



## WHETHER THERE IS A RIGHT TO REMEDIAL SECESSION UNDER INTERNATIONAL LAW?

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### SUMMARY

*Purpose of this article is to determine whether the right to remedial secession exists under the contemporary international law. This question is relevant because intense legal debates concerning an existence of this right has not come to conclusion. Moreover, it is important to answer this question because of a vast number of separatist movements worldwide that base their claim for independence on self-determination and the concept of remedial right to secede. In order to answer the question whether the right to remedial secession exists under the contemporary international law relevant judicial decisions, state practice and opinio juris were analysed.*

*It was concluded that there is no remedial right to secede under the contemporary international law. First, it was determined that international community is reluctant to recognise unilateral attempts of secession. Therefore, consent of parent state is still considered to be an important factor for acceptance of new states. Secondly, there was no single instance of acceptance of entitlement to remedial secession in state practice. Also, there is a split in states opinio juris concerning an existence of remedial right to secede. Furthermore, there is no strong and united opinio juris supporting this notion. Accordingly, weak opinio juris and lack of practical implementation show that remedial secession cannot be considered as a part of the binding international law.*

### KEY WORDS

*Self-determination, remedial secession, territorial integrity, unilateral secession.*

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## ABBREVIATIONS

**ACHPR** – African Commission on Human and Peoples’ Rights  
**LN** – League of Nations  
**ICJ** – International Court of Justice  
**SCC** – Supreme Court of Canada  
**SFRY** – Socialist Federal Republic of Yugoslavia  
**UN** – United Nations

## INTRODUCTION

Self-determination of people is considered to be one of the fundamental principles in modern international law and is named as one of the aims of UN in the UN Charter.<sup>2</sup> Principle’s *erga omnes* status has been proclaimed by ICJ.<sup>3</sup> In the contemporary international law self-determination is usually divided into two types: internal and external. International law recognizes people’s right to internal self-determination which is understood as self-determination exercised within the framework of existing states.<sup>4</sup> The notion of internal self-determination imply that every state has an obligation to respect a right for its people to determine their political, social or cultural status. External self-determination can be described as the right for people to decide their status in relation to other states, including the right to secede and form an independent state. Traditionally, international law recognizes the right to external self-determination for colonized people and for people under foreign military occupation.<sup>5</sup> But the existence of an external self-determination in other instances is unclear. Emerged remedial secession doctrine implies that there is a right for people whose internal self-determination is denied to exercise self-determination externally and unilaterally secede from the abusive sovereign state.

Scholars often derive this notion from Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations also known as Friendly Relations declaration adopted by the UN General Assembly in 1970.<sup>6</sup> In declaration proclamation of people’s right to self-determination is followed by the statement that:

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

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<sup>2</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html>

<sup>3</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, para 155.

<sup>4</sup> Simone F. Van den Driest, Remedial Secession: A right to external self-determination as a remedy to serious injustices (Antwerpen: Intersentia, 2013), p. 61.

<sup>5</sup> Vita Gudelevičiūtė, “Does the principle of self-determination prevail over the principle of territorial integrity?”, International Journal of Baltic law Vol. 2, No. 2 (April 2005), p. 73.

<sup>6</sup> Ieva Vezbergaitė, “Remedial secession as an exercise of the right to self-determination of peoples” (master’s thesis, Central European University, 2011), p. 40.

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.<sup>7</sup>

This “safeguard clause” as it is often referred to<sup>8</sup> can be considered to imply that exercise of peoples’ right to self-determination cannot result in impairment of territorial boundaries of the sovereign state. However, the declaration also seems to limit principle of territorial integrity by stating that territorial integrity of the sovereign state is only safeguarded if the state acts “in compliance with the principle of equal rights and self-determination of peoples”. Therefore, it can be considered that state’s territorial integrity is not protected if that state does not respect internal self-determination of its peoples.

These passages are often used by remedial secessions proponents as an evidence that territorial integrity is not absolute and could be impaired in situations of denial of internal self-determination.<sup>9</sup> Idea that in a case of persistent oppression people should find a remedy in unilateral secession from abusing state has a strong support among legal scholars and because of that it is no longer contested that remedial secession can be considered as *Lex ferenda*.<sup>10</sup> But even proponents of a remedial secession disagree if this notion is reflected in international practice and therefore can be considered as a part of *Lex lata*. One group of scholars consider remedial secession as a part of the international binding law.<sup>11</sup> Other scholars view remedial secession only as a declaratory notion and emphasise a lack of evidence to proclaim remedial secession as an existing positive right.<sup>12</sup>

The question about an existence of remedial right to secede is relevant and novel because modern states are not homogenous societies and therefore are home to many different ethnic groups. Because of this ethnic diversity there is a vast number of separatist movements worldwide. Significant number of these separatist movements base their claim for independence on principle of self-determination and remedial secession doctrine. Recently, ongoing Catalanian independence movement that is seeking secession from Spain has reignited discussions about an existence of the remedial right to secede.<sup>13</sup> Moreover, ongoing armed separatist conflicts where separatists base their secessionist claim on principle of self-determination are taking place in such

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<sup>7</sup> General Assembly resolution 2625, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) (24 October 1970). <sup>7</sup> Simone F. Van den Driest, *supra* note 3, p. 104.

<sup>8</sup> Simone F. Van den Driest, *supra* note 3, p. 104.

<sup>9</sup> *Ibid.*, p. 107.

<sup>10</sup> Antonello Tancredi, “A Normative ‘Due Process’ in the Creation of States through Secession.”:185; in: Marcelo G. Kohen, ed., *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006).

<sup>11</sup> Christine Griffioen, “Self-Determination as a Human right: The Emergency Exit of remedial Secession” (master’s thesis, Utrecht University, 2010), p. 138.

<sup>12</sup> Simone F. Van den Driest, *supra* note 3, p. 310.

<sup>13</sup> Anne Verhelst, “Remedial Secession for Economic Harm in International Law: the Catalan Case”, Leuven Centre for Global Governance Studies Working Paper Volume 202 (May 2018), p 9.; Josep Costa, “Does Catalonia have the right of self-determination?“, (April 2017) <[https://www.elconfidencialdigital.com/media/elconfidencialdigital/files/2017/09/27/ECDFIL20170927\\_0002.pdf](https://www.elconfidencialdigital.com/media/elconfidencialdigital/files/2017/09/27/ECDFIL20170927_0002.pdf)>, p.3.

regions as Kurdistan, East Ukraine, Nagorno-Karabakh, North Mali and others. Moreover, 2019 Hong Kong protests show that international community must be prepared to face the consequences of disputes between separate people and their parent state.

Aforementioned ambiguousness surrounding an existence of the right to remedial secession seems to ignite separatist ambitions and violent conflicts. Because of that legal certainty concerning this issue is needed. Accordingly, a legal status of the right to remedial secession needs to be defined. Therefore, the purpose of this article is to determine whether the remedial right to secession exists under international law. In order to answer this question traces of remedial secession in sources of international law will be analysed.

## **THE NOTION OF REMEDIAL SECESSION IN INTERNATIONAL LEGAL SOURCES**

### **Judicial decisions**

Judicial decisions are established as one of the sources of international law in Article 38 of the Statute of the International Court of Justice.<sup>14</sup> Despite that it is not considered to be a primary source of international law<sup>15</sup> it is agreed that judicial decisions “may serve as subsidiary means for the identification of rules of customary international law.”<sup>16</sup> Accordingly, in order to determine the legal status of the right to remedial secession analysis of possible traces of this right in various judicial decisions is necessary.

The concept of remedial secession was for a first time reflected in a judicial decision in LN *Åland Islands* dispute. In 1920 inhabitants of Åland islands, which constitute a part of Finland but which population is predominantly Swedish, sought to secede and join their “kin” state Sweden. Experts, selected by LN to solve the dispute, came to the conclusion that islanders did not have a right to unilateral secession and stated that “[p]ositive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish”.<sup>17</sup> Nevertheless, experts also added that if a state does not provide autonomy or minority protection<sup>18</sup> as the last remedy right to secession can be granted. They stated: “[t]he separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective

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<sup>14</sup> United Nations, Statute of the International Court of Justice, 18 April 1946, Art 38.

<sup>15</sup> Justice Bankole Thompson, *Universal Jurisdiction: The Sierra Leone Profile* (Hague: Springer, 2015), p. 9.

<sup>16</sup> International Law Commission, Report of the International Law Commission, Sixty-seventh session (4 May-5 June and 6 July-7 August 2015), A/70/10, (2015), p. 33.

<sup>17</sup> Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question', *Official Journal of the League of Nations, Special Supplement No. 3*, October 1920.

<sup>18</sup> Daniel Fierstein, “Kosovo’s declaration of independence: an incident analysis of legality, policy and future implications.” *Boston University International Law Journal* (2008), p. 426.

guarantees.”<sup>19</sup> It seems that this paragraph means that experts recognized a possibility of *ultima ratio* remedial right to secede in situations where people cannot exercise their self-determination internally. In present, case experts decided that minority protection and autonomy arrangements are sufficient remedies and islanders did not have a right to secede. But added that if Finland would not grant autonomy for the region experts would “advise the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite.”<sup>20</sup> Therefore, in *Åland Islands* dispute possible right to remedial secession in a case of denial of internal self-determination was recognized but it was not implemented in particular situation of the population involved.

ACHPR also dealt with the question concerning the unilateral right to secede in *Katangese Peoples' Congress v. Zaire*. After Zaire was granted an independence from Belgium in 1960 its region of Katanga tried to secede and form an independent state. Secession was unsuccessful and Katanga remained a part of Zaire. In 1992 president of Katangese Peoples' Congress requested ACHPR to recognize Katanga's independence. In its judgement ACHPR denied Katangese right to secede and proclaimed:

“[i]n the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.”<sup>21</sup>

The decision shows that ACHPR considered that Katangese people's right to self-determination is limited by the territorial integrity of Zaire and should be exercised only inside the territorial framework of Zaire. Nevertheless, it can be considered that the decision implies that in a case of “evidence of violations of human rights” and “evidence that the people of Katanga are denied the right to participate in government” external self-determination resulting in impairment of state's territorial integrity is possible.

ACHPR repeated similar position in *Kevin Ngwanga Gumne et al. v. Cameroon*. In this case, South Cameroon people sought to secede from Cameroon. The Commission declared that in order for people to have a right to external self-determination they must satisfy criteria cited in aforementioned *Katanga* case. According to the Commission:

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<sup>19</sup> The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921), p. 4.

<sup>20</sup> *Ibid.*, p. 13.

<sup>21</sup> *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), para 6.

“there must be: “concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13.1.”<sup>22</sup>

It was decided that people of South Cameroon had not been subject to denial of their internal self-determination and massive violations of their human rights and therefore they do not have a right to unilateral secession. It can be concluded, that despite denying that Katanga and South Cameroon have a right to unilaterally secede Commission acknowledged the possibility of an existence of the remedial right to secession.

In 1998 concept of remedial secession was analysed by the SCC in *Reference Re Secession of Quebec*. In 1995 the province of Québec held the referendum to determine if it should secede from Canada. Despite that referendum was unsuccessful request for the advisory opinion was given to SCC which was concerned with legal implications of a possible secession of Quebec.

First, the Court emphasised the relationship between self-determination and territorial integrity. According to the Court, exercise of people’s self-determination is limited by territorial integrity of state: “international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”<sup>23</sup> But it was added that “in the exceptional circumstances <...>, a right of secession may arise.”<sup>24</sup> Court distinguished that external self-determination is possible in cases of “former colonies” and “where a people is oppressed, as for example under foreign military occupation”.<sup>25</sup>

Most importantly, the Court acknowledged that a number of legal scholars have recognized another possible instance of external self-determination - last resort secession in a case of denial of internal self-determination. The court stated: “the underlying proposition is that, when people are blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession”<sup>26</sup>. It was also stated that in present case Quebecois would not satisfy criteria for the remedial right to secession because “[t]he population of Quebec is equitably represented in legislative, executive and judicial institutions.”<sup>27</sup>

In *Quebec* the doctrine of remedial secession was acknowledged by SCC. Nevertheless, SCC refused to recognize an existence of the positive right to remedial secession under international law and stated: “it remains unclear whether this <...> actually reflects an established international law standard”.<sup>28</sup> It seems that Court’s position is more a reiteration of prevailing position among legal scholars than a recognition of the existence of a binding rule.

Despite traces of the right to remedial secession in aforementioned decisions, ICJ for a long time had stayed away from this concept. After Kosovo issued its declaration of independence in 2008, the advisory opinion concerning Kosovo situation was requested by the UN General Assembly. Question submitted before the court was “[i]s the unilateral declaration of

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<sup>22</sup> *Kevin Ngwanga Gumne et al. v. Cameroon*, African Commission on Human and Peoples' Rights, Comm. No. 266/03 (2009), para 194.

<sup>23</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217, para 122.

<sup>24</sup> *Ibid.*,

<sup>25</sup> *Ibid.*, para 138.

<sup>26</sup> *Ibid.*, para 134.

<sup>27</sup> *Ibid.*, para 136.

<sup>28</sup> *Ibid.*, para 135.

independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?“.

In 2010 ICJ issued the advisory opinion concerning this matter. Disappointingly, Court took a narrow approach and only analysed the legality of the unilateral declaration of independence and refused to evaluate possible legal consequences of it.<sup>29</sup> Therefore, the Court considered that it did not need to answer a question whether a positive right to unilateral secession exists under international law and declared that in order to evaluate the legality of the declaration of independence one does not need to analyse possible right to secession that the declaration entails.<sup>30</sup> It added that legality of the declaration of independence does not in itself mean that the right to secession exists.<sup>31</sup> Accordingly, the Court considered that despite different possible consequences that a declaration may have, declarations of independence in themselves are not illegal under international law: “[s]ometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law.”<sup>32</sup> Therefore, Court decided that Kosovo declaration of independence was not incompatible with international law. This narrow approach has been subject to criticism. ICJ has been criticized for avoiding the main question in Kosovo dispute: whether Kosovo has a right to unilateral secession and whether that right exists under international law?<sup>33</sup>

Despite that ICJ avoided analysing a unilateral right to secession, ICJ acknowledged that during advisory proceedings, various states expressed their positions regarding Kosovo situation including the remedial right to secession and stated:

radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so in what circumstances.<sup>34</sup>

This statement can be considered to imply that the Court recognized differences in states’ positions concerning an existence of remedial right to secede. It can be considered that it means that ICJ acknowledged split in *opinio juris* of the states.<sup>35</sup>

In conclusion, despite ICJ silence, traces of remedial right to secession can be found in other judicial decisions which were analysed in this chapter. Several observations can be made. First, all these decisions strictly linked self-determination with territorial integrity of states. Territorial

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<sup>29</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion., I.C.J. Reports 2010, p. 403., para 51.

<sup>30</sup> Ibid., para 56.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid., para 79.

<sup>33</sup> Dren Doli, *The International Element, Statehood and Democratic Nation-building: Exploring the Role of the EU and International Community in Kosovo's State-formation and State-building*, (Cham: Springer, 2019), 80 p.

<sup>34</sup> Kosovo, supra note 28, para 82.

<sup>35</sup> Asatiani Sopio, “Remedial Secession under International law: Analysis of Kosovo, Abkhazia and South Ossetia” (master’s thesis, Central European University, 2013), p. 51.

integrity was seen as the generally prevailing principle. Secondly, in all of the discussed decisions possibility of remedial right to secede in cases of denial of internal self-determination and systematic violations of human rights was recognized. Nevertheless, it was not implemented in any of these cases. Therefore, there was no single instance in which the remedial right to secede was granted to a secessionist unit. Given the lack of practical application, discussed decisions in itself cannot be considered to be sufficient to show an existence of the remedial right to secede. Therefore, in order to determine a status of the right to remedial secession under international law, further analysis of state practice and *opinio juris* is needed.

### **State practice and *opinio juris***

In order to determine whether the remedial right to secession can be considered to be a part of the customary international law, it is essential to analyse relevant state practice and *opinio juris*. For this purpose, international community's responses to attempts of unilateral secession will be analysed in this chapter. States' recognition of seceding entities despite not providing "any retroactive justification for an act of secession"<sup>36</sup> is important in this regard because it may show legal community's position on the legality of secession.<sup>37</sup> Furthermore, statements concerning an existence of the remedial right to secession made by states during *Kosovo* advisory proceedings need to be analysed to determine an *opinio juris* concerning an existence of the remedial right to secede.

Through the years the international community has dealt with various attempts of unilateral secession. These unilateral attempts constantly resulted in failure and non-recognition of a majority of states. As Crawford stated that in situations where "the government of the state in question has maintained its opposition to the secession, such attempts have gained virtually no international support or recognition".<sup>38</sup> It can be concluded that international community generally supports maintenance of territorial integrity of states. Despite this general rule, secessions of Bangladesh from Pakistan, Croatia from Yugoslavia and Kosovo from Serbia must be noted. The situation of Bangladesh cannot be considered fully consensual because it was recognised by a significant number of states before recognition by its parent state Pakistan. Similarly, the secession of Croatia is sometimes considered to be the case of unilateral secession.<sup>39</sup> Kosovo is also significant because it was recognised by 98 UN members despite objections from its parent state Serbia. Because in all of these situations seceding entities can be considered to have been subject to state-sponsored abuse, these cases are sometimes cited as

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<sup>36</sup> Quebec, *supra* note 22, para 155.

<sup>37</sup> Christine Griffioen, *supra* note 10, p. 111;

<sup>38</sup> James Crawford, James Crawford, "State practice and international law in relation to unilateral secession", p. 52, in: Anne Bayefsky, ed., *Self-Determination in International Law, Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000).

<sup>39</sup> Glen Anderson, "Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?", *Arizona Journal of International & Comparative Law* Vol. 34, No. 1 (2016), p. 17.

examples of state practice indicating the existence of the remedial right to secede.<sup>40</sup> Therefore, they will be further analysed in this chapter.

Bangladesh constituted an eastern part of Pakistan since 1947 when the State of Pakistan had been created. Eastern and Western Pakistanis were culturally and ethnically different but Western Pakistanis constituted a dominant position politically.<sup>41</sup> In 1970 Bangladesh sought a bigger autonomy but it was denied by Pakistan. Pakistan reacted to growing Bangladesh independence movement with the military operation which resulted in various human rights abuses. Independence war started in which India intervened and helped Bangladesh in defeating Pakistan forces. After the surrender of Pakistan, Bangladesh was recognised by a vast number of states. By September 1973 over 100 states had granted their recognition.<sup>42</sup> It must be noted that these recognitions were granted despite the fact that at that time Pakistan did not consent with Bangladesh secession. Finally, in 1974 Pakistan submitted its recognition and the same year Bangladesh was admitted to UN. It seems that Bangladesh can be classified as an instance of unilateral secession. That is evident in a fact that it received widespread recognition despite the absence of the consent of the parent state. This position can be contested because Bangladesh was admitted to UN only after recognition by Pakistan. But Pakistan recognition may also be seen as its *post factum* reconciliation with the loss of its territory.<sup>43</sup>

Despite secession was remedial by its purpose, the case of Bangladesh cannot be considered to be sufficient enough to provide an evidence for the existence of a positive right to remedial secession. It is often considered that recognition of Bangladesh was not explicitly based on remedial secession and relied on acceptance of *fait accompli*. The defeat of Pakistani army and subsequent effective separation of the territory of Bangladesh created a unique situation “which in the circumstances other States had no alternative but to accept.”<sup>44</sup> Therefore, special circumstances surrounding this case can be considered to be reasons for the acceptance of secession by a vast number of states. First, the intervention of Indian army is often considered to be an important factor which helped Bangladesh to emerge as a new state and was important in states’ decisions to recognise it.<sup>45</sup> Second, because of the unique territorial positioning of Pakistan which was constituted of two separate territories divided by India the secession of Bangladesh did not involve in a complex redrawing of territorial boundaries. Third, because West Pakistan was economically stronger “secession would not undermine West Pakistan’s political stability or economic wealth”.<sup>46</sup> Therefore, there is no explicit evidence that international community based

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<sup>40</sup> Ilya Berlin, "Unilateral Non-Colonial Secessions: An Affirmation of the Right to Self-Determination and a Legal Exception to the Use of Force in International Law" (master's thesis, The University of Western Ontario, 2017), p. 80.

<sup>41</sup> John Dugard and David Raič, “The role of recognition in the law and practice of secession.”: p. 120, in: Marcelo G. Kohen, ed., *Secession: International Law Perspectives* (Cambridge, UK: Cambridge University Press, 2006).

<sup>42</sup> *Ibid.*, p. 122.

<sup>43</sup> Ieva Vezbergaitė, *supra* note 5, p. 76.

<sup>44</sup> James R. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2006), p. 390: quoted in: Jure Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice”, *St Antony's International Review* 6, No. 1 (2010), p. 43.

<sup>45</sup> Li-ann Thio, “International law and secession in the Asia and Pacific regions”, p. 308; in: Marcelo G. Kohen, ed., *Secession: International Law Perspectives* (Cambridge, UK: Cambridge University Press, 2006).

<sup>46</sup> *Ibid.*

its recognition of Bangladesh on remedial secession doctrine. By contrary, it seems that unique circumstances of secession were the main reason for international acceptance of Bangladesh independence.

Croatia independence from SFRY is also sometimes cited as a case of remedial secession. On 29 November 1991 The Badinter Arbitration Committee, which was set up by European Economic Community to resolve legal issues concerning a partition of SFRY, released an Opinion No. 1 which proclaimed that the breakup of SFRY was a case of “dissolution”.<sup>47</sup> Despite that, it is often considered that dissolution of SFRY was a result of unilateral secessions by federal Yugoslavian republics.<sup>48</sup> The secession of Croatia which was declared on 25 June 1991 must be emphasised because some scholars consider it as an example of unilateral remedial secession because Croats were subject to denial of their internal self-determination and human rights abuses committed by the Yugoslavian government.<sup>49</sup>

Nevertheless, recognition of Croatia independence was granted by international community only after Badinter Committee proclaimed a process of the breakup of SFRY as “dissolution”. It can be deduced that international community was reluctant to recognize secession from a sovereign state and only were prepared to grant recognition to Croatia and other republics after the case was classified as “dissolution”. Till when states were “reaffirmed its commitment to the preservation of Yugoslavia’s territorial integrity”.<sup>50</sup> Similarly to Bangladesh it seems that states were silent concerning the right to remedial secession and saw the independence of Croatia as a case of *fait accompli*. According to Tancredi states recognized “the inevitability of a de facto process which was already underway and which would have produced the dissolution of the SFRY in any case.”<sup>51</sup> It can be considered that by describing fall of SFRY as “dissolution” international community tried to avoid creating a precedent from possible secessions.<sup>52</sup> Therefore, independence of Croatia cannot be considered to be an evidence of remedial secession.

Another case that needs to be analysed is the separation of Kosovo from Serbia in 2008. Kosovo was an autonomous region in the Socialist Republic of Serbia which population was predominantly Albanian. During the breakup of SFRY Serbian government abolished Kosovo autonomy and that led to unrest in the region. During 90s Serbia committed systematic human rights violations against Kosovars and that led to the intervention of NATO in 1999. After that Kosovo was put under international administration. During that time negotiations between Kosovo and Serbia about possible peaceful solution happened. Debates were unsuccessful and in 2008 Kosovo proclaimed its independence. To this day Serbia has not consented with this separation. Despite the absence of approval by parent state, Kosovo is recognized by 98 UN member states. It can be considered that circumstances of Kosovo independence fulfilled criteria

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<sup>47</sup> Allain Pellet, “The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples”, *European Journal of International Law* 3 (1) (1992), p. 179.

<sup>48</sup> John Dugard and David Raič, *supra* note 40, p. 128.

<sup>49</sup> *Ibid.*, p. 130.

<sup>50</sup> Patrick Dumberry, “Lessons Learned from the Quebec Secession Reference Before the Supreme Court of Canada”: p. 442; in: Marcelo G. Kohen, ed., *Secession: international law perspectives*, (Cambridge Univ. Press, 2006).

<sup>51</sup> Antonello Tancredi, *supra* note 9, p. 185.

<sup>52</sup> Christine Griffioen, *supra* note 10, p. 114.

for an exercise of remedial right to secede: Kosovo Albanians were distinct people which were subject to massive human rights violation and after failed peaceful negotiations seceded from abusing state.

Nevertheless, statements made by states who recognised Kosovo imply that recognition was based on political reasons. No state clearly referenced remedial secession doctrine while justifying its decision and references to legal issues such as the application of self-determination were brief.<sup>53</sup> Main motives expressed by states were political and concerned with peace and stability of Balkan region.<sup>54</sup> Moreover, states emphasised *Sui generis* circumstances of Kosovo situation.<sup>55</sup> An emphasis of *Sui generis* nature of Kosovo implies that states did not want to create a precedent for other secessionist movements.

It can be considered that recognition of Kosovo was not derived from a legal entitlement to the remedial right to secede. Accordingly, it means that Kosovo did not create a precedent for the legal right to remedial secession. Despite that, during ICJ *Kosovo* advisory proceedings various states submitted their positions concerning the situation of Kosovo and one of the issues that was constantly mentioned was the right to remedial secession. These submissions can be considered to reflect states *opinio juris* concerning legal status of the remedial right to secede.

During advisory proceedings, two different positions can be distinguished. One group of states supported an existence of the remedial right to secede. Safeguard clauses, Åland Islands and Quebec decisions and legal doctrine were often cited as supporting this position.<sup>56</sup> It must be noted that states generally did not mention any state practice supporting this notion.<sup>57</sup> Another group of states opposed an existence of the remedial right to secession. Their main arguments were that territorial integrity is a fundamental and prevailing principle, lack of state practice and weak theoretical foundations of the principle derived from *a contrario* reading of safeguard clauses.<sup>58</sup> It seems that these different positions show split in states' *opinio juris*.

In conclusion, analysis of state practice and *opinio juris* show that international community is reluctant to recognise attempts of unilateral secession and therefore generally supports maintenance of the territorial framework of states. It seems that in cases of Bangladesh, Croatia and Kosovo unilateral attempts of secession gained the support of the legal community not because of recognition of peoples' entitlement to remedial secession but mainly because of

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<sup>53</sup> Simone F. Van Den Driest, *supra* note 3, p. 244.

<sup>54</sup> Michael P. Scharf, "Earned Sovereignty: Juridical Underpinnings", 31 *Denver Journal of International Law and Policy* 373 (2003), p. 19.

<sup>55</sup> Heiko Krueger, "Implications of Kosovo, Abkhazia and South Ossetia for International Law: The Conduct of the Community of States in Current Secession Conflicts", *Caucasus Review of International Affairs* 3 (2009), p. 140.

<sup>56</sup> International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), Written Statement of Albania, 14 April 2009, para 75-85; Written Statement of Estonia, 13 April 2009, para. 2.1; Written Statement of Germany, 15 April 2009, p. 32-37; Written Statement of Ireland, 17 April 2009, para 27-34; Written Statement of the Netherlands, 17 April 2009, para 3.1-3.22.

<sup>57</sup> Simone F. Van den Driest *supra* note 3, p. 260.

<sup>58</sup> Written Statement of Argentina, 17 April 2009, para 87-100; Written Statement of Cyprus, 3 April 2009, para 140-148; Written Statement of Romania, 14 April 2009, para 23; Written Statement of Serbia, 17 April 2009, para 589-638.

factual and political reasons. Moreover, Kosovo advisory proceedings show that there is no consensus among legal community in *opinio juris* concerning the remedial right to secede.

## **THE LEGAL STATUS OF REMEDIAL SECESSION AND RECOMMENDATIONS FOR FUTURE DEVELOPMENT**

It is commonly agreed that in order for a customary international law to exist two elements must be present. The first element is a state practice and it is understood as consistent practice by states.<sup>59</sup> It is considered that for customary law to vest state practice needs to be uniform, extent and representative.<sup>60</sup> Uniformity can be understood as a consistency of practice by states. Extensity and representativeness depend on a number of states that adhere to the practice. Therefore, in order for a practice to be sufficient, it needs to be consistent and supported by a significant number of states. The second element is *opinio juris* that is “belief that this practice is rendered obligatory by the existence of the rule of law requiring it”.<sup>61</sup> Therefore, in order for a customary rule to emerge, states must subjectively believe that practice is required because of a legal obligation.

Taking into account aforementioned conditions and analysis of relevant judicial decisions, state practice and *opinio juris*, it can be concluded that there is no customary positive right to remedial secession under the contemporary international law.

First, it must be concluded that there was no single instance in which remedial right to secession was implemented in practice. In general, analysis of state practice shows that states are reluctant to recognize secessionist movements and usually support maintenance of territorial framework of states. Second, cases of Bangladesh, Croatia and Kosovo which are sometimes cited as examples of remedial right to secede cannot be considered as instances of implementation of this right. Despite that it can be argued that in these cases abuses of secessionist units played a part in states’ decisions to submit their recognition and therefore these situations can be considered to be remedial in their purpose, it seems that other factual factors were more important. As mentioned before, it can be observed that in these situations recognition of new entities came from acceptance of *fait accompli* and political reasons and not because of acceptance of some legal right. As a result, the analysis showed that there is no explicit evidence that in any of these cases recognition stemmed from an acceptance of a legal entitlement to remedial secession. Third, in the case of Kosovo states verbally emphasised a *sui generis* nature of the situation and therefore it seems tried to avoid creating a legal precedent for other separatist movements. This stance of states can be seen as implying legal community’s unwillingness to recognize the legal right to remedial secession. Keeping in mind that in order for a customary rule to emerge threshold for relevant state practice is high and relevant state practice needs to be

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<sup>59</sup> Silke Sahl, “Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law”, update by Catherine Deane( November/December 2018) <[https://www.nyulawglobal.org/globalex/Customary\\_International\\_Law1.html#\\_edn1](https://www.nyulawglobal.org/globalex/Customary_International_Law1.html#_edn1)> .

<sup>60</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3., para 74.

<sup>61</sup> *Ibid.*, para 77.

uniform, extensive and representative, it does seem that there is no sufficient state practice to support the existence of the customary right to remedial secession.

Moreover, in general, it seems that the international community is reluctant to recognize non-consensual instances of secession. It can be observed that in any of analysed situations unilateral secession was universally recognized by international community. In the case of Bangladesh, despite widespread support new entity had received before consent of parent state Pakistan, it was universally recognized and admitted to UN only after that consent was given. In a case of Croatia, its independence was granted a recognition of international community only after Yugoslavia was declared as “dissolving”. Kosovo despite having a big support among legal community is still not recognized by 95 UN member states and itself is not granted a UN membership. Therefore, consent of a parent state can be considered to be an important factor for international community’s decisions to recognize new entities. Accordingly, because of aforementioned reasons it can be concluded, that analysed state practice does not support an existence of the unilateral remedial right to secede.

Nevertheless, there is a position that despite lack of relevant state practice customary rule can still emerge. Some scholars use a different and more progressive approach in assessing an existence of a customary law. According to this approach, “a substantive manifestation of *opinio iuris* ‘may compensate for a relative lack of practice’”.<sup>62</sup> Nevertheless, it is considered that only “clear-cut and unequivocal”<sup>63</sup> *opinio juris* can be sufficient. Despite that this method is not universally accepted<sup>64</sup>, it has been used before in assessing an existence of remedial right to secede.<sup>65</sup> Therefore, according to this method, if a strong and unequivocal *opinio juris* supporting remedial secession could be found, one might conclude that a customary right to remedial secession exists.

First, it must be noted that there is some evidence of *opinio juris* that supports the notion of remedial secession. This is evident in various judicial decisions which recognised a possibility of a remedial right to secession. Furthermore, some states expressed their *opinio juris* supporting an existence of remedial right to secede during Kosovo advisory proceedings. Nevertheless, there was another group of states that clearly rejected the notion of remedial secession in their *opinio juris*. Therefore, as it was mentioned before it can be deduced from these proceedings that there is a split in states’ *opinio juris* concerning an existence of remedial right to secede. ICJ has previously stated in *Nuclear Weapons* that in situations where states positions were divided no *opinio juris* can be found.<sup>66</sup> Accordingly, it can be concluded that states positions expressed during Kosovo advisory proceedings can be understood as showing that there is no unified *opinio*

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<sup>62</sup> Pisillo Mazzeschi, Riccardo, De Sena, Pasquale eds., *Global Justice, Human Rights and the Modernization of International Law*, (Buch: Springer, 2018), p.74.

<sup>63</sup> International Law Association, ‘Statement of Principles Applicable to the Formation of General Customary International Law’, Final Report of the Committee on the Formation of Customary Law, Conference Report London (2000), p. 42.

<sup>64</sup> J.P. Kelly, “The Twilight of Customary International Law”, 40 *Virginia Journal of International Law* 448(2000), p. 451.

<sup>65</sup> Christine Griffioen supra note 10, p. 140.

<sup>66</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para 67.; For similar position see Driest supra note 1, p. 147.

*juris* supporting the remedial right to secede. Moreover, it must be added that only 43 states participated in these proceedings, therefore they cannot be considered as representing the whole legal community.<sup>67</sup> As a result, it does seem that aforementioned judicial decisions and states' positions expressed during Kosovo advisory proceedings are not sufficient to state that there is a strong and unified *opinio juris* supporting the remedial right to secede. Therefore, it can be summarised that an existence of the remedial right to secession cannot be recognized even if the less strict, progressive approach to customary law is applied because of a lack of “clear cut and unequivocal” *opinio juris* supporting the notion of remedial secession.

Despite the fact that international community does not recognise a legal entitlement to remedial secession, it can be considered that abuses of a secessionist unit can be one of the reasons for states' decision to support secession and grant their recognition. Therefore, it can be argued that human rights violations against people of Bangladesh, Croatia and Kosovo were an important factor for international community's support of their independence. This position is supported by Jure Vidmar who states that in a case of oppression “the international community will be more willing to ignore the territorial integrity of the parent state and grant recognition to the secession seeking entity”.<sup>68</sup>

Despite that, it seems that political reasons play a much more important part in these decisions. Therefore, it is hard to imagine that those aforementioned situations would have received the same support if other circumstances were different and therefore less politically convenient. India intervention of Pakistan, the breakup of Yugoslavia, NATO humanitarian intervention and later international administration of Kosovo were important factors which made states' decision to grant their support much less problematic.

Therefore, because the international community has not explicitly addressed an issue of the unilateral remedial secession and found a consensus on it, one might suggest that issue of secession is still operating in a legal vacuum and decisions concerning recognition of secessionist units are made in the political sphere. Accordingly, it seems that success of secessionist movements who often base their claim on the legal entitlement to self-determinations depends not on an assessment of their legal claim but on political interests and convenience of other nations.

It can be argued that the aforementioned legal vacuum only contributes to an instability in the international community. In an absence of legal clarity, there are a lot of secessionist movements whose claim cannot be assessed legally and their fate is left to political decisions of other states. Accordingly, there could be situations in which secession unit who has suffered significantly less abuse could get the support of the international community while much more abused group might be ignored for political reasons. It could be said that successful instances of independence like Kosovo only creates a false hope for secessionist movements who believe that they have a legal entitlement to self-determination but whose claims are likely to be ignored because of political decisions. These situations of false hope can be considered to result in an increase of secessionist movements who often lead to bloodshed and violence. Furthermore, an absence of any legal clarity results in possible manipulations of the concepts of self-determination

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<sup>67</sup> Marko Milanovic, “A Footnote on Secession” (October 2017) < <https://www.ejiltalk.org/a-footnote-on-secession/> >.

<sup>68</sup> Jure Vidmar, *supra* note 43, p. 50-51.

and remedial secession such as in situations in Ukraine or Georgia where the notion of remedial secession can be used as a pretext for occupation or annexation.<sup>69</sup> Therefore, it seems that this legal uncertainty and politically driven system of recognition are not working and are contributing to the growing number of secessionist conflicts worldwide.

Having in mind all the problems aforementioned legal vacuum creates, it can be suggested that legal certainty concerning the question of secession is needed. As a result, it can be suggested that agreement of the international community on this issue would contribute to the international stability.

One might suggest that international community's agreement on the complete denial of possibility of remedial right to secession might be an answer and solution to this issue. Nevertheless, it seems that this decision would not seem to be compatible with changing international law. It can be observed that international law is becoming more human rights oriented and state-centred international legal order is shifting into more individual-centred.<sup>70</sup> Therefore, it can be considered that "governments have less legal authority to invoke the concept of sovereignty to justify policies that violate fundamental rights of citizens".<sup>71</sup> This shift has been acknowledged in various legal scholars' work.<sup>72</sup> It has been suggested that humanization of international law is one of the reasons for another phenomenon that is the decline of a power of a nation state.<sup>73</sup> It seems that in modern international law state's sovereignty cannot be considered to be absolute because of responsibilities for its people.<sup>74</sup> It seems that maintenance of territorial framework of states even in cases of human rights violations would not be compatible with these changes. As a result, it does seem that modern approach to international law cannot be compatible with the idea that states can be allowed to commit injustices and hide behind their territorial sovereignty. It could be argued that in a case of international community's agreement on the complete denial of possibility of remedial secession states would feel much more secure to commit atrocities against certain groups. Furthermore, it could be argued that with the exhausted hope of possible remedial right to secession separatist movements could be prone to become even more violent. Therefore, because of aforementioned reasons, it seems that intentional community's agreement on the complete denial of possibility of the right to remedial secession cannot be suggested.

Keeping in mind aforementioned humanization of international law and all the problems that legal uncertainty concerning the question of secession creates, it can be suggested that international community's agreement on remedial secession, in a case of serious human rights violations and creation of the legal framework to implement it, would contribute to maintenance

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<sup>69</sup> Tero Lundstedt, "Peaceful' and 'Remedial' Annexations of Crimea" (January 2018) < <http://voelkerrechtsblog.org/peaceful-and-remedial-annexations-of-crimea/>>.

<sup>70</sup> Solomon E. Salako, "The Individual in International Law: " Object" versus " Subject"". *International Law Research*, Vol.8 (2019), p. 1.

<sup>71</sup> Ali Khan, "The Extinction of Nation-States.", *American University International Law Review* 7, no. 2 (1992), p. 199.

<sup>72</sup> Simone F. Van den Driest, *supra* note 3, p. 315.

<sup>73</sup> Ali Khan, *supra* note 70.

<sup>74</sup> Michael Bolt, "The Changing Nature of Sovereignty" (October 2013) < <http://www.e-ir.info/2013/10/17/the-changing-nature-of-sovereignty/>>.

of stability of international community. Proposed framework could be used as guidelines for assessing secessionist claims that states could use before granting their recognition.

First, as it was mentioned before, this suggestion would be in line with the changing dynamics of international law which is becoming more human rights oriented. Therefore, because of these changes, one cannot see sovereignty of a state as an irreducible especially in the case of human rights abuses committed by that state. As a result, proposed framework would establish the standards that states must adhere to in order to safeguard their sovereignty.

Some may argue that due to the increasing emphasis on the individual in modern international law, and with the role of state diminishing, the creation of separate statehood for an abused group is not needed and the punishment of the perpetrators is a sufficient remedy. Nevertheless, according to the author, self-determination which is one of the fundamental principles of international law would be rendered meaningless in the absence of opportunity for people to separate in a case of exceptional circumstances. A similar position is shared by some legal scholars.<sup>75</sup> Furthermore, a punishment of perpetrators would not guarantee security for abused people especially in the cases of long-standing ethnic conflicts. It could be argued that in those situations the overthrow of a repressive regime would not resolve long-term ethnic tension and would not protect against possible emergence of new abusers. Moreover, international community's agreement on remedial secession and creation of the framework for it would help to eradicate legal uncertainty concerning the question of secession and therefore help to maintain stability in the international community. The agreement on the framework would create a legal way to assess claims of secessionist units. Therefore, success of secessionist attempts would not depend on political convenience of other nations. That would help to avoid situations where a claim of the group which had suffered massive abuses would be ignored because of political calculations of other nations.

As it was argued before, it seems that absence of a clear legal framework only increases a number of secessionist conflicts worldwide. Politically driven recognition of seceding entities such as in situation of Kosovo creates a false hope that encourages other groups to pursue inaccessible goals which could easily turn into endless violent conflicts. Creation of clearly defined legal framework could help groups to assess their claims and avoid false hopes that leads into separatist conflicts. Assessment of a claim might help groups to reach a solution in a peaceful way and encourage a dialogue between separatist group and state government. Similar position is shared by Ved P. Nanda who states that “the absence of institutions, procedures, and strategies to implement the right of secession will leave few alternatives to violence.”<sup>76</sup>

It must be added that with the creation of clean-cut framework for the implementation of remedial secession it would be much harder to manipulate this concept in order to justify illegal annexations or occupations. It can be thought that situations of Abkhazia or Crimea where notion

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<sup>75</sup> Dietrich Murswiek, “The Issue of a Right to Secession - Reconsidered”: p. 27; in: Christian Tomuschat, ed., *Modern Law of Self Determination* (Dordrecht, Netherlands: Springer, 1993), p. 26; David Raič, *Statehood & the Law of Self-Determination* (Leiden, Boston: Martinus Nijhoff Publishers, 2002), p. 262, quoted in: Simone F. Van den Driest, *supra* note 3, p. 68.326.

<sup>76</sup> Ved P. Nanda, “Self-Determination Under International Law: Validity of Claims to Secede”, *13 Case Western Reserve Journal of International Law* at (1981), p. 280.

of remedial secession was used as a justification for international law violations<sup>77</sup> stemmed back from uncertainty surrounding this concept. Therefore, with the legal clarity concerning this subject such manipulations could be avoided.

It can be suggested that proposed framework should accord with the most commonly agreed conditions of remedial secession as given in the legal doctrine.<sup>78</sup> To start with, the framework should require that seceding group are separate people which are objectively and subjectively different from the parent state's population. Because secession involves a change in territorial boundaries of state, seceding unit must reside in the distinct territory and constitute a clear majority in it. As it was previously proposed in legal doctrine, clear majority can be understood as at least 80 percent of territory's population.<sup>79</sup> Acceptance of a lower percentage could lead to the emergence of even more volatile situations and additional ethnic conflicts.

Another condition of the framework should be that in order to secede group must be subject to abuses committed by a parent state. To not impair a stability of the legal order, a threshold for secession should be high - serious human rights violations. Furthermore, because it is widely considered that remedial secession should be a remedy of last resort it can be suggested that framework should require that group could exercise their right to secession only after it had exhausted other solutions proposed by domestic or international law.

It may also be suggested that framework should have an additional requirement which should be an obligation for a secessionist unit to ensure and safeguard rights of minority groups or ingenious people in a seceding entity.<sup>80</sup> It is unlikely that the population of seceding territory would be homogeneous, therefore newly seceded entity needs to provide internal self-determination for these groups. It can be suggested that international community could agree on the concept of remedial secession and on the proposed framework for its implementation by the adoption of UN General Assembly resolution concerning this subject.<sup>81</sup> Despite their not binding status, General Assembly resolutions can be understood as “indications of a general consensus, thus leading to the creation of a norm for international law.”<sup>82</sup> It is considered that General Assembly resolutions “have a notable legal impact in the field of customary law.”<sup>83</sup> As a result adoption of General Assembly resolution could be an important factor in the emergence of the customary right to remedial secession and could signal a shift in international community's position concerning this issue. Most importantly, it would be a big step in eradicating legal uncertainty concerning the question of remedial secession and accordingly would help to improve international stability.

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<sup>77</sup> Erika Leonaitė and Dainius Žalimas, “The Annexation of Crimea and Attempts to Justify It in the Context of International Law”, *Lithuanian Annual Strategic Review* Volume 14 (2016), p. 52.

<sup>78</sup> Anne Verhelst, *supra* note 12, p. 10; John Dugard and David Raič, *supra* note 41, p. 109.

<sup>79</sup> Christine Griffioen, *supra* note 10, p. 134.

<sup>80</sup> Buchanan, “Theories of Secession”, *Philosophy and Public Affairs* Vol. 26, No.1 (1997), p. 37.

<sup>81</sup> Christine Griffioen, *supra* note 10, p. 143.

<sup>82</sup> Celine Van Den Rul, “Why Have Resolutions of the UN General Assembly If They Are Not Legally Binding?” (June 2016) < <http://www.e-ir.info/2016/06/16/why-have-resolutions-of-the-un-general-assembly-if-they-are-not-legally-binding/>>.

<sup>83</sup> *Ibid.*

## CONCLUSION

1. In order to determine the legal status of remedial secession under the contemporary international law, relevant judicial decisions, state practice and *opinio juris* were analysed. From these analyses, it can be observed that there is no sufficient state practice supporting an existence of customary right to remedial secession. Firstly, generally international community seems to be reluctant to accept non-consensual attempts of secession. Even in a case of Kosovo which got a vast support among legal community, a significant number of states have refused to recognise it and Kosovo is still not admitted to UN. Secondly, there was no single instance where international community had recognized a legal entity's entitlement to remedial secession. It seems that even in cases of Bangladesh, Croatia and Kosovo which can be considered remedial by their essence states' decisions to recognise were based on political and factual reasons and not on acknowledgment of legal entitlement to remedial secession. Moreover, in a case of Kosovo states emphasised *sui generis* circumstances of situation implying reluctance to create a precedent for other secessionist movements.
2. It can also be considered that there is some *opinio juris* supporting an existence of this right. This *opinio juris* is evident in various judicial decisions that acknowledged a possible existence of the remedial right to secede. Furthermore some states expressed their support for the notion of remedial secession during Kosovo advisory proceedings. Nevertheless, it must be noted that during these proceeding number of states clearly rejected an existence of this right. Accordingly, it can be considered that Kosovo advisory proceedings show a split in *opinio juris* of the states concerning an existence of remedial right to secede. Therefore, it can be declared that these traces are not sufficient to declare that there is strong and united *opinio juris* supporting an existence of remedial right to secede.
3. An absence of solid *opinio juris* supporting an existence of remedial secession and lack of state practice show that there is no positive right to remedial secession under modern international law. Even if a more progressive approach to customary international law were applied result would remain the same because of the lack of strong and united *opinio juris*. As a result, answer to the article's question is negative. Accordingly, there is no remedial right to secede under the contemporary international law.
4. In the absence of the legal right to remedial secession, the success of secessionist claims by oppressed groups depend on political decisions. Therefore, political reasons become more important than moral or legal strength of the claim by a secessionist group. This legal uncertainty only contributes to growing number of separatist conflicts worldwide. It can be suggested that international community's agreement on the existence of the remedial right to secede and creation of the framework for implementation of this right which states could use when recognising seceding entities could help to stabilise this situation. According to proposed framework remedial secession should be granted to distinct groups which constitute a clear majority in the defined territory and which are subject to serious and widespread human rights violations committed by the state and if other

possible remedies are exhausted. Also seceding unit should provide minority protection for minorities within seceding entity. It can be proposed that adoption of UN General Assembly resolution, concerning remedial secession and framework of its implementation, would be recommended in order to eradicate legal uncertainty and subsequent international instability concerning this issue.

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## SANTRAUKA

### AR TARPTAUTINĖJE TEISĖJE TURI BŪTI SUTEIKIAMA TEISĖ Į GYNYBINĘ SECESIJĄ?

Šios publikacijos tikslas yra nustatyti ar tarptautinėje teisėje egzistuoja teisė į gynybinę secesiją. Tautų apsisprendimo principas yra svarbi modernios tarptautinės teisės dalis. Ši teisė įtvirtinta įvairiose tarptautiniuose dokumentuose, tarp jų ir Jungtinių Tautų Chartijoje. Jos svarbą ir erga omnes statusą yra pabrėžęs Tarptautinis Teisingumo Teismas. Dažnai teigiama, jog post-koloniniame pasaulyje ši teisė turėtų būti įgyvendinama valstybės viduje. Nepaisant to, egzistuoja gynybinės secesijos teorija, kuri teigia, jog tauta, negalinti įgyvendinti savo tautos apsisprendimo teisės valstybės viduje, turi teisę į vienašalį atsiskyrimą iš suverenių valstybės. Ši teorija turi didelį palaikymą tarp teisės mokslininkų. Nepaisant to, teisės į gynybinę secesiją egzistavimas jau ilgai yra išsamių teisinių ginčų objektas. Šios doktrinos kritikai dažnai pabrėžia, jog tokios teisės egzistavimas pažeistų šalies teritorinio vientisumo principą ir taip sugriautų valstybių ir teisinės tvarkos status quo. Taip pat pabrėžiama, jog ši teorija nesiremia jokia konkrečia šalių praktika. Tačiau autoriai, palaikantys gynybinės secesijos egzistavimą, dažnai nurodo įvairius atvejus, kai žmogaus teisės pažeidimus patyrusių tautų nepriklausomybės siekis buvo gausiai palaikomas tarptautinės bendruomenės. Teisės mokslininkai vis dar nepadarė išvados ir vis dar nenustatė, ar tokia teisė egzistuoja. Šio darbo aktualumui svarbu tai, jog pasaulyje yra daugybė separatistinių judėjimų, kurie dažnai remiasi tautų apsisprendimo principu ir būtent gynybinės secesijos doktrina.

Atlikus tyrimą, į klausimą, ar gynybinė secesija egzistuoja tarptautinėje teisėje, atsakyta neigiamai. Pirmiausia, atlikus teismų praktikos, šalių praktikos ir opinio juris analizę buvo nustatyta, jog nėra nei vieno atvejo, kad gynybinė secesija būtų pripažinta tarptautinės bendruomenės ir įgyvendinta praktikoje. Darbo metu buvo išanalizuoti Bangladešo, Kroatijos, Kosovo atvejai, kurie yra dažnai laikomi kaip gynybinės secesijos pasireiškimas praktikoje. Nežiūrint to, jog visose šiose situacijose su įvairiais žmogaus teisių pažeidimais susidūrusiai grupei buvo suteikta teisė į nepriklausomybę, panašu, kad tai buvo padaryta ne dėl jos teisės į gynybinę secesiją egzistavimo, bet dėl faktinių ir politinių aplinkybių. Nėra jokio įrodymo, jog tarptautinė bendruomenė, palaikydama šių šalių nepriklausomybes, rėmėsi gynybinės secesijos doktrina. Dar daugiau, panašu, kad Kosovo atveju tarptautinė bendruomenė siekė nesukurti precedento ir, pabrėždama išskirtines šios situacijos aplinkybes, siekė atgrasinti kitus panašius judėjimus. Taip pat, opinio juris, palaikantis gynybinės secesijos egzistavimą, yra nepakankamai

stiprus ir vieningas. Nepaisant to, jog tokio opinio juris galima rasti įvairiuose teismų sprendimuose, kuriuose yra nurodoma gynybinės secesijos galimybė, taip pat dalis šalių išreiškė palaikymą tokios teisės egzistavimui Kosovo bylos nagrinėjimo metu Tarptautiniame Teisingumo Teisme, negalima ignoruoti grupės šalių, kurios Kosovo bylos nagrinėjimo metu atmetė tokios teisės egzistavimą. Taigi, akivaizdu, jog Kosovo bylos nagrinėjimo metu išreikšta šalių opinio juris yra per daug susiskaldžiusi, kad rodytų vieningos ir stiprios opinio juris palaikančios gynybinę secesiją egzistavimą.

Taip pat, reikėtų pažymėti, kad šalies, nuo kurios yra atsiskiriama, sutikimo egzistavimas vis dar išlieka svarbiu faktoriumi pripažįstant naują valstybę. Galima teigti, jog tarptautinė bendruomenė yra nelinkusi pripažinti vienašalių secesijos atvejų. Tai akivaizdu Kosovo atveju, kuris nepaisant to, jog sulaukė didelio tarptautinės bendruomenės palaikymo, vis dar yra nepripažintas didelio skaičiaus valstybių ir nepriimtas į Jungtines Tautas.

Atsižvelgus į teismų praktikos, šalių praktikos ir opinio juris analizę galima teigti, jog tarptautinė teisė nepripažįsta teisės į gynybinę secesiją egzistavimo. Ši išvada remiasi tuo, kad opinio juris šiuo klausimu yra nepakankamai stiprus ir vieningas. Taip pat šios teisės egzistavimas yra neįrodytas šalių praktikoje. Netgi ir taikant labiau progresyvių paprotinės teisės nustatymo metodą, kuriame stiprios opinio juris egzistavimas gali kompensuoti šalių praktikos trūkumą, išvados lieka tos pačios. Kaip ir minėta anksčiau, opinio juris šiuo klausimu yra per daug nevieningas, kad galėtų įrodyti teisės į gynybinę secesiją egzistavimą.

Šiuo metu vienašalių secesijos bandymų sėkmė priklauso nuo tarptautinės bendruomenės politinių sprendimų. Todėl dažnai tokiais atvejais svarbesni tampa politiniai išskaičiavimai, o ne moraliniai ar teisiniai faktoriai. Tokia teisinė nežinomybė tik skatina separatistinių konfliktų augimą pasaulyje. Todėl, rekomenduotina, jog tarptautinė bendruomenė susitartų dėl gynybinės secesijos egzistavimo ir galimų gairių, kurios padėtų nustatyti tokių atvejų atitikimą teisei. Šiomis gairėmis tarptautinė bendruomenė galėtų vadovautis prieš suteikdama pripažinimą naujai atsiskyrusioms valstybėms. Tokia situacija galėtų suteikti daugiau teisinio tikrumo ir padėtų stabilizuoti situaciją tarptautinėje bendruomenėje. Gairės turėtų atitikti dažniausiai doktrinoje sutinkamus reikalavimus, keliamus gynybinei secesijai. Pirmiausia teisės turėtojas turėtų būti objektyviai ir subjektyviai išsiskirianti grupė, sudaranti daugumą atskiroje teritorijoje. Antra, tautai turėtų būtų užkirstas kelias išreikšti savo apsisprendimą valstybės viduje ir tauta turėtų patirti pastovius ir rimtus žmogaus teisių pažeidimus. Trečia, visos kitos priemonės išspręsti konfliktą būtų išnaudotos. Taip pat galima teigti, jog papildoma sąlyga galėtų būti atsiskyrusioje šalyje gyvenančių mažumų teisių užtikrinimas.

## **REIKŠMINIAI ŽODŽIAI**

*Apsisprendimo teisė, gynybinė secesija, teritorinis vientisumas, vienašalis atsiskyrimas.*