

[27] Cf. Ryngaert and Griffioen, *supra* n. 17, at 581. J. Soroeta Liceras, 'La opinión consultiva de la Corte Internacional de Justicia sobre Kosovo de 22 de julio de 2010: una interpretation judicial *sui generis* para un caso que no lo es. Aplicabilidad de la cláusula de salvaguardia de la resolution 2625 (XXV) o de la 'secesión como remedio"', 25 *REEI* (2013), 29, at 28. Tancredi, *supra* n. 25, at 39. Del mismo autor, 'A Normative 'Due Process' in the Creation of States Through Secession', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 171-207, at 176.

[28] Cf. M.N. Shaw, 'Peoples, Territorialism and Boundaries', 8:3 *EJIL* (1997), 478-507, at 483. Intervention of Mr. Riphagen (The Netherlands), UN Doc. A/AC.125/SR.114, at 52, cited in Tancredi, *supra* n. 25, at 40, note 11.

[29] Cf. Jaber, *supra* n. 14, at 935-936. Van den Driest, *supra* n. 17, at 129-131.

Opinion issued by Judges Luzius Willhaber and Rolv Ryssdal in respect of the *Loizidou v. Turkey* case before the European Court of Human Rights in 1996.[30] To this can also be added the decisions of the African Commission on Human and Peoples' Rights relating to the matters of Katanga in 1996, and Southern Cameroon in 2009, based on the 'safeguard clause'.[31]

One particularly crucial contribution was the basis for the decision by the Supreme Court of Canada in its *Reference re Secession of Quebec* in 1998 when examining the recognition of a claimed right to secession. The Supreme Court took a step forward in accepting the existence of a right to external secession exclusively on the assumption that "a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development".[32]

The statements listed do not, however, seem sufficient to assert that there is a general conviction about the theory of remedial secession. This has led to striking divisions in the international community, as was highlighted by the case presented by *Kosovo* before the International Court of Justice (ICJ).[33] It might have been expected that the ICJ would deliver an opinion, but it toed the same line as legal and political bodies, whether internal or international, and avoided making any pronouncement on the existence of a right to remedial secession. It did no more than provide an answer strictly limited to the points raised by the General Assembly.[34] This attitude was criticized both by Judges Abdulqawi A. Yusuf and

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[30] Cf. 'Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal', ECHR (Chamber), *Loizidou v. Turkey*, Application No. 15318/89, Judgment (Merits), 28 July 1998, 42, at 24, para. 1-2.

[31] Cf. *Katangese Peoples' Congress v. Zaire*, Merits, Communication No. 75/92, 8th Annual Activity Report, at para. 6. *Kevin Mgwanga Gunme et al./Cameroon*, Communication No. 266/2003, of 13-27 May 2009, at 36, para. 190-194.

Apart from the authors quoted previously, on these matters see: M. Vashakmadze and M. Lippold, "Nothing but a road towards secession'? The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", 2:2 *GoJIL* (2010), 619-647, at 635.

[32] Cf. Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217. 115 *International Law Reports* (1999), 536, at 287, para. 138. 37:6 *ILM* (1998), 1342-1377. S.E. Meller, 'The Kosovo Case: An Argument for a Remedial Declaration of Independence', 40:3 *Ga.J. Int'l & Comp. L.* (2012), 833-866, at 848.

[33] Among States expressing their support for remedial secession were Albania, Estonia, Germany, Finland, Ireland, Jordan, Lithuania, Maldives, the Netherlands, Poland, the Russian Federation, Slovenia, Switzerland, and Kosovo. Opposed to the theory were: Argentina, Azerbaijan, Belarus, Bolivia, Brazil, Burundi, China, Cyprus, Iran, Romania, Serbia, Slovakia, Spain, Venezuela, and Vietnam. Cf. G. Bolton, 'International Responses to the Secession Attempts of Kosovo, Abkhazia and South Ossetia 1989-2009', in D. French (ed.) *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), 109-138, at 109. Christakis, *supra* n. 26, at 742. Del Mar, *supra* n. 9, at 80-83. See also Vashakmadze and Lippold, *supra* n. 31, at 636, note 86.

[34] Cf. *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 403-626, at 438, para. 82-83. Del Mar, *supra* n. 9, at 84. Kapustin, *supra* n. 25 , at 107.

Bruno Simma and by an extensive group of commentators.[35]

(2) The Lack of International Practice on Remedial Secession

Some writers on the topic have referred to practice among the international community confirming the emergence of a right to secession when there is oppression and gross human rights violations.[36] These authors point to the cases of Bangladesh, Eritrea, Croatia and Slovenia, the Baltic Republics, South Sudan and Kosovo, unanimously highlighting the instance of Bangladesh as the clearest example.[37] Alongside these cases, account has also been taken of the instances of Southern Rhodesia, Katanga, Chechnya, South Ossetia and Abkhazia. However, these have been discounted because the international community opposed their recognition and in the end the secession failed.[38]

The outcome of the analysis performed by legal doctrine is the conclusion that only the instances of Bangladesh and Kosovo can be considered the result of a process of unilateral secession. Consequently, they alone can be taken into account as a manifestation of international practice relative to remedial secession.[39] To this should be added the fact that the Kosovo secession has not been universally accepted as a clear example. Among other reasons cited, this is because the abuses involved lay at some distance in time and did not justify remedial secession.[40]

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[35] Cf. 'Separate Opinion of Judge Yusuf', *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 618-626, at 620, para. 5-6. 'Declaration of Judge Simma', *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 478-481, at 480, para. 7.

Cf. Arp, *supra* n. 18, at 853. H. Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', 24:1 *LJIL* (2011), 155-161, at 156]. A. Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the 'Foam on the Tide of Time"', 15:1 *Max Planck YUNL* (2011), 65-104, at 86. C. Ryngaert, 'The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: A Mixed Opportunity?: International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 201', 57:3 *NILR* (2010), 481-494, at 492.

[36] Cf. Vidmar, *supra* n. 10, at 42-50.

[37] Cf. Dugard and D. Raič, 'The Role of Recognition in the Law and Practice of Secession', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 94-137, at 120-130. Tancredi, *supra* n. 25, at 40-41. Van den Driest, *supra* n. 17, at 276, 279-289. Vidmar, *supra* n. 10, at 42-48.

[38] Cf. Ryngaert and Griffioen, *supra* n. 17, at 578. Tancredi, *supra* n. 25, at 53,

[39] Cf. Van den Driest, *supra* n. 17, at 289. Van den Driest, *supra* n. 2, at 345.

[40] Cf. M. Goodwin, 'From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law', 8:1 *German LJ* (2007), 1-20, at 6. Jaber, *supra* n. 14, at 941-942. R. Kolb, 'Autodétermination et 'sécession-remède' en droit international public', in *The Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice. Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford: Oxford University Press, 2013), 57-77, at 63. Van den Driest, *supra* n. 17, at 273. Vashakmadze and Lippold, *supra* n. 31, at 636, and note 86. Vidmar, *supra* n. 10, at 49. Wilson,

In accordance with the arguments taken on board by a broad sector of legal doctrine, it can be deduced that it is not possible to see any general and uniform international practice reflecting clear support for a right to remedial secession.[41]

(D) CONCLUSION

In the absence of a rule in treaty law envisaging a right to remedial secession, it may be asked whether the concept of remedial secession can constitute a norm of international customary law. In the light of what has been stated above, it would appear difficult to point to the existence of general practice embodying any recognition of a right to remedial secession.[42] The presence of a strong *opinio juris* confirming an obligatory nature for remedial secession might provide a foundation for the emergence of a right to remedial secession as a norm of customary international law.[43] For this, it would be necessary to show that the behavior of States provides "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[44]

The two instances accepted would have to evince particular coherence from which the acceptance of remedial secession could be deduced.[45] Consequently, the presence of an *opinio juris* could be inferred from statements serving as a basis for recognition by States.[46] However, only in relation to Bangladesh did States allude to the infringement of human rights, to deprivation of access to internal self-determination, and to the impossibility of resolving the situation when justifying their recognition.

Furthermore, it should be plain that practice is an outcome of declarations by States as to why they are behaving in ways in conformity with any supposed new right to remedial secession, and not a question of seeing a posteriori that the result achieved corresponds to the premises for such secession. In the case both of Bangladesh and of Kosovo, the authorities did not invoke any claimed right to remedial secession, but rather put forward all sorts of justifications outside international law.

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supra n. 7, at 477. S. Yee, 'Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion', 9:4 *Chinese JIL* (2010), 763-782, at 780.

41 Cf. S. Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession', in C. Walter *et al.*, *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), 45-67, at 58. Ryngaert and Griffioen, *supra* n. 17, at 584. Van den Driest, *supra* n. 17, at 290.

42 Cf. Kolb, *supra* n. 40, at 63.

43 Cf. *North Sea Continental Shelf, Judgment*, ICJ Reports (1969), 3-57, at 44, para. 77. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports (1986), 12-150, at 98-100, para. 186-188.

44 Cf. *North Sea Continental Shelf, Judgment*, ICJ Reports (1969), 3-57, at 44, para. 77.

45 Cfr. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment*, ICJ Reports (1984), 244-352, at 299, para 111.

46 Cf. Jaber, *supra* n. 14, at 941.

It may be deduced that no acceptance can be assumed on the part of States of the emergence of any asserted right to secede under the circumstances characteristic of remedial secession in current international law.[47] Indeed, it may be affirmed that there are more instances in which negative practice may be observed, in the sense that attempts to secede are rejected. This is the consequence of an *opinio non juris*, in other words, the conviction that no such right exists.[48]

The ICJ avoided any pronouncement on the question in the *Kosovo* case, although it made itself clear about the precarious nature of any right to remedial secession linked to exercise of the right to self-determination.[49] The fact that eleven States expressly declared that remedial secession is recognized by international law and that two ICJ justices supported remedial secession implies a major development. However, even with this backing, it is far from constituting a general customary international law.[50] It should be added that Kosovo has been recognized as a new State by a far from negligible group of States, but this fact does not provide grounds for admitting the existence of a right to remedial secession, integrated into customary international law, as the basis for creating new States.[51] This conclusion is given considerable support by the declarations made by many other States, unequivocally opposing acceptance of Kosovo's right to secede.[52]

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[47] Cf. P. Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories', 8:1 *Chinese JIL* (2002), 47-61, at 56, para. 15. Jaber, *supra* n. 14, at 941. D.H. Meester, 'Remedial Secession: A Positive or Negative Force for the Prevention and Reduction of Armed Conflict?', 18:2 *Canadian Foreign Policy Journal* (2012), 151-163, at 152. R.A. Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia', 8:1 *Chinese JIL* (2009), 2-25, at 19. Yee, *supra* n. 40, at 780.

[48] Cf. Del Mar, *supra* n. 9, at 107. Ryngaert and Griffioen, *supra* n. 17, at 584. Tancredi, *supra* n. 25, at 48.

[49] Cf. Del Mar, *supra* n. 9, at 84. Orakhelashvili, *supra* n. 35, at 86. V. Röben, 'The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or Principles?', 2:3 *GoJIL* (2010), 1063-1086, at 1075. A. Tancredi, 'Secession and the Use of Force', in C. Walter *et al.*, *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), 68-94, at 81.

[50] In the matter of Kosovo, 36 States presented country submissions to the ICJ. In these submissions, eleven States (Albania, Estonia, Finland, Germany, Ireland, the Netherlands, Norway, Poland, Russia, Slovenia, and Switzerland) held remedial secession to be recognized in international law; six States felt that Kosovo constituted a unique or *sui generis* case, with varying stances on remedial secession in international law; five States remained neutral or expressed views on remedial secession that were ambiguous; and fourteen States (Argentina, Azerbaijan, Bolivia, Brazil, China, Cyprus, Egypt, Iran, Libya, Romania, Serbia, Slovakia, Spain, and Venezuela) were against recognition of remedial secession in international law. Cf. Meester, *supra* n. 47, at 153. By the same author, 'The International Court of Justice's *Kosovo* Case: Assessing the Current State of International Legal Opinion on Remedial Secession', 48 *Canadian Yearbook of International Law* (2010), 215-254, at 223-243.

[51] Cf. Tancredi, *supra* n. 25, at 49. Van den Driest, *supra* n. 17, at 351.

[52] Cf. J. Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42:3 *Vand. J. Transnat'l L.* (2009), 779-851, at 835. Among the members of the United Nations opposing this were Algeria, Angola, Argentina, Armenia, Azerbaijan, Bahamas, Belarus, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Cambodia, Cameroon, Cape Verde, Chile, China, Democratic Republic of the Congo, Cuba, Cyprus,

Ecuador, Equatorial Guinea, Eritrea, Ethiopia, Georgia, Greece, Guatemala, India, Indonesia, Iran, Iraq, Israel, Jamaica, Kazakhstan, Kenya, North Korea, Kyrgyzstan, Laos, Lebanon, Libya, Mali, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Nigeria, Paraguay, Philippines, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Sao Tomé and Principe, Serbia, Seychelles, Slovakia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Syria, Tajikistan, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia, and Zimbabwe.

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