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Self-determination and Access to Independence under Current International Law: From Language to Concept

Helena TORROJA*

Abstract

This article examines the legal concepts and principles describing and regulating the means of accessing independence under current general international law. It argues that there is a *gap* between a *legal language widely used by scholars* today and the *original state consensus* behind the *essential international principle of self-determination of peoples* as it relates to the protection of territorial integrity and secession of territories. As a result, academic legal language is erasing the concept of *the right to restore territorial integrity, i.e., to restore sovereignty* (attributed to colonial and occupied peoples). This is due to the assumption that the international right to external self-determination of peoples is *a right to unilateral secession in some circumstances as an exception to territorial integrity*. It is likewise erasing the concept of *the right to freely determine without discrimination (against minorities or majorities) the status of one's own territory* (a right attributed to a state's whole population), which the same international norm protects through a *tacit limitation on secession*. In this case, the erasure is due to the widespread assumption that general international law is neutral with regard to secession.

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Contents

I. INTRODUCTION: SCHOLARS' LEGAL LANGUAGE *VERSUS* STATE CONSENSUS. THESIS OF THIS ARTICLE

Given the sheer volume of literature already written on the international principle of self-determination of peoples, one might wonder if there is anything left to say. Yet there are still arguments to be made and theses to be laid out. The one I will present here concerns the method and language used by scholars in their analysis of the principle. This method and language reveal a *gap* between a *legal language widely used by scholars* today and the *original state consensus* behind the *essential international principle of self-determination of peoples* as it relates to the protection of territorial integrity and secession of territories. By *original state consensus,* I mean the interstate consensus that

drove the adoption of the principle in the 1960s and 1970s and remains in force today, as I contend that the essential content of the principle has not yet changed. By *gap* I mean the distance between what *scholars* say the norm says (language) and what the *states* actually adopted (state consensus) in this key international principle.

This gap between scholars' legal language and state consensus is, in fact, a gap between *legal concepts as they are adopted by states* and the *academic language* used to discuss them. As a result of this gap, scholarly legal language is *erasing* certain international legal concepts from the dialogue on the self-determination of peoples by excluding them from consideration – or relegating them to a minor role – in the general debate among scholars and practitioners, a group that includes the legal advisors to states' foreign offices or state departments. I argue that this is the case with the concept of *the right to restore territorial integrity, i.e., to restore sovereignty (a right attributed to colonial and occupied peoples)*, as well as the concept of *the right to freely determine without discrimination (against minorities or majorities) the status of one's own territory (a right attributed to a state's whole population), which the same international norm protects through a tacit limitation on secession*. The former concept is being erased by the assumption that the international right to external self-determination of peoples is a right to unilateral secession in some circumstances as an exception to territorial integrity, an idea fostered by the Supreme Court of Canada's decision on the secession of Quebec. The latter is being erased by the widespread assumption that general international law is neutral with regard to secession, an idea espoused by the International Court of Justice (ICJ) in its Kosovo Opinion.

This is a study on *public international law*, addressed to scholars of the discipline. Therefore, when it refers to international legal concepts, it is referring to those reached by state consensus and generally contained in international norms. Needless to say, one could also discuss the term "self-determination of peoples" from a historical, philosophical, political, international relations, or constitutional law perspective, and it would have very different meanings. But my goal is to restore *the specific meaning of the exercise of the (external and internal) rights to self-determination in public international law*. Ultimately, I aim to show how scholarly legal language (from both

internationalist and non-internationalist disciplines) can change the reality of an international norm in scholars' minds, and how this new legal language influences the language of legal practitioners and vice versa.

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The gap between scholarly language and international legal concepts has several causes. One is the practice of secessionist movements and their interpretation of the principle of self-determination of peoples. Each wave of secessionist movements has rekindled the scholarly debate on the link between this international principle and secession: from Katanga, Biafra, and East Pakistan in the 1960s and 1970s to Quebec, North Ireland, and the Basque Country in the 1980s, the displacements of sovereignty in Europe and Africa following the fall of the Berlin Wall in the 1990s, or the cases of Kosovo, Scotland, Catalonia, and Hong Kong – among others – in the early 2000s and today. Certainly, due to the subject's strong political connotations, the conclusions of some scholarly studies seem to blur the lines between politics, terminology, and fundamental international concepts in the process of determining the content of the self-determination principle.

Another cause is the confusion of different kinds of scholarly debate regarding the principle's content. Briefly, the myriad debates in the literature can be classified into two main groups: those aimed at *determining the content* of the *positive norm* (i.e., what the principle *is*) and those *proposing a change to the norm* and, thus, dealing with proposals *de lege ferenda* (i.e., what the principle *should be*). When these two types of debates – the *should be* approach and the *is* approach – and the language they use are confused, the dialogue in the literature becomes quite difficult, if not impossible.

For example, the *should be* approach addresses multiple questions. A particularly widespread one is whether an expanded notion of self-determination *could be the solution* to internal tensions caused by the presence within a state's population of

minorities who want access to independence.[2] Such approaches seek to contribute *reflections and proposals to foster a change in the law* toward what the authors view as greater social justice.[3] Alternatively, they may seek to deconstruct and critically argue about the positive law from a theoretical and political perspective.[4] In all these cases, the research has a policy (or political) aim of changing, suppressing, or reinterpreting the positive law.

I maintain that, in parallel to considering what the norm *should be*, we can also seek a clear understanding of what it *is* and *why*. After all, it is the states, not the scholarly literature, that create and change international law. Yet for years, this *is* has seemed impossible to pin down due to the *ambiguity* of some of the terms and wording of the norm as it is currently formulated by states. Certainly, this ambiguity is what first gave rise to the gap between scholars' language and the original state consensus. This problem has thus likewise affected the other scholarly debate, i.e., the *is* approach. One of the most hotly debated issues in this group is the *question of whether this principle is applicable to minorities or fractions of the population of a state with secessionist ambitions and, if so, where that leaves the principle of territorial integrity*. In the 1990s, many authors wondered whether the classic international principle was undergoing a *new development*

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[2] According to Professor Crawford, many studies have taken this approach (J. Crawford, "The Right of Self-Determination in International Law: Its Development and Future," in P. Alston (Ed.), *People's Rights* (Oxford University Press, 2001), at 7–8).

[3] Including, among many others, Professor Klabbers's approach, which suggests that the right to self-determination is best regarded "as a procedural right: the right to be taken seriously" (J. Klabbers, "The Right to be Taken Seriously: Self-Determination in International Law," 28 *Human Rights Quarterly* (2006), at 18).

[4] Among many others, this would be the approach taken by Professor Koskenniemi when he shows the "paradoxes inherent in the very notion of national self-determination" as a patriotic concept that justifies statehood versus a secessionist concept in cases of "abnormality" or exceptional situations (M. Koskenniemi, "National Self-determination Today: Problems of Legal Theory and Practice," 43 *International and Comparative Law Quarterly* (1994), at 245–246).

in this sense.[5] Since the turn of the century, the number of studies in one way or another dealing with the question has only grown.[6]

This particular question has reached the *highest levels of application and codification of public international law*. In 2010, in an *obiter dictum* in its Advisory Opinion on Kosovo, the International Court of Justice (ICJ) asked "whether the right to self-determination allows a part of a state's population to separate" (paragraph 83). The Court considered it unnecessary to answer this question to continue with its legal argumentation. At the same time, however, it stated that general international law was neutral concerning declarations of independence, i.e., concerning secession.[7] Years later, in 2019, the question arose again, this time in the framework of the International Law Commission, where Special Rapporteur Dire Tladi asked "whether the circumstances in which the right applies would permit external self-determination (secession)." He, too, avoided answering what he considered a "complex problem" to solve.[8] For whatever reason, two international bodies that could have contributed greatly to settling the matter declined to do so.

The subject of the present article falls within this second group of debates (the *is* approach). The aim is not simply to respond to the question raised – but not answered – by the ICJ and Special Rapporteur Tladi (i.e., does the principle of self-determination of peoples include a right to separate from the state for a fraction of a state's population?). Rather, it seeks to address an even greater problem: is it possible to give a clear, coherent, and objective answer, reflective of the current positive state of international law on the

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[5] Among many others, see C. Tomuschat (Ed.), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht, 1993).

[6] Among many others, see M. Kohen, *Secession: International Law Perspectives* (Cambridge University Press, 2006); M. Sterio, *The Right to Self-determination under International Law: "Selfistans," Secession, and the Rule of the Great Powers* (Routledge, 2012); M. Sterio, *Secession in International Law: A New Framework* (Edward Elgar, 2018); F. Bérard and S. Beaulac, *The Law of Independence: Québec, Montenegro, Kosovo, Scotland, Catalonia* (Lexis Nexis, 2017); C. Closa, C. Margiotta, and G. Martinico (Eds.), *Between Democracy and Law: The Amorality of Secession* (Routledge, 2020).

[7] See: ICJ, Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* July 22, 2010, paras. 59–56 and 82–83.

[8] Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/727, January 31, 2019, at 52, para. 115.

matter, that consistently uses all the terminology and concepts in use today? The disparate terminology found in the scholarly language thus provides the rationale for this study.

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To undertake this research, we must first tackle a preliminary methodological problem: if we want to discuss the gap between scholars' language and state consensus, we must first determine the content of that consensus despite the undeniably ambiguous wording of the principle in the international texts that formulate it. Section (II) deals with this problem by identifying the secondary rules of recognition and change of the essential principle of self-determination of peoples. It then applies these secondary rules in two separate stages since the principle of self-determination clearly comprises two distinct rights: the right to external self-determination and the right to internal self-determination. Section (III) addresses the problem of determining the content of *the right to external self-determination* and how it relates to the protection of territorial integrity and the legal concepts of separation and secession of territories. Section (IV) focuses on the scope of the protection of territorial integrity established by the right of internal self-determination. Section (V) briefly addresses the problem of the link between events (facts) and the evolution (change) of the content of the international principle of self-determination (do facts change custom? has the principle been modified by state practice?). Finally, Section (VI), the Conclusions, lays out the article's thesis in greater detail.

II. THE INTERNATIONAL LEGAL PRINCIPLE OF SELF-DETERMINATION OF PEOPLES AND THE METHOD TO DETERMINE ITS CONTENT (STATE CONSENSUS)

To determine the content of the international legal concepts established by the principle of self-determination of peoples, it is essential to identify the original state consensus behind the principle's adoption. This is a matter of method. Only the right method will bring us to the answer most in keeping with the reality of the positive norm and the values it protects. To this end, certain basic methodological aspects of the general

theory of international law should be taken into consideration. In general terms, to be valid, the process for interpreting an international norm must meet two requirements. First, it must respect the *secondary rules of interpretation* of international norms, which vary depending on the formal source of the norm in question. Second, and indissociably, the norm's interpretation must be guided by *the necessary presence* of a *consensus* or *the consent* of the states (again depending on the formal source) behind it, i.e., its material source.

In the present context, ICJ case law, including both advisory opinions and judgments, supports the existence of the *customary rule* of the right to *external* self-determination and independence of colonial peoples and of peoples subjected to occupation and exploitation,[9] its *erga omnes* effects,[10] and, ultimately, its imperative (*jus cogens*) nature,[11] which the ILC has also confirmed.[12] State *consensus* is the *material*

[9] Thus: "52. Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them" (ICJ, Advisory Opinion, *Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, June 21, 1971, at 31, para. 52). See also: ICJ, Advisory Opinion, *Western Sahara*, October 16, 1975, at 31–33, paras. 54–59, and at 68, para. 162. Likewise: "During the second half of the twentieth century the 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" (ICJ, Advisory Opinion, *Kosovo*, *supra* n. 2, at 436, para. 79; ICJ, Advisory Opinion, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, February 25, 2019, para. 152).

[10] ICJ, Judgment, *Case concerning East Timor (Portugal v. Australia)*, June 30, 1995, at 102, para. 29: "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable ... it is one of the essential principles of contemporary international law."

[11] ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 9, 2004, at 171–172, para. 88. Although the Court cautiously states that "the right of peoples to self-determination is today a right *erga omnes*," it was referring to the *imperative nature* as observed in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (A. Remiro Brotóns *et al.*, *Derecho internacional* (Tirant lo Blanch, 2007) at 68–69).

[12] The principle is included in point h) of the non-exhaustive list of international *jus cogens* norms added as an Annex to the ILC's "Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)" (adopted by the International Law Commission at its seventy-third session, in 2022, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/77/10, para. 43)). As already noted, it had been included in ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Commentary to Article 26, para 5.

source of international *custom* referred to as "evidence of a general practice accepted as law" (Article 38 ICJ Statute). Two related requirements – general, constant, and uniform *practice* (*usus*) and the *opinio juris sive necessitatis* – must be met *to prove* the content of a custom.[13] Thus, the determination of the existence and content of the *jus cogens* principle of self-determination of peoples must follow certain *basic general secondary rules of recognition and change of customary norms*. These rules are included in many books, as well as in the Draft conclusions on identification of customary international law adopted by the ILC in 2018 (hereinafter 2018 ILC Draft conclusions).[14] To help the reader understand the arguments I will be making here, I will summarize them briefly below.

First, *written international legal instruments* are useful for *determining the existence and content* of a custom. Interpreting and determining the existence and content of a custom are overlapping operations.[15] In the present case, the ICJ has referred to three main legal texts to determine part of the content of the principle of self-determination: UNGA Resolution 1514 (XV), from 1960; common Article 1 of the human rights covenants of 1966; and UNGA Resolution 2625 (XXV), from 1970. There is an intense debate in the literature on the relationship between international resolutions and customary law. From the perspective of the theory of international law, UNGA resolutions can be considered evidence of the customary norm itself (i.e., the *opinio juris* and state practice) or of only one of its elements (i.e., the *opinio juris* or state practice).[16] The ILC has done considerable work to clarify this point. Article 12 of its 2018 Draft conclusions clearly establishes that

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[13] J. Crawford, *Brownlie's Principles of Public International Law* (9th ed., 2012), at 21 *et seq*.
[14] The international law system has secondary norms that have to be followed to prove the existence and content of a custom; these secondary norms are included in a custom as well and have recently been identified by the ILC in its *Draft conclusions on identification of customary international law*, adopted at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65).
[15] A. Remiro Brotóns *et al*., *supra* n. 11, at 596. See also: Articles 11 and 12 of ILC, *Draft Conclusions on identification of customary…*, *supra* n. 14.
[16] A. Remiro Brotóns *et al*., *supra* n. 11, at 511, 548–549, and 554.

> "1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
>
> 2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development
>
> 3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)."

When the texts are considered to reflect the *opinio juris*, general legal theory speaks of the *opinio juris of the consensus* as opposed to the *opinio juris of the precedent* (i.e., of every single state act).[17] In the case at hand, the cited texts reflect the *opinio juris of the consensus*. It could be argued that today these texts have a *declaratory effect* with regard to the custom.[18]

Second, and consequently, *state consensus is not necessarily found only in written texts*. Although in the present case study, the aforementioned international texts may

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[17] In the *opinio juris* of the *consensus* it is not necessary to individually analyze the behavior of each state, as it has been reflected in international legal texts; this differs from the *opinio juris* of the *precedent*, which should be identified in the practice of each state (A. Remiro Brotóns *et al*., *supra* n. 11, at 510, 511).

[18] A separate matter is to consider in greater detail what the relationship was between international custom and the most relevant UNGA resolutions (Res. 1514 and Res. 2625) at the historical moment in which they were adopted, that is, whether their effect was declaratory of an existing norm – which could be more easily affirmed in the case of Res. 2625 in its historical moment – or generative of the future international custom, as the ICJ would argue and other authors believe (A. Remiro Brotóns *et al*., *ibid*., at 553; in ICJ, Advisory Opinion, *Western Sahara*, October 16, 1975, pp. 31–33, paras. 54–59, and p. 68, para. 162). The ICJ has reiterated this point, noting that "although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption" (ICJ, *Legal Consequences of the Separation…*, *supra* n. 9, para. 152).

reflect this *opinio juris* of the consensus, to determine the content of a customary norm, it is always necessary to identify *the confluent practice (usus)*. In other words, the legal method *requires analyzing both* the texts themselves and states' positions toward them *and* state practice (*usus*). Forgetting to observe this *usus* in addition to the written texts when seeking to determine the existence and content of the self-determination principle would not, in my view, be conducive to finding the interpretation most in keeping with the reality.

Third, UNGA resolutions can be interpreted applying *mutatis mutandis* the rules of interpretation contained in the Vienna Convention on the Law of Treaties between States of 1969 (hereinafter, VCLT), provided their different nature is taken into account.[19] Under the *general rule of interpretation* (Article 31.1 VCLT), "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A "good faith" interpretation and use of the "ordinary meaning" of the "terms" "in their context" and "in the light of [the treaty's] object and purpose" are indissociable aspects. In other words, *these three criteria are not disjunctive, but cumulative*. Thus, the international legal method does not typically turn to what I would call *the literal criterion* (i.e., look only at the terms' ordinary meaning); rather, it requires that the *trifold criterion (of literal meaning* plus *context* plus *object and purpose*) be the main one applied. The VCLT further specifies that a "special meaning shall be given to a term if it is established that the parties so intended" (Article 31.4 VCLT). Additionally, recourse may be made to supplementary means of interpretation – such as the preparatory work for a resolution and the circumstances of its adoption – to *confirm* the meaning resulting from application of the general rule *or* to *determine* the meaning when the interpretation according to it remains ambiguous or obscure or leads to a *manifestly absurd* or *unreasonable* result (Article 32 VCLT). In short, these criteria are calling for a reasonable, coherent, and sound interpretation of any norm.

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[19] A. Remiro Brotóns *et al.*, *supra* n. 11, at 608.

Fourth, it is important to bear in mind the principle of autonomy of sources of the international legal system. This refers to the absence of a hierarchy of sources. In other words, "the customary norms retain a separate identity even where the two norms [of a treaty and of a custom] may be identical in content."[20] From this perspective, an interpretation of the norm *resulting from the merging of sources*, e.g., to affirm that common Article 1 of the covenants prevails over the UNGA resolutions, would not be particularly useful.[21] Nor would it be in step with international secondary rules of recognition to think that *a treaty could include a provision contrary* to a *jus cogens custom* (Article 53 VCLT). In other words, the 1966 human rights covenants could not modify the customary *jus cogens* norm.

Fifth, as stated in UNGA Resolution 2625 (XXV) of 1970, in "their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles."[22] Proceeding to interpret the principle of self-determination of peoples without taking into account its relationship with other basic principles – such as the principle of sovereign equality and its indissociable principles of territorial integrity and political independence and the principle of non-intervention – will always lead to dubious claims.

Moreover, sixth, there are also international general secondary rules for determining changes in *jus cogens* customs that must be followed if one wants to prove that the content of the principle of self-determination of peoples has changed. The key question at this stage is whether events involving the secession or separation of territories since 1970 have changed the norm. In the wake of the fall of the Berlin Wall in 1989, Europe witnessed a fair number of changes in sovereignty, under different legal

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[20] J. Crawford, *Brownlie's Principles of…*, *supra* n. 13, at 30; S. D. Murphy, *Principles of International Law* (Thomson West, 2006), at 83.
[21] In this regard, I do not consider the following statement to be correct: "Surely, the Declaration (which is not a treaty) does not prevail over the covenants (which are)" (Y. Dinstein, "Is there a Right to Secede?," *ASIL, Proceedings* (1996), at 301, 299–303).
[22] Para. 2, dispositive part of UNGA Res. 2625 (XXV).

circumstances, as will be discussed below. Have these events changed the norm? Despite what some scholars, including a special rapporteur of the UN Council of Human Rights, might say,[23] *events* alone *do not change a law*. Any change to a *jus cogens* custom must be brought about by another *jus cogens* custom. If one wishes to argue that states have changed the norm to make it applicable to minorities within a state or to include remedial secession as an exception to the territorial integrity principle, one must prove it by demonstrating the *new* material practice (*usus*) and *opinio juris cogentis* (Article 38 ICJ Statute).

There is one final point in the process of determining the content of the principle: it is essential to distinguish between two main rules or norms included in it in order to better analyze the holder and object of the right in each one, namely, the norms of *external* and *internal* self-determination. At first glance, the wording of the main aforementioned legal instruments does seem confusing. This confusion stems from the assertion at the start of the texts that "all peoples" have the right to self-determination.[24] On the other hand, each instrument, immediately thereafter and in parallel, includes clear and unequivocal references that make it easier to understand that there are some *specific peoples* who, with the aim of ending colonialism, would have a *right to sovereignty and independence* should they so decide, in the exercise of their self-determination. In the words of Professor Tomuschat, this gives rise to an "enigma": "[h]ow can the two propositions: that all 'peoples' have a right to self-determination, and that self-determination includes the right to the establishment of a sovereign State, be reconciled

[23] I.E. Alfred Zayas, in Note SG, "Interim report of the Independent Expert on the promotion of a democratic and equitable international order," UN Doc. No. A/69/272, August 7, 2014, paras. 28–29.
[24] UNGA Res. 1514 (XV), para. 2: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Art. 1.1, common to the 1966 human rights covenants: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." And para. 1 of the principle's formulation in the Annex to Res. 2625 (XXV): "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

to fit reasonably well into the edifice of present-day international law?" Because, it "can of course be presumed that, as representatives of States, they did not wish to ring the death-knell for their masters." On the contrary, it seems safe to assume that states were unlikely to be looking "to dig their own grave" by affording each minority, ethnicity, or otherwise differentiated group a right to secession.[25]

In this regard, Professor Cassese recalls the methodologically useful contribution of Professor Virally, namely: an essential principle is a *general norm*, which, in turn, can comprise *several distinct legal rules (or norms)*;[26] each rule has its own subject and object (attributed rights/obligations). In this case, the essential principle comprises, at least, two basic legal rules (norms): those of external self-determination and of internal self-determination.[27] Neither the ordinary or literal meaning of the paragraphs in context nor the will of the states suggests that they sought to create a *single norm encompassing multiple rights and obligations with multiple holders*, something that, in any case, due to the very nature of a legal norm, is in itself impossible.[28] In other words, it seems to me that it would be *unhelpful to conflate the subjects of each of the two main rules, which have different regulatory objects*. It is thus necessary to identify the content of the term *peoples* and of their rights in each of the principle's two basic norms, in light of each one's specific content. In my view, this is one of the main methodological imperatives to deal with the intrinsic *enigma* of the international principle and determine its objective content.

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[25] C. Tomuschat describes this "enigma" thusly in "Secession and self-determination," in M. Kohen, *Secession...*, *supra* n. 6, at 24–25.

[26] A. Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, Cambridge, 1995), at 126 *et seq*. Professor Cassese bases his argument on the contribution of Professor Virally (M. Virally, "El papel de los 'principios' en el desarrollo del Derecho Internacional" (original published in *Hommage à Paul Guggenheim*, 1968), in M. Virally, *El devenir del derecho internacional: Ensayos escritos al correr de los años* (Fondo de Cultura Económica, Mexico, 1998), at 222–223).

[27] Professor Cassese mentions a third one, namely, the rule concerning the prohibition of discrimination against majorities who are victims of apartheid in the exercise of their right to self-determination in the colonial context (*ibid.*, at 108–115).

[28] H. Kelsen, *Teoría pura del Derecho (2ª edición de 1960)* (Editorial Porrúa, Mexico, 1997), at 17–30 and 123–199.

Thus, in general terms, the first and main purpose of the principle is the rule attributing to colonial and occupied peoples a subjective right to sovereignty and, as a last resort, independence (right to external self-determination). The second purpose is the rule attributing to the people of a state a subjective right to determine their political, economic, cultural, and social future without foreign intervention (right to internal self-determination).

In the following sections, I will try to apply the basic general secondary rules of interpretation of international norms with the aim of determining the original state consensus behind the self-determination principle as it relates to the external and internal right to self-determination. I will then compare this consensus with some widely used scholarly legal language concerning the various problems, which I will present in each section.

III. PEOPLES' RIGHT TO EXTERNAL SELF-DETERMINATION: FROM LANGUAGE TO CONCEPT

In view of the historical background of the principle's adoption, the essential aim of the self-determination principle was to end colonialism. Therefore, its object and purpose were to recognize the right of colonial peoples – later expanded to include militarily occupied peoples – to access sovereignty and independence (rule of external self-determination). Only a minority of authors argue that any fraction of a state's population is legitimated to exercise the external right to self-determination. The majority of the literature considers only colonial and occupied peoples to have this right.[29] Although I

[29] Among many others, R. Emerson, "Self-Determination," 65 *AJIL* (1971), at 463–465; A. Cassese, *supra* n. 26, at 71–90; C. Tomuschat, "Secession and self-determination," *supra* n. 25, at 23; M. Koskenniemi, *supra* n. 4*;* H. Hannum, "Rethinking Self-Determination," 34 *Virginia Journal of International Law* (1993); M. Kohen, "La création d'Etats en droit international contemporain," VI *Cursos Euromediterráneos Bancaja de Derecho Internacional* (2002), at 108–141; J. Crawford, *The Creation of States in International Law* (2006), at 257–266; Special Rapporteur A. Cristescu (UN, *The right to self-determination: historical and current development on the basis of United Nations instruments: study. Prepared by Aurelio Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of*

will not go into this debate in depth here, I will briefly explain the arguments in this regard on which there is consensus.

The terminology used in the legal texts reflecting the *opinio juris cogentis* shows that the states are asserting that only colonies – whether trust or non-self-governing territories – and people under military occupation have the right to external self-determination.[30] The ICJ has indicated this multiple times in its case law interpreting and applying the principle of self-determination of peoples.[31] To put to rest any possible doubts regarding who the holders of this subjective right to sovereignty and independence were – information that the metropolitan states were to transmit to the UNGA (Article 73 UN Charter) – the day after UNGA Resolution 1514 (XV) was adopted, the UNGA itself adopted Resolution 1541 (XV).[32] The list of peoples having the right to self-determination was drawn up based on this information and was not a matter of minorities, but rather the *people of each colonial territory*. In other words, the right was attributed to the people

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Minorities, E/CN.4/Sub.2/404/rev.1, 1981, para. 209, at 36. Among Spanish scholars, see, among others: J.A. Carrillo Salcedo, *Soberanía del Estado y Derecho Internacional* (2nd ed., Tecnos, Madrid, 1976), at 32; A. Remiro Brotóns, *Derecho internacional público 1. Principios fundamentales* (Tecnos, 1982), at 331; P. Andrés Sáenz de Santa María, "La libre determinación de los pueblos en la nueva sociedad internacional," I *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1997), at 133; X. Pons Rafols, *Cataluña: Derecho a decidir y Derecho internacional* (Reus, 2015), at 103 *et seq.*; J.F. Soroeta Liceras, "El derecho a la libre determinación de los pueblos en el siglo XX: entre la realidad y el deseo," *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2011* (2013), at 473. See also the "Statement on the lack of foundation in international law of the independence referendum in Catalonia," signed by about 400 members of the Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (Spanish Association of Professors of International Law and International Relations, or AEPDIRI) *REDI* (2018), at 297.

[30] For example, there are references to "[t]he subjection of peoples to alien subjugation, domination and exploitation" (UNGA Res. 1514 (XV), para. 1); enabling "dependent peoples ... to exercise peacefully and freely their right to complete independence" (UNGA Res. 1514 (XV), para. 4); "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence" (UNGA Res. 1514 (XV), para. 5); "Non-Self-Governing and Trust Territories" and promoting their "right of self-determination" (common Art. 1 Covenants, para. 3); and "bring[ing] a speedy end to colonialism, ... bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights" (UNGA Res. 2625 (XXV), para. 2 of the principle).

[31] See *supra* notes 9, 10, and 11.

[32] UNGA Res. 1541 (XV), of December 15, 1960. Annex "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter."

of the colonial territory (*territory-people*), which was geographically separate from the metropolis.[33] The population was thus of an *accessory* nature to the territory;[34] it was often made up of populations with *distinct ethnic or cultural traits among themselves*. There was no requirement for the people settled in the territory to be homogeneous, nor was any link established with the idea of people as a nation or people as an ethnic group. *Identity was grounded in the colonial territory and not in national or ethnic traits*. This is confirmed by another legal criterion typical of decolonization: the duty to respect the internal administrative borders or external borders between the different colonies inherited from colonization when establishing the borders of the newly independent states (principle of *uti possidetis juris*).[35] Practice (*usus)* corroborates that the peoples in question were multi-ethnic territory-peoples.[36] As Professor Tomuschat wrote, the

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[33] They were *geographically separate* and *ethnically and culturally distinct* peoples (Principles IV and V). They were also peoples who had not yet exercised the right of self-determination as they had not yet achieved independence, free association, or integration with an independent state (Principle VI). UNGA Res. 1541 (XV), *ibid*.

[34] It is true that "the human beings concerned were more or less treated as an appurtenance of the territory where they lived" (C. Tomuschat, "Secession and self-determination," *supra* n. 25, at 25). This is an undisputed and widely addressed point in the literature. See: M. Kohen, *supra* n. 29, at 585; A. Remiro Brotóns, "Soberanía del Estado, libre determinación de los pueblos y principio democrático," in F. M. Mariño Menéndez (Ed.), *El Derecho Internacional en los albores del siglo XXI. Homenaje al Profesor Juan Manuel Castro-Rial Canosa* (Editorial Trotta, Madrid, 2002), at 549; P. Andrés Sáenz de Santa María, *supra* n. 29, at 134. In this regard, it is relevant that paragraph 4 of UNGA Res. 1514 refers to the "*national* territory" of dependent peoples (emphasis added).

[35] This criterion for delimiting the colonial territory was imposed by international law, as set forth in paragraph 4 of UNGA Res. 1514 ("All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the *integrity* of their national territory shall be respected" (emphasis added)). Meanwhile, at its meeting in Cairo in July 1964, the OAU adopted a resolution recognizing the binding nature of the borders drawn by the colonial powers. As the ICJ has noted, the principle of *uti possidetis juris* was adopted for a purpose related to maintaining international peace and security (ICJ, Judgment, *Case concerning the frontier dispute between Burkina Faso and the Republic of Mali*, December 22, 1986, especially paras. 20 and 25). It is true that behind the adoption of the *uti possidetis juris* criterion lay the interests of the *elites representing the colonial territory-people* (M. Koskenniemi, *supra* n. 4, at 259). It is likewise true that the delimitation of the concept of "colonial territory" was not absolute, and there were political interests in restricting the concept and limiting it to what has been called the "'classic' colonialism" context (H. Hannum, *supra* n. 29, at 32). At the same time, the USSR also insisted on and achieved a consensus regarding the saltwater criterion (geographical separation by sea) to exclude many of its colonized territories from the norm's application.

[36] Indeed, the discriminated minorities of Katanga (Belgian Congo) in 1960 were attributed no right of external self-determination, nor were those of Biafra (Nigeria) in 1967-1979, or East Pakistan, who were the victims of human rights violations by Islamabad, in 1970-1971.

territory-people method of establishing the holders of the right "ran against the idea of self-determination, according to which humans should be able freely to decide to which polity they wish to belong."[37] One can argue whether or not this state consensus was just, but it is beyond doubt that, when the states established this international right, they had no intention of internationally legalizing the Wilsonian political idea of "one people/one state" or "one nation/one state."[38]

There is, however, a greater problem consisting of the discrepancies between the *scholarly legal language* and the original state consensus. It is a problem that has gone virtually unaddressed in the literature and which I wish to highlight. It is all but impossible to identify a common understanding of the meaning of this right of peoples to external self-determination among scholars due to the lack of uniform meanings in scholars' language. Some studies equate the international right of self-determination of peoples with a right of separation of territory or with a secession process as exceptions to the protection of territorial integrity. Others equate it with a restoration of the virtual sovereignty and territorial integrity of colonial and occupied peoples. The question thus becomes: what does it really mean to *exercise* a right to external self-determination according to the principle? Did the states establish such a right of secession or such a right of colonies to separate from the metropolis? Like numerous other scholars, I believe that the original state consensus was not to create any right to separate or secede from the territory. The exercise of the right to external self-determination by colonial peoples and, later, by occupied peoples was conceived of as an *international right to restore the territorial integrity* of colonial (or occupied) territories. It is a right that *simultaneously preserves the territorial integrity of the metropolitan states and of the colonial people.* In other words, it is a right of colonial and militarily occupied peoples to have their

[37] C. Tomuschat, "Secession and self-determination," *supra* n. 25, at 25.
[38] In fact, the norms' selective subsequent application was soon called into question by the literature. See, for example, M. Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff Publishers, The Hague, 1982).

usurped territory restored. Let us now look, first, at scholars' legal language, before turning to the original state consensus.

1. Scholars' language: a right to secession as an exception to territorial integrity

Provided below is a brief, non-exhaustive set of examples of arguments claiming that the *international* right of peoples to external self-determination consists of a *right to separate from the territory of the state, or a case of secession,* as *an exception to the territorial integrity principle.*

In UN practice, this was the view taken by Special Rapporteur Cristescu in his *Report on the right of self-determination* in 1981:

> "The principle of equal rights and self-determination, as laid down in the Charter of the United Nations, does not grant an unlimited right of secession to populations living in the territory of an independent sovereign State (...). *The right of secession unquestionably exists, however, in a special but very important case: that of peoples, territories and entities subjugated in violation of international law*."[39]

This same perception would seem to be implicit in the wording of the ILC Rapporteur's writings on *jus cogens* norms.[40] In the Council of Europe, the Venice Commission (the European Commission for Democracy through Law) also seems to have equated secession, separation, and self-determination.[41]

In national practice, in very similar terms, the Supreme Court of Canada considered the right of colonial and occupied peoples to self-determination to consist of a "right of

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[39] UN, *The Right to...*, *supra* n. 29, at 31, para. 173 (emphasis added).
[40] Specifically, as already cited, Tladi asks "whether the circumstances in which the right applies would permit external self-determination (secession)." A/CN.4/727, *supra* n. 8, para. 115.
[41] See *Self-Determination and Secession in Constitutional Law*, Report Adopted by the Commission at its 41st meeting (Venice, December 10–11, 1999), CDL-INF (2000) 2 Or. F, at 3; and, again, in the *Revised Guidelines on the Holding of Referendums Approved by the Council of Democratic Elections at its 69th online meeting* (October 7, 2020) and adopted by the Venice Commission at its 124th online Plenary Session (October 8–9, 2020) Strasbourg, October 8, 2020 CDL-AD(2020)031, at 5.

secession" which originates as an *exception to the principle of territorial integrity of the state*. Specifically, the Supreme Court of Canada found

> "as will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and *consistently with the maintenance of the territorial integrity of those states. Where this is not possible*, in the *exceptional circumstances* discussed below, a *right of secession may arise*."[42]

The Court later addresses these exceptional circumstances, identifying three cases, namely, colonies, occupied peoples, and, presumably, situations of discrimination *(remedial secession)*. This suggests that it is equating these three cases with exceptions to territorial integrity because a right of secession has arisen. This case has had an important influence on other national cases, such as on Spain's Constitutional Court.[43] Furthermore, a majority of constitutional law scholars have accepted the terminology of the Canadian Supreme Court in the Quebec case; this means that they consider the right to external self-determination to be a secession or separation from the territory, and an

[42] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R., para. 122 (emphasis added). The Supreme Court of Canada itself uses *secession* as equivalent to *unilateral separation*, therefore acknowledging that there are consensual separations; later, in its argumentation, it uses the expression "unilateral secession," which would seem to suggest that it considers such a thing as non-unilateral secessions to exist, i.e., secessions reached by consensus between the parties (Supreme Court of Canada, *Reference re Secession of Quebec*, para. 110). Again, in para. 131, the Supreme Court of Canada found that "the right to self-determination (...) operates within the overriding protection granted to the territorial integrity of 'parent' states," only to later say that in "certain defined contexts" (the "exceptional circumstances" of para. 122), the right may be exercised externally, which "would potentially mean secession," referring in this point to colonies and occupied peoples.

[43] As Professor J.M. Castellà states "[j]udgement 42/2014 represents the closest the Spanish Constitutional Court has ever been to the doctrine of the SCC of 1998" (J.M. Castellà Andreu, "The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec," in G. Delledonne and G. Martinico (Eds.), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan, 2019), at 84).

exception to territorial integrity.[44] Some political scientists and international legal philosophers also follow this line of thinking.[45]

A careful reading of the studies of various international legal scholars suggests that they, too, equate the exercise of the self-determination of peoples with a right of separation or a situation of secession, as an exception to the territorial integrity principle.[46] It would seem to be commonplace among some English-speaking authors to consider that "[t]raditionally, the external right to self-determination at international law has been equated with a right to unilateral secession under certain narrowly defined circumstances."[47]

All these statements are comprehensible and respectable if we consider them simply to be using the terms *separation* and *secession* and the content of the *international right to self-determination* interchangeably. In that case, they would be using them *descriptively, without legal weight*. However, I contend that there is a deeper way of talking and writing about international law: a way that takes into account the actual international law meaning (the concept) of these terms (the language).

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[44] Among many others, see the various contributions in: G. Delledonne and G. Martinico (Eds.), *ibid.;* and N. González Campañá, *Secession and EU Law: The deferential attitude* (Oxford University Press, 2023).

[45] According to A. Buchanan and E. Levinson, "Another difficulty is that while international legal doctrine [has] an arbitrarily restricted conception of the situations that generate a unilateral right to secede, several important international legal documents include reference to an apparently much broader 'right of self-determination of all peoples' which is said to include the right to choose full independence, and hence the right to secede" (and here, note 10 refers to UNGA Res. 2625) (A. Buchanan and E. Levinson, "Secession," in E.N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2021 ed.), available at: <https://plato.stanford.edu/archives/win2021/entries/secession/>).

[46] Among others, Professor Weller considers that the "essence of the traditional right of self-determination of peoples is that it in itself constitutes a valid basis for a claim to secede, irrespective of the wishes of the central government" (M. Weller, "Why the Legal Rules on Self-determination Do Not Resolve Self-determination Disputes," in M. Weller and B. Metzger (Eds.), *Settling Self-determination Disputes: Complex Power-sharing in Theory and Practice, 20-23* (2008). The same idea can be found in M. Weller, https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/); T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (CERIC, La Documentation française, Paris, 1999) ; and in "La sécession: une question de simple fait?," *Working Papers of the European Society of International Law* (2008), at 2. Additionally, H. Hannum's detailed and comprehensive study equates external self-determination with secession (*supra* n. 29), at 64. So does R. Howse and R. Keitel, "Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law," 7 *The Law \& Ethics of Human Rights* (2013), at 2, note 2.

[47] L. Seshagiri, "Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law," 51 *Harvard International Law Journal* (2010), at 566–567.

This approach involves answering two different questions: first, are secession and separation of territories the same in public international law; and, second, was the original consensus reached by the states when they adopted the international norm of external self-determination to create a right to secession or to separation as an exception to the territorial integrity principle. In the following subsection, I will focus on the *international legal concepts* of secession and separation of territories in state practice and the theory of international law. I will then look at the international legal concept of the international right to external self-determination.

2. Theory of international law and the concepts of separation (devolution) and secession

According to international legal theory, when a parent state consents to the independence of a fraction of its people and territory, it is a case of *separation* (*devolution* or *grant of independence)*. In contrast, when the parent state opposes the action and there is a revolutionary act by the secessionist people against the parent state, it is a process of *secession* (*forcible seizure of independence*).

Professor Crawford refers to cases of a "grant of independence" (devolution) and of "forcible seizure of independence" (secession). What distinguishes them is "the presence or absence of metropolitan consent, although in some circumstances this distinction is formal and may even be arbitrary."[48] Elsewhere, in his *Report to the Government of Canada concerning unilateral secession by Quebec* (1997), he specifies,

> "'[S]ecession' is the process by which a particular group seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state. It is to be distinguished from a consensual process by which a state confers independence on a particular territory and people by legislative or other means, a process which may be referred to as devolution or the grant of independence. 2. The

[48] J. Crawford, *The Creation of States...*, *supra* n. 29, at 330.

> key difference between secession and devolution is that the former is essentially a unilateral process, whereas the latter is bilateral and consensual. For the sake of clarity I will use the term 'unilateral secession' throughout."[49]

Professor Remiro Brotóns clearly distinguishes between the separation (peaceful) and the secession (violent) of a part of the state territory.[50] Professor Kohen also contrasts "sécession" and "dévolution."[51] Other authors, such as Professors Tomuschat, Cassese or Tancredi, follow the same line of thought.[52]

In practice, *separation (devolution)* can *be formalized in the constitution or based on politics. In the latter case, the right is neither included nor prohibited* in the constitution; instead, it is the political will of the authorities to recognize it *ad hoc*.[53] In the former case, the basic law of the state can include a domestic right that may be called the "right to secession," the "right to separation," or even the "right to self-determination."[54] However, *the name given to this right in a particular constitution does not change its nature as a discretionary domestic right*. Thus, the fact that the constitutions of the former USSR and the former Socialist Federal Republic of Yugoslavia mentioned the principle or right to self-determination does not in any way mean that this

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[49] J. Crawford, *State Practice and International Law in Relation to Unilateral Secession: Report to the Government of Canada concerning unilateral secession by Quebec*, 1997, para., 6 (available online and in: A. Bayefsky, *Self-determination in International Law: Quebec and Lessons Learned, Legal Opinions Selected and Introduced by Anne F. Bayefsky* (Kluwer Law International, 2000)). Professor Crawford's use of the expression "unilateral secession" in the last sentence of this paragraph could be the origin of its use by the Canadian Supreme Court and, from there, by a great number of authors.

[50] A. Remiro Brotóns *et al*., *supra* n. 11, at 73–74. See also P. Andrés Sáenz de Santa María, "La libre determinación...," *supra* n. 29, at 139.

[51] Professor Kohen also contrasts "sécession" and "dévolution." By "sécession" he means those cases in which the separation is achieved "sans l'accord de l'Etat prédécesseur," whereas he uses the term "dévolution" to refer to cases in which this separation "se produit avec un tel consentement"; a separate issue is that of decolonization (M. Kohen, *supra* n. 6, at 572).

[52] A. Tancredi, *La secessione nel diritto internazionale* (CEDAM, Padua, 2001); A. Cassese, *supra* n, 26, at 122–124; C. Tomuschat, "Secession and self-determination," *supra* n. 25, at 24–25. See also: A.G. López Martín and J.A. Perea Unceta, *Creación de Estados, secesión y reconocimiento* (Tirant lo Blanch, 2018), at 95.

[53] If the UK or Canada – with their flexible constitutions – are able and willing to allow a vote on separation for a part of their populations (Scotland and Quebec, respectively), they may do so at their own discretion.

[54] See Venice Commission, *Self-Determination and Secession in Constitutional Law*, Report Adopted by the Commission at its 41st meeting (Venice, 10–11 December 1999), CDL-INF (2000) 2 Or. F., *supra* n. 41.

wording was chosen with a view to incorporating into their domestic jurisdictions the international right to external self-determination agreed by the states in the 1960s.[55] Although the term was the same, the concept behind it was entirely different. Because, if a state's domestic legal order recognizes a right of separation for part of its population, this would be a national internal right. It would be respected by international law under the equal sovereignty principle, but not imposed, promoted, or authorized by it. International law respects state sovereignty and independence, as they are the very basis for its existence. These concepts include a state's power to define its internal territorial organization, which is a discretionary power of states based on the self-organization principle. This means that management of the territory is protected by the sovereignty and independence principle, an essential principle of international law.

In this respect, to think that the notion that the domestic right to separation that some states may grant to a part of their population is based on an international norm that takes precedence over the principle of territorial integrity is nonsense. There is no international duty to allow a vote on separation for a part of a state's population. No norm in the international legal system recognizes the right of any part of a state's population to sovereignty and independence. States have not agreed to make such groups the holders of this right. Therefore, neither a domestic right to separation nor an *ad hoc* domestic agreement to enable separation should be confused with an international right to separation, which does not exist. According to the Supreme Court of Canada, the non-existence of this international right is precisely why secessionist movements resort to a contrived interpretation of the principle of self-determination.[56]

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[55] The 1977 Soviet Constitution recognized the principle of self-determination of nations (Art. 70) and each republic's right to secede from the Union (Art. 72), although in practice these articles were "dead letter" (A. Cassese, *supra* n. 26, at 264–265). The 1974 Yugoslav Constitution recognized that the Federation was based on a right of self-determination in the Preamble and in principles I, III, and VI (A. Cassese, *ibid*., at 269).

[56] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R, *supra* n. 42, para. 110–111.

It is worth recalling that the functional concept of state sovereignty is defined in international law as a set of powers recognized by international law for states. These powers consist of both inherent rights, such as their political independence and territorial integrity, and duties, such as the effective exercise of sovereign powers, including the obligation to respect the rights of other states within their territory.[57] *National unity* and *territorial integrity* (generally cited together with *political independence*) are internationally recognized *rights* of the state, which are mentioned across the definitions of several fundamental principles in the main international texts that define them.[58] National unity and territorial integrity are thus a sovereign right, and not an international obligation. And because they are a right, any state wishing to transfer its sovereign powers to a part of its population may do so. Consequently, the grounds for it always lie in the domestic legal order.

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[57] See: Arbitral award from the *Island of Palmas (or Miangas) case* of April 4, 1928, *Recueil SA*, Vol. II, at 829–871. https://legal.un.org/riaa/cases/vol_II/829-871.pdf

[58] In 1945, Art. 2.4 UNC included it when it established the obligation to refrain "from the threat or use of force against the territorial integrity or political independence of any state." Likewise, UNGA Res. 2625 (XXV), of October 24, 1970, whose annex includes the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, mentions it in delimiting the content of several of the basic principles it contains. In defining the principle of the prohibition on the threat or use of force, it provides, "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State..." Similarly, in defining the principle of sovereign equality, it provides, "All States enjoy sovereign equality .... In particular, sovereign equality includes the following elements: ... c) Each State has the duty to respect the personality of other States; d) The territorial integrity and political independence of the State are inviolable." In defining the content of the principle of non-intervention, it states, "No State or group of States has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." Note that in the latter two cases, territorial integrity can also be understood to be comprised within the notion of the "personality of the State" and of its "political elements." The principle itself is also mentioned in the delimitation of the principle of self-determination of peoples, an aspect that will be examined in greater detail below. At the regional level, in 1975, in the context of peaceful co-existence, the Final Act of the Conference on Security and Co-operation in Europe (CSCE), or Helsinki Conference, also includes it generally in several of the ten stated principles (Conference on Security and Co-operation in Europe, Final Act, Helsinki, 975, available at: https://www.osce.org/es/mc/39506?download=true).

The constitutional recognition of a domestic right to separation is exceptional in contemporary state practice.[59] The practice of separations, since 1945, has been varied. Examples include Singapore in 1965, eleven of the former USSR republics in 1991,[60] the Czech Republic and Slovakia in 1993, and Montenegro in 2006.

In contrast with separation (devolution), a revolutionary act by a secessionist people against a parent state that opposes said act is a process of *secession* (*forcible seizure of independence*). This strict understanding of secession can be defined as the action of becoming independent from a state, undertaken by a part of its population, usurping a part of its territory in violation of constitutional norms and/or against the will of its government. In other words, to secede is to break away from a state in order to establish another state (or become part of a third state, which, though less common, is not unheard of) against the constitutional order and, therefore, against the will of the parent state. As Professor Remiro Brotóns so succinctly put it, secession is a "revolutionary act."[61] This is because it is contrary to domestic constitutional law. Even if there is a constitutional right to the territory's separation, if the parent state were to oppose it politically, it would become a process of secession. This was the case of the first new republics to emerge from the former Yugoslavia – the republics of Slovenia, Croatia, and Bosnia-Herzegovina, which were the first to embark on the secessionist path.[62] Furthermore, were a secession

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[59] See *Self-Determination and Secession in Constitutional Law*, Report adopted by the Commission at its 41st meeting (Venice, December 10–11, 1999), CDL-INF (2000) 2 Or. F, *passim.*, *supra* n. 41.

[60] Ukraine, Belarus, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan; they did not join the UN until 1992. Russia was the successor of the parent state, the USSR, under the name of the Russian Federation. These separations had been consented to via the treaty between Russia, Ukraine, and Belarus (founding republics of the *Union* of Soviet Socialist Republics) under the 1991 Minsk Agreements: Agreement of December 8, 1991, establishing the Commonwealth of Independent States, expressly declaring that the USSR ceased to exist; subsequently amended by the Alma-Ata Agreements of December 21, 1991 (J. Crawford, *The Creation of...*, *supra* n. 29, at 295).

[61] A. Remiro Brotóns, "La independencia como un hecho revolucionario," 34 *REEI* (2017).

[62] Followed by Macedonia. The cases differ in terms of the duration of the belligerent events; however, all involved hostilities and internal armed conflicts, with the conflict in Bosnia-Herzegovina being the bloodiest due to the interethnic and religious fratricidal fighting. Bosnia-Herzegovina, Croatia, and Slovenia joined the UN in 1992. The former Yugoslav Republic of Macedonia joined in 1993. On the "revolutionary"

to come to pass through the creation of a new state – due to the effectivity principle – it would not retroactively attribute a right of separation to the part of the population that sought the revolution at the start of the secessionist process. A separate issue is that, in practice, some cases fall in a gray area, between secession and separation (devolution), or reflect a *sui generis* situation.[63]

Thus, conceptually there can be no doubt that, because states are jealous of their sovereignty, when they do not want to grant independence to a part of their population and that part of the population nevertheless seeks to break away, it will do so by means of a different phenomenon, namely, secession or the forcible seizure of independence. The fact that the states have never settled on a definition of secession – indeed, the term "secession" itself is rarely found in any written international norm – can itself be understood as a rejection of it. Certainly, the states did not use the term (language) "secession" in the Vienna Conventions on Succession of States of 1978 and 1983.[64] The

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nature of this process, i.e., against the internal constitutional order, see A. Cassese, *supra* n. 26, at 270. The former Yugoslav constitution established the right but was, again, "dead letter"... (see *supra* n. 55).

[63] One such *sui generis* situation was the case of the three Baltic republics of the former USSR – Estonia, Latvia, and Lithuania; they joined the UN in 1991. They were not secessions, because these populations had an international legal right to recover their independence since they had been annexed by the USSR, most recently in 1940. Although the USSR ultimately yielded and did not oppose their declarations of independence, they were not cases of s*eparation* (*devolution*), but rather of *restoration of their former statehood*. Tomuschat affirms that they are cases of "*restitution*," as all three republics had been annexed in 1940 by the USSR (C. Tomuschat, "Secession and self-determination," *supra* n. 26, at 31). Other authors are similarly inclined (M. Kohen, "La création d'Etats...," *supra* n. 29, at 592; A. Cassese, *supra* n. 26, at 264).

Two cases in Africa likewise fall in this murky area: Eritrea and South Sudan. After years of armed conflict, both cases might initially be described as secession (from Ethiopia and Sudan, respectively). But in both cases, the birth of the new state was sponsored by the UN, facilitating a long process of pacification, in which the parent state ultimately consented to the separation (*devolution*). In the case of Eritrea, following a long and harrowing war, Ethiopia finally consented in 1992, such that the situation could be considered to have shifted from a secessionist process to a situation of separation (devolution). The case of South Sudan is similar in terms of the bloody war, which lasted more than 20 years, including various UN peacekeeping missions. Once a peace agreement was reached, a referendum was called for, leading to its independence in 2011.

[64] The actual term used in Art. 34 of the 1978 Vienna Convention and Arts.17, 30, and 40 of the 1983 Vienna Convention is simply "separation," in reference to parts of a state. This silence is relevant. In the preparatory work, especially in the context of the ILC, the terms "secession" and "separation" are sometimes used interchangeably. The fact that only the term "separation" is used in the actual Conventions enables any conclusion, namely, that "secession" is part of a generic concept of "separation," but also, on the contrary, that it falls beyond the scope thereof. In any case, the absence of the term "secession" reflects the reticence

Security Council, too, has expressed negative views of secessionist processes.[65] And, as we will see below, when adopting the principle of the self-determination of peoples, the states tacitly prohibited it.

What I wish to underline here is that, in view of state practice, secession and separation (devolution) of territories are conceptually distinct in the theory of international law. Some scholars may say that this view is too strict or narrow, but concepts help us understand real-life social phenomena. And international legal concepts are not – or should not be – an exception. In the present case, these concepts help us understand that there are specific grounds for both situations (separation and secession), and that they fall within the internal jurisdiction of the state: they are internal phenomena, one in accordance with the constitutional order of the sovereign state, the other against it. The principles of sovereign equality (including political independence and territorial integrity) and of the duty not to intervene in the affairs of any state apply to both domestic situations. And, as will be seen below, these domestic situations are expressions of the content of the right to internal self-determination.

3. The original state consensus: an international right to restore sovereignty and territorial integrity

Having carefully distinguished between secession and separation (devolution) of territories, we must now determine whether they can be equated to the exercise of the

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of the states to mention it, particularly when the Conventions establish its non-application in phenomena *not in conformity with international law*. Additionally, it is neither the object nor the purpose of these Conventions to regulate displacements of sovereignty, but rather their *legal consequences* in the matter of the succession of states. See: Vienna Convention on Succession of States in Respect of Treaties of August 23, 1978 (Doc. A/CONF.80/31) and Vienna Convention on Succession of States in respect of State Property, Archives and Debts of April 8, 1983 (Doc. A/CONF.117/16).

[65] Security Council practice has used the term *secession* in relation to the violation of a state's *internal constitutional law* and in the absence of the said state's consent, always expressing a wary attitude toward and employing a disparaging tone with regard to the phenomenon of secessionism. In this regard, see: M. Kohen, "La création d'Etats...," *supra* n. 29, at 578–581; T. Christakis, *supra* n. 46, at 35. To cite just a few examples, see the Security Council Resolutions deploring the secessionist activities in Katanga (Res. 169, of November 21, 1961) or the declaration of secession of a part of the Republic of Cyprus (Res. 541, of November 18, 1983).

international right of external self-determination of peoples. Therein lies the problem: did the states establish such a right of secession or such a right of colonies to separate from the metropolis? I contend that it is highly unlikely that they did.

First, at no point do the UNGA texts or the 1966 human rights covenants use the word "secession." Nevertheless, paragraph 6 of UNGA Resolution 2625 (XXV), of 1970, does contain an expression that includes the words "separate (...) from the territory":

> "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a *status separate* and *distinct* from the territory of the State administering it." (emphasis added)

It establishes the recognition of a *separate and distinct legal status* for the colonial territory, thereby *precluding the application of the principle of territorial integrity in relations between the metropolises or administrators and the territory of the colonies (or between the occupant States and the occupied peoples)*. The profound importance of this recognition with respect to the territorial integrity principle included in the legal concept of sovereignty as an attribute of the state has not always been stressed enough.

Clearly, it resulted from the metropolitan states' agreement to abandon their traditional view that the colonies were *their territorial possessions*, i.e., part of the colonial power's territory. This is an important aspect of contemporary international law. Until then, under classical international law, *colonies were considered the territory of the state*. For example, in 1929, Professor Von Liszt wrote, "In addition to the motherland, internationally, colonies belong to the territory of the state. Even in the form of protectorates, colonies' relations with the motherland *are not governed by international law but by political law*."[66] And, of course, the colony's emancipation gave rise to a case of "separation of a colony or a province from the motherland."[67] All of this under classical international law.

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[66] F. Von Liszt, *Derecho Internacional Público* (Gustavo Gili, Barcelona, 1929), at 128 (emphasis added; translation by the author).
[67] *Ibid*., at 247.

Today, paragraph 6 benefits the colonial powers by minimizing the impact on their sovereignty, as there was no exception to the principle of territorial integrity. But it also benefits the populations of the colonies *whose territorial integrity* – taken from them by the heinous crime of colonialism – was *restored* to them. This is the meaning of the "status separate and distinct" from the administering state that this paragraph includes. Consequently, the *colonies did not secede or separate from the territory because they were not a part of it*. It may be considered a legal fiction. This was the state *consensus* behind the norm. To cite just one example, the delegation of Jordan called for the "right" to "recover [...] territorial integrity" during the debates of the General Assembly in 1960, preceding the adoption of Resolution 1514 (XV).[68] This is something that various prominent authors have highlighted.[69] Professor Cassese is clear on this point.[70] In 1971, Professor Emerson was likewise quite clear, noting, "[T]he transition from colonial status to independence is not regarded as secession, whether or not it is achieved by force of arms, but rather as the 'restoration' of a rightful sovereignty of which the people have been illegitimately deprived by the Colonial Power concerned."[71] Professor Higgins similarly asserts, "[T]here was no suggestion that the old colonial rulers should stay in State X, with 'the peoples' seceding, but rather that the colonial rulers should go. Secession was not in issue in this context."[72]

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[68] Delegation of Jordan, UNGA, Official Records, 946th Plenary Meeting, 1960, at 1268, para. 39 (emphasis added).
[69] M. Kohen, *supra* n. 29, at 572. Among Spanish scholars, see: A. Remiro Brotóns *et al*., *supra* n. 11, at 171; and A. Remiro Brotóns, "Soberanía del Estado...," *supra* n. 34, at 549. J.F., Soroeta Liceras, "El derecho a...," *supra* n. 29 at. 468, n. 24.
[70] Cassese is quite clear regarding this idea of the restoration or recovery of sovereignty: "...the right to external self-determination *[is]* based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that *their* '*territorial integrity*,' all but destroyed by the colonialist or occupying Power, *should be fully restored*..." (emphasis added) *(*A. Cassese, *supra* n. 26, at 334). Thus, approaches such as Portugal's – which Spain would later imitate from 1956 to 1961 – rooted in assimilation through the provincialization of overseas territories, were condemned (A. Remiro Brotóns *et al*., *supra* n. 11, at 171). This is the deeper meaning of the inclusion of the *separate and distinct status* clause in UNGA Res. 2625 (XXV) of 1970.
[71] R. Emerson, *supra* n. 29, at 465.
[72] R. Higgins, "Self-Determination and Secession," in J. Dahlitz (Ed.), *Secession in International Law: Conflict Avoidance – Regional Appraisal* (The Hague: Asser Press 2003) 21, 35.

Let us recall that here we are interested in the *legal* concept of the exercise of the right to external self-determination agreed by the states, not the descriptive or lay meaning or a political idea of self-determination. This original state consensus – which reflected the balance of powers between the metropolises and the peoples of the colonial territories, already established in states that had recently gained independence – was clearly not to recognize an exception to territorial integrity through a right to separation freely granted by the metropolitan states. It went much deeper than that, namely, to recognize a compulsory right to the restoration of the colonial territory's territorial integrity, a kind of *virtual sovereignty* that had been *stolen* from it by the crime of colonization.[73] As noted above, this is confirmed by the principle of *uti possidetis juris*, another legal criterion typical of decolonization. The *territorial integrity of the colony* was thus also protected. Territorial integrity is therefore a principle that does not apply *between* metropolitan or administering states and colonial peoples, or between the occupant state and occupied peoples. The right to external self-determination is not an exception to the territorial integrity principle.

As a corollary, a second reason that states are unlikely to have established such a right is that, in attributing this kind of *virtual sovereignty* to the colonial people, the international norm confers *international status on the relations between the colonial people and the metropolitan state*. This is a crucial point. In fact, this international relationship between the metropolis and the people of the colonial territory is reflected in other international rules, such as: the consideration of national liberation movements as legitimate representatives of this territory-people with an *international* right to self-determination; the legitimization of resistance, including through the use of force; or the classification as *international* armed conflicts of any decolonization wars that may arise, as reflected in Article 1.4 of the Additional Protocol I to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts, of June 8, 1977. In other words, *unlike the case of separation*, where the population has no

[73] The expression "virtual sovereignty" is highlighted in the Spanish literature (e.g., A. Remiro Brotóns *et al.*, *supra* n. 11, at 169).

international right, but rather a domestic one, the exercise of the international right to external self-determination is not an internal affair. Consequently, *neither is it a case of secession*, as secessionist processes remain internal affairs until the secession is effectively achieved.

Finally, the international right to external self-determination is not a discretionary right granted to the colonial people by the metropolitan state, but an international right attributed by a *jus cogens* norm. This is a key difference with *any domestic right to separation*. It is one thing for international law to allow states to engage in the peaceful transfer of sovereignty (*devolution*) through the granting, in the domestic sphere, of a right to separation; it is quite another for international law to establish a *duty for the metropolitan state to undertake this displacement of sovereignty*, an *international duty* that, moreover, is not included in a dispositive norm, but a *jus cogens* one. As such, it includes obligations *erga omnes*, and not only for the metropolitan/occupying states, but also for third states. The peoples of a colonial territory have the right to restore their sovereignty and to "freely" decide whether to become an independent state or seek free association or integration with an independent state or "the emergence into any other political status" (Res. 2625 (XXV), point 4).[74] The procedure for this decision had to be "informed and democratic" (Res. 1541 (XV), Annex, principles VII and IX): through referendums, with the participation of all the people belonging to the territory, without any discrimination (against majorities or minorities).

Here, I consider it possible to distinguish between the devolution of sovereignty (or grant of independence) and the exercise of the international right to external self-determination. In this, I differ from Professor Crawford, who considered the exercise of the international right to external self-determination to be similar to a grant of

[74] See UNGA Res. 1541 (XV), principles VII and IX, and UNGA Res. 2625 (XXV), point 4 of the definition of the principle in the Annex.

independence or devolution, or a secession in the case of colonial wars.[75] I respect that position, but I believe that it is possible to be more precise. Although it is true that the metropolises and the peoples of the colonial territories signed *agreements for the transfer of powers*, that was simply the *method* chosen to give effective content to a peremptory (*jus cogens*) duty to restore the usurped sovereignty, not the discretionary exercise of a right of the metropolitan states (internal grant of independence or devolution). Professor Remiro Brotóns clearly distinguishes between the separation (peaceful) and secession (violent) of a part of the state territory, in addition to the cases of decolonization.[76] In fact, international law distinguished between cases of colonial independence (newly independent states) and the separation of parts of a state in the 1978 and 1983 Vienna Conventions on Succession of States.[77] Clearly, as Professor Kohen states,[78] we are talking about an "international regime," which means that the holders and the right are directly established by an international norm that also creates a correlative duty to another international subject.

Thus, the *deeper* meaning of the original state consensus behind the creation of such a revolutionary right to access sovereignty and independence was the idea of

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[75] In his book "The Creation of states...," Professor Crawford includes the cases of decolonization as a type of *devolution* or grant of independence. Furthermore, he considers that where "self-determination was opposed by the colonial power it was a case of secession" (J. Crawford, *The Creation of States...*, *supra* n. 29, at 330, 387, 388). Elsewhere, he also affirms that "the principle of self-determination which, in the Court's words, was 'made... applicable' to all non-self-governing territories, did not involve an automatic right of *unilateral secession* for the people of those territories. In the vast majority of cases, the progress to self-government or independence was *consensual*. It occurred with the agreement of the State responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that State and local leaders. These arrangements dealt with the modalities of transfer of power and, in many cases, made provision for succession with respect to treaties, property and debt. (...). But it did not advocate or support unilateral rights of secession for non-self-governing territories, except where self-determination was opposed by the colonial power. This was the case for example in the Portuguese African territories (Angola, Mozambique, Guinea-Bissau). In the vast majority of cases, self-government or independence was achieved peacefully and by agreement with the administering authority." (J. Crawford, *State Practice and...*, *supra* n. 49, para. 6 (emphasis added). In the same regard, see J. Crawford, *Brownlie's Principles of ...*, *supra* n. 13, at 130–132.)

[76] A. Remiro Brotóns *et al.*, *supra* n. 11, at 73–74.

[77] Both conventions conceive the diversity of phenomena similarly. See in the 1978 Convention the distinction between "newly independent states" (Art. 16 *et seq.*, 1978 Convention) and "separation of parts of a State" (Art. 34 *et seq.*, 1978 Convention).

[78] Professor Kohen clearly talks about a specific "international regime" as a separate matter of decolonization (M. Kohen, *supra* n. 6, at 571-572).

simultaneously preserving the territorial integrity of the metropolitan states and the virtual territorial sovereignty of colonial territories. That is why their consensus was not to attribute to colonial territories any right to secede or to separate from the metropolitan states. It follows that a more accurate way to understand the content of the right to external self-determination is to consider it an international right to restore usurped territorial sovereignty, applicable to both colonial and occupied territories. Behind this consensus was a specific general interest of the international community as a whole, a specific value: the abolition of colonialism by recognizing a right of colonial territorial peoples to have their territorial integrity restored. This value was coherent with the protection of another basic value: the equal sovereignty of states as the grounds for international peace, a value that includes their right to political independence and territorial integrity, a value grounded in international law from its origins as *jus gentium* with the creation of the modern state system.

Thus, the states decided to legally protect the value of the human dignity of the people subjected to colonialism, condemning and eradicating this widespread practice that, in one way or another, had been permitted since the 15th century. In 1970, the value of the protection of the human dignity of militarily occupied peoples was also incorporated. But the concept was never broadened to include minorities, nor was it considered a right to separation in violation of the principle of territorial integrity. That is, the new and revolutionary international right to access sovereignty and independence, where applicable, was created in a way that protected the territorial integrity of both the former metropolises and the colonial territories, before and after the exercise of self-determination.

To talk about a *right to restore sovereignty* and territorial integrity or a right to access sovereignty and independence, as appropriate, is not the same as to talk about a right to secession or a right to separation from the state territory. There is a more precise way to delimit the phenomena and their regulation under international law, a way that state representatives bore in mind for years, even if international practitioners (diplomats,

legal officers of states' foreign ministries, etc.) subsequently forgot it, or never learned it, until it faded into obscurity.

IV. PEOPLES' RIGHT TO INTERNAL SELF-DETERMINATION: FROM LANGUAGE TO CONCEPT

The state consensus on the content of the right to internal self-determination insofar as it relates to the protection of territorial integrity principle is another point of contention among scholars. There are other debates surrounding this norm, such as whether it includes a right to democracy, which I will not discuss here.[79] The right is worded more or less similarly in the international texts. For instance, paragraph 1 of the principle's formulation in the Annex to Resolution 2625 (XXV) provides:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[80]

This same Annex rounds out the right with paragraphs seven and eight of the principle's formulation. The seventh paragraph states:

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[79] With the fall of the Berlin Wall, the decline of communism, and the triumph of liberal democracy, much of the specialized literature revived the interpretation of the rule of internal self-determination as a right of the people to democracy. Thus, in 1992, Professor Franck spoke of the emerging right to democracy, which, in 1993, was also defended by Professor Crawford (T.M. Franck, "The Emerging Right to Democratic Governance," 86 *AJIL* (1992), at 46; J. Crawford, *Democracy in International Law: Inaugural Lecture Delivered 5 March 1993* (1994)). In 1995, Professor Cassese published his "reappraisal" of the principle, in which, in addition to the traditional interpretation, he developed this democratic vision of it, considering it *de lege ferenda* (A. Cassese, *supra* n. 26, at 101). See P. Andrés Saénz de Santa María, "A right of all peoples: the internal dimension of self-determination and its relation with democracy," *SYbIL* (2018), at 165–166.

[80] A sentence repeated thusly: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." (UNGA Res. 1514 (XV), para. 2). Likewise, in Art. 1.1, common to the 1966 human rights covenants: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

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

The eighth establishes:

"Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."

My contention is that the state consensus is to attribute the right to internal self-determination to the whole population of the state ("all peoples"), and that the main purpose of that seventh paragraph is to limit secession, among other practices. Thus, the state consensus was not to create any right to remedial secession, but to preserve democratic participation – without any discrimination against the whole people of the territory – in the decision regarding that population's political, economic, and social future, including the future of its territory.

Let us take a moment to review the positions taken and language used by scholars, before turning to my thesis.

1. Scholars' language: the three language-related interpretation problems

The main debates have to do with the meaning of "all peoples" and the scope of the protection of territorial integrity afforded under the norm.[81] In this regard, three language-related problems can be identified.

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[81] Professor Crawford was categorical: this norm is *lex obscura* concerning the holders of the right and remedial secession (J. Crawford, "The Right of...," *supra* n. 2, at 31).

The first has to do with who holds the right. Some positions hold that the expression "all peoples" encompasses *any population, including minorities or fractions of a state population*. This very broad understanding of "all peoples" is endorsed by authors who argue that this paragraph likewise applies to the external self-determination rule.[82] But it is also advocated by authors who consider that the paragraph only concerns the internal self-determination rule.[83] This was the perspective taken in the Supreme Court of Canada's opinion in *Reference re Secession of Quebec* [1998]:

> "[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 population."[84]

This statement by the Supreme Court of Canada has been pointed to as proof of certainty. The Court adds that the notion of "peoples" in this rule of the principle cannot refer to the state population, because,

> "[t]o restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to

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[82] Among others: J. Zourek, *La lutte d'un peuple en vue de faire prévaloir son droit à l'autodétermination constitue-t-elle au regard du droit international un conflit interne ou un conflit de caractère international* (Studi Udina, I, Milan, 1975); J. Zourek, "Le respect des droits de l'homme et des libertés fondamentales constitue-t-il une affaire interne de l'Etat?," in *Estudios de Derecho internacional: Homenaje al profesor Miaja de la Muela, I* (1979) 603; J. Brossard, "Le droit du peuple Québécois de disposer de lui-même au regard du Droit international," *CYIL* (1977), at 84 *et seq*.; J. Duursma, *Fragmentation and the International Relations of Micro-States: Self-determination and Statehood* (1996), at 80; J. Klabbers and R. Lefeber, "Africa: Lost between Self-Determination and *Uti Possidetis*," in Brölmann *et al*. (Eds.), *Peoples and Minorities in International Law* (1993), at 37; D. Turp, "Le droit de sécession en droit international public," 20 *CYIL* (1982) 24; and Y. Dinstein, "Self-Determination revisited," in M. Rama-Montaldo (Ed.), *El derecho internacional en un mundo en transformación: Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga, I.*, Fundación de Cultura Universitaria, Montevideo, 1994, especially at 248–251.

[83] For example, J. Crawford, "The Right of...," *supra* n. 2, at 27–32 and 38.

[84] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998], *supra* n. 42, para. 124.

protect the territorial integrity of existing states, and would frustrate its remedial purpose."[85]

In other words, it is as if the Supreme Court of Canada were asking itself: why would territorial integrity need to be protected if the notion of "peoples" meant the population of the state? This leads it to assert that "people" is any part of a state's population.

The second and third problems have to do with the object of the right and its relationship with the protection of territorial integrity included in the seventh paragraph of UNGA Resolution 2625 (XXV). Specifically, the second problem is precisely the lack of a scholarly consensus on whether the principle of territorial integrity has an *ad intra* application for states, in addition to its application in interstate relations. Does the protection of national unity and territorial integrity prohibit or set limits on secessionist practices? Or, on the contrary, is general international law neutral with regard to secession? As we will see, some authors consider the norm to establish a prohibition on secession and, thus, the principle of territorial integrity to have an internal application. Others claim that general international law is neutral as to secession and, therefore, that the territorial integrity principle does not have an *ad intra* application.[86] This is a matter of particular international legal interest. In its Advisory Opinion on Kosovo (2010), the ICJ stated that international law was neutral regarding unilateral declarations of independence and that the principle of territorial integrity did not apply internally, but rather only in relations between states.[87] Since this opinion, scholarly claims regarding the neutrality of international law concerning secession have become commonplace.

Finally, and this is the third problem, still other authors consider that the norm establishes a right to remedial secession as an exception to the territorial integrity principle, from which perspective, the territorial integrity principle also has an internal application, although the authors endeavor not to notice it in this case. This problem

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[85] *Ibid.*
[86] Among others, see J. Crawford, *The Creation of...*, *supra* n. 29, at 389–390; M. Sterio, *Secession in International Law*, *supra* n. 6, at 40; N. González Campañá, *supra* n. 44.
[87] ICJ, Advisory Opinion, *Kosovo*, *supra* n. 7, para. 80

stems from the interpretation of the second sentence of the seventh paragraph of the principle's formulation in the Annex to UNGA Resolution 2625 (XXV): "conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." The paragraph could *literally* be read as saying that, if a government is not representative, the part of the population that is discriminated against has the right to separate. The literature supporting this reading relies on this *literal interpretation* of the paragraph's second and last sentence. These authors talk about a right to remedial secession, not a domestic right, but an international right of separation as a remedy for or correction of situations of discrimination against populations and/or human rights violations by the government of a state. Even if we go all the way back to Professor Buchheit – one of the first to make this case in 1978 – it is difficult to find a single argument in this sense based on any text or interpretation other than this *literal* one.[88]

These three language-related problems could be summarized as problems with the method of interpretation of general international law and General Assembly resolutions. On this last point, the methods used by scholars and practitioners have something in common: they mainly, and often exclusively, focus on the literal meaning of the words

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[88] L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978), at 221–222. One widespread school of thought considers that *any discrimination* gives rise to this right. See: E. Ruiloba Santana, "Una nueva categoría del panorama de la subjetividad internacional: el concepto de pueblo," in *Estudios de Derecho Internacional...*, *supra* n. 4, 303, especially at 328. Another stricter one holds that it arises *only in cases of gross and systematic violations of human rights*. Professor Crawford also seems to take a favorable view of the applicability of remedial secession, pointing to the Supreme Court of Canada's opinion on Quebec (J. Crawford, *The Creation of States...*, *supra* n. 29, at 119). See, also: A. Cassese, *supra* n. 26, at 119-120; and D. Muswiek, "The Issue of a Right of Secession: Reconsidered," in C. Tomuschat, *Modern Law of...*, *supra* n. 25, at 25–26. Among Spanish scholars see F. Mariño Menéndez, "Naciones Unidas y el Derecho de Autodeterminación," en F. Mariño Menéndez (Ed.), *Balance y perspectivas de Naciones Unidas en el Cincuentenario de su creación (*Ed. Universidad Carlos III de Madrid-BOE, 1996), at 85-86 (although he does not refer to secession as a remedy); J.A., Carrillo Salcedo, "Sobre el pretendido 'derecho a decidir' en el Derecho internacional contemporáneo," *El Cronista del Estado Social y Democrático de Derecho* (2013), at 22; X. Pons Rafols, "Cataluña: Derecho a...," *supra* n. 29, at 149-156; J.F. Soroeta Liceras, "El derecho a...," *supra* n. 29, at 470; and "La Opinión consultiva de la Corte Internacional de Justicia sobre Kosovo de 22 de julio de 2010: una interpretación judicial sui generis para un caso que no lo es. Aplicabilidad de la cláusula de salvaguardia de la Resolución 2625 (XXV) o de la "secesión como remedio," REEI (2013), at 28.

and wording used in the international texts. However, this literal interpretation is not the one that follows under the secondary rule of interpretation of international texts when they are declaratory of an international custom.

2. Theory of international law and the general rule of interpretation of international written texts: the trifold criterion

Let us recall here what we saw in Section II. UNGA resolutions can be interpreted applying *mutatis mutandis* the rules of interpretation contained in the VCLT of 1969. The international general secondary rule of interpretation does not say: *texts may only be interpreted literally*. It says that *texts' ordinary meaning* shall be taken in *context* and in consideration of their *object and purpose* (the *trifold criterion) in good faith*. Additionally, if the result is *absurd*, then the meaning must be gleaned based on the will of the states as evidenced in the preparatory work for the text.

Let us further recall that all of this simply provides us with the *opinio juris cogentis*, which is reflected in the UNGA resolutions and common Article 1 of the two international human rights covenants. It is still necessary to consider state practice (*usus*) as well to determine the content of the norm established by the states' consensus.

The trifold criterion (text – context – object and purpose) requires not only an examination of the text's ordinary meaning, but also a logical-systematic and teleologic interpretation.[89] Logical-systematic because the context of the text includes not only the paragraph in which it appears, but all the other paragraphs of the resolution or legal instrument (preamble, annexes, etc.). Furthermore, as paragraphs 2 and 3 of Article 31 VCLT state, the context also includes any contemporary agreements and instruments between the parties, as well as subsequent agreements, practice, or other relevant rules of international law that might apply. Teleologic because the object and purpose of the main

[89] A. Remiro Brotons *et al.*, *supra* n. 11, at 598.

instrument – in the present case, a UNGA Resolution – must also be considered. And this whole process must be performed, let us recall, in good faith.

I maintain that the first, seventh and eighth paragraphs of the formulation of the self-determination principle in the Annex to UNGA Resolution 2625 (XXV) must be interpreted together. The legal history of UNGA resolutions and the human rights covenants sheds light on this point. The internal self-determination rule was included in the definition of the self-determination principle at the initiative of the former USSR in the context of the tensions of the Cold War. For the USSR, internal self-determination – understood as the emancipation of people under the *yoke of the capitalist bourgeoisie* – was the basis for any recognition of human rights. In 1955, it thus sponsored its inclusion in the draft text that would later give rise to the two human rights covenants adopted in 1966.[90] The US, the UK, and their allies unsuccessfully sought to remove the paragraph, ultimately managing only to modify the wording to include the Wilsonian criterion of representative democracy as a form of government (although, in the end, the word "democracy" itself was not included).[91] From its inclusion in drafts of the covenants, it made its way into UNGA Resolutions 1514 (XV) and, later, 2625 (XXV). In the deliberations of the Special Committee on the Principles that drafted Resolution 2625 (XXV), the USSR again pushed for recognition of the right to internal self-determination to be identified with the right to non-intervention, in response to the US and UK's efforts to have the rule be considered to promote the representative democratic system. Moreover, for a time, the end of this first paragraph expressly included territorial integrity, as the USSR was consistently concerned with protecting it.[92] These

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[90] A. Miaja de la Muela, *La emancipación de los pueblos coloniales y el derecho internacional* (Tecnos, Madrid, 1968), at 98–112 *et seq*.

[91] The UK and the US lobbied to include the words "enjoying a democratic government" in the first paragraph of the draft Res. 2625 (UNGA, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation among States*, 1970, UN Doc. No. Supplement No 18 (A/8018), para. 65).

[92] See the amendments of the non-aligned countries in 1969 in the debates: Joint proposal by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia (A/AC.125/L.48): "l. All peoples have the inalienable right to self-determination and complete freedom, the exercise of their full sovereignty and the integrity of their national territory" (UNGA, *Report of the Special*

deliberations further show that the expression *territorial integrity* was moved elsewhere in order to devote the final two paragraphs of the definition of the principle to its protection.[93] Therefore, the proper approach is to *systematically interpret* the first, seventh, and eighth paragraphs of the definition of the principle in UNGA Resolution 2625 (XXV), all of which concern the rule of internal self-determination, as highlighted by most of the literature.[94]

Consequently, determination of the state consensus on the meaning of "all peoples" and on whether to establish an exception to the principle of territorial integrity (remedial secession) cannot depend on a literal interpretation of these paragraphs alone, but rather must be based on the trifold criterion of interpretation.

It should also be borne in mind that, as a customary norm, the rule of internal self-determination coincides, in part, with the *principle of non-intervention in the affairs of states.*[95] However, there are some slight differences in both the holder of the right (which, in the former case, is the people of the state and, in the latter, the state itself) and in its object (which, in the former case, includes the *ad intra* protection of territorial integrity, but in the latter, includes only *ad extra* protection).

I will now apply the general rule (trifold criterion) of interpretation to each of the aforementioned three problems.

Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Official Records, Twenty-fourth Session, Supplement No. 19 (A/7619), 1969, at 58, para. 143). See also the USSR's amendment in the proposal submitted in 1969 by Czechoslovakia, Poland, Romania, and the Union of Soviet Socialist Republics (A/AC.125/L.74): "l. All peoples, large and small, have equal rights, the inalienable right to self-determination and complete freedom, the exercise of their full sovereignty and the integrity of their national territory" (*ibid*., at 58, para. 145).

[93] The two final specific paragraphs are paragraphs 7 and 8 of the principle's definition in the Annex to UNGA Resolution 2625 (XXV). For background, see UNGA, *Report of the Special Committee...*, Doc. No. A/7619, 1969, *supra* n. 89, at 58, paras. 143 and 145, and at 62, para. 150.

[94] See, among others: A. Cassese, *supra* n. 26, at 110, in note 14.

[95] See, among others: J. Salmon, "Internal aspects of the right to self-determination: towards a democratic legitimacy principle?," in C. Tomuschat, *Modern Law of...*, *supra* n. 5, at 258; A. Cassese, *supra* n. 26, at 55 and 103.

3. The original state consensus (I): the whole people belonging to the state

There are several main arguments for why, in the context of this rule and with regard to its object and purpose, the term "peoples" refers to the *people of a state*, i.e., all the people who make up a state's population.

First, the paragraph itself must be read in its entirety, as it consists of a compound sentence made up of two juxtaposed simple sentences: "*all peoples* have the right" and "*all states* have the duty to respect this right." The right to freely determine their political condition is held by the *people under the jurisdiction of the state that has the duty* to respect it. This is supplemented by the duty of third states not to interfere in such internal affairs of the state.

Second, this compound sentence makes two references to the United Nations Charter (UNC), in which context the phrase "equal rights and self-determination of peoples" (Article 1.2 UNC) has been identified with the *people of the state;* the background of the drafting of the Charter supports this reading of the scope.[96] Likewise, in the preparatory work for the drafting of Article 1 of the two human rights covenants, it was debated whether to include the phrase "all nations" together with the phrase "all peoples," prompting complaints due to the ambiguity of the terms and "the danger of encouraging the separatist attitude of some minorities." It was ultimately decided to leave only the phrase referring to "peoples," understood to mean "the state's people."[97]

Third, this first paragraph must be interpreted in the context of all the paragraphs delimiting the content of the principle, especially the last two, that is, the seventh and eighth paragraphs of the principle's definition in the Annex of Resolution 2625 (XXV). In referring to the requirement of a representative government, the seventh paragraph

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[96] As indicated by Special Rapporteur Aureliu Cristescu, responsible for the study "The Right to Self-determination," published in 1981 (UN Doc. E/CN.4/Sub.2/404/rev.1, *supra* n. 29, at 45–46, para. 260–266).
[97] A. Miaja de la Muela, *supra* n. 90, at 102.

specifies it in relation to "the whole people belonging to the territory." It very clearly refers to *the whole people of the state territory*.

Fourth, when both rules (internal and external) are taken into account, the object and purpose of the principle lead to the same conclusion: internal self-determination presupposes the prior exercise of external self-determination. That the states would have sought to attribute a right to internal self-determination to part of a state's population without a prior right to external self-determination is utterly illogical. It is the people of the existing state, who have already exercised their right to external self-determination once, who come to permanently hold the right to internal self-determination.

Fifth, interpreting the term as referring to the people of the sovereign state is more in keeping with the reality of the international legal system and the will of its primary subjects: *sovereignty resides in the people of a state, not in fractionable parts thereof*. It is highly implausible that states would have attributed an international right to a sub-state entity so imprecisely. Whenever they have sought to do so, they have done it clearly, as in this norm itself, when it makes reference to colonial people and *peoples subject to alien subjugation, domination and exploitation* or uses other such expressions. State practice supports this interpretation, which is closely linked to a *monist conception of sovereignty*. This was the interpretation supported by the Spanish Supreme Court in the case of the Catalan secession process.[98]

[98] One of the arguments made by the Spanish Supreme Court in the "Procés" case (on the Catalan secessionist independence process) to deny the existence under international law of a right to decide on independence attributed to some infrastate groups was precisely the *monist conception* of sovereignty within the territorially decentralized state of Spain. (Supreme Court of Spain, Criminal Division, Judgment 459/2019, of October 14, 2019, on the *Procés*, at 200). See H. Torroja Mateu, "The 'right to decide' in International Law as grounds for exclusion of unlawfulness," Agora on "The Catalonia independence process before the Spanish Supreme Court," 24 *Spanish Yearbook of International Law* (2020). Many Spanish authors hold this same position, considering the whole people of a state to be the holder of the right to internal self-determination. See, e.g.: J.A. Carrillo Salcedo, *supra* n. 29, at 69; A. Remiro Brotóns, *supra* n. 11, at 170–172; P. Andres Sáenz de Santa María, *supra* n. 29, at 153–154.

4. The original state consensus (II): the tacit limitation on secession

Let us now focus on the object of the right to internal self-determination and its relationship to the protection of territorial integrity. To my knowledge, the states were not at all neutral regarding secession when preparing the content of the principle of *international self-determination of peoples in the 1960s and 1970s*. This is the sense of paragraph seven of the formulation of the principle of self-determination in UNGA Resolution 2625 (XXV). The first sentence is clear enough and bears repeating here:

> "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 (...)."

The whole paragraph seven is usually referred to as the territorial integrity safeguard clause. With this paragraph, the states clearly established that the *right to external self-determination* is not for the purposes *of any part of a state's population*. Thus, this rule prevents any portion of such a people from claiming that right for itself and seeking to usurp part of the territorial sovereignty of the old or new state in clear violation of the right of that state's people as a whole to its territorial integrity. It further formally establishes that the exercise of external self-determination is a right that may be exercised only once, a *one-shot affair* so to speak. Secession, which necessarily entails the absence of the parent state's consent and is, as we have seen, a revolutionary act, is, in this regard, *tacitly limited by international law in the framework of this principle of self-determination of peoples*. This tacit limitation is included in the phrase "dismember or impair, totally or in part, the territorial integrity" of states. What is *prohibited is the use or construction (i.e., the interpretation and application) of the self-determination principle to promote the dismemberment of the territory of a state*. The safeguard clause thus reinforces the position of the parent state before the secessionist movement: the state is not obliged by any international norm to grant this independence to a territory under the essential principle of self-determination. On the contrary, in theory, the parent state could enforce the international community's duty of non-recognition of any new state to

emerge through secession – because it would violate this rule of the right to internal self-determination of peoples – despite the effectiveness rule.

To claim that this is the state consensus is reasonable according to the general rule of interpretation, i.e., the trifold criterion of interpretation. The right to internal self-determination protects *the right of the whole population of the state* to decide about its sovereign territory. The previous discussions and reports by the Special Committee on Principles that negotiated the subsequent UNGA Resolution 2625 (XXV) shed light on this matter, as they explain why there are two paragraphs and not one to protect territorial integrity. Indeed, of the various circumstances the states were dealing with during the debates (secession, territorial segregation, occupation, or the assimilation of enclaves to colonies), some were problems related to internal jurisdiction and others had to do with interstate relations. Hence, in the end, two paragraphs were established in the formulation of the principle in UNGA Resolution 2625 (XXV): the seventh, on the *ad intra* applicability of the protection of territorial integrity, and the eighth, on its *ad extra* implications, i.e., those applicable to interstate relations. In 1969, during the debate over the implementation of the principle by a state with respect to peoples within its jurisdiction (seventh paragraph), concerns were raised with regard to secession in relation to: a) future claims by minorities concerning respect for human rights; b) the need to safeguard territorial integrity against possible secessions; and c) the inconsistency of internationally prohibiting acts falling within the domestic sphere of a state.[99] Among the issues affecting domestic jurisdiction, the discussions show that the states wished to prevent potential secessions, such as those attempted by the secessionist leader Moïse Tshombe in Katanga (Belgian Congo) in 1960 or by the Biafran secessionist movement in Nigeria (1967–70). Ultimately, the states were so fearful of secession that they even avoided calling it by its name. But, of course, they still sought to prevent it, through the

[99] See UNGA, *Report of the Special Committee on Principles...*, 1970, UN Doc. A/8018, *supra* n. 88, at 46; UNGA, *Report of the Special Committee on Principles...*, 1969, UN Doc. A/7619, *supra* n. 89, at 69.

expression "dismember or impair, totally or in part, the territorial integrity or political unity."[100]

State practice (*usus*) has followed a similar path. The UN defended the territorial integrity of the newly independent states (whose borders were guided by the general principle of international law of *uti possidetis*), in faithful application of the rule of the safeguard of territorial integrity. It positioned itself against the secessionist processes in Katanga and Biafra, as well as in Bangladesh, although the latter ultimately succeeded as a result of certain favorable circumstances, including the external support of India. Nevertheless, it is worth recalling that Bangladesh only became a member of the UN once Pakistan had recognized it, and the principle of effectiveness was one of the main reasons for this recognition. The states were, and remain, opposed to secession.[101]

Since the right to territorial integrity is an inherent part of the principle to equal sovereignty and of the right to internal self-determination of all the people of a state, general international law clearly establishes *the primacy of internal self-determination over any type of secession*. What other purpose could the inclusion of the seventh paragraph have other than to recognize an *ad intra* application of the territorial integrity principle? Professors Kohen and Corten, among others, also affirm this *ad intra* nature of the principle of the protection of territorial integrity in this norm.[102] Interestingly, among other arguments, the Spanish Supreme Court cited precisely this paragraph protecting territorial integrity included in UNGA Resolution 2625 in its judgment in the

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[100] See *ibid*., at 68, para. 176, and at 69, paras. 177 and 179.

[101] A. Remiro Brotóns *et al*., *supra* n. 11, at 188–191; M. Kohen, *supra* n. 29, at 593; P. Andrés Sáenz de Santa María, *supra* n. 29, at 139. J. Crawford affirmed that the "unwillingness of the international community to accept unilateral secession from an independent state can be illustrated by reference to the so-called "safeguard" clause to the Friendly Relations Declaration..." (J. Crawford, *State Practice and...*, *supra* n. 50, para. 61). Elsewhere, however, the same author considers international law to be neutral as to secession: J. Crawford, *The Creation of...*, *supra* n. 29, at 389–390.

[102] M. Kohen, *supra* n. 29, at 595. Professor Corten concludes his study on the issue asserting that "l'expression de 'neutralité juridique' nous semble en tout cas fondamentalement inappropriée, le droit international favorisant visiblement l'Etat dans ses relations avec les mouvements sécessionnistes qui le menacent" (O. Corten, "Are there gaps in the international law of secession?," in M. G. Kohen (Ed.), *Secession...*, *supra* n. 6, at 254).

Catalan independence process case in order to deny the existence of a Catalan "right to decide" or right to self-determination.[103]

The Supreme Court of Canada considered that there is an "implicit" prohibition on secession under the essential principle of self-determination, although it reached this conclusion through a different line of reasoning, which I do not share.[104]

On this point, let us now recall the idea that general international law is neutral concerning secession, claimed by the ICJ in its Kosovo Opinion. While this is not the place for an in-depth study of the ICJ's reasoning, it should be stressed, first, that the Court decided, surprisingly, to limit the scope of its arguments by not examining the self-determination of peoples principle.[105] Logically, as a result, it was incapable of realizing that preventing secessions is exactly what the norm does. Had the ICJ examined the principle of self-determination of peoples, it would have had to address the scope of the seventh paragraph of the principle's formulation in UNGA Resolution 2625 (XXV). Instead, the Court focused its arguments on general international law and declarations of independence (secession), rejecting the *ad intra* application of the principle of territorial integrity, and focusing only on its interstate application.[106] Arguments based on general international law that do not consider the principle of self-determination of peoples? To me it makes no sense at all to argue over the status of general international law without

[103] Supreme Court of Spain, October 14, 2019, *supra* n. 89, at 204.
[104] "International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below" (Supreme Court of Canada, *Reference re Secession of Quebec*, [1998], *supra* n. 42, para. 112).
[105] The ICJ decided not to address the question of whether the right to self-determination allows a part of a state's population to separate. See ICJ, Advisory Opinion, *Kosovo*, *supra* n. 7, paras. 59–56 and 82–83.
[106] The Court responded that "the scope of the principle of territorial integrity is confined to the sphere of relations between States," based on the wording of Art. 2.4 UNC, UNGA Res. 2625, and the principle of prohibition of the threat or use of force, the ICJ's own interpretation in *Nicaragua v. United States of America* from 1986, and the Final Act of the Helsinki Conference from 1975 (ICJ, Advisory Opinion, *Kosovo*, *supra* n. 7, para. 80).

including such an essential principle of the international legal system.[107] It was a difficult problem to solve because of the political implications behind it. As Professor Anne Peters has said, "What could have realistically happened if the Court had qualified the declaration of independence as unlawful? (...) the Court did not have a real choice, if it did not want to place its own legal, moral and political authority at risk."[108] As it stands, however, the right to internal self-determination of the Serbian people as a whole was completely disregarded.

To summarize so far, scholars' language concerning the *neutrality of international law* with regard to secession is erasing the international legal concept of *the right of the whole population of a state to freely decide about its territory*. A right reinforced by the *tacit limitation on secession,* in the sense that the internal self-determination norm restricts the use of the external self-determination norm by secessionist groups seeking to fracture the territorial integrity of old or new states. Indeed, this is an obvious conclusion. As Professor Koskenniemi recalled, "In fact, it is difficult to think of a situation where a secessionist self-determination claim would not be disputed by the argument that it violates the self-determination rights – the territorial integrity – [of] the larger community."[109] What is not so obvious is that the language of general international law's neutrality concerning secession undermines the value of – by rendering inferior –

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[107] In addition, the ICJ decided to apply *tacitly* the Lotus criterion (*that which is not prohibited is allowed*) established by the Permanent Court of International Justice in 1927 to facts falling within the scope of a state's internal affairs and to limit Serbia's sovereignty, when it is usually applied to relations between states precisely to affirm that limitations on sovereignty cannot be presumed. The ICJ uses this argument to note that no prohibition against secessionism can be inferred in international law. But it fails to realize that, in that case, it falls under domestic jurisdiction and, thus, international law likewise cannot *refrain from prohibiting* it. In other words, if international law does not regulate a situation – because it is an internal affair – it makes no sense to state that it does not prohibit it. Furthermore, if we were to accept the ICJ's reasoning that international law *does not prohibit it*, then we must likewise accept that it *cannot allow it*. Judge Bruno Simma criticized the ICJ's reasoning thusly: "... its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called Lotus principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from 'tolerated' to 'permissible' to 'desirable'. Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest" (*Declaration of Judge Simma*, in UN Doc. No. A/64/881/Add.1, at para. 8).
[108] A. Peters, "Does Kosovo Lie in the Lotus-Land of Freedom?," 24 *LJIL* (2011) 95, at 108.
[109] M. Koskenniemi, *supra* n. 4, at 260.

the right of the whole population of the state to decide its political future together, including that of its territory. My argument is that this is not what the states intended when they adopted the norm. On the contrary, the state consensus was to limit secession to protect the right of the whole population of the state to its internal self-determination.

5. The original state consensus (III): no right to remedial secession

The last language-related problem concerns the so-called right to remedial secession. If we accept that the first part of the seventh paragraph of the principle's formulation in the Annex to UNGA Resolution 2625 (XXV) is intended to protect the *ad intra* territorial integrity of new and old states, it is difficult to accept positions that maintain that, in contrast, the second part of this paragraph establishes an exception to territorial integrity, a right to remedial secession.

After affirming the safeguard of the territorial integrity of sovereign and independent states, this seventh paragraph adds,

> "conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

Some authors call this paragraph a safeguard against discrimination or the *democracy clause.* Despite the *literal* reading, an examination of the *text* in its *context*, taking into account its *object and purpose*, indicates that the states were not seeking to create a right of separation as an exception to territorial integrity here. Given that the term "remedial secession" does not appear in the language of the text of the Resolution or in the debates that preceded it, let us consider the reasoning of the delegations discussing it at the General Assembly. As we have seen, they were quite reluctant to give even colonies a right to separation: *why would they then make exceptions to give it to any minority in virtually the last paragraph of the UNGA resolution*? To think this was their intention flies in the face of reason. It is likewise nonsensical to think that the paragraph whose object and purpose are to prevent the principle from being interpreted in any way that

might call the safeguard of territorial integrity into question might give rise to such a right of separation. A right to access to sovereignty and independence recognized by international law, of an *erga omnes* and, today, a *jus cogens* nature? If the states had wished to recognize such a right, they would have established it in the norm. They did not. Instead, they recognized it exclusively for colonial-territory and occupied peoples.

In other words, after establishing a revolutionary international system recognizing colonies' rights to sovereignty and independence (a right to restore their stolen territorial sovereignty), with all the attendant corollaries (legality of the use of force, international relationship between the parties, flexibility of the effectiveness principle, etc.), would the states really have made the misstep of internationally undertaking to transfer sovereignty to minorities or to parts of their populations provided they had been victims of discrimination or gross and systematic human rights violations? It is *manifestly absurd or unreasonable* to think they would have, and so we must look to the preparatory work, as a *supplementary method* of interpretation (Article 32 VCLT).

As Professor Cassese stated, an examination of the work of the Special Committee on Principles indicates that the convoluted wording of this paragraph (a compound sentence that allows for such a literal interpretation) was due to a last-minute decision by the chairman of the Drafting Committee (specifically, to switch the order of two simple sentences and subordinate the second to the first) that altered the meaning (*object and purpose*) that the states had intended to give it.[110] Besides, the previous debates in the UNGA show that this safeguard against discrimination was established to protect victims of apartheid as in the cases of South Rhodesia or the Bantustans in South Africa. Specifically, the aim of the paragraph was and is to prevent any recognition of the exercise of (external or internal) self-determination that did not adhere to the criterion of *democratic procedure* for the determination of that population's political future. The expression *democratic processes* was already expressly stressed in UNGA Resolution

[110] This final wording has been confirmed by Professor Cassese (Cassese, *supra* n. 26, at 117 and 123).

1541 (XV) of December 15, 1960.[111] This democratic procedure is supplemented here, requiring the presence of a "representative government" and of "the whole people belonging to the territory without distinction as to race, creed or colour."[112] Thus, the states protected the autochthonous majorities that were victims of apartheid – or the victims of any other kind of discrimination today: they are recognized as having a right *to participate in the democratic decision concerning the future of the territory they belong to.*[113]

State practice (*usus*) also bears witness to this part of the norm's content. The discriminated majorities in Rhodesia and South Africa were not interpreted to have a direct right to independence. Rather it was argued that they had to be allowed to vote in the exercise of independence, respecting their right to be represented in the government of the people belonging to the territory, as stated in the paragraph. Likewise, one need only look at how the states reacted in the cases of the discriminated minorities in Katanga and Biafra. Although the former Belgian Congo and Nigeria were said not to be respecting the minorities who lived in those regions, *those minorities were not granted any right to separation*. A literal interpretation of this final paragraph as remedial secession was not applied. On the contrary, UN member states, and even *blue helmets*, fought to safeguard both states' territorial integrity. Meanwhile, Bangladesh was a pure case of secession, achieved with the aid of the Indian army.

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[111] UNGA 1541 (XV), 1960, principles VII and IX, both related to the process of external self-determination.
[112] The paragraph was intended precisely to prevent the type of abuse of the rule of external self-determination that led to the independence of South Rhodesia under the leadership of a racist white minority or, as in South Africa, that enabled the consolidation of an *apartheid* regime through the creation of Bantustans. See, among others: M. Kohen, *supra* n. 29, at 595.
[113] Today, recent universal resolutions and declarations include the prohibition of discrimination of *any kind* and not only as to *race, creed, or color*. See: *Vienna Declaration on Human Rights* from 1993; and UNGA Res. 50/6, *Declaration on the Occasion of the 50th Anniversary of the United Nations*, November 9, 1995.

The ICJ has wisely indicated the *de lege ferenda* status of this "remedial secession" doctrine (Kosovo Advisory Opinion), as has the Supreme Court of Canada (Secession of Québec decision).[114]

In short, it is difficult to deduce from the application of the secondary rule of determination of the content of customs that the state consensus behind the right to internal self-determination was to include a right for minorities, or any part of a state's population, to separate in cases of discrimination and/or gross and systematic human rights violations as an exception to the principle of territorial integrity. Scholars who claim that such a right to remedial secession exists are erasing, or ignoring, the international legal concept of the right of the whole population of the state to freely decide, without any discrimination, including against majorities, the future of their territory, a right that includes the limitation on secession.

V. HAS THE ORIGINAL STATE CONSENSUS EVOLVED TO CHANGE THE CONTENT OF THE RIGHTS TO SELF-DETERMINATION?

Recalling the methodological premise of how customs change, let us now determine whether there is a new custom that modifies the content of the self-determination principle, as it has been identified thus far. Few scholars have followed a rigorous path to study the existence of such a *new custom of change*. One is Professor Tomuschat, whose work provides a clear analysis in this respect. He has convincingly shown that *there has been no modification of the customary norm*.[115] Professor Crawford has likewise asserted that facts do not automatically change the law and that the post-1989 cases of secession

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[114] ICJ, Advisory Opinion, *Kosovo*, 2010, *supra* n. 7, at 436, para. 82; Supreme Court of Canada, *Reference re Secession of Quebec*, [1998], *supra* n. 42, paras. 134–135 and 138. In the same sense, see some authors, such as E. Orihuela Calatayud, "Does a Right of Remedial Secession Exist under International Law?," 22 *Spanish Yearbook of International Law* (2018), at 268; or J.A Perea Unceta, "La ausencia de fundamentación de la secesión en el derecho de libre determinación de los pueblos y en la violación grave de los derechos humanos," in C. Fernández de Casadevante Romaní (Ed.), *Consecuencias jurídicas de la secesión de entidades territoriales. Una visión para España* (Thomson Reuters-Aranzadi, 2020) at 59.
[115] C. Tomuschat, *supra* n. 25, at 23–45.

provided no precedent for extending an international legal "right to secede to the constituent units of federal states."[116] I agree with them both: recent practice has not changed the essential principle of self-determination of peoples to include a right to separation for any part of a state's population – nor, I would add, a right to remedial secession. I have explained why in detail elsewhere. In this study I wish only to focus on what I believe is the most useful *method* to arrive at this conclusion, distinguishing between two main questions.

The first question is the following: *Have the states changed the* jus cogens *custom by agreeing a new one conferring the international right to external self-determination on minorities or a fraction of a state's population*? To answer this question, it is necessary to prove that there exist both the requisite *opinio juris cogentis* and relevant material practice in this regard. To this end, let us first recall that there is no international treaty or UNGA resolution on the self-determination of peoples reflecting such a new trend, including the UNGA resolutions on the rights of minorities or indigenous peoples.[117] Consequently, there is no *opinio juris cogentis of consensus* to facilitate the demonstration of the existence of a new custom. To find relevant precedents, we must thus turn to individual instances of practice and see whether they are accompanied by an *opinio juris cogentis* in this sense. Should such relevant practice exist, it would be found in the cases of the creation of new states through secession, rather than those of devolution or separation of territories. Why? Because in cases of separation of territories there is an internal right to separate and/or it is the will of the parent state to transfer sovereignty. When there is no such domestic right or will on the part of the central government, we would have to prove that those minorities who seceded against the will

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[116] J. Crawford, *State Practice and..., supra* n. 49, para. 46 *et seq*.

[117] No UNGA resolution on the rights of minorities indicates that the states have conferred on them a right to sovereignty and independence. Nor is such a provision found in the resolutions on the rights and non-discrimination against indigenous peoples. For example, Arts. 3 and 4 of the UN Declaration on the Rights of Indigenous Peoples (UNGA Res. 61/295, of September 13, 2007) clearly state that the right to self-determination of these peoples is a right to autonomy or self-government and not a right to sovereignty and independence.

of the parent state did so in the exercise of an international right. As Professor Tomuschat notes, compared to the number of cases in which states' territorial integrity has been maintained and defended, the cases of secession are strikingly few.[118] However, this point should not be overemphasized, as the relevant practice would include not only the practice of the parent states, but also the response of the rest of the states and international organizations to the secession phenomenon.

The attitude of the secessionist groups themselves cannot be taken as relevant material practice, as for all intents and purposes they are domestic actors for international law. Their attitudes do not constitute state practice for the purpose of assessing the material dimension of an international custom.[119] A separate issue is whether such domestic practice indirectly induces certain behaviors on the part of states and international organizations. It is this response or attitude toward secessions – of the parent states, third states, and international organizations – that must be studied. Furthermore, it is the *start* of the secession process that must be observed, for it is then, at the start of the secessionist revolution, that the rejection by the parent state and, in general, the silence of third states – who will view it for what it is, i.e., an internal affair of that state – will occur. The *end* of the process scarcely matters, since, if the secession results in the creation of a new state, it will be due to a different international norm, namely, the effectiveness principle, which certainly does not retroactively endow the population in question with an original right to independence.

What would the attitude of rejection by the parent state and third states have to look like at that initial moment to be considered a relevant material precedent in the formation of an international custom modifying the previous one? What would the secessionist movements or the scholarly literature seeking to legitimize their violence against the will of the parent state, based on the essential international law principle of self-determination of peoples, need to prove? In my opinion, for it to constitute a relevant precedent, the parent state would have to *accept* that a part of the state population (e.g.,

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[118] C. Tomuschat, *supra* n. 25, at 27.
[119] See Article 4.3 of the ILC Draft conclusions on identification of customary international law, *supra* n. 14.

a *minority*) *could be entitled*, under general international law rules, to separate from the state insofar as it fell within the concept of a people with a right to external self-determination. At the same time, however, it would have to *reject that the factual situation provided for under the norm existed in the specific case, as well as the existence of an exception or other justification*.[120] While this seems highly unlikely, it is certainly possible as a working hypothesis.

Let us examine, for example, Serbia's position regarding the declarations of independence by Slovenia, Croatia, and Bosnia-Herzegovina in the process of disintegration of the Socialist Federal Republic of Yugoslavia begun in 1991. Its course of action was not to accept that the international principle of self-determination of peoples was applicable to those parts of the Yugoslav state population yet at the same time reject the application of the principle in those specific cases on the grounds that the factual situation covered by the norm did not exist. On the contrary, Serbia did not even heed its own domestic constitutional law, which recognized that the Federation was based on a right of self-determination (Yugoslav Constitution of 1974). Indeed, if we accept as authoritative the positions of the International Conference on the Former Yugoslavia and its Badinter Commission – which did not authorize the external self-determination of the minorities of Serbian origin from the subsequent Republika Srpska, a federated republic of the Republic of Bosnia and Herzegovina – this case is even less indicative of an *opinio juris* in favor of the right of external self-determination of national minorities. Nor can the attitude of third states be considered a relevant material element. As Professor Andrés Sáenz de Santa María has noted, although the Badinter Commission referred to the

[120] I follow the ICJ's argument concerning the analysis of state practice to determine the existence of a customary rule in the *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America, Merits, 27 June 1986), at para. 186: " (...) In order to deduce the existence of customary rules, the Court deems it sufficient (.../...) that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

requests submitted to it by the states of the former Yugoslavia as an exercise of self-determination, they were not cases of the exercise of this internationally recognized right.[121] Likewise, as Professor Pellet affirmed, the then "twelve" did not intervene to enforce a right to self-determination of the former Yugoslav republics, but rather to maintain peace and international security.[122]

In other cases, such as those of Eritrea, South Sudan or even Crimea (2014), the parent states similarly have not acted in such a way as to induce an *opinio juris* recognizing an exception to the international rule of external self-determination, extending it to include any fraction of a state's population. In short, it is virtually impossible to prove a new *jus cogens* custom of change. On the contrary, parent states' attitude of rejection of the secessionist claims should be considered proof corroborating the existing norm.

The second question is: *Have the states changed the international custom by agreeing a new one conferring a right to remedial secession as an exception to the territorial integrity protected by the right of internal self-determination?* Unless the states were to draw up a treaty on the matter – which is by no accounts on the international agenda – it would have to be a new customary norm that modified the current status of the principle of territorial integrity as it is established in the context of the right to internal self-determination. Given that we are asking about the right of part of a state's population to access sovereignty and independence, there does not seem to be any other legal framework in which such a norm could be formulated. It would be a matter

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[121] According to this professor, the Member States of the then European Communities were more interested in politically managing a factual reality that was assumed to be a "descomposición estatal imparable" than in applying a legal principle of self-determination, which "ocupaba sin duda un lugar secundario que podía incluso no haber existido" (P. Andrés Saénz de Santa Maria, *supra* n. 29, at 180).

[122] "... les Douce comme le Conseil de Sécurité sont intervenus non pas pour faire respecter le droit des peuples à disposer d'eux-mêmes dans une variante nouvelle, mais pour préserver la paix et la sécurité internationales menacées par l'usage de la force au sein de la Yougoslavie. A aucun moment en tout cas, ni les Douze, ni les Nations Unies n'ont prétendu défendre un droit quelconque à l'indépendance des Républiques ou des peuples yougoslaves" (A. Pellet, "Quel avenir pour le droit des peuples à disposer d'eux-mêmes ?," in M. Rama-Montaldo (Ed.), *El derecho internacional en un mundo en transformación: Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga*, I (Fundación de Cultura Universitaria, Montevideo, 1994), at 263).

of proving that an exception to the principle of territorial integrity has been established conferring a right to sovereignty and independence on fractions of a state's population who are victims of discrimination or gross and systematic human rights violations. As there has been no UNGA resolution categorically affirming this in recent years other than Resolution 2625 (XXV), an inductive analysis cannot be based on an *opinio juris* of *consensus*; therefore, as in the previous case, we must carefully examine the individual instances of practice.

To this end, for the attitude of rejection of the secessionist process by the parent state to constitute a practice that could give rise to a custom of change in this regard, the parent state *would have to accept that*, in accordance with the norms of general international law, *a minority or part of the population that had been discriminated against or been the victim of gross and systematic human rights violations would hold the right to separate from the state as an exception to the principle of territorial integrity* contained in the internal self-determination norm, *but reject that such a situation existed in the specific case*. Again, this is unlikely to happen. A state that has such a bad conscious that it discriminates against its own population and/or commits gross violations of its people's fundamental rights is hardly going to simultaneously turn around and confer a right to sovereignty on that same part of its population. The two logics are diametrically opposed. The scholarly literature refers to the case of Bangladesh, which gained independence in 1971, as the first example of remedial secession. More recently, it refers to the case of Kosovo, which declared its independence in 2008. Yet an analysis of the two cases shows that neither includes relevant precedents constituting a new custom.[123]

Pakistan's attitude was not to reject the application of a right of separation recognized by the international norm at that time, on the grounds that the factual situation required did not exist in the case of the population of East Pakistan. On the contrary, the Pakistani army fought to the bitter end to hold on to the territory in which

[123] *Ibid.*

the Bengali population was settled. The General Assembly did not mention the right to self-determination in its resolution on the subject, nor did the Security Council take action until Pakistan had surrendered and withdrawn its state forces from the region.[124]

Similarly, Serbia's rejection of the Kosovo Assembly's declaration of independence in February 2008 – backed by the UN envoy Martti Ahtisaari – did not consist of recognizing an exception to the principle of territorial integrity that could be triggered in cases of gross and systematic human rights violations or discrimination but denying its applicability to Kosovo. Not at all. The members of the Kosovo Assembly may have defended their right to self-determination and their *right to remedial secession*,[125] but Serbia opposed it and expressed that opposition to the UN. The great Western powers' position in favor of the recognition of the new Republic of Kosovo has been the subject of various assessments, and an in-depth analysis thereof would exceed the scope of this paper.[126] Nevertheless, one can hardly infer from these responses a precedent for a *new custom* with an opposite content in order to change the existing *jus cogens* norm of internal self-determination.

Consequently, facts have not changed the norm. Secessions may be accepted and situations may be recognized by the majority of the states in one case and not in others, but the reason lies in the power of the states and in international relations. It does not lie

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[124] India soon recognized the new state, followed by other states in 1972. Pakistan would not do so until 1974, after which Bangladesh joined the UN that same year. These and other details can be found in J. Crawford, *The Creation of..., supra* n. 29, at 393, 140, 141–142.

[125] ICJ, *Written Contribution of the authors of the unilateral declaration of independence, Republika Kosova – Ministry of Foreign Affairs* – April 17, 2009. Full text available at: https://www.icj-cij.org/files/case-related/141/15678.pdf.

[126] When independence was declared in 2008, the holder of the territory's sovereignty was Serbia, which had ceded the administration (not the sovereignty) to the international administration (UNMIK) established under UN Security Council Resolution 1244 (1994), which only exercised interim administration, to pacify the territory of Kosovo, with the aid of an EU mission. It cannot be accepted that, for that fourteen-year period, the population was the victim of a situation of gross human rights violations, as it would mean accusing UNMIK itself, and the EU, of having committed those violations. A few days after the declaration of independence, the Republic of Kosovo was recognized by the United States, France, the United Kingdom, Germany, and others, despite failing to meet the conditions of effectiveness, as the territory remained under the effective control of UNMIK. Critical voices claim that Kosovo was a planned secession fostered by the main Western powers (A. Mangas Martín, "Kosovo y Unión Europea: una secesión planificada," *REDI* (2011) at 101–124).

in international law, let alone in a modified new legal principle of self-determination of peoples.

VI. CONCLUSIONS

There is a *gap* between a *scholarly language* that is widely used today and the *original state consensus* regarding the international principle of self-determination of peoples as it relates to the protection of territorial integrity and secession. I contend that this gap is not only a matter of different opinions but a result of the blurring or erasing of certain specific and essential international legal concepts in the discipline of public international law. If there is one debate in the literature that I would like to highlight, it is the debate over classic legal concepts in international law and whether they have evolved as a result of state consensus or scholars' arguments and language.

Research has shown that the equating of different terms (secession, separation, self-determination) arose as a result of a shift from the international legal system to national ones, in which the legal concepts of each type of system came to be regarded as the same. In this sense, authors sometimes use certain terminology neutrally (descriptively), disregarding the concrete legal content behind it. Is this simply a matter of technicalities, of the subtleties of language? I do not think so. Legal language imposes order and clarifies. It creates. In relation to the essential principle of self-determination of peoples, with its highly political and sensitive content, a return to the international method of interpretation of international norms is the only way to correctly identify to whom this principle truly applies and the rights and duties it entails. It is the only way to do so without being led astray by political positions, misused terminology, or terms from other disciplines (e.g., constitutional law) that might obscure the international reality of the phenomena of displacements of sovereignty in question. Because states have no memory, because they are no more than a fiction of international legal persons, the responsibility to understand their commitments lies with their leaders and the legal advisors to their foreign offices or state departments. When faced with the need to interpret general international law (customs and general principles of law), they rely on the scholarly literature, the ILC Draft Articles or Conclusions, relevant judgments handed down by

international courts, ICJ case law, etc. Likewise, both national and international courts base their cases on the main scholarly literature, *amicus curiae* submitted by professors, state lawyers, etc. The significance of scholars' language is thus undeniable. In this regard, four clear conclusions concerning the international legal concepts behind the principle of the self-determination of peoples follow from this study.

First, despite the language of a majority of scholars, international practitioners, and the Supreme Court of Canada in its Secession of Quebec decision, among others, I maintain that the original state consensus behind the attribution of a right to external self-determination to colonial peoples was not to establish any right to unilateral secession or to separate from a territory as an exception to the protection of territorial integrity. The *international legal concept* at risk of being forgotten is *the right to restore sovereignty and territorial integrity* granted to the classic colonial peoples. The idea behind the creation of the right to external self-determination was certainly not the Wilsonian principle of nationalities. This is true not only because the holders of the right were established by a political (i.e., artificial) delimitation and not equated to nations, but also because the meaning of the right was to take back a usurped virtual sovereignty. Therefore, there was nothing to separate; rather, this sovereignty was restored to its holders. Although it might be considered a legal fiction, the international norm is based on the already separate and legally distinct status of the colonial territory's people. To assert that it established a right to secession from the administering territories is to accept both a limitation on the principle of territorial integrity for the metropolitan states and the humiliation of dependence and a lack of virtual sovereignty for the recently independent states, which neither group wanted. The states never agreed to renounce their territorial integrity, nor to establish any exception to this essential principle of public international law. In this sense, it is urgent to revive this concept of a *right to restore sovereignty and territorial integrity* of colonies or occupied territories, a right of peoples that is always linked to a *democratic procedure* to protect the will of the whole people belonging to the territory, at least in the case of colonial peoples. (The norm does not address this point in the case of occupied peoples.)

Second, despite those positions that hold that general international law is neutral as to secession, such as that taken by the ICJ in its Kosovo Opinion, I maintain that the existing international norm of *internal* self-determination of peoples safeguards the right of the *entire* population of a state to freely determine, among other things, its territory's future without discrimination. In my opinion, notwithstanding some authors' proposals, the holders of this right under this norm are the whole people of a state (the state consensus behind "all peoples"), while the object of the right includes the protection of territorial integrity with an *ad intra* application. The safeguard clause establishes the tacit prohibition on secession: specifically, it prohibits the use (i.e., interpretation) of the external self-determination norm to promote the dismemberment of the territory of a state. Thus, general international law – which clearly includes the essential self-determination principle – both regulates and tacitly prohibits secession: it is not neutral toward it. The international legal concept at risk of being erased by this language concerning its alleged neutrality in this regard is the right of the whole people of any state to freely determine, without discrimination (i.e., through democratic processes), the future of their territory, including the tacit prohibition on secession.

Third, I further hold that the state consensus behind the content of the right to internal self-determination was never to establish a right to remedial secession in cases of discrimination or gross human rights violations as an exception to territorial integrity, despite the literal reading of the ambiguous wording of UNGA Resolution 2625 (XXV) followed by those authors who claim that such a right exists. Literal interpretation is not a method of interpretation of international legal texts in public international law; the general rule of interpretation includes a trifold criterion (text – context – object and purpose). Besides, when the norm is part of a custom, as in the present case, one must consider not only the *opinio juris* reflected through the text but also the relevant practice (*usus)* to prove its existence and content. To this end, it seems highly unlikely that the state consensus was to create a right to remedial secession. Given the great pains that the states took to avoid establishing any right of separation in the norm of external self-determination, why, in the norm intended to protect their territorial integrity, would they

suddenly do an about-face and seek to establish exactly that for minorities in certain cases? It makes no sense. Remedial secession is a doctrine with no legal basis.

This latter norm and the content of the right to internal self-determination is not *jus cogens*; a state's population can decide to change its content by establishing an internal right to separation in that state's constitutional law or through politics. But this is due to the very concept of equal sovereignty and independence of states and to the *right – not duty – of all peoples to decide the future of their state's territorial integrity*. The revolutionary exercise of a process to secede when the majority of the population of the parent state does not accept it simultaneously entails a violation of the right of the population of that state as a whole to its territorial integrity, including the people in the secessionist territory in question who do not want to secede. Additionally, the international right to internal self-determination excludes any right to separation, even at the *moral level*: there is no conflict of values to weigh here between the right of a minority and the right of the population of the state as a whole, because the legal norm protects the right of a state's whole population to its internal self-determination. One can argue whether or not this is just, but it is what the states, i.e., the creators of international law, have established. There is a widespread bias against majorities and in favor of minorities on this issue: many consider that only a secessionist reading of the internal self-determination norm is just. But the view that secessionism may also be understood as establishing the supremacy of some human beings over others should not be dismissed: calls for secession may also contain such *supremacist nationalism*, which could likewise be found in the roots of the Second World War.

The fourth main conclusion is that the rights and duties included in the principle have not evolved in the sense of coming to include a right to sovereignty and independence from the territory for any fraction of a state's population, or even a right to remedial secession in exceptional circumstances of discrimination or gross human rights violations. It is impossible to prove the existence of relevant precedents of a new custom. The self-determination of peoples principle has not been modified by a new custom of change.

To sum up, the following table shows the international legal concepts and principles that describe and regulate the means of accessing independence:

Access to independence and territorial integrity under current general international law

<table>
<tr><th>Process of independence</th><th colspan="2">Description and international legal concepts</th><th>General international law (main principles applied)</th></tr>
<tr><td rowspan="3">As a domestic affair</td><td colspan="2">At the origin, there is the single territory of the parent state</td><td rowspan="3">Principle of equal sovereignty (political independence and territorial integrity)

Principle of non-intervention in states' affairs

Right to internal-self-determination of the whole population of a state (which tacitly limits secessionist processes)</td></tr>
<tr><td>When a domestic right to independence is accorded by politics or the Constitution/law (regardless of what it is called in the norm)</td><td>Separation (devolution or discretionary grant of independence)</td></tr>
<tr><td>When an independence process is undertaken in violation of the domestic law and/or the central government</td><td>Secession (forcible seizure of independence)</td></tr>
<tr><td rowspan="2">As an international affair</td><td colspan="2">At the origin, there are two legally different territories
(the administering/occupant state's territory and the colonial/occupied territory)</td><td rowspan="2">Right to external self-determination (jus cogens)

Principle of equal sovereignty (political independence and territorial integrity)</td></tr>
<tr><td>When there is an international right to external self-determination held by:

-colonial peoples
-occupied peoples</td><td>International regime of external self-determination: a restoration of sovereignty and territorial integrity</td></tr>
</table>

Source: The author.

Understanding international legal concepts helps us understand the international reality, the interplay between international norms and politics. I may be wrong, and my *language* in this article about the *state consensus* on the self-determination of peoples and territorial integrity may be regarded as not reflective of the reality of international law. Maybe I am also in the *gap*. But this is the most rigorous way that I have found to contribute to this intense and passionate international dialogue on the topic among scholars of public international law.

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