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Title: Remedial Secession: Emerging Right or Hollow Rhetoric?

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3. Cases Decided by National Courts

Reference Re Secession of Quebec (1998) 115 ILR 585

ABBREVIATIONS

Art(s).	Article(s)
AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
Comm.	Commission
Cornell ILJ	Cornell International Law Journal
CUP	Cambridge University Press
CYIL	Canadian Yearbook of International Law
Doc.	Document
ed(s)	editor(s)
EC	European Community
EJIL	European Journal of International Law
EPIL	Encyclopaedia of Public International Law
fn.	footnote
fns.	footnotes
FRY	Federal Republic of Yugoslavia
GA	General Assembly
GAOR	General Assembly Official Records
GA Res.	General Assembly Resolution
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILJ	International Law Journal
ILM	International Law Materials
ILR	International Law Reports
LNTS	League of Nations Treaty Series
mtg.	meeting
No(s).	Numeros(s), Number(s)
OUP	Oxford University Press
pl.	plenary
p(p).	pagina(s), page(s)
para(s)	paragraph(s)
PCIJ	Permanent Court of International Justice
SC (UN)	Security Council
SCOR	Security Council Official Records
SC Res.	Security Council Resolution
Ser.	Series
Sess.	Session
SFRY	Socialist Federal Republic of Yugoslavia
SG	Secretary-General of the United Nations
SR	Slovak Republic
Suppl.	Supplement
UK	United Kingdom
UN	United Nations

UN Doc.	United Nations Document
UNJYB	United Nations Juridical Yearbook
UNTS	United Nations Treaty series
USSR	United Socialist Soviet Republics
USA	United States of America
VC	Vienna Convention
Vol.	Volume
YBIL	Yearbook of International Law
YBILC	Yearbook of the International Law Commission

I. Introduction

1. Preface

On 22 July 2010 the International Court of Justice (hereinafter ICJ) handed down its advisory opinion in the case concerning the unilateral declaration of independence by Kosovo.¹ As was widely expected by the international community, the ICJ held that the declaration had in fact been legal, as there is no general rule of international law preventing secession.² It stopped short, however, of declaring Kosovo a state under international law or for that matter, ruling upon a subject which has come to dominate international debates on the matter: self-determination, or, more precisely, remedial secession.

Remedial secession is a 'right' of peoples to separate a part of the territory from the parent state on the basis of a breach of that people's right to self-determination. Emerging from the lofty theoretical rhetoric of self-determination in political theory, and the morass of self-determination in international legal practice, the concept of remedial self-determination is based upon an *a contrario* reading of the notion that

*A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity*³

Though still highly contested, remedial secession would grant the right of independence to non-state groups in situations where their right to internal self-determination (namely equal representation and responsible government) had been significantly and substantially breached by the state. Thus, remedial self-determination at once evokes fundamental human rights precepts, democratic principles of representative government and freedom from arbitrary power, whilst

¹ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for Advisory Opinion) [Kosovo Advisory Opinion], 22 July 2010, available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

² *Ibid* para 81.

³ *Reference re Secession of Quebec*, Supreme Court of Canada [Re Secession of Quebec] (1998) ILM Vol 37, 1340 para 133.

posing a serious threat to the international legal order, state sovereignty and territorial integrity. So where then does this 'right' currently lie in the international legal order?

2. Statement of the Problem

With the Kosovo decision there are now have a number of cases, not to mention a substantial amount of state practice and the opinions of many eminent scholars which seem to hint at, but stop short of declaring, the existence of a substantial legal right to remedial secession. A growing number of communities within existing states are attempting to claim their right to unilateral secession based upon this principle, but it becomes clear that international legal opinion on the matter is very much divided. With many commentators calling for Kosovo's independence to be justified on the basis of remedial secession, the failure of the Court to make any comment about the precedential or crystallising potential of the legality of Kosovo's declaration in light of the assertion of the emergence of a customary rule of remedial secession, will ensure that the debate is not resolved any time soon.

The failure by the international community to come to terms with the reality of secession claims has serious implications. States may exploit the confused position of the law to perpetrate human rights violations against sub-groups with little or no threat of sanction. Third states which offer support to peoples exploited by their own state risk accusation of breaching the law of non-intervention, or possibly even the use of force. Where groups do succeed in forming a semblance of an independent State, the international community is faced with the question of how to respond to such a claim. The foregoing situation raises the fundamental need for a comprehensive analysis of theory and practice to respond to the vagueness of the law.

3. Research Objective and Approach

This thesis seeks to investigate whether remedial secession, as an aspect of the international law of self-determination, has a valid legal basis in public international law. To do so, it will conduct a juxtaposition of theory and practice: an inquiry into the legal theory on secession and an analysis of state practice.

Chapter II will seek to elaborate the legal theoretical framework through which

remedial secession is understood. This will involve a two-stage inquiry. First, remedial secession will be analysed within the scope and content of self-determination as it currently lies within public international law, in light of the conflicting principle of territorial integrity. Second, consideration will be given to whether remedial secession has enough support in legal doctrine to be considered an actual entitlement under international law. For this purpose I employ a traditional *lex lata* approach of international legal positivism. I will commence my legal analysis from a close scrutiny of the recognised sources of international law. When considering the sources of international law, reference is usually made to Art. 38 of the Statute of the ICJ which contains the sources made applicable to the Court, *i.e.* international treaties, custom, general principles of law recognised by civilised nations and as subsidiary means judicial decisions and legal writings.⁴ Although the provision cannot in itself be creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself, it is generally regarded as reflecting state practice.⁵

In Chapter III, with the intention of testing the devised theoretical understanding, an analysis of state practice will be undertaken by examining a number of pertinent cases. In depth case study analysis, rather than a broad empirical approach, is best suited to the task of examining the application of remedial secession. By closely examining a relatively small number of cases, and comparing and contrasting them, it is possible to identify the significant features and variable of each application. Further, given the numerous geo-political factors involved in the international law of statehood, a heavily contextualised, fact-based approach is called for.

Last, in Chapter IV, the case of Kosovo will be examined. As the most recent case of secession to claim validity on the grounds of remedial secession, an assessment of the international community's reaction to the case, together with the ICJ's advisory opinion is integral to an appreciation of the present state of remedial secession in public international law.

⁴ Art. 38 (1), litras a-d of the *Statute of the International Court of Justice*, 26 June 1945, 59 Stat.1055, UNTS 993, 3 Bevans 1179 (1945) [Statute of the Court].

⁵ Jennings, R. & Watts, A. (eds.), *Oppenheim's International Law, Vol. 1, Introduction and Part 1*, 9th edition, (London: Longman, 1992), p. 24.

4. Caveat

To explore self-determination is, as Antonio Cassese notes⁶, a way of opening a veritable Pandora's box. Its vagueness and heavy politicisation make a juridical study of self-determination extremely difficult. Therefore with regards to analysis of state practice I have attempted as best I can to organise a systematic comparative study of the cases selected.

I would like to emphasize that the cases examined involve highly complex historical and political issues, and it is not the aim of this thesis to account for these extensively. However, I have sought to present the historical and political facts pertinent to an examination of the legal issues at hand, contextualizing them to reflect the geo-political issues at play.

⁶ A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, CUP, 1995) p. 1

II. Remedial Secession in Law and Theory

1. Introduction

The following chapter will provide the theoretical framework through which to conceive of the notion of remedial secession. It involves a two part inquiry: first, a critical appraisal of remedial secession in light of the tension between self-determination and territorial integrity will be undertaken in order to conceptualise how remedial secession can theoretically be accommodated in the international legal order; second, evidence of support for remedial secession within the hierarchy of the recognised sources of international law will be sought. Turning first to treaty law⁷, an analysis of the most prominent legal texts relating to self-determination will be undertaken, taking special consideration of the *travaux préparatoires* as a possible source of *opinion juris*, to observe whether support for the notion of remedial secession can be gaged. Further, while UN General Assembly resolutions are not strictly speaking sources of international law as proclaimed in the ICJ Statute, they have nevertheless been identified as relevant in the crystallisation of customary law⁸, and may be evidence of *opinio juris*.⁹ Therefore a number of resolutions relating to self-determination will also be examined here. Last, a number of judicial decisions addressing the notion of remedial secession will be examined, together with the views of eminent legal scholars¹⁰.

2. Secession within the Scope of Self-Determination

As presently expressed in international law, self-determination is a right of “peoples” to determine their political status and freely pursue their economic, social and cultural development.¹¹ Affirmed in the United Nations Charter¹², and other major international legal instruments¹³, self-determination has been pronounced as *erga*

⁷ *Statute of the Court* Art. 38 (1)(a).

⁸ *Statute of the Court* Art. 38 (1)(b).

⁹ G. Kerwin, “The Role of United Nations General Assembly Resolutions in Determining Principles of International Law” (1983) 4 *Duke Law Journal* pp. 876-899.

¹⁰ *Statute of the Court* Art. 38 (1)(d).

¹¹ Common article 1, *International Covenant of Civil and Political Rights* [ICCPR], *International Covenant of Economic, Social and Cultural Rights* [ICESCR] 1966.

¹² Articles 1(2), 55 and 73.

¹³ *African Charter on Human Rights and Peoples’ Rights* 1981 art. 20; *Vienna Declaration and Programme of Action*, 1993; *Final Act of the Conference on Security and Co-operation in Europe*, 14 I.L.M. 1292 (1975) [Helsinki Final Act], states (in Part VIII).

*omnes*¹⁴ and is arguably a *jus cogens* norm¹⁵. To understand how secession may be said to inform the exercise of self-determination, it is perhaps useful to first recall the core philosophical idea that is implicit in the principle.

Self-determination guarantees peoples autonomy and freedom to govern themselves—to live by “a free and genuine expression of [their] will,”¹⁶ and can be seen as a form of the liberal goods of freedom, autonomy and liberty¹⁷. James Tully connects it with the liberal value of “self rule,”¹⁸ and Daniel Philpott similarly grounds it in the value of individual moral autonomy advanced by liberal democracy¹⁹. In this formulation, the value of autonomy, freedom or self-rule that is enjoyed by individuals in a free and democratic society is analogously extended collectively to groups as self-determination.

Turning to the substantive idea of self-determination as a matter of international law, James Anaya suggests that this right can be understood as comprising two elements: “In what might be termed its *constitutive* or external aspect, self-determination requires that the governing institutional order result from procedures that give expression to the will of the people governed. Secondly, in what might be called its *ongoing* or internal aspect, self-determination requires that the governing institutional order itself, apart from the events leading to its creation or change, be one under which individuals and groups may live and develop freely on a continuous basis.”²⁰ Anaya’s pronouncement is reflective of most theorists who conceive self-determination in dichotomous terms: internal, or ongoing self-determination to be exercised within the borders of existing states; and external or constitutive self-determination which leads to the formation of a new state on the basis of that people’s political will. While in this author’s opinion self-determination should be conceived

¹⁴ *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, p.90.

¹⁵ I. Brownlie, *Principles of International Law*, 6th Edition (Oxford: OUP, 1990) p 515; Gross Espiell, “Self-Determination and Jus Cogens” in Cassese (ed) *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff 1979) p.167.

¹⁶ H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) pp. 30-31.

¹⁷ M. Bennett, “Indigeneity as Self-Determination” (1995) *Indigenous Law Journal* 4, 71, p 92.

¹⁸ J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, CUP, 1995) p. 6.

¹⁹ D. Philpot, “Self-Determination in Practice” in Moore, *National Self Determination and Secession* (Oxford: OUP, 1998) pp. 81.

²⁰ J. Anaya, *Indigenous Peoples in International Law* (Cambridge: CUP, 2004) p. 98.

of as one coherent legal norm, for conceptual ease we will maintain this dichotomy for the time being.

At present the latter form of self-determination is extended only to the peoples of colonial territories to seek their independence.²¹ However, the scope of self-determination (the right of the populace to determine their political structures) also logically envisages the possibility of a people choosing to exercise another form of governance, including independence. One might point to the pronouncement of Judge Dillard in the Western Sahara case, in which he noted: “It is for the people to determine the destiny of the territory and not the territory the destiny of the people”.²² With the consent of the state, self-determination could likely encompass the right to consensual dissolution or consensual merger of a state, but what about unilateral secession?

A number of theorists actively promote the right of unilateral secession as an element of the scope and content of self-determination outside the designated colonial right. These can be classified under four main theories: (1) choice theories; (2) national self-determination theories; (3) just cause theories; and (4) calculation of legitimacy theories. The various theories are based upon a variety of legal interpretations of the principle of self-determination, and all gain their greatest argument for validity from the fact that secession is neither proscribed nor prescribed under international law.²³ Thomas Franck, one of the five international law experts asked by the Canadian government to consider certain issues regarding a hypothesised secession of Quebec, wrote that

It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits

²¹ See G.A. Resolution 1514 (XV) [The Declaration on Granting Independence to Colonial Countries and Peoples] UN DOC. A/4684 (1960) and Resolution 1541 (XV) UN DOC. A/4684 (1960).

²² *Western Sahara* (Advisory Opinion) ICJ Reports 1975 p. 122.

²³ R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) pp. 8-9.

secession. There is a privilege of secession recognized in international law and the law imposes no duty on any people not to secede²⁴

However, while secession as such may not be expressly prohibited under international law, it comes into conflict with a number of fundamental norms of international law, primarily the principle of the territorial integrity of states, as will later be discussed.

2.1. Choice Theory

As the title would imply, choice theories of the right to secede require that a territorially concentrated majority merely express a desire to secede for the secession to be legitimate, and do not require that the seceding group demonstrate that they are victims of injustice or that they have a special claim to the territory they intend to take with them.²⁵ Choice theorists base their reasoning primarily upon the democratic ideals contained within the principle of self-determination: namely that the legitimacy of government is based upon the consent of the governed, and that the governed have the inalienable right to withdraw that consent whenever they wish.²⁶

2.2. National Self-Determination Theory

The notion of national self-determination denotes that minority-peoples have a right to self-determination, including a right to an independent state in which the members of the minority-people form the majority.²⁷ This theory is grounded in the idea that the national attachments that people feel have intrinsic ethical significance and are also instrumentally valuable as a means to realizing other goods.²⁸ That is, that where a nation is politically autonomous, and where a state encompasses a nation, it is able to implement redistributive justice, protect a common culture, and collectively determine its own destiny (because people have a commitment to live together and are

²⁴ Thomas Franck, as quoted in S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possedetis* (Ithaca NY: McGill-Queen's University, 2002) p. 209.

²⁵ D. Philpott, "Self-Determination in Practice", in: Moore *supra* note 19

²⁶ H. Hannum, "Rethinking Self-Determination", 34 *Virginia Journal of International Law* (1993) 1, p. 43.

²⁷ W. Norman, "The Ethics of Secession as the Regulation of Secessionist Politics" in: Moore *supra* note 19 p. 35.

²⁸ *Ibid*

more likely to compromise).²⁹

2.3. Remedial Right Theory

Just-cause, or remedial secession theories place a heavier burden of proof on the secessionists, and are in many ways analogous to Locke's theory of revolution³⁰: the right to secede is only legitimate if it is necessary to remedy an injustice (in Allen Buchanan's terminology, it is a remedial right only).³¹ Different just-cause theorists focus on different kinds of injustices: some on prior occupation and seizure of territory; some on serious violations of human rights, including genocide; others view discriminatory injustice as sufficient to legitimate secession.³² One advantage of this type of theory is that it suggests a strong internal connection between the right to resist tyranny (exploitation, oppression, genocide, wrongful seizure of territory) and the right to self-determination³³. By suggesting a strong link between the right to self-determination and human rights this kind of argument grounds the right to self-determination within the generally accepted framework of human rights.³⁴

2.4. Calculation of Legitimacy Theory

A fourth approach has been suggested which identifies a list of criteria that might be used in specific cases to evaluate secessionist claims. Lee Bucheit suggests calculating the legitimacy of the claims through a

[b]alancing of the internal merits of the claimants' case against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation³⁵

²⁹ *Ibid*

³⁰ Moore, *supra* note 19 p. 3

³¹ A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), 335.

³² Moore, *supra* note 19, p.4

³³ *Ibid*

³⁴ *Ibid*

³⁵ L. Bucheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) p. 238, see also L. Chen, "Self-Determination as a Human Right" in: *Toward World Order and Human Dignity*, M. Weismann & B. Western (eds) (New York: Free Press, 1976)

Buchheit grounds his suggestion on the ‘first principle’ of the UN Charter, that is a “maximization of international harmony coupled with a minimalization of human suffering”.³⁶ He suggests that where a secessionist claim is made by a group ethnically distinct and capable of viable existence apart from the surrounding state, secession should be approved by the international community if it promotes “general international harmony”.³⁷

3. Assessment of Theories of Secession in Light of Territorial Integrity

Having elucidated the theoretical claims for secession within the scope and content of self-determination, it would be wise at this point to introduce the proverbial “pooper” into this secession/self-determination party. The crucial importance of the principle of territorial integrity is sung by a chorus of legal scholars, and is well established and protected by a series of consequential rules prohibiting interference within the domestic jurisdictions of states, for example, Art. 2(7) of the UN Charter. This norm protects the territorial framework of independent states and is part of the overall theory of the sovereignty of states. It is beyond question that this principle applies generally in interstate relations, and hence it represents a guarantee “contre tout démembrement du territoire”.³⁸ The question in the context of secession is whether a secessionist movement, as a non-state actor, is equally bound by this principle³⁹. While this aspect remains contentious, given the delicate geo-political balance involved it can be concluded that the national self-determination and choice theories of secession are both unsustainable in public international law. Most commentators agree that the promotion of an unconditional right of secession, with the only ‘condition’ being the wish of a respective population, would foster a tenuous and unsustainable international system.⁴⁰

That being said, while there is thus a presumption against the existence of an absolute

³⁶ Buchheit, *supra* note 35, p. 238

³⁷ *Ibid*, p. 239

³⁸ M. Kohen (ed.), *Secession. International Law Perspectives* (Cambridge: CUP, 2006), p. 579.

³⁹ See *infra* chapter IV, discussion of territorial integrity by the ICJ in the Kosovo Advisory Opinion, which would suggest that non-state groups are not subject to the principle of territorial integrity.

⁴⁰ Hannum, *supra* note 26 pp. 41-50.

right of secession, there is no cogent reason to presume that the right of territorial integrity of states will always prevail over the right to self-determination.⁴¹ As Christian Tomuschat asserts “States are no more sacrosanct. [...] [T]hey have a specific *raison d’être*. If they fail to live up to their essential commitments they begin to lose their legitimacy and thus even their very existence can be called into question.”⁴² That is to say, territorial integrity is not an absolute. If we are to assume that sovereignty, and its corollary principle territorial integrity, incorporate rights and responsibilities to other states in the international order, and also to the population of the state, failure to meet these responsibilities will logically give way to consequences for the state.

Within the sphere of human rights, this *raison d’être* could be regarded as the responsibility to protect and implement human rights and individual freedoms⁴³ or to ensure the prevention of genocide and other crimes against humanity⁴⁴. Indeed, respect for human rights has become a pillar-principle of today’s world, in addition to the principles of sovereignty and non-intervention in the affairs of other states. In this context, if a state excludes or persecutes parts of its population, then that population might legitimately secede to form a more representative government.⁴⁵ Further, as Ved Nanda argues ‘....where violence is perpetrated by a minority to deprive a majority of political, economic, social and cultural rights, the principles of “territorial integrity” and “non-intervention” should not be permitted as a ploy to perpetuate the political subjugation of the majority’.⁴⁶ Therefore, the qualified remedial right of secession (just-cause and calculation of legitimacy theories of secession) can conceivably be maintained and even promoted on the international plane. Indeed, as David Raic notes an interpretation of self-determination and territorial integrity which would require a minority-people to remain within a state, despite severe infringement

⁴¹ D. Raic, *Statehood and the Law of Self-Determination* (Leiden, Brill, 2002) p. 311.

⁴² C. Tomuschat (ed.), *Modern Law of Self-Determination* (The Hague: M. Nijhoff, 1993), p.9.

⁴³ R. McCorquodale, “Self-Determination: A Human Rights Approach,” *International and Comparative Law Quarterly* 43 (1994) p.860.

⁴⁴ States are obligated to ‘prevent the crime of genocide’ under the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 278 (1951), however, like any human rights convention, it contains no threat of sanction, and no enforcement mechanism. Given the severity of the crime, perpetration by a State or failure to intervene should logically give rise to a remedial redress for the people subjected to the genocide.

⁴⁵ J. Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden: Brill, 2007) pp.343-344.

⁴⁶ V. P. Nanda, “Self-Determination Under International Law: Validity of Claims to Secede”, *Case Western Reserve Journal of International Law*, Vol. 13, 1981, p. 275.

of their right to self-determination – possible even to the extent that the continued physical existence of that people becomes threatened – would reduce self-determination to a ‘hollow shell’.

4. Seeking a Legal Basis for Remedial Secession

While it is thus arguable that remedial secession, as an aspect of the scope and content of self-determination, can in theory be accommodated on an international legal plane in light of the principle of territorial integrity, it must now be considered whether the notion of remedial secession has enough support in the recognized sources of international law to be considered an actual entitlement under international law.

I will now turn to analyse the major treaties and international instruments relating to self-determination, taking special consideration of the *travaux préparatoires* to observe whether remedial secession was envisaged as an implicit element of self-determination contained therein. The analysis will focus upon two crucial issues relevant to any notion of remedial secession: first, that sub-state groups and minorities are deemed a “people” eligible to exercise self-determination; and second, that what the “people” may determine is to separate from the parent state on the basis of a remedial justification. The analysis will then turn to examining a number of judicial decisions and the views of eminent legal scholars, who have pledged support for the notion of remedial secession.

4.1. Treaty Law

4.1.1. United Nations Charter

The Charter enunciates in Arts. 1(2) and 55 the principle of self-determination as one of the fundamental pillars upon which the newly formed international order would rest, providing that one of the purposes of the United Nations (hereafter UN) is “to develop friendly relations among nations on respect for the principle of equal rights and self-determination of peoples”. However, given that the articles provide only vague, although incendiary terminology on self-determination, to assess whether a

remedial aspect can be implied the *travaux preparatoire* must be examined to elucidate their intended content.

Two major views emerge from the debates held at the United Nations Conference on International Organisation in San Francisco in April 1945. First, it was strongly emphasised by some states that the principle of self-determination “corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated”.⁴⁷ The Soviet delegate claimed that all nationalities had sovereignty equality which in certain cases could become a right of secession.⁴⁸ He defined nationality in its broadest possible sense to mean national communities under alien subjugation. The Belgian delegate also noted that “in the expression ‘the peoples of self-determination’ the word ‘peoples’ means the national groups which do not identify themselves with the population of a state”.⁴⁹ This seems to advocate an extension of the right of self-determination to national groups which do not identify themselves with the population of their governing state. On the other hand we can observe States’ condemnation of the possibility that a right to self-determination would foster civil strife and encourage secessionist movements. The Colombian delegate noted that if self-determination were to be interpreted as connoting “the right of withdrawal of secession”, it would be regarded “as tantamount to international anarchy”.⁵⁰ The Syrian Rapporteur’s report to the Commission articulated that Syria stood firm on the position that in no uncertain terms could self-determination ever amount to a right of remedial secession by an ethnic or national group⁵¹. Eventually, the Committee responsible for the drafting process concluded that

“the principle conformed to the purposes of the Charter in so far as it implied the right of self-government to peoples and not the right of secession”.⁵²

4.1.2. Two Covenants⁵³

⁴⁷ UNICO, Doc 343, I/1/16 (1945).

⁴⁸ *Ibid*

⁴⁹ UNICO, Doc 374 I/1/17 (1945).

⁵⁰ UNICO, Doc 397 I/1/17 (1945).

⁵¹ *Ibid*.

⁵² UNICO, Doc 343, I/1/16 (1945).

⁵³ ICCPR, ICESCR

With the inception of the two Covenants issued by the UN in 1966, self-determination was expanded in both content and scope. Common Article 1 declared that ‘all peoples have the right to self-determination’, and in addition to free determination of political status in an external sense Art. 1(1) articulates the idea of self-determination as an ongoing, universal right - the right of a people to freely develop its own system within the state. According to Antonio Cassese, the ongoing right to self-determination presupposes the all members of a population be allowed to exercise those rights and freedoms which permit the expression of a popular will – it thus evokes the democratic ideals of its inception in the Enlightenment.⁵⁴ Cassese goes on to explain that ongoing self-determination is best explained as a manifestation of the totality of rights embodied in the Covenant, and that only when all individuals are afforded these right scan it be said that a whole people enjoys the right of internal self-determination.⁵⁵ However, does the imposition of a direct right of self-determination for all peoples, envisage any form of remedial redress in the form of secession?

Turning to the *travaux préparatoire*, similar concerns to those mentioned above were raised at the committee stage. The Iranian delegate cautioned that, “if self-determination was misused and considered an absolute right nothing but anarchy would ensue” and cautioned that, “no country would be in existence if every national, religious and linguistic group had an absolute and unrestricted right to self-determination”.⁵⁶ Nevertheless, the US, UK, Greece, New Zealand, Denmark Afghanistan and other Asian, African and Latin American countries emphasised that the right should apply to peoples oppressed by despotic governments.⁵⁷ The position was also taken by India which noted that “individual and political rights could not be implemented if the people to whom they had been granted lived under a despotic regime...the will of the people should be the basis for the authority of government”.⁵⁸ This may necessarily envisage a right to secession, where the only possible exercise of self-determination to refute despotic power is external self-determination. The articulation of self-determination providing freedom from despotism together with the inclusion of Art. 27 on minority rights and protections could be read cumulatively to

⁵⁴ Cassese *supra* note 6 p. 68.

⁵⁵ *Ibid.*

⁵⁶ UN Doc A/C/3/SR/888 (1950).

⁵⁷ UN Doc A/C/3/SR 310 (1950).

⁵⁸ *Ibid.*

suggest that minorities are entitled to a right to free themselves from majority rule where their Art. 1 and 27 rights are not respected. However, an examination of the preparatory work suggests that the question of whether the term ‘peoples’ could refer to sub-state groups was contentious⁵⁹. Some states expressly contemplated that the right would be available to subgroups within independent states; several proposed that the definition of people in the ICCPR include “large compact national groups”, “members of a group inhabiting a compact territory to which they belong, ethnically, culturally, historically, or otherwise”, “racial units inhabiting well-defined territories”, and even “ethnic, religious and linguistic minorities”.⁶⁰ However, in 1950, Afghanistan and Saudi Arabia, the authors of the draft resolution regarding the article of self-determination, deleted the word ‘peoples’ from their draft “at the suggestion of delegations which feared that its inclusion might encourage minorities within a State to ask for the right of self-determination”. Although the term ‘peoples’ was eventually reintroduced, according to Cassese, it was only done on the clear understanding that it was not intended to refer to minorities⁶¹.

4.1.3. Conclusion

Reviewing the *travaux préparatoire* of both the UN Charter and the Two Covenants, it must be concluded that States did not intend the respective provisions of self-determination to include any aspect of secession, even under a remedial justification. We can deduce that little or no support exists within these instruments for an extension of the term ‘peoples’ to include sub-state groups or minorities, nor for the exercise of self-determination to include the possibility of secession outside the colonial context.

4.2. Other Instruments

4.2.1. The Declaration on the Granting of Independence to Colonial Peoples

⁵⁹ *Ibid.*

⁶⁰ M. Bossuyt, *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (Boston, MA: M. Nijhoff Publishers, 1987), p.32.

⁶¹ Cassese *supra* note 6 p. 61.

*The Declaration on the Granting of Independence to Colonial Countries and Peoples*⁶² recognises the right of peoples subject to “alien subjugation, domination and exploitation” in the colonial context to have the opportunity to decide for themselves their international status, of which independence is an option. Resolution 1514 (XV) notes that

All peoples have the right to self-determination; by virtue of that right they have freely to determine their political status and freely pursue their economic, social and cultural development⁶³

That the right is made in reference to “subjugation, domination and exploitation” presupposes a certain remedial quality inherent in decolonisation. It links the furtherance of independence with the breach of a people’s self-determination under colonial regimes, and can therefore seem analogous to the case for remedial secession. Indeed, decolonisation, while largely carried out with the blessing of the former parent state, was often implemented where that parent state was resolvedly opposed⁶⁴. James Crawford identifies such instances as “secession in furtherance of self-determination”⁶⁵, and points to the cases of Indonesia’s independence from the Kingdom of the Netherlands⁶⁶, and the Democratic Republic of Vietnam’s independence from France.⁶⁷ In these instances, despite not obtaining recognition from the parent state for several years, they were recognised as *de facto* states.

While the colonial right of external self-determination is available only to ‘non self-governing territories’⁶⁸, so far as remedial secession is concerned, it may be possible to construe this provision as applying to distinct groups inhabiting a specified territory within a state who are treated in such a way by the central government that they may become in effect non self-governing territories with respect to the rest of the State.

⁶² G.A. Resolution 1514 (XV) UN DOC. A/4684 (1960)

⁶³ *Ibid*, principle 2.

⁶⁴ Portugal refused to list its overseas territories as colonies eligible for independence, leaving the UN no other choice than to enact GA Res 1542 (1960) forcefully listing the territories in opposition to Portugal’s official stance.

⁶⁵ J. Crawford, *Creation of States under International Law*, 2nd edition (Oxford: OUP 2006) p.384.

⁶⁶ Indonesia leaders declared the Republic of Indonesia on 17 August 1945. While sovereignty was not transferred until 27 December 1949, it was recognised as a *de facto* state by the Netherlands itself and by a number of other States; in addition other States accorded *de jure* recognition (from Crawford *supra* note 65 p. 384).

⁶⁷ Vietnam declared its independence in 1945. While not achieving formal statehood until 1956, as in the Indonesian case, several State recognised Vietnam, and France even accorded *de facto* recognition to some extent. (from Crawford *supra* note 65 p. 385).

⁶⁸ UN Charter Art.73; *Declaration on Granting Independence to Colonial Peoples and Countries*; *East Timor*, *supra* note 14, p.90.

While Resolution 1514 suggests geographical separation, which is usually taken to mean separation across land and sea, according to James Crawford, “there is nothing to suggest that other defining characteristics, including historical boundaries or de facto boundaries established through the hostile action of the government in question might not also be relevant.”⁶⁹ The inclusion of the requirement of a relationship between the territory and the administering state as one which arbitrarily places the latter in a position of subordination, according to Crawford, seems to suggest that measures discriminating against the people of a region on the basis of ethnicity or culture may define the territory concerned as non-self-governing.⁷⁰

Thomas Frank formulates a similar argument stating

[in case of] a minority within a sovereign state – especially if it occupies a discrete territory within that state – [which is] persistently and egregiously denied political and social equality and the opportunity to retain its cultural identity... it is conceivable that international law will define such repression, prohibited by the Political Covenant, as coming within a somewhat stretched definition of colonialism. Such repression, even by an independent state not normally thought to be ‘imperial’ would give rise to a right of ‘decolonization’⁷¹

This internal colonisation approach would support a right of remedial secession. However, as Frank himself acknowledges, the approach is “stretching” the concepts and definitions, and seems to be somewhat artificial.⁷² Ioana Cismas argues that it would be incorrect to equate a right to independent statehood of peoples under colonial regime or foreign occupation with the right to secession.⁷³ Indeed, state practice, and statements by the UN, throw weight behind the notion that geographical separation must be significant to ensure that the exercise of decolonisation is in conformity with the principle of *uti possidetis juris*⁷⁴.

⁶⁹ Crawford *supra* note 65, p.126.

⁷⁰ *Ibid.*

⁷¹ T. M Frank, “Postmodern Tribalism and the Right to Secession”, in: Brolmann (ed) *Peoples and Minorities in International Law* (The Hague: M. Nijhoff, 1991) pp. 13-14.

⁷² *Ibid*

⁷³ I. Cismas, “Secession in Theory and Practice: the Case of Kosovo and Beyond”, (2010) *Goettingen Journal of International Law* 2, p542.

⁷⁴ As a general principle of international law *uti possidetis juris* provides that a newly independent State must retain its former borders (*Frontier Dispute (Burkina Faso v. Republic of Mali)* ICJ Reports 1986 p. 567.

4.2.2. Friendly Relations Declaration

The Friendly Relations Declaration⁷⁵ has been characterised by the International Commission of Jurists (hereafter ICmJ) as “the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity”⁷⁶. In view of its unanimous approval in the General Assembly (hereafter GA) and the extensive legal debates and political negotiations amongst states which preceded it, the Declaration is considered as an interpretation by the member states of the obligations under the Charter⁷⁷ and was proclaimed as customary law by the ICJ⁷⁸. After affirming that all peoples have the right to self-determination, the Declaration states in paragraph V

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

Despite the formulation of this provision in the form of a *saving clause*, it connotes the recognition of the right to self-determination also to peoples within existing states, as well as the necessity for governments to represent the governed. The latter outcome is reached by an *a contrario* reading of paragraph 7 in light of the state’s duty to promote respect for an observance of human rights and fundamental freedoms in accordance with paragraph 3. The underlying rationale of the *saving clause* of the Declaration, it can be said, is that when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise this right externally by means of secession.

⁷⁵ GA Res. 2625 (XXV), Oct. 24, 1970, U.N. Doc.A/RES/2625(XXV).

⁷⁶ *East Pakistan Staff Study* [East Pakistan Study], International Commission of Jurists, (1972) ICJR Vol 8 p. 44.

⁷⁷ S. Hillebrink, *The Right to Self-Determination and Post-Colonial Governance: The Case of the Netherlands Antilles and Aruba* (Cambridge: CUP 2008) p. 22.

⁷⁸ *Kosovo Advisory Opinion*, para 80, see *infra* chapter IV discussion of ICJ’s Kosovo Advisory Opinion.

Looking to the drafting process of the Declaration it could be argued that Paragraph 7 implicitly endorses the legitimacy of secession in the case of unrepresentative or discriminatory governments. While there were states, such as the UK, who expressed the opinion that the right of self-determination did not entitle minority peoples to secede,⁷⁹ other states, most notably from the Eastern Bloc, favoured a broad construction which could include a right to secession⁸⁰. The Netherlands delegate proposed the following construction:

If, for example – in the opinion of the world community - basic human rights and fundamental freedoms which imposed obligations on all States, irrespective of their Sovereign will, were not being respected by a certain State vis-à-vis one of the peoples living in its territory, would one in such an instance – whatever the implications – wish to prevent the people that was fundamentally discriminated against from invoking its right to self-determination? The concept of self-determination was based on the right of collective self-expression and it was conceivable that there were cases, albeit exceptional, where a people within a State had, or might have in future, the right to self-determination.⁸¹

Such views support the interpretation expressed by many scholars of a qualified right to remedial secession.⁸²

According to Cassese, a close analysis of both the text of the Declaration and the preparatory work warrants the contention that secession is not ruled out but may be permitted only when very stringent conditions have been met.⁸³ The basis for this conclusion is that the clause prefaces the territorial integrity of states, underscoring that it may be considered the primary principle. A different conclusion may be reached of course in light of the Kosovo opinion, in which it is stated that the principle of territorial integrity applies only between states⁸⁴. He suggests that a literal reading of the paragraph supports the conclusion that the text provides a right to

⁷⁹ UN Doc. A/AC 125. SR.69 (1967) p. 19.

⁸⁰ UN Doc. A/AC 125.SR. 106 (1969) p. 62.

⁸¹ UN Doc A/AC.125.SR 107, 5 (1969) p. 85.

⁸² see R. Rosenstock, "The Declaration on Principles of International Law", (1971) 65 *AJIL*, p.732; P. Thornberry, "The Democratic or Internal Aspect of Self-determination", in: Tomuscat, C. (ed.) *Modern Law of Self-Determination* (The Hague: M. Nijhoff Publishers, 1993) p.108. Raic, *supra* note 41 at pp. 336-338.

⁸³ Cassese, *supra* note 6 p. 113.

⁸⁴ *Kosovo Advisory Opinion* para 81, see *infra* chapter IV discussion of Kosovo Advisory Opinion

groups that are refused participatory rights and experience gross and systematic violation of their fundamental rights on the grounds of their race, creed, or religion. He would support the conclusion that it only a right conferred to racial or religious groups, not linguistic, cultural or national minorities. By this, Cassese argues, “the drafters made it clear that self-determination was not considered a right held by the entire population of an authoritarian state”⁸⁵. However, Malcolm Shaw argues that a theory based on an inverted reading of the safeguard clause is problematic

Such a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed before the qualifying clause in the provision in question.⁸⁶

4.2.3. Vienna Declaration

With the adoption of the 1993 Vienna Declaration and Program of Action⁸⁷ by the UN Conference on Human Rights, the principle contained within the Friendly Relations Declaration was expanded somewhat. The articulation in the Vienna Declaration reiterates that a government is only entitled to the protection of its territorial integrity or political unity where it is representative. However, the clause removes the phrase, “without distinction as to race, creed or colour” and replaces it with “without distinction of any kind”⁸⁸. This would suggest that the confinement of the principle of remedial secession is not limited to racial or religious groups.

4.3. Conclusion

It can thus be concluded that the only international instruments which arguably contain a reference, and then only implicitly, to a right of remedial secession are the Friendly Relations and Vienna Declarations. Indeed, the inverse reading of paragraph 7 of the Friendly Relations Declaration is widely cited as the basis for most doctrinal

⁸⁵ Cassese *supra* note 6 p. 114

⁸⁶ M. Shaw, “Peoples, Territorialism and Boundaries,” *European Journal of International Law* 8, no. 3 (1997): 478–507, 483.

⁸⁷ A/Conf. 157/24, 25 June 1993.

⁸⁸ *Vienna Declaration* principle 2.

arguments in favour of a right to remedial secession. However, given that many some scholars still question whether this reading is feasible, and that the weight of these declarations as sources of international law is very much disputed, they may not be sufficient to confidently assert the existence of an enforceable legal right.

As it is clear that we will “search in vain”⁸⁹ for an express recognition of remedial secession in international instruments and treaties, it necessary to consult some of the subsidiary sources of law, namely judicial decisions and the views of eminent legal scholars, where support for remedial secession can be gauged.

4.4. Judicial Decisions

4.4.1. The Åland Islands Decision

As the first international legal arbitration concerning self-determination, the Åland Islands case provides the first judicial articulation of the question of secession. In 1920 the ICmJ was called upon by the Council of the League of Nations to determine whether the inhabitants of the Åland Islands were free to secede from Finland and join the Kingdom of Sweden based upon a right of self-determination. The first report issued by the Committee of Jurists regarding whether the question fell within the competence of the League of Nations stated that

Positive International Law does not recognise the right of national groups, as such to separate themselves from the State of which they form a part by the simple expression of a wish, any more than it recognises the right of other States to claims of such a separation⁹⁰

While the Commission ultimately decided that the Islands would remain part of Finland⁹¹, their second Report is of particular significance to the notion of remedial secession. The Commission delved into the link between self-determination and minority protection, and delineated, on the basis of general principles of law and

⁸⁹ Raic *supra* note 41 p. 317.

⁹⁰ *The Åland Islands Question, Report of the Committee of Jurists*, (1920) LNOJ Spec Supp No. 3. p.5.

⁹¹ League of Nations, *Report presented to the Council of the League by the Commission of Rapporteurs*, Council Doc. B7/21/68/106 (1921) [Åland Islands Report] para 21.

justice, policy lines that the international community ought to adopt.⁹² In noting that states had an obligation to provide guarantees and safeguards to ethnic or religious minority groups under their sovereignty under the principle of self-determination, they concluded that there might be cases where the minority protection might not be regarded as sufficient.⁹³ These cases, they asserted, arose where states at issue manifestly abused their authority to the detriment of the minority, by oppressing or persecuting its members, or else proved powerless to implement the required safeguards⁹⁴. In such cases it could be exceptionally allowed to permit the right of “separation” of the minority from the State

The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.⁹⁵

4.4.2. Katangese Peoples’ Congress v. Zaire

The question of remedial secession was raised in the African Commission on Human and Peoples’ Rights in the Katangese Peoples’ case. In 1992, the President of the Katangese People’s Congress, the only political party representing the people of Katanga, submitted a communication under Art 65(5) of the African Charter in which the Commission was requested to recognise the Katangese Peoples’ Congress as a liberation movement and the right of the Katangese people to secede from Zaire.⁹⁶

The Commission first observed that the right of self-determination was applicable in the case and subsequently clarified that the right might be exercised in a variety of ways, including “independence, self-government, federalism, confederalism, unitarism or any other form of relation that accords with the wishes of the people, but fully cognizant of other recognised principles such as sovereignty and territorial integrity”⁹⁷. It then continued

⁹² Cassese, *supra* note 6, pp. 30-31.

⁹³ *Ibid.*

⁹⁴ Åland Islands Report. p.28

⁹⁵ *Ibid.*

⁹⁶ African Commission on Human and Peoples’ Rights, Communication 75/92, *Katangese Peoples’ Congress v Zaire*, Decision taken at its 16th Secession, Banjul, The Gambia (1992).

⁹⁷ *Ibid* para 26.

[t]he Commission is obligated to uphold the sovereignty and territorial integrity of Zaire....in 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 Zaire 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 Zaire⁹⁸

The statements suggests that the Commission was of the opinion that in the case of serious violations of human rights and a denial of internal self-determination (access to government), the Katangese people would be entitled to exercise external self-determination in seeking their independence from Zaire⁹⁹. However, in the absence of such conditions Katanga would be expected to exercise the right to self-determination internally.¹⁰⁰

4.4.3. *Loizidou v Turkey*

In the 1997 case of *Loizidou v Turkey*, before the European Court of Human Rights, Judges Wildhaber and Ryssdal argued that

In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to reestablish international standards of human rights and democracy.¹⁰¹

Their concurring opinion obviously adopts the remedial secession argument and accepts the possibility of secession in situations where peoples are oppressed by and/or not adequately represented within the political structures of their parent states

⁹⁸ *Ibid* paras 27-28.

⁹⁹ Raic *supra* note 41 p. 330.

¹⁰⁰ *Ibid* p.331.

¹⁰¹ *Loizidou v Turkey* (1997) 23 EHRR 244 (European Commission of Human Rights), 535 (Judge Wildhaber concurring, joined by Judge Ryssdal).

4.4.4. Re Secession of Quebec

By far the most important pronouncement lending support to the notion of remedial secession is the Canadian Supreme Court decision in the *Quebec Secession Reference*. In reference to the possibility of a secession attempt by the Quebec province, the Court was asked to consider whether international law provides a right of secession, and whether the right of self-determination would give the people of Quebec the right to unilaterally secede from Canada. The Court observed that while self-determination is normally exercised within the borders of an existing state there are certain defined contexts within which international law does allow the right of self-determination to be exercised externally

[i]n situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.¹⁰²

The Court of Canada also attempted to define the meaning of the term “people” for the purpose of the right to self-determination as follows:

. It is clear that a “people” may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to “nation” and “state”. The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state’s population¹⁰³

The Court continued by noting that a number of commentators have asserted that

[w]hen a people is blocked in the meaningful exercise of its rights to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent ‘the whole people belonging to the territory without distinction

¹⁰² *Reference re Secession of Quebec* para 138.

¹⁰³ *Reference re Secession of Quebec*, [1998] para. 124.

of any kind’ adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession¹⁰⁴

The Court, however, held that these circumstances were not met in the case of Quebec,¹⁰⁵ and the pronouncement remained an *obiter dictum*.

4.5. Juristic Opinion of Eminent Legal Scholars

In addition to support contained within judicial opinion, remedial secession has been promoted in the work of eminent legal scholars. However, as James Summers points out, most writers express their support for remedial secession rather cautiously by claiming that such a right ‘perhaps’ or ‘possibly’ exists.¹⁰⁶ Indeed it must be said that most apply a *lex ferenda* approach to the subject, which does not provide considerable weight to making out the existence of the right.

We can observe support for the concept emerging in natural law doctrines from the 16th century onwards. Hugo Grotius, one of the first proponents of a right of secession in international law, conceded a right to minority secession under extreme circumstances.¹⁰⁷ According to Grotius a segment of the state’s population is not entitled to unilaterally withdraw from the state “unless it is evident that it cannot save itself in any other way”¹⁰⁸. This view was supported by other theorists such as Emmerich de Vattel, and John Locke, who noted that a right of resistance can arise where legislative power assumes a tyrannical character.¹⁰⁹ De Vattel denies the right of secession so long as the sovereign does not exceed the powers granted to him under the social compact, stating that an exercise of the right to resistance is legitimate only in “a case of clear and glaring wrongs”¹¹⁰. Locke concludes that individuals, upon their entrance into society, retain an inherent right to resist oppressive civil authority, however, that this will only be taken in the wake of “a long train of abuses,

¹⁰⁴ *Ibid* para 134.

¹⁰⁵ *Re Secession of Quebec* para 135.

¹⁰⁶ Summers, *supra* note 45, p.347.

¹⁰⁷ H. Grotius, 2 *De Jure Bellis Ac Pacis Libri Tres*, (1646) 1925 ch. 6 para 4, in: Bucheit *supra* note 35, p. 53.

¹⁰⁸ *Ibid*.

¹⁰⁹ J. Locke, *Two Treatises of Government* (1764), para 168, in Raic *supra* note 41 p. 311.

¹¹⁰ E. de Vattel, *The Law of Nations* (1916) Bk. 1, Ch 4 para 54 in: Bucheit *supra* note 35 p. 53.

prevarications and artifices”¹¹¹. In summary, these prevalent theories are highly qualified, and cautiously avoid promoting an absolute right of secession.

Support for remedial secession has gained strength in more recent scholarship. The main argument of the academic proponents is well-captured by Allen Buchanan who states

If the state persists in serious injustices toward a group, and the group’s forming its own independent political unit is a remedy of last resort for these injustices, then the group ought to be acknowledged by the international community to have the claim-right to repudiate the authority of the state and to attempt to establish its own independent political unit.¹¹²

The academic proponents of remedial secession thus tend to see secession as a ‘qualified right’ which is triggered by oppression.¹¹³ At the same time, it is viewed as an exceptional, last-resort solution. Antonio Cassese, one of the foremost scholars on self-determination, concludes that secession “is not ruled out but may be permitted only when very stringent requirements have been met”¹¹⁴. He continues, stating that such a situation may exist when the central authorities of a sovereign state persistently refuse to grant participatory rights to a people, grossly and systematically violate their fundamental rights, and deny the possibility of a peaceful settlement within the framework of the existing state¹¹⁵. Lee Bucheit notes that “at a certain point, the severity of the State’s treatment of its minorities become a matter of international concern [which] may finally involve an international legitimization of a right to secessionist self-determination”¹¹⁶. According to Hurst Hannum, secession should be supported by the international community in the presence of massive and discriminatory human rights violations, approaching the level of genocide¹¹⁷. It would seem that most scholars would agree that this point is the serious violation or denial of internal self-determination of the people concerned, together with widespread violations of fundamental human rights, with no other realistic and effective remedies

¹¹¹ *Ibid.*

¹¹² Buchanan, *supra* note 25, p.335.

¹¹³ Raic *supra* note 41, p. 323.

¹¹⁴ Cassese, *supra* note 6, pp. 119-20.

¹¹⁵ *Ibid.*

¹¹⁶ Bucheit, *supra* note 35 p. 222.

¹¹⁷ Hannum sees only those ‘rare circumstance when the physical existence of a territorially concentrated group is threatened by gross violations of fundamental human rights’ as giving rise to remedial secession, Hannum, *supra* note 26, pp. 46-47.

available.

5. Conclusion

In summary, the *lex lata* vs *lex feranda* status of remedial secession may best be summed up by the findings of the Supreme Court of Canada: “it remains unclear whether this[...] actually reflects an established international law standard”¹¹⁸

While there is a conspicuous absence of express legal pronouncements on the matter, the support observed from judicial opinions and legal scholars does lend credence to the notion of remedial secession proposed earlier in this chapter. Namely that where a State subjects a sub-state group or minority to discriminatory treatment in breach of their internal right to self-determination, it may no longer rely upon the principle of territorial integrity to prevent that group seceding to form a new state. However, it is suggested that this right would only be available in cases involving grave and widespread human rights abuses with no other means of redress.

Still, it is questionable whether remedial secession has enough support in legal doctrine and state practice to be considered an actual entitlement under international law. Therefore, it now needs to be considered whether remedial secession has been approved in state practice.

III. State Practice

1. Introduction

Having defined the legal notion of remedial secession in theory and law and ascertained that there is some legal support for the existence of a qualified right of

¹¹⁸ Re Secession of Canada para 75

remedial secession, it is now necessary to turn to an examination of the pertinent practice of states to test the foregoing framework. Surveying state practice, we can observe that since 1945 there have been few examples in which the international community has recognised any claim to unilateral secession. Where unilateral secession has been successful however, we can observe that many of the common elements upon which the theory of remedial secession is prefaced are present. The following chapter will therefore present a detailed analysis of three case studies in order to assess whether support for the theory of remedial secession can be observed. In regard to the selected approach, it must be noted that any case study pertaining to secession and statehood will necessarily involve a number of complex geo-political factors. Therefore it is necessary to present a detailed factual overview to best contextualise the legal and political elements present in each. Last, we will consider whether the state practice is sufficient to observe an emergent customary international legal rule.

2. Delimitation of Cases Examined

While many authors will point to the large number of failed secession attempts to draw the conclusion that remedial secession cannot be supported in state practice,¹¹⁹ they fail to differentiate between secession attempts in further of a primary right of self-determination (under the choice or national secession theories) most of which have necessarily failed¹²⁰, and those pursued in accordance with remedial secession.

I have confined the scope of this study to examples of unilateral secession that are widely understood as evidencing the doctrinal theories of remedial secession given earlier. That is, that they exhibit many of the attributes identified as the proposed criteria of remedial secession. Two cases in which the right to secession were recognised are the emergence of Bangladesh and of Croatia. Both states have been universally recognised, leading one commentators to conjecture that “success is still relevant...to the question of who may or who may not exercise the ‘right’ of self-

¹¹⁹ T. Jaber, “A Case for Kosovo? Self-Determination and Secession in the 21st Century” (2010) *International Journal of Human Rights*, published 28 July 2010 (iFirst)

¹²⁰ See for example, Katanga, Kashmir, East Punjab, Western Australia, The Karen and Shan States, Quebec, The Faroe Islands etc

determination”¹²¹. A third, Biafra, will allow us to examine an example of a failed remedial secession bid.

Two other cases of seemingly successful remedial secessions are Eritrea and East Timor. Both exhibited evidence of gross human rights violations and breach of internal self-determination, however it is arguable that they were exercising a long overdue right of colonial self-determination, and thus have been left out for the purposes of this study.

A) Bangladesh

a) Introduction

Bangladesh’s secession from Pakistan in 1971, and its subsequent recognition by the world community, is often used as a basis for asserting the legitimacy of secessionist struggles. According to David Raic, from the standpoint of the prevailing doctrine of a qualified right of secession, the question of whether the people of East Bengal were entitled to secede from Pakistan can only be answered in the affirmative.¹²² James Crawford suggests that the situation in East Bengal was a clear illustration of *carence de souverainete*, that is to say, a clear illustration of a situation in which a distinct and clearly identifiable group of people were seriously discriminated, ultimately completely excluded from the government of the state, and the victim of massive violations of fundamental human rights, including the right to life¹²³.

b) Background

i. Formation of Pakistan

The State of Pakistan was created in 1947 as a result of the partition of India and the British departure from the Indian subcontinent.¹²⁴ The powerful Muslim league ensured that the *Indian Independence Act* recognised their wish for a single Islamic

¹²¹ M. Pomerance, *Self-Determination in Law and Practice* (M. Nijhoff: The Hague, 1982) p. 20.

¹²² Raic, *supra* note 41 p. 341.

¹²³ See Crawford *supra* note 65 p. 126.

¹²⁴ Raic *supra* note 41 p. 335.

state in the region, and Pakistan was formed.¹²⁵ The unitary State of Pakistan consisted of two territorial units separated by 1200 miles of Indian territory, West and East Pakistan (East Bengal). The two units did not possess a common language, culture, economy or history, but were united by a common religion, Islam.¹²⁶

ii. Events Leading to Secession

From its inception, there were serious political and economic disparities between the Western and Eastern parts of Pakistan¹²⁷. East Pakistan experienced under-representation in government and civil institutions, there was an uneven wage gap in average income, and the majority of public investment funds were spent in West Pakistan¹²⁸.

When, in 1958, civilian rule was replaced by a military government under the presidency of General Ayub Khan, the chief of the military, the new regime immediately took several repressive measures among which the banning of political parties¹²⁹. In 1962 when political parties were once again allowed to function again, the Awami league, the dominant Bengali party, demanded full autonomy for East Bengal as the only means of redressing the disparity between West and East¹³⁰. The Awami League and its six-point plan for East Pakistan's autonomy and a federal system for Pakistan, gained wide support, which undermined the political legitimacy of Ayub Khan¹³¹. The latter stood down in 1969 and was replaced by Army Commander in Chief Yahya Khan, who promised to hold general elections to a National Assembly of Pakistan¹³².

The elections held in 1971 were a turning point in the nation's history. It marked the emergence of a fully-formed Bengali national consciousness which led to the Awami League winning an overwhelming majority (160 out of 162 seats) in East Pakistan,

¹²⁵ *Ibid.*

¹²⁶ East Pakistan Study *supra* note 76 p. 24.

¹²⁷ Raic, *supra* note 41 p. 336.

¹²⁸ S. R. Chowbury, *The Genesis of Bangladesh* (New York: Asia Publishing, 1972) pp. 9-11.

¹²⁹ Raic *supra* note 41 pp 336.

¹³⁰ Chowbury *supra* note 128 p. 42.

¹³¹ *Ibid.*

¹³² Raic, *supra* note 41 p. 337.

which in turn provided them with a majority in the National Parliament (300 seats in all).¹³³ In the months following the election the majority party in West Pakistan led by Zulfikar Bhutto initially offered a measured support for cooperation with the Awami League. However, this initially thaw was short lived¹³⁴. The political conflict between the two parties intensified, which led to Yahya Khan suspending the inaugural session of the National Assembly on March 1¹³⁵. From this point onwards the situation in East Pakistan steadily deteriorated. The people and the Awami League, feeling that their democratic rights had been subverted began a wave of civil disobedience, which was generally peaceful.¹³⁶ In response, however, the army was ordered to move in and a curfew was imposed.¹³⁷

iii. Military Intervention

On 25 March 1971 things took a dramatic turn for the worse, and a full blown military campaign was commenced.¹³⁸ Within the first 24 hours, thousands of civilians were killed and widespread violations of other fundamental human rights were committed by the army¹³⁹. In response Sheikh Mujibur Rahman, leader of the Awami League proclaimed the independence of Bangladesh on 26 March.¹⁴⁰ On the same day Rahman and a number of other Awami League leaders were imprisoned.¹⁴¹ On 10 April, those leaders who had not been taken into custody adopted the Proclamation of Independence Order made retroactive from March 26, which made it clear that the proclamation was a measure of last resort based upon “the legitimate right of self-determination of the people of Bangladesh”.¹⁴²

The atrocities committed during the military occupation by the Pakistani army, the Pakistani police and a paramilitary force known as the Razakars were extreme, with

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Bucheit, *supra* note 35, pp. 201-202.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Raic *supra* note 41, p. 338.

¹⁴⁰ Crawford *supra* note 65 p. 393.

¹⁴¹ Bucheit *supra* note 35 p. 206.

¹⁴² Bangladesh Documents 1972 p. 281-282 in Raic *supra* note 41 p. 338.

over one million Bengalis killed and some 10 million driven into exile in India¹⁴³. The army eliminated all known supporters of independence, and carried out massacres at Dacca University, directly targeting both the Hindu minority and the rural population¹⁴⁴.

iv. India's Intervention

India became directly involved in the conflict through a pre-emptive attack by West Pakistan warplanes on airfields in Indian on 3 December 1971.¹⁴⁵ Not only did India respond with armed force to the military action, but it also recognised the independence of Bangladesh on 6 December¹⁴⁶. Indeed between January and May 1972, Bangladesh was recognised by some 70 states¹⁴⁷. India defended its military action on the ground that Bangladesh was an independent state and that its military action was means to secure Bangladesh's independence.¹⁴⁸ India also argued that its actions were justified to prevent loss of life and to facilitate external self-determination. According to India, it was beyond doubt that the right of self-determination was applicable to the people of East Pakistan, as the policy of the central Pakistani government amounted in their eyes to a form of neo-colonialism¹⁴⁹.

c) Elements of Bangladesh's Secession

There are a number of factors which are considered of relevance to the success of the Bangladeshi claim to secession: the discrimination against East Pakistan, the geographic bifurcation of East and West Pakistan; the human rights abuses bordering on genocide taken by the Pakistani army; and the intervention of the Indian army. The first three factors have a direct bearing upon the question of legitimacy, and the third recalls the geopolitical factors required for a successful claim to be realised

¹⁴³ Easy Pakistan Study *supra* note 76 pp. 26-41.

¹⁴⁴ *Ibid.*

¹⁴⁵ Raic *supra* note 41 p. 339.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ UN Doc. S/PV 1606 4 Nov 1971 paras 97-100.

i. The Claimants

It is generally uncontested that the Bengalis constituted a discernable ethnic and national group, sharing a common language, history and culture.¹⁵⁰ Further, they possessed a sense of self-identification and the political will to take action in the interests of the 'self, as well as occupying an obviously separate territorial unit.

ii. Discrimination Against East Bengal

There is no shortage of evidence demonstrating that the population of East Pakistan had experienced a sustained discrimination and breach of their internal self-determination, with no hope of national or international redress.¹⁵¹ At a government level all but one of the ministerial appointees had been from the West¹⁵². The official language of Pakistan became Urdu despite the fact that the majority (55%) in the East spoke variations of Sanskrit and were opposed to the imposition of Urdu.¹⁵³ The Army was almost exclusively West Pakistani. On an economic level the inequitable distribution of power was keenly felt¹⁵⁴. Estimates for the period from 1958 to 1968 speak of an annual budget in which civil expenditure for the respective regions amounted to 62% for the West and 38% for the East, with nearly all major industrial projects and the majority of foreign aid allocated to the West¹⁵⁵. There is little doubt that the government's aim was to improve the economic position of the West, and thus consolidate its political primacy.¹⁵⁶ This led to neglect in the East, including failing to provide assistance to flood affected areas. The 1965 Indo-Pakistan War and a serious cyclone in 1970 added further economic woes to the region¹⁵⁷. The denial in 1971 of the Awami League's place as the majority party in the National Assembly was the final catalyst that plunged the country into civil war.

¹⁵⁰ V.P Nanda "Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect" in Y. Alexander and R.A Friedlander (eds) *Self-Determination: National, Regional and Global Dimensions* (Boulder, CO: Westview, 1980) p. 208.

¹⁵¹ East Pakistan Study *supra* note 76 p. 37

¹⁵² V. P. Nanda "Self-Determination in International Law: The Tragic Tale of Two Cities: Dacca and Islamabad" (1972) 66 *AJIL* p. 321.

¹⁵³ Nanda, *supra* note 150 p. 209.

¹⁵⁴ Nanda *supra* note 152, p. 323.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

iii. Human Rights Abuses

David Raic suggests that it is reasonable to argue that the extreme amount of suffering of the Bengalis has played a significant role in the international community's evaluation of the legitimacy of the claim to secession¹⁵⁸. R.S Choudhury, the Pakistani member of the UN Human Rights Commission, described the action as "atrocities unparalleled in history"¹⁵⁹. The action encompassed racial discrimination and religious persecution, which together with the scale of the atrocities suggest a policy of genocide was being followed. A Pakistani officer stated:

We are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years¹⁶⁰

Estimates of a death toll are between 1 and 4 million, with Pakistan even admitting deaths in the range of a quarter of a million¹⁶¹. One commentator stated:

This was organised killing, this is what is terrifying about it. It was not being done by mobs. It was a systematic organised thing¹⁶².

With the extent of the action taken by the Pakistan army and police and paramilitary force, it could no longer be argued that Pakistan was a state conducting itself "in compliance with the principle of equal rights and self-determination of peoples", and that the Government had in effect foregone the right to legally govern East Pakistan.

iv. Geographic Bifarcation

Bangladesh's geographic separateness from the rest of Pakistan meant that the risk of a breach of territorial integrity was not keenly felt. The lack of geographical contiguity and the 1200 miles separating the two regions singled it out as a unique situation, which could not lead to a wide precedent forming and engendering a

¹⁵⁸ Raic, *supra* note 41 p. 341.

¹⁵⁹ New York Times, May 30th 1971 p. 5 c.1 quoted in Nanda *supra* note 152, p. 332.

¹⁶⁰ ICJ Press Release, Aug 16, 1971, pp. 3-4.

¹⁶¹ East Pakistan Study *supra* note 76, p. 33.

¹⁶² Anthony Macarenhas quoted in Nanda *supra* note 152 p. 336.

domino effect as was feared with Biafra's secession on the African continent¹⁶³. Further, this separation also meant that East Pakistan's separation would not undermine the West Pakistani State, as the latter did not depend on the former for its political stability or for its economic viability.¹⁶⁴ This can be said to distinguish Bangladesh's claim from the unsuccessful claims of Katanga from Congo¹⁶⁵, and Biafra from Nigeria¹⁶⁶.

v. Indian Intervention

The Indian intervention was probably most instrumental to the success of the Bangladeshi secession. Without the support of the largest power on the subcontinent, it would have been impossible to form a viable political entity in the region¹⁶⁷. Given India's concerns about the possibility of a secessionist movement in its own region of West Bengal, it could have easily hesitated in lending support fearing a domino effect in the region.¹⁶⁸ However, India refused to lend support for Pakistan's territorial integrity in the face of the human rights disaster in Bangladesh.¹⁶⁹

d) Reaction of the Pakistani Government

The Pakistani government rejected all attempts by the Awami League to enter into peace talks to seek an end to the crisis.¹⁷⁰ This inflexible and conflictual response by the Pakistani government, the suspension of the National Parliament, coupled with the deployment of the Army in East Pakistan and the subsequent gross and serious violations of fundamental human rights after March 1971, as well as the absence of any other realistic option for the realisation of self-determination, meant that secession was the last and only resort available.

¹⁶³ Nanda *supra* note 152 p. 333.

¹⁶⁴ *Ibid.*

¹⁶⁵ The Katangese secession attempt of 1960 was largely instigated and supported by wealthy Belgian investors, eager to wrench control over Congolese mineral and oil deposits from the newly independent government of Congo. If successful it would have deprived the people of Congo of their economic viability as a state, and thus rightly failed. (From Bucheit *supra* note 35 pp. 143-146).

¹⁶⁶ see *infra* discussion of Biafran secession later in this chapter.

¹⁶⁷ Crawford *supra* note 65 p. 141

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Raic *supra* note 41 p. 341.

e) Reaction of the UN

Both the GA and the Security Council (hereafter SC) took up the matter in December 1971 after open warfare between India and Pakistan had become evident.¹⁷¹ The GA adopted Resolution 2793 calling for an immediate end to military action in the region and the withdrawal of troops from each other's territories¹⁷². The SC also called for a ceasefire in the region "as soon as practicable"¹⁷³. In effect, this meant that Indian troops were not required to withdraw immediately because of the dangers posed to Bangladeshi civilians. However, the GA Resolution 2793 made no mention of the right of self-determination declaring only:

A related problem which often confronts us and to which as yet no acceptable answer has been found in the provisions of the Charter, is the conflict between the principles of integrity of sovereign states and the assertion of the right to self-determination, and even secession by a large group within a sovereign state. Here again, as in the case of human rights, a dangerous deadlock can paralyse the ability of the UN to help those involved¹⁷⁴.

f) Reaction of the International Community

Despite the violence committed in East Pakistan, the large numbers of dead and displaced, and the sympathy for East Pakistan thereby generated, no state other than India was prepared to recognise Bangladesh prior to the surrender of the Pakistani forces in December 1971¹⁷⁵. The United States demonstrated little inclination to lend support to the people of East Pakistan, with United States Secretary of State, Rogers, saying at the time

¹⁷¹ *Ibid* p. 339.

¹⁷² UN Doc A/Res/2793 8 Dec 1971

¹⁷³ UN Doc S/Res/307 21 Dec 1971

¹⁷⁴ UN Doc A/Res/2793 8 Dec 1971

¹⁷⁵ UN Doc A/P 2003, Dec 1971, p. 11-17

We favour unity as a principle and we do not favour secession as a principle, because once you start down that road it could be very destabilising¹⁷⁶

The Soviet Union expressed its desire to see a peaceful resolution to the conflict, as did a number of states.¹⁷⁷ In various sessions of the UN delegates spoke of the sympathy for the people but all steered clear of advocating a right to self-determination. The Sinhalese Ambassador to the UN articulated this position when he noted that

[i]mmmediate recognition (be given) to the will of the East Pakistani population as expressed in the elections of December 1970...(but)...the East Pakistani leaders must renounce their secessionists demands¹⁷⁸

However, given India's support, and the moral and legal justifications present, most states eventually recognised Bangladesh's independence. Twenty-eight states had recognised Bangladesh *de jure* by 4 February 1972 and a further five had extended *de facto* recognition¹⁷⁹. Recognition by Pakistan was, however, delayed until 22 February 1974¹⁸⁰. Bangladesh was admitted to the UN on 17 September 1974, completing its admission into the world community as a recognised State¹⁸¹.

B) Croatia

a) Introduction

Some 20 years after the successful secession of Bangladesh, the independence of Croatia from the Socialist Federal Republic of Yugoslavia (hereafter SFRY) seems to confirm the position that before a claim to secession is deemed to be legitimate, a people must have suffered grievous wrongs at the hand of the parent state. However, the same practice also points to the fact that the threshold with respect to the required amount and scale of suffering is indeed lower than the one which may be suggested on the basis of the extremes in the case of Bangladesh.

¹⁷⁶ Quoted in Bucheit *supra* note 35, p. 209

¹⁷⁷ Crawford *supra* note 65 p. 141

¹⁷⁸ UN Doc A/P 2003.

¹⁷⁹ Crawford, *supra* note 65 p. 141.

¹⁸⁰ *Ibid.*

¹⁸¹ UN Doc. A/Res/3203 (XXIX), 17 Sept. 1974

b) Background

i. Formation of the SFRY

After decades of shifting borders and foreign domination, the SFRY was formed as a federal state comprised of six constituent Republics, including Serbia, Montenegro, Macedonia, Croatia, Slovenia, and Bosnia-Herzegovina.¹⁸² Each of these Republics possessed substantial autonomy, was represented in the Federal Parliament, and shared power in a Collective Presidency which operated on a rotation system.¹⁸³

ii. Events Leading to Secession

A mixture of interrelated events in the late 1980s informed the process of the break up of the SFRY. First, tensions arose between Croatia and Serbia and between the Kosovo Albanians and the Serb leadership regarding the operation of the federal system.¹⁸⁴ Second, the election of the nationalist Slobodan Milosevic led to perceived threats to federal autonomy by the other republics.¹⁸⁵ Milosevic succeeded in removing the political autonomy of both Vojvodina and Kosovo, an action which was denounced by Croatia and Slovenia.¹⁸⁶ Further, the resignation of the Montenegrin government in September 1990, to be replaced by a puppet Serbian regime, meant Serbia's control over the SFRY was further strengthened.¹⁸⁷ In combination with the disintegration of the Soviet bloc and a severe economic crisis, tensions were at boiling point by 1990.¹⁸⁸

The tensions between the centralist and communist centred Serbia, and the Croat region, which favoured Westernisation and political and economic liberation, became evident during the 1990 federal elections.¹⁸⁹ The Croatian Democratic Party gained a wide majority under Franjo Tudjman, who went on to produce a new constitution for

¹⁸² Raic *supra* note 41 p. 344.

¹⁸³ S.L. Burg, *Conflict and Cohesion in Socialist Yugoslavia, Political Decision Making since 1966* (Princeton, NJ: Princeton University Press, 1983), 117-21.

¹⁸⁴ Raic *supra* note 41 p. 346

¹⁸⁵ *Ibid* p. 347.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ R.J. Crampton, *The Balkans Since the Second World War* (London and New York: Longman, 2002), p. 251.

Croatia and demanded greater autonomy for all the federal republics.¹⁹⁰ The plan was supported by Slovenia, but blocked by Serbia.¹⁹¹ On 22 December 1990, the Parliament of Croatia ratified the new constitution, changing the status of Serbs in Croatia to a 'national minority' from a 'constituent nation'.¹⁹² The percentage of those declaring themselves as Serbs, according to the 1991 census, was 12% (78% of the population declared itself to be Croat)¹⁹³. This decision fueled ethnic tensions and in response the Serbian authorities proclaimed they no longer recognised the jurisdiction of the Croatian Department of Internal Affairs¹⁹⁴.

In June 1991, this period of tension between the Republics culminated in Serbia blocking the installation of the Croatian candidate for the Presidency.¹⁹⁵ A few days later, on 19 May 1991, a referendum was held on the question of Croatian independence in which an overwhelming voted for independence¹⁹⁶. This led both Croatia and Slovenia to declare their independence from the SFRY on 25 June 1991.

iii. Military Intervention

In reaction to the proclamations of Independence, the Serb-dominated Secretariat for National Defence authorised the military occupation of Slovenia, without the consent of the collective Presidency, in order to “undertake measures to prevent division of Yugoslavia and changes to its borders”.¹⁹⁷ Although a cease fire was declared in Slovenia after a few days, the situation in Croatia escalated quickly, and numerous battles were reported between Serbs and Croats in Croatia.¹⁹⁸

The European Community (EC) intervened to mediate the conflict and negotiated the Brioni Accords - a ceasefire agreement which postponed the declarations of Independence of Croatia and Slovenia by three months, in order to try and settle the

¹⁹⁰ *Ibid.*

¹⁹¹ Burg *supra* note 183 p. 125.

¹⁹² *Ibid.*

¹⁹³ *Ibid* pp 125-126.

¹⁹⁴ *Ibid.*

¹⁹⁵ R.J. Crampton, *The Balkans Since the Second World War* (London and New York: Longman, 2002), 251.

¹⁹⁶ *Ibid.*

¹⁹⁷ M.C. Greenberg et al. (eds), *Words Over War, Mediation and Arbitration to Prevent Deadly Conflict* (Lanham, MD: Rowman & Littlefield, 2006), p.76.

¹⁹⁸ Raic *supra* note 41 p. 350.

dispute internally.¹⁹⁹ However, despite the ceasefire, Serbia intensified its military offensive.²⁰⁰ In August the situation erupted into all out war, in which the pro-Serbian Yugoslav People's Army (JNA) used tanks, mortars, air force jets to engage in combat.²⁰¹ The Yugoslav army blocked the access to Croatian harbours and a major ground and air offensive was launched towards several Croatian cities, without distinction being made between military and civilian objects.²⁰² This was accompanied by widespread violations of human rights, 'ethnic cleansing' of Croats and other nationalities, the destruction of towns and villages, and a large number of displaced persons.²⁰³ Until November 1991, Croatian casualties were estimated at around 10,000 killed, with a further 5,000 unaccounted for.²⁰⁴ By August 1991, 350,000 refugees were registered in Croatia and this figure rose to 600,000 by November 1991.²⁰⁵

Serbian and pro-Serbian representatives also conducted a 'bloodless' coup d'etat and secured control of both the Collective Presidency and the Federal Parliament; thus decision-making in Yugoslavia was effectively transferred to Serbia.²⁰⁶ This move was condemned by the international community, which declared that Serbia had "resorted to a disproportionate and indiscriminate use of force".²⁰⁷

On 8 October 1991, after the expiration of the three months period negotiated in the Brioni Accords, Croatia renewed its declaration of Independence.

c) Dissolution vs Secession

It is important at this point to delineate the situation in Croatia as a case of secession, rather than dissolution. Some scholars have contested that the creation of Croatia should be characterised as the dissolution of a federal arrangement rather than a

¹⁹⁹ *Ibid* p. 351.

²⁰⁰ Greenberg *supra* note 197, p.86.

²⁰¹ Raic *supra* note 41 p. 352.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ G. Nikic (ed) Croatia Between Aggression and Peace, (Zagreb: AGM, 1994) p. 43.

²⁰⁵ Report on the Situation of Human Rights in the Territory of the SFRY by Mr Tadeuzs Mazowiecki, Special Rapportuer of the Commission on Human Rights, UN Doc E/CN/1992/S-1/10 cited in Raic *supra* note 41 p. 353.

²⁰⁶ Kohen, *supra* note 38, p. 125.

²⁰⁷ Raic *supra* note 41 pp. 352-353.

unilateral secession.²⁰⁸ While the latter involves only the removal of a portion of a state's territory, the former means that the state in question effectively ceases to exist altogether.²⁰⁹ However, while the distinction may be theoretically coherent, as James Crawford notes, in reality it is exceedingly difficult to maintain.²¹⁰ This is particularly true where dissolution is brought about by the forceful exercise of secession, as opposed to through a consensual arrangement.²¹¹ Shaw has indicated that such dissolutions necessarily “bring into focus the doctrine of self-determination in the form of secession”.²¹²

The difficulties in maintaining the distinction between dissolution and secession in practice are reflected in the academic debate over the SFRY. While some scholars strictly maintain that it amounted to dissolution and is not indicative of state practice towards unilateral secession,²¹³ others maintain that the position is not so clear cut, and that the scenario *is* relevant to assessing state practice with regard to remedial secession.²¹⁴ David Raic notes that the break up of the SFRY took place against the backdrop of self-determination under international law, according to the views of many academics and the Arbitration Commission of the International Conference on Yugoslavia²¹⁵. In September 1991, the Declaration on Yugoslavia which was adopted by the Council of Ministers of the EC stated that it was “for the peoples of Yugoslavia themselves to decide on the country’s future”.²¹⁶ The use of the term ‘peoples’ has been understood as a reference to self-determination as in the same Declaration the EC calls for negotiations to be based upon respect for the peoples’ right to self-determination.²¹⁷ Croatia, Slovenia and Macedonia also deemed the right of self-determination to be applicable to their cases.²¹⁸

²⁰⁸ Jaber *supra* note 119.

²⁰⁹ Crawford, *supra* note 65, pp.395-401.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² M. Shaw, *International Law* (Cambridge: Grotius Publications, 1986), p.139.

²¹³ Crawford, *supra* note 65, pp. 395-401.

²¹⁴ Hannum, *supra* note 26 pp. 51-2.

²¹⁵ Raic, *supra* note 41, pp. 361-2.

²¹⁶ Declaration on Yugoslavia, Informal Meetings of Ministers of Foreign Affairs, Haarzuilens, 5 October 1991, EPC Press Release, P. 97/91, Reprinted in: S. Trifunovska *Yugoslavia Through Documents* (London: Nijhoff, 1994), p. 352.

²¹⁷ Declaration on the Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union, Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991, *EC Bulletin* 12-1992, p. 119.

²¹⁸ *Brioni Accords*, Europe Documents, No. 1725, 16 July 1991, p. 17.

In addition, at the time at which the EC granted recognition to Croatia, in January of 1992, the SFRY had not yet dissolved. It is important to note that in its advisory opinion in November, one month after the secession of Croatia, the 'Badinter' Arbitration Commission appointed by the EC indicated that the SFRY was *in the process* of dissolution.²¹⁹ It was not until July 1992 that the Commission finally determined that the dissolution was complete.²²⁰ In reaching this conclusion, the Commission particularly took into account the fact that Serbia and Montenegro had established a new state on 27 April 1992.²²¹ This date is particularly significant as prior to this point Serbia and Montenegro had not relinquished their title as the SFRY and had continued to resist the secessions of the other Republics.²²² Thus prior to this point, it is arguable that the independence of Croatia was more akin to a unilateral secession resisted by a 'parent state' that was still in existence.²²³ The fact that a substantial number of states had recognised Croatia prior to the clear and complete disintegration of the SFRY, and at a point where the governing authority was still resisting the secession suggests that recognition could have been extended on the basis of the validity of Croatia's secession according to the remedial criteria.²²⁴

d) Elements of Croatian Secession

A number of factors have been identified as of considerable relevance to the success of Croatia's claim to secession: the frustration of Croatia's internal self-determination; the human rights abuses classified as 'ethnic cleansing';²²⁵ and the intervention by the European Community. The first two factors have a direct bearing upon the question of legitimacy, and the third recalls the geopolitical factors required for a successful claim to be realised

²¹⁹ A. Pellet, 'The Opinions of the Badinter Arbitration Committee, A Second Breath For the Self-Determination of Peoples', *European Journal of International Law* 3 (1992): 178, Opinion 1, p.184, para. 3.

²²⁰ Conference on Yugoslav Arbitration Commission, Opinion 8, 4 July 1992, I.L.M, Vol. 31, 1521-3 at 1523, para. 4.

²²¹ *Ibid.*

²²² Jaber *supra* note 119.

²²³ *Ibid*

²²⁴ *Ibid*

²²⁵ *Final report of the United Nations Commission of Experts established pursuant to security council resolution 780* (1992) [UN Commission Report], Annex IV The policy of ethnic cleansing, available <http://www.ess.uwe.ac.uk/comexpert/anx/IV.htm> (last visited September 26, 2010)

i. Claimants

The Croats have identified as a national group for many centuries.²²⁶ While they have been absorbed into the Ottoman and Austro-Hungarian empires, and eventually the Yugoslav union, they have maintained their separate political and ethnic identity throughout.²²⁷ As in the case of the Bengalis, the Croats share a common history, language and culture, and are the majoritarian people occupying what was to become the State of Croatia.

ii. Discrimination Against Croatia

The actions by the SFRY government clearly amount to a frustration of the right of the Croatian people to exercise their internal right to self-determination within the federal arrangement of the SFRY. The ability of the Republic to exercise self-government was completely frustrated by the Serbian Communist Party, which initially blocked Croatia's rotational access to the Presidency, and then staged a coup d'etat which usurped power from the Federation and denied Croatia, and all the other constituent Republics, their right to representation.²²⁸ However, there is simply not the degree of discrimination as was present in the case of Bangladesh, where the Pakistani government seemed to actively promote the rights and interests, particularly economic interests and political influence, of West Pakistan. According to the doctrine of remedial secession mentioned in chapter II, the circumstances at the time of the first declaration of independence on 25 June 1991, would not give rise to a qualified right of secession. This was also the opinion of the international community under the supervision of which the Brioni Accord was concluded.²²⁹ However, the events following the first declaration leading to the renewal of the declaration of independence on 8 October 1991 are entirely different.

²²⁶ Raic *supra* note 41 p. 342.

²²⁷ *Ibid* p. 343.

²²⁸ Kohen, *supra* note 38, p.125.; UN Commission Report.

²²⁹ Raic *supra* note 41 p. 362.

iii. Human Rights Abuses

The atrocities committed during the breakup of Yugoslavia are well known, and are still being prosecuted at the International Criminal Tribunal for the former Yugoslavia (ICTY).²³⁰ In the months following the first declaration of independence, war crimes and crimes against humanity against Croats were perpetrated on a massive scale by Serbian forces, as well as by the JNA²³¹. These violations included murders, torture including rape, 'disappearances', arbitrary detention and forcible expulsions²³². Several infamous massacres were committed against Croatian civilians, including the Lovas, Škabrnja, Vukovar, Voćin massacres.²³³ Instances of mass human rights violations took place in November 1991 following the fall of the town of Vukovar in eastern Croatia, where, after a protracted and destructive siege of the city by the JNA, its eventual surrender was followed by grave human rights violations, including murders, "disappearances", torture including rape, and the forceful expulsion of a large part of the non-Serb population.²³⁴ These persistent human rights violations committed by the SFRY can be seen to have met the threshold for the doctrine of remedial secession, as witnessed in Bangladesh, when the declaration was renewed on 8 October 1991.

iv. EC Intervention

The role of the EC was instrumental in ensuring the widespread recognition by the international community of the independence of Croatia. In overseeing the development of the crisis, the EC attempted to facilitate every possible resumption to the crisis short of secession. After attempts to seek a peaceful end to the conflict through the Brioni Accord failed,²³⁵ they again called for peace talks²³⁶. When these also failed, the EC commenced proceedings to recognise the independence of Croatia.²³⁷ The EC maintained assistance to Croatia, despite calls from other members

²³⁰ Ongoing cases at the ICTFY available at <http://www.icty.org/action/cases/4>

²³¹ UN Commission Report

²³² M. Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: CUP, 2004) pp. 390-401

²³³ Nikic *supra* note 204, p. 48

²³⁴ Ibid

²³⁵ Raic *supra* note 41 pp. 351-354.

²³⁶ Ibid p. 353.

²³⁷ Ibid p. 355.

of the international community to uphold the territorial integrity of the SFRY, ensuring the eventual success of the Croatian claim to statehood.

e) Reaction of the SFRY Government

The government of the SFRY refuted all attempts by the Croatian government, prior to the eruption of the conflict, to find a solution to the emerging tensions, one based around the transformation of the SFRY into a confederation.²³⁸ Even after the conflict began, the Croats continued to make an effort to resolve the situation internally by acceding to the Brioni Accords.²³⁹ However, the Serbian army did not abide by the ceasefire agreement, and escalated the military offensive.²⁴⁰ The escalation of the conflict and the position of the Serbian government made it almost impossible to conduct meaningful negotiations on the future of Croatia within the Yugoslavian federal institutions.²⁴¹ Thus secession was arguably sought as a measure of last resort when attempts at satisfying self-determination internally had been completely exhausted.

f) Reaction of the UN

The Security Council took a very strong position on the humanitarian crisis in the SFRY, set out in a unanimous resolution, which maintained that the continuation of the situation in the SFRY constituted a threat to international peace and security.²⁴² The response by the Security Council that falls under the scope of Article 39 of the Charter cleared the way for acting under Chapter VII.²⁴³ The Security Council referred, *inter alia*, to the heavy loss of life, the refugee crisis, as well as the adverse consequences on war in the region.²⁴⁴ However, the UN was reluctant to extend this

²³⁸ *Ibid*

²³⁹ Greenberg *supra* note 197 p. 86

²⁴⁰ Burg *supra* note 184 p. 126

²⁴¹ *Ibid*

²⁴² S.C Res.713, UN Doc S/713 (1991).

²⁴³ Final Report: The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention (2001) NATO [NATO Final Report]

www.nato.int/acad/fellow/99-01/kumbaro.pdf (last accessed september 18, 2010).

²⁴⁴ S.C Res.713, UN Doc S/713 (1991).

concern to recognition of the seceding entities. The Secretary-General to the UN, Javier Perez de Cuellar addressed a letter to the EC in which he expressed his concern as to an early, selective recognition of the former Yugoslav republics, which he said could widen the conflict.²⁴⁵ In response, Germany's foreign minister pointed out that a refusal to recognise would lead only to further escalation of the use of force by the JNA.²⁴⁶ The Secretary-General replied stating:

[l]et me recall that at no point did my letter state that recognition of the independence of particular Yugoslav republics should be denied, or withheld indefinitely. Rather, I observe that the principle of self-determination is enshrined in the Charter of the United Nations²⁴⁷

g) Reaction of the International Community

As in the case of Bangladesh, the international community was initially reluctant to extend recognition to Croatia in the period immediately following the first declaration of independence, calling for dialogue between the parties. However, with the escalation of the crisis, their position changed dramatically.²⁴⁸ After the EC condemned the use of force by the Yugoslavian authorities on 6 October 1991, Croatia reasserted its declaration of independence on 8 October.²⁴⁹ A few days into the declarations, the German and Austrian governments began to suggest that 'the right of self-determination' of Croatia and Slovenia should be recognised, but neither formally recognised either state at the time.²⁵⁰ This was largely due to fears that recognition of a secessionist claim could have substantial negative consequences for the developments in the former Soviet Union.²⁵¹ However, with the former Soviet Union's recognition of the Baltic states, the EC eventually published two Declarations to reflect a common position on the member State's recognition: recognition would be forthcoming if a number of requirements were satisfied, chiefly among these, respect for democracy, the rule of law, human rights and respect for ethnic and national

²⁴⁵ UN Doc. S/23280, 10 Dec 1991 in Raic *supra* note 41 p. 357.

²⁴⁶ Text of Exchange Between UN Chief and Gensher, Reuter, 14 Dec 1991 in Raic *supra* note 41 p. 357.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* p. 354.

²⁴⁹ *Ibid.*

²⁵⁰ Raic *supra* note 41 p. 357.

²⁵¹ *Ibid* p. 355.

minorities.²⁵² On 13 January Croatia's President Tudjman issued a formal written statement that Croatia would implement the requirements, and on 15 January the EC announced that it formally recognised Croatia.²⁵³ Croatia was subsequently recognised by 76 States²⁵⁴, before its admission to the UN on 22 May 1992²⁵⁵.

C) Biafra

a) Introduction

If the previous two cases are famous for their success in seceding from their respective states then equally Biafra has gained notoriety as a representative of a failed secession. Crucially, the situation in Biafra arose in 1967, before the events in Bangladesh, however, the pattern of alienation, mobilisation and suppression is similar. The difference in outcome can be attributed to a number of factors but the key to distinguishing the relative legitimacy of these three demands for self-determination is to be found in the substantial nature of each of the elements. In the cases of Bangladesh and Croatia these elements were present in their most extreme manifestations making their claims to secession more likely to find success and be accorded legitimacy. The same cannot be said of Biafra.

b) Background

i. The Colonial Legacy

The establishment of the United Protectorate of Nigeria by the British in 1914 marked the first attempt to merge the Muslim North and the predominantly Christian South²⁵⁶. At this time the country was composed of three major tribal peoples and several smaller ethnic groups.²⁵⁷ The more populous north was the territory of the Hausa-Fulani who were overwhelmingly Muslim, but was markedly underdeveloped in relation to the rest of the country²⁵⁸. In the West were the Yorubas who were a mix of

²⁵² *Ibid* pp. 355-356.

²⁵³ *Ibid* p. 356.

²⁵⁴ *Ibid* p. 356.

²⁵⁵ UN Doc. A/Res/46/238, 22 May 1992.

²⁵⁶ *Ibid* p.162.

²⁵⁷ *Ibid*

²⁵⁸ *Ibid*

Muslim and Christians, and the Christian Ibos, the wealthiest and most developed amongst the ethnic groups, dominated the Eastern region²⁵⁹. The merger caused increased tensions between the two regions, under what can only be described as a ‘divide and rule’ type policy utilised by the British to retain control over the region²⁶⁰.

ii. Nigerian Independence

Independence in 1960 only created more tensions, as the central government was incapable of imposing any semblance of unity on the country²⁶¹ which became engulfed in ethnic hostility and government corruption, that set the stage for a number of coups which were to lead directly to the Declaration of Biafran independence. The first coup occurred in January 1966, led by junior members of the national army who launched an attack against Northern politicians and army commanders²⁶². In May a counter coup was launched, and in July another coup occurred.²⁶³ Meanwhile a number of riots took place in the North accompanied by massacres which took the lives of between 10,000 and 40,000 Ibos living in the North²⁶⁴. One million Ibos were expelled from the North and resettled in the Eastern region.²⁶⁵

iii. Secession

The Eastern Ibos, resentful of the North’s treatment of their people and intent on achieving independence, declared the Republic of Biafra in May 1967²⁶⁶. On 6 July of that same year the armed force of Nigeria attacked Biafra with the stated aim of reintegrating the area within a new Nigerian federal structure²⁶⁷. The civil war ended on 12 January, 1970 when the leaders of the Biafran secession surrendered unconditionally and the Eastern region was reabsorbed into Nigeria.²⁶⁸

²⁵⁹ *Ibid*

²⁶⁰ K. Post “Is There A Case for Biafra? (1968) *International Affairs* 44, p. 28

²⁶¹ *Ibid* p. 29

²⁶² Bucheit *supra* note 35 p. 164

²⁶³ *Ibid* p. 165

²⁶⁴ *Ibid*

²⁶⁵ Post, *supra* note 260, p. 30

²⁶⁶ *Ibid*

²⁶⁷ Bucheit *supra* note 35 p. 168

²⁶⁸ D. A. Ijalaye, “Was Biafra at any Time a State in International Law?” (1971) *AJIL* Vol. 65, p. 551

c) Elements of Biafran Secession

A number of elements have been identified as of considerable relevance to the failure of the Biafra claim to secession: the diverse ethnic makeup of the inhabitants of the Biafran province; the lack of evidence suggesting widespread discrimination against the people of Biafra by Nigeria; and the complex geo-political impact a successful Biafran secession would have wrought.

i. Claimants

The occupants of East Nigeria – the Ibos – have a common history and share tribal and racial characteristics which distinguish them from other Nigerians. The major difficulty, though, lies in the fact that the Ibos and the Biafrans were not synonymous groups²⁶⁹. The Biafran nation embraced not only the Ibos but also other tribal groups in the Eastern region. This lack of ethnic homogeneity threw doubt upon the Biafran claim to ‘peoplehood’. Further, it was not conclusively established that the Ibos had the full support of the other tribal groups residing in the Eastern Region who made up approximately 40% of the population.²⁷⁰ The other major tribal group, the Ijawes may also have wished for autonomy within the region which was not united under the Biafran claim.

ii. Discrimination Against Biafra

The strength of the Biafran claim emerges from the threats to the physical security of the Ibos, which was borne out of widespread massacres of Ibos in the Northern regions.²⁷¹ However, while there was undoubtedly a suspension of equal rights for the Ibos, it took the form of an interethnic conflict rather than direct government oppression²⁷². Unlike Bangladesh there was no evidence to suggest that the massacres were authorised by the central government, although the Nigerian government were clearly guilty of negligence in failing to control the ethnic tensions. An international

²⁶⁹ M. G Kaladharan, “Self-Determination Beyond the Colonial Context: Biafra in Retrospect” (1975) *Texas ILJ* 10, p. 334

²⁷⁰ *Ibid*

²⁷¹ Bucheit *supra* note 35 p. 174.

²⁷² Bucheit *supra* note 35, p. 165

groups of observers found no evidence of genocide and concluded that federal troops had behaved with restraint.²⁷³

What becomes evident from the failure of the Biafran secession is that human rights abuses alone will not give right to an irresistible right to secede under international law. The abuses must be accompanied by a central policy of discrimination and repression – in short a breach of the internal right to self-determination. The degree of governmental oppression in the former two cases was not present here. There was none of the political, economic and social exploitation that was present in East Bengal. Biafra had contributed a significant number of political and military members to the central government²⁷⁴. Economically Biafra was probably the strongest of the provinces and it enjoyed symbiotic relations with the rest of the country²⁷⁵. This is not to deny that human rights abuses did take place on a large scale, but the remedy in this case could not be one of a last resort since (i) this was not the most extreme denial of rights possible and (2) a number of alternative remedies has been bypassed.

iii. Geo-political Factors

Biafra was a test case not only for self-determination but also for the precarious notion of African territorial integrity and the wider ideal of pan-Africanism.²⁷⁶ Its legitimacy was thus perceived differently from that of Bangladesh. It would appear that it became a matter of African ‘public policy’ that Biafra, regardless of the merits of the claim should fail to attain independence.²⁷⁷ The sovereign rights of the new African states were regarded as being under threat so that even if Biafrans were thought to possess a good cause in vacuo the greater good of African unity would have to prevail.²⁷⁸

²⁷³ J. Woronoff, *Organising African Unity* p. 424 in: Saxena, *Self-Determination from Biafra to Bangladesh* (University of New Delhi, 1978) p. 47

²⁷⁴ Post, *supra* note 260 p. 28.

²⁷⁵ *Ibid.*

²⁷⁶ Kaladharan *supra* note 270 p. 345.

²⁷⁷ *Ibid* pp 345-346.

²⁷⁸ *Ibid.*

A successful Biafran secession would have undoubtedly had major strategic consequences.²⁷⁹ Nigeria would have lacked access to the sea and there was the possibility of a continuing conflict between it and Biafra²⁸⁰. Biafra's choice of international allegiance may have had an effect upon the region.²⁸¹ Most importantly, however, was the potential for the commencement of a domino effect of similar secession attempts in the rest of Nigeria and the wider region²⁸². Even Biafra itself may have experienced a claim to secession by the Ijawes tribe at some point²⁸³.

d) Reaction of the Nigerian Government

The Nigerian government's willingness to enter into federal re-negotiations was by far the most decisive factor against the Biafran claim to Independence²⁸⁴. Biafra's claim to secede would have acquired much greater legitimacy in the face of government intransigence. Instead the government proposed a restructured constitutional arrangement intended to eradicate the very problems that had led to the claim to independence. The Nigerian government's decision to follow an integrative solution rather than a conflictual one prevented the secessionist's claim that the independence was a remedy of last resort.

e) Reaction of the UN

The Biafran claim was looked on with some disdain by the large majority of the member states of the UN, which may account for the organisation's passive response to the crisis²⁸⁵. There was little attempt to address the legal and political dilemmas presented by the case and the UN seemed content to allow the OAU exclusive supranational jurisdiction²⁸⁶.

²⁷⁹ *Ibid.*

²⁸⁰ Bucheit *supra* note 35 p.175.

²⁸¹ C. Nixon, "Self-Determination: The Nigeria/Biafra Case World Politics" Vol. 24 Issue 4 (July 1972) p. 490.

²⁸² Bucheit *supra* note 35 p. 175.

²⁸³ *Ibid.*

²⁸⁴ Nixon *supra* note 281 p. 492.

²⁸⁵ Not one member state brought the issue before the UN during the crisis (Bucheit *supra* note 35, p. 168).

²⁸⁶ Bucheit, *supra* note 35 p. 168.

The timing of the secession is of some importance in this regard. The Biafran secession came at a time when the concept of colonial self-determination was predominant and the post-colonial unit's right to territorial integrity was free from caveats subsequently attached by the 1970 Declaration. U. Thant, the then Secretary General made clear the organisation's official position when he stated:

As far as the question of secession of particular section of the State is concerned, the United Nations' attitude is unequivocal. As an international organisation, the United Nations has never accepted and does not accept the principle of secession²⁸⁷

The practice of the UN at this time was most concerned with eradicating colonialism and preserving post-colonial boundaries, and it was ill-equipped to deal with secessionist claims based upon self-determination which did not conform to the colonial model. The Colonial Declaration of 1960 applied only to peoples subject to "alien subjugation, domination and exploitation". None of these factors were present to a significant degree in Biafra.

f) Reaction of International Community

It must be noted that Biafra was recognized as a state by only five members of the international community: Tanzania, Gabon, Ivory Coast, Zambia and Haiti.²⁸⁸ In respect of the constitutive view it is difficult to conclude that Biafra, as a consequence of the recognition by only five small states, attained the status of an independent nation. Indeed, the response by the rest of the world community and the UN in particular sealed the fate of the Biafran claim.

3. Analysis of the Theoretical Framework of Remedial Secession in Light of Case Studies

Having presented the factual scenarios present in the proceeding cases let me now proceed to an analysis of the theoretical framework of remedial secession contained in

²⁸⁷ UN Monthly Chronicle, Vol 7, Feb 1970, p. 36.

²⁸⁸ D. A. Ijalaye *supra* note 166, pp. 553-554.

Chapter II with respect to these cases to observe whether they can be said to conform to the proposed doctrinal criteria for remedial secession.

3.1 Overview of the Theoretical Criteria

To briefly recap the theory of remedial secession elucidated in the previous chapter, as we know remedial secession is exemplified by an *a contrario* reading of the Friendly Relations Declaration suggesting that a state which does not possess “a government representing the whole people belonging to the territory without any distinction” is not entitled to invoke the principle of territorial integrity. Given the importance of territorial integrity, the act of remedial secession must only be invoked in “extreme cases”²⁸⁹ perpetrated against a ‘people’ entitled to self-determination. Scholarly opinion suggests that the notion of remedial secession can only be invoked when the human rights violations perpetrated by the state in a discriminatory fashion are “grave and massive”.²⁹⁰ Moreover, it is suggested that remedial secession is an exceptional solution of last resort which can be called upon only after all realistic and effective remedies for the peaceful settlement have been exhausted.²⁹¹ Therefore in testing the theory of remedial secession and its proposed criteria, let us examine whether the cases analysed above conform with the following criteria:

- a) the existence of a competent “self”
- b) systematic and egregious injustices have been committed by the “parent state” denoting a breach of that peoples’ right to internal self-determination; and
- c) that it is a measure of ‘last resort’

3.2 Claimants: “People”

In both Croatia and Bangladesh, the inhabitants can be seen to conform to the objective criteria for people elaborated by the Special Rapporteur of the UN Sub-

²⁸⁹ *Re Secession of Quebec*.

²⁹⁰ The example given by Tomuschat is that of genocide. C. Tomuschat, *supra* note 42, p.9.

²⁹¹ D. Thurer, ‘Self-determination’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 371; J. Dugard & D. Raič, ‘The role of Recognition in the law and practice of secession’ in Kohen, *supra* note 38, p. 109.

Commission on Prevention of Discrimination. Aureliu Cristescu's position is instructive as it draws on United Nations instruments relating to self-determination, and the opinions of states as expressed in the debates prior to the adoption of these instruments. He concluded that there were three recurrent elements that are relevant to identifying 'a people' for the purposes of self-determination: a social entity possessing its own clear identity and characteristics, a relationship with a territory, and an entity distinct from an ethnic, linguistic or religious minority²⁹²

The International Commission of Jurists in identifying the 'people' of Bangladesh pointed to the shared history, ethnicity, culture, language, religion, geography and territory²⁹³. Similarly, the inhabitants of Croatia shared a common language, history and culture. Further, the people of both Bangladesh and Croatia self-identified as a distinct group. This identification arose through the common political goals and objectives of the East Bengalis and of the Croats, asserted against West Pakistan and the SFRY respectively. This is also indicative of a strong feeling of differentiation from the people of the parent state, which seems to be necessary in satisfying the criteria for 'people'. Bartkus refers to the requirement that a "distinct community" must be identified in order to constitute the 'self' in relation to the rest of the populace.²⁹⁴ Further to this, Raic stresses that, since the notion of secession denotes the separation of a part of the territory of a state, a 'people' must constitute a numerical minority in relation to the rest of the population of the state in question, but a numerical majority within the borders of a certain coherent territory, as was the case in Croatia and Bangladesh.²⁹⁵ These requirements were not present in the case of Biafra, as the Biafran nation embraced not only the Ibos but also other tribal groups in the Eastern region of which there were approximately 40%. This lack of ethnic homogeneity threw doubt upon the Biafran claim to constituting a 'people'.

Lastly, it would seem from the two successful secessions that the seceding people must be organised as a political unit capable of acting at an international level. A disparate group without this structure would find it very hard to claim a right to

²⁹² A. Cristescu, Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, 'The Right to Self-Determination: Historic and Current Development on the Basis of United Nations Instruments', UN Doc. E/CN.4/Sub.2/404/Rev. 1 (1981).

²⁹³ East Pakistan Study *supra* note 99, p. 70.

²⁹⁴ V. O. Bartkus, *The Dynamic of Secession*, Cambridge UP, 1999, p. 14.

²⁹⁵ Raic *supra* note 41, p. 366.

secede.²⁹⁶

3.3 Breach of Internal Self-Determination and Extreme Human Rights Violations

In both Bangladesh and Croatia we can observe governmental conduct constituting a formal denial of the people's right to internal self-determination: in Bangladesh after the suspension of the first session of the National Assembly, and in Croatia after the coup d'état. This element was conspicuously lacking in the case of Biafra, where there was no evidence that the population of Biafra were subjected to any form of political, economic or social discrimination at the hands of the Nigerian government.

Further, we observe the presence of widespread and serious violation of fundamental human rights, most notably the right to life which would certainly include the practice of genocide (arguably Bangladesh) and the practice of 'ethnic cleansing' (Croatia).²⁹⁷ Crucially, the endemic and fundamental human rights abuses were state sponsored (Bangladesh, Croatia), which was not the case in Biafra's unsuccessful claim.

Reference must also be made to the evidence of a threat to the group's existence, and it has been stated that secession must be considered as a remedy if, for example, it seems impossible to save the existence of a people which is entitled to self-determination and which inhabits a defined territory²⁹⁸. This can certainly be said to be the case in Bangladesh where the situation bordered upon genocide. Although, it cannot be asserted that, in each and every single case, the level of suffering must be equal to the results of the situation in Bangladesh.²⁹⁹ Rather, the amount of suffering can be different in various situations, such as the campaign of 'ethnic cleaning' against the Croats, which, although less severe than the number of those killed in Bangladesh, was still directed towards wiping out the ethnic Croatian inhabitants.

The government sanctioned human rights abuses, coupled with the prolonged

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*, p. 368.

²⁹⁸ D. Murswiek, "The Issue of a Right of Secession-Reconsidered", in: Tomuschat *supra* note 42, p.

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²⁹⁹ Raic *supra* note 41 p.370.

discrimination, meant that the governments of the SFRY and Pakistan had effectively breached the responsibilities of sovereignty to a sufficient degree to preclude them from exercising control over West Bengal and Croatia. Therefore, they could no longer claim the right to maintain their territorial integrity.

3.4 *Measure of Last Resort*

We can observe that in both Bangladesh and Croatia, all effective local and international remedies had been exhausted.³⁰⁰ In the case of Bangladesh, the Awami League's proposals for greater provincial autonomy was met with a violent military response from the Pakistani government, leaving secession as the only remaining option against the widespread killings. In the case of Croatia, the initial claim to independence, before the exhaustion of peace talks with the SFRY government was not recognized. However, falling the Serbian government's refusal to respect ceasefire agreements and generally conflictual attitude, Croatia's renewal of the claim to independence was met with widespread recognition. Conversely, the legitimacy of the Biafran claim was undermined by the Nigerian government's willingness to enter into peaceful negotiations as a solution to the crisis.

3.5 *Other Critical Variables*

A number of other critical variables which impacted the success of the cases examined must also be noted.

3.5.1 *Viability of the Seceding Entity*

It would appear that the seceding entity must be eligible to satisfy the criteria of statehood, and ensure it has the economic structure to support its independence. In relation to Croatia, this is evidenced from the Declaration on the Guidelines for Recognition by the EC, requiring Croatia and the other Yugoslav Republics to satisfy the requirements of statehood and honour basic democratic and human rights commitments. Given the human rights issues involved, it would be appear that State

³⁰⁰ *Ibid* pp. 370-371.

must be satisfied that the seceding entity be capable of providing a great degree of stability in the new regime than the original state. That is, if independence is likely to cause greater humanitarian strife than in the previous state, this fact will surely count against the claim.

3.5.2 Impact on the Original State

The greatly negative impact upon the economic structure of Nigeria which would have ensued from Biafra's secession surely contributed to its failure. Therefore, a secession which seriously impacts upon the economic capacity of the parent state will likely be denied legitimacy on humanitarian and geo-strategic grounds.

3.5.3 Geo-political Factors

If a secession attempt appears likely to cause major international disruptions and conflicts it will likely fail³⁰¹. The possibility of a regional 'domino effect' as was feared in the case of Biafra on the African continent encompasses the fear of escalating conflicts and secession attempts should one be deemed successful. Further, the fears over regional conflicts fuelled the initial reluctance of states to recognise Croatia, and it was not until tensions within the former USSR were abated, did they extend recognition.

3.6 Conclusion

From the proceeding cases studies and analysis, we can observe that the successful cases of secession (Bangladesh and Croatia) can be seen to conform to the criteria for remedial secession elaborated in the proceeding chapter. Whereas in the case of Biafra, which did not satisfy the proposed criteria, the international community will refuse to recognise an otherwise worthy claim, despite evidence of human rights violations. It is thus arguable that in recognising the claims to secession in these two cases, the international community has implicitly confirmed the existence of a legal rule of remedial secession, upon which the justification for the two cases of secession

³⁰¹ Bucheit, *supra* note 35, pp 231-249.

can be said to be based. State practice would suggest that remedial secession can be said to come into effect when it became legally, morally and practically impossible to refute it.³⁰² Of course, it must now be asked whether the international community's recognition of Bangladesh and Croatia confirms the existence of a customary international rule of a right of remedial secession.

4 Emergence of a Customary Rule?

The two-element theory of customary international law advanced by the ICJ requires not only state practice, but also *opinio juris*, a subjective element whereby a state possesses the belief that it is acting on the basis of a legally binding rule.³⁰³ Thus even though the above-mentioned instances of state practice may correspond to a right of remedial secession, it must be shown that the necessary *opinio juris* has been made out in order to support the crystallisation of this right in customary international law³⁰⁴.

It is submitted by David Raic that the international community's recognition of Bangladesh and Croatia is a confirmation of the prevailing doctrine of a qualified right of secession.³⁰⁵ While the 'right' has not been articulated expressly, it is arguable that the relevant *opinio juris* could be 'read into' the cases, since the practice appears to be consistent with the invocation of such a right. Charles DeVisscher has argued that *opinio juris* "could be inferred from the outside qualities of the precedents invoked, especially from their coherence", and that consequently the relevant rule does not need to be explicitly articulated.³⁰⁶ In his dissenting opinion in the *North Sea Continental Shelf* case, Judge Sorensen supported this interpretation.³⁰⁷

It could also be argued that *opinio juris* could be inferred from the fact that states seemingly took into account the criteria inherent in remedial secession when justifying their recognition, namely the humanitarian suffering involved, the frustration of internal self-determination, and the fact that the situation could no

³⁰² Bucheit *supra* note 35 pp. 242-244.

³⁰³ *North Sea Continental Shelf*, Judgment, ICJ reports 1969, para. 77.

³⁰⁴ *Ibid* para 76-77

³⁰⁵ Raic *supra* note 41 pp. 361-362.

³⁰⁶ E. Slava, 'Opinio Juris in Customary International Law', *Oklahoma City University Law Review* 15, no. 2 (1990): 603 at 617.

³⁰⁷ *North Sea Continental* dissenting opinion of Judge Sorensen, 247.

longer be resolved internally.³⁰⁸ Further, given that secession attempts not falling strictly into the category of remedial secession have been overwhelmingly rejected³⁰⁹, there is a clear distinction drawn between a rule of secession states will and will not abide by.

However the judgement of the ICJ in the *Nicaragua* case has suggested the need for more direct expressions of *opinio juris* than a mere inference from state practice.³¹⁰ It was indicated that where conduct is 'prima facie' inconsistent with a norm of international law (which in this case is territorial integrity) the significance of such practice lies “in the nature of the ground offered as justification”; thus “reliance...on a novel right...might tend towards modification of customary international law”.³¹¹ Therefore it may very well still be inconclusive whether a customary right can be inferred from Bangladesh and Croatia.

5 Conclusion

State practice seems to suggest that despite the crucial importance of territorial integrity to international peace and stability, States will reluctantly suspend the principle where grave breaches of human rights approaching genocide demand it. However, whether these two instances of successful secessions can be said to form a customary rule is still very much disputed. Therefore, the instance of a third, seemingly successful case of secession which is sought to be justified on remedial secession grounds – the case of Kosovo, is crucial to our appreciation of the state of the law concerning remedial secession.

³⁰⁸ Jaber *supra* note 119.

³⁰⁹ See for example, Katanga, Quebec, Somaliland, Republica Sparska.

³¹⁰ *Nicaragua*, para. 207.

³¹¹ *Nicaragua*, para. 207.

IV. Implications of Kosovo's Independence and the ICJ's Advisory Opinion

1. Introduction

While the evidence suggesting that remedial secession has crystallized into a customary international rule is inconclusive, with the widespread recognition of the Kosovo claim to independence and the ICJ confirmation of the Declaration's legality, international law must once again re-evaluate this position. From the Declaration of Independence of Kosovo in July 1990 to the Declaration made by the Provisional Kosovo Assembly on 17 February 2008, claims to self-determination have been continuously made to uphold the Kosovo Albanians' assertion of independence from

Serbia. Therefore, the following chapter will appraise Kosovo's claim to secession against the criteria for remedial secession proposed in theory, and seemingly reflected in the two previous cases of remedial secession (Bangladesh and Croatia) to examine whether its successful claim to independence conforms with the proposed criteria. I will then seek to analyse whether the ICJ's advisory verdict, together with Kosovo's widespread recognition by the international community, confirm the existence of a customary rule on remedial secession in public international law.

2. Background to Kosovo's Independence

2.1. History within the SFRY and the FRY

The place of Kosovo in the Balkans has fluctuated over time, but in 1946, the territory, with a predominantly Albanian population, came to settle in the constituent Republic of Serbia within Yugoslavia.³¹² From 1946 until 1989 Kosovo enjoyed autonomous status within Serbia, where it exercised important regional self-governance functions, and the predominantly ethnic Albanian population enjoyed multiple rights, such as the right to education in the Albanian language, the right to Albanian language media, the right to celebrate cultural holidays and to generally preserve its ethnic structure and belonging³¹³. However, in the 1980s, tension between Kosovo and the Serbian administration developed, after Milosevic assumed power in Belgrade.³¹⁴ This tension culminated in Serbia's unilateral abolition of Kosovo's autonomous status in 1989.³¹⁵ The abolition was the first in a series of events that would lead to the eventual dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). This process ended in 1992 with the secessions of four of the constituent Republics. Although Kosovo also declared its independence at this time, it was not recognised by the international community, and was incorporated into the new state of the Former Republic of Yugoslavia (hereafter FRY).³¹⁶

³¹² T. Judah, *Kosovo: What Everyone Needs to Know* (New York: OUP, 2008), p.2.

³¹³ R. Muharremi, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited', *Review of Central and East European Law* 33 (2008): 401, p.406.

³¹⁴ *Ibid* p. 407.

³¹⁵ *Ibid*.

³¹⁶ P. Williams, 'Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status', *Denver Journal of International Law and Policy* 31 (2002): 387, p. 396.

2.2. Events Leading to Secession

Throughout the 1990s the Kosovo Albanians were generally denied any meaningful representation within Serbia.³¹⁷ Although a peaceful resistance was initially led by Ibrahim Rugova, the leader of the Democratic League of Kosovo, the character of the resistance became increasingly violent in the mid 1990s, with the introduction of the Kosovo Liberation Army (KLA).³¹⁸ What ensued were violent clashes between the KLA and Serbian forces which intensified between 1997 and 1998. Reports from governmental sources or NGO accounts note unequivocally the atrocities against civilians³¹⁹. There is evidence that Serbian forces in Kosovo pursued a policy of ethnic cleansing at least since 20 March 1999.³²⁰ Further, evidence shows that a systematic and forced removal of Kosovo Albanians from their homes and communities had taken place.³²¹ The OSCE Kosovo Verification Mission estimates put forth that over 90 percent of the Kosovo Albanian population – over 1.45 million people – had been displaced by 9 June 1999.³²²

The international community intervened with a diplomatic solution which sought to reach a settlement to the conflict.³²³ The most notable diplomatic effort took place in Rambouillet in February 1999. However, Milosevic's subsequent rejection of the proposed plan prompted a military intervention by NATO, who feared an imminent humanitarian catastrophe,³²⁴ when it launched Operation Allied Force launched on 24 March 1999.

2.3. Resolution 1244 and UN Interim Status

Following the NATO intervention, Security Council Resolution 1244 (1999) was

³¹⁷ Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, 'Report on the Situation of Human Rights in the Territory of the Former Yugoslavia', UN Doc. E/CN.4/1992/S-1/10 (1992).

³¹⁸ Williams, *supra* note 317, p. 397.

³¹⁹ Cismas, *supra* note 73, p. 564

³²⁰ Ibid

³²¹ OSCE, *Kosovo/Kosova: As Seen, As Told* (1999), at viii.

³²² The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned* (2000), 44.

³²³ *Ibid*, pp. 402-4.

³²⁴ NATO: Kosovo on the Brink of 'Major Humanitarian Disaster', March 28, 1999, <http://edition.cnn.com/WORLD/europe/9903/28/kosovo.fighting.02/> (accessed December 2009).

passed on 10 June 1999 in response to the crisis, authorizing an international security presence in Kosovo with “substantial North Atlantic Treaty Organization participation ... deployed under unified command and control” (KFOR) and an international civil presence “in order to provide an interim administration for Kosovo”.³²⁵ Resolution 1244 did not make a determination on Kosovo's final status, but it did establish a UN interim administration in Kosovo, UNMIK (United Nations Mission in Kosovo) whose purpose was two-fold: to engage in institution building, and to facilitate a political process in order to reach an agreement on Kosovo's final status.³²⁶ A diplomatic initiative headed by Martti Ahtisaari was established in 2005, and continued into 2007.³²⁷ However, no settlement could be reached between the Kosovo representatives.

2.4. Declaration of Independence

In the wake of the failed talks, Martti Ahtisaari submitted the Ahtisaari report to the Security Council, in which he concluded that it would not be possible to reach a settlement, and that the way forward for Kosovo was 'supervised independence'.³²⁸ Kosovo unilaterally declared its independence on 17 February, 2008. The Declaration of Independence received US blessing and was coordinated with the EU³²⁹. On 18 February, the United States, formally recognized Kosovo as a “sovereign and independent state”.³³⁰ As of 3 September 2010, 70 out of 192 United Nations member states have formally recognised the Republic of Kosovo as an independent state.³³¹ Notably, 22 out of 27 member states of the European Union and 24 out of 28 member states of NATO have recognised Kosovo

3. Claim to Remedial Secession

³²⁵ SC Res. 1244, 10 June 1999.

³²⁶ Judah, *supra* note 312, p.90.

³²⁷ *Ibid* p.111.

³²⁸ M. Ahtisaari, Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, UN Doc. S/2007/168 (2007).

³²⁹ Cismas *supra* note 73 p. 578.

³³⁰ “US Recognises Kosovo as Independent State”, 18 February 2008, available at: www.pristina.usmission.gov

³³¹ The list of states which have recognized Kosovo, as well as the recognition statements are available online at <http://www.kosovothanksyou.com/> (last visited 13 September 2010).

From the proceeding factual analysis, we can observe many of the common elements that are common to the secessions of Bangladesh and Croatia: an ethnic group experiencing political and civil discrimination escalating to the point of grave human rights abuses. Therefore, using the criteria elaborated in chapter III Kosovo's claim to secession will be evaluated to observe whether it conforms to the theory of remedial recession.

3.1 'People'

The Kosovo Albanians make up 90 percent of the population of Kosovo and they have for centuries long maintained and cultivated characteristics distinct from other groups inhabiting the territory of the FRY³³². They speak a common language, have their own culture and traditions, and self-identify as a 'people'.³³³ Further, Kosovo has been recognised as a distinct geographical region with clearly defined borders.³³⁴ From this it could be argued that the Kosovo Albanians satisfy both the objective and subjective elements of a 'people' suggested by .Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination. Aureliu Cristescu.³³⁵

3.2 Breach of Internal Self-Determination and Human Rights Violations

The claim to secession advanced by the people of Kosovo to the ICJ is based upon evidence of a continuous process of oppression by the Serbian government, deprivation and denial of any meaningful exercise of their right to internal self-determination commensurate with the relevant provisions of international conventions. The scale of abuse which took place in Kosovo are documented not only by UN bodies and special procedures³³⁶ and non-governmental organizations (here

³³² NATO Final Report *supra* note 243 p. 39.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

³³⁶ See for example General Assembly resolutions: GA Res. 47/147, 18 December 1992; GA Res. 48/153, 20 December 1993; GA Res. 49/204, 23 December 1994; GA. Res.50/190, 22 December 1995; GA Res. 51/111, 5 March 1997; Resolutions of the Commission on Human Rights: 1992/S-1/1, 14 August 1992; 1992/S-2/1, 1 December 1992; 1993/7, 23 February 1993; 1994/76, 9 March 1994; 1995/89, 8 March 1995; 1996/71, 23 April 1996; 1997/57, 15 April 1997; 1998/79, 22 April 1998;

after NGOs)³³⁷, but also by Serbian laws which themselves legalized discrimination.

Evidence presented before the ICJ suggested that the Serbian government sought to remove any autonomous control or self-government by the Kosovo Albanians, and effectively segregate Serbs and Albanians in Kosovo³³⁸. With the inception of the 2006 Serbian Constitution, Serbia took full control over Kosovo's banking, judicial and educational systems as well as police³³⁹. Further, Albanian mass media were banned; Albanian language schools and university were closed, and more than 120 000 Albanians were dismissed from their jobs³⁴⁰. In the public domain and in state institutions the use of the Albanian language was proscribed, names of streets, squares, schools and cultural centres in Kosovo were changed to Serbian names, with the requirement that they be in the Serbian Cyrillic alphabet³⁴¹. In 1996, the UN Committee on the Elimination of Racial Discrimination summarised the situation as one that "deprived [the ethnic Albanians] of effective enjoyment of the most basic human rights provided for in the Convention".³⁴²

Major human rights abuses against ethnic Albanians by Serbian government officials during the escalation of the crisis include evidence of disappearances, torture, arbitrary arrests and detentions, trials for political prisoners, deliberate and

Reports of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia: E/CN.4/1992/S-1/9; E/CN.4/1992/S-1/10; A/47/666-S/24809; E/CN.4/1993/50; A/49/641-S/1994/1252; E/CN.4/1995/57; E/CN.4/1996/107; E/CN.4/1998/9; E/CN.4/1998/15; E/CN.4/1998/164.

³³⁷ See for example reports and press releases of Human Rights Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992* (1992); *Open Wounds: Human Rights Abuses in Kosovo* (1993); *Human Rights Abuses of Non-Serbs in Kosovo, Sandzak & Vojvodina* (1994); Yugoslavia (Serbia and Montenegro): Persecution Persists, Human Rights Violations in Kosovo (1996); Kosovo – Fair Trail for Albanians (1997) available <http://www.hrw.org/reports/>

³³⁸ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for Advisory Opinion) ICJ, Written Contribution of the Authors of the Unilateral Declaration of Independence

³³⁹ The Law on Transmission of Financial Funds, of March 29, 1991, in which the banking system of Kosovo, the financial funds of the National Bank of Kosovo and of all commercial banks were placed under Serbian control quoted in NATO report *supra* note 243 p. 45

³⁴⁰ The Law on Job Relations in Special Circumstance, July 26, 1990 resulted in the subsequent expulsion of 150,000 Kosovo Albanians from their jobs, representing 80 percent of the employed Albanians in Kosovo quoted in NATO Report *supra* note 243 p. 45

³⁴¹ The Law on the Official Use of Language and Scripts, July 27, 1991 banned the Albanian language notwithstanding the demographic make up of the Kosovo population (90 percent ethnic Albanians) quoted in NATO Report *supra* note 243 p. 43.

³⁴² CERD, Concluding Observations, 15-16 March 1996.

indiscriminate attacks on civilians, including women and children³⁴³. According to a report of the Council for the Defence of Human Rights and Fundamental Freedoms (CDHRF), human rights abuses against ethnic Albanians included 35 cases of violent death, five of which resulted from police brutality; 5031 cases of ill-treatment or torture; 596 arbitrary arrests; 1288 persons summoned or taken to police stations for ‘informative talks’; 425 civilians’ homes raided; and over 10 000 other cases of human rights abuses against Kosovo Albanians by Serbian police³⁴⁴. Police operations undertaken in early 1998 by Serbian police forces which caused the death of around 80 civilians, led to the displacement of around 20,000 ethnic Albanians³⁴⁵. Subsequent attacks by Serbian military, paramilitary and police forces targeted civilians, and attempted to hind the return of the displaced and refugees³⁴⁶.

Resolution 1244 (1999) described the situation in Kosovo as a “grave humanitarian situation”³⁴⁷ and the Independent International Commission on Kosovo: the concluded that the “Serb oppression included numerous atrocities that appeared to have the character of crimes against humanity in the sense that this term has been understood since the Nuremberg judgment.”³⁴⁸

3.3 Measure of Last Resort

The ICJ noted in its decision that the declaration of independence was, according to its authors, a result of the fact that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached³⁴⁹. The Preamble of the declaration refers to the “years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status” and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that “no mutually-acceptable status outcome was possible” (tenth

³⁴³ International Helsinki Federation for Human Rights, Human Rights in Albania, Belarus, Slovakia and the Federal Republic of Yugoslavia, (July 1, 1998), available <http://www.ess.uwe.ac.uk/kosovo/Cdhrfrep99.htm>

³⁴⁴ *Ibid.*

³⁴⁵ See Amnesty International Report, A Human Rights Crisis in Kosovo Province, Document Series B: Tragic events continue #4: The Protection of Kosovo’s displaced and refugees, October 1998, EUR 70/73/98.

³⁴⁶ *Ibid.*

³⁴⁷ SC Res. 1244, 10 June 1999.

³⁴⁸ The Independent International Commission on Kosovo, p.164

³⁴⁹ *Kosovo Advisory Opinion* p. 11.

and eleventh Preambular paragraphs)³⁵⁰.

3.4 Conclusion

We can thus conclude that there is sufficient evidence to suggest that the case of Kosovo gathers the factual elements of remedial secession namely:

- (a) the Kosovo Albanians are a cultural group within Serbia, concentrated and forming the majority within the territory of Kosovo;
- (b) the Milosevic regime carried out a policy of systematic discrimination followed by the perpetration of massive and grave abuses against the Kosovo Albanians; and
- (c) the potential to produce any mutually agreeable outcome through peaceful settlement of disputes had been exhausted.

The widespread recognition of Kosovo as an independent state, in conjunction with the recent ruling by the ICJ declaring the legality of the declaration of independence, would thus suggest that Kosovo represents another successful example of a remedial secession in the international arena.

However, to ascertain the weight of precedential or crystalising value to a customary rule on remedial secession given by the Kosovo case, I will need to examine in depth both the ICJ's Advisory Opinion pertaining to the legality of the declaration of independence, and the wider response by the international community.

4. Implications of The ICJ's Advisory Opinion

4.1 Background

Shortly after the 2008 declaration of independence, the question of the legality of the declaration was referred to the ICJ by the General Assembly. The question posed to the Court by the General Assembly was as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"³⁵¹ While the question of remedial secession was

³⁵⁰ *Ibid.*

³⁵¹ G.A. Res. 63/3 Oct. 8, 2008.

not directly referred to the Court, the legality/illegality of Kosovo's declaration of independence will have a bearing on the whether the basis upon which it was made (seemingly remedial secession) is said to have validity in international law.

4.2 State Submissions

Thirty five member states of the United Nations filed written statements with the Court. Most of the legal arguments condemning the unilateral declaration of independence centred on two issues: first, the protection for the territorial integrity of FRY in various significant international documents, including in the UN Charter and in UN Security Council Resolution 1244, which refers "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia";³⁵² and second, that self-determination was not applicable to the people of Kosovo.³⁵³

Arguments presented in support of the unilateral declaration of independence generally raised some of the following five main issues: first, that secession is not contrary to international law³⁵⁴; second, that territorial integrity will apply only between states to prevent the use of force and intervention by third States are concerned, and that secession is thereby an internal matter which is beyond the realm of international law;³⁵⁵ third, that self-determination is an *erga omnes* obligation that applied beyond the colonial context, and was applicable to the people of Kosovo;³⁵⁶ fourth, that the breach of self-determination may give rise to remedial secession under international law;³⁵⁷ and last, that the independence of Kosovo should not be seen to set a precedent for secession.³⁵⁸

³⁵² See Argentina's Written Submission p.45; Cyprus' Written Submission paras 88-90; Brazil's Written Statement.

³⁵³ See Russia's Written Statement, Argentina's Written Submission p. 34, Cyprus' Written Submission paras 123-148

³⁵⁴ See Kingdom of the Netherlands Written Submission p.3, United Kingdom's Written Submission p. 4.

³⁵⁵ See United Kingdom's Written Submission, Denmark's Written Submission p. 3.

³⁵⁶ See Kingdom of the Netherlands Written Submission p. 3, Germany's Written Submission 28-30

³⁵⁷ See Estonia's Written Submission para 2.1.2; Ireland's Written Submissions para 7(d); Kingdom of the Netherlands' Written Submissions p. 3, Poland's Written Statements, p.6; Switzerland's Written Submissions paras 81- 86.

³⁵⁸ See Denmark' Written Submission p. 4, France's Written Submission p.2; Germany's Written Submission 26-27.

4.3 Overview of the Advisory Opinion

On 22 July 2010, the ICJ delivered its advisory opinion, concluding that the declaration of independence did not violate any applicable rule of international law noting that “international law contains no applicable prohibition of declarations of independence”.³⁵⁹ Regrettably, the Court restricted its opinion strictly to the question of the act of declaring, not the legal effects of the declaration (i.e whether Kosovo can be said to be a state) or a right to secession. Therefore, it provided little guidance on the question of the legality of the Kosovo’s independence in international law.

With regards to the question of a breach of territorial integrity, the Court concluded that the scope of the principle of territorial integrity is confined to the sphere of relations between States, and, therefore, does not apply to declarations of independence or other acts taken by non-state actors.³⁶⁰ Crucially, in making this determination the Court recalled The Friendly Relations Declaration, which, it said, reflects customary international law³⁶¹, which lends strength to the possibility of a legal basis for remedial secession being derived from the Declaration. However, in regards to remedial secession the court merely noted that it was “a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question.”³⁶² This may be taken to mean that the Court may have considered that there was no consolidated legal opinion (*opinio iuris*) in international law on this topic. Ultimately, the Court undertook only a very limited analysis of this argument. So it stated:

The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”, however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed

³⁵⁹ *Kosovo Advisory Opinion* para 84.

³⁶⁰ *Kosovo Advisory Opinion* para 80,

³⁶¹ *Ibid*,

³⁶² *Ibid* paras 82-83.

by the General Assembly.³⁶³

Nevertheless, the Court's opinion did refer to a number of matters which are relevant to remedial secession. In reaching its conclusion, the Court referred to the numerous instances of unilateral declarations of independence leading to statehood in the 18th, 19th and 20th centuries.³⁶⁴ State practice during this period, it noted, "points clearly to the conclusion that international law contained no prohibition of declarations of independence"³⁶⁵. Further, the Court alluded to the right of external self-determination leading to independence that developed during the second half of the twentieth century, noting that

[t]he international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new States have come into existence as a result of the exercise of this right."³⁶⁶

Crucially, the Court referred to "instances of declarations of independence outside this context"³⁶⁷, alluding to the many instances of purported remedial secession. With regard to these, the Court noted that "the practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases."³⁶⁸ In discussing the instances in which the Security Council condemned particular declarations of independence in Southern Rhodesia, northern Cyprus and Republika Srpska, the Court concluded that

[i]n all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other

³⁶³ *Ibid* para 81.

³⁶⁴ *Ibid* para 79.

³⁶⁵ *Ibid*.

³⁶⁶ *Ibid* para 79.

³⁶⁷ *Ibid*.

³⁶⁸ *Ibid* para 81.

egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).³⁶⁹

In the context of Kosovo, the Court concluded, the Security Council has never taken this position.³⁷⁰ The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

Lastly, the Court did not enter into the consideration of the other argument put forward by some delegations, according to which the declaration of independence by Kosovo was a case *sui generis* from which no precedent could flow. This clearly left the door open for the possibility of a wider precedent forming.

4.4 Implications of the Advisory Opinion for Remedial Secession

Despite the hype surrounding the Kosovo verdict³⁷¹, the effect of the ICJ's opinion is, in a word, limited. The ICJ merely confirmed that there is no norm of international law which prohibits an entity from declaring independence, but remained silent on the consequences of such declaration of independence and whether effecting independence may or may not violate international law. Given that the ruling is strictly confined to the question of the legality of the Declaration, it would be very difficult to construe it as implying that there is a right to secession for Kosovo, even less so for other secessionist movements. Further, the opinion resolved only a few of the contentious legal questions, which are relevant in the context of the Kosovo issue.

The ICJ did not provide an opinion on whether Kosovo has achieved statehood; on the validity or legal effects of the recognition of Kosovo as an independent state by other states; whether international law confers a positive entitlement on Kosovo unilaterally to declare its independence; or whether international law generally

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ 'If Kosovo goes free; the independence precedent', *The Economist*, 29 November 2007; in other regions: 'Breakaway regions look to Kosovo precedent', *Reuters*, 9 December 2007, 'Breakaway territories watch and wait', *Financial Times Deutschland*, 25 January 2008.

confers an entitlement on entities situated within a State unilaterally to break away from it; and it expressly refused to address the extent of the right of self-determination and the existence of a right of remedial secession. Bluntly put, given its failure to answer these fundamental questions, the ICJ opinion throws little light on the controversy over the existence of a right to remedial secession.

5. Implications of State Recognition of Kosovo's Independence

By far the most crucial aspect of the independence of Kosovo is the widespread recognition it has received. Returning to the two element theory of customary international law advanced by the ICJ, it again must be considered whether this provides evidence of both state practice and *opinio juris*.³⁷² Presently 70 out of 192 UN member states have extended recognition to Kosovo. Additionally, states recognising the independence of Kosovo seem to have taken into account the criteria of a remedial secession in justifying their recognition.³⁷³ Both the US and the UK have referred to human rights abuses, and the exhaustion of all attempts at negotiating with Serbia.³⁷⁴

However, can this recognition be considered as evidencing the necessary *opinio juris* to support the establishment of a customary rule? A declaratory approach to statehood and recognition³⁷⁵ would imply that States consider that the secession was lawful and are that recognition was an acknowledgment of this fact. Given the presence of the doctrine of non-recognition, where recognition cannot occur when an entity is created in breach of international law,³⁷⁶ the recognition of Kosovo by several states could be interpreted as a proof of these states' consideration that Kosovo's independence is not the result of an illegal situation. As the ICJ noted, in cases of secession where recognition was withheld by states, such as Rhodesia or the South Africa Homelands,

³⁷² *North Sea Continental Shelf*, Judgment, ICJ reports 1969, para. 77.

³⁷³ Jaber *supra* note 119.

³⁷⁴ C. Gray, *The Use of Force* (New York: Oxford University Press, 2008), p. 22.

³⁷⁵ The declaratory theory of statehood asserts that the act of recognition serves only as evidence that a state has come into being, and that where a State actually exists, the law must take account of the new situation despite possible illegality. In contrast, the constitutive theory asserts that a state has its genesis in recognition, it regards the mere effectiveness as insufficient for the validation of a claim to statehood.

³⁷⁶ Kohen, *supra* note 38, p.627. Crawford, *supra* note 65, p. 51

States referred to the “illegality” or “invalidity” as the reason behind withholding recognition. Therefore, States do not shy away from withholding recognition where they believe a state is based in illegality, implying that the creation of Kosovo was not one such situation. Further, States have recognised and continued to support Kosovo’s independence despite the continuing protests of Serbia. This support appears to contradict existent state practice, since in the past states have recognised new state entities -created either as a result of secession or dissolution - only after the parent state consented to the separation.³⁷⁷ Along these lines then, state practice in the case of Kosovo would appear to set a precedent and crystallise remedial secession as a legal option for state creation.

From a constitutive view, the widespread recognition would infer that recognition by the majority of states has confirmed Kosovo’s statehood. However, as Crawford suggests, individual state pronouncements are not constitutive of the legality of that statehood.³⁷⁸ Thus, it could be implied that states, in recognizing Kosovo, are not implying a right of secession, but merely confirming the existence of the state of Kosovo. To examine the intention of States’ further, we must turn to some of the statements made by those state lending support to Kosovo’s independence. The United States of America asserts that

The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today³⁷⁹

Along similar lines, the Foreign Ministers of the European Union states declared that

The Council [...] underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call

³⁷⁷ See for example Pakistan.

³⁷⁸ Crawford *supra* note 65, p. 21

³⁷⁹ U.S. Department of State, *U.S. Recognizes Kosovo as Independent State*, Washington D.C., 18 February 2008, <http://www.america.gov/st/peacesecenglish/2008/February/20080218144244dmslahrellek0.9832117.html>

into question these principles and resolutions.³⁸⁰

This would seem to imply that in recognizing Kosovo the recognizing states have consciously and clearly opted not to create a general rule governing remedial secession. However, we must indeed ask whether this is at all possible.

The argument for uniqueness suffers from a conceptual problem, in that it contradicts the idea of equal application of law. If it can be seen that international law upholds Kosovo's claim – as it arguably has – it is, as Thomas Franck suggests, doubtful if that right can be fairly limited to one part of the world.³⁸¹ Any argument for *sui generis* can only be made after articulating the material evidence supporting the special character of the relevant situation, and that no other legal category exists in which to accommodate it.³⁸² However, as this thesis has outlined, there is most certainly an existent legal category – remedial secession, and its defined index of validity – that should be given due consideration. The prevailing considerations of legal security, transparency and predictability require this.³⁸³ To do otherwise necessarily implies applying international law to Kosovo differently from other entities. Thus, the idea of a *sui generis* character of Kosovo goes against not only the available evidence, but also against the non-discriminatory application of international law.

6. Conclusion

“It is quite obvious that such a development [the EU's recognition of Kosovo's independence] would create a serious negative precedent from the point of view of international law. It will be seen as a precedent by many people, perhaps far too many people, across the world”³⁸⁴

As suggested by the quote by Russia's foreign minister to the EU, many states fear

³⁸⁰ Council of the European Union, Press Release, 2851st Council Meeting, General Affairs and External Relations, Brussels, 18 February 2008, available at

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf

³⁸¹ T. Franck, *Fairness in International Law and Institutions*, (New York: OUP, 1995) p. 160.

³⁸² A. Orakhelashvili, “Statehood, Recognition and the UN System: A Unilateral Declaration of Independence in Kosovo”, (2008) *Max Planck Yearbook of UN Law* 12 p. 21.

³⁸³ *Ibid.*

³⁸⁴ Vladimir Chizhov, Ambassador of the Russian Federation to the European Union as quoted in ‘Russia warns EU over Kosovo recognition’, *Financial Times*, 7 February 2008.

that recognition of Kosovo may set a precedent or confirm a clear right to secession in international law. However, both the ICJ's opinion, and the recognition of Kosovo by States both are inconclusive to whether this is a reality. The widespread recognition of Kosovo suggests that these recognizing states do not believe that Kosovo was not created in breach of international legal norms. However, by systematically arguing that Kosovo's remedial secession does not represent a precedent, the international community have tried to deprive Kosovo of its precedential or crystallising value. While I have argued that this claim to *sui generis* is quite unreasonable, it is quite likely that the position taken by the recognizing states, robs the state practice of its required *opinion juris*, making it difficult to assert that a customary law of remedial secession can be made out.

V. Conclusion: 'Ay, There's The Rub'³⁸⁵

With regards to the question of remedial secession in international law, states appear to be stuck somewhere between Hamlet's existential dilemma: to recognise the right or not to recognise the right. By virtue of their recognition of Bangladesh, Croatia and Kosovo as state, the international community has made a claim – albeit implicit – that the state entities were not created in breach of international legal norms. This would suggest that the legal and theoretical framework for remedial secession has received

³⁸⁵ To be or not to be– that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles
And, by opposing, end them. To die, to sleep...
To sleep, perchance to dream. Ay, there's the rub, Hamlet Act 3, scene 1, 55–87

support, even approval by the practice of states. The problem is of course that states are careful not to lend express support to remedial secession as a universally accepted entitlement of oppressed peoples. Therefore, it is difficult to assert that a customary rule has developed, given the dubious nature of *opinion juris* on the matter.

Where then does this state of affairs leave secessions which are in all but name, based upon remedial secession? The simple truth is that the absence of an express right to unilateral secession does not imply that such an act is illegal. Indeed, “secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.”³⁸⁶ Indeed the idea underlying remedial secession—the last resort for ending the oppression of a certain people— can still influence the recognition policies of states. In *Re Secession of Quebec*, the Supreme Court of Canada held that

The ultimate success of ... a [unilateral] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.³⁸⁷

This position of the Court suggests that

- (1) the success of a unilateral secession depends on international recognition; and
- (2) the conduct of the parent state towards the seceding entity will be taken as a major consideration when states decide on granting recognition

The judgement therefore implies that remedial secession could be given effect through recognition—indeed, it falls close to Shaw’s argument that “recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights.”³⁸⁸ Furthermore, where recognition is granted almost universally to such an entity, it is difficult to separate collective recognition from collective state creation.³⁸⁹ For these reasons it is possible to accept that remedial-secession claims could be realised through recognition. The actual position of remedial secession in international law may therefore be as follows: that, as a consequence of oppression, the parent state’s right to territorial integrity becomes weaker; foreign states might

³⁸⁶ Crawford, *supra* note 65 p. 390.

³⁸⁷ *Re Secession of Quebec* para 155

³⁸⁸ Shaw, *supra* note 86 p.483

³⁸⁹ Crawford *supra* note 65 p.501

then decide not to observe this right of the parent state and to recognize the secession-seeking entity; however, remedial secession is not an entitlement of oppressed peoples and oppression creates no obligation for foreign states to grant recognition.

It is unfortunate, however, that remedial secession cannot find legal force in international law. While states are understandably fearful of setting a precedent of legitimising secessionist movements or of making their own cultural groups aware of the remedial secession option in case their minority rights are systematically refused, or autonomy and self-governance brutally denied, the consequences of not assuming the precedent are far more important. The international community seems to believe that secessionist movements should be left to the mercy of their respective parent states, or as Rosalyn Higgins states “if a people wishes strongly enough to form a separate political community, the matter is one to be resolved between them and the large political unit of which they are a part”³⁹⁰. However, this statement is quite naïve, because as the cases of Bangladesh and Croatia demonstrate, in many instances it is not a wish, but rather a need to secede.

The force of remedial secession lies in its prevention potential - empowering minority groups to hold governments accountable to their international obligations. It is therefore less of a threat to the integrity of states, then a non-traditional human rights mechanism. Kosovo, then, represents a missed opportunity by the international community to take a firm stand on minority protection, human rights and the prohibition against genocide. The message states send in refusing to articulate a right of remedial secession is that their borders are sacrosanct even when governments by way of their discriminatory and repressive actions against part of their population question their own *raison d'être*. It is a perverse implication that does little to further the cause of human rights or democracy in the international community.

³⁹⁰ R. Higgins, “International Law and Civil Conflict” in E. Luard (ed) *The International Regulation of War* (London: Thames & Hudson, 1972)

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