Univerzita Karlova v Praze
Právnická fakulta

Concept of Remedial Secession under International Law

Studentská vědecká a odborná činnost

Kategorie: magisterské studium

2015
VIII. ročník SVOČ

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Zuzana Žaludová

Poděkování

Touto cestou bych ráda poděkovala mé konzultantce Doc. JUDr. PhDr. Veronice Bílkové, Ph.D., E.MA, za vstřícnost, ochotu a podnětné rady, které mi byly poskytnuty při vypracování této práce. Dále bych poděkovala kouči a celému týmu Jessup 2015 za velmi přínosné diskuze, které jsou nenahraditelné.

TABLE OF CONTENTS

ABSTRACT

The present paper deals with the topic of remedial secession; i.e. the question of self-determination and the characterization of the seceding entity under international law. The text builds on the case law of international and domestic courts and the scholarly teachings. The purpose of the paper is to provide the description of the fundamental terms and the general insight to the problems inherent into the subject matter as discussed within the related cases.

KEY WORDS

Oppression – People – Recognition – Reference Quebec - Self-determination

I. INTRODUCTION

Secessionist tendencies are becoming a phenomenon under international law. The topic of Remedial secession stands for a very controversial issue within the realm of international cooperation. It is important to realize that there is a lack of the exact definition in law applicable to this issue.

The topic of remedial secession concerns the fundamental matters of a state, such as state sovereignty, territorial integrity, minority rights and self-determination. Also remedial secession is connected to subjective rights of individuals and groups, human factors which cannot be ignored.

The right of self-determination may be exercised in two ways, on the internal and external level. Opinions differ on the subject of the right to external self-determination. It was applied mostly within the decolonization of dependent territories. Under modern international law such a right is mostly associated with the oppression of peoples and with the denial of their right to internal self-determination. The remedial secession represents an ultimate last resort for the application of peoples' rights.

In general secession is a justifiable option in cases of large-scale violations of fundamental human rights of people or groups. The concept of separation is in all of its variations within the right of self-determination. This is verifiable by researching the fundamental documents of the international community and the topic receives notable and thorough attention.

The contribution of this paper is to present the fundamental opinions and arguments on the given issue. Factors to ponder include significant numbers of divergent opinions, the practice of the International Court of Justice and domestic courts related to the issue, and the rise of such an issue after the decolonization era.

Remedial secession as a subject matter is discussed mostly by scholars writing in English. I based my research on their academic writings, the practice and decisions made by international and domestic courts and primarily the case law of the International Court of Justice.

Firstly I proceed with the general characterization of secession and its variations; secondly I focus on the topic of remedial secession and its relation to the right to self-determination.

Subsequently I characterize the addressers of the right; I draw mostly from practice of courts and academic sources. I recapitulate the exemplary cases at the end.

II. SECESSION - THE METHOD OF CREATING STATES

The term *secession* generally represents a manner of separation. The unilateral character is the main attribute. The secessionist entity usually has the intention to separate and create a state[1] or the intention to join another already existing state. The most states are facing some attempts to secede by at least one secessionist entity. The consequence of secession from a practical view point is that one state is splitting into the two states. Consequently, the secessionist body becomes a new independent state.

The act of secession affects the state's integrity. Secession as a legal institution is not unlawful, although international law disfavors it in favor of the territorial integrity of the original state. The legal doctrines' opinions are oriented to the international stability and against the fragmentation.[2]

Secession was the most conspicuous and probably the most common method of the creation of new states until 1914.[3] The attempts continue in many parts of the world. Several movements for territorial separation were for example in Bangladesh, Katanga, South Africa, East Timor, Eritrea, Kurdistan, Quebec, Southern Sudan, Tibet, Western Sahara, Abkhazia, Kosovo etc.

The contemporary international system is state-oriented. Any measures which tend to support the territorial separation would be considered disruptive. Thus the measures would be taken as unacceptable. The Friendly Relation Declaration and other legal instruments such as the Declaration on the granting of Independence to Colonial Countries and peoples state that:

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[1] Christakis, T. ‚*Secession*' [online:http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0044.xml] 2nd December 2014, [hereinafter "Christakis – Secession"].

[2] Nanda, V. P., '*Self-determination under International Law: Validity of Claims to secede'* [online:http://heinonline.org/HOL/Page?handle=hein.journals/cwrint13&div=21&g_sent=1&collection=journals#276], p. 259-266, [hereinafter "Nanda – Self-determination"].

[3] James Crawford, *Creation of States in International Law* (2nd edn, Oxford University Press 2006), 375 [hereinafter "Crawford – States"].

"[…] any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."[4]

a. Secession in the Context of Decolonization and Devolution

The concept of secession is mostly discussed in the framework of the decolonization of dependent territories. Another form is based on the bilateral agreement of the involved parties, the central government and the governance of the unit. States have not yet reached consensus on other forms of secession out of decolonization and the bilateral agreement.[5]

The right to external self-determination was granted to colonized peoples in process of decolonization and it has been the firm ground on which the right to self-determination was applied.[6] This characterization stands for the traditional concept of the right to self-determination. General Assembly of United Nations passed the Resolution No. 1654 which established a committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples on 27 November 1961. The committee reviewed over 50 cases of colonized territories.[7]

The bilateral agreement is commonly referred as a case of *devolution*.[8] The examples of states dissolved by the bilateral settlement are for example the dissolution of Czechoslovakia. As a legitimate consent given is perceived even the agreement *ex post*, which occurs for example in the case of South Sudan, which concerned human rights abuses.

b. Principle of effectiveness vs. *Ex injuria ius non oritur*

From a practical viewpoint the emergence of a new state follows the principle of effectiveness pursuant to the maxim "*secession is not a question of law, but a question of fact*"[9]. Hence the

[4] UNGA Res 2625 (XXV) (24th October 1970);
UNGA Res 1514 (XV) (14th December 1960), art. 46 (1).
[5] Radan, P., Pavkovic, A., '*The Ashgate Research Companion to Secession*',Ashgate Publishing, Ltd, p. 325.
[6] Daniel Thürer, Thomas Burri, '*Self-determination*' in Rüdiger Wolfrum (ed), The Max Planck encyclopedia of public international law (Oxford University Press 2012), p. 34. [hereinafter "M. Planck: Self-determination"].
[7] Day, J., '*The Remedial Right of Secession in International Law*', University of Denver, Potentia 2012, [hereinafter "Day: The Remedial Right of Secession"].
[8] Crawford – States, 375.
[9] Kohen, G., *'Secession: International Law Perspectives*',Cambridge University Press 2006, p. 138;

establishment of a new state requires the fulfillment of the conditions of statehood. *This traditional view […] leads to an impression of perfect "legal neutrality" on the matter of secession.*[10]

The most widely accepted[11] characteristics of a state are Criteria of Statehood, which are embodied in Montevideo Convention on the Rights and Duties of States in Art 1, which requires*:*

a) permanent population;
b) a defined territory;
c) government;
d) capacity to enter into relations with the other states.[12]

The requirement for the capacity to enter into the relations with other states, formulated also by the Permanent Court of Justice[13] is a combination of the requirements of government and independence.[14] The condition is fulfilled by the fact that a state enters into the diplomatic relations with other states.

These criteria were adjusted by several authors, who extended the scale in view of modern international law. As an example *J. Crawford* is enriching the list of conditions for example by circumstance of independence, sovereignty, criteria of permanence, a certain degree of civilization etc.[15] The variance of doctrinal teaching outside of the traditional concept makes the question of the conditions of statehood discussable.

According to J. Vidmar "*Declaring independence does not create a new State, even if the entity exhibits the attributes of statehood*."[16]

Jennings, R., '*Oppenheim's International Law*', vol. 1 (rst edn., 1905), p. 624.

[10] Christakis – Secession, p. 2.

[11] Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press 2008), 198.

[12] Convention on Rights and Duties of States (adopted December 26 1933, entered into force December 26 1934) 165 LNTS art. 1.

[13] *Case of the S. S. "Wimbledon"* (*UK, France, Italy and Japan V. Germany*) (Merits) (17 August 1923) PCIJ Rep Series A No 01, 25.

[14] James Crawford, '*State'* in Rüdiger Wolfrum (ed), *The Max Planck encyclopedia of public international law* (Oxford University Press 2012).

[15] See Crawford J, '*The criteria for statehood in international law'* [online: http://188.129.255.234/uni/electronic_library/download/371], 7th January 2015 [hereinafter "Crawford, Criteria for Statehood"].

[16] Vidmar J, *'Territorial Integrity and the Law of Statehood'* (2012) 44 Geo. Wash. Int'l L. Rev. 709.

The maxim *ex iniuria ius nor oritur* outlines the external limits of acceptance of the principle of effectiveness.[17] The maxim stands for the formulation, which claims that legal rights cannot obtain from an illegal situation.[18] Application of the maxim is based on illegality of the act of secession, thus nullity of the act itself and also the establishment of a new state. The situation arises for example when the conditions are not fulfilled or the act of secession is invalid. It might be caused by the use of force or violation of the principle of non-intervention.

The United Nations Charter contains the prohibition of the use of force in the Art. 2(4). Another instrument to discourage the interference of third parties is the doctrine of non-intervention. Although despite these arguments there are still legal prescriptions under which the qualified attempt to secession would be considered valid.[19]

a. Recognition of an Emerging State

Recognition might have important legal and political effect. For example, when an entity which lacks some necessary element is widely recognized as a state, it can be strong evidence of the statehood, although it is not conclusive.[20] As an example from practice Kosovo as the controversial case under international law is recognized by 108 states[21] which gives certain support to the Republic of Kosovo.

Secession as mentioned above leads to creation of a new independent state and it is subsequently followed by other states' recognition. Recognition of a state forms two different theories, constitutive and declarative. The academic writings have the protagonist of the both theories. The modern concept of recognition is also connected with the existence of international community and organizations.

The constitutive theory presented by H. Kelsen shows the opinion on the legal existence of a state and its relative character. In other words, a state exists legally only when it has ongoing

[17] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (22 July 2010) ICJ Rep 81.
[18] Yamali, N. 'What is meant by state recognition in international law' [online: http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf] 2nd January 2015.
[19] Nanda – Self-determination, p.259.
[20] Crawford, Criteria for Statehood, p. 106.
[21] Plus two other entities: Republic of China (Taiwan) and Sovereign Military Order of Malta.

relations with other states.[22] On the other hand, H. Lauterpacht stated that the recognition of states is a question of policy not a matter governed by law.[23]

J. Crawford considers the recognition as not a full-fledged condition in context of the statehood. The entity which is not recognized but meets the requirements for recognition has the rights of a state under international law. Thus the recognition is referred to as the declaratory principle, although it might be very important part within establishing a new state.[24]

According to I. Brownlie: "*Recognition, as a public act of state, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally, if they ignore the basic obligations of state relations*."[25]

Another opinion stated by German-Polish Mixed Arbitral Tribunal in reference to the existence of the new State of Poland to the topic is: "*[...] the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates*."[26]

If the authority in fact exercises governmental functions within an already accepted state-area, the recognition has actually nothing to constitute, at least at the international personality level. On the other hand J. Crawford deals with the recognition of a new state as an act involving the demarcation of a certain area for the purposes of international relations.[27]

Thus the recognition in the modern view has the declaratory character and case law does not consider an entity mostly on recognition by other states. It might be a supportive action, because of the future stability of the state and the possibility to enter into the relations with other states or international bodies.

[22] Crawford, Criteria for Statehood p. 102.
[23] H. Lauterpacht, 'Recognition In International Law', CUP Cambridge 1948.
[24] Crawford – States, 93.
[25] Ian Brownlie, *Principles of Interantional Law* (8th edn, Oxford University Press 2012), 94;
[26] Deutsche Continental Gas Gesellschaft:v, Polish State (1929), Annual Digest, 5 (1929-30), No. 5.
[27] Crawford, Criteria for Statehood p. 104.

III. STATUS OF REMEDIAL SECESSION UNDER INTERNATIONAL LAW

Remedial secession reflects the situation when there has been harm made to a seceding entity.[28] The junction of '*remedial'* implies the right for a group to secede, if and only if it had suffered certain injustices, and the secession remains the last remedy to such a situation.[29]

Under given circumstances the concept of remedial secession comes as a response to mistreatment in a way of separation. The opinions of scholars diverge on the topic of remedial secession and the legal status remains unclear.[30]

a. Status of Remedial Secession in Applicable Law

C. Tomuschat agrees with the theory of empirical basis in practice of this right.[31] *A. Cassese* identifies with the opinion of reflecting the right to remedial secession in the existing law, *de lege lata*.[32] The opposite view is held i.e. by known author A. Buchanan that remedial secession takes its place as *lex ferenda* in contemporary international law.

The ambivalent approach was mentioned for example by The Supreme Court of Canada which considered the remedial secession and its reflection as an established law standard unclear.[33]

b. Arguments for and against Remedial Secession

The arguments reflect perception of both sides within the dispute. Considerations related to justifying the right to remedial secession include at first the oppression and its impact. With the argument of oppression go other supportive arguments such as the geographic isolation of

[28] Buchanan, A., '*Theories of secession'* [online:http://philosophyfaculty.ucsd.edu/faculty/rarneson/BuchananTheoriesofSecession.pdf] 1st February 2015, [hereinafter "Buchanan, Theories of secession"].
[29] Vidmar, J., '*Remedial Secession in International Law: Theory and (Lack of) Practice*' p. 37.
[30] Daniel Thürer, Thomas Burri, '*Secession'* in Rüdiger Wolfrum (ed), The Max Planck encyclopedia of public international law (Oxford University Press 2012), p. 8. [hereinafter "M. Planck: Secession"]
[31] Tomuschat C. '*Secession and self-determination*' p. 42 in Kohen, G., *'Secession: International Law Perspectives*',Cambridge University Press 2006.
[32] Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995), p. 118-119.
[33] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 135. [hereinafter: Reference re Secession of Quebec].

a territory, the ethnic dissimilarity or the will of the population proclaimed i.e. in a referendum.[34]

The doctrinal theories come to a conclusion of application the right to remedial secession under circumstances of grievance on members of an entity by actions of the state.[35] Although the practice indicates that remedial secession is justifiable only if there are documented cases of extreme harm being imposed to the people in question. Those theories are based on political arrangement of the population within one particular state. The demand of separatists' tendencies might be also based on preserving culture, language and keeping their identity in general, the group of people wants to avoid from destruction by a more powerful group. Thus the entities may not consider the extreme harm on the people as determinative.

On the other hand, international law prefers a steady ground, which construes the foundations of the international co-operation. The main argument refers to the overall stability. This model is highly emphasized.

The second view concerns the inner-state stability, which is questioned under circumstances of a dissolving state. The successful secession might make a precedent and an example for other entities of a disintegrated state. These rebellious branches might not even be considered as a possible secessionist before the first detachment. Thus their existence is connected to the first successful secession of another entity.

Secession represents a radical solution with a huge impact. It is important to take into the consideration other solutions, which are based on equal footing and might solve the situation in a less aggressive way.[36] The objective is to draw attention to other means as a response to the secessionist claims.

A. Buchanan's arguments against secession are based on protecting majority rule, which minorities must abide by them from their position. His writings include that "*All citizens are in principle obliged to maintain loyalty to the state and accept certain limitations on their freedom.*"[37]

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[34] M. Planck: Secession, p. 8.

[35] Reference re Secession of Quebec.

[36] M. Planck: Secession, p. 19.

[37] C. F. Doehring, *'Self-Determination'* in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002), 66.

In context of territorial principle, the territorial principle is not the only legal base for the right to secede, simply because a group of people possesses land and demands political independence.[38] As the unsuccessful examples for secession based on territorial principle is the Aaland Islands Question, which is described below and the Case of Catalonia which concerns the autonomous territory of Catalonia, in which the domestic court decided in favor of Spain that: "*Autonomous Community may not unilaterally hold a referendum of self-determination in order to decide on its integration*."[39]

IV. REMEDIAL SECESSION AND THE RIGHT OF SELF-DETERMINATION

The right of self-determination contributes to the development of international law in the sense of the development of human rights and underlies the international order. The importance of the principle stems from its inclusion in United Nations Charter.[40] It was incorporated into Art 1(2) of UN Charter, which represents the purposes of the United Nations[41]; *"to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."*[42]

Recognition of the right of external self-determination within the right to self-determination leads to the option of independence. The internal self-determination may result in i.e. the autonomy for the entity.

Art. 1 of International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights declares that: "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*"[43] The principle of self-

[38] Day: The Remedial Right of Secession, p. 2.
[39] *Case concerning Catalonia* (Spain v. Catalonia), Constitutional Court of Spain, 2013.
[40] M. Planck: Self-determination, p. 27, 28.
[41] *Ibid*, p. 6.
[42] Charter of the United Nations (24 October 1945) 1 UNTS XVI, art. 1(2) [hereinafter "UN Charter"].
[43] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 1 [hereinafter "ICCPR"]; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1.

determination is determined in an unrestricted form; therefore it is open for broad interpretation in differing situations.[44]

The *erga omnes* character of the right of self-determination was reaffirmed by International Court of Justice in Case concerning East Timor: "(…) *the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ...; it is one of the essential principles of contemporary international law."*[45]

The dimension of right to self-determination has two components; the right to internal and the external self-determination. Both of these terms and their collision are much related to the every secessionist impulse.

a. Internal Self-Determination

The internal dimension is met by satisfying the principle of self-determination on some level within a state. It is achieved by participation of peoples or groups in the political system of a state with the respect to the state's territorial integrity.[46]

The form of self-determination and its internal dimension is based on Art. 1 ICCPR and Art 1. ICESC and also on the other legal instruments i.e. the Helsinki Final Act and the doctrinal teaching. The internal aspect encompasses the right of 'a people' to forms of political, economic and cultural participation.[47]

b. External Self-Determination

The modern theories of the right to external self-determination are based on its reach beyond the decolonization. The right to external self-determination in modern context arises especially from practice and present status of international affairs.

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[44] M. Planck: Self-determination, p. 45.

[45] *Case concerning East Timor, (Portugal v. Australia)* (Hungary v. Slovakia) (ICJ) (1995). [hereinafter "East Timor Case"]

[46] Crawford J, '*State Practice and International Law in Relation to Unilateral Secession Report to Government of Canada concerning unilateral secession by Quebec'* (1997), [online:http://tamilnation.co/selfdetermination/97crawford.htm] 4th January 2015 [hereinafter "Crawford – Quebec"].

[47] M. Planck: Self-determination.

The Supreme Court of Canada in *Reference re Secession of Quebec* identified three circumstances. Three declared conditions under which the right to external self-determination may be considered are:

a) The case of decolonization
b) Subjection of peoples to alien subjugation, domination or exploitation
c) When a people is blocked from the meaningful exercise of its right to self-determination.[48]

These circumstances were mentioned also in the Case of Cameroon and Katanga, which was judged by the Court of African Union. Decisions in these two cases coupled the b) and c) conditions to the right to remedial secession.[49] The second condition means extreme grievances on people and gross violations of human rights. As mentioned-above, this theory is allowing the right to secession, although only as an *ultima ratio.*

Exploitation of Peoples

One of the fundamental principles of United Nations is the promotion of respect for human rights and for fundamental freedoms for all without distinction.[50] Oppression of people means massive and systematic human rights violations, such as ethnic cleansing, mass murder, slaver and widespread torture.[51] The oppression of people plays a part in the many cases in a recent past, such as Kosovo, in which the central government reached toward radical means of maintaining power and control over its populations before or after the secessionist tendencies.

Secession as a the Ultimate Last Resort

The third condition allows the right to remedial secession only under exhausting the meaningful ways to apply for the right to internal self-determination within the parental state.

The condition of exhaustion the application of the right to self-determination within the domestic ways means, that if people are internally blocked from the meaningful exercise of

[48] Reference re Secession of Quebec para 133, 134.
[49] *Kevin Mgwanga Gunme et al / Cameroon* (May 27 2009) Decision 266/03 [online: http://www.achpr.org/communications/decision/266.03/], 4th January 2015, [hereinafter "Cameroon"].
[50] UN Charter, Art. 1(3).
[51] Krüger, H., 'The Nagorno-Karabakh Conflict: A Legal Analysis', Springer, edition 2010 p. 75.

the right to self-determination, they are authorized to exercise it by secession, as a last resort.[52]

A. Buchanan refers to the secession as a last way of remedy in connection to Kosovo Case and Case of South Sudan. Secession became the option of the last resort, while it was clear that both of the parental states Serbia and Sudan had committed serious grievances on their population with no change to realize remedy of any kind.[53]

c. The Right to Self-Determination in Practice

The right to self-determination and its application emerges with the *people*. The International Court of Justice advised in the case Western Sahara (1975) that there is a strong legal claim for "*the principle of self-determination as functionalized in the free and genuine expression of the will of the peoples of [a] territory."*[54] The example of Western Sahara indicates that 'a people' could lay a claim to the territory and remain free from the outside intrusion.[55]

The Yugoslavia case concerns the right to self-determination of the Serbian population in Croatia and Bosnia-Herzegovina. The Badinter Commission was established in 1991 and it was appointed to answer the legal questions arising from the dissolution of Socialist Federal Republic of Yugoslavia. The Badinter Commission shows its view on the topic of self-determination in Opinion No. 2. "*The Arbitration Committee is therefore of the opinion: (i) that the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups under international law."*[56]

The Canadian Supreme Court addressed in 1998 decision in the case of Québec, in which francophone population of Québec demanded unilateral secession from Canada. Although the Canadian Supreme Court came to the conclusion that secession would be illegal for Québec, it stated that secession could be legally recognized under different circumstances. The Supreme Court of Canada referred to the right to self-determination at para 126: "*[t]he recognized*

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[52] Reference re Secession of Quebec para 134; Wood, M, Milanovic, M., '*The Law and Politics of the Kosovo Advisory Opinion*' [online:http://ukcatalogue.oup.com/product/9780198717515], p. 202.

[53] Buchanan, Theories of secession.

[54] *Western Sahara* (Advisory Opinion) (16 October 1975) ICJ Rep 12, para 58. UNGA Res 1514 (XV) (14 December 1960).

[55] Day: The Remedial Right of Secession, p. 2.

[56] Badinter Commision, *The Opinions of the Badinter Arbitration* (27 August 1991), Opinion 2(1) [hereinafter "Badinter Commission"].

sources of international law establish that the right to self - determination of a people is normally fulfilled through internal self – determination."[57] The non-recognition was reasoned by the successful cooperation between the two governments; the central government and the Province of Québec.

The decision leads to conclusion, that Québécois were not oppressed by the central government. The province maintained complete internal agenda of language, education cultural programs, and social developments. Named aspects of self-determination are identified as crucial aspects in Helsinki Final Act.[58] Hence Quebecers were recognized as fully competent to uninhibitedly enjoy internal self-determination; therefore there was no need for external self-determination. The exercise of the right to self-determination must have some limits to prevent threats to an existing state's territorial integrity.[59]

The Friendly Relations Declaration

The limits of the right to self-determination are shown in Resolution 1514 (XV).[60] The connection between democratic representation and self-determination is reflected in the "safeguard clause" which does not authorize: " … *any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples (…) and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*"[61]

A similar argument can be deduced from The Aaland Island Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, wherein the Commission stated: "*The separation of a minority from a State of which it forms a part and its incorporation into another State can only be considered an exceptional solution, a last*

[57] Reference re Secession of Quebec.
[58] Day: The Remedial Right of Secession.
[59] Reference re Secession of Quebec, para 127.
[60] Tomuschat C., *'Self-determination in a post-colonial world'* in Henry J. Steiner, Philip Alston (ed), *International human rights in context: law, politics, morals: text and materials* (Oxford: Clarendon Press 1996), 27.
[61] UNGA Res 2625 (XXV) (24th October 1970), principles 7;
UNGA Res 1514 (XV) (14th December 1960), art. 46 (1).

resort when a State lacks either the will or the power to enact and apply just and effective guarantees."[62]

V. THE SECESSIONIST ENTITY CHARACTERIZATION

With the principle of self-determination comes a question about identifying the holders of the right.[63]

a. The meaning of the term 'Peoples'

An answer to the question 'who belongs to *the peoples'* is demanded usually within the right to self-determination. The question arises whether the term of people limits to the people of a state as a whole or it goes beyond,[64] as a term for a specific groups and ethnicities in a state. The question is connected mostly to a referendum.

The definition of people was included in the Study on the concept of the right of peoples on International meeting of experts of UNESCO. The term 'a people' demands to have: "*a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life*."[65] This definition of 'a people' should be softened by the "subjective criteria theory".[66]

The V. Gudelevičiūtė's opinion is an example of the extensive interpretation of the term 'a people', which states that inter alia the term involves the "*entire unrepresented/ oppressed part of population of a particular territorial unit*."[67]

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[62] The Aaland Islands Question (On the Merits), Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921), p. 28.

[63] M. Planck: Self-determination, p.18.

[64] Crawford – Quebec.

[65] UNESCO International Meeting of Experts on further study on the concept of the rights of peoples, final report and recommendation, 1989 November.
Cameroon, para 170;
Joseph S, Schultz J, Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd end, Oxford University Press 2004), p. 141-154.

[66] Cameroon, para 170;
P. Peter Roethke, *'The Right to Secede under International Law: The Case of Somaliland'* JIS Fall 2011, p. 41.

[67] Gudelevičiūtė, V., '*Does the principle of self-determination prevail over the principle of territorial integrity?'* [online:https://www.tamilnet.com/img/publish/2009/10/Gudeleviciute.pdf], 5th February 2015, [hereinafter "Gudelevičiūtė – The principle of self-determination"].

The Quebec case defines, that 'a people' might constitute only a part of a population of a state.[68] The referendum in the case of Western Sahara has been blocked due to the disagreement over the question '*who belongs to the people of Western Sahara'*, if the referendum concerns also persons who have moved into the territory or the former census initiated in 1974.[69]

The Montenegro referendum in May 2006 held the question whether Montenegro would separate from Serbia and it was accompanied by arguments over the meaning 'the people of Montenegro'; the participation threshold, qualified majority and who had the right to vote.[70]

The both parties to the dispute of East Timor Case (Portugal v. Australia) agreed to that fact, that people of East Timor had the right to self-determination.[71] The ICJ underlined that the population of East Timor possess such a right and is a people.

In the Palestinian Wall case the ICJ '*observes that the existence of a Palestinian people is no longer in issue*' and that the rights of Palestinian people also include the right to self-determination.[72] Similarly, the Independent International Commission on Kosovo claimed that the people of Kosovo do have the right of self-determination and also that ''*[t]he people of Kosovo must take over the running of their affairs*''[73]

In conclusion the term 'a people' does not have a specific definition. Case law shows the admission of the title 'the people' to the groups within a specific state, considered under circumstances, which are unique to every situation. After recognition as a people arises the question of the rights extent.

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[68] Reference re Secession of Quebec, para 281.

[69] Gudmundur Alfredsson, '*Peoples'* in Rüdiger Wolfrum (ed), The Max Planck encyclopedia of public international law (Oxford University Press 2012), [hereinafter "M. Planck: Peoples"].

[70] *Ibid*.

[71] East Timor Case, para 31, 37.

[72] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion]* para. 118;
Israeli Wall Advisory Opinion *[Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]*).

[73] '*The Kosovo Report: Conflict, International Response, Lessons Learned'*, The independent international Commission on Kosovo, Oxford University Press, p.186, 287.

b. Minorities

The definition of the term 'minority' relies on common national, ethnic, linguistic, and/or religious characteristic of the groups and their desire to develop their communities.[74] The ICCPR defines the members of minorities as a distinct category, which enjoys only certain cultural, religious or linguistic rights within an existing state.[75]

Minorities are defined outside of the term of people by the Covenants.[76] According to T. Musgrave, a minority cannot determine its own political status, although a people under Art. 1 can. The reason is that minorities are protected by Art. 27 of the ICCPR, which does not include any right of self-determination.[77]

The status of minorities within the right to self-determination remains unclear. By many opinions national minorities have the right of self-determination[78], but this right does not include a right to secede;[79] it concerns only the internal self-determination.[80]

There are doctrinal opinions on external self-determination in the context of minorities. The possibility of external self-determination would affect 'a people' only[81] and not minorities.[82]

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[74] M. Planck: Peoples.
[75] ICCPR, art. 27.
[76] Gudelevičiūtė – The principle of self-determination.
[77] Thomas D. Musgrave, *Self-determination and National Minorities* (Oxford: Clarendon Press, 1997), 168.
[78] ICCPR art. 1;
Western Sahara (Advisory Opinion) (16 October 1975) ICJ Rep 12, para 59.
[79]D. J. Harris, *Cases and Materials on International Law* (5th edn, Sweet & Maxwell 1998), 120-1.
[80]Crawford – States, 107.
Chinonso Ijezie, *'Right of Peoples to Self-determination in the Present International Law'* SSRN (2013) [online:http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304441#] 25th December 2014.
[81] Ian Brownlie, *Principles of Interantional Law* (8th edn, Oxford University Press 2012), 580;
European Commission for Democracy through Law, *'Opinion on "Whether Draft Federal constitutional Law No. 462741-6 on amending the Federal constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law" endorsed by the Venice Commission at its 98th Plenary Session'* (2014) Opinion no. 763 [online:http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)004-e] 4th January 2015, para 25;
Gudelevičiūtė – The principle of self-determination, p. 51.
[82] Badinter Commission, opinion 2.

The Badinter Commission draws a conclusion that the right of self-determination was so far successfully invoked by colonial peoples only.[83]

c. Will of the People

As mentioned-above, the self-determination comes with the people; the main attribute is the initiative. The application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.[84] The will of a people could be expressed in various forms; through government decision or parliamentary resolution, possibly supported by a plebiscite, or through a referendum.[85]

"*In international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more "peoples" in the ordinary sense of the word."*[86]

J. Crawford implies that the call for independence is a matter for the central government of the state, which makes the decision how to respond to such a claim.[87] If the request is upheld by the government of the state, the practice complies with the theory of bilateral secession by consent of the both parties. The case of Scotland occurred as an example in very recent past. The case concerned consent given to hold a referendum, although the results were in favor of the United Kingdom.

VI. PRACTICE: CASE STUDIES

a. Aaland Islands

The Aaland Islands represents a widely known case which was addressed by the former League of Nations. The representatives of the Aaland Islands requested annexation to Sweden as an exercise of their right of self-determination. The League of Nations confirmed the Finland's sovereignty over the Islands. This case became a precedent for non-existence as a right in positive international law for separation from a state, which they are a part, by

[83] *Ibid.*
[84] *Western Sahara* (Advisory Opinion) (16 October 1975) ICJ Rep 12, para 55; UNGA Res 1514 (XV) (14th December 1960).
[85] M. Planck: Peoples.
[86] Crawford – Quebec.
[87] *Ibid.*

simple expression of a wish. The Commission of Rapporteurs concluded that the right of separation would destroy order and stability of states and international cooperation.[88]

b. Bangladesh

The case of Bangladesh shows the relation between self-determination and the use of force. The government of West Pakistan used military operations to suppress the political movements in the territory of East Bengal. Also East Bengal was geographically separated from the western Pakistan by the territory of India. The people were exposed to serious harm as widespread violations of fundamental human rights and denial of the right to internal self-determination. Also all realistic options of the realization of internal self-determination were already exhausted. On basis of ongoing violations East Bengal seceded. Consequently in the ensuing civil war India intervened on the territory of East Bengal and defeated West Pakistani military. "*Intervention was criticized by many governments, but that illegality was not regarded as derogating from the status of East Bengal, or as affecting the propriety of recognition*"[89] Despite the intervention, Bangladesh was widely recognized as a state. Pakistan had given its consent by recognition three years later, which J. Crawford referred to as the bilateral agreement[90], actually the case of Bangladesh is one of the closest situations to the term of secession.

c. Turkish Republic of Northern Cyprus

The case of Northern Cyprus distinguishes from the case of Bangladesh. The Island of Cyprus consisted of two communities; Turkish and Greek. Legally it was a non-self-governing territory which was administered by the United Kingdom. After 1960, when the independence was proclaimed, both communities were considered as the co-founders of the Cypriot State. Military action was held in 1974 of Greece with intention to annex the island. It escalated to the violations of human rights. Subsequently Turkey intervened and deployed its army in the North of the Island, which was under its control. The north Turkish community declared Turkish Federative State of Cyprus. The situation arises from artificially building a community and providing its right to self-determination. The attempt was unsuccessful. One

[88] Crawford, Criteria for Statehood, p. 149.
[89] Crawford, Criteria for Statehood, p. 140.
[90] *Ibid* p. 142.

of the attributes of an entity is that the existence of the State is dependent on the military lead of Turkey.[91]

d. Eritrea

The Eritrean liberation movement proclaimed its right to self-determination in plebiscite which was sponsored by the United Nations. The territory of Eritrea fought a long civil war against Ethiopia. Ethiopia persistently denied the right to self-determination of Eritrean people with no chances to effective remedy. The liberation movement of Eritrea helped overthrow the military government of Ethiopia in 1991 and Eritrea achieved independence in 1993 after the referendum. The facts of the situation in Eritrea may be defined as an outcome of the settlement of a decolonization process rather than secession. It is important to mention that the case of Eritrea had consensual elements while Ethiopia agreed.[92]

e. Katanga

Attempt to secede in case of Katanga is one of the most noticeable among the post-decolonization era. Katanga declared independence from the newly established Republic of Congo. The attempt failed mainly because the movement was not sufficiently endorsed by international community, the State of Katanga was not recognized by any state and Congo effectively suppressed secession.[93] One year after the movement in Katanga the African leaders of the Organization of African Unity in Cairo reiterated their commitment to uphold the established borders.[94]

f. Kosovo

Kosovo represents probably the most controversial case which happened in the immediate past and the separation was promoted by a large number of states. Serbia did not express the agreement to the separation. Kosovo enjoyed the status of an autonomous province within the SFRY. Kosovo did not have any constitutional right to secede from the federation. Kosovars resisted the pressure from the central government firstly by peaceful means. Later on Serbia started ethnic cleansing in Kosovo. The diplomatic efforts to settle the situation led to intervention by the North Atlantic Treaty Organization despite non-authorization of these

[91] *Ibid* p. 143, 146.

[92] Ntwiga, D., '*Ethiopia-Eritrea Conflict: Self Determination of Peoples or 'International Community' Interests*?', 18-03-2002, [online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2066676], 1st March 2015.

[93] *Ibid*, 111.

[94] M. Planck: Secession, p. 30.

steps. In 1999 was established the international civil and military presence in Kosovo by the UN Security Council. Kosovo Case took almost ten years of finding a solution, meanwhile Serbia instated on the unity of the State.[95]

Kosovo proclaimed its independence in 2008. States refers to Kosovo as a unique case with an effort not creating a precedent. The noteworthy fact is that question requested by UN General Assembly to the ICJ, asking whether declaration of independence is in accordance with international law[96], did not explicitly asked whether Kosovo has legal right to secede or the legal status of secession with international law.

g. South Ossetia

South Ossetia is one of the post-Soviet 'frozen conflict' zones. The other zones are Abkhazia, Nagorno-Karabakh and Transnistria. In 1990 South Ossetia declared independence from Georgia. Georgian government did not approve these steps and continued by abolishing South Ossetia's autonomy. The tension escalated to the South Ossetia War, which lasted till 1992.[97] Another conflict in 2008 led to war between Russia and Georgia, which opened the chance to have a control over the territory of South Ossetia by Russia and Ossetia. The majority of the international community considers the territory to be occupied by the Russian military, which South Ossetia is dependent on.[98] Thus the state of South Ossetia is not able to appear in the international community without the help from Russia. The criteria for remedial secession are not fulfilled.

a. Crimea

The Crimea case has taken place in a very recent past. The Crimea peninsula is the subject of dispute between Russia and Ukraine. This peninsula is considered as a part of Ukraine by the majority of the international community, despite the view of Russia and the minority of states. The peninsula consists of the Autonomous Republic of Crimea and Sevastopol. The tension in the territory known as the Crimea crisis led to organization of a referendum whether to join the Russian Federation. The referendum results were 97 % positive. Subsequently the city of

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[95] *Ibid*.

[96] UNGA Res A/RES/63/3 (9th October 2008).

[97] Donaldson, R. H., Nogee, J. L, Shapre M. E. '*The Foreign Policy of Russia: Changing Systems, Enduring Interests*' 2005. p. 199.

[98] '*NATO Membership Would Strain Georgia's Ties with Russia – Medvedev'*. RIA Novosti. 2013-08-07, [online: http://sputniknews.com/russia/20130807/182614986.html] 4th March 2015.

Sevastopol and the Autonomous Republic of Crimea merged into one unified state and unilaterally declared independence. Next the territory was annexed by Russia. Ukraine did not recognize the referendum or the steps taken later, also the acts were not recognized by the majority of international community. Despite that Crimean legal and tax system is under the Russian jurisdiction. Recognition was granted by five states,[99] the disapproval of these events is mostly based on military steps and the use of force taken by Russia on the Crimea peninsula. The UN General Assembly adopted a non-binding resolution, which considered the referendum invalid.[100] Remedial secession aspect was based on existence a legal right to separate, although the citizens of Crimea do not form a nation.

[99] Russia, Afghanistan, Nicaragua, Syria, and Venezuela.
'*Nicaragua recognizes Crimea as part of Russia'*. Kyiv Post. 27 March 2014 [online: http://www.kyivpost.com/content/ukraine/nicaragua-recognizes-crimea-as-part-of-russia-341102.html] 4th March 2015.

[100] UNGA Res A/RES/68/262 (17th March 2014).

VII. COCLUSION

The cases concerning remedial secession are the current topic within the international community. The cases from the past are characterized by similar and divergent features. The common element is the desire for certain degree of independence, which is supposed to be attained by the right of self-determination.

The problematics may be viewed from two sides, one focusing on people and citizens, the other concentrating on international stability. The international community has always given emphasis to stability, but not ignoring the right of peoples, who originally form the states and the community itself. At the end the act of secession must be considered within the circumstances, such as the dependence or ability to enter relationships with other states, i.e. the criteria of statehood and other circumstances; as recognition of a state, which might be crucial in establishing the state and the current situation.

The addresses of the right of self-determination are peoples. The term 'a people' is not clear under international law. To call an entity '*people*' is questioned before courts and the international community. Another question is; on which level is the right supposed to be exercised? The right to self-determination may be perceived under two views, the internal and external level. The opinions of courts and the majority of the international community are concentrated to the internal level of such a right for the entities within one state. Although the wish of the majority does not always meet with the current situation, i.e. when a state is under another state military occupation or is dependent on its help. In other words, the law and the generally accepted view does not correspond to reality, which practically works otherwise.

The topic under modern international law represents a structure, which needs to be built on a steady ground; nevertheless the steadiness arises from the case law. The rules nowadays rely on the specificity of cases and the only partial precedence, which these cases create.

Response to the question whether the current international law recognizes the right to remedial secession is ambiguous, although from my point of view the right is neither acknowledged nor documented. The cases where the relevant part is connected to remedial secession problematics have no approving or denying documents. For example in the Case of Kosovo, the problematics might have been commented, but the ICJ decided not to comment this subject matter. Within this question the international community keeps in silence due to the aspect of stability, which is desired.

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