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Secessionist wars and movements of the Post-Colonial era.

Analysis and classification.

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ABSTRACT

Il concetto di autodeterminazione dei popoli è da sempre considerato uno degli argomenti più spinosi del diritto internazionale. É stato accettato universalmente come diritto dei popoli e ha cominciato a svilupparsi a partire dal XVII secolo, giocando un ruolo centrale nei due eventi rivoluzionari più importanti della storia dell'umanità: la Rivoluzione Americana del 1776 e quella francese del 1789. Gli ideali rivoluzionari basati sulla libertà del popolo di scegliere liberamente il proprio status e futuro si diffusero in tutto il mondo e i concetti di sovranità popolare e democrazia impugnati dai più importanti filosofi del periodo, da Locke a Rousseau, contribuirono a plasmare il carattere democratico e universale del concetto. Allo stesso tempo, era alla base delle teorie nazionaliste dei filosofi dell'Europa centro - orientale: essi vedevano infatti l'autodeterminazione come il dritto delle nazioni a sviluppare, in maniera autonoma, le proprie culture e identità all'interno di stati "multinazionali", che caratterizzavano la regione orientale del continente europeo. Questa duplice interpretazione del concetto portò inevitabilmente allo creazione di due teorie di autodeterminazione, una centro - orientale e una occidentale, che si svilupparono parallelamente durante tutto il XIX secolo e gli inizi del XX. Alla vigilia della Prima Guerra Mondiale le due teorie erano alla base dei pensieri di due tra i più importanti sostenitori del concetto, Lenin e Wilson. La teoria del Presidente degli Stati Uniti era inizialmente basata sulla visione occidentale dell'autodeterminazione: egli sosteneva infatti, che i popoli dovessero avere un diritto all'auto governo, che gli permettesse di scegliere la forma di governo più appropriata per i loro interessi. Inoltre, il consenso del popolo verso l'autorità politica scelta doveva essere rinnovato continuamente, e ciò era possibile solo in un governo di stampo democratico, l'unico che permetteva al popolo di poter scegliere. Lenin invece sviluppò la sua teoria basandosi sulla visione nazionalista dell'autodeterminazione: egli infatti affermava che tale principio doveva permettere alle nazioni di potersi "staccare" dal territorio multinazionale a cui appartenevano, per poter formare il proprio stato indipendente in cui sviluppare i propri interessi, esprimendo liberamente la loro identità e cultura. Durante il primo dopoguerra, per la prima volta l'autodeterminazione cominciò ad essere considerata un principio del diritto internazionale, poiché gli Alleati cominciarono ad usarla come principio guida nello

smantellamento dei grandi imperi plurinazionali che risultarono sconfitti, l'Impero Ottomano e quello Austro-Ungarico. Nonostante questa intenzione, si dovrà aspettare il secondo dopoguerra e la fondazione delle Nazioni Unite perché il principio entri a far parte effettivamente del diritto internazionale, grazie alla sua inclusione nella Carta delle Nazioni Unite all'articolo 1. All'inizio, il principio era stato concepito solo per essere utilizzato nella lotta al colonialismo, e quindi diretto solo alle colonie e ai loro abitanti. Tuttavia si diffuse anche oltre il periodo coloniale, come dimostra l'inclusione dell'autodeterminazione in importanti Risoluzioni dell'Assemblea Generale, come le due dichiarazioni del 1960, la 1514 e la 1541, e la più importante Risoluzione 2625, che sancisce un diritto all'autodeterminazione per tutti i popoli, ampliando quindi la sua portata ma soprattutto trasformandolo da principio a diritto. Molti altri strumenti internazionali si riferiscono all'autodeterminazione come diritto, tra cui i *Covenants* sui diritti umani del 1966 o la dichiarazione di Vienna del 1993, che ne hanno accresciuto l'importanza, anche oltre il contesto coloniale. Il diritto all'autodeterminazione è legato al concetto di popolo, un altro tema molto dibattuto nel contesto del diritto internazionale. Esistono molte definizioni del termine popolo, che evidenziano l'estrema ambiguità del concetto, ma la più accettata nel diritto internazionale è senza dubbio quella proposta dall'UNESCO in un rapporto del 1989, cioè il *Final Report and Recommendations on Further Study of the Concept of the Rights of Peoples* of 1989, in cui vengono elencati i criteri che un gruppo deve soddisfare per essere definito popolo: deve costituire un gruppo di individui che sono accomunati da tradizioni storiche, omogeneità culturale, unità linguistica, religiosa o ideologica, tutte caratteristiche che devono essere espresse esplicitamente dal gruppo che mira ad essere considerato "popolo"

Lo status legale del concetto dell'autodeterminazione è stato ulteriormente confermato dalla Corte Internazionale di Giustizia che, in molti dei suoi casi, si è riferita ad esso come "diritto". In generale, nel contesto internazionale, l'autodeterminazione è considerata come un diritto umano, avente anche un carattere *erga omnes* e universale, e molti hanno anche provato ad attribuirgli un carattere assoluto, inserendola tra i diritti fondamentali e *jus cogens*. In realtà, l'autodeterminazione non può essere considerata come un diritto avente un carattere assoluto poiché è limitata

da altri principi del diritto internazionale, come l'integrità territoriale e il principio dell'*uti possidetis*, che prevedono l'applicazione dell'autodeterminazione esclusivamente in circostanze talmente gravi da limitare il loro.

Il diritto all'autodeterminazione ha sviluppato, nel corso della sua evoluzione, due dimensioni, una interna, secondo cui un gruppo può esercitare il diritto all'interno dei confini del proprio stato, e una esterna, il cui esercizio prevede la creazione di un nuovo stato indipendente. L'autodeterminazione nella sua dimensione esterna era particolarmente utilizzata durante il periodo coloniale, per facilitare il passaggio dei territori occupati da colonie a stati indipendenti, mentre quello interno si è sviluppato particolarmente durante il periodo post-coloniale, per permettere ai gruppi etnici o nazioni presenti all'interno di uno Stato di ottenere più autonomia, qualora lo Stato stesso lo ritenesse possibile. Durante il periodo post-coloniale, entrambi gli aspetti sono stati sviluppati e considerati imprescindibili: l'autodeterminazione esterna poteva essere esercitata solo nei casi in cui lo Stato vietava l'esercizio di quella interna. Ci sono diversi modi in cui l'autodeterminazione esterna può essere esercitata: autonomia, dissoluzione, etc., e tra questi vi è anche la secessione.

La secessione è un altro argomento molto controverso nell'ambito del diritto internazionale. Le radici del termine si trovano nel termine latino *secedere*, che significa "spostarsi da". Nel diritto internazionale, il termine secessione si riferisce al distacco di una regione da uno Stato esistente, con l'obiettivo di crearne uno nuovo e indipendente. Si sono sviluppate diverse definizioni del concetto, che possono essere divise in due categorie: permissive e restrittive. Le prime comprendono tutte le definizioni che al loro internon includono i diversi modi di dividere un territorio, come ad esempio la dissoluzione di uno stato o l'autonomia di un gruppo, che secondo molti studiosi sarebbero da considerare secessione. Le definizioni restrittive invece stabiliscono che la secessione avviene in caso di assenza del consenso da parte dello stato, che vieta quindi ad un gruppo di creare un nuovo stato in una parte del proprio territorio. Gli studiosi che promuovono questo tipo di definizioni suggeriscono infatti che la secessione avviene solo attraverso metodi violenti, che possono includere anche la guerra, e non possono essere definiti tali la dissoluzione e l'autonomia, in quanto avvengono con il consenso delle parti coinvolte. Nonostante siano adesso molto

diffuse, le prime teorie sula secessione hanno cominciato a svilupparsi solo in tempi recenti, poiché il numero di conflitti secessionisti è aumentato dopo la fine della Guerra Fredda, con la dissoluzione dell'Unione Sovietica e della Federazione Socialista della Yugoslavia, che hanno dato vita a molti nuovi stati indipendenti. Prima di questi importanti eventi, la secessione non era contemplata a causa della più diffusa teoria liberale, che vedeva la società come un perfetto agglomerato plurinazionale, che riusciva a sopravvivere grazie all'equità che caratterizzava i rapporti tra gli individui, e tra questi ultimi e lo stato. Nella visione liberale della società, i bisogni di tutti erano soddisfatti allo stesso modo, con un equa distribuzione di risorse e benessere. Tuttavia, la dissoluzione dell'URSS e della Yugoslavia spostò l'attenzione sulla secessione, e molti studiosi cominciarono ad occuparsene. Le teorie sulla secessione possono essere divise in due categorie: le *Primary Right theories* e le *Remedial Right only theories*. Il primo gruppo di teorie si basa sulla scelta libera degli individui: il popolo può esprimere liberamente e democraticamente la sua scelta e decidere se attuare la secessione o meno. Questa categoria può essere a sua volta divisa in due sub-categorie, una associativa e una ascrittiva. Secondo le teorie di tipo associativo, qualsiasi gruppo può esprimere la propria scelta e può attuare la secessione se raggiunge la maggioranza. La particolarità di queste teorie è che il gruppo con l'intenzione di attuare la secessione non deve soddisfare particolari requisiti: i suoi componenti possono anche non avere una identità comune, o condividere gli stessi interessi. L'unico requisito è che sia raggiunta la maggioranza a favore della separazione. Al contrario, le teorie ascrittive prevedono che il gruppo soddisfi particolari requisiti, chiamati caratteristiche ascrittive, cioè lingua comune, storia e tradizioni comuni, cultura comune, cosi da poter esprimersi democraticamente sulla secessione. La categoria del *Remedial Right only* si basa invece sul concetto di giusta causa: la secessione può avvenire solo se costituisce l'ultima risorsa di un gruppo etnico, vittima di abusi e discriminazioni da parte del proprio governo. In questo caso, come si intuisce dal nome delle gruppo di teorie, la secessione è un rimedio per prevenire ulteriori discriminazioni e violazioni da parte dell'autorità dello stato.

L'obiettivo principale di queste teorie è quello di creare un diritto alla secessione riconosciuto a livello internazionale, come avvenuto per

l'autodeterminazione. Al momento si può affermare che tale diritto è riconosciuto, anche esplicitamente, a livello locale: è cioè inserito in alcune Costituzioni, come ad esempio quella Etiope, o Austriaca, che prevedono la possibilità di esercitare il diritto alla secessione. Dal punto di vista internazionale, analizzando vari strumenti legali si può notare invece l'assenza di tale diritto. Nonostante ciò, la teoria della secessione come rimedio all'oppressione e alle violazioni dei diritti umani ha ricevuto l'approvazione e il supporto da parte di molti studiosi. Anche a livello del diritto internazionale, tale concetto è stato implicitamente riconosciuto in alcuni strumenti legali, come ad esempio nella risoluzione 2625, in cui, al paragrafo 7 del Principio V, ci si riferisce implicitamente alla *remedial secession*. L'esistenza di un diritto alla secessione come rimedio è riconosciuta anche dalla Corte Internazionale di Giustizia, che l'ha utilizzato in alcuni di suoi casi, tra i quali ad esempio il caso *Katangese Peoples' Congress v. Zaire* del 1992, ma anche a livello locale dalla Corte Suprema del Canada nel caso sulla secessione del Quebec, *Reference Re Secession of Quebec* del 1998.

Tutti i tipi di secessione sopra menzionati possono essere inseriti in due categorie, che si basano sulle reazioni degli Stati in caso di rivendicazioni secessioniste: secessione consensuale e unilaterale. La prima prevede che la secessione avvenga con il consenso dello Stato di appartenenza. In questo caso si tratta generalmente di movimenti pacifici, che si basano principalmente su negoziati e accordi tra il gruppo secessionista e lo Stato di appartenenza. La secessione unilaterale, al contrario, avviene senza il consenso dello Stato, e generalmente comporta conflitti e guerre, anche molto violenti, che costituiscono anche un pericolo per la stabilità internazionale. In questi casi è possibile che la comunità internazionale intervenga per sedare il conflitto e cercare di raggiungere una soluzione quanto più pacifica possibile, come ad esempio nel caso del Kosovo. La comunità internazionale ha anche il ruolo di riconoscere come Stati le nuove entità formatesi a seguito del processo di secessione. Il riconoscimento internazionale è strettamente legato alla secessione e contribuisce a regolamentarla nell'ambito del diritto internazionale. Per essere riconosciute come Stati, le nuove entità internazionali devono prima di tutto soddisfare i criteri di statualità elencati all'articolo 1 della Convenzione di Montevideo sui Diritti e Doveri dello stato del 1933, e cioè possedere una popolazione permanente, un territorio, un

governo effettivo e la capacità di stabilire relazione con gli altri stati della comunità internazionale. Alcuni studiosi aggiungono a questi criteri l'indipendenza, ma anche il requisito del riconoscimento da parte di altri Stati, secondo la teoria costitutiva sul riconoscimento, che lo trasforma in una *conditio sine qua* non per la statualità. Secondo la teoria dichiarativa invece, il riconoscimento da parte degli altri stati è una mera constatazione della creazione di un nuovo Stato.

Come si è visto, anche la secessione è un argomento molto dibattuto, e questo è confermato dal fatto che non esiste ancora una fissa definizione del concetto, nonostante tutte le teorie sviluppate negli ultimi decenni. Questo è dovuto anche al fatto che ogni conflitto secessionista ha le sue particolarità, come ad esempio il contesto storico, le diverse reazioni della comunità internazionale, o anche il modo d'agire del gruppo secessionista e le ragioni che lo spingono a tale decisione. Queste caratteristiche possono essere utili per trovare una soluzione o anche legittimare le rivendicazioni secessioniste. Grazie a tali elementi caratterizzanti è stato anche possibile classificare i conflitti secessionisti analizzati in tre categorie: la secessione etnica, quella democratica e ,infine, quella territoriale. La secessione etnica può essere considerata come una componente speciale della *remedial secession*: essa infatti prevede che un gruppo etnico, soggetto a discriminazione e oppressione e ripetute violazioni dei diritti umani, perpetrate dal suo stesso governo, può avanzare rivendicazioni secessioniste. Il caso analizzato per questa categoria è il conflitto etnico tra Kosovo e Serbia, avvenuto negli anni Novanta, durante il quale atroci violazioni dei diritti umani furono compiute dal governo serbo di Milosevic contro l'etnia degli Albanesi Kosovari. Questo ha portato ad una violenta guerra secessionista, sedata grazie all'intervento della comunità internazionale, con la missione NATO e ONU, per portare stabilità nel territorio. Nel 2008 il parlamento kosvaro ha definitivamente dichiarato l'indipendenza dalla Serbia, ed è stato riconosciuto dalla maggior parte dei paese membri dell'ONU e dell'UE, ma non dalla Serbia, che rende di fatto la separazione del Kosovo una secessione unilaterale. La secessione democratica, al contrario, si ottiene in seguito ad un referendum in cui la maggioranza di un gruppo si esprime a favore della secessione. Il caso principale analizzato è quello del referendum della Crimea, avvenuto nel 2014, che ha portato poi alla separazione della regione

dall'Ucraina e alla seguente annessione alla Russia. In questo caso però, al contrario di quanto successo in Kosovo, la comunità internazionale non ha dato appoggio alla popolazione della Crimea, e ha anzi condannato il risultato della secessione, definendolo illegittimo. Alla base della sua illegittimità c'è l'inviolabilità dell'integrità territoriale dell'Ucraina: come si è visto, l'integrità territoriale può essere violata solo in presenza di gravi circostanze, come ad esempio violazioni dei diritti umani o discriminazione, che non erano presenti nel caso della Crimea. A questo si aggiunge anche la seguente annessione al territorio russo, vista da molti come violazione del principio di non interferenza, dovuto anche alla presenza di truppe militari russe sul territorio della Crimea. La terza categoria è quella della secessione territoriale, che vede al centro dei movimenti secessionisti la rivendicazione di un territorio, storicamente appartenuto ad un gruppo ed ingiustamente compreso nel territorio di un altro stato. Uno degli esempi più importanti di secessione territoriale e senza dubbio il conflitto del Nagorno – Karabakh. La sua storia ci mostra che questa regione è sempre stata contesa dal governo Azero e quello Armeno, che rivendica l'appartenenza di quel territorio. La maggior parte della popolazione del Karabakh è infatti costituita da Armeni. Inclusa nel territorio Azero durante il periodo sovietico, l'etnia armena ha cominciato a rivendicare il territorio e chiedere l'indipendenza a partire dal 1988, attraverso manifestazioni che presto sfociarono in una guerra tra Azerbaijan, Nagorno - Karabakh e Armenia, che appoggiava gli armeni della regione autonoma. Nel 1994 fu siglato un accordo di cessate il fuoco e da allora la comunità internazionale collabora con i governi dei due stati per trovare una soluzione al conflitto. Il Karabakh ha ottenuto lo status di Stato *de facto* indipendente, ma non è riconosciuto da nessuno Stato della comunità internazionale, neanche dall'Armenia stessa, per non aggravare le già difficili relazioni con l'Azerbaijan. Anche in questo caso, la secessione è ritenuta illegittima perche viola l'integrità territoriale dell'Azerbaijan, anche se va aggiunto che nei primi periodi del conflitto, l'etnia armena del Karabakh è stato oggetto di oppressione da parte del governo azero.

Non tutti i conflitti di secessione si concludono con la creazione di un nuovo stato. Ci sono infatti molte più secessioni mancate che riuscite, e un esempio sono i conflitti della Repubblica Cecena e dell'Abkhazia e il movimento secessionista del

Quebec. Questi conflitti sono molto diversi tra loro. I primi due sono stati caratterizzati da violente guerre intraprese dal gruppo secessionista contro lo stato di appartenenza. Nei casi della Cecenia e dell'Abkhazia il fallimento è dovuto anche all'ostinazione con cui i rappresentanti dei gruppi secessionisti hanno affrontato i negoziati per ottenere l'autonomia: in entrambi i casi, i leaders delle repubbliche secessioniste hanno rifiutato tutte le opzioni proposte dagli stati di appartenenza e dalla Comunità internazionale. non essendo dunque la secessione l'ultima possibilità per i due gruppi, le loro mire secessioniste sono inevitabilmente state respinte e quindi fallite. Nel caso del Canada, al contrario, si è trattato semplicemente di una risposta negative della maggioranza della popolazione del Quebec alle istanze secessionista: il referendum, organizzato dal partito indipendentista, non ha infatti ottenuto la maggioranza dei voti a favore di una separazione dal Canada.

L'analisi dei conflitti secessionisti proposta ha contribuito ad evidenziare il carattere indefinito del concetto di secessione. La classificazione ha evidenziato che ogni caso ha le sue caratteristiche, che determinano anche le diverse reazioni della comunità internazionali riguardo il risultato del processo secessionista: è stato possibile notare come in alcuni casi essa ha accettato e giustificato la secessione, mentre in altri ha invece appoggiato lo stato d'appartenenza dei gruppi secessionisti, difendendo la sua integrità territoriale. Questo è dovuto al fatto che la comunità internazionale basa la sua posizione sulle reazioni degli stati che la compongono, che potrebbero avere particolari interessi nell'area del conflitto, o avere relazioni molto strette con lo stato di appartenenza del gruppo secessionista, oppure proteggere il gruppo etnico: tutti elementi che influenzano la loro posizione riguardo il conflitto. Per provare a definire la secessione, potrebbe esser avanzata un'altra teoria che prevede che il diritto alla secessione debba includere tutti i tre elementi alla base delle tre categorie analizzate: dovrebbe essere rivendicato da un gruppo etnico oppresso, con una rivendicazione storica sul territorio in questione, attraverso un referendum democratico a favore della secessione. Tuttavia, la posizione della comunità internazionale avrà sempre un certo grado di influenza nell'interpretazione di questi criteri. La migliore soluzione per evitare che ci siano interpretazioni troppo diverse potrebbe essere la creazione di una autorità internazionale superiore e indipendente

dalla comunità internazionale stessa, che basa le sue decisioni riguardanti casi del genere basandosi su una osservazione imparziale dei fatti. Purtroppo, è quasi impensabile che una entità del genere venga creata nei prossimi anni, e quindi al momento, la soluzione migliore sarebbe basare le decisioni e opinioni sui tre criteri sopra citati, cercando di essere i più imparziali possibile.

INTRODUCTION.

The concept of self-determination of people is one of the most controversial issue of international law. This principle has been accepted almost universally as a right of peoples and began to develop in XVIII century, by playing a central role in two of the most important revolution of that period: the 1776 American Revolution and the 1789 French Revolution. Revolutionary ideas, based on the people and its freedom to freely express its decisions, began to spread all over the world and over centuries. During the first post war period, self-determination began to be conceived as a fundamental principle of international law, in particularly after that President Wilson asserted that "self-determination is not a mere phrase, it is a principle of action which statesmen will ignore at their peril". The principle continued to developed during the whole XXth century, also thanks to United Nations that, since the early stages of its foundation, began to use self-determination as a guiding-principle in its struggle for dismantling colonialism. In XX century, self-determination was thus conceived as a principle for colonial people. Nevertheless it also spread after decolonization ended, during the post-colonial period, as it was referred to in some of the most important UNGA resolutions and documents, such as the Res. 2625, which extends the principle to self-determination to all peoples, by making it a right. The right to self-determination has developed two dimensions, an internal one, which provide the exercise of the right *within* the border of a state, and an external one, whose exercise provide the creation of a new, independent state. The external dimension of self-determination incorporates the concepts of secession. Like self-determination, it is one of the most debatable concepts of international law, as can be noticed by the fact that it has not a single, fixed definition because of the absence of references within international legal instruments. Secession can be conceived as a mode of implementation of the right to self-determination, as it implies the withdrawal or separation of a territory from a "parent" state to create a new one. In recent years, many scholars shift their attention on this concept, as the number of secessionist claims increased, especially after the break-up of the two socialist blocs, Soviet Union and Socialist Republic of Federal Yugoslavia, which gave rise to a number secessionist claims, aiming to create new, independent states. In focusing on secession, scholars

develop a great number of theories that contribute to increase the vagueness of the concept, that, as a matter of fact, has not a fixed meaning and it is not even a right, due to the absence of references in international legal instruments. During my academic studies, I have deepened the argument of the concepts of self-determination and secession when preparing for a simulation of United Nations works (MUN) at Harvard University and I subsequently decide to focus on the issues, aiming to define them by classifying some of the most relevant post-colonial secessionist conflicts through their defining features.

In the general section of this thesis, self-determination and secession will be analyzed from a theoretical point of view. In the first chapter, the historical development of self-determination will be analyzed in order to understand how a mere principle has became a right legitimized by international law. For this purpose, the most relevant Resolutions and Declarations provided by United nations will be analysed. After this introductory paragraph, self-determination will be analyzed in the context of international law, by describing its three normative levels and focusing on its relation with other fundamental principles of international law, namely the territorial integrity and the *uti possidetis* ones. It will be also provided a definition of the concept in its internal and external dimensions, focusing on its meaning and content, and it will be also defined the "self", that is the holders of the right to self-determination, by focusing on the debated definition of the concept of people.

The second part of the general section will try to define the controversial concept of secession in the light of the several theories of secession advanced by scholars in the last decades. The first paragraph will provide an analysis of political and philosophical theories of secession and it will also focus on the critics on this theories, which aim to provide a limitation to the exercise of secession in international system. Then, after this introduction on a theoretical description of secession, it will be provided an analysis of the definitions of secession, focusing on the different notions developed by scholars and on their relation with other forms of withdrawal of territory, namely irredentism, autonomy, decolonization and dissolution. The second chapter will also focus on the beneficiaries of secession and analyse the characteristics that a groups should have to be entitled to secession. Then, the concept of secession

will be analysed in the context of international law, by taking into account a legal theory of secession and some of the most important international legal instrument, also focusing on domestic law and on constitutions which provide a legal right to secede. Finally, the chapter will focus on the state practice and the principle of recognition by states in order to analyse the outcome of secession, namely the creation of new states.

The second section of this thesis will focus on the case study, the analysis and classification of the most relevant secessionist conflict of the post-colonial period. In this chapter, self-determination and secession will be analyzed in a practical context, focusing on the causes of secessionist instances and on some of the most relevant secessionist conflicts of the last decades. Then, three categories of secession will be provided, namely the ethnical, the democratic and territorial ones, named after the analysis of the historical backgrounds, the mode of exercises, causes of the claims and reactions of the parent states and international community to the secessionist claims at the basis of the main conflict of the last decades. Among the analysed conflict, particular attention will be paid on conflicts of East Europe area, because it represents the area of interests of my course of studies. Finally, a brief analysis and description of the failed secessionist attempts will be provided.

I

THE RIGHT TO SELF-DETERMINATION OF PEOPLE

SUMMARY: 1.1 Self-Determination as a fundamental principle of International law: origins and development of the right; - 1.2 Defining the "Self": to whom is addressed the right to self-determination?; - 1.3 Defining self-determination: meaning and content of the right; - 1.4 Self-Determination in international law

1.1 Self-Determination as a fundamental principle of International law: origins and development of the right.

In classic international law, "people" are not seen as international legal subject. Nevertheless, in international settled practice, it evolved into the principle of self-determination of people, which seems to give rights to people as such, as non-state entities which aim to constitute an independent State.[1]

1.1.1 Origins and development of self-determination.

The concept of self-determination developed in the Eighteenth and Nineteenth centuries. It was originally understood to be exercised whenever a people determines its own political status and organizes as it wishes. This notion was influenced by several ideas and two concepts of self-determination, with different orientations, spread throughout the world: a Western Europe/United States concept, politically oriented, which did not take into account ethnic features, and a Central and Easter Europe notion, which was strongly related to nationalism and to ethnic and cultural factors.[2]

From the Western point of view, the origins of the concept of self-determination can be traced back to the period of Enlightenment. As a matter of fact, the ideas that

[1] FOCARELLI C., *Diritto internazionale I, il sistema degli Stati e i valori comuni dell'Umanità*, seconda edizione, Padova, CEDAM, 2012, p.48; on self-determination see also: ARANGIO-RUIZ G., *Autodeterminazione (diritto dei popoli alla),* in *Enc. Giur*., vol. IV, Roma, 1988; LATTANZI F., *Autodeterminazione dei popoli*, in *Dig./ pubb.*, vol.II, sez. int., Torino, 1987; PALMISANO G., *Autodeterminazione dei popoli*, in *Enc. Dir*., vol. Annali V, Milano, 2012; TOSI D. E., *Secessione*, in *Dig./ pubb.*, aggiorn. 3.2, L-Z, sez. int., Torino, 2008; CONFORTI B., D*iritto Internazionale*, Editoriale scientifica, Napoli, 2014

[2] MUSGRAVE T. D., *Self-determination and national minorities,* Oxford, Oxford University Press, 2002, p.2

developed in that period had a great influence on the development of this concept[3]. By the eighteenth century, in United Kingdom and France political debate focused on issues like liberty, constitutionalism, societies of free citizens and concepts like popular sovereignty and representative government, which were the core of the principle of self-determination in its early development. These ideals were put forward by some of the most important philosophers and thinkers of western society. John Locke, John Milton and James Hurrington all claimed that political sovereignty resided in the nation, and that power of governments "is nothing else, but what is derivates, transferred and committed to them from the people"[4]. They all emphasized that civil liberty and equality and popular sovereignty should be guaranteed by fundamental law or constitution. These concepts influenced Enlightenment philosophers, such as Montesquieu, Rousseau, Voltaire, who started to think about the concept of popular sovereignty as an expression of general will of the people. All these ideals were then proclaimed during the French revolution. The history of self-determination is closely related with the concept of popular sovereignty, which found its highly expression in 1789 Revolution and was explicitly incorporated in the French Declaration of Rights[5]: "all men are born and remain free and equal in rights […] the principle of all sovereignty resides essentially in the nation. No body of men, no individuals can exercise authority that does not emanate expressly from that source"[6]. According to this ideal, the government should have been based on the will of people, who should be able to secede and organize themselves as they wish if the government of the country does not respect the whole nation's interests. People were not intended to be a mere component of the territory of a nation anymore, but an active part in the constitution and the government of the state. The ideal of popular sovereignty gave to self-determination, from the very beginning of its history, the connotation of a threat to established order so as to gain more equality.[7] The concepts of liberty, representative government and equal rights spread all over the world and also influenced American thinkers and leaders of the Revolution of 1776 and were set out

[3] GRIFFIOEN C., *Self-Determination as a Human Right: the Emergency Exit of Remedial Secession*, Utrecht, Science shop of law, economics and Governance, Utrecht University, 2010, p.6
[4] MILTON J., *The Tenure of kings and Magistrates,1650* in MUSGRAVE T. D., *supra* at 2 pp.2-3,
[5] Id. Pp.3-4
[6] *Déclaration des Droits de l'Homme et du Citoyen* art. 1 and 3
[7] RIGO SUREDA.A., *the evolution of the right of self-determination*, Sijthoff, 1973, pp. 17-27

in the Declaration of Independence[8]: "We hold these truths to be self-evident, that all men are created equal, with certain unalienable Rights, liberty and the pursuit of happiness. Government are instituted among men, deriving their just power from the consent of the governed. Whenever any form of Government becomes destructive of these ends, it is the right of people to alter or abolish it and to institute new government, most likely to effect their safety and happiness.[…]".[9] In the United States and Western Europe, the concept of self-determination was thus considered a democratic and universal principle as it developed and was influenced by the notion of popular sovereignty, individual liberty and representative government[10].

The Central and Eastern Europe concept of self-determination grew out of the phenomenon of nationalism. In this area there was a different situation: in a single state co-existed a multitude of ethnic groups and for this reason there was no correlation between states and ethnic groups, as seen in Western Europe and USA, where homogeneous cultures belonged to politically unified states.[11] Central European commentators, in particular the German ones, began to focus on the concept of identity and on ethnic, cultural and linguistic factors determining it. In these circumstances (was expressed) the idea of *Volk* was expressed, translated into English as "nation", which was a community of people whose relationship and sense of belonging were based on common culture, language and ethnic features, understood as a "natural unit" with the right to develop its own political institution and to posses its own separate state.[12] According to this idea, a natural state must have its own national character and its boundaries must coincide with those of the nation. Multi-national states were seen as "artificial contrivance, fragile contractions, devoid of inner life". [13]Thus, Self-determination in Central and Eastern Europe occurred whenever a nation was able to create its own nation-states, whose boundaries corresponded to geographical distribution of the ethnic group. Self-determination in Central and

[8] MUSGRAVE T. D., *supra* at 2, p.4
[9] *The Declaration of Independence of United States of America 1776*
[10] MUSGRAVE T. D., *supra* at 2, p.4
[11] Id. P.5
[12] Id. P. 5
[13] Id. Pp.5-6

Eastern Europe had a nationalistic flavour and gave primary importance to the group rather than to the individuals.[14]

In XIX century self-determination was conceived as the right of nations to become independent states. In the early years of XX century nationalist movements and self-determination were about peace and unification of nation with a homogeneous people. During the First World War, this concept changed its connotations, due to the breakup of the Austro-Hungarian and Ottoman empires, and started to be conceived as a means for smaller nationalities to divide states and drawing and legitimizing new national boundaries. This was the idea of self-determination of the Allied Powers that intervened in the war against the Central Powers. One of the most important advocates of the principle of self-determination was US President W.Wilson and his ideas of self-determination played a central role during the War and in the after-war period[15]. Wilson's vision of self-determination was initially based on the Western European understanding of the concept: he thought that peoples should have the right to self-government, by which he meant the right of peoples to choose their own form of government. According to Wilson, the people's consent was to be given continuously and this was only possible in a democratic government, which would allow them to choose the best form of government and to control it[16]. The existence of a democratic government was very important for Wilson and he tried to spread American beliefs in the territories of the Central Powers. These beliefs influenced his attitudes towards the enemies and his vision of the war, which was seen as a war between democracy and autocracy[17]. In 1917 he set out US war aims: "fight for liberty, self-government development of people, because no people should be forced under sovereignty under which it doesn't wish to live […]"[18]. This statement was addressed to subject nationalities affected by the war[19] and was seen as the legal basis for peace negotiations. But these nationalities interpreted Wilsons's ideas in the terms of the of their own concept of self-determination, the Central

[14] Id.p.13
[15] GRIFFIOEN, *supra* at 3, p.6
[16] MUSGRAVE T. D., *supra* at 2p.22-23
[17] Ibidem.
[18] Message from President Wilson to Russia on the occasion of the visit of the American mission, June 1917;
[19] Through subject nationalities, Wilson intended peoples affected by the result of the war.

European one, according to which each nationality or ethnic group should have its own state. The "self" that had to determine its future assumed an ethnographic character[20]. This influenced Wilson's initial vision of self determination, making him modify his original message, in order to include the notion of national self-determination.[21] The acceptance that all nationalities had the right to self-determination took place gradually: Wilson finally accepted that all nationalities were entitled to self-determination by the time of the Peace Conference, at the end of the War and he emphasized this concept in a speech to the congress of 1918: "national aspiration must be respected; self-determination is not a mere phrase, it is a principle of action which statesmen will ignore at their peril […]", including it in his famous "Fourteen Points"[22].

The concept of self-determination also found rhetorical support in the Marxist-Leninist theory. In 1917, after the tsarist empire was overthrown, the Bolsheviks strongly supported self-determination and secession, adopting a resolution that recognized to each nation part of Russia "the right to freely secede and form independent states"[23]. They realized that resentment of Russian nationalities against the tsarist regime could be used as a means to support the socialists' objectives to gain power[24]. One of the most important advocates of self-determination among the Bolsheviks was their leader, Lenin who defined self-determination as the right of people to choose to secede from the state or ask for autonomy[25]. The emphasis posed on the right of self-determination highlighted that Bolsheviks were opposed to all forms of discrimination and Lenin strongly believed that unity would be maintain only by voluntary agreement, that would last more than forced unions (as happened during

[20] Id.p.23
[21] ibidem
[22] FOCARELLI, *supra* at 1, p.48;Wilson's Fourteen Points,1918, Point V: "A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined". He exalted self-determination, even without mentioning it explicitly, as the right of people to freely choose its own government.
[23] MUSGRAVE T. D., *supra* at 2, p.17
[24] GRIFFIOEN, *supra* at 3p.6;
[25] To persuade other Bolsheviks of the importance of self-determination and brushed aside their fear, Lenin drew an analogy between self-determination and liberal divorce law: "to accuse supporter of freedom of self-determination of encouraging separatism is as foolish as hypocritical as accusing advocates of freedom of divorce of encouraging destruction of families: they believed that divorce, on the contrary, will strengthen families on a democratic basis, the only possible and durable basis in civilized society […]"

the tsarist empire)[26]. When Lenin and the Bolsheviks came to power, they began to implement their policies of self-determination and incorporated them in the Declaration of the Rights of People of Russia: this assured the right to all people of Russia, giving them the right to secede and form independent states, and also the freedom of national minorities to develop. These principles were all confirmed later in the first Soviet Constitution of 1918[27]. Their policy in support of self-determination was very useful to Bolsheviks during the civil war of 1917: the war took place in areas mostly peopled by Non-Russian and, as a result of their acclaimed policy, these people gave all their support to the Bolsheviks. The principle was also recognized in the Brest-Litovsk peace negotiations, where the Bolsheviks proposed to entitle all nationalities with the rights to determine their own status and also to protect the rights of minorities in multi-national areas. The principle of self-determination was then also incorporated in the Treaty of Brest-Litovsk. [28]

The principle of self-determination was one of the most important motives of the Allies during the war and, bearing in mind the Wilsonian statements, the representatives of the victorious powers declared that it would be their guiding principle and point of departure at the Paris Peace Conference in 1919.[29] Allies powers believed that self-determination could be used to reorganize and restructure Central European boundaries, changed by the war, and to create new nation states throughout Central and Eastern Europe, in order to resolve all the ongoing problems of nationalism and claims of independence, also taking into account ethnical and cultural characteristics of people and their aspiration for freedom and independence.[30] But it soon became evident that there were many problems associated with any implementation of self-determination. At the time of the Conference, no one had a real understanding of the complexity of nationalities problems in Central Europe, which was inhabited by a multitude of people, in many instances inextricably mixed together. In these circumstances it was impossible to avoid the creation of other

[26] MUSGRAVE T. D., *supra* at 2, p.20
[27] http://www.abc.net.au/concon/constitutions/sov1918.htm chapter Three of the First Soviet Constitution.
[28] MUSGRAVE T. D., *supra* at 2, pp.20-21.
[29] Id. p.26.
[30] Id.

ethnic minorities in new nation states, proving that it was not only a question of redrawing political boundaries to conform to the ethnic distribution of population of this area[31]. Thus, self-determination could not be applied in an absolute sense, as Wilson had always thought, because the creation of new nation-states also depended upon economic, geographic and strategic considerations. Moreover, it was not clear to whom the principle was meant to apply[32]. "Without a definite unit, application of this principle could be dangerous to peace and stability"[33], and there was the risk of disintegration and war if self-determination would be granted to anyone. Allies therefore decided to apply the principle only to defeated powers territories, excluding their own possession and colonies, and all those people considered not sufficiently politically mature to govern themselves were committed to the newly formed League of Nation with the adoption of the "Mandate System"[34]. This system was set out in Article 22 of the Covenant of the League of Nations which provided that people not prepared for self-government would be administrated by a mandatory commission until they become mature enough to be independent.

Even if the Allies initially had the intention of making self-determination their guiding principle during the conference, no one supported Wilson's idea to include the right into the Covenant of the League of Nation as a universal legal right, because of the problems previously analyzed related to the principle[35]. Wilson tried to include it in the Covenant, as can be seen in the Draft Article 3, which considered self-determination as the basis for any further territorial adjustments[36]. But Allies opposed to the inclusion of this right, considered "loaded with dynamite", since they saw it as a possible source of instability, disorder and cause of rebellion[37]. Article 3 was redrafted many times and renumbered Article 10: any references to self-determination were deleted, there were no mentions of territorial adjustments, but it emphasized respect for territorial integrity and existing political independence, which was the primary norm of the

[31] Id. pp.26-28

[32] GRIFFIOEN, *supra* at 3, pp.7-8

[33] Robert Lansing, US secretary of State during Wilson Presidency, argued that it was impossible to determine what self-determination was, because there was no a fixed idea of what it is and to whom apply: " when the president talks of self-determination what units has he in mind?" Lansing, Self-Determination, Saturday Evening Post, 9 Apr. 1921, 6, 101.

[34] GRIFFIOEN, *supra* at 3, p.8

[35] Id. p. 7

[36] MUSGRAVE T. D., *supra* at 2, p.30

[37] Id., p. 31 Lansing, Self-Determination, Saturday Evening Post, 9 Apr. 1921, 6, 101.

league of Nation[38]. Self-determination remained what it had been before, a matter of self-help, and continued to be an essentially political concept, until its inclusion twenty-five years later in UN Charter in 1945, that changed its status in legal principle in international law.

1.1.2. First case of self-determination: *Aaland island.*

The Aaland island dispute is considered the first case in which the League of Nation had to decide whether to apply the principle of self-determination or not and demonstrated the attitude of the League towards the principle[39]. The Aaland islands are located in the Gulf of Bothnia, between Sweden and Finland. They were under Swedish control for at least eight hundred years, until Sweden's defeat by Russia in 1809, after which they were ceded to Russia and became part of the Gran duchy of Finland. Even if they were under Russian and Finnish control, Aalanders preserved their Swedish cultural and linguistic heritage, and by 1920 the population of these island was of 97 per cent Swedish. When Finland proclaimed independence from Russia in 1917, recognized by Bolsheviks, Aalanders declared their desire of independence from Finland and union with their cultural motherland Sweden, based on the principle of self-determination. In spite of the Aalanders desire, Finland declared the islands a province in 1918, starting a dispute that has continued for several years.[40] Aalanders continued to claim that they should have the possibility to decide their own political status applying the principle of self-determination and to reunite to Sweden, sending delegations through Europe appealing for help and for recognition of their rights[41]. The question was brought before the Council of the League of Nation when Finnish government arrested the most important pro-Swedish leaders of the Islands, after Aalanders rejected the Finnish offers of autonomy. The first step of the Council of the League was to create a Commission of jurists, which had to prove whether the matter was of international concern and therefore within the League's competence, or a domestic one[42]. The Commission stated that the case was

[38] Id., p.31
[39] Id., p.32; GRIFFIOEN, *supra* at 3, p. 9;
[40] MUSGRAVE T. D., *supra* at 2, p. 33
[41] Id. pp.32-33
[42] Id. pp. 33-34;

within the League's competence because, in their opinion, Finland was not definitely constituted as a sovereign state[43]. For this reason it could not exercise the "right of disposing of national territory" enshrined by Positive International law, because "it only applies to nation which is definitely constituted as a Sovereign state"[44]. Finland was only a *de facto* revolutionary unity and as such it couldn't exercise its sovereignty above others minorities, and this meant that self-determination could be use to solve the question, even if it was not mentioned in the League Covenant[45]. The Commission of Jurists submitted its report to a Commission of Rapporteurs, a second body of experts that had to find solutions to solve the problem. Unlike the Commission of Jurist, the Rapporteurs determined that Finland was "definitely constituted" and, as such, its right of sovereignty over Aaland island was "incontestable".[46] According to the second commission, Aalanders were "simply a minority" and they were not entitled to claim any right to self-determination, also because they did not suffer any form of oppression from the Finns, that would have allowed them to separate from Finland and seek union with another state[47]. The commission also noted that Finland offered guarantees and autonomy to Aaland islands, and found that there was no need for Aalanders to separates in order to preserve their cultural heritage. The Commission thus stated that some recommendation had to be included in Finnish law of Autonomy of Aaland Island of 1920, to preserve cultural and linguistic heritage of the minority: exclusive teaching of Swedish, exclusive ownership of property, appointment of a governor after approval by the local general Council. All this guarantees had to take precedence over any Finnish law and any claim or complaint could be transmitted to the League Council. The Commission of Rapporteurs presented its report to the Council in 1921, was accepted by the council and annexed to its resolution of 1921 which recognized Finland's sovereignty over the islands and also signed a treaty which neutralized Aaland islands[48].

[43] GRIFFIOEN, *supra* at 3, p. 9
[44] The Aaland Island Question: report Submitted to the Council of the League of Nations by Commission of Jurists, 1921.
[45] MUSGRAVE T. D., *supra* at 2, p. 34-35
[46] Id. pp. 35-36; GRIFFIOEN, *supra* at 3, pp. 9-10; The Aaland Island Question: report Submitted to the Council of the League of Nations by Commission of Rapporteurs, 1921, 27.
[47] MUSGRAVE T. D., *supra* at 2, p.36;
[48] id. pp.36-37, GRIFFIOEN, *supra* at 3, p.10;

1.1.3 From a political principle to a legal right: self-determination through decolonization and in the post-colonial context.

In the aftermath of World War I the principle of self-determination did not develop into a legal right and continued to be simply a political principle. The World War II led to great changes in international order and it also caused a significant change in the way self-determination was perceived[49]. The principle of self determination was evoked several times during the War: Germans used it in its opposite direction to re-acquire territories, and it was also proclaimed in the Atlantic charter of 1941 (Declaration of Principle of 14 August of 1941)[50]. The Charter, ascribed by President Roosevelt and Prime Minister Churchill and agreed upon by Allies, contained "eight principles of common policy" that outlined a new world order. The declaration contained two points that referred, not explicitly, to self-determination: Roosevelt and Churchill stated, *inter alia*, that "they desired to see no territorial change that do not accord with the freely expressed wishes of the people concerned" (principle 2 of the Charter) and that "they respected the right of all people to choose the form of government under which they will live" (Principle 3)[51]. The principles provided by the Atlantic Charter had a great influence on the works of the San Francisco Conference, when the Charter of the United Nation was drafted, initiating a new era for self-determination. In its early stages, the Charter did not mention the principle. In Dumbarton Oak Proposal, which preceded San Francisco Conference, the principle was not discussed and the UN Scheme did not include any right to self-determination, following the general thought of the League of Nations and its cardinal principles of territorial integrity and sovereignty[52]. During the San Francisco conference in 1945, the Soviet Union proposed an amendment and thanks to its pressure the principle was included in the Charter. The term self-determination is mentioned twice in the UN charter. In the Ist chapter, article 1(2) refers to it as one of the purposes and principles of the United Nation: "develop friendly relations based on

[49] GRIFFIOEN, *supra* at 3, p.10
[50] Ibidem.
[51] RAIC D., *Statehood and the law of self-determination*, London, The Hague, Kluwer Law International, 2002, pp.199-200; Wilson, pp.58; Atlantic Charter, 1941, principles 2, 3.
[52] Wilson, p.59;

equal rights and self-determination"[53]. The second reference is in article 55, Chapter IX, on International economic and social cooperation, where, while listing several goals the organization should promote in the world, it is claimed that "the creation of condition of stability is based on respect of equal rights and self-determination"[54]. The principle also underlies the Charter and was most prominently present in parts concerning colonies and other dependent territories: it is implicitly mentioned in art. 73 and 76 (Chapters XI and XII), according to which well-being and progressive development toward self-government should be granted to those people, that "have not yet attained a full measure of self-government", under the responsibility of UN members[55]. Although the principle was referred to in the charter, its content was not well defined and for its vagueness and the absence of a concrete definition of self-determination it cannot be interpreted as a fully legal right.

The first significant contribution to the development of the concept of self-determination as a legal right was given by the UN and in particular by the General Assembly with the adoption of several resolutions concerning self-determination of people[56]. In the two decades after the foundation of UN until 1960, GA adopted a number of resolutions primarily concerning the context of decolonization as several UN Member states continued to demand decolonization of Allies territories [57]. The concept of self-determination and decolonization were strictly related in UN context and Chapters XI and XII of the Charter played an important role for the evolution of the principle into the right to self-determination. Both chapters argued that a gradual development of non-self-governing territories towards self-government and independence was required. This policy was thus emphasized by the General Assembly in its resolutions and was also replaced with a policy that claimed an immediate independence for these colonial territories[58]. Since its first session, the General Assembly has highlighted its interest in Non-Self-Governing territories and new

[53] RAIC D., *supra* at 49, p.200; UN Charter 1945, Article 1(2).
[54] Id.p. 200; UN Charter, 1945.
[55] RAIC D., *supra* at 49, pp.200-201; Griffioen, pp.13-14
[56] GRIFFIOEN, *supra* at 3, p.18; Wilson, p.61
[57] RAIC D., *supra* at 49, pp-2020-203; as seen above, in the first years after the WWI, only territories of the defeated powers were subject to self-dtermination as intend by the Allies powers. in the Aftermath of the WWII a great number of states, member of the UN, started to ask an equal treatment for former Allies Powers colonial territories.
[58] RAIC D., *supra* at 49, p.202-203

independent states and started to adopt resolutions asking delegates and special committees to focus on these special categories of territorial units to get more information about their status and to give more rights to their peoples[59], also asserting its authority on these territories. The General Assembly started to consider self-determination as an imperative and immediate goal for all colonial people and this was highlighted in its resolutions, providing for the independence of North Africa French Colonies[60]. Most of these resolutions were adopted during the Fifteenth session which is considered a milestone in the evolution of self-determination: during this session a resolution considered the beginning of a revolutionary process within the United Nation was also adopted [61]. The resolution 1514 (XV), also called Declaration on Decolonization, was adopted without dissenting votes in 1960 and was the clearest expression of the change of policy concerning colonial territories[62]. One of the main purpose of the resolution was "the necessity to bring to a speedy and unconditional end of colonialism" and immediately grant independence to all colonial territories[63]. This was a radical shift of opinion of the United Nations and it was determined by different influential factors. First of all, the slow progress of colonies toward independence and self-government was an important reason for change: only ten of the seventy-two territories listed as non-self Governing had became independent. Then continued pressure on abolition of colonialism by Soviet Union and Afro-Asian states influenced the general opinion of the UN[64]. In the first paragraph of the resolution the right to "self-determination to all people", primarily to peoples subject to "alien subjugation" is granted. The revolutionary charge of Resolution 1514(XV) became clear when comparing it to art. 73 and 76 of the UN Charter: these two articles distinguish between Non-Self-Governed territories and trust territories, according to which the former were entitled to reach a form of self-government, but not independence, and the latter were spurred to independence with the help of the

[59] Res. 9(I), through which GA requested the secretary general to include in his annual report a summary of information on Non-Self-Governing territories; Res 66(I), which provided for an ad Hoc Committee on information to study that summary; Res 217 (III), i.e. International Bill of Human Rights. Wilson, pp.67-69;

[60] id. p.63

[61] Id., p. 67

[62] RAIC D., *supra* at 49, p.204

[63] UN Doc. A/Res/1514 (XV), 1960, General Assembly resolution

[64] Id.204-205; Wilson, p.68-69

administrative powers when they became ready for it[65]. Paragraph five of Res. 1514 considered them equal and both entitled to self-determination and so to independence. At the same time, the resolution firmly requires a complete independence for all territories, whether they are ready for it or not, "without any conditions or reservations, in accordance with their freely expressed will and desire"[66]. The last, significant point of the resolution was the fourth paragraph in which the use of force against dependent peoples exercising "peacefully and freely their right to complete independence" and self-determination was prohibited[67]. The importance of this resolution also lies in its attempt to eliminate colonialism through self-determination: it represents the political and legal basis for UN decolonization policy to determine the will of all peoples, claiming that "subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation"[68]. According to some scholars, Res. 1514 can be considered a step in the gradual transformation of the principle into a legal right to self-determination[69]. Although Resolution 1514 states that all peoples have the right to self-determination, UN practice and Member states general opinion highlighted that the principle was mainly developed in its decolonization aspect, actually applied only to colonial people and territories. These thoughts were incorporated into another important, anti-colonial resolution that contributed to shape the concept of self-determination: Resolution 1541, adopted one day after the 1514[70]. This resolution lists a number of guiding principles which former colonies could use to self-determine and reach independence. In its principles, Resolution 1541 states that Chapter XI of UN charter was meant to apply to "colonial type" territories, i.e. Non-Self-Governing territories, defining them as territories "geographically separate and ethnically distinct from the country administering it"[71], adding that the right to

[65] GRIFFIOEN, *supra* at 3, p. 19
[66] Ibidem.
[67] Id. P. 20
[68] Wilson, p.69-70.
[69] RAIC D., *supra* at 49, p.202-203
[70] GRIFFIOEN, *supra* at 3, p.20
[71] In defining non-self-governing territories, references are often made to the Salt water theory. UN decolonization practice was almost entirely along salt water theory, according to which a non-self-

self-determination was granted only to people inhabiting these territories. The most significant part of the Resolution is Principle VI which provides three possible ways to achieve self-determination. The first of the three optional means was "independence": the "emergence of an independent sovereign state" was considered the preferred means to self-determine. In UN context independence and self-determination were considered synonymous and for this reason no conditions were posed to limit the achievement of independence[72]. Some restriction and regulations were posed to the other two alternatives, "Free association" and "Integration"[73]. Principle VII emphasizes that these aspects should be the result of the "free choice" of colonial people[74] and strict democratic standards were required for their application. In the decolonization context the free choice was considered an essential feature for the correct exercise of self-determination and the best way to express it was through democratic processes. Referenda, plebiscites and supervised elections were essential tools that should be used in those cases where association and integration where the result of self-determination[75]. While association was considered to be a temporary process, always open to revision, integration was irreversible and therefore only colonies at an advanced stage of self-government and a fully aware of their status can achieve "integration with an independent state"[76]. Resolutions 1514 and 1541 are considered a significant milestone in the development of the right to self-determination: in both resolutions the General Assembly refers to self-determination as a right and these, with others resolutions adopted both by the Security Council and the General Assembly during the 1960s and even before, contributed to the development of self-determination as a rule of customary law. It was not seen as a simply political principle anymore and a further step in its development was its inclusion in the two

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governing territory is "geographically separate" from the country administering it. as a result, the provision of 1541 resolution where limited only to this kind of territories. RAIC D., *supra* at 49, p.207

[72] RAIC D., *supra* at 49, p. 205.

[73] Pomerance M., Self-Determination in law and practice, Nijhoff publishers, Boston/London, 1982, pp. 10-11

[74] Concept of free choice has been confirmed by ICJ in the Western sahara case: on the basis of Res. 1514 and its own statement in another case, the Namibia one, the Court provided that "the application of the right to self-determination requires a free expression of the will of the people concerned". Here, the will of people means the will of the majority of people of a colonial territory. As a matter of fact, during decolonization period, the element of "free choice" was considered essential for the exercise of self-determination. RAIC D., *supra* at 49, p 211.

[75] POMERANCE, s*upra* at 70, p.10

[76] Id. p.10

International Human Rights Covenants in 1966. The two covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were signed by the majority of the States and in their first, common, identically worded article re-define the right of self-determination, stating that "all people have the right of self-determination" and that all "States Parties shall promote and respect the right to self-determination"[77]. The incorporation of the right to self-determination in ICCPR and ICESCR strengthened its legal status and gave it the characteristic of a fundamental human right, but the most important and authoritative formulation of the right of self-determination can be found in Resolution 2625 (XXV) of 1970, also called the Friendly Relations Declaration[78]. It is considered the dividing line between colonial and post-colonial era because it is the first resolution in which no connections between self-determination and decolonization are made, adopted unanimously: for the first time Western States accepted, without reluctance, self-determination as a right of all people[79]. It is considered the most important document for the development of self-determination because it was considered a "rare example of instant customary law", a unanimous expression of the international community[80]. Resolution 2625 has a great legal value, also recognized by International Court of Justice which referred to it in a number of cases and it can be considered an instrumental legal document in determining the extension of the right to self-determination to other areas beside Non-Self-Governing territories[81]. Among the seven Principles listed in the Resolution, principle V refers to "equal rights and self-determination of peoples" and all the principles of the Resolution are balanced and "interrelated in their interpretation and application", meaning that all principle shall be interpreted and exercise in the light of the other principle provided by the Declaration, included self-determination. Principle V also contributes to give to the right to self-determination a universal connotation as it is not only meant to apply to colonial people, but is considered a right granted to all people. The Declaration also states that the "emergence of into any other political

[77] RAIC D., *supra* at 49
[78] GRIFFIOEN, *supra* at 3, p.21
[79] RAIC D., *supra* at 49
[80] GRIFFIOEN, *supra* at 3, p.21
[81] Id., p. 22

status freely determine by a people" constitutes a mode for exercising self-determination, adding it to the other three option enumerated in Resolution 1514 (independence, free association and integration)[82]. Aside from resolution 2625, one of the first, most relevant international instrument which referred to self-determination as a right outside the colonial context is the Helsinki Final act of 1975, an agreement signed by states parties of the CSCE (Conference on Security and Co-operation in Europe), which contains ten "principles guiding relations between participating states"[83]. Among these principles, the VIII refers to equal right and self-determination, defining the latter as a right of people to "determine, when and as they wish, their internal and external political status, without external interferences"[84]. As well as determining an ongoing character of self-determination outside the colonial context, the Helsinki final act is also considered progressive in its language. In principle VIII it makes very clear that the right to self-determination is not confined to the colonial context and, by using the phrase "when and as they wish" it guarantees a continuing character to the right, confirming its implementation outside decolonization. At the same time, principle VIII clearly refers to the existence of a double dimension of the right, internal and external ones, highlighting that beyond the colonial context the emphasis has shifted from the external to the internal aspect, confirming its ongoing character as will be analysed in further paragraphs[85]. Furthermore, some ICJ's pronouncement on some cases support the argument that self-determination was not confined to the colonial context, such as in the Nicaragua Case and the Wall Opinion, in which it was confirmed the applicability of self-determination beyond colonial context to post-colonial situations[86].

As we have seen, the right of self-determination developed from a mere political principle to a right in international law. It has been included in the most important legal instruments of international law, widening its value and its fields of application. It developed also beyond the decolonization context and it is in constant development,

[82] Id. Pp. 22-23
[83] Id., p.59
[84] *Helsinki Final Act*, Conference on Security and Co-operation in Europe (CSCE), 1975, Principle VIII (2)
[85] GRIFFIOEN, *supra* at 3, p. 60
[86] Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 2004; Nicaragua *v.* United States of America, 1986; Griffioen pp. 64-65

shared at both international and regional level. As we will see in further paragraphs, its status, its beneficiaries and its application continue to be controvert and difficult to determine. A deep analysis of the main features of the right to self-determination will help to shed some light on the extent to which it is accepted and recognized in the international system.

1.2 Defining the "self": to whom is addressed the right to self-determination?

The overview of the historical evolution of self-determination shows that it is a very elusive and vague concept. There is no clear definition of what the right entails and there are several conflicting interpretations of it in the international community. Moreover, this ambiguity is also due to the absence of a clear definition of peoples: "there is no internationally accepted definition of the term peoples" and the inability to define this concept also causes troubles in defining to whom and in which circumstances self-determination applies. As Sir Ivor Jennings stated "people cannot decide until someone decide who are the people"[87].

1.2.1 Definition of the notion of "people".

Instruments and resolutions related to self-determination referred to peoples as the bearers of the right to self-determination. There are several definition of the concept of people and its meaning is fundamental to understand the right and its application. One of the first attempts to define "people" was made by Hans Kelsen, who equated the notion with that of equal rights in general international law as they were international actors and for this reason the reference to people in the article meant "states" (people were not yet considered international actors). Obviously, Kelsen's analysis of article 1(2) and its comparison between states and peoples was incorrect: as revealed by *travaux préparatoires* of the Charter, the drafters did not intend the word "peoples" to be synonymous of "states" and the article explicitly declares equal rights for people as such. Moreover, this distinction was confirmed by subsequent UN practice and interpretation of UN Charter's Articles, especially in Resolution 2625 which states that "all *people* have the right to self-determination" and

[87] Sir Ivor Jennings, The Approach to Self-Government, 1956, 55-6 in MUSGRAVE T. D., *supra* at 2p. 148 ; on definition of people see also QUANE H. *The United Nations and the Evolving Right to Self-Determination*, The International and Comparative Law Quarterly, Vol. 47, No. 3 (Jul., 1998

that the "*states* have the duty to respect it"[88]. Beyond Kelsen's definition, many other attempts were made to define the concept. After the establishment of the United Nations, self-determination was identified with decolonization and even the notion of people was defined in this context[89]. According to a decolonization definition, the term "people" meant "colonial people", the inhabitants of a territory defined by "alien" forces. This definition is based on an interpretation of Article 1(2) in the light of the Chapters XI and XII of the charter, where the term people refers to non-self-governing and trust territories inhabitants[90]. This conclusion is also uphold by UN practice in the decolonization period and also by Resolutions 1514 and 1541, which also invoked a territorial criterion for defining the concept of people, limited to the population of a given colonial territory with pre-existing boundaries, by prohibiting the disruption of territorial integrity of a colony and enumerating possible ways for given territory to achieve self-determination[91]. In the decolonization context people were understood to be united by the fact that they were under alien subjugation and they were referred to as the whole, colonial population of a given territorial unit[92]. Another definition of the term, paralleling the decolonization view of the concept of people, was the representative government one. Contained in representative government theory, it defined people as the entire population of a territorial unit, in terms of prior existing territorial boundaries[93]. According to some scholars, the right to self-determinations here refers to the "right of the majority" of a population in a generally accepted political unit, which can be a colony or even an independent state, to the exercise of power. "Universality" is one of the two features of the concept of people which characterizes the representative government definition, as it is used to identify both sovereign, independent states population and non-self-governing territories inhabitants; the second one provides that "people" comprise the entire population of a given political entity, or at least the majority, defining it by territorial boundaries[94]. This definition of people is confirmed by Principle VIII of the Helsinki Final Act, in which

[88] Id., pp.148-149
[89] RAIC D., *supra* at 49, p.243
[90] MUSGRAVE T. D., *supra* at 2p.150
[91] Id., p. 150
[92] KNOP K., *Diversity and self-determination in international law,* Cambridge, Cambridge University Press, 2002;, p.57
[93] MUSGRAVE T. D., *supra* at 2, p.151
[94] Id., p.152-153

the term "people" is used to refer to the entire population of sovereign and independent states, as they were the only signatories of the Declaration. Both the decolonization and the representative definitions defined people by using a subjective, territorial criterion. Both ignored the ethnic, linguistic, cultural and religious factors that characterized peoples, highlighting differences between the population within a certain territory, which are at the basis of an ethnic definition of the concept of people[95]. Defining "people" as an ethnic group creates several difficulties. Generally, ethnic differences in a given population create problems for the popular sovereignty because ethnic groups consider themselves as distinct groups and do not identify with the entire population. Fixing precise criteria for an ethnic definition has been proven to be impossible because they may vary from group to group or even within one group over a period of time, as ethnic groups tend to choose identifying criteria by themselves[96]. One criterion which can be used to identify an ethnic group is that of *identity* of the group as such: it is more than the sum of the identities of the individual members of the group, it is a sort of self-consciousness which determines affinity between member and a sense of belonging to the ethnic group[97]. As every group has different features and identities, any attempt to define the concept of people under international law is fruitless, but not impossible. Many scholars attempted to enumerate ethnic groups features: Raič identifies some criteria which define a people in an ethnic sense, stating that a group who enjoys a historical territorial connection, a common history, a common ethnic identity, a common language and culture and a common religion can be considered a people and its identity is also strengthen by its "belief of being a distinct people, distinguishable from any other people inhabiting the globe"[98]; Brownlie asserts that race, or nationality, expressed in terms of culture, language, religion and group psychology, is one of the most important criteria to define a people[99]; the International Commission of Jurists enumerated "certain characteristic that people's members have in common of historical cultural, religious,

[95] Id., p.152. RAIC D., *supra* at 49, p.246
[96] MUSGRAVE T. D., *supra* at 2, p.154-155; RAIC D., *supra* at 49,pp. 247-248
[97] RAIC D., *supra* at 49, p. 259
[98] Id., pp. 262-263
[99] MUSGRAVE T. D., *supra* at 2, p.161

economic geographical or racial nature"[100]. As can be seen, it is extremely difficult to define people in an ethnic sense and for this reason no single definition of ethnic group has ever been agreed upon. Among these definitions of people, the broadest one is the UNESCO definition. In the *Final Report and Recommendations on Further Study of the Concept of the Rights of Peoples* of 1989, some characteristics were enumerated to define the concept of people. According to the UNESCO description, a "people" is a "group of individual human being who enjoy some common features" such as historical traditions, cultural homogeneity, linguistic unity and religious or ideological affinity. In order to be considered a people, a group shall also "be of a certain number" (which need not to be large) and should be "more than a mere association of individual within a state" and it must have "the will *to be identified* as a people", with institutions or other means to express these common characteristics and will[101]. UNESCO final report is a vital document in the definition of the concept of people; it has been used as a "guide" for the drafting of several Human rights convention, in particular by African Commission on Human and Peoples' Rights in many of its reports[102].

Defining the concept of people is one of the key issue of international law and even if there have been many attempts to describe it, its definition is still uncertain and further efforts to define "peoples" are still needed. The uncertainty of the definition of people also causes some problems in the definition of the "self" entitled to the right to self-determination, which is still unclear and undetermined. After having determined the concept of "people", the new challenge is to determine the self: which people is entitled to the right to self-determination?

1.2.2 To whom is addressed the right to self-determination?

Another key issue in the study of self-determination is to establish who is entitled to the right, who is the "self". Most discussions about self-determination begin with an attempt to define the self and how it should reach its determination. Its definition is

[100] Id., p.161

[101] *Final Report and Recommendations on Further Study of the Concept of the Rights of Peoples* of 1989, UNESCO Doc. SHS-89/CONF.602/7.

[102] FOCARELLI, *supra* at 1, pp. 50-51

essential for the analysis of the scope of the right to self-determination, but it is also a challenge as many definitions of the self have been "hopelessly political and confused"[103]. This confusion has been caused by an incorrect comparison between the right to self-determination and an absolute right to attain statehood[104]. In order to solve the question many attempts were made to limit the category of right holders drastically, causing problems for the definition of the bearers of the right. The controversy arises at the end of colonialism and the key issue in the definition of the self was whether it refers only to colonial people or it has a broader meaning. According to the Declaration on Colonialism and Article 1 of International Covenants on Human Rights "all people" have the right to self-determination. Despite the universality of the article, here underlies a limitation of the right to people subject to "alien subjugation, domination and exploitation", in other words to "dependent, colonial people"[105]. Many scholars endorsed this argument, arguing that self-determination entered international law as a rule of decolonization and for this reason any definition of the self beyond the colonial category was precluded. This thesis is based on a "colonies only" interpretation of the "self", according to which colonial people are the only holders of self-determination because the right was not recognized in international law before its development as a right for colonies, and its formulation denies self-determination to any people other than colonial ones. Also the principle of *uti possidetis* supports this point of view as it reinforces the principle of territorial integrity of existing boundaries by prohibiting the exercise of self-determination by groups within the state who were not part of the majority of the people, or didn't recognized themselves as such[106]. In general, there are three broad categories of groups more often suggested to be the holders of the right to self-determination: the entire population of a state, the ethnic groups and minorities. In decolonization period it was widely thought that the only holders of the right to self-determination were the entire populations of colonies or non-self-governing territories[107]. The United Nations supported this argument as can be noticed in its practice in that period. An objective,

[103] HANNUM H., *Rethinking self-determination*, p.35
[104] RAIC D., *supra* at 49, pp. 242-243
[105] GRIFFIOEN, *supra* at 3, p.81
[106] KNOP K., *supra* at 89; p. 54
[107] RAIC D., *supra* at 49, p. 243

territorial criterion was preferred for defining the "self" because a community already organized as a state constitute a people, and any other, ethnic considerations were considered irrelevant[108]. In most cases the whole population of a colony achieves independence, thus the former colonial boundaries became the newly established state boundaries. This understanding of people leads to the actual subject of self-determination: the nation. "Permanent population is identical to the nation", as nations are generally understood in a territorial sense, and nationality refers to the country in which a person is citizen. This argument has considerable support in international law, as for example in Resolution 637 A of the UN the principle of self-determination is related to people and nations[109]. Another source of evidence of the argument that the entire population of a state is the holder of the right to self-determination can be found in the Helsinki Final Act of 1975, as in its *Travaux Prépataroire* the term people primarily referred to nations as such, and also Article 20 of the African Charter refers to the entire population of a state as the bearer of the right to self-determination[110]. Self-determination was considered to be the right of the majority to exercise power in an accepted political unit, in respecting former colonial boundaries. But the insistence on maintain former colonial boundaries also caused some problems, such as a disintegration of heterogeneous units into competing selves and also a huge wave of nationalisms with the purpose of uniting former groups divided by colonial domination[111]. Undoubtedly, especially considering the rising nationalisms, the territorial definition cannot be considered anymore the only criterion of definition of the self and it became evident that, even if considered irrelevant, the ethnic issue did not disappear, as most populations were composed by different ethnic groups. Outside the colonial context, the applicability of self-determination was extended also to ethnic groups within the states and this was also confirmed by post-colonial states practice which entitled those groups, based on an ethnic background, to self-determination. In several cases United Nations permitted self-determination to ethnic groups, as can be seen in the separation of previous colonial unit of Ruanda-Urundi in two separate states dominated by two different ethnic groups (Rwanda and

[108] Griffioen, p. 30
[109] RAIC D., *supra* at 49, p. 245
[110] Id., pp.246-247
[111] POMERANCE, *supra* at 70, pp.18-19

Burundi). The expansion of the applicability of self-determination to ethnic groups has made more difficult the process of identification of the actual holder of the right[112]. Which population or ethnic group is entitled to self-determination? From a theoretical point of view, the right to self-determination should be addressed to all those groups in a non-dominant position within the state, which are numerically inferior to the rest of the population. Thus, as the main aim of self-determination is to protect the collective identity of a group, also ethnic groups are entitled to self-determination, because their need for protection is greater with respect to the whole population of a state[113]. This argument is supported by international instruments related to self-determination, which contain references to peoples as addressees of the right. Principle V of the Friendly Relation Declaration states that the right to self-determination entitles all people, "without distinction of race, creed or color", aiming to protect at least racially and ethnically distinct groups within a state[114]. This conclusion was reinforced by the 1993 Vienna Declaration, which emphasized the role of sovereign states in respecting the right to self-determination, especially if they possess a "government representing the whole people of the territory without distinction of any kind". The applicability of self-determination to ethnic groups was also confirmed in the case *Katangese Peoples' v. Zaire* in which African Commission on Human and Peoples' Rights, by accepting self-determination claims of Katangese people over Zairian government, listed several principle that every group should use to achieve self-determination, in respecting at least principles like sovereignty and territorial integrity[115]. This point of view was also agreed upon by the Constitutional Court of the Russian Federation in the Tatarstan case and by Supreme Court of Canada in Re Secession of Quebec, in which it was stated that "the people may also include only a portion of the population of an existing state"[116]. Additional support for the extension of the right to ethnic groups can be found in the European context, in the

[112] POMERANCE, *supra* at 70, p. 19

[113] RAIC D., *supra* at 49, pp.247-250; Musgrave, p.

[114] UN Doc. A/Res/2625 (XXV), 1970, General Assembly resolution, principle V.

[115] Id. Pp.251-256. The other way through which achieve self-determination enumerated by the African commission are: "independence, self-government, local government, federalism, confederalism, unitarism or any other forms of relations which fully recognize principle like sovereignty and territorial integrity". *Katangese Peoples' Congress v. Zaire*, African Commision on Human and Peoples' Rights, Comm. N°. 75/92, 1995, para. 6.

[116] Reference re secession of Quebec, Supreme Court of Canada, 1998.

Vienna declaration of CSCE parliamentary Assembly which "calls upon the Council of Ministers to place discussion of self-determination and the related issues of territorial integrity and the stability of States for setting guidelines so as to enable the territories *where different national groups coexist* to implement innovative forms of self-government and guarantee the maintenance and development of the linguistic-cultural identities in those territories"[117]. In sum, we can affirm that international law recognizes ethnic subgroups as holders of the right to self-determination. Nevertheless, some problems can be averted in defining the holders of self-determination in an ethnic sense, which involved human rights. Equating people with ethnic groups could create discrimination because in case of self-determination those who do not belong to a particular ethnic group "should not be permitted to participate to the exercise of the right"[118].

1.2.3 Minorities, indigenous people and National Liberation Movements.

Minorities, indigenous people and National Liberation Movements are considered special categories of holders of the right to self-determination. There are several debates on their definitions and their classification as subject of self-determination.
Minorities are considered the third category of holders of the right, but no single definition of the term has yet been accepted. Several studies have been undertaken but none of these succeeded because of the existence of numerous minority groups, difficult to classify. One of the first definition of minority can be found in the *Greco-Bulgarian Communities* case, in which the Permanent Court of International Justice identifies the minority as a group characterized by common religious, race, language and traditional features with the goal to preserve them[119]. Another definition was the one of the Sub-commission of the Prevention of Discrimination and Protection of minorities which states that the "term minority shall include non-dominant groups of the population with the wish to preserve their ethnic, religious or linguistic features"[120]. The most widely accepted definition was the one of Capotorti, who

[117] GRIFFIOEN, *supra* at 3, p. 82, in note. Emphasis added.
[118] RAIC D., *supra* at 49, p. 250-255
[119] PCIJ, Advisory opinion, Series B, No. 17, 1930, p. 21.
[120] ECOSOC OR. 18th sess. Supp. No. 7. Commission on Human Rights. Report of 10th sess., 23 feb.-16 Apr, 1954, para. 420, p. 48 in MUSGRAVE T. D., *supra* at 2, p. 168; on minorities see also HENRARD K., *Devising*

argued that a minority is "a group numerically inferior to the rest of the population of a state, in a non-dominant position with ethnic, religious and linguistic characteristic differing from those of the rest of the population […]"[121]. These definitions contribute to create a general set of criteria to identify minorities, but not a generally accepted definition. In order to be recognized, a minority should have a self-consciousness and subjective awareness of its own distinct identity and also a desire to preserve it. Many scholars argued that these criteria of identification of minorities are the same of the nation and hence equated the two concepts[122]. In the former paragraph, nation has already been equated to the notion of people. Are thus "minorities" to be entitled to self-determination likewise "people"? The concepts of people and minority have always been considered as two distinct concepts. Since the Paris Peace Conference of 1919 the creation of minorities was considered an attempt of Allies to prevent ethnic groups from claiming for self-determination and attempts to keep the two concepts separate continued also in the post war period[123]. Relevant international law instruments considered people and minorities two, distinct concepts. In the International Covenant on Civil and Political rights two articles refers to the two concepts. According to Article 1 people are the only bearers of self-determination, while minorities are simply protect from being denied the right to enjoy their own culture, as stated by article 27. ICCPR thus provides that minorities are not entitled to self-determination like people[124]. This can be also seen in the Helsinki Final act of 1975 where principle VII grants protection for minorities and principle VIII entitles people to the right to self-determination. In order to qualify for self-determination, minorities must demonstrate that they are people[125]. Many ethnic minorities identify themselves as a people and some commentators argue that they do constitute "peoples" as both occupy a specific territory and possess cultural and religious characteristics. Some other scholars propose another theory on the relationship minority/people called right

an adequate system of minority protection : individual human rights, minority rights, and the right to self-determination, The Hague [etc.] : M. Nijhoff, 2000, pp. 279-321;

[121] Id., p. 169; Capotorti, 96.

[122] RAIC D., *supra* at 49, pp. 266-269; Musgrave, p.170.

[123] MUSGRAVE T. D., *supra* at 2, p. 167.

[124] MUSGRAVE T. D., *supra* at 2, p. 168.

[125] Id., p.168.

of reversion[126]. According to proponents of this theory, minorities are not "*ipso facto* people but possess a right of reversion to self-determination": when minority rights are severely violated and its members suffer oppression, minorities may exercise a right to self-determination, qualifying themselves and acting as "potential peoples" in order to determine their own status[127]. The right of reversion can be found in resolution 2625, which prohibits any action which would dismember the integrity of a state whose government represents the whole people belonging to its territory, without distinction, and thus implicitly providing to minorities a right to self-determination if needed to protect themselves[128]. Except for rare cases, minorities lacking collective individuality are not entitled to self-determination under international law.

It is also difficult to give a clear definition of indigenous populations. They were early considered as distinct political entities with territorial rights but in the twentieth century they were not consider as people at all. As can be seen in *Cayuga Indians v. United States* American Indian tribes were not considered as a legal unit in international law[129] and in recent years indigenous people have been recognized as minorities[130]. Despite these understandings, indigenous populations identify themselves as people, for they satisfy the definition of people and they constitute a *sui generis* category[131]. Many commentators support this proposition, declaring that they possess religions, languages, customs and values on their own which they try to preserve, fulfilling the requirements of a people and constituting a nation. It is not alike other nations or minorities but constitutes a sui generis category of holders of the right to self-determination. Special status to indigenous people has already been recognized in many states, such as in United States from the earliest time of European settlements[132]. Indigenous people were considered to have sufficient independent

[126]Badinter Arbitration Commission's Opinion N. 2 of 11 January 1992 "On Serbian minorities of Croatia and Bosnia Herzegovina"; MUSGRAVE T. D., *supra* at 2, p, 170.
[127] Ibidem; Buchheit L., Secession: the legitimacy of self-determination, Yale University Press, New Heaven, 1978 in MUSGRAVE T. D., *supra* at 2, p.170.
[128] Id. p. 171
[129] Reports of International Arbitral Awards, *Cayuga Indians(Great Britain) v. United States*, 1926, 176.
[130] MUSGRAVE T. D., *supra* at 2, p. 172; on indigenous people see also CASTELLINO - GILBERT, Self-Determination, Indigenous people and Minorities, Macquarie Law Journal, Volume 3, 2003, pp.155- 178
[131] Id., p.173.
[132] Id. p. 173-174

legal existence to enter into treaties and to get the dependent nation status. In the United States, for example, Indian nations were considered as distinct, independent political communities. In recent time, indigenous populations have begun to be recognized as people at an international level. One example is the Martinez Cobo Report, commissioned by the Sub-commission on the Prevention of Discrimination and Protection of minorities to study the discrimination of indigenous people. According to the report, self-determination "must be recognize as the basic precondition for the enjoyment of by indigenous people of their rights" and was understood as the exercise of free choice by indigenous people[133]. Also the International Labour Conference recognizes indigenous population as people[134]. In the ILO convention No. 169 concerning indigenous and tribal people it was provided that indigenous people should be allowed "as much control as possible over their own economic, social and cultural development"[135]. As a matter of fact, article 1 of the Convention defines indigenous and tribal population as "people" and article 7 provides that "people shall have the right to decide their own priorities and participate in national and regional development which may affect them directly", extending this right to indigenous people. At the same time, the Convention also puts some limit to the exercise of self-determination by indigenous populations: the preamble states that self-determination aspirations of indigenous people are recognized only "within the framework of the states in which they live", *de facto* limiting their right to self-determination[136]. The most recent international instrument dealing with indigenous people is UN Declaration on the Rights of Indigenous people. In the draft declaration are set out rights accorded to indigenous populations, here also recognized as people. By explicitly stating that indigenous populations are people, the drafters entitled them to self-determination, which becomes part of the wide range of rights provided for tribal people. Although the declaration provides that also indigenous people have the right to self-determination, it also limits it by the inclusion of the right to autonomy: according to this right, self-determination does not include secession or the creation of an independent, separate state, but, as seen in ILO convention, it must occur within the

[133] UN Doc. E/Cn.4/Sub.2/183/21/add.8, para. 580-581.
[134] Id., p. 174
[135] ILO convention C169, Indigenous and Tribal People convention, n° 169, 1991, Articles 1 and 7.
[136] Id., p. 176

frameworks of the existing state[137]. The right of self-determination as provided in the declaration, allows indigenous people to participate in the government of the state and to establish autonomous indigenous institinutions, within the borders of the state, without seceding or claiming independence. By recognizing indigenous populations as people while limiting their right to self-determination, refusing to allows them to determine their own status, international law instrument thus contribute to create the *sui generis* category of indigenous people, as they cannot be identified neither as minorities nor as people.

A controversial issue is whether National Liberation Movements are to be considered as holders of the right to self-determination. There are two types of national liberation movement: political-military groups, fighting against an alien power in order to gain independence and sovereignty of the state, and organizations whose aim is to replace a foreign power which governs their state even if independence has been reached (such as trusteeship territories). The former type is more important than the latter as they are recognized by international organizations and states. In the 1970s the UN began to invite them to participate to some of their activities and assemblies and with the adoption of the Resolution 2621, the General Assembly confirmed this practice by stating that "when needed, representatives of National Liberation Movements should be invited to participate to debate concerning their states"[138]. A radical change in the understanding of these movements came with the adoption of Resolution 2918, in which the General Assembly began to consider their representatives as "authenticable representative of people aspiration of independence and self-determination". Later in 1974, after having invited the African National liberation Movement to participate to their debate as observer, the United Nations gave the observer status to the most important movement of the world. By giving this status, UN gave also voices to the oppressed people that this movement represents, in order to give to their fight for self-determination an international sight.[139] In the UN context, National Liberation Movements enjoy special privileges, such as assistance and material aid from states needed by the peoples they represent, to continue their

[137] GRIFFIOEN, *supra* at 3, p. 83; Musgrave, p. 177
[138] JOUVE E., *Les Droit des Peuples*, Paris, Presses Universitaires de France, 1986, p. 32- 33; 36-37
[139] Id., p. 37

fight, and they also enjoy a special credit from UN budget to cover travel expenses of their representatives who participate to UN sessions and works.[140] The weight gained within UN helps them share the ideals of their people, fighting for self-determination, and making the international community pay more attention to problems affecting those people living under oppressive governments. People fighting for their determination can also be considered a special category of insurgents. While insurgents are seen as rebels rising against legitimate government, the people organize themselves in National Liberation Movements, in order to obtain secession from the oppressive government.

1.3. Defining self-determination: meaning and content of the right.

Self-determination is often analysed by distinguishing between its components, the "self", which determines who is entitled to the right of self-determinations, and the "determination" component, which determines the control, the power or the autonomy that the "self" is entitled to. In its overall form self-determination provides that any group of individuals is entitled to any level of autonomy or independence, giving them the right of free choice to determine their status. What is the actual meaning of self-determination? As explained in previous paragraphs, in its earlier stage, during colonial period, self-determination was understood as the right to achieve independence or, at least, autonomy from external powers, taking into account only its external dimension. In the post colonial period, world order changed and also self-determination changed in scope, meaning and content, starting to be seen also as a right of people against oppressive powers, introducing an internal dimension of self-determination[141].

1.3.1. Meaning of the right: internal and external dimension of self-determination.

During the decolonization period self-determination was seen as a temporary right, which would have expired once every state under alien subjugation would have reached independence from the colonial powers. But "self-determination has never

[140] Id., p. 42-44
[141] Molos D., *Turning Self-Determination On Its Head,* Philosophy and Public Issues (New Series), Vol. 4, No. 1 (2014), Luiss University Press, pp. 78-79

simply meant independence" and, as can be seen in doctrine and state practice, the right to self determination continued to evolve as a legal right beyond the context of decolonization[142]. In post-decolonization era two further developments can be seen concerning self-determination. First, the creation of new international legal instruments as well as state practice, jurisprudence and resolutions pointed out the continuing character and a universal application of the right outside the decolonization context. Second, references to a double dimension of self determination were made and emphasis was placed on the internal dimension, which together with the external one, contributes to shape the right to self-determination in post the colonial period[143].

While the traditional context in which the right was exercised was the post war period, during which it was limited to the colonial context and related to its external aspect, in present day the meaning of self-determination relates to its internal dimension and it is highlighted by contemporary international law. The internal dimension has become increasingly important after the decolonization period and, especially after the end of the cold war, it develops enlarging its field of application[144]. Internal self-determination is understood as an implementation of the right within the state, primarily referring to intra-state relations, that is the relationships between a people and its own state. The essence of the meaning of internal self-determination was first introduced by ICJ in the *Western Sahara case*, in which it was defined as the "need to pay regard to the freely expressed will of the people" and this was confirmed by international legal instruments, like declarations and resolutions of the UN, state practice and regional acts, which added that all people, not only colonial ones, were entitled to self-determination, denoting a universal and continuing character of self-determination[145]. In order to understand the present meaning of self-determination in its internal aspect it is important to analyse the international Covenants, in particular the common article 1, considered of vital importance for the validity of self-determination outside the colonial context[146]. By stating that "all people have the right

[142] VAN DEN DRIEST S. F., *Remedial secession: a right to external self-determination as a remedy to serious injustices?,* Intersentia, Cambridge ; Antwerp ; Portland, 2013, pp. 37-38
[143] Id., p.39
[144] RAIC D., *supra* at 49, p.227-228
[145] Id. p. 228; p. 237; Western Sahara, Advisory Opinion of October 1975, rep. 12, para. 60
[146] VAN DEN DRIEST S. F, *supra at* 131 P. 39

to self-determination" the universal character of the right is emphasized. Moreover, the phrase "freely determine their political status" highlights the main aim of internal self-determination, that is to enable people to choose their government without a third state intervention or interference[147]. This last sentence also gives to internal self-determination a continuing aspect, as it does not cease to exist as soon as it is evoked, but can be pursued continuously. References to the continuing character of self-determination are also made in the Friendly Relation Declaration of 1970, one of the most authoritative legal instrument in international law. Principle V clearly states that self-determination does not expire once independence has been achieved and that states have to "conduct themselves in compliance with the right" and must respect it without distinction as to race, creed or colour. Moreover, the declaration also contains explicit references to self-determination and to the existence of both an internal and external dimension of the right[148]. Again in Principle V, it is stated that self-determination may be exercised through independence, integration or association, clearly referring to the external aspect of self-determination. By determining that the right does not cease to exist once independence has been achieved, it makes clear reference to internal self-determination. The Friendly Relation Declaration also confirms the universal character of the right, as it addressed all states, not only colonial ones. Support for the argument that self-determination is an on-going right, transcending colonial context, can also be found in the Helsinki final act. It was adopted in a period in which colonization did not exist anymore and in its *travaux préparatoires* some specific terms were used, like "always" and "when and as they wish", which emphasizes the continuing character of the internal self-determination[149]. Some opinions of the ICJ also confirm the ongoing character of self-determination outside the colonial context. In the *Nicaragua case*, for example, the court affirmed that "the right to freely choose a political, economic, social and cultural system was applicable to independent, sovereign states as it was to non self-governing territories", extending it beside the colonial context as the decision does not involve a

[147] Id., p. 40
[148] Id., pp. 44-45; RAIC D., *supra* at 49, pp. 230-231;
[149] RAIC D., *supra* at 49, p. 231, Van den Driest S. F, pp. 46-47;

process of decolonization[150]. Another document which stresses the importance of the internal aspect of the right is the Vienna Declaration of 1993, that considered the "denial of internal self-determination as a violation of human rights". In addition, also the African charter on Human and Peoples' Rights makes it clear that self-determination goes beyond the colonial context. In the first paragraph of article 20 it states that all people have the "unquestionable right to self-determination", not merely in its internal form, but, as stated in the third paragraph of the article, also external self-determination is envisaged. In this case, some limits were posed to the right: it was highlighted that the right should be implemented in "any forms that accords with the wishes of people" but that it should respect the right to territorial integrity, stressing the application of the internal self-determination over the external one[151]. Another instrument which focuses on internal dimension of the continuing right of self-determination is the UN declaration of the right of indigenous peoples (UNDRIP). It explicitly extends the right to indigenous people and, thus, outside colonial context, by providing to the indigenous the right to "freely determine their political status and freely pursuing their economic, social and cultural development", envisaging the internal dimension of self-determination[152]. As it can be deduced by these relevant international legal instruments, besides the universal and on-going character, internal self-determination can be defined as the right of people to freely determine their status in their own state, without external interferences or manipulation and without leading to the change of external border of the state. As a right which refers to intra-state relation, internal self-determination denotes a right of people to participate to the decision-making processes of their own state. The degree of participation varies according to the specific case but, in general, it is evoked in those cases in which cultural, ethnic or historical identity are affected by matters of the government, prohibiting the people to determine their own political status[153]. Internal self-determination also includes peoples' freedom to pursue their economic, social and cultural development which can be achieved through the participation to

[150] RAIC D., *supra* at 49, p. 236; Case Concerning The Military And Paramilitary Activities In And Against Nicaragua, Nicaragua v. United States of America – 1986,
[151] RAIC D., *supra* at 49, p. 232-233; Van den Driest S. F, pp. 47-49
[152] Van den Driest S. F, *supra at* 131 p. 49, Article 3 of UNDRIP.
[153] RAIC D., *supra* at 49, p. 238

the decision making processes of the government, providing a right of peoples to govern themselves, as stated by article 25 of ICCPR. Self-determination in its internal dimension is of particular importance in relation to human rights because, as the Human Right Committee states in a comment to the two covenants, it is "an essential condition for the effective guarantee and observance of individual human rights" and, as stated previously, it guarantees the protection of cultural and ethnic identity of peoples from discriminating provisions of the government of the state in which they live[154]. Self-determination is a *conditio sine qua non* for the observance of human rights and it is necessary for the existence and preservation of subgroups identity, as it represents a relevant level of security against abuse of powers and interference with the enjoyment of human rights. This is a sort of surplus value of internal self-determination, which also contributes to define the on-going character of the right[155]. Internal self-determination has become increasingly important after the decolonization period and its application has been stressed by the most relevant international legal instruments. The supreme court of Canada in reference to the secession of Quebec stressed the internal dimension of the right, arguing that the right to self-determination is normally fulfilled through internal self-determination, and UN practice also acknowledges the existence of this aspect of the right. While external self-determination in understood as the right of colonial people, internal one is the main aspect of the right in post-colonial period.

Conversely, the external dimension of self-determination is an implementation of the right which provides the formation of new independent states that leads to a change of external boundaries of the states. It provides (to the people) an international status to the people, entitling them of the right to freely constitute a nation-state or to integrate or associate to a third, existing state. It was exercised particularly during the colonial period and, as it has been analysed in previous paragraph, it was conceived as a synonymous of decolonization. As in the case of the internal dimension, some international instruments concern external self-determination, mostly resolutions and declarations related to the colonial context. As

[154] Van Den Driest S. F, *supra at* 131
[155] RAIC D., *supra* at 49, pp.240-241.

seen in previous paragraphs, two of the most important instruments related to external self-determination are the two GA resolutions of 1960, the 1514 and 1541. The Declaration on Decolonization (Res. 1514) states that a speedy and unconditional end of colonialism was needed and it would be achieved through self-determination. People were subject to alien subjugation and, thus, to manipulation and interference of other, external states. In order to freely determine their status and gain independence from colonial powers they could use their right to external self-determination, provided by the resolution, by integrating with other states or even dissolving their own state, *de facto* modifying its external borders. Moreover, Resolution 1541 provides three possible ways to achieve self-determination, the aforementioned independence, free association and integration, which can be considered the preferred way to achieve self-determination from an external power. These resolutions clearly refer to external self-determination as they were adopted during decolonization period, during which the main goal was to eliminate colonialism and alien subjugation, without caring about intra-state relation between peoples and their own states. Even if external self-determination was mostly emphasized during colonial period, it developed also beyond that era, as demonstrated by its inclusion in the Friendly Relation Declaration and by some practical examples such as the secession of Singapore or the dissolution or Czechoslovakia.

As can be noticed, in contrast to the internal dimension, external self-determination inevitably causes modification of the external border of the states and refers to relationship between people and external power which dominates it, which interfere with their right to freely determine its political states and its cultural and social development. There are several modes of implementation both external and internal self-determination, that go from referenda or plebiscites to secession and will be analysed in the next paragraph.

1.3.2 Modes of implementation of external and internal dimensions of self-determination.

The right to self-determination of people is widely considered as one of the fundamental human rights in international law. It addresses people directly, without

the mediation of the states, and it has a universal and on-going character. As it was first developed as a way to dismantle decolonization, it can be argued that its core goal is freedom from subjugation. In its early stages it first referred to alien subjugation and decolonization, nevertheless, once colonialism expired, self-determination continued to develop outside colonial period, widening the concept of subjugation beyond its external aspect, including also oppression and discrimination by government within the state. Self-determination entitles people of a right to freely determine their status and cultural features and, as referring to people as a whole, it can be considered a collective human right, which requires the expression of the free will of people for its exercise.

As it was said, self-determination can have both an internal and an external aspect, that it can be exercised in several different ways. Internal self-determination has been widely emphasised outside the colonial context and it refers to the relation between a people and its own state or government. It provides that all people have a right to participate in political decision-making of their state. The participation can be either direct or indirect and the way through which peoples exercise their right to participate can be seen as a mode of implementation of the right to internal self-determination. The notion of direct participation to the decision making processes refers to the right of people to stand for election to create their representative government. It can be achieved directly, through plebiscites or referenda regarding public matters[156]. Although this kind of participation is a direct expression of the will of people, in some cases its exercise can be extremely difficult, especially in those states with a numerous population. In larger polities it is quite impossible to exercise a simultaneous right to participate to decision making processes, especially at a central level of decision making, and in these circumstances an indirect form of participation is preferred.[157] The Friendly Relations declaration and The Vienna Declaration of 1993 relate the concept of representative government to the right of self-determination, arguing that its presence is fundamental for the exercise of internal self-determination. The representative government expresses the will of people, as it is elected by the

[156] RAIC D., *supra* at 49, pp.272-273.
[157] ibidem

population, and as such it must represent the population as a whole, without any distinction. This notion is universally accepted and also confirmed by UN charter and the above mentioned Friendly Relations Declaration and 1993 Vienna declaration[158]. Since representing the people as a whole, it obviously has to be a non-discriminating government, allowing people to participate in the general decision-making processes of the states. For this reason, a representative government is often equated with a democratic form of government and this is emphasised by several international legal instruments, mostly concerning Human rights. The Human rights Committee firmly stressed this aspect of representative government. It emphasised that the right of political participation provided by article 25 of the ICCPR, which enables the population to participate to the decision making processes of the government of their state, is closely related to the right to internal self-determination, that enables people to determine their own status and decide their own government, and these two right based on the free choice of people are at "the core of democratic government, based on the consent of people"[159]. This understanding of representative government as a democratic government reflects a western conception of democracy. Some scholars argue that the internal aspect of self-determination can be equated to the western style concept of democracy and this has been accepted by an increasing number of states[160]. Although this conception of internal self-determination and representative government is widespread on the globe, there is some criticism, negatively influenced by some state practice in achieving democracy. First of all there is no *communis opinion* that representative government means democratic government: many states, during the drafting of Friendly relation declaration argued that a representative government should be at least a non-racist government and also former UN secretary General Kofi Annan claims that democracy is "not a model to be copied but a goal to attain"[161]. Linking internal self-determination to a western-style democratic government leaves no choice to people, which are not free to decide the form of government they prefer, being incompatible with the core meaning of self-

[158] Van den Driest S. F, *supra at* 131 p. 53; RAIC D., *supra* at 49, p. 273;
[159] RAIC D., *supra* at 49, pp. 274-275; Human Rights Committee, general Comment 25 (57), Un doc. CCPR/C/21/-Rev.1/Add.7, 1996, para. 1-2.
[160] RAIC D., *supra* at 49, p.275
[161] VAN DEN DRIEST S. F, *supra at* 131, p. 56; UN Doc. A/2/513, 1997, para. 27.

determination. As a matter of fact, a representative democratic government should be seen as one of the several possible means for achieving self-determination. It clearly requires a representative government, which can include other, different forms intended to represent people, with the minimum requirement to be a non-oppressive government. Another mode of implementation of self-determination is territorial autonomy. Claims for autonomy generally arise in situation of discrimination perpetuated by a government against its people, or at least a part of it, or it can be demand to reinforce and preserve a people identity which differ from the majority of the population of the state it belong to. Autonomy provides a right to act upon one's own discretion. It denotes a certain degree of governmental independence for groups of people which differ from the majority of the population, constituting the majority in a specific region of the state. It can be related to cultural, social or economic matters and can be based on a federal system of organization of the territory. Through autonomy a group numerically inferior can protect the individual right of its member and also preserve its collective identity[162]. When granted to minorities, it can be seen as a way to achieve internal self-determination, as it gives them the possibility to freely determine their status and protects the development of their interests. While a legal status for self-determination has been recognized, no general right to autonomy has been agreed under international law[163]. Autonomy can be achieved in several ways. As one of several options for the exercise of self-determination, autonomy can be achieved through good faith negotiation between the parties: states negotiate with the minorities claiming for autonomy in order to reach an agreement and according to the degree of autonomy considered appropriate[164]. There are also many other ways of implementation of internal self-determination in addition to representative government and autonomy, such as federalism, power sharing or holding a referenda[165]. All of these entitle people of a right to freely determine their status and preserve their identities and cultures[166].

[162] RAIC D., *supra* at 49, p. 281
[163] Id., p. 281.
[164] Id., p. 283.
[165] Id., 283-285.

The Friendly Relations Declaration also refers to modes of implementation of external self-determination arguing that it can be achieved through the establishment of a sovereign and independent state. Like internal self-determination, the external aspect of the right can be exercise is several ways. It can be implemented through a peaceful dissolution of a state or merger of one state with another or even through secession[167]. Dissolution provides the establishment of a new independent state through the separation of one or more parts of the territory of an existing state. It often occurs in federal type systems and relevant examples of dissolution are the break-up of the Soviet Union and of the dissolution of the Socialist Federal Republic of Yugoslavia[168]. Furthermore, external self-determination can be exercise through the merger or reunification of a pre-existing state. This kind of implementation rarely occurs, but there are very important examples of it, such as the reunification of East and West Germany, formerly divided by the Berlin wall[169]. The most relevant mode of implementation of external self-determination is secession. It generally refers to the establishment of a new independent state through the withdrawal of an integral part of the territory of an existing state, with or without the consent of the state government[170]. Secession can be both consensual, or constitutional, and non consensual, which is referred to as unilateral secession. If consensual, it occurs when the separation of part of territory is prior accepted by the central government, as happened in the secession of South Sudan from Sudan[171]. Secession can be also provided by constitution of a state which determines that specific minorities or part of the population, generally restricted to a federal type of entity, is entitled to a right of external self-determination, as can be seen in Ethiopian Constitution, which states that "every Nation, nationality and people in Ethiopia has the unconditional right to self-determination, including the right of secession"[172]. It can be noticed that the exercise

[167] VAN DEN DRIEST S. F, *supra at* 131, P. 85.
[168] Ibidem.
[169] Id., pp. 86-87.
[170] Id., 87-88.
[171] In the case of secession of South Sudan, in 2011 a referendum was held in Sudan on the question whether the Southern part of the Country should separate from the rest of it. the 98.83 per cent of the population voted in favour of secession. President Al-Bashir welcome the result of the referendum and promulgated a formal decree acknowledging the outcome. The South Sudan secession case will be analysed in the third chapter of this work.
[172] Van den Driest S. F, *supra at* 131 pp.87-88; Constitution of the Federal Democratic Republic of Ethiopia, adopted on 8 December 1994, Article 39 (5).

of the external dimension inevitably causes the modification of the external borders of a state. It should be added that dissolution or secession may be realized in a peaceful way as well as through wars and conflicts[173]. The creation of new states through secession has been considered controversial and contested as it is considered a violation of principles like territorial integrity and state sovereignty. Secession is one of the most critical issues that international law does not currently address adequately. Historical cases of secession, such as those of Abkhazia and South Ossetia seceding from Georgia, the independence of Kosovo from Serbia and secession of South Sudan, show that secession often involves violence and also war, as in the case of Ukraine, militarily engaged in a civil war against separatists in favour of independence of Eastern Ukraine since the Crimean secession in 2014. All these cases and the right to secession and its relation with external self-determination will be broadly analysed in further chapters.

1.4 Self-Determination in international law.

As previously discussed, in its early stages, self-determination was seen as a political principle and it did not appeared anywhere in international legal instruments, held to be part of international law only in cases of oppression. In the post-war period, since the creation of the United Nations, its status has changed and it has been included in several relevant international instruments, likewise the UN Charter, General Assembly resolutions, the two Covenants on International Human Rights and also figured in numerous cases of the ICJ which contribute to shape its legal status and its development from political principle into a legal right.

1.4.1 The status of self-determination in international law and its normative levels

In previous paragraphs, the analysis of the historical development of self-determination has already highlighted its shift from a merely political principle to a legal right. Its acknowledgment as a right of people in several international legal instruments, such as the Human rights Covenants, the Friendly Relation Declaration, the Helsinki act as well as pronunciations of the ICJ, contributes to shape the legal

[173] Ibidem.

status of self-determination. Also state practice confirmed this argument. As a matter of fact, 167 state are signatories of the two Covenants on Human rights, which recognizes Self-determination as a right of people, and those states which are not part of the covenants are mostly signatories of other instruments, like the African Charter on Human and Peoples' Rights, that also provides for the right to self-determination, thus implying that the vast majority of the states agrees with the inclusion of a right to self-determination in international law[174]. Furthermore, jurisprudence refers to self-determination as a part of international law. This reference results from several decisions, which emphasize that the right to self-determination must be qualified as a legal right under international law. The ICJ stated that it has an *erga omnes* character, as claimed in the *East Timor case* and confirmed in the *Construction of the Wall advisory opinion*, in which the court asserted that the "obligation *erga omnes* violated by Israel included obligation to respect the right to self-determination"[175], recalling the above mentioned judgment on *East Timor*[176]. Legal doctrine also supports the argument that self-determination can impose obligations on all members of the international community, arguing that it can also be considered as a *jus cogens* and as such no derogations are possible[177]. A description of *jus cogens* can be found in Article 53 of Vienna Convention on the law of Treaties, according to which a rule can became a peremptory norm if it is "accepted and recognized by the international community as a whole". Some scholars firmly support that the right to self-determination is to be added to the few rules considered absolute right, such as prohibition of use of force and genocide, and this contribute to create an ongoing debate over the *jus cogens* character of self-determination[178]. In conclusion, self-determination in international law is characterized by three relevant normative levels: it can be seen as a human right, as an *erga omnes* rule and as *jus cogens*. These three normative levels will be analysed in the next paragraphs.

[174] SAUL M., *The Normative Status of Self-Determination in International Law: a Formula for Uncertainty in the Scope and the Content of the Right?*, Human Rights Law Review, volume 11, Oxford University Press, 2011, pp.625-626.

[175] In this statement, self-determination was referred to as having an erga omnes character and also included within obligations of humanitarian international law, thus giving to self-determination the status of legal right. Legal Consequences of the *Construction of a Wall in the Occupied Palestinian territory, advisory opinion 2004, p. 136, paras. 155-156.*

[176] East timor Case, ICJ Reports, 1995, p. 102, para. 29.

[177] Van den Driest, *supra at* 131, P. 62-63.

[178] Ibidem.

1.4.1.2 *Self-determination as a human right*.

While the early stages of its development as a legal right can be traced back to its inclusion in the two GA Resolutions of 1960, the 1514 and 1541, self-determination began to be referred to as a human right after its inclusion in the two Human Rights covenants of 1966. This inclusion gave way to a debate over the actual relation between self-determination and human rights and there have been many attempts to give a full meaning to this relationship. First of all, the Human Rights Committee, in its General Comment n°12, considered self-determination as an "essential condition for the effective guarantee and observance of individual human rights" and its exercise improve the protection and preservation of these rights, thus stressing that it is perfectly integrated in Human Rights context[179]. On the other hand, Cassese refers to self-determination as the mirror image of human rights, describing this relation from an inverted perspective: according to him self-determination presupposes human rights and "whenever these rights are trampled upon, the right to self-determination is infringed.", arguing that the protection of human right guarantees the correct exercise of self-determination[180]. At any rate, the inclusion of self-determination in the two covenants brought it into the international human rights framework, which contributes to shape it as a legal norm. This legal framework is mostly composed by global and regional treaties containing international human rights law. Most of the provisions of these treaties are also part of customary international law, which contributes to give to human rights and self-determination a universal character, as very few states are not part to at least one instrument related to human rights. What is more, principal international law tribunals, like the European court on Human rights or the Inter-American Court of Human Rights, recognize and clarify this framework, contributing to give a legal status to all the norms composing the framework[181]. Between the principal international treaties composing the framework, the ones which refer to self-determination as a right are the above mentioned ICCPR and ICESCR of

[179] HILPOLD P., *self-determination in the 21st century – modern perspectives for an old concept*, Israel Yearbook on Human Rights, Volume 36, Martinus Nijhoff Publishers, Leiden/London, pp. 262-263; General opinion n°12, U.N. Doc. HRI/GEN/1/Rev.1 at 12, para.1.

[180] Ibidem.

[181] MCCORQUODALE R., *Self-Determination: a Human Rights Approach*, International and Comparative Law Quarterly, volume 43, 1994, p.870.

1966. Nevertheless, despite the inclusion of self-determination in the legal framework of human right, none of the aforementioned international tribunals expressed directly on people claiming the abuse of their right to self-determination, mainly because they primarily concentrate on abuses of individual rights, avoiding issues of collectivity. Nevertheless, the purpose of self-determination is to protect people from oppression and to protect their human rights. This common aim allows it to be considered within the framework, as they share the same purpose of protection and preservation of international human rights[182]. As part of the framework, self-determination is subjected to the general rules, discerned within it. First, like human rights, it has to be interpreted "in the context of current standards", by taking into account the condition of the context in which it is exercised; second it is subject to limitations "to protect other rights" and the general interest of the society", which must be considered "narrowly, with consideration given to the circumstances of a given society", that has to prove that there are pressing social need before limiting the right; then, "a victim of a violation, any individual, NGOs or group of persons, must present the claim[183]". Among these rules, the one which needs to be analysed more closely is the one about limitation. Generally, limitations are ignored in human rights and in the context self-determination, even by those who claim an abuse of their rights. While some human rights are considered absolute, such as freedom from torture or prohibition of genocide, most human right are subject to limitations. These limitations provides that other rights of the society and its security, public order or morals should prevail and the exercise of a human rights in contrast with one of them should be limited, in order to maintain the given social order, international peace and security. Of course, this also applies to self-determination, for it is not an absolute right without limitations. Its purpose is to entitle people to freely determine their status and to protect their cultural identity, whose exercise can also cause structural or institutional changes in the state, or affect other groups or individual rights, living in the same state, state security or international peace. Limitations are thus required by the nature of the right

[182] Id., p. 872.

[183] ICCPR ICSCRm 1966. All these rules are compatible with Universal Declaration of Human Rights of 1948, precisely with article 29: "everyone shall only be subject to such limitations solely for the purpose of securing due recognition and respect for the rights and freedom of others and of the meeting the just requirements of morality in democratic society", MCCORQUODALE, *supra* AT 161 pp.873.

and can be dealt with by using the human rights approach mentioned above[184]. Article 5 of the Covenants provides that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein", claiming that the exercise of self-determination should be balanced with other human rights of the covenants[185]. Of course this kind of limitation goes beyond 1966 Covenants as also European Court of Human rights prohibited "indoctrination against parents' wishes", that is the prohibition of those acts by groups or states aiming to destroy the rights or wishes of other groups in the same state or of the state itself, in order to protect the general interests of society. The aim of the limitations to the exercise of self-determination is also to protect groups that could be affected by it. In general, limitations to the exercise of some human right and self-determination are needed to protect groups or individuals from oppressive acts in the name of self-determination or, worst, of human rights.

1.4.1.2 *Erga omnes character of self-determination*

In the *Barcelona Traction* case, the ICJ stated that there are some obligations in international law that "can held all states of international community to have a legal interest in their protection". This can be considered one of the first attempts to define obligations *erga omnes*, also defined as obligation "incumbent on a states, which must be fulfilled regardless the behaviour of other states". The right to self-determination is considered an *erga omnes* obligation and this is provided in the ICJ in the *East Timor case* and confirmed in the *Construction of the Wall advisory opinion*, where the court asserted that the "obligation *erga omnes* violated by Israel included obligation to respect the right to self-determination", recalling the above mentioned judgment on *East Timor*. The ICJ definition should be added to other considerations on the *erga omnes* obligations of self-determination claimed by other international bodies, like the *Insitut de Droit International* or the International Law Commission, which argues that *erga omnes* obligations focus on the legal interest of the state towards international

[184] MCCORQUODALE, *supra* AT 161, P. 874-875; SAUL M, P. 627-628.
[185] ICCPR and ICESCR, 1966.

community[186]. *Erga omnes* obligations are owed by states to the international community as a whole and any state can be invoked responsibility for their protections and even a call for reparation is allowed when violated and have also the mandatory duty to respect them in every circumstance. There has been a full acceptance of self-determination as an *erga omnes* norm by the international community and this acceptance has had relevant implications in international law and states behaviour. In case of abuse of the right to self-determination, any state of the international community can invoked responsibility and call for reparations for the injured party, in order to protect its rights and its beneficiaries. Moreover, a state can also suggest the application of lawful countermeasures, which do not imply the use of force, to ensure the compliance of the injuring state. This is provided by article 48 of ILC, which sets out that "Any State, entitled to invoke responsibility, may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition; (b) performance of the obligation of reparation, in the interest of the injured State or of the beneficiaries of the obligation breached", referring to countermeasures in articles 49 and 54[187] according to which states have the to take lawful measures against that State to ensure the end of the abuse and reparation in the interest of the injured[188].

1.4.1.3 *Jus cogens* status of self-determination.

There are only few rules of international law which have an absolute character and can be considered *jus cogens*, such as the prohibition of the use of force, genocide, slavery and racial discrimination. Many scholars argues that self-determination should be added to this list and considered as a *jus cogens* norm. The concept of *jus cogens*, or peremptory norms occurred in international law through the 1969 Vienna Convention

[186] PALMISANO G., *Autodeterminazione dei popoli*, in *Enc. Dir*., vol. Annali V, Milano, 2012, pp. 126-127.

[187] "1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two. 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question. Any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached". International Law Commission work on State Responsibility.

[188] PALMISANO, *supra 166* PP.126-127; SAUL M, P. 632-633

on the law of treaties: article 53 states that a *jus cogens* norm is "a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In order to be considered a *jus cogens*, a norm should be accepted by the majority of the states as such. In addition, if a treaty conflicts with a *jus cogens* of general international law is void and if a state fails to accomplish obligations of a peremptory norm, other states must not recognize the result of this failure[189]. It has been argued that *Jus cogens* norms can also have a regulative or a constitutive character: those norms which prohibit or permit some behaviours or state of affairs are regulative, while those used to establish international tribunals or for defining legal concepts are constitutive. Many scholars argue that self-determination can be seen as a *jus cogens* with a regulative character, as it aims to allow people to freely determine their status, thus permitting a given behaviour. Three possible approaches to determine how self-determination relates to *jus cogens* have been identified. According to some scholars self-determination should be considered *jus cogens* in its entirety and each of its aspects must be respected and fulfilled by states in order to validate their actions. The entirety approach is quietly debatable and, from a positive law perspective, it is extremely troubling to identify self-determination in its entirety as a peremptory norm. As previously set out, there is a two-stage test a norm should pass to achieve *jus cogen* status. First of all it must be accepted as jus, then the overwhelming majority of states must accept it as *jus cogens*. The level of specificity of the norm could influence the acceptance of a norm as *jus cogens* because the more specific and clear it is the easier it would be to fulfill it and avoid violations. Self-determination can be considered an umbrella type of norm, composed by several aspects. An acceptance of this multifaceted norm could underlie certain interests of states in retaining some aspect of the norm, for example a democratic government as representative government of self-determined people, which can be accepted as *jus cogens* without passing the aforementioned test, simply by adding it to the umbrella of

[189] LINDERFALK Ulf, The Effect of Jus Cogens norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?, The European Journal of International Law Vol. 18 no.5, pp. 856- 857; Saul, p.634.

self-determination, already classified as *jus cogens*. Another mode of relating self-determination and *jus cogens* is the qualified approach. According to this approach, more specific aspects of self-determination can be considered to have a peremptory norm status, rejecting the entirety approach idea. Some scholars support this argument in their studies. In his special report on prevention of discrimination, Espiell highlights the external dimension of self-determination, arguing that the right to self-determination only applies to people subject to alien subjugation, thus recognizing that only this aspect has a status of *jus cogens*[190]. He supported his idea highlighting that similar statements were made at the UN and that many delegations also identified external self-determination, in its colonial aspect, as an example of peremptory norm[191]. Conversely, Cristescu, in another special report, argued that there was no evidence of an overwhelming acceptance of self-determination as a *jus cogens*, stating that "no UN instrument confers such a peremptory character on self-determination [..]"[192]. It is noticeable that these studies only refer to the peremptory norm status of self-determination in the colonial context and they do not consider other aspects of the right. This obviously does not imply that other aspects of self-determination are not *jus cogens*. Cassese for example, argues that other particular aspect of the right could be considered *jus cogens*, namely the right of people to freely choose their rulers and the right to have access to the government. Thus it could be said that self-determination can possibly have a *jus cogens* status in more than one of its aspects. The "possible" approach is the third approach, and it refers to the possibility of the right to have a peremptory norm status. In this case, self-determination is analysed in its entirety and it involves many scholars commenting on the possibility of the right to be considered *jus cogens*. Some argue that even if it is an essential right, it is "site of controversy, as threat to territorial integrity," that limits the *jus cogens* status only to certain aspect, as Burchill suggests, while other endorse the qualified approach ideas that only external self-determination can be considered *jus cogens*. Scholars did not

[190] The right to self-determination: implementation of United Nation Resolutions, Study prepared by Hector Gros Espiell, Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/405/Rev.1, 1980, para. 42

[191] Id., paras. 71-87.

[192] Cristescu, The Right to Self-determination: Historical Current Development on the Basis of United Nations Instruments, E/CN.4/Sub.2/404/rev.1, 1981, para. 154.

provide any reason or explanation for their hesitation in proclaiming self-determination as a whole or only certain aspects, as a peremptory norm[193].

As can be noticed there are different ideas on whether self-determination is to be considered *jus cogens* or not. Over the years, self-determination developed first from moral principle to right and then from jus to *jus cogens*. Many scholars continue to deny that self-determination is a legal right with the status of peremptory norm, considering it to be incapable to attain this status. This debate began in the 1960s, when it was argued that self-determination was not even a right, but only a principle[194]. The first reference to self-determination as a right was made by the ICJ in the Namibia case, and confirmed in the Western Sahara case, where the court explicitly referred to self-determination as the right of people to choose their status. The uncertainty over the real status of self-determination influenced the debate. While in recent years many international instruments have confirmed the legal status of self-determination, its status of peremptory norms is still uncertain. Although international law commission cited self-determination as a "further example of *jus cogens*", much of the confusion related to the status of self-determination is due to the fact that both states and most prominent scholars fail to clearly express their opinion on the *jus cogens* status of self-determination[195]. To solve this issue, scholars should be more precise about the aspects that, in their opinion, a *jus cogens* status should have. By painting a clear picture of the right and its status, states can be encouraged to make suggestion for the scope of the right and to take a position over its status of *jus cogens*[196].

1.4.2 Self-determination in relation to other principles of international law: Territorial integrity and *uti possidetis*.

As stated above, many international legal instruments provide the right to self-determination while emphasizing at the same time other principles that are closely

[193] SAUL, *supra* at 156 pp.635-640
[194] POMERANCE, s*upra* at 70, p. 63
[195] Ibidem.
[196] State opinion is fundamental as the second stage of the test for a norm to achieve the status of jus coges is its acceptance as such by the wide majority of states. Thus, clairity in states' position is required, and they should also pay more attention to this issue to finally solve the problem and give self-determination a status in international law.

related to the right of people to determine their status. Article 1(3) of ICCPS and ICESCR provides a limitation on self-determination, stating that it should be exercised "in conformity with the provision of the Charter of the United Nations". Other principles provided by the Charter assert that the UN generally purposes to maintain international peace and security. The protection of these purposes thus causes a limitation of self-determination, which should take into consideration principles like territorial integrity and *uti possidetis juris*.

Territorial integrity is a specific limitation to self-determination. The declaration on principle of international law states that self-determination shall not "be constructed as authorizing any action which would dismember the territorial integrity of a state [..]". The concept of territorial integrity emerged in the second post war period and became a key principle in the UN charter, provided by the article 2(4). It has been also mentioned in other international instruments such as Helsinki Final Act, or the OAU Charter and so on, and affirmed in many resolutions, like the Friendly Relation Declaration. Territorial integrity indicates the effective control of the states over material elements lying between its boundaries and it is now considered a corollary of a state sovereignty[197]. Resolution 1514 states that "any attempt aimed at the disruption of territorial integrity is incompatible with the purposes of the UN Charter" and the principle become relevant when the effective control of a state over its territory is threatened by external of internal agents, linking it to the right of self-determination. In particular, the external dimension of self-determination was interpreted by taking into account the principle of territorial integrity, as the division of a territorial unit, even if it was a colonial territory, was not accepted if consent of the majority of the population had not been expressed[198]. There is a close relationship between territorial integrity and self-determination as the exercise of the one must be interpreted in the light of the other and thus self-determination can be limited by territorial integrity. Nevertheless, the territorial integrity limitation cannot be claimed in every situation. While stating that "self-determination shall not "be constructed as authorizing any action which would dismember the territorial integrity", the Declaration on Principle of International Law also provides that only "states possessed

[197] RAIC D., *supra* at 49, pp.293-294
[198] ibidem

of government representing the whole people belonging to the territory can rely on this limitation". This is also confirmed by state practice: as a matter of fact state practice shows that territorial integrity limitation are often ignored by oppressive governments, as in the cases of independence of Bangladesh or Singapore. Only a government which represents its people as a whole and allows them to decide their status is really interested in territorial integrity and its respect, evidencing that this kind of limitation can be applied only by non-oppressive governments which allow the exercise of internal self-determination[199].

The principle of *uti possidetis* provides that new independent states will maintain the same boundaries they had when they were colonies or administrative units. This doctrine sets its origin in Roman law and, in modern times, emerged in the international system during the decolonization period. In Roman law, the principle of *uti possidetis* determines an interdiction of the *praetor*, which prohibits the alteration of the existing state of possession between two contending individuals. The principle was also called *uti possidetis, ita possideatis* and was used to preserve the status quo[200]. With its transfer to the decolonization context, it was applied in a totally different context. It was first applied in the early years of 1800 to South and Central American colonies and its main aims were the prevention of a new wave of European colonization and prevention of boundaries dispute between the new states. The doctrine of *uti possidetis* has also characterized African decolonization, focusing on the continuity of the boundaries. The circumstances of African decolonization where extremely different from the ones of Latin America, as boundaries were artificially delimited. Moreover frontiers were perceived as unjustified because they did not respect any cultural, historical or geographical tradition, as they were arbitrarily marked. For this reasons *uti possidetis* in the African context was seen as a guarantee for devolving boundaries and maintaining the status quo and "it was in the interest of all Africans to respect frontiers draw by former colonizers" in order to prevent and avoid new territorial wars [201]. The fact that *uti possidetis* was primarily adopted in

[199] MCCORQUODALE, *supra* AT 161, p. 878-880; on self-determination and territorial integrity see also: GUDELEVICIUT V., *Does the principle of self-determination prevail over the principle of territorial integrity?,* Internationl Journal of Baltic Law, Volume 2, 2005, pp. 48-74;
[200] RAIC D., *supra* at 49, p. 297-298
[201] RAIC D., *supra* at 49, p. 300

many cases during the decolonization period led to the expression of doubt on its applicability beyond the colonial context and thus on its universal character. These doubts expired as a result of *uti possidetis* adoption in non-colonial situation, in the context of the break-up of former Yugoslavia. The concept of *uti possidetis* was applied to the internal federal division of Yugoslavia and was expressly recognized by European Community and all its member states and by the Arbitration Commission on the International Conference on Yugoslavia, which stated, in its Opinion 3, that the principle of *Uti possidetis* constitutes a general principle of international law, not confined to situations of decolonization, de facto entitling it of a universal character[202]. The principle has been sometimes equated to the concept of territorial integrity, but they actually have different modes of application and characteristics. Territorial integrity is generally applied after a territorial entity established itself as an independent state, giving to the principle an on-ongoing character. Conversely *uti possidetis* has a temporary application, as it is applied in the moment of the transition of sovereignty, to guarantee the respect of former boundaries, and then expires when transition is completed. The only common characteristic is their relation with the right to self-determination. Like territorial integrity, the *uti possideti* principle is a means of interpretation of the right to self-determination. Some international tribunals adopted the principle of *uti possidetis* as a limitation of self-determination because, in many cases, the exercise of the right might have led to an alteration of former colonial boundaries and thus resulting in inequities often giving rise to conflicts and war, as also Judge Luchaire remarked in the frontier dispute case. The *Uti possidetis* principle provides limitation especially in those cases when claims of self-determination lead to secession, whose result can also be the alteration of former boundaries. [203]

As stated previously, self-determination can be conceived in many different way. In its early stages, at the beginning of the twentieth century, self-determination was considered a mere principle. In the aftermath of the Second World War, after the creation of United Nations, it began to be considered as a political principle of all

[202] RAIC D., *supra* at 49, p.302.

[203] MCCORQUODALE, *supra* AT 161, p. 880-882. On *Uti possidetis* see also CASTELLINO J. *International law and self-determination : the interplay of the politics of territorial possession with formulations of post-colonial national identity*, The Hague [etc.] : Nijhoff, 2000, pp. 109-144

people under alien subjugation searching for independence and with the inclusion in the most relevant Resolutions and international instruments, like Res. 1514, 2625 or the two Human Rights covenants, it began to be conceived as a legal right, applicable both in colonial and post-colonial context. As noticed previously, self-determination is a multi-faceted right, with an internal and an external dimensions, which can be implemented in several ways, implying or not the modification of a state boundaries. Although it has been argued that external self-determination was strongly emphasized to decolonization context, there are examples of external self-determination in present day, like the secession of Singapore from Malaysia or secession of East Timor and so on, that all caused a modification of states frontiers. As a matter of fact it can be argued that one of the most relevant mode of implementation of external self-determination is secession, which will be addressed in the next chapter.

II

SECESSION

SUMMARY: 2.1. Theories of secession; 2.2. Definition of secession; 2.3. Secession in international law: the legitimacy of the right to secede

2.1. Theories of Secession.

As seen in the first chapter, the external dimension of self-determination can be implemented through several, different means, generally leading to the formation of independent, new states. One of the most important and controversial means of implementation of self-determination is secession. These concepts are two of the most contested issues of international system and, while self-determination has been widely supported and accepted as a right, secession still remains a neglected topic, not currently addressed adequately in international law. History has showed that secession was often accompanied by violence and was considered as a source of instability of international order. For this reason, secession was not addressed as well as self-determination but, conversely, as former UN secretary general Thant affirmed, it was not accepted and "will ever be accepted as a principle" of UN and its member states[204]. In recent years this trend has changed and many scholars change their mind turning their attention to secession. As a matter of fact, there has been an increase in secessionist movements in the last decades, showing that secession has became more common than before. The growing number of secession movements highlights that there is a need of addressing secession, as it is among the most pressing issues facing the world.

2.1.1 Justifying secession: are theories of secession really needed?

The lack of a theory of secession in the past decades can be seen as a defect of the liberal doctrine of political philosophy, which was widely spread in the post-colonial periods[205]. According to this theory there was no needing of secession in order to maintain the status quo in the international system. One of the most prominent

[204] Stanford encyclopedia, available at *http://plato.stanford.edu/entries/secession/*.
[205] BUCHANAN, *Towards A Theory Of Secession*, Ethnics, volume 101, 1991, pp 323-325.

theorist of the liberal doctrine was John Rawls, that, with his theory of justice as fairness, contributes to provide a valuable reason for the failure in the studying of secession and the absence of an actual theory[206]. Rawls theorized the existence of a liberal, fair society, in which citizens are free and equal. Rawls' fair society is characterized by pluralism and it exists under favorable conditions: there are enough resources to meet the needs of each of its member. This fair society is a closed society and every member is part of "one cooperative scheme in perpetuity"[207], until his death. Admitting a right of secession in this kind of society could only have a destructive effect on it, because it would give people the awareness of the existence of many life options beside the ones they were forced to choose, that would probably make them want to change the perfect compliance in which they live, searching for a better commitment best suiting their will[208]. Nonetheless, the destructive effect of secession on this ideal society cannot be a reason for not studying it and not developing a theory of secession. As a matter of fact, the issue of secession extends beyond liberal doctrine: it is nowadays one of the most important and crucial debate in international law and this is confirmed by an increase of consideration by scholars, searching for argument that provide a justification for the application of secession in domestic and international affairs[209]. Some scholars justify secession by arguing that it is necessary when the political authority of a state lacks consent. One of the most prominent theorist supporting this argument is Harry Beran, who argues that the consent of the governed is the principal condition for legitimating the government, which also legitimate the existence of a right to secede[210]. Even if the argument of consent is a valid theory, it can be criticized and considered incomplete, as it does not take into account one of the most relevant component of any justification of secession: territorial claims. As a matter of fact, a group needs to claim a territory in order to secede, where to establish their new, independent state, and the lack of consent is not enough to claim secession. Claims of secession can be justified by the

[206] BUCHANAN, supra at 181, pp 323-325
[207] RAWLS J., *Justice as fairness: a brief Restatement*, Harvard University Press, 2001, Boston, p.132; see also Stanford encyclopedia, supra at 1;
[208] Ibidem.
[209] BUCHANAN, supra at 181, pp.326-327;
[210] Id., p. 327;BERAN H., *The Consent theory of Political Obligation*, Beckenham , Kent: Croom Helm, 1987, p,37.

right to self-determination of people[211]. This argument is also called normative nationalist principle and asserts that every people has the right to have its own territory, arguing that political and ethnic boundaries have to coincide. This is the most relevant justification of secession as it comprehends the element of territorial claim by a group, it is based on the right to self-determination and it is also accepted by the United Nations, which endorses it in many resolutions[212]. But, on the other hand, nationalist principle can lead to a political fragmentation of territory: cultural pluralism is a characteristic of the modern, liberal state and the fact that every culture shall have its own territory, added to the not-fixed, increasing number of ethnic groups in the world, inevitably lead to fragmentation. Here again, as for the consent argument, being an ethnic group is not enough to justify secessionist claims and a valid territorial claim is needed[213]. The two most complete arguments justifying secession are the argument from rectificatory justice and the one of discriminatory redistribution. Both concern territory and this make them more valid than the others analysed above. According to the rectificatory justice theory, a political unit has a right to secede when it has been unjustly incorporated. This argument include a territorial claim and for this reason many scholars have assumed that it is the only right justification of secession. According to this thesis, secession is a means for reappropriation of an unjustly taken land. This is what scholars call historical grievance[214]. Many secessionist movements add an historical territorial claim to the other reason for which they are claiming secession. This generally happens when the territory belonged to a group in the past has been unlawfully annexed or occupied by another states. Brilmayer asserts that there are at least two argument that can demonstrate when existing boundaries are illegitimate and there is thus a claim of secession based on historical grievance[215]. The first asserts that the contested territory was annexed through conquest by the parent state. In this case, the seceding group bases its claims of secession on an improper annexation[216]. The parent state is responsible of an illegitimate act and thus the

[211] Id., p.328;
[212] Id., pp.328-329;
[213] Id., p.329;
[214] Id., pp. 329- 330;
[215] BRILMAYER L., *Secession and self-determination: a territorial interpretation*, Faculty Scholarship Series, paper 2434, Yale Law School Legal Scholarship Repository, 1991, p. 189;
[216] BRILMAYER L.,*supra at 191*, p.190

seceding group has a superior territorial claim over that part of territory they used to own in the past. According to the second argument, a third state intervenes and joins a dispute on territory between the dominant states and the separatist group and, by doing so, fixes boundaries in suiting its own convenience[217]. This happened during colonialism, when European powers fixed colonial boundaries without taking into account the existing division and left them intact when colonialism end, giving rise to all secessionist conflict and claim which characterized decolonization and post-colonialism.[218] A moral imperative thus underlies some secessionist movement: to fight for their land which was wrongfully included within the territory of an existing states, following that a complete secession theory should also take into account the historical feature of the seceding groups, in order to fully understands their claims[219]. Another argument that justify claims of secession is a discriminatory redistribution of policies by the government toward a group of citizens. In these cases the political authority implements taxations or economics programs in such a way that disadvantages a group while giving privileges to others[220]. Discriminatory distribution has generally a central role in claims of secession and it is the most relevant justification for secession beside territorial claim, as can be seen in Basque secessionist movement[221]. What is more, this unjust behaviour of the state with respect to one group deprive the state itself from any claim to the territory in which the victims live, giving them a valid claim to secede[222]. These are the most relevant argument for justifying secession but there are also other argument that can justify secession, among which the most important is the preservation of culture and identity, which also the main reason for self-determination.

[217] Id., p. 190;

[218] An example can be the secession of Bangladesh: Great Britain was in part responsible of having drawn the boundaries in a way to include two different cultures (Bengals and Pakistanis) within the same state, and whn the war began, Great Britain was no longer involved. The same can be saind for many of moder African states. BRILMAYER L.,*supra at 191,* pp.190-191*;*

[219] Id., p. 191;

[220] Buchanan, supra at 181, p. 330;

[221] Id., p. 331; in the case of Basque group, basque secessionist movement noticed that Spanish government enact a discriminatory policy with regard to basque minority concerning the payment of taxes: those of the Basque were three times higher than Spanish people taxes.

[222] The same situation of Basque people can be noted in south America prior secessionist war: the Southern Americans charged the North of providing a discriminatory policy through the federal taxes, which was seen as a way to foster only North economy. Id.pp. 331-332;

2.1.2. A theoretical approach to secession.

In recent years, secession has become more and more common and many scholars began to be interested in it, starting to analyse and study it in a more depth way. Before setting out a right of secession, it is necessary to consider theories that contributes to shape its legal status in international law. Secession has been studied by using a philosophical approach, which based its analysis on the political and legal concepts of legitimacy, trying to find a way to legitimize a right to secede[223]. The philosophical theoretical approach to secession contain two kind of theories, from which all the other existing theories of secession developed[224]. The first one is based on the right to self-determination, called the national self-determination theory, which also include a choice theory of secession[225]. According to the former, those groups having the right to self-determine themselves also have a right to an independent states, which means that groups classified as "people" are entitled to a right to secede. Moreover, choice theory claims an absolute right of secession. It finds its basis in the same justification of democracy: the consent of the governed determines the legitimacy of the government and this inevitably means that the governed have the right to retract their consent whenever they wish[226]. Similarly, choice theory hold that secession is an unconditional right and every group living in a given part of the territory of a state, which has collect a majority in favour of secession is inevitably entitled to it, free to secede from the former government, thus lacking of consent, whenever they want[227]. As previously seen, the consent argument cannot be considered as a valid justification of secession. This kind of theory is strongly debatable and, as a matter of fact, it has not found many adherents[228]. First of all, as seen in the previous chapter, there isn't a single, fixed definition of people and before being considered as such, a group should take many steps. Then, by giving to every subgroups a right to secede only because of their ethnic diversity would only

[223] *http://plato.stanford.edu/entries/secession/;*

[224] RAIC D., *supra* at 49, pp. 309-310; see also GROARKE P., *Dividing the state: legitimacy, secession, and the doctrine of oppression*, Aldershot [etc.], Ashgate, 2004, pp. 89-90

[225] Id., p.309;

[226] id., p.310

[227] Id., p. 310

[228] Id., p. 310;

contribute to create confusion and fragmentation, shifting the attention from those specifically different nationalities which strongly needs a right to secede. Then, secession cannot be seen as an absolute right because it must be taken into account the territorial integrity of the pre-existing state and its sovereignty[229]. The second philosophical theory of secession is the "qualified right of secession" theory and seems to be more convincing than the first set of approaches[230]. It is based on the notion of the just cause, which asserts that a groups has a right to secede when it is subject to serious and continuing injustices perpetuated by its own state. Secessionist claims are thus seen as a moral remedy to all the abuses of the former political authority[231]. One of the most relevant advocate of the qualified-right theory is Buchheit, who, in his studies, suggests that one of the most important approach to secession is the one that sees it as a means for protecting a group[232]. "The focus of attention is on the condition of the group making the claim; international law recognizes a continuum of remedies from the protection of individuals to minority right, ending with secession as ultimate remedy […]"[233]. By arguing this, Buchheit emphasises that secession is a collective right, aiming to protect the whole abused group, and at the same time recognizes that these collectivities have a right to secede under extreme circumstances. In defining secession as an ultimate, moral remedy, Buchheit introduced the notion of remedial secession, the most accepted view of secession in international law, that will be analysed further in the chapter[234]. Many other scholars adopts similar views on secession: Philpot confirmed the just cause theory, asserting that a group "attains a moral right to secession when it has suffered certain kind of threats or grievances" and Wellman argues that the source of secession has to be found in justice and choice of people[235].

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[229] id., pp. 310-311; the relation between these concepts will be analysed in further paragraphs

[230] GOARKE, supra at 200; see also *http://plato.stanford.edu/entries/secession/*;

[231] RAIC D., *supra* at 49, p. 311;

[232] id., p. 311, BUCHHEIT, *Secession: the Legitimacy of self-determination*, Yale University Press, New Heaven, 1978, p.46.

[233] GOARKE, supra at 200, p- 89;

[234] Id., pp. 89-90; RAIC D., *supra* at 49, p. 311; BUCHHEIT, SUPRA AT 232.

[235] GOARKE, supra at 200, p- 89-90;PHILPOT, *Self-determination in Practice*, p. 81; WELLMAN, *A defense of Secession and political self-determination*, p. 142.

As can be noticed, theories of secession are based on the concept of just cause and also on the right to self-determination. Allen Buchanan, one of the most prominent theorist of secession, distinguishes two different theories, based on the abovementioned concepts[236]. According to him, secession related to the notion of just cause can be considered as a remedial secession, used as a remedy for the injustices suffered by a people[237]. At the same time, he argues that secession can be also related to self-determination, affirming that a "group can have a right to secede in the absence of any injustice", not limiting secession to be only a moral remedy[238]. The latter theory of secession can be seen as a political theory, as it is based on the free choice of people to secede or not. It differs from the former in the fact that it is a statement of a will of people, arising when minorities express their will *politically*[239]. Buchanan names this approach primary right theory, which can be divided into two more main group of theories: associative and ascriptive[240]. While asserting that groups have a right to secede even in the absence of injustice or abuses, the associative group of theories provides that the group in question do not even require to share some characteristics in common, like ethnicity or religion, to be entitled to secession. What is more, it emphasizes the voluntary choice of people: as a statement of the will of people, associative theories provide a right of secession to the majority of a group which democratically choose to secede from the former state to form their own independent unit[241]. The simplest version of these theories is the pure plebiscitary theory of secession which simply give to any group able to form a majority in favour of secession a right to put it in place[242]. The plebiscite condition plays a central role in many other associative political theories. Harry Beran also based his theories of secession on the assumption that individuals have the moral right to decide their political relations. According to him, "any group is justified in seceding if it constitutes a substantial majority and it is able to marshal the resources necessary for a viable

[236] GOARKE, supra at 200, p. 89; see also BUCHANAN A., *theories of secession*, available at http://philosophyfaculty.ucsd.edu/faculty/rarneson/BuchananTheoriesofSecession.pdf;
[237] Stanford encyclopedia, supra at 180; GROARKE, supra at 200, pp.89-90;
[238] Ibidem.;
[239] Goarke, supra at 200, p. 90, 97-99;
[240] Buchanan, supra at 212; Stanford encyclopedia, supra at 180; Groarke, supra at 200, pp.90-91;
[241] Buchanan, supra at 212; Stanford encyclopedia, supra a 180;
[242] Buchanan, supra at 212;

independent state"[243]. This is what he calls democratic liberalism, which allows to "territorially concentrated groups" with moral and practical possibilities to secede whenever they want[244]. He bases his theories on the consent theory, arguing that by providing a right to secede to individuals, a government can obtain the consent of the governed. What underlies Beran theory of secession is individual freedom of association, which can be related to a right of political association[245]. Wellman conceives this freedom as a source of political self-determination that give rise to a right of secession[246]. He compares secession with political association, arguing that any group has a right to form its own state if it satisfies three criteria: first the groups shall constitute a majority in a given territory; second the state the group will form should be able to "effectively perform the legitimating functions of a state[247]. Like Beran, Wellman emphasizes the role of the majority in the formation of new states, but also criticizes his notion of consent. He asserts that consent as a conceptual basis for secession would only give rise to "virtually unlimited right to secede" from state lacking consent[248]. To limit the abuse of this theory, Wellman argue that a state performing its function without committing injustices can retain its own jurisdiction over its territory, adding a legal value to his theory[249]. Moreover, he argues that a right to secede is legitimate if its results do not jeopardize political stability or affect the former state legitimating functions[250]. The other group of theories, composing the Primary Right theory of secession, provided by Buchanan is composed by the so-called Ascriptive theories[251]. Similarly to the associative one, this set of theories is based on the right to self-determination and entitle certain groups to a right of secession even in the absence of injustice. Ascriptive theories differs from associative ones in the fact that groups claiming secession should be defined by characteristics called ascriptive characteristics, existing independently of any political associations or majorities

[243] GOARKE, supra at 200, p. 90
[244] Id., pp.90-91
[245] Ibidem;
[246] Similarly, Buchanan relates the right of secession to a right of political association in his associative theories, BUCHANAN, supra at 212; GROARKE, supra at 200, p.91
[247] GROARKE, supra at 200, pp. 91-92; Stanford encyclopedia, supra at 180
[248] Id, p. 91;WELLMAN, p. 147.
[249] ibidem.
[250] Id., pp.91-92;BERAN, SUPRA AT 210, P. 39.
[251] Stanford encyclopedia, supra at 181; BUCHANAN, supra at 212;BERAn, supra at 210, p. 41.

formed by the group[252]. They are a set of nonpolitical characteristics, which are ascribed to individuals, independently of their choice: common language, culture, history, shared aspiration to become an independent political unit and all those feature that makes a group a nation or people[253]. Thus, according to this theory, nations or people sharing this set of characteristics, which are entitled to a right of self-determination, may also have a right to secede. Many other scholars embrace this theory of secession. Some relate it to a nationalist principle: Margalit and Raz, for example, assert that member of an "encompassing group", sharing common social and cultural features which mark important aspect of its members, have the right to secede[254]. The group main goal is to protect the well-being of its member and this depend on its ability to preserve its culture. Having it own territory can improve the prosperity of the culture and thus, secession can be seen as a good way to protect the well-being of the member of the nation[255]. Nevertheless, Margalit and Raz pose some limit to secession for encompassing group: it should be allocated in a substantial part of the relevant theory and it secession should not affect the interests of the former state or other countries[256]. David Miller also argues that national groups have the possibility to claim for secession. He distinguish between national and ethnic groups and asserts that only those groups which exercise authority over the territory they wish to separate can be entitled to self-determination and subsequently to secession[257]. Miller asserts that it must be taken into consideration the viability of the remaining state and the respect of human right to uphold a particular claim of secession to a group. Surely, ascriptive theories of secession actively support national causes[258]. Another theory of secession can be added to the lists of the theories analysed above: a territorial theory of secession. It can embody ascriptive and plebiscitary elements, but the characterizing one is the need of territorial connections

[252] GROARKE, supra at 200, pp. 93-96; Stanford encyclopedia, supra at 180;
[253] BUCHANAN, supra at 212; Stanford encyclopedia, supra at 180;
[254] MARGALIT AND RAZ, National Self-determination, The Journal of Philosophy, Vol. 87, No. 9 (Sep., 1990), pp. 443-450.
[255] GROARKE, supra at 200, p. 94; Stanford encyclopedia, supra at 180;
[256] Ibidem;
[257] GROARKE, supra at 200, pp. 94-95; MILLER, *Secession and the principle of nationality*, Canadian Journal of Philosophy, volume 22, 1997, p. 65.
[258] Id., pp.95-96;Miller, supra at 257, ibidem.

in order validate secessionist claims[259]. This theory is promoted by Brilmayer, who argues that "without a claim to territory, self-determination arguments do not form a plausible basis for secession"[260]. As seen above, territorial claim can be fundamental in legitimating secession from a parent state. But, on the other hand, it can also cause some troubles. First of all, relating claims of secession to the territory can reduce the possibility for minorities of new settled people to claim for secession, as it will give it a sort of historical justification[261]. Moreover, it may emphasize a tension between internal self-determination and external one, implemented through secession: the claim of a territory by minorities in order to form a new states can clash with the already existing claims to territorial integrity of the majority of the population of an host state and this can give rise to a never-ending conflict in defining the ultimate, lawful claim of territory[262]. Buchanan tries to solve this impasse by including all this notions in its remedial only right theory, according to which "the validity of a claim to territory is based upon its provision of justice, understood as the protection of basic human rights"[263]. Protection of human rights and identity is a central argument of Nielsen's Theory of secession. Nielsen argues, for example, that "human beings cannot flourished without a secure social identity"[264]. Multinational states failed to preserve different culture existing in their territory and a valid option to protect it is to gain control of the condition of their existence and thus separate, with secession, from the former multinational state.[265] Nielsen's theory is very close to Buchanan remedial theory of secession as both share the same aim, that is the protection of a minorities form abuses and injustices. This is the basis of legal theories of secession, which can be said are based on the notion of the just cause. Allen Buchanan is the most prominent theorist of remedial secession, that arise when the state lose its legitimate right to

[259] SESHAGIRI L., *Democratic Disobedience: reconceiving Self- Determination and Secession at International Law*, Harvard International Law Journal, volume 51, 2010, pp. 570-572.
[260] BRILMAYER, supra at 191, pp. 192-193.
[261] SESHAGIRI, supra at 233, p. 571.
[262] Ibidem, such a situation can be seen in the secessionist claim of Nagorno Karabakh from Azerbaijan: the region of Karabakh claims for a territory which is also part of Azerbaijan and, as such, claimed by it, creating an ongoing conflict that will be analysed in the next chapter.
[263] Buchanan argues that the respect of human rights underlies the validity of any territorial claim, both by the existing state and the seceding minority. This concept will be depth analysed in further paragraphs, BUCHANAN, supra at 212.
[264] NIELSEN, *Secession: the case of Quebec*, Journal of Applied Philosophy, volume 10, 1993, p.31.
[265] GOARKE, supra at 200, pp. 95-96.

govern over a group after having oppressed or abused it[266]. He enumerate some general condition a group must satisfy to be entitles to secession: first it has to demonstrate that its cultural survival is threatened by the action of the state; then that its previously "sovereign territory was unjustly taken by the state" and then that it suffer of violation of basic human rights[267]. Other theorists focus on the remedial aspect of secession. Sidgwick argues that secession must be based on something more than common interests in secede or nationality. There should be "serious oppression or misgovernments" to give to a group a right to claim for secession[268]. Bauhn argues that minorities are entitled to secession in order to prevent discriminatory action perpetuated from their state[269]. We will focus on Remedial Right only theories of secession in the next paragraph, providing a depth analysis of the legal approach to secession.

2.1.3. Critics to theories of secession.

All the theories analysed above, composing the group of the Primary right theories of secession, provide that the right of secession can exist even in absence of injustice, allowing ethnic subgroups with different cultural or social feature to choose whether to be independent or not. This argument can be very debatable because it can encourage just states to act in an unjust way, trying to prevent secession for preserving their legitimate territories[270]. There are many argument that criticize theories of secession and which provide some limitation to it. According to a self-defense argument, secession can be limited in cases in which it can be incompatible with the independence of the remainder state, from which a group aims to secede. This argument allows a state to resist secession if a successful claim can make it vulnerable to assimilation with another, unjust states or can cause the physical destruction of the rest of the population[271]. A state can also use a coercive resistance when there is a higher danger following secession, that is when it will probably be

[266] Id, p. 96; BUCHANAN, supra at 212.
[267] Ibidem.
[268] GOARKE, supra at 200, pp. 96-97; SIDGWICK, *The elements of Politics*, Cambridge University Press, 2012, p. 648.
[269] Ibidem; BAUHN, *Nationalism and Morality*, Lund University Press, Lund, 1995, p. 111.
[270] BUCHANAN, supra at 212; Stanford Encyclopedia, supra at 180.
[271] BUCHANAN, supra at 181, pp. 322-333.

followed by an attack by another state. Only in these cases a self-defense right can be perpetuated[272]. Another argument in favor of a limitation of secession is the soft paternalistic one. Soft paternalism usually describes situation in which a paternalistic intervention is required to protect those individuals not capable of voluntary choice or unable to protect themselves[273]. In secessionist context, the paternalist argument provides that a liberal state can resist to claims of secession if the group perpetuating it aims to form a new state in which individuals will be submitted to an illiberal government that will deprive them of basic human rights, such as freedom of expression, in order to preserve its culture in the society[274]. In resisting to secession, which can be considered as an expression of the choice of a people, a liberal state faces the so-called liberal paradox: liberalism generally tolerate the emergence of different kind of communities that may also aim to destroy the fundamental civil and political rights shared by liberalism itself. Paradoxically, the only way for liberal states to prevent catastrophic results is to use restrictive policies or even illiberal methods. Soft paternalist intervention can be seen as a solution of the paradox, as it has the goal of protecting those who wish to live under a liberal government[275]. Critics have been made also to the Plebiscitary and Ascriptive theories of secession. Even if they are considered less conservative than Remedial Right Only ones, Plebiscitary theories can be criticized in the fact that they base unilateral secession only on the mere decision of the majority of the population, without taking into account normative implication of the occupation of a territory, as Brilmayer suggests.[276] Plebiscitary theory has been also criticized because it seems to limit popular sovereignty: the doctrine of popular sovereignty asserts that a state's territory is conceived as the territory of the people as a whole, and thus every citizens should be able to express its preference of the state issues, including the territorial one[277]. This argument cannot inevitably endorse a plebiscitary theory of secession, as according to it only a part of the population, the majority, is entitled to decide something that would also affect the whole community. For what concern the Ascriptive theory of secession, the most important critic, maybe

[272] Id., pp. 334-335;
[273] Id., pp. 335-336;
[274] Ibidem;
[275] Ibidem;
[276] *Stanford encyclopedia*, supra at 180; BRILMAYER, supra at 191.
[277] Ibidem;

the solely one, that can be advanced is that by allowing to every nation to secede and to have its own state can create confusion in international law and give rise to a series of ethno-national conflict, which can also escalate in violence and oppression.[278] On the other hand, some scholars distinguish some ways to support this theory of secession. Miller, for example, argues that one argument supporting ascriptive theory is that nations need to have their own state, as in this way they can be able to protect themselves and their interests[279]. Mono-national states better achieve democracy, as there can be distributive justice, equal redistribution of wealth, trust solidarity, all things that cannot flourish in multinational states, where discrimination and bad redistribution of wealth and justice are widely diffused. According to Miller, nations should secede from their multinational state in order to form a mono-national state to preserve their interest and identity and where better achieve the well-being of their components[280]. Nonetheless, this kind of nation states is far from exist as it is a very recent phenomenon, and for this reason these justification can be considered to be premature[281]. This critical analysis of primary right theories of secession highlights that remedial approach can be superior and preferable, as we will see in further paragraph.

2.2. Definition of secession.

Since the end of the Cold War, interest in the concept of secession has increased among scholars of international law. In the last two decades, many scholars began to devote their attention on the process of state creation. Nevertheless, the concept of secession is still very vague and undefined and this is confirmed by the absence of a single, fixed definition of the notion in international law[282]. Reasons of this uncertainty can be find in the way secession is conceived: by giving to groups of individuals the possibility of creating a new independent state, it is seen as a challenge to territorial integrity and sovereignty of the former state, which are among the most important principles of international law. Moreover, secessionist conflicts of colonial and post-colonial period showed that it could be a very violent process and for this

[278] Ibidem;
[279] Ibidem; MILLER, supra at 257, p. 65.
[280] Ibidem;
[281] Ibidem;
[282] ANDERSON G., *Secession in International Law and Relations: what are we talking about?,* Loyola of Los Angeles International and Comparative Law Review, volume 35, 2013, pp.343-344;

reason it was viewed negatively, associated with chaos, fragmentation and instability[283]. In recent years, number of secession claims increased and scholars find out that processes of secession can be also peaceful, based on negotiation for independence. They began to attempt to define it, trying to understand methods used in attempting secession or even ways to suppress it, when becoming too violent[284].

2.2.1. What is secession?

To better understand and define the concept of secession, an analysis of the etymology of the term is required. The roots of the term secession can be found in the Latin verb *secedere* composed by the two particles *se*, which means "apart", and *cedere*, which means "to go", suggesting that to secede means to go away from something[285]. In the context of international law, secession is conceived as the withdrawal of a territory from part of an existing state, aiming to create a new state[286]. Starting from the common roots of the word, several definitions of the concept developed. Even if they share same origins, the diversity of approaches to secession seen in the previous paragraph contribute to shape different and incompatible definitions of secession[287]. We can distinguish two categories of definition, namely the restrictive and the permissive one[288]. According to restrictive definitions, secession is a rare phenomenon and, as such, a comparative depth study is not needed. According to scholars embracing this approach the only definition of secession is that it is simply the withdrawal of a territory for the creation of a new state without the consent of the host state[289]. The most prominent advocate of this restrictive definition is James Crawford, who argues that secession takes place only if the host sovereign state opposes to it, following that the continuing existence of the former state is required in order to legitimate secession and its result[290]. As a matter of fact, if the host state

[283] PAVKOVIC A., RADAN P., *Creating new sates: theory and practice of Secession*, Burlington/ Hampshire, Ashgate, 2007, introduction, pp.2-4;
[284] Ibidem;
[285] ANDERSON, supra at 255, pp. 346-346; see also PAVKOVIC A., RADAN P., supra at 256, p. 5;
[286] ANDERSON, supra at 255, p. 346;
[287] PAVKOVIC A., *Secession and its diverse definitions*, Macquarie University, Macquaire law working paper series, p. 5;
[288] Ibidem.
[289] Id., pp. 5-6;
[290] CRAWFORD, t*he Creation of States in International Law*, Oxford University press, 2006, in PAVKOVIC, supra at 287.

ceased to exist, it would be a mere dissolution which, according to the restrictive definition, cannot be considered as secession[291]. Secession main goals is to create new states and Crawford distinguishes four categories to classify the result of secession claims[292]. The first category comprehends cases in which the host state opposed to secession until the creation of the new state, while continuing its existence as a sovereign state. An example for this category is, according to Crawford, the Bangladesh's secession from Pakistan[293]. The second category includes cases where the host state opposed to secession only at the beginning of the process and stop opposing at the end of the process, when a new state is created. Also in this case, the host state continues its existence after secession[294]. The third and the fourth categories conversely provide the dissolution of the host state: the former includes cases in which the dissolution of the host state leads to the creation of two or more new states, as in the case of Czechoslovakia; the latter comprehends those cases where the factual dissolution of the host state, caused by some international circumstance, gives birth to new states, like in case of the break-up of the Republic of Yugoslavia in 1991[295]. Obviously, Crawford restrictive definition of secession only includes the first category because, as can be notices it is the only one in which the withdrawal of territory for creating a new state faces the constant opposition of the host one[296]. Against Crawford argument of the opposition of the host state can be advanced some reasons: first, Crawford himself argues that in the initial stages of secession, almost every cases can face the opposition of the host state, and thus, the presence and the absence of consent is very arbitrary, as it depends on secession circumstance and for this reason cannot be seen as a universal criterion for a definition of secession[297]. Then, in secession claims, what is relevant is the outcome, that is the creation of the state. Whether the host state opposes or not to the withdrawal of the

[291] Id. P. 5

[292] RADAN P., *The Definition of Secession*, Macquarie University, Macquaire law working paper series, pp. 10-12; CRAWFORD, supra at 20, pp. 390.418.

[293] RADAN, supra at 264, p.10; Bangladesh was recognized as a state by Pakistan after that almost 70 other state recognized it as such. During the secessionist conflict, Pakistan strongly opposed to it, with oppression and repression of the Bengali minority of east Pakistan (Bangladesh), which were asking for independence. CRAWFORD, id.

[294] Ibidem.

[295] Id., pp. 10-11;

[296] Ibidem.

[297] Id., p. 11-12;

territory, the result will be always the same[298]. The criterion of the opposition to secession is thus irrelevant to the final outcome of the process and there is apparently no reason to differentiate situations of secession[299]. Heraclides go even further with his definition, as he argues that only non-consensual secession characterized by an escalation of violence can be defined as secession[300]. The use of force is generally associated with the absence of consent, and it the second criterion of the restrictive definition of secession. The absence of the consent of the host state make secessionists consider violence and use of force against their opponents which in turn justifies the use of force by the Host state, to defend its sovereign territory[301]. Here again, two comments can be advanced against this argument, asserting that the use of force should not be included in a definition of secession. [302]First of all, by arguing that opposition of the host state is an element of the definition of secession, the addition of the use of force criterion is superfluous: secession claims always contemplate an element of force, as it is already "inherent in the lack of approval by the previous sovereign"[303]. When a state opposes secession there must be a threat of the use of force by the seceding group, thus underling the element of the absence of consent. Second, as showed previously, even opposition of host states is not an element of the definition, so there is no reason to include the use of force[304]. Moreover, it relates only to the means through which secession can be achieved. Whether secession is peaceful or violent, the outcome would be the same[305].

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[298] the analogy with the divorce practice has been advanced here in support of this argument: whether with the consent or not of the two partners, it is a practice that lead to the termination of the marriage. Even if different means are used, the outcome is the same. In the context of secession, whether it happens with the consent or not of the host state, the outcome will be the same: separation and creation of a new state.

[299] Ibidem.

[300] PAVKOVIC, supra at 260, p. 5; HERACLIDES, Self-determination of minorities in international politics, Franck Cass and Company, 1991.

[301] Ibidem.

[302] RADAN, supra at 264, p. 14;

[303] SCHOISWOHL M., Status and human rights obligations of non-recognized de facto regimes in international law : the case of Somaliland: the resurrection of Somaliland against all international Odds: state collapse, secession, non-recognition and human rights, Leiden and Boston, the Hague M. Nijhoff, 2004, p. 48;

[304] RADAN, supra at 264, p. 14;

[305] In this case, an analogy with childbirth has been proposed in support of this vision: wheter the child born by natural delivery or by caesarian section, the outcome is the same: the difference in method of delivery does not change the outcome. The same can be said for secession: even if it is enact through different manners, which can be either peaceful or violent, the outcome will be the same.

The permissive definitions of secession developed as a response to the restrictive ones, as they include only few elements in their definitions minimizing the number of effective secession (according to restrictive definition only one, at least two secession conflicts of post – 1945 period are effective secession)[306]. The most prominent scholars of permissive approach are Radan and Anderson. Both argues that secession is the withdrawal of a territory from an existing state with the aim to create a new state[307]. Julie Dahlitz also expands the definition of secession, arguing that it "arises whenever a significant proportion of the population of a given territory express the wish to become a sovereign state in itself or to join another state"[308]. This surely expands the definition, but at the same time refers to the transfer of territory from one state to another, which cannot be seen as secession. An even more permissive definition is that of Haverland, who define secession as "the separation of part of the territory of a state with the aim of creating a new independent state or *acceding* to another existing state"[309]. This definition gives to secession another aim beside the one of creating new state, that is the transfer of territory to another state through annexation or cession, that, according to Haverland, can be considered secession. Nevertheless, this kind of definition can be considered too inclusive, and some arguments may be advanced against it[310]. One of the most important concerns the two outcome provided by Haverland's definition: creation of a new state or transfer of territory to a third existing state. This two outcomes are very different and have different consequences from a legal and political point of view[311]. The creation of a new state generally introduces some changes in the withdrawn territory: first of all, the name of the territory changes, in order to asserts its status and distinguish it from the others. New offices, new institutions and even a new flag are created and new state borders are delineated. This highlight that secession involves the creation of a new state with its own, different borders and apparatus[312]. In this it differ from the

[306] PAVKOVIC, supra at 260, p. 6;
[307] Id., pp. 7-8; ANDERSON, supra at 255.
[308] Ibidem; see also DAHLITZ J., *Secession and international law: conflict, avoidance, regional appraisals*, The Hague : T.M.C. Asser press, 2003;
[309] PAVKOVIC, supra at 260, p. 8; HAVERLAND C., *Secession*, in BERNHARDT R., *Encyclopedia of Public Intenational Law,* Volume IV, 2000.
[310] Id., pp. 8-9;
[311] Ibidem.
[312] PAVKOVIC – RADAN, supra at 256, pp. 8-9;

transfer of territory, which is also known as *irredenta*, and differs from secession in the fact that it is only an adjustment: no new institution, borders and apparatus are created, but they are only replaced with the ones of the third state annexing the withdrawn territory. In this cases, the secede groups has no sovereignty over its territory, but are under the political authority of another states[313]. For this reason secession and *irredenta* cannot be assimilate in the same definition. As secession differs from *irredenta*, annexation or dissolution, a restrictive definition should be preferred[314]. Nevertheless, secession can be achieved even in a peaceful way, without the threat of the use of force and also with the consent of the host state. We can assert that secession should be conceived as the withdrawal of a territory from an existing state to create a new independent state, where ethnic groups or nations can express their sovereignty[315].

All the above mentioned definitions describe secession as a process, whose outcome is the creation of a new state. Generally, the representatives of a group of people settled on part of territory of a state proclaim independence and began the process of secession: new institutions are created, new laws are written, flag, arm coats and name are replaced by the new one and new borders are demarcated and the new state is created. We can distinguish two type of secession: consensual and unilateral one[316]. Consensual secession can be divided into two more types, namely the constitutional and the politically negotiated secession. The former does not involve the use of force and occurs with the state consent. It can be negotiated constitutional secession, when it can be found in a state constitution, as in the case of the Constitution of Ethiopia[317]. In this case, an amendment to the constitution is negotiated to legitimate the secession of part of the territory. It can also be an explicit constitutional secession, which occurs when the host state provides a specific *iter* that a group must follow for the secession of its territory. This kind of procedure is usually

[313] Ibidem.
[314] Ibidem.
[315] Id., pp.2-4.
[316] ANDERSON, supra at 255, pp. 350- 355;
[317] Ibidem.

find in federal states[318]. The second type of consensual secession is the politically negotiated one. It occurs without the use of force, when the host state and the seceding entity are willing to negotiate the resolution of a secessionist situation. It is generally used when negotiations between the parties fail to provide a constitutional legitimization for secession[319]. Some examples of politically negotiated secession are secession of Norway from the Union of Sweden and Norway in 1905, or the secession of former soviet republics as the Baltic republics, Armenia, Belarus, Azerbaijan, Ukraine and others in 1991 and also the secession of both the Czech republic and the Slovak republic from the former Czechoslovakia, which ceased to exist after secession was negotiated between the two parties[320]. The second major type of secession is Unilateral secession. It occurs without the consent of the host state and in this case, the use of force may be involved[321]. It typically occurs in the absence of negotiation between the two parties, but it can also occurs when initially attempt to negotiations fails or when existent constitutional provision about secession are ignored by secessionists or conceived as inadequate for their reasons. In Unilateral secession the host state claims conflict with the secessionists claims: the state pretends its sovereignty over the seceding territory to be recognized, and so do the secessionists. Some example of unilateral secession are the secession of Eritrea from Ethiopia, of Bosnia, Croatia, Montenegro, Serbia and others from Yugoslavia and so on[322].

2.2.2. Who is entitled to a right to secede?

In the first chapter, the issue of the definition of people has been widely analysed and several definitions have been provided[323]. As seen above, secession is an instrument through which external self-determination is exercised and, for this reason, we can consider the above mentioned definition of people also for studying secession. As a matter of fact, because of this relation with the right to self-determination, the peoples are entitled to exercise the right to secede, also those constituting a minority

[318]Id., pp. 350-352: some example of constitution including a right to secession are: 1968 Constitution of Czechoslovak socialist republic, 1974 Constitution of SFRY, 1977 constitution of Soviet Union and so on.
[319] Ibidem.
[320] Id. Pp. 352-353;
[321] Id., pp. 353-354;
[322] ibidem
[323] For the debate over the definition of the concept of people, see par. 1.2. of the first chapter.

of the population of a given state but the majority of the territory of that state which aims to secede. In defining people or nations claiming for secession, the same criteria mentioned in UNESCO report of 1989 can be used, and it can be added a fifth criterion for defining holders of a right to secede: the group must form a clear majority on a distinct territory. Which groups are thus entitled to secession? This is a controversial issue and it has been subject of many debates. Many scholars argue that secession should be a right of nationalities[324]. Nowadays, neither a definition of the concept of nation nor its historical origins are agreed by scholars. Some define nation using its objective markers, such as language, culture, religion and so on[325]. An example of objective definition of nation can be the one of Smith, who argues that nation is "a named human population occupying an historic territory, sharing common myths and memories, public culture and common laws and customs"[326]. Other define it from a subjective point of view, including its psychological characteristics, its sense of solidarity, the common will of its members or even their sense of belonging. A subjective definition of nation is the one provided by Renan, who define it as a "grand solidarity constituted by the sentiment of sacrifices" which its members have made and which "are disposed to make again", highlighting a strong sense of belonging and loyalty of the members of a nation[327]. As for origins of nations, nationalists usually traced back the origins of their nation to the first civilized settlement of the territory they consider motherland. This primordialistic view is rarely sustained, as since 1980s a modern definition of origins developed. Modernists set the origin of the nation to the advent of modernity[328]. Some scholars see its birth as a need of industrialized society for culturally homogenizing the population[329]. Others link its origin with the emergence of the vernacular languages, which replaced Latin, which constituted a way for individuals to identify each other as members of a single language community[330]. Others see it as a "conscious and deliberate engineering of nineteenth century

[324] PAVKOVIC, RADAN, supra at, p. 15; see also GOARKE, supra at 200, pp. 101-102;
[325] Ibidem.
[326] Id. P. 16;
[327] Id., p. 15; RENAN, 1882, p. 27.
[328] Ibidem.
[329] Id., p. 16
[330] Ibidem. ANDERSON, supra at 255.

governments"[331]. Whatever are their origin or characteristics, nations claiming for secession generally have to satisfy some criteria: every group should possess a common set of markers which distinguish them by others; a sense of solidarity with other members of the group; an association with the territory they are claiming for[332]. Nationalism has been widely used to justify attempts of secession. Moreover, it can be argued that it has also provided the motivation for secession. As a matter of fact, national groups are seen as natural sources of political sovereignty and this has also been endorsed by the French declaration of the rights of Man and Citizens, which provides that "the principle of all sovereignty resides essentially in the nation"[333]. It derives that every nation shall have its own separate state, where it can exercise its sovereignty. There are several reasons for a group to secede from its host state. The basic one is the group political ideology, which are usually called nationalists ideology[334]. It provides the reason which give to a particular group settled on a given territory the right to secede and create its own state. These reason usually includes the different culture, or the historical origins and other among the aforementioned characteristic[335]. The circumstance which make a people a holder of secession can be classified as such: first of all, circumstance in which systematic violation of fundamental human rights and of the right self-determination are perpetrated entitle a people of the right o secede; similarly, when negotiation for peaceful solution of the conflict have been exhausted , and no other remedies are provided, a people can claim secession[336].

2.2.3. Irredentism, decolonization, dissolution, autonomy and secession.

As seen above, from a permissive point of view, secession can be compared to other forms of creation of an independent state. Some scholars argue that also these other way of creating a new state should be included in a definition of secession, while other advanced some reason to oppose to this inclusion. As Haverland argues,

[331] Ibidem; Eric Hobbesbawm sees the emergence of contemporary European nations was "the result of a deliberate ideological engineering".
[332] Ibidem.
[333] Id. Pp. 17-18
[334] Ibidem.
[335] Ibidem.
[336] GRIFFIOEN C., SUPRA at 3, pp. 132-136.

secession also includes cases of *irredenta*, which is an Italian word meaning unredeemed[337]. In the context of international law, irredentism refers to the amalgamation of a state territory with another state or a territorial claim of a third state over the territory of another[338]. There can be four types of irredentism. The first two types concern a violent annexation of all, or part, of the territory of a sovereign state by another state. An example of these two type is the invasion of Kuwait perpetuated by Iraq[339]. The other two types of irredentism provided for a complete amalgamation of the territory of the two states. In some cases the amalgamation can even follow some form of secession of one of the two parties involved[340]. As can be deduced, irredentism and secession refers to different processes as the former provides for an amalgamation or annexation, while the ultimate goal of the latter is the creation of a new state. What is more, the first two types of irredentism include a forcible way to amalgamate a territory, which in many has been considered as illegal occupation. Only the forth type of irredentism include secession, as it occurs after a territory has secede from its host state[341]. Even in this case, irredentism and secession cannot be compared: first of all secession is the process whose exercise allows irredentism, which can be considered the outcome. As a matter of fact, the secession of part of the territory of a state allows the subsequent amalgamation of the secede territory to a third states. Then irredentism has different outcome and it provides a shift of sovereignty from one territory to another: no new institutions, borders or flag are created, they are just replaced with that of the annexing state. Irredentism thus not provide the creation of a new state, and for this reason cannot be included in the definition of secession[342].

[337] ANDERSON, supra at 255, p. 371; HAVERLAND, SUPRA AT 309.
[338] Id., pp. 370-371;
[339] Id., pp. 371-372;
[340] Id., p. 372;
[341] Id., p. 373;
[342] It can be added that the distinction between the two concept is not always clear, especially in state practice. An example of this indefiniteness is the attempt of secession of the Republic of Serb Krajina from Croatia in 1990. After having claimed secession from Croatia and having recognized Krajina as an independent state, it was clear that the actual intent was that of remaining part of Yugoslavia. After the break up of Yugoslavia, none of the resulted states recognized Kraijna as a state. even if irredentist desires were clear in this case, it has been conceived as secession, because of its application for recognition as an independent state, and because of the absence of irredentist claims by Krajina population, RADAN supra at, p. 6;

In many cases, the process of state creation through decolonization has been included in definition of secession[343]. There are different schools of thoughts on this argument, as many scholars accept decolonization inclusion, while other strongly oppose to it. The opposition to the inclusion of decolonization within a definition of secession may be seen as reflection of the current situation. Nowadays there are no longer colonies or trust Territories and the number of non-self-governing territories has enormously decreased[344]. For this reason, scholar who exclude decolonization from their definition simply considered it as superfluous, as colonization ended years ago and does not exist anymore.[345] This situation can be considered also as a reflection of the ambiguity of the attitude of international system towards cases of state creation as an outcome of decolonization during the first years of anti-colonialism. In many cases, a new state was created through the secession of part of territory of a host state and, while the UN and International system recognized the emergence of new state through process of decolonization, secession from a former states was generally disadvantaged[346]. This is due to the fact that UN guarantee the territorial integrity of States at the Article 2(4) of its Charter, precluding "the threat or the use of force against territorial integrity of a state". But at the same time, UN also provided, through the two 1960s resolutions, that colonialism is illegitimate and thus a state sovereignty over a colonial entity is illegal. This contributes to create the current debate on the inclusion of decolonization in the definition of secession[347]. Bishai argues that decolonization must be excluded by the definition of secession because "colonies contain populations which lack the benefits of full membership in the host state; colonies are territory without history of statehood and then colonial independence movement is closer to the creation of a state *de novo* then to the withdrawal of a territory from a proper state"[348], arguing that the outcome of the two process differs, because the withdrawal of a territory is not properly a creation of a

[343] ANDERSON, supra at 255, pp. 373- 374;- see also RADAN , p. 7;
[344] Radan, p. 9;
[345] Ibidem;
[346] Radan, p. 8
[347] Id. Pp.8-9; ANDERSON, supra at 255, pp. 374-375;
[348] RADAN, p. 9; BISHAI L. S., *Forgetting Ourselves, secession and the impossibility of territorial Identity,* Lexington Books, Lanham, 2004, p. 33.

state *de novo*[349]. Conversely, Crawford argues that decolonization may also be included in the definition of secession if it was obtained without the consent of the sovereign state, involving a threat of the use of force[350]. Therefore, it can be argued that this issue is still unresolved, and the inclusion of decolonization in definition of secession depends on the attitude and ideas of the scholar.

As the creation of the Czech and Slovak Republics has showed, dissolution is strongly related to secession. In international law context, dissolution denotes the legal extinction of an existing state, which can occur after one or more secession and it can be described as an outcome of secession[351]. For this reason, even if they are closely related, they cannot be consider synonymous and thus, dissolution cannot be included in a definition of secession[352]. Crawford argues that "it is necessary to distinguish secession and the dissolution of the predecessor state […]" because "if the process goes beyond and involved a withdrawal of all territories concerned" it is not secession anymore but dissolution of the predecessor states[353]. Similarly, Craven observed that dissolution, or dismemberment is only a description of a form of extinction of a state following secession and, as such, it is a "situation *ex post facto*", not synonymous of secession[354]. Then Lalonde highlights the main distinction between the two processes, that is the fact that after dissolution, "no parent state is entitled to insist on respect of its territorial integrity", as it does not exist anymore[355]. There are practical example that confirmed this argument: the above mentioned case of Czechoslovakia, the dissolution of former socialist republic of Yugoslavia or the break-up of Soviet Union[356].

For what concern autonomy, it is generally seen as one of the modes of implementation of external self-determination, beside secession. It is understood as a

[349] Ibidem;
[350] Ibidem. CRAWFORD, p. 415.
[351] ANDERSON, supra at 255, p.381;
[352] As seen above, the new state creates through secession requires the continuing existence of the host state, which have to decide whether recognizes it or not.
[353] Anderson , p. 381;
[354] Ibidem. CRAVEN M., The European Community Arbitration Commission On Yugoslavia, British Yearbook of International Law, volume 66, 1995, p. 369.
[355] LALONDE, *Determining Boundaries in a conflicting World: the Role of uti possideti*, McGill-Queen's University Press, 2002, p.221.
[356] Id., pp. 381-384;

"arrangement aimed at granting a group a means by which it can express its distinct identity" and also a way for minorities to express their distinctiveness without "being detached from the state of which they are part"[357]. Nonetheless, autonomous states does not have sovereignty over a territory, because they exist within a state and their status can be revoked whenever the central government decide it. In this it differ from secession, as the latter has a definitive outcome, and for this reason cannot be seen as a synonymous of secession, and thus cannot be included in any definition of secession[358].

2.3. Secession in international law: the legitimacy of the right to secede

In the last two decades, many scholars attempted to define secession and its scope as the number of claims of secession increase. The concept of secession has always been a very controversial issue under international law. Even if many cases of secession the seceded states have been recognized by the most important institutions of international system, international law is still very reluctant in considering a legal right to secede because, according to some theorists, it would only contribute to create more chaos in international system, impairing sovereignty and territorial integrity on which states are based, thus undermining the foundation on which the state-centered international system is based[359]. "If every ethnic, religious or linguistic group claimed statehood [secession], there would be no limit to fragmentation, and peace, security and well-being for all would become even more difficult"[360].

2.3.1. A legal theory of secession.

The doctrine about secession includes several kind of theories, from political to philosophical ones. Among those theories there is also a legal theory of secession, which contributes to shape a legal right of secession in international law. As seen above, the main difference between this kind of theory is that the legal theory provides secession only for groups which suffered injustice and abuses by their own state and for this reason they want to separate and create their own new state,

[357] Id., p. 385;
[358] Id., p. 386;
[359] DAY J., *The Remedial right of secession in international law*, POTENTIA, volume 19, 2012, p. 19
[360] UN secretary general Boutros Boutros-Ghali.

without injustices[361]. Before focusing on the characteristic of such a theory, a depth analysis of its conceptual basis is required. First of all, it should be argued that secession is closely related to the principle of sovereignty. The concept of sovereignty began to develop after the peace of Westphalia in 1648, after which a long transition from the middle ages to the modern European system of sovereign states began, developing all over the world in the next centuries[362]. It is very difficult to provide a fixed meaning of sovereignty as it varied across history and many scholars still doubt that a single, fixed definition of the notion exists[363]. Nevertheless, it can be identified a core meaning of the notion, which emphasizes what sovereignty comes to mean after its historical development, from which almost all the other definitions developed: it can be consider as the supreme authority within a territory[364]. According to this core definition, the holder of sovereignty possesses authority, that is the "right to command and correlatively to be obeyed". The holder of sovereignty derives its authority from superior source of legitimacy, which legitimate its power, such as natural law, hereditary law and international law. An important feature of sovereignty is territoriality. As a matter of fact, sovereignty is exercise over a specific territory, with fixed borders and a people, over which the government or the institutions of the state can exercise their supreme authority, that is sovereignty[365]. Territoriality is an important feature of international system as a whole, as it contributes to define people and groups in the international law context (for example UN and EU use territoriality to identify the states composing them, o their member states)[366]. The concept of sovereignty developed worldwide since the Peace of Westphalia of 1648, for at least four centuries, culminating in the decline of imperialism and dissolution of former colonial empires of the XXth century. Nowadays, we can find norms on sovereignty in UN Charter, which prohibits attack to political independence and territorial integrity, the main features of sovereignty, in Article 2(4) and also restrict intervention, implicitly

[361] GOARKE, supra at 200, p.89;
[362] Stanford encyclopedia – sovereignty, available at http://plato.stanford.edu/entries/sovereignty/; see also DAHLITZ J., *Secession and international law: conflict, avoidance, regional appraisals*, The Hague : T.M.C. Asser press, 2003, pp. 125-160;
[363] Stanford encyclopedia, supra at 328.
[364] Ibidem.
[365] GOARKE, supra at 200, pp. 74-75.
[366] Stanford encyclopedia, supra at 328.

defending sovereignty, in article 2(7)[367]. Even if it is implicitly included in a legal instrument, a fixed definition is still absent in international law. Recently there have been many attempt to define it, and the most useful one is the definition provided in the *Corfù Channel Case (UK v. Albania)*, in which judge Alvarez asserted that " by sovereignty, we understand the whole body of rules and attributes which the state possesses in its territory", highlighting that only states have and exercise sovereignty, through internal rules and procedure without external interference[368]. In Crawford's definition sovereignty is seen as a descriptor of statehood, rather than a criterion: he argues that "sovereignty is the term for the totality of international right and duties of the state recognized by international law. It is not a right nor a criterion for statehood. It is somewhat unhelpful, firmly established, description of statehood"[369]. It shall be noticed that Crawford does not give it a plenary legislative competence[370]. This is due to the widely accepted argument that every states have an equal sovereignty. As such, every state shall exercise its competence only within its own territory, contributing to give sovereignty an absolute plenary legislative competence only in domestic law context[371]. It can thus be argue that sovereignty is not an absolute norm in international law. As a matter of fact, the fundamental premise that links the legal theory of secession to sovereignty is that it can legally limit its exercise. It can limit the sovereignty of a state when it manifestly abuses of its citizens, violating their rights[372]. Those states perpetuating injustices towards their population, or at least against part of it, lose their title to sovereignty and a claim of secession is thus justify. This is the result of another way of interpreting sovereignty, in its external and internal context. We have already seen that a title to sovereignty give to its holder a supreme authority on its territory. This title can derive from natural law, or it can derive by the historical presence over the territory on which it has authority[373]. In its internal context, it derives from the governed, who politically justify the supreme authority of the state

[367] Ibidem; see also ANDERSON, pp. 346-349.
[368] Corfù Channel, UK v. Albania, 1949, ICJ, Separate Opinion by Judge Alvarez, p. 43, para. V; Anderson, pp. 346.
[369] Id., p. 346-347;
[370] CRAWFORD J., The Creation of States in International Law, Oxford University Press, Oxford, 2006, p. 32 in ANDERSON, p. 348.
[371] Id., p. 348
[372] GOARKE, supra at 200, p. 74;
[373] Stanford encyclopedia, supra at 328;

through their consent. On the other hand, in the international law context, the legal justification of a state sovereignty comes from the international system as a whole, which gives a sort of license of sovereignty, recognizing and justifying the actions of a state[374]. The international system has thus an underlying title to sovereignty, which gives it the authority to decide whether to recognize or not the title to sovereignty of a state. This entitles international system to intervene in the internal affair of a state in cases of abuses on the population or violation of human rights in order to stop any abuses of sovereignty by the political authority[375]. The relationship between the sovereign authority and the people it governs, including minorities, can be seen as a contract that the parties shall respect[376]. The state obtaining consent by its people has some duties and obligation to respect and exercise: if it violates some of its duties, the people, or part of it, can rescind the political contract and claims of secession are thus justified[377]. As we have seen, claims of secession arise in a domestic context, questioning the sovereignty of the political authority of a state. In order to determine the legitimacy of these claims it is better to rely on international law and system, as the domestic courts operates thanks to the validity gives by the illegitimate state and can thus be affected by the result of secession[378]. International law has different ways through which validate and regulate secession, among which there is international recognition[379]. Through international recognition, the other states composing international system can determine whether emerging states, results of secession, are legitimate and can be entitled to sovereign power[380]. It mostly relies on state practice and it will be analysed in the next paragraph. Also the single states intervention is related to secession. This kind of intervention come within the doctrine of humanitarian intervention, which relies on single states, that have the right to decide if to intervene in internal affairs of a state which violates fundamental human rights[381]. Humanitarian intervention contemplate a military action against an oppressive

[374] GOARKE, supra at 200, p. 75.
[375] Id., pp.75-76; Humanity shares some attributes and have common goods and when part of it is in danger, the rest has the moral right to protect it, even by intervening in the internal affairs of a state and limiting its sovereignty.
[376] Id., p.76.
[377] Ibidem.
[378] Id., p.76.
[379] Id., p. 77.
[380] Ibidem.
[381] Id., p.80

sovereign state which perpetuate abuses on its people. This military intervention has some implication for secession because, in helping oppressed minorities, it allows them to self-determine themselves and even to secede from the oppressive state[382]. Humanitarian intervention is seen as the moral duty of other states of international system to help and assist minorities which claims secession from an "unsupportable tyranny" of a state[383]. What should be noticed here is that humanitarian intervention is possible thanks to the fact that states composing international community are free actors, which can arbitrary act[384]. Nevertheless, it should be added that humanitarian intervention is regulated by United Nations Security Council, which must approve a military intervention and a state interference in internal affairs of other state before a humanitarian intervention can be put in place[385]. In order to safeguard international system, there have been attempts to create a doctrine of humanitarian intervention, which also include the principle of "responsibility to protect" and the principle of non-intervention[386]. It is generally limited to particularly grievous circumstances, such as repression, insurgency, genocide, but it is still too permissive[387].

From this theoretical premise, it can be deduced that international system tries to protect basic human rights and oppressed people in every way, even limiting the fundamental principle of sovereignty of a state. As Buchanan argues, "the moral goals of international legal system are peace and justice" where justice is conceived as "respect of human rights, both within the state and in the state interaction with those

[382] Id., pp. 80-81.

[383] VETTEL, *the law of nations, or principles of the law of nature applied to the conduct and affaire of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Liberty Fund Inc, Indianapolis, 2008, p. 239, at §56 "If the prince, by violating the fundamental law, gives his subject the right to resist him-, if tyranny, becoming insupportable, oblige the nations to rise in their own defense,- every foreign powers has a right to succour an oppressed people who implore their assistance", in GROARKE, pp. 81-82. Humanitarian intervention is also closely related to the principle of Responsibility to Protect (R2P): this principle was adopted by United Nation General Assembly in 2005. The principle provides that State have to "do their utmost to protect and prevent their populations from atrocities that can be categorized as genocide, war crimes, ethnic cleansing or crimes against humanity". The adoption of the principle came after the experiences of some violent conflict in which there have been atrocious violation of human rights, as in the case of Rwanda, and there has been a debate over its adoption after the military intervention of NATO in Kosovo's conflict. For more information on R2P see http://www.un.org/en/preventgenocide/adviser/responsibility.shtml
http://www.unric.org/en/responsibility-to-protect/26981-r2p-a-short-history

[384] GOARKE, supra at 200, p. 82.

[385] Ibidem..

[386] Ibidem.

[387] Ibidem. The criteria which permit the international intervention are open to different interpretations, and for this reason, they can be used in a very selective manner.

beyond its borders"[388]. Secession can be included between the moral remedies that a group can use to eliminate oppression. Many scholars endorse this argument and develop a Remedial Right only theory of secession[389]. It is called remedial as it provides that a right to secession only exists in cases of injustices, as an ultimate remedy to eliminate a condition of oppression: according to this theory, a group can claim secession when it has suffered injustices and it has been oppressed by its own state[390]. According to this theory, there are two basic reasons for a group can secede from its state. First, it may secede if its physical survival is threatened: when the state put in place some policies with the aim to physically destroy a minorities or violate their basic human rights, their claims of secession are justify[391]. Second a group can secede in order to regain sovereignty over a territory that was unjustly taken by another state. This kind of theory is very similar to John Locke's theory of revolution, which argues that there exist a right to revolution, according to which people have "the right to overthrow the government if and only if their fundamental rights are violated"[392]. The only difference between these two theory is that the Remedial Right one is a selective theory, in that it provides some rights only to a part of a population, usually the oppressed one aiming to control the part of territory on which they live, without overthrow the government of the host state[393]. Nevertheless, this similarity helps us to understand the moral basis of a remedial secession, which occurs only in cases of perpetuated violence against a given group. The most prominent advocate of remedial right only theories of secession is Allen Buchanan and he also argues that there can be a special right to secede also in the absence of injustice, namely when a state grants a right to secede, or when secession is included in the Constitutions, or when a right to secede was included, implicitly or explicitly, in the agreement by which the state was created[394]. In arguing that secession arises only in cases of injustices and oppressions against a minority, remedial right theories rejects the assertion that nations have a unilateral right to secession, based on their nationalists instances and their right to

[388] Id. , pp.78-79, BUCHANAN A., Justice, Legitimacy and Self-determination, Moral Foundation for International Law, Oxford University press, Oxford, p. 77.
[389] Id., p. 83.; Stanford encyclopedia, supra at 180.
[390] Ibidem. BUCHANAN, supra at 212;
[391] BUCHANAN, supra at 212;
[392] Ibidem;
[393] Ibidem;
[394] Ibidem.; see also GOARKE, supra at 200, pp. 149-166;

self-determination. According to remedial theory scholars, limiting secession claims only in cases of perpetuated injustices or other, above mentioned, special cases can be an incentive for states to act justly, in order to avoid to lose part of its territory and sovereignty: almost every state of the world is composed by different nationalities, and giving them a right to secede when they wish would only contribute to create fragmentation and chaos in international system[395]. Remedial right only theories, conversely, offers a "immunity" to just states and, by doing so, it helps to eliminate violence and maintain the status quo in international system[396].

The definition of secession as a remedy for opposing injustice and oppression receive strong support from other scholars. Judges Ryssdal and Wildhaber argue that secession may also be exercised "if human rights are consistently and flagrantly violated" and such an argument has also been endorsed by Buchheit[397]. He argues that remedial right of secession come to existence when there is a "denial of political freedom and human right" to a certain degree that it legitimate secessionist claims by part of the population of the oppressive state[398]. In order to legitimize claims of secession and the application of a right of remedial secession it should be paid attention "on the condition of the group making the claim. Corresponding to the varying degrees of oppression inflicted to a group by its governing state, international law recognizes a continuum of remedies ending with secession as the ultimate remedy"[399]. Buchheit recognizes secession as one of the possible remedy to oppression and injustice and also relate it to self-determination, arguing that when oppression reach the highest level, "it become a matter of international concern which may involve an international legitimating of a right to secessionist self-determination as a self help remedy"[400]. Many scholars of the qualified secession doctrine see secession as a necessary component of the right to self-determination. What is more, it must be added that minorities and people do not have any international legal

[395] Stanford Encyclopedia, supra at 180;
[396] Ibidem.
[397] RAIC, supra at 49, pp. 324-325, *Concurring Opinion of Judge Wildhaber joined by Judge Ryssdal, European Court of Human Rights, Loizidou v. Turkey, Judgment, 1996, in Report of Judgments and Decisions of the European Court of Human Rights, V*olume VI, p. 2241, 1996.
[398] Id., p. 325; BUCHHEIT, Secession, p.94.
[399] Id., p. 326;
[400] ibidem

remedies through which exercise their right to self-determination[401]. For this reason, secession should be conceived as a remedy available in cases of violation of international human right or denial of the right to self-determination[402]. There are also other interpretation of the qualified secession doctrine. According to this alternative vision of secession, a right to territorial separation is closely related to some elements of the concept of colonialism, which seem to be applicable also to people of metropolitan states[403]. Crawford is one advocate of this interpretation and define it as internal colonialism approach: according to him, people or minorities within the borders of a metropolitan states are threaten "in such a way by their political authority than can become to be conceived as non-self-governing territories with respect to the rest of the state"[404]. The state plays out policies or measure which discriminate people living in part of its territory on the ground of their ethnicity or cultural background, and such a behaviour may define the region in which the discriminated people lives as a geographically separate territory, thus creating a situation of internal colonialism[405]. What can be noticed here is that, similarly to what is provided by the qualified secession doctrine, serious denial of self-determination and discrimination are required to legitimate the claim of secession of the injured group. Internal colonialism, even if It is a very rare phenomenon, helps to justify the existence of a right of secession in international law[406].

2.3.2. A legal right of secession.

According to Buchanan, a groups is entitle to a right to secede if it is included in the constitution of its state. Nevertheless, the vast majority of the states in international system does not provide any right of secession. According to a study, conducted by Monahan and Bryant, who analysed eighty-nine constitutions, many states strongly affirm the maintenance of the territorial integrity, which is considered

[401] Id., p. 327;
[402] Ibidem;
[403] Id., pp. 327-328;
[404] Id., p. 327
[405] Ibidem.
[406] Id., p.328;

inviolable or absolute[407]. But in seven of the eighty-nine constitutions analysed a constitutional right of secession is provided. Such a right was provided in the constitution of 1977 of the Soviet Union (article 72), in the 1968 constitution of Czechoslovakia and in article 1 of the 1974 Constitution of former Yugoslavia[408]. Today we can find provision on secession in some other constitutions such as the one of Ethiopia, or Saint Kitts and Nevis, Austria and other states.

Article 39(5) of Ethiopian constitution provides that "every nation, nationality and people in Ethiopia has the unconditional right to self-determination, including the right of secession", defining a nation as "a group of people who share common culture, language, beliefs and inhabit a contiguous territory […]"[409]. What is more, it also provides a set of necessary procedure to exercise secession: article 39(4) states that the first step for a nation to claim secession is the two-third vote of the legislative council of the nation, nationality or ethnic group desiring it; then the proposal is put on referendum by the federal government and once it has passed in favour of secession, there is a negotiation on the terms of secession, the division of assets and the new territorial borders, including a third part, which is the adjacent non seceding group[410]. If the parties do not reach an agreement, the federal government decides, also following the will of the seceding people[411]. Another example of a constitutional right of secession can be found in St. Kitts and Nevis constitution. Its Article 113 explicitly refer to a right of secession. Like Ethiopian constitution, St. Kitts and Nevis one also provides the procedures to effect secession: as only Nevis can secede from the federal republic of St. Kitts, it is required a two-thirds vote of the Nevis Legislative Assembly and of the Nevis electorate through a nationally organized referendum[412]. In this case, no *ex - post* negotiation are required if the referendum achieved the majority required[413]. Other constitutions refers to secession in an implicit way,

[407] KREPTUL A., *the Constitutional Right of Secession in Political Theory and History*, Journal of Libertarian Studies, Volume 17, 2004, pp.71-72; MONAHAN P. – BRYANT M. J., *Coming to Terms with Plan B: Ten Principles Governing Secession*, (C.D.Howe Institute, 1996). *Commissioned Reports and Studies.* Paper 71, pp. 7-14.
[408] Ibidem.
[409] Id., p.73.
[410] Ibidem.
[411] Ibidem.
[412] Id., p.74.
[413] Id., p. 75.

constitutionalizing the possibility of changes of borders. This is the case of Austrian constitution which recognizes this possibility at article 3, stating that changes "can only be effected by corresponding constitutional law of the Federation and the State whose territory undergoes change"[414]. A referendum on secession is determined by the federal government and voted by the national population, both by seceding and non-seceding groups. In this case, a simple majority is necessary and after it is reached there are negotiations between the seceding territory and the national government. After that, it is required a constitutional amendment voted by the two-thirds of the Austrian House of Representatives[415]. The same implicit inclusion of secession can be observed in Singapore and Switzerland constitutions. When a constitution lacks a right to secede, a group can obtain it through an approval from the central government, like for example in the secession of Singapore from Malaysia or the secession of Slovenia from former Yugoslavia[416].

From an international point of view, it is very difficult to find any explicit reference to a right of secession. It can be argued that international instruments neither prohibit nor recognize it. According to some scholars, international law is neutral about secession: there isn't any right of secession in international law, but it isn't neither prohibited[417]. These scholars argue that secession is a political act, because "the existence or the disappearance of a state is a fact, not a law". As a matter of fact, international law only recognize the outcome of a successful secession[418]. Nevertheless, there are few international legal instruments that refer, even implicitly, to a right of secession. Among this, the most relevant is the Friendly Relation Declaration[419]. As seen in the previous chapter, it is the most authoritative statement of principles of international law concerning self-determination and territorial integrity. In Paragraph seven of the principle V, it states that the right to self-determination, provided to people, shall not "be construed as authorizing or encouraging any action which would dismember or impair the territorial integrity of a

[414] Ibidem.
[415] Id.p.76.
[416] Raic, supra at 49, pp. 314-316.
[417] GRIFFIOEN, supra at 3, p. 95.
[418] Ibidem.
[419] RAIC, supra at 49, p. 317.

state"[420]. Some scholars argue that this negative provision was conceived to be addressed to a third states, as also the complete title of the declaration suggests: "Friendly relations and co-operation among state" declaration[421]. Despite of this statement, in a draft report, the Special committee on principle of international law concerning friendly relation argues that in some subscribed circumstances, namely when a state fails to respect the right to self-determination of people, a third state is entitled to support people attempting to secede, following other principle stated in the Declaration[422]. Following this interpretation, it can be argued that the friendly relation declaration does not exclude a priori a right of secession, but, at the contrary, it implicitly recognize a legitimacy of a right to secede under some circumstances. By doing so, the Friendly Relation Declaration acknowledge the qualified, or remedial, right to secede, which can be exercise as a remedy against some violation of principle of international law[423]. Many scholars endorse this argument: Cassese states that even if secession is not ruled by the friendly declaration, it can be permitted in very rare circumstance, "when very stringent requirements have been met" when, for example, a state violate basic human rights of a group or deny the possibility of peacefully exercising their right to self-determination[424]. On the other hand, this position encountered the opposition of some states of international community. United Kingdom for examples argued that there was nothing in UN Charter which "support that part of independent state was entitled to secede"[425]. Nevertheless, United Kingdom also asserts that "if a right to self-determination was held to exist it could be held to authorize the secession of a province" and this position was endorsed by many other states which support the inclusion of a right of secession in the right of self-determination[426]. These two right are very closely related, primarily because the violation of the latter can provide the exercise of the former. As a matter of fact a right of secession is provided when a state does not "act in compliance with the right of internal self-determination": a people whose right to internal self-determination is

[420] Id., p. 318-319.
[421] Ibidem.
[422] Id., p. 319
[423] Ibidem; see also GRIFFIOEN, supra at 3, pp. 94-96.
[424] RAIC, supra at 49, pp. 320-321.
[425] Id., p. 319-320.
[426] Ibidem.

denied can exercise external self-determination, which can lead to the application of its ultimate mode of implementation, that is secession[427]. This is also confirmed by two special Rapporteur, Gros Espiell and Cristescu, who argue that "the state must possess a government representing the whole population, without distinction" and that "a right to secession exist in the special case of people subjugated in violation of international law"[428]. According to them, a people has a right to self-determine themselves, in order to regain their freedom, and they can be entitled to secession to reach this goal. It can be thus argued that a right to secession came into existence when a state deny to its population, or part of it, to exercise its right to internal self-determination[429]. But this implementation shall respect the other principles of international law, in particular territorial integrity. This is supported in the OSCE Charter of Paris and European Community Declaration on the situation in Yugoslavia, in which it was argued that secession and territorial integrity in turn limit themselves: the implementation of external self-determination must be interpreted in the light of territorial integrity, as it cannot be exercise if there aren't special circumstances, such the ones enumerate above[430]. At the same time, territorial integrity shall be limited in cases of repeated violation of basic human rights or discrimination against a part of the population, which thus as the right to freely determine themselves, also by creating their new states through secession[431]. It can be deduced that the right of secession implicitly provided by the friendly relation declaration is inevitably a qualified right, which come to exist only in exceptional circumstances.

The existence of a remedial right to secession is also acknowledge by the international court. What is more, such an argument was promoted since the Aaland island case was discussed[432]. As it has been pointed out in the first chapter, the case was discussed by two commissions, the Commission of Jurists and the Commission of Rapporteurs. The former first argued that "international law does not recognize to national groups a right to separate from the state" they belong to and the latter

[427] Id., p. 321;
[428] Id., p. 321-322; UN Doc. E/CN.4/Sub.3/405/Rev.1, 1980, para. 60; UN Doc. E/CN.4/Sub.2/404/Rev.1, 1981, para. 173.
[429] Ibidem;
[430] Id., p. 322
[431] Id., 323-324;
[432] Griffioen, supra at 3, p. 104;

shared the same view, while adding that such a right can "only be considered as an exceptional solution, when the state lacks to apply just and effective guarantees", considering unilateral secession as a "last resort" against violation of human rights[433]. A more recent example can be find in the case *Katangese Peoples' Congress v Zaire.* In this case the African commission, after having recognized the right to external self-determination to Katangese people, asserts that "in absence of concrete evidence of violation of human rights and in the absence of evidence that the people of Katanga are denied to participate in government, Katanga is obliged to exercise a variant of self-determination, compatible with territorial integrity of Zaire", implicitly affirming that the exercise of external self-determination, and thus secession, is possible only in cases of violation of human right or other basic right provide to Katangese people by international law[434]. Moreover, the Supreme Court of Canada, in the Reference re Secession of Quebec, enumerates three situation which legitimate a right to external self-determination and secession, namely "situations of former colonies; where people are oppressed or where a definable group is denied access to government to pursue their political, economic, social and cultural development"[435].

It can be noticed that, even if implicitly, international law legitimate the right to external self-determination and provides some parameters to justify the exercise of its most relevant mode of implementation, that is secession. First, there must be a people which constitutes the minority of the population of the parent state and the majority of the part of the seceding territory. Second, the parent state must have oppressed the minority through serious violation or denial of the right to internal self-determination or violation of basic human rights. Third, secession must be the ultimate remedy, and no other effective remedies for a peaceful settlement of the conflict exist. It can be concluded that the unilateral secession which does not satisfy these parameters cannot be considered legitimate, but conversely it is an abuse and a violation of international law[436]. In these cases, statehood will be denied to the new seceded entities, and other states of international community may also deny their recognition,

[433] Ibidem; see also Raic, supra at 49, pp. 328-329;
[434] Id., pp.330-331;
[435] Griffioen, supra at 3, p. 105;
[436] See Raic, supra at 49, p.332;

which , as we will seen forward, is an important requirement for the existence of a state.

2.3.3. State practice and secession: the creation of new states and their recognition.

Among the ways of regulating secession in international law there is the international recognition of a new state, emerged from the secessionist conflict. As argued before, one of the main outcome of the process of secession is the creation of a new entity through the withdrawal of part of the territory of a parent state[437]. Secession and recognition are very closely related as new seceded entities require recognition by the other states of the international community to become states[438]. Since the earlier stages of secession, when it was recognized as a natural consequence of decolonization, recognition has played a central role in the validation of those claims, which had the goal to constitute a new, independent state[439]. In the period of decolonization a new state should have to respect some requirements, namely effective government, independence and the ability to conduct foreign affairs with state, in order to ensure the recognition by the international community. In that period there were no limitation to recognitions, except for premature recognitions[440]. With the end of decolonization, many changes in the legal regulation of self-determination and secession occurred, which inevitably leaded to transformations also in the rules of recognitions and the way they were used[441]. In post-colonial period, international law focused on principle like territorial integrity and sovereignty, which become "sacrosanct", and any attempt of secession and subsequent recognition of the new state, created after the redrawing of existing boundaries, were seen as violation of international law[442]. Nevertheless, the rules of recognition have not disappeared and continues to be used in relation with other principle of international law, such as

[437] GOARKE, supra at 200, p. 77;
[438] Ibidem.
[439] DUGARD – RAIC, *The Role of Recognition in the Law and Practice of Secession*, in KOHEN M. G., *Secession: international law perspectives*, Cambridge, Cambridge University Press, 2006, pp.94-95
[440] Id., p. 94;
[441] Id., p. 95;
[442] Ibidem; see also ANDERSON, pp. 355-356;

prohibition of aggression or statehood, which provides the necessary criteria for the recognition of a new, seceded entity as state[443].

Recognition is an important element of state practice concerning secession, as the reactions of international community to the creation of a new entity from claims of secession can contribute to give it a legal status. In order to become a state, a new entity shall satisfy some criteria of statehood, which are provided by Article 1 of the Montevideo Convention on the Rights and Duties of States[444]. It "should posses a permanent population, a defined territory, a government and the capacity to enter into relations with other states". The first criterion, the permanent population, has been described as "an aggregate of individuals who live together as a community", which can be composed also by people of different races or creed[445]. It has been argued that the criterion of permanent population can also include nomadic tribes, as states in the *Western Sahara case*, and thus it should not be considered as a constant criteria[446]. For what concerns the second feature of statehood, a state must possess a territory where it can exercise its sovereignty. It has been also argued that a state can exists if its territory "has a sufficient consistency, even though its boundaries have not yet been accurately delimited", and this positions has been endorsed in cases like the *North Sea Continental Shelf Cases* and *Case Concerning the Territorial Dispute*[447]. In relation to the third criterion, new arguments have been recently developed, also concerning secession and self-determination. It has been argued that, in cases in which it lacks an effective government, it can be compensate by the right of external self-determination: Raic argues that when a state is created through the exercise of the right of self-determination, it can be considered a state even if it has not yet an effective government[448]. He asserts that this is possible, thanks to the compensatory force of the external self-determination[449]. According to this theory, an entity created through secession, which has not been exercised in conformity with the right to

[443] DUGARD – RAIC, supra at 404, p. 95.
[444] Id. p. 96.
[445] Ibidem; see also ANDERSON, pp. 356- 360.
[446] ANDERSON, p. 357.
[447] Ibidem; *North Sea Continental Shelf Cases*, judgment of 20 Feb., 1969; *Case Concerning the Territorial Dispute,* Libyan Arab Jamahiriya/Chad, 1994.
[448] Id., p. 358.
[449] Ibidem; RAIC, supra at 49, p. 104.

external self-determination will be unable to satisfy the criterion of effective government, and will not thus be considered a state[450]. The last criterion of statehood is the capacity to enter relation with other states. In order to satisfy it, the entity should be able to politically and legally represent itself in the international system[451]. Many scholars argues that it exist a fifth criterion of statehood, not included in the Article 1 of the Montevideo declaration. According to them, a state must demonstrate that it is independent and not subject to political control of other states, making of independence the fifth criterion for statehood[452].

Once an entity meets all the criteria of statehood, the international community shall confirm it through recognition. There are two school of thought on recognition, namely the declaratory and the constitutive one[453]. According to a declarative theory, recognition is a formal acknowledgment of an existing fact. It consider statehood as a "purely factual question" and for this reason it argues that once an entity satisfies all the statehood criteria, "ipso facto becomes a person in international law" (Chen), reducing recognition to a merely declaration of existence by the international community[454]. Many scholars endorse this theory of recognition. Chen for examples, argues that "whenever a state exists, it is subject to international law, independently of the will or actions of other states"[455]. Brierly similarly argues that that "a state may exist without being recognized by other states; it has the right to be treated by them as a state. the primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain", thus asserting that recognition is only a formality to acknowledge the factual existence of a state[456]. And it has also confirmed by practice, as can be seen in the decision of Badinter Arbitration Commission with regard to Yugoslavia[457]. In its Opinion1, the commission stated that "the effect of recognition by other states are purely declaratory", supporting it in another opinion, Opinion 8, in

[450] Ibidem;
[451] ANDERSON, pp. 359-360.
[452] Ibidem; DUGARD – RAIC, supra at 404, p. 96-97.
[453] ANDERSON, p. 360;
[454] DUGARD – RAIC, supra at 404, p. 97; ECKERT, Constructing States: the Role of International Community in the Creation of New States, p. 21;
[455] Ibidem;
[456] Ibidem; BRIERLY, *Law of Nations*, Oxford university press, 1963, p. 139.
[457] Ibidem; Griffioen, supra at 3, pp.107-109;

which it states that "recognitions only has a declarative value"[458]. The constitutive theory of recognition, at the contrary, states that an entity become a state only and exclusively if it is recognized as such by the international community. This can be seen as a criticism to the declaratory theory, as scholars supporting the constitutive one argues that statehood cannot be seen as a factual question. according to this theory, recognition thus become a *conditio sine qua non* of statehood, which can be added to the above mentioned criteria of article 1 of Montevideo declaration[459]. Many critics have been advanced against the constitutive theory, mostly because, according to some scholars, it lead to uncertainty. As a matter of fact, some state of international community can recognize the new entity as a state, while some other may not, and this inevitably leads to uncertainty of the status of the new entity. This is what Lauterpacht describes as a "grotesque spectacle" which can be avoided if states recognizes new states as soon as the satisfy the four criteria of statehood, as they have the "duty to grant recognition"[460]. The whole concept of recognition is still quietly debatable and not fixed, as states can arbitrary decide whether to recognize or not a new entity as state. The discretionary character of recognition is due to the absence of an international authority deciding over these questions, and this make state practice differs from what theories suggest[461]. As a matter of fact, even if the provision of the declaratory theory are widely supported, it is difficult to accept that a new entity that has received recognition by none or very few state of international community can pretend to be a state, because it cannot demonstrate its ability to enter in relation with the other state, that do not recognize it[462]. One way to resolve this impasse is to use a collective recognition. This procedure co-exist with the traditional recognition, but it is more efficient: states exercise their right of recognition collectively, by using some guidelines in order to reach a common result[463]. This is the policy of European Union and also of United Nations. With regard to United Nations, it has been asserted

[458] Ibidemn; Arbitation Commission of the Conference on Yugoslavia, also Known as Badinter Arbitration Commission, Opinion n°1, Dissolution of SFRY, and Opinion n° 8, completion of the process of the dissolution of the SFRY, 1991.
[459] DUGARD – RAIC, supra at 404, p. 98; Eckert, supra at 419, p. 23.
[460] GRIFFIOEN, supra at 3, p. 108; DUGARD – RAIC, supra at 404, p. 97; LUTERPACHT, *Recognition in international law*, Cambridge University Press, 1947, p. 78.
[461] GRIFFIOEN, supra at 3, p. 110.
[462] DUGARD – RAIC, supra at 404, p. 98.
[463] Id., p. 99.

that the admission to the organization can be compare to a collective recognition. In support of this argument, it should be argued that membership of UN is limited to states only[464]. This is provided in some articles of the Charter and other references related to the criteria of statehood (Articles. 3-4) and today all members of UN are accepted as states in international community, even those that would have probably not received such an approval by individual states. The collective recognition procedure has relevant implication in the debate on recognition. It helps to solve the problems related to the constitutive recognitions: it eliminate the grotesque spectacle as all members of UN are inevitably forced to recognized each others, and that also replace the subjective decision with a collective one[465]. United Nations thus plays an important role in the recognition and admission of new states in international community. By the same means, it can also reject claims of statehood and the reject recognition for some entities. The doctrine of non-recognition is based on the principle *ex injuria jus non oritur*, according to which acts perpetuated in violation of *jus cogens* of international law are illegal and thus illegitimate[466]. From this starting point, non-recognition doctrine prohibits the recognition of entities develops from the violation of some absolute right or principle of international law. By adopting such a doctrine, United Nation firmly prohibits its member state to recognize entities created with aggression, racial discrimination, denial of self-determination on other violation of basic human rights[467]. This doctrine has been put in place in the cases of secession of Rhodesia: United Nations adopted several resolutions asking states not to recognize Rhodesia, as it based its claim of secession on the discrimination of the majority of the population and violation of their basic human rights and also on apartheid. The same happened with the secession of South Africa's Bantustans and the attempt to secession of Katanga from Congo[468].

As seen for the right to self-determination, also secession is a very vague and indefinite concept. Despite the existence of a number of theories offering a validation for secession and reference to it in some constitutions, international law does not refer

[464] Ibidem;
[465] Id., p. 100; GRIFFIOEN, supra at 3, p. 110;
[466] DUGARD – RAIC, supra at 404, p. 100, 132-133;
[467] Id., p. 132;
[468] Id., pp. 132-133;

to it explicitly in none of its legal instrument. This contribute to create a sort of l*acuna* in international law, as it does not provide any legal regulation for the claims of secession arose in post colonial period. It is possible to distinguish two macro-categories of secession which included all the other analysed above: consensual secession and unilateral secession. Consensual secession is based on the consent of the host state to the secession of a group. At the contrary, unilateral secession occurs without the consent of the host state, which can lead to very violent conflicts, constituting a danger for international security and stability. Secession has always been seen as a controversial issue, which can be addressed in very different ways. As we will see in the next chapter, every secessionist claim has its own defining features, which can be the different historical background, different reactions of international community, or different action of the majority of a seceding group, or reasons which take to secession, which can help in finding a solution to legitimate it. In the next chapter, defining features will be taken into consideration to classify some of the most relevant conflicts of the post-colonial period, also relying on the principles of international law related to secession and self-determination.

III

SECESSIONIST WARS AND MOVEMENTS IN THE POST-COLONIAL ERA. ANALYSIS AND CLASSIFICATION.

SUMMARY: 3.1. Secession outside the colonial context: causes of secessionist instances; 3.2. The rights to self-determination and to secede in a practical context: analysis and classification of the main post-colonial secessionist conflicts.

3.1. Secession outside the colonial context: causes of secessionist instances.

In this chapter, the most relevant secessionist wars of the post colonial period will be analysed. The exercise of the right to external self-determination and secession was hardly recognized by the international community, which was in the past very reluctant to consider that external self-determination and secession would have the possibility to develop outside the colonial context. Many conceived the recognition of a right to secede as a danger for territorial integrity and sovereignty of multinational states composing the international system and this apparently led to the fear that, by providing a right to secession, "there would be no limit to fragmentation and peace, security and well-being would become even more difficult to achieve"[469]. Nevertheless, example of secessionist conflict outside colonialism highlights that external self-determination and secession developed even beyond the colonial context. Among post colonial secessionist claims, it can be cited the separation of Singapore from Malaysia in 1965. It was a case of consensual secession as it was based on a separation agreement between the parties. For this reason international community collectively recognize the new state and admitted it as a member of United Nations[470]. Similarly, Baltic republics secession can be seen as peaceful, consensual secession: in 1991 Baltic States seceded from Soviet union, regaining their former independence, with the consent of the parent state. Also in this case, international community positively reacted and admitted them as members of United Nations, thus recognizing their independence and secession[471]. Even the break-up of Soviet Union was conceived as secession. Its legal personality was continued by the Russian

[469] Griffioen, supra at 3, p.111; on external self-determination and secession see also Chapter I and II of this work;
[470] Id., p. 112;
[471] Id., pp. 112-113;

Federation and, as the parent state support secession, international community was positively influenced to recognize the eleven new republics and admitted them as member of United Nations. What is more, European community drawn up a "guidelines on the recognition of new states in Eastern Europe and in the Soviet Union", providing five criteria for the recognition of new states[472]:

> "i)respect for the provision of the Charter of United Nations and the commitments subscribed to the Final Act of Helsinki and the Charter of Paris, with regard to the rule of law, democracy and human rights; ii) guarantees for the right of ethnic and national groups and minorities in accordance with the commitments subscribed to in the frameworks of the CSCE; iii) respect for the inviolability of all frontiers which can only be changes by peaceful means and by common agreements; iv) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; v) commitment to settle by agreement, including where appropriate by recourse of arbitration, all question concerning state succession and disputes".[473]

These guidelines were also used by EC for the common recognition of Slovenia and Croatia, which seceded from former Socialist Republic of Yugoslavia. The separation of Croatia and Slovenia can be considered cases of unilateral secession as they declared their independence before the dissolution of former Yugoslavia, subsequently causing the break-up of SFRY[474]. The dissolution of former Yugoslavia can be considered as the most unclear issue of the last decade, due to the contrasting opinions of the Arbitration commission established for this special case. The Arbitration Commission established for solving dissolution question and legitimating secessionist claims of former socialists republics composing SFRY used to refer to its break up both as secession and dissolution, contributing to increase the confusion on the argument [475]. As a matter of fact, in its first opinion, the commission argued that "the SFRY is in the process of dissolution"[476]. This connotation was nevertheless very convenient to international community as there was not a parent state that should have to accept the process, facilitating the process of recognition by the other states of international

[472] Id., pp. 113-114;
[473] Declaration on the `Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 16 December 1991.
[474] Ibidem; Griffioen, supra at 3, p. 113.
[475] as seen in the second chapter, many scholars argue that dissolution can be considered as synonymous. It has been largely argued that they differ in their outcome and, for this reason they are not the same thing. For the discussion about this topic see chapter 2, par. 2.2.3;
[476] Id., pp.114-115;

system. However, this confusion did not affect the separation of the above mention states, which can be considered without doubt as secession because took place before the process of dissolution of former Yugoslavia began[477]. Another example of secession outside the colonial context is the separation of Eritrea from Ethiopia. Eritrean secession was a consensual one and took place after an agreement between Eritrean People Liberation Front and transitional government of Ethiopia was reached, after which Eritrea was admitted as member of Unite Nations and recognized as a state from the international community[478].

Apart from the secession of Balkan republics, occurred after many years of violent civil war, and other few examples, the majority of claims of secession of post colonial period were consensual, a feature that eased their recognition by states of international community. There are several reason for a group want to secede from its host state. As seen in the previous chapter, the group may suffer some injustices and this may lead to a remedial secession, in order to stop the violation of the right of a minorities. Or the group may want to secede in order to reclaim their land, illegally annexed by a foreign state, or even for self-determine themselves and create a new independent state where to develop their culture without discrimination or interference of a third states or simply because the majority of that group wants to separate from the parent state without an apparently severe reason. In the next paragraph some of the most relevant secessionist war of the post-colonial period will be analysed, trying to classifying them by using elements of self-determination and secession analysed in the previous chapters, also taking into account their defining features.

3.2. The right to self-determination and to secede in a practical context: analysis and classification of the main post-colonial secessionist conflicts.

External self-determination and secession can be considered as the most relevant issues of international law from their early developments. During

[477] It has been argued that the recognition of Croatia and Bosnia Herzegovina was premature, as the two entities did not satisfy the criteria for statehood enumerated by the Article 1 of the declaration of Montevideo. Id., p. 114
[478] Id., p.115

decolonization period, self-determination was seen as a right that would have expired once the main goal of decolonization was reached, that is once every state under alien subjugation would have reached independence from the colonial powers. Nevertheless, as seen previously, self-determination also become applicable in the post-colonial period and international law "strongly favours the internal aspect of self-determination", redefining the traditional external aspect used during colonialism[479]. What is more, during post-colonial period, the concept of self-determination has been expanded and also equated to secession, reintroducing its external aspect related to the free choice of people about their future and status in the international system. The above mentioned events in Soviet Union, Eastern Europe and other parts of the world show us that the internal and external aspect of self-determination are closely relates, especially because of the practice of recognition of new entities as states by other states composing the international community. In particular, after European Union set out the abovementioned general criteria for recognition, this relation become more evident. It can be argues that in post-colonial period, external self-determination is accepted and recognized if a state deny to minorities living in its territory the right to internal self-determination and other basic rights[480]. That is to say that external self-determination can be exercised defend the rights of a minorities or ethnic groups, which want to self-determine. As seen previously, among the mode implementation of the external aspect of self-determination there is also secession, which is one of the most controversial issue of international law. Even if secession was seen as a colonial concept, which can be used only in colonial or decolonization situations, the increased of the number of secessionist movements and attempts in post-colonial period contribute to shift the attention of international law on the concept and many theorists began to focus on secession. There are different opinion about its application and lawfulness among scholars of international law. As seen in the previous chapter, the multitude of arguments concerning the concept of secession contribute to create confusion about its definition and many theories have been advanced for legitimating it. it can be noticed that these theories emphasize two approaches of secession, which

[479] For the analysis of external and internal aspect of self-determination see chapter 1, par. 1.3. of this work;
[480] GRIFFIOEN, supra at 3, pp. 91-92;

have defined as a remedial and primary right theories of secession, which conceive secession as a remedy against abuses or violation of minorities right perpetuated by the parent state (the former) or as the result of the decision of the majority of a minority of a group to secede from the host state to freely exercise their right to self-determination (the latter). Nowadays, it does not exist a single, fixed definition of secession and thus a legal right of secession is not explicitly provided in any international legal instruments. Nevertheless, international community has faced several secessionist claims during the last decades, resolving the different secession issues case by case by accepting, at least implicitly, the exercise of secession by minorities or group of people for achieving independence. As a matter of fact, after having analyzed some of the most relevant secessionist conflict of the post-colonial period, we noticed that each of them have different, defining features and that, depending on this features, international law and community addressed and resolved them in different ways. By analyzing their defining features, deriving from the different historical background, reactions of international community, or by the action of the majority of a giving seceding group, it has been possible to distinguish three categories of secession, through which classify the analysed secessionist movements: ethnical secession, democratic secession and territorial secession. Each of these categories have been named after the peculiarities of the secessionist conflict analysed, also referring to the elements of the right to self determination and secession seen in the previous chapters. In further paragraphs, we will address these categories to explain the conclusions reached analyzing case by case the secessionist conflicts.

3.2.1. *Ethnical secession:* Kosovo's Declaration of Independence as special case of remedial secession.

As seen in the second chapter, remedial secession generally occurs in situation of violation of basic human rights or injustices and abuses repeatedly perpetrated by the state against part of the population living within its border[481]. Ethnical secession can be considered one of the modes of exercise of this kind of separation and it can be

[481] This is only a theory. It has not been accepted as a right in international law, even if it is acknowledged by ICJ and some International instruments, as seen in the second chapter of this thesis. For more information of remedial theory of secession see para. 2.3 of this work.

argued that it is based on violation of human rights and discrimination of ethnic minorities by a political authority. One of the most important example of ethnical secession is Kosovo secession from Serbia. An analysis of Kosovo case can help to better understand this category of secession. The roots of the tension between the two parties of the conflict, Kosovo and Serbia, can be traced back to many centuries ago, as both Kosovars and Serbian have inhabited that area for hundreds years[482]. Serbia absorbed the region of Kosovo in the late 12th century and controlled it until 1389, year in which , after the battle of Kosovo, Serbia lost control of the region after it was defeated by the Ottoman Turks. Since early years of 13th century, Kosovo's population was composed by different ethnics groups, among which Albanians, Serbs, Greek Armenians and others, highlight that this region was a fertile ground for the spread of different nationalism[483]. Despite this ethnic mosaic composing Kosovo's population, the situation remained stable for long time also after Serbia regained control over the region when Ottoman Empire began to dissolve after the WWI, integrating it in the kingdom of Serbs, Croats and Slovenes[484]. After the WWII, when Josip Broz Tito came to power, Kosovo was integrated in the Federal Republic of Serbia, which composed, with other six republics, the Socialist Federal Republic of Yugoslavia. During Tito's dictatorship, Kosovo enjoyed some autonomous rights with respect to culture and economics, mirroring the political structure of SFRY[485]. Later in 1974, a definitive autonomy was granted to Kosovo Albanians with the 1974 SFRY Constitution. It become to be conceived as an autonomous province within the federal republic of Serbia, and this status gave it the rights of representation to the presidency of the republic of Yugoslavia and also the authority of drafting its own constitution[486]. Nevertheless, this constitution did not entitles it of a right to secede. First signs of political instability and changes developed after Tito's death: each of the six federal republics began to claim independence and even in the Kosovo's region the same

[482] FIERSTEIN D., *Kosovo's Declaration of Independence: an incident analysis of legality, policy and future implication*, Boston Univeristy International Law Journal, volume 26, 2008, p. 419; see also BURRI T., *The Kosovo Opinion and Secession: the Sound of Silence and Missing Links,* German Law Journal, volume 11, 2010;
[483] Id., p. 420;
[484] Ibidem;
[485] Ibidem;
[486] Id., p. 421;see also MELLER S. E., The *Kosovo Case: an argument for a Remedial Declaration of Independence,* Georgia Journal of International and Comparative Law, volume 40, 2012, p. 836.

claims developed among the ethnic minority of Kosovar Albanians[487]. In the meanwhile, Milosevic began to gain power in Serbia and at the same time started to claim secession and independence of its state by the federal republic of Yugoslavia[488]. With the advent of Milosevic, Kosovo began to lose the autonomy to which it was entitled during Tito dictatorship. Serbia president accused Kosovar of violation of the rights of Serb minority in the region and for this reason, as a response to this violation, began to reconceive rights and autonomy of Kosovo, by preparing amendments to 1974 constitution to strip Kosovars of the autonomy granted by the above mentioned constitution[489]. From then on, there has been a violent escalation in the relationship between Kosovo and Serbia: Kosovar Albanians responded with violence to Serbian government restrictions and began to claim independence from Serbia, which revoked its status of autonomy[490]. The first attempt of secession was made in 1990, when Kosovo declared its independence from SFRY, which dissolved one year later. In addition, Kosovar began to organize parallel government structures, schools, clinics, and through a referendum in which the 99% of the voters were in favour of independence, it asserts its independence and full sovereignty[491]. In response to this claims, Serbian government started to perpetrate violence against Kosovar Albanians, including massacres, forced migration, rapes, torture, ethnic cleansing and also the destruction of schools and entire villages[492]. This situation led to the intervention of international community: the NATO intervened with air strikes against Serbia, that lasted until Milosevic signed the Military Technical Agreement in 1999[493]. Also the UN Security Council intervened by adopting the Resolution 1244, with which provided the deployment the establishment of an interim administration for securing and guaranteeing peaceful and normal life in Kosovo, until it wouldn't be able to set the

[487] Ibidem;
[488] ibidem; see also BORGEN C. J., *Kosovo's Declaration of Independence: Self-determination, Secession and recognition*, American Society of International Law, volume 12, 2008, p.1.
[489] Id., p. 421
[490] Ibidem.
[491] Id., p. 422;
[492] Kosovars responded with the creation of a terrorist group, the Kosovo Liberation Army (KLA), to defend themselves by the atrocities of Serbian Government. before of the intervention of international community, the two conflicting parties try to sign a cease-fire agreement, in1999, whose failure brought to the massacre of 45 albanians, which led to the intervention of the NATO., id., p.422;
[493] FIERSTEIN, p. 423.

basis for its own government[494]. Res. 1244 creates a special agencies for Kosovo, the United Nations Mission in Kosovo (UNMIK) which had the duty to supervise Kosovo provisional institutions, conduct its external relations and it was even responsible of its internal affairs in order to help Kosovo to become a new, self-governing, state[495]. After few years, in 2008, Kosovo finally declared its independence from Serbia, and some states of international community recognized it to be a new effective state[496].

As can be noticed from the tumultuous historical background, Kosovar Albanian ethnic minority claimed for secession in order to stop the abuses and violence perpetrated by Serbian Government and regain the autonomy they had during Tito dictatorship. According to the Remedial Right Only theory analyzed in the second chapter, the secessionist claim should satisfy at least three criteria to be considered legitimate, namely that a people claim for it, that there has been violation of human rights and that secession is the last resort of the abused people. As seen before, Kosovar Albanians shared the same region with Serbians for centuries, while being ethnically separated, and the cultural and linguistic differences of the two groups contribute to give to Kosovar Albanians the status of people[497]. On the other hand, some consider Kosovar Albanians as an ethnic enclave rather than a people, constituting the 90% of the population of Kosovo, sharing the same features with the inhabitants of Albania, bounded on the south by the region. The human rights atrocities perpetrated by the Serbian government contribute to emphasize the ethnical

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[494] BORGEN C. J., *Is Kosovo a Precedent? Secession, Self-determination and Conflict resolution*, International Legal Material, Meeting Report 350, Volume 47, 2008, pp. 1-3.

[495] The resolution provided the creation of a Provisional Institutions of Self-Government (PISG), developed under the supervision of UNMIK. This framework would have the duty to provide to Kosovo a "substantial autonomy within FRY. Tat the same time, the resolution also provided that five powers (UNMIK, EU, Serbia, Kosovo, through the PISG, and NATO) would have the duty of supervising PISG in the conduction of external relations and internal affairs; cleaning the minefield and boundaries of Kosovo; providing international military presence to maintain peace and stability in the region. Id., p. 424; see also MELLER, pp. 834-835.

[496] Id. pp. 424-425; is declaration of independence necessary to achieve secession? Crawford argues that it "antedates the outcome of secession, confined to the unilateral secession". it can be argued that declarations may also coincide with the outcome , and thus signifying that can be necessary for the creation of a new state, but, generally, this usually happens in case of constitutional or politically negotiated secession. nevertheless, it should be added that declaration of independence is not included among the criteria for statehood, so it is not necessary to create a new state. CRAWFORD J., *State Practice and international law in relation to secession*, British Yearbook of International Law, volume 69, 1998, pp.85-85; ANDERSON, p. 379-380.

[497] FIRSTEIN, supra at 446, pp. 435, 436; BORGEN C. J., *Kosovo's Declaration of Independence: Self-determination, Secession and recognition*, American Society of International Law, volume 12, 2008, p. 4;

division of the two groups inhabiting the same region and this also entitle the Kosovar Albanian minority of a right to self-determination[498]. Kosovar minority can be thus considered as "people", with different religion, culture, history and language, and ,as such, it should be able to exercise their right to self-determination to freely develop their status within the border of the shared territory, or even by creating its own new, independent state[499]. For what concerns the second criterion, it is quietly demonstrated that Serbian government perpetrated human rights atrocities against Kosovar minority, only stopped after the intervention of the NATO and international community. It was the NATO intervention that confirmed that the situation was instable in such a way that a separation of the two ethnic group was be needed to solve the situation[500]. Secession can be thus be considered as the last resort of Kosovar Albanians, not only because it was stated by international community, but also for other strong arguments which demonstrate that this situation could not be resolved through domestic remedies[501]. First of all, with the advent of Milosevic the initial status of autonomy of Kosovo was revoked, and this highlights that Serbian government did not have the intention to recognize Kosovar rights to self-determination. Then, as also UN Special envoy Ahtisaari noticed, even after the intervention and the mediation of international community Serbia and Kosovo were not able to reach any agreements on the final status of Kosovo, leading to the conclusion that there were not realistic option other than separation to solved the issue[502]. After having analysed Kosovo claim of secession in the light of the criteria provided by the Remedial Right only theory, it can be concluded that Kosovo secession can be thus considered as a special case of remedial secession held by an oppressed ethnic minority and that the subsequent independence can be seen as the last resort for Kosovars to safeguard themselves from destruction, in order to preserve their ethnic identity. What is more, the intervention of the international community can be seen as a moral duty, recalling the responsibility to protect which every state has in presence of injustices and violation of human rights against a groups which is not able

[498] FIRSTEIN, supra at 446, p.436;
[499] Ibidem;
[500] Ibidem;,
[501] Id. , pp. 437-438; BORGEN, supra at 457, pp. 4-5;
[502] Ibidem;

to defend itself: "the moral goals of international system are peace and justice, respect of human rights, both within the state and in the state interaction with those beyond its borders", argues Buchanan in speaking about the existence of a remedial right of secession, which is at the basis of every action against an oppressive authority[503].

Few years after the intervention of NATO and UN, in 2008 Kosovo parliament declared the independence of Kosovo from Serbia. It is recognized by 111 states of UN and 23 of the 28 member states of European Union[504]. Nevertheless, Serbian government still not recognizes it and this make the separation of Kosovo a unilateral secession, lacking the consent of the host states. Serbia and other states of international community, including Russia, rejected the Unilateral Declaration of Kosovo, considering it illegal and illegitimate. Serbia addressed the General Assembly, asking it to request the ICJ to give an opinion about the conformity of Kosovo declaration to international law[505]. In narrowly interpreting Serbia and UNGA request, the Court express its opinion in 2010 on whether or not "the Declaration of Independence is in accordance with international law"[506]. According to the Court, the question was "narrow and specific; it ask for the opinion on whether or not the declaration is in accordance with international law; it does not ask about the legal consequences of that declaration"[507]. By reformulating the submitted question, the Court emphasize that the actual issue rely on the lawfulness of such a declaration and not on whether Kosovo has a right to declare independence. As a matter of fact, in its opinion, the Court focused on an analysis of international law in order to find whether prohibitive rules against declaration of independence exist and then to decide if the declaration of independence of Kosovo has been adopted in violating rules of international law[508]. By analyzing the several historical cases of independence and

[503] For R2P and Remedial secession see chapter 2 of this work;
[504] CIRKOVIC E., *An analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence*, German Law Journal, volume 11, 2010, p. 895; for a list of states recognizing Kosovo see http://www.kosovothanksyou.com/.
[505] Id., p. 896;
[506] The original question was: "is the unilateral declaration of independence by the provisional institution of Self-government of Kosovo in accordance with international law?", GA Res. 63/3, UN Doc. A/RES/63/3 of Oct., 8, 2008;
[507] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion OJ ICJ, 2010, par.51;
[508] CIRKOVIC, SUPRA AT 463, PP. 897-899;

adoption of declarations of independence during the XVIII and XIX centuries, the Court noticed that, even if some of them were contested, "state practice points clearly to the conclusion that international law contained no prohibition of declaration of independence"[509]. This practice was confirmed in the XX century by the development of the right to self-determination which create a right to independence for non-self-governing territories recognized by international law[510]. The court also argued that even outside this context there were instances of independence and thus "state practice does not point to the emergence of new rules prohibiting the making of declaration of independence"[511]. In arguing so, the Court emphasized that it does not exist any rules of international law which deny the possibility of declaring independence, and so declarations are not illegal. What is more, in referring directly to Kosovo situation, the Court also argued that its people can exercise a right to create a new state as an implementation of self-determination and also of remedial secession, thus legitimating Kosovo claims of secession from Serbia (par. 82)[512] . To confirm its conclusion, the Court also analysed the case in relation to security Council practice and its resolution 1244, concerning the interim administration of Kosovo[513]. In analyzing the Security Council practice, the court argued that it has condemned some declaration of independence because they were related to the violation of some basic rights of international law, such as an "unlawful use of force or other egregious violation of norms of peremptory character" and not because of a unilateral character[514]. In addition, as the Court noticed, in the situation of Kosovo, Security Council "has never take this position" and all other SC resolutions seems to confirm the Court arguments, that "no general prohibition against unilateral declaration of independence" exist in international law (par. 81)[515]. In considering the declaration of independence in relation to the Res. 1244 of UN Security Council, the Court had to established if it was compatible with the provision of the above mentioned resolution and whether it was prohibited by the regulation of the UNMIK, the provisional

[509] Id., p. 900, advisory opinion, supra at 466, par. 79
[510] Ibidem;
[511] Advisory opinion, supra at 466, par. 79;
[512] the court did not develop this issues because its opinion only concern the legitimacy of the declaration of independence under international law.
[513] CIRKOVIC, SUPRA AT 463, PP. 901-902;
[514] Advisory opinion, supra at 466, para. 80-81;
[515] CIRKOVIC, SUPRA AT 463, PP. 903-904;

administration created through the resolution[516]. First of all, the Court noticed that the 1244 had the aim of creating an interim government for Kosovo, and did not taken in consideration what would be the final status of Kosovo, also adding that res 1244 did not addressed the kosovar leadership, but those who were part of the provisional government[517]. As the author were external to the provisional government, the declaration of independence was not prohibited even in the framework of the resolution 1244 and the PISG, because they "did not bar the authors from issuing a declaration of independence. Hence the declaration did not violate the Resolution 1244"[518]. To confirm this argument the court further added that both the instrument adopted in Kosovo situation were part of international law and, as the declaration did not violate it, consequently cannot violate them. (par, 114-119). After having express its idea, the Court reached the conclusion that "the declaration of independence did not violate international law" by ten votes to four of the participants. (par.123). This conclusion highlights the vagueness of the concept of secession in international law, as it provide neither a right of secession nor prohibit it. This conclusion has been questioned by Judge Simma in his separate opinion, adding that international law can also be neutral on some specific facts and that there are areas that international law not regulate at all[519]. As international law does not contain any rules concerning secession, its legitimacy is leaved to state practice: as seen before, states of international community can recognized the creation of new states, as in the case of Kosovo, by accepting their declaration of independence. As already seen, mostly states of international community accept the declaration of independence of Kosovo and recognized the new entity as an independent state. nevertheless, Serbia, the parent state, still not recognizes Kosovo as an independent state, and for this reason its secession can be seen an a unilateral ethnical secession.

Other examples of claims of secession which can be included in this category can be Bangladesh's secession from Pakistan. Also in this case, people of Bangladesh, in particular the East Bengals, were subject to violence and repression perpetrated by

[516] Ibidem;
[517] Advisory opinion, supra at 466, para. 110-118, on "whether the authors acted in violation of resolution1244 […]";
[518] Circovic, SUPRA AT 463, P. 904; ADVISORY OPINION, SUPRA AT 466, PAR. 118-119;
[519] Id., p.899; Advisory Opinion, supra at 466, Separate opinion of Judge Simma, para. 9.

the Pakistan's army. United nations and international community interpreted this oppression as the signal of an ultimate split up between the two states, and a reunification was quite impossible. For this reason they legitimate Bangladesh secession and after Pakistan recognition of the new entity, it was admitted as a member of UN[520].

3.2.2 *Democratic secession:* the secession of Crimea and inviolability of Ukraine's territorial integrity.

Different ways for exercising secession and external self-determination developed since the first years of post-colonial period. As seen in previous chapter, a people can achieve secession through declaration of independence, provided by the leaders of liberation movements or representatives of the people at the government of parent states, but also through the expression of the will of the majority of a group which represent a minority in an existing state. Democratic secession is achieved through a referendum in which the majority of the people claiming for secession vote in favour of a separation from the host state, in order to create a new independent state or even to annex to a third state[521]. This is the case of secession of Crimea from Ukraine in favour of annexation to Russian Federation, which represent a special case related to this category of secession. The historical background of the autonomous region of Crimea is fundamental here in order to understand the reason of the claim of secession from Ukraine. The history of Crimea has been characterized by continuous cession and annexation to both Ukraine and Russia Federation, due to its strategic geographical position in the Black Sea, as, since the early development of the modern state, it has represented an outpost to the West for the Russian Empire and to the east for European and occident Powers[522]. The situation of Crimea seems to stabilized

[520] Raic, supra at 49, pp.335-342;

[521] the concept of Democratic Secession has been provided by MacLaren in his article "Trust the people?" Democratic Secessionism and Contemporary Practice, German Law Journal, volume 16, 2015, pp. 634-635: he argues that referendum in the context of democratic secession poses some questions, whose answers may determine the democratic nature of its process and results. These question are namely: who is the sovereign?(the role of international authorities and the people in deciding about secessionist claims), what are the territory's boundaries ?(definition of the territory and group entitled to participate to referendum), How are identities to be handled? (the role of the different identities and how they are managed), When is "the last word"? (determining the final result of referendum).

[522] Ferrari A. – Cella G., *Crimea, faro russo sul Mediterraneo,* in *L'Ucraina tra noi e Putin*, Limes – rivista italiana di geopolitica, volume 4, 2014, pp.148-149;

when Russian empire annexed it after a war with the Ottoman Empire, at the end of which, with the peace of Kuçuk-Kanyarca, the Turk lost sovereignty over the region, which was annexed by the Russian empire in 1783[523]. This situation would last until 1954, when Soviet Union ceded some of its territories, included Crimea, to the Socialist republic of Ukraine, as a symbol of the Russian-Ukrainian friendship[524]. Crimea was part of Socialist republic of Ukraine territories until the break-up of Soviet union. Influenced by secessionist movements and claims of independence of the other republics composing the former Soviet Union, Crimea began to claim for secession since first years of 1990, even before of USSR dissolution[525]. As a matter of fact, in 1991, a referendum was held after the approval of Simferopol parliament, through which, with 93% of votes in favor, it was reconstituted the autonomous republic of Crimea, owned during soviet period. What is more, a month later the Socialist Autonomous Republic of Crimea was proclaimed[526]. After the break-up of Soviet Union, Crimea was included in Ukrainian territories, but also continued to maintain its status of autonomous republic. Nevertheless, the dissolution of USSR contributed to the spread of a wave of nationalism in its former republics which inevitably influenced also Crimea, and attempts to secede for independence or for gaining more autonomy continued during 1990s. In 1993, the role of President of Crimea was created and in 1994 the first presidential election took place[527]. Ukrainian government responded with some decrees aimed at abolishing this new figure, but also to regain more power in Crimean region, by reinforcing Ukrainian military presence[528]. In 1995, it was first drafted a constitution of Crimea, which was officially approved in 1998. The Constitution is still lawful and provide to Crimea the status of autonomous region, integral part of Ukrainian territory[529]. Nevertheless, after the worsening of Russian-

[523] Id., p.149: before the war against the ottoman, Crimea was a *khanate*, became independent after the end of the period of Tartar Gold Horde in 1441. Crimean Khanate was conquered by Turks in 1475 and then, after war, was annexed to Russian empire;
[524] Id., p. 150;
[525] Ibidem.
[526] Ibidem;
[527] Id., p. 151: first Crimean president was Jurij Meškov, pro-Russian separatist, who wasn't able to ameliorate Crimea conditions and to follow up on campaign promises;
[528] There were also applied some economic sanctions, in particular of water and electrical supplies, p. 151;
[529] Even if it has an high degree of autonomy, Crimea has to act in the light of Ukraine law: as stated for example in article 134 of its constitution, Crimea has to solve its authority problems in relation to Ukrainian constitution and so on.

Ukrainian relationship in recent times, due to the destitution of the pro-Russia president Janukovic, who deny economic relationship with European Union and the Occident in favour of a stricter relation with Russian Federation, the majority of the population of Crimean region, belonging to Russian-speaker ethnic minority, began to demonstrate and manifest for more protection. After the removal of Janukovic, in February 2014 Crimean militias took control of administrative borders of the region and all other strategic facilities, commencing a protest that inevitably took to secession of Crimea for Ukraine[530]. Pro - Russian protests were held in Crimea, and Russian and pro-russian forces began to take control over other official institutions and military sites in the region in order to protect Russian minorities claiming for secession[531]. On 16 march of 2014 a referendum was held, after the adoption of the resolution "on the all-crimean referendum" by the Supreme Council of the Autonomous republic of Crimea, in which the 97 % on Russian Crimean voted in favour of secession from Ukraine and, after that President Putin signed a decree for recognizing Crimea as independent state, it was annexed to Russian federation. As can be inevitably deduced, Ukrainian Government did not and still not recognize the referendum, and it conversely considers it unconstitutional and thus illegal. Similarly, international community negatively reacted to Crimean secession: Council of Europe's Venice Commission argued that referendum was unconstitutional and illegitimate and UN General Assembly, in resolution 68/262, highlight that the referendum "having no validity, cannot form the basis for any alteration of the status of Crimea […]"[532].

In order to understand Ukrainian denial of Crimean secession it is necessary to analyse Ukrainian constitution. The key principle of this constitution is territorial integrity: it is the central feature of Ukrainian constitution, and it is important to a point such to limit other rights, also fundamental one, in order to preserve territorial integrity[533]. As a matter of fact, Ukraine declaration of Independence states that "the territory of Ukraine is integral and inviolable", *de facto* giving to territorial integrity a

[530] Roznai Y. – Suteu S., The eternal territory? The Crimean crisis and Ukraine's territorial integrity as an unamendable constitutional principle, German Law Journal, volume16, 2015, pp. 543-544

[531] On March 2014, the Russian state Duma approved a request be president Putin to send Russian troops in Crimea in order to protect Russian minority., id., p. 543

[532] A security council resolution was also drafted, urging states not to recognized the referendum as legitimate, but it did not passes., id. p. 544

[533] Id., p. 549;

quiet absolute status. In article 132 of 1996 Ukrainian Constitution this concept is emphasized, by asserting the "the territorial structure of Ukraine is based on the principles of unity and integrity of state territory"[534]. Included in the administrative and territorial structure of Ukraine, which, as stated in Article 133 of its Constitution "is composed of the Autonomous republic of Crimea, oblasts, districts, cities districts, settlements and villages", Crimea is an exception as it has significant independence and a special status, although remaining a constituent part of the territory of Ukraine[535]. As seen by the analysis of the historical background, Crimea has always enjoyed special status of autonomous region: since its inclusion in the USSR and its cession to the SSR of Ukraine, Crimea has been granted special autonomy, especially for its ethnic composition, where the majority of population was part of the ethnic minority, the Russian one, but also for its geo-strategic location in the black sea, halfway between Occident and Orient. The autonomy of the region has been frequently renegotiated since Ukraine become independent after USSR break up. Nevertheless, it was finally granted by the 1996 Constitution of Ukraine, which dedicate chapter X to the relationship with Crimea[536]. Chapter X also give Crimea the possibility to write its own constitution, which was adopted in 1998, and which was seen as a way of prevent further conflicts between the two parties: it helped to maintain the peace in Ukraine and it can be argues that it played "an important conflict-preventing role"[537]. Chapter X of Ukrainian constitution thus define the relationship between Ukraine and Crimea, regulating the autonomy of the latter. Here again, it is emphasized the inviolable territorial integrity of Ukraine and for this reason Crimea is conceived as "inseparable constituent part" of Ukrainian territory, which is also stated in Crimean Constitution first article[538]. In regulating the relation with the autonomous region, the Ukrainian constitution determines, limits and create Crimea authority, also holding that Crimea constitution or other laws of the region cannot contradict Ukraine's ones. This is furthermore confirmed by article 2 of Crimean constitution, which states that in a situation of conflict between Crimean acts and

[534] Ibidem;
[535] Id., pp. 549-550;
[536] Id., p. 549;
[537] Id., p. 551;
[538] Ibidem;

Ukrainian constitution, the latter prevails because of its supremacy over all other laws and acts[539]. As argued before, the main aim of including and recognizing the special status of Crimea in Ukrainian constitution was that of stabilized the situation in the region and also to avoid secession, which was considered an issue no longer concerned with Crimea. But the limiting provision of the constitution and its unamendability about the territory can sort an opposite effect, as it can be in tension with popular sovereignty and will[540]. The Constitution, at the article 69, enumerates different means to express popular will such as referendum, elections and forms "of direct democracy"[541]. But on the other hand, at article 73, it links popular sovereignty to territory. This article states that "issue of altering the territory of Ukraine are resolved *exclusively* by an all-Ukrainian referendum", limiting the power of popular sovereignty, also adding that only *Verkhovna Rada* can "designate a referendum (art. 85)[542]. It successively confirm the concept through the adoption of the law on national referendum of 2012, in which different types of referendum was enumerated, including those on change to the territory among the "ratification referendum". In the same document, referendum on territorial change designate by popular initiative were banned , like also modification to territory, independence and Ukrainian constitution[543]. Seen in this light, Crimean referendum of 2014 is inevitably illegitimate, as only part of the Ukrainian population expressed its vote with regard to the change of Ukraine's territory. What is more, as seen before, Crimea is considered indivisible part of Ukraine and for seceding from it, it should require an amend to the Ukrainian constitution through a national referendum[544]. Nevertheless, the unamendability provision make any attempt of secession or referendum for the change of territory illegitimate. Even if the secession of Crimea would be accepted by the majority of all Ukrainians through a referendum, as provided by article 73, and thus providing an amendment to the constitution to legitimate it, it would still

[539] Id., p. 552; an example of the supremacy of the Ukrainian rules over the Crimean ones can be seen in a case proposed at Ukrainian *Verkhovna Rada* in 2001: the court invalidated part of four normative Crimean acts, declaring that only the *Verkhovna Rada is a parliament,* while the one of Crimea is only a representative organs, which cannot provides normative act.
[540] Id. p. 551-553;
[541] Id. p. 569;
[542] Ibidem, emphasis added;
[543] Id., p. 569
[544] Id., 570;

paradoxically remain impermissible due to the abovementioned unamendability clause. this is the actual aim of unamendability: neutralize majoritarianism in order to protect territorial integrity and sovereignty, in a state that, since 1991, has suffered continuous instability[545].

Territorial integrity is one of the most relevant principle of international law, mentioned in the Article 2(4) of UN Charter. It is referred to in a number of legal instrument, such as Declaration on Principle of International Law, or Helsinki Final Act, or the OAU Charter and even in some important Resolution like the 1514. "Any attempt aimed at the disruption of territorial integrity is incompatible with the purposes of the UN Charter"[546] to which it should be added that it should not be constructed "any action which would dismember the territorial integrity of a state", as stated in the Friendly Relations Declaration[547]. As in the case of Ukrainian constitution, territorial integrity can impose some limitation to the exercise of external self-determination, in order to protect the sovereignty of a state which can be based on its territorial integrity, like Ukraine. From this point of view, international law and instruments support Ukrainian invalidation of Crimean secession[548]. Nevertheless, it should be argued that in some cases, under particular circumstances[549], it is territorial integrity to be limited by external self-determination, as in the case of South Sudan. In the case of secession of South Sudan, in 2011 a referendum was held in Sudan on the

[545] Id. p.571; Roznai and Suteu propose two possible solution at this paradox of Ukrainian constitution: first, the adoption of a new constitution can help in solving the problem of unamendability. Its authoritative legitimacy would be granted exclusively ex-post facto, because, due to unamendability principle, such an adoption could constitute a constitutional violation. Or it can be held a referendum to amend article 157 and remove unamendability. This could be possible because article 157 is not " self-entrenched" and could be amended through and amendment act.

[546] UN Doc. A/Res/1514 (XV), 1960, General Assembly resolution, para. 6

[547] A clear explanation of territorial integrity can be found in chapter 1, par. 1.4 of this work; UN Doc. A/Res/2625 (XXV), 1970, General Assembly resolution Principle V, para. 7

[548] For what concern the referendum, it should be added that Beran speak about a "democratic liberalism", which allows to "territorially concentrated groups" with moral and practical possibilities to secede whenever they want. He also added that if the government provide such a right to its governed, it could also obtain their consent. For a depth analysis of democratic theories of secession see chapter 2, par. 2.1.2 of this work; see also Christakis T., Self-determination, territorial integrity and fait accompli in the case of Crimea, ZaöRV/Heidelberg Joournal of International Law, volume 75, 2015, pp. 15-16.

[549] These particular circumstances includes: people in territories that are subject to decolonization; the territory inhabited by a certain people should be occupied or annexed after 1945; the secessionists shall be "a people"; their parent state shall flagrantly violate their human rights and no other effective remedies under national or international law may exist. http://cjicl.org.uk/2014/04/20/international-law-legality-secession-crimea/

question whether the Southern part of the Country should separate from the rest of it. Like Crimeans, the majority of the population (98.83%) voted in favour of secession, which was welcomed by President Al-Bashir, who promulgated a formal decree acknowledging the secession and independence of South Sudan. In this case, secession has been recognized because it was the last resort of southern Sudanese, who suffered twenty years of civil war and repression before reaching an agreement with the Sudan government, providing for a referendum to resolve the severe situation[550]. In this case, the particular circumstance of oppression, violation of human rights and war took the southern Sudanese to violate Sudan territorial integrity in order to self-determine themselves, to preserve their identity and develop economically and politically. Conversely, at the time of the referendum, Crimean Russian minority was not suffering any kind of oppression or violation of human right, which make their claim of secession groundless. What is more, an high degree of autonomy was granted to Crimean region, which provided to Russian speaking minority the possibility of exercising an internal right of self-determination and freely developing their identity. Even if Crimean and Russian government justify secession and annexation arguing that it was a way to protect Russian speaking minority form the advent of a violent Ukrainian crisis, Crimean secession should not be considered as a valid claim neither under international law, for the above mentioned reason[551]. Nevertheless, this conflict is still ongoing, as the other Russian - speaking minorities of the south-east *oblasty* of Ukraine, influenced by the events of Crimea, are asking for protection to the Russian

[550] *The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army,* 2008; Van Den Driest,

[551] In addition, the intervention of Russian military forces, later confirmed by President Putin himself, violate the principle of non-interference in internal affair of a state and the one of non-use of force. http://cjicl.org.uk/2014/04/20/international-law-legality-secession-crimea/; it should be added that Russian Government changed its mind with regard to secession: it must be remembered that Russia was an opponent of a right of secession and external self-determination outside the colonial context, as it recognized them as colonial rights. Russian Constitution of 1995 takes strong stances against unilateral secession in its article 4(3), 5(3), 13(5) and so on, strongly rejecting any aspect of unilateral secession. It began to change its mind after unsuccessful secession of Abkhazia and South Ossetia, when it used remedial theory of secession to justify its decisions. And it used remedial secession again nowadays to justify Crimean secession. see Christakis T., Self-determination, territorial integrity and fait accompli in the case of Crimea, ZaöRV/Heidelberg Joournal of International Law, volume 75, 2015, pp. 9-10.

government, which only contribute to worsening the already tense situation between Russian and Ukrainian governments[552].

3.2.3. *Territorial secession:* territorial claims in the conflict of Nagorno - Karabakh.

As seen in previous chapter, territorial claim can be conceived as a central element of secession[553]. As a matter of fact, individuals of the same ethnic group generally share some common elements, such as language, religion and so on, which are encompassed with a given territory. Beside cultural context, as the territory is contemplated to be one of the element of statehood, the group aiming to secede must claim for a territory on which they will base their new independent state. Generally, a group claiming a given territory constitutes the majority of inhabitants of that part of a state. Moreover, historical grievance and primordial attachment to that part of territory which the parent state conquest or stole in the past may be at the basis of the group claims of that territory. Territorial claim is the defining element of *territorial secession*, according to which it is the epicenter and the main cause of attempts of secession[554]. The secessionist conflict of Nagorno - Karabakh is the most important example of the third category of secession. Primordial claims of territory are seen as the cause of the secessionist movement of this region, that since ancient time, was disputed by Armenia and Azerbaijan. Both states believe that they have an historical claim over that territory, which is considered the place in which both Armenian and Azerbaijani ethnic identities are rooted[555]. Armenian historians argue that the region of Artsakh, the ancient name of Nagorno Karabakh, is the "cradle of Armenia identity", an historic part of Armenia, where first Armenian school was opened and in which can be find the roots of Armenian Christianity and language[556]. On the other hand, Azerbaijanis sees that region as one "of the historical hearts of the Turkic culture of Azerbaijan", where most of their poets and authors are buried, as it is "the most

[552] It cannot thus be considered as a failed secessionist conflict, because, as still ongoing, a solution has not been found yet, as in the case of the CPA agreement between Sudan and South Sudan.
[553] See territorial theory of secession, par. 2.1, chapter 2 of this work;
[554] Kuburas M. ,Ethnic Conflict In Nagorno-Karabakh, Review of European and Russian Affairs, volume 6, 2011, p. 44;
[555] Id., pp. 44-45;
[556] Id., p. 45;

ancient state of Northern Azerbaijan"[557]. Surely, these historical claims of both the states contribute to create the nowadays tense situation in that region, which also caused the exacerbation of the relations between Armenia and Azerbaijan. In addition, Russian empire intrusion in Caucasus region and the following policies adopted first by the tsarist empire and then by the soviet union, contributed to worsening the situation[558]. Beyond historical context, the region of Artsakh was part of Armenian kingdom until Russian empire annexed it in the XIX century, at the end of Russian-Persian war. During Soviet period, Karabakh was declared a disputed territory between Armenia and Azerbaijan: after some negotiations, the two recognized that karabakh was an integral part of Armenia and, through an agreement between the two governments, Karabakh was legally recognized as part of Armenia in 1921[559]. Nevertheless, one year later the two states were included in the formation processes of USSR and transformed in socialist republics. Also Nagorno Karabakh was included in this process and became part of SSR of Azerbaijan as an autonomous *oblast*, even if the majority of its population belonged to Armenian ethnic groups[560]. Nagorno Karabakh will last this status until the beginning of its secessionist conflict in 1991 after the dissolution of Soviet Union[561]. This incorporation can be conceived as the starting point of the tensions between Azerbaijan and Nagorno Karabakh, as the Armenian minority never accepted the decision of the central government of USSR and began to struggle for a reunification with Armenia, their homeland[562]. It should be added that Azerbaijani's government adopted discriminatory policies against Armenian minorities of Karabakh, which contribute to worsen the situation and increase the nationalistic feelings based on historical grievance on the stolen territory[563]. Consequently, the Soviet of Nagorno Karabakh started to ask about the reconsideration of the decision on incorporating Nagorno-Karabakh to Azerbaijan, supported by the SSR of Armenia. These requests were ignored or rejected, causing a further deterioration of the situation. Nagorno Karabakh secessionist claim began in 1988, when a manifestation

[557] Id., pp. 45-46
[558] *Nagorno Karabak*h, available at http://www.usa.mfa.am/en/
[559] Ibidem; Great Britain, special envoy of the League of Nation, first asserted that Nagorno Karabakh was , without doubt, part of the state of Azerbaijan;
[560] Nagorno Karabakh, supra at 515;
[561] Ibidem;
[562] Ibidem; Kuburas, supra at 515;
[563] Ibidem;

for claiming a right to self-determination was violently suppressed by the Azerbaijani's government, which also began to organize massacre and ethnic cleansing in that area[564]. As can be seen, in this case territorial claims and violence suffered by the seceding group are closely related and contribute to increase the nationalist feelings and identity of the Armenian minority of Nagorno Karabakh, which continued to claim secession in the following decade. After the dissolution of Soviet Union in 1991, following the practice of the other components of USSR, Nagorno Karabakh declared its independence, which was rejected by the new state of Azerbaijan[565]. What is more, Nagorno karabakh also lost its status of autonomous *oblast* and this decision, added to the violent oppression suffered few years before in 1988, gave rise to a violent situation in Nagorno karabakh, deteriorating in a violent conflict between the region of Nagorno Karabakh, Azerbaijan and Armenia, which intervened in support of Armenian population of Karabakh. The conflict then degenerate into a full-scale war between Armenia, Azerbaijan and Nagorno Karabakh. The conflict last until 1994 when the three parties of conflict signed a cease-fire which is still effective, despite some violation[566].

International community intervened in the conflict with the role of mediator, in order to find solutions and resolve the conflict to end the war[567]. After the cease-fire was signed, OSCE and the Minsk Group, composed by French, Russia and United States, led the negotiation between the parties of the conflict, focusing on possible solutions for the conflict[568]. Among the several proposals of the international mediators, there were an agreement on the final status of Nagorno Karabakh, a peace agreement of the conflicting parties, international security guarantees for Nagorno Karabakh, the return of displaced persons and finally the normalization of the relation between Armenia and Azerbaijan. The Minsk group set out several solutions to solve the conflict, but Azerbaijan rejected all the provision provided, requiring for the

[564] http://www.usa.mfa.am/en/karabagh/
[565] Ronzitti N. Il conflitto del Nagorno karabakh e il diritto internazionale, Giappichelli editore, pp.2-3; se also http://www.usa.mfa.am/en/karabagh/
[566] Ibidem: Azerbaijan repeatedly affirms that Armenia and Nagorno karabakh troops invaded its territory and the region near to the autonomous *oblats*. This obviously contribute to lengthen the conflict, which does still not have a solution;
[567] http://www.usa.mfa.am/en/karabagh/; Klever E., The Nagorno Karabakh Conflict between Armenia and Azerbaijan: an overview of the current situation, European movement, 2013, pp. 2-3;
[568] http://www.usa.mfa.am/en/karabagh/, Ronzitti, supra at 523, pp. 16-17;

intervention of other international organizations[569]. UN security council adopted four resolution concerning Nagorno Karabakh conflict, namely the 822, 853, 874, 884, all adopted in 1993[570]. The resolutions implicitly refer to the legal status of Nagorno Karabakh, asserting that is part of the Republic of Azerbaijan, without any mention about its special status. What is more, the Armenians of Nagorno Karabakh are classified as a minority, not a people, as can be seen in par.9 of Res 853 or 2 of Res. 884, in which Un talks about "Armenians of Nagorny karabakh". Security council resolutions also condemned the use of force and violence in the occupation of the territories of the autonomous oblast, requiring the complete withdrawal of the military forces occupying Nagorno Karabakh[571]. Similarly, resolution 62/243 of General Assembly, adopted in 2008, strongly required by Azerbaijan, requires the "immediate, complete and unconditional withdrawal of forces", also adding that no one should recognize "as lawful the situation resulting from the occupation of the territories" of Nagorno karabakh, here considered as part of the state of Azerbaijan[572]. Despite the efforts of international community to solve the conflict, no tangible results have been produced, due to the rejection of several solutions by the conflicting parties[573]. This highlights that the situation is still vague and that the final solution is far from being found. Meanwhile, negotiation are held on the basis of the so called Madrid principles, a set of principle provided by the Minsk group, based on the principle of territorial integrity, non-use-of-force, and equal rights and self-determination of people. only 6 of the 14 proposed principles have been accepted: "return of the territory surrounding Nagorno karabakh to Azerbaijani control, interim status for Nagorno Karabakh providing guarantees for security and self-governance, corridor linking Armenia to Nagorno Karabakh, future determination of the final legal status of Nagorno Karabakh,

[569] These were the so-called "Paris principles": their name is connected with the meeting held to negotiate a solution for the conflict in Paris in 2001. These principles included : exception of vertical subordination of NK to Azerbaijan; ensuring permanent communication between Armenia and NK; presence of security guarantees for the population of NK. These principle were not accepted by Azerbaijan;
[570] Ronzitti, p. 22;
[571] Id., p. 23;
[572] Id., pp. 23-24;
[573] http://www.usa.mfa.am/en/karabagh/

return of the displaced persons to their former place of residence, and international security guarantees, including peace-keeping operations"[574].

The scenario of the proclamation of independence of Nagorno Karabakh is very similar to the one of other declarations adopted quietly in the same period. It can be cited as an example the declarations of independence of former republics of federal Yugoslavia, which saw in the break-up of the socialist republic the opportunity of create their own state. In the case of Nagorno Karabakh, it proclaimed its independence few after Azerbaijan proclaimed its independence from Soviet Union, after its dissolution. As stated in the second chapter, there are some criteria that a new entity should satisfy in order to become a state: a permanent population, and effective government and a defined territory[575]. It should be noticed that state practice in secession cases also adds a fourth element for obtaining statehood, namely the recognition of the sovereignty of the new entity by other states of international community. Even if it is not a binding criterion, recognition is an important element for the existence of a new state because, as such it should have the capability to enter in relation with other states, which implicitly lead to the recognition of the new entity as a state[576]. Bearing in mind these features, it is possible to distinguish two consideration on new independent entities: political entities widely recognized by international community and with the status of member of international organization can be considered states; those not recognized and not part of nay international organizations are not considered states. In analyzing the situation of Nagorno karabakh, despite the proclamation of independence, it can be argued that it belong to the second category of non-recognized states. As a matter of fact, neither international organizations nor other states recognized the existence of Nagorno karabakh as a state. What is more, neither Armenia recognized the independence of Nagorno Karabakh, because its recognition would have worsen the already troubled relationships with Azerbaijan[577]. Because of its lack of recognition, it has been argued that Nagorno Karabakh secession can be considered as an unsuccessful attempt of secession, and as such it can be

[574] Klever, p. 5;
[575] Montevideo declaration, article 1;
[576] For an analysis on recognition of state, see par 2.3, chapter 2 of this work;
[577] Recognition of NK by Armenia could have been *causus belli* with Azerbaijan, Ronzitt, p. 21

included in the " Commonwealth of Unrecognized states", comprehending entities like Abkhazia, South Ossetia and Transnistria whose independence has not been recognized[578]. As previously analysed, secession claim of Nagorno karabakh is an ongoing situation which has not yet reached a solution. This highlights that there is still the possibility that it can be recognized in the future, at least implicitly, by entering in some relations with other states or by obtaining the status of member of an international organization.

Here again, apart from the absence of recognition, one of the main element against the validation of secession of Nagorno Karabakh is the violation of territorial integrity, to which in can be also added the violation of the principle of *uti possidetis* of Azerbaijan. As for Crimea, the secession of Nagorno Karabakh and the subsequent annexation to Armenia would constitute a violation of territorial integrity of Azerbaijan, as, since the creation of the Soviet Union, the region of Karabakh has belonged to the SSR of Azerbaijan, with the status of autonomous region[579]. After the dissolution of Soviet Union, Nagorno Karabakh, whose territory was included within Azerbaijani's borders, was definitely annexed to Azerbaijan, following the principle of *uti possidetis*, according to which new independent states will maintain the same boundaries they had when they were colonies or administrative units [580]. International law and community support this vision and this can be confirmed by the absence of recognition. Some scholars, at the contrary, believe that Azerbaijan violates its own internal law by rejecting secession claim of Karabakh: Avakian, for example, argues that in annulling the status of autonomous region of Karabakh, "Azerbaijan violated its own Law on "Nagorno Karabakh Autonomous Oblast/Region" of 1981, stating that "the territory of the NKAO may not be altered without the consent of National Deputies' Council of Karabakh Autonomous oblast", adding that this action, undertake without the consent of Karabakh people, also violate their right to equal right and self-

[578] Ibidem;

[579] It should be also added a violation of the non-use of force principle, as all the parties involved in the conflict have allocated troops over Karabakh territory, also invading some conterminous region of Azerbaijan; Azerbaijan strongly insisted on this point, calling for opinion by international organization and international community. as a matter of fact, as seen before, the territorial integrity of Azerbaijan is stressed in SC resolutions of 1993, UNGA resolution of 2008 and in Madrid principle used by the Minsk group to solve the question.

[580] In the case of Azerbaijan, socialist federal republic. The same principle was used for the creation of new states after the break-up of former Yugoslavia.

determination, violating international instruments which refer to it[581]. This positions highlights the vision of Armenians scholars, which is evidently in contrast with the one of Azerbaijanis. These contrasts also contribute to the creation of the current vague situation in the region. Despite the ethnic cleansing enacted by Azerbaijan's government in 1988, the current population of Nagorno Karabakh is composed mostly by Armenians, and a return under the sovereignty of Azerbaijan is impossible, or at least unthinkable, as it can cause a new wave of repressions against Karabakh population[582]. Then, despite the absence of recognition, Nagorno Karabakh is a *de facto* independent state, owning a military force, a parliament, a government, universities and so on, which can be considered as an intermediate solution, that satisfy the requests of both Armenia and Azerbaijan[583]. Finally it should be added that territorial integrity and *uti possidetis* can be also limited by the exercise of self-determination, in the above mentioned circumstance.[584] Nagorno karabakh question is thus far from being resolved, due to the contrast and the huge differences between the requests of the parties involved in the conflict[585]. Even if Nagorno Karabakh secession has not been recognized by anyone in international law, it cannot be defined as an unsuccessful attempt of secession, because talks and meetings are still ongoing, and international mediators are working in order to find a suitable solution for the conflicting parties involved.

3.3. Failed secession: unsuccessful attempts of secession

Here above we have analysed some of the most relevant, successful claims of secession which result in the creation of a new independent state, or that are still ongoing. Among the secessionist conflicts attempted outside the colonial context, there are also claims that can be considered to be unsuccessful for many different reason, that will be analysed in the following paragraphs.

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[581] Avakian S., Nagorno Karabakh – legal aspect, Tigran mets Publishing House, Yerevan, 2014, p.39;
[582] http://www.homolaicus.com/storia/contemporanea/armenia/nagorno-karabakh.htm
[583] As a de facto state, it does not belong anymore to Azerbaijan, as Armenia government required, and it has not been annexed to Armenia, which was the request of Azerbaijan. The two parties finlly reached a compromise.
[584] http://www.homolaicus.com/storia/contemporanea/armenia/nagorno-karabakh.htm
[585] Id.

One of the most violent failed attempt of secession of the last decade was the claim of secession by the Republic of Chechnya. Composed predominantly by Sunni Muslims, the majority of the population of this republic of the former USSR is composed by 72 % of Chechens[586]. Like many other groups of Soviet Union, at the eve of its dissolution, also Chechnya was influenced by independence and secessionist desire, and, also for economic and nationalist motives, in 1991 it declared independence from USSR[587]. Profiting by the power vacuum leave by the dissolution of Soviet Union, Dudaev, leader of nationalist movement, managed a *coup d'etat* which led to presidential elections which resulted in his election as president[588]. After being elected president, in 1991 Dudaev proclaimed the independence of Republic of Chechnya from Russian Federation. In response, Russian government imposed economic sanctions, but also began to make efforts to negotiate the situation and the status of Chechen republic[589]. Since then, Russian government started to provide agreement and tried to negotiate with chechen leaders, who promptly rejected every proposal of the Russians. Any progress in negotiation was hindered primarily by Chechen President Dudaev[590]. In 1992 the republic did not signed the federation treaty; later in 1994, it also reject a constitutional agreement, which would have granted them greater autonomy, insisting for independence[591]. Because of the uncooperative nature of Chechen leaders and because of the high crime rate, even at the governmental level, characterizing the republic, Russian government began to be military involved, and this situation inevitably led to the first Russian-Chechen war in 1994-1996[592]. After long military actions in Chechen territory, the war ended in 1996, after Chechen fighter recapture the Grozny and signed the Khasavyurt Agreement, which froze any claims for independence and secession for five years, period in which negotiations between the two parties with respect to the status of Chechnya should

[586] Raic, supra at 49, p.373;
[587] Ibidem;
[588] Ibidem; see also Griffioen, supra at 3, pp. 117-119;
[589] Raic, supra at 49, p. 374;
[590] Ibidem;
[591] The same agreement was signed between Russia and Tatarstan, granting tartars an high degree of autonomy. the one with Chechnya would have follow the same points.
[592] Even if supporting the principle of territorial integrity of Russian federation, the international community strongly condemned the disproportionate and indiscriminate use of force of the Russian military forces; Raic, supra at 49, p.374;

have come to an end[593]. Another peace agreement between Russia and Chechnya was concluded a year later, in 1997 in Moscow (the Moscow agreement). After the end of the first Chechen war, Russian government continued with its proposal concerning Chechnya status and its autonomy which continued to be rejected by Chechen leaders, continuing to insist on the recognition of its independence. In the meantime, the inability of Chechen government to led the republic took to a deterioration of the situation in the region, and "extremely violent violation of human rights" were also committed[594]. Moreover, a series of terroristic attack was held in Moscow, killing hundreds of civilians, and this, added to the absence of order in Chechnya led to the second Russian- Chechen war, in 1999[595]. During this war, ended in 2000, Russian troops conquered grat part of Chechen territory, and its operations were also supported by the international community, which first condemned its actions during the first war, arguing that Russia had the right to defend its territorial integrity, threatened by Chechen leaders[596]. As can be deduced, the International community would have not recognize any claims of independence by Chechen republic, preferring to support the preservation of Russian territorial integrity. Some legal arguments were advanced in support of this position of international community. First of all, the declaration of independence was made under Soviet law, which did not support secession claim, and thus cannot be recognized under international law[597]. Then it was made by a government whose validity was questioned, because it probably rigged the election. As a matter of fact, international community thought that it did not represent the will of the whole Chechen population[598]. In addition, the Chechen government refused all the alternative to secession proposed by Russian government to solve their issue and for this reason secessionist claims of Chechnya cannot be legitimate because Chechen authority did not exhaust all efforts to reach independence, and secession was not their last resort[599]. Finally, no serious threat to human rights by Russia were

[593] Id., 375;
[594] Ibidem;
[595] What is more, Chechen Troops also invaded Daghestan, another Russian, Muslim region, in 1999, with the aim of creating a big Islamic state. Raic, p.375
[596] Ibidem;
[597] Id., p. 376;
[598] Ibidem;
[599] Id., p. 377;

reported to justify any claim of secession[600]. These arguments, in addition to strategic interest in the region inevitably lead to a failure of secession claim of the Chechen leaders[601].

As for Chechnya, also Abkhazia was influenced by the wave of independence declarations following the break-up of Soviet Union. Since 1921, Abkhazia has been part of Georgia with a "special contract of alliance", signed by the two republics before the former became part of the latter, while retaining its status of Union republic[602]. With the advent of Stalin, Abkhazia lost its status of republic, as it was reduced to a mere autonomous region of Georgia[603]. It then began a period of "Georgianization", during which Abkhazian language was banned and its alphabet was changed with the Georgian one. Since 1978 Abkhazia promoted a campaign to separate itself from the republic of Georgia, in order to annex to Russia Federative Socialist Republic, which was rejected by Russian government[604]. Because of the past georgianization imposed by Stalin government, at the eve of the break-up of Soviet Union, Abkhazia renewed its fears as a strong Georgian nationalism was developing[605]. During this period it also renewed its desire of secession and as a matter of fact, in 1990, the supreme soviet of Abkhazia voted in favor of independence and declared the sovereignty of Abkhazia SRR[606]. At the same time, Abkhazians also declared the desire to form a federal republic with Georgia, in order to preserve Georgia's territorial integrity and increase its own degree of autonomy[607]. This decision was however declared invalid by Georgian government, worsening the situation and leading to inter-ethnic tension[608]. After the definitive break - up of Soviet Union, in 1991 Abkhazia elected a new parliament, but after few month it was paralyzed because Georgian government

[600] Conversely, violation of human rights and oppression were perpetrate by Chechen government itself.
[601] International community recognized that the situation of Russia was very fragile and a recognition of Chechnya would have contribute to a worsening of the situation. Raic, p.377-378;
[602] Id., p. 379; see also Griffioen, supra at 3, pp. 120-122;
[603] During the Soviet Period, there were several replacement in the region, aiming to concentrate the largest possible number of Georgia in oder to begin a process of georgianization. For this reason, at the time of the first manifestation of hostilities, the Abkhazian constitute the minority in that region, considered their homeland., id., p.379;
[604] Id., pp.379-380;
[605] Ibidem;
[606] Id., p. 380
[607] Ibidem;
[608] Ibidem;

rejected all the decision taken in it, which inevitably led to ethnic tension[609]. In the meantime, Georgia proclaimed its independence through a referendum and Gamsakhurdia was elected as president. Nevertheless, after a firm opposition and a *coup d'etat*, a military council took power and reinstalled the 1921 constitution of Georgia, which did not recognized Abkhazia separate unit status. Even if the Abkhazian leaders proposed an agreement to provide a federative relations with Georgia, Georgian new government ignored and reject all these agreement and , in response, Abkhazian Soviet proclaimed its independence in 1992[610]. After the declaration of independence, Abkhazia government reintroduced 1925 constitution, as a temporary measure, in order to protect its autonomous political status, as it continued to propose to Georgia the creation of a federative state. Nonetheless, Georgia reacted negatively to Abkhazia independence and proposal: it send its military forces to suppress the secessionist movements that were rising in the autonomous region and to preserve its territorial integrity[611]. This give rise to a conflict between the two region, as hostilities increased during 1993, ending with the success of Abkhazian troops in the city of Sukhumin and the expulsion of Georgian troops from the region[612]. In the same year, a ceasefire was signed by the conflict parties which was followed by Georgian proposal of extending autonomies to Abkhazia, which was rejected by the Abkhazian government[613]. After the cease-fire, United Nations intervened as a mediator between the two parties in order to reach an agreement. The central argument of the talks was the status of Abkhazia, and Russia federation participated to the meetings as facilitator[614]. During the meeting, United Nations provides a number of proposals, which were rejected by both Abkhazia and Georgia: first, it presented a draft declaration which contain provision in favour of Georgia territorial integrity, which were inevitably rejected by Abkhazia, which refused to sign every document containing such a provision; during Geneva talks, Georgia refused another proposal, as during that period Abkhazian government declared Abkhazia as a Sovereign democratic state[615].

[609] Id., pp.380-381;
[610] Id., p. 381;
[611] Ibidem;
[612] Ibidem;
[613] Id., p.382;
[614] Ibidem;
[615] Ibidem;

This was interpreted by Georgia as a violation of its territorial integrity, and after some protest at United Nation, Russia prepared a draft providing for a federative unit between the two parties, accepted by Georgia and refused by Abkhazia, which saw in it an attempt to offer mere autonomy[616]. In the following years no progresses were made and no solutions were found as Abkhazia stated that it would only accept a confederal arrangement. All the meeting and talks were followed by a referendum through which Abkhazia declared its independence, followed in 1999 by the Act of State independence of the Republic of Abkhazia[617]. The referendum was declared illegitimate and no states of international community recognized the state of Abkhazia[618].

As for Chechnya, international community did not recognize the new entity of Abkhazia as a new state, for several reasons. First of all, international community support the territorial integrity of Georgia, strongly rejecting every claims of secession of Abkhazia. This position is stressed in Security Council resolutions. For examples in Res. 896 of 1994, Security council argues that "progress must be made on political status of Abkhazia, respecting the sovereignty and territorial integrity of the republic of Georgia" highlighting the importance of territorial integrity in this case[619]. Then, in res. 1065 of 1996, it reaffirmed these concepts, also arguing that no Abkhazia actions prejudging sovereignty and territorial integrity of Georgia would have been accepted and for this reason, condemned as "unacceptable and illegitimate" the referendum held in Abkhazia in 2000[620]. Other international organizations endorsed this position, such as European Union and Council of Europe. As for Chechnya, there are several legal reason explaining the refusal of Abkhazian claims by international community. First of all, even if Abkhazian people were qualified as a minority entitled to self-determination, it did not constitute a clear majority within Abkhazia. Then, like Chechnya, Abkhazia government opposed almost all the solutions found during the various negotiations held for solving the question, rejecting them, to which it should

[616] Id., p.383;
[617] Ibidem;
[618] The decision of the whole international community was based on three points: support for the preservation of Georgia territorial integrity; rejection of eventual secession of Abkhazia; insistence on the grant of extensive autonomy for Abkhazia in Georgia. Id., p.383;
[619] Id., p. 383-384;
[620] Id., p.384;

be added the absence of violation of human rights and oppression against Abkhazian people by Georgia. The continuing rejections, the unwillingness of enter into good faith negotiations about its future status, contribute to suggest that Abkhazian were not prepared to exhaust political solution for a peace settlement[621].

The case of Quebec's secession completely differs from the two ones analysed above. Canada is a federal state, composed by ten provinces grouped in four macro-regions: west Canada, North Canada, Central Canada and Atlantic Canada. Each province has a high degree of autonomy, allowing them to freely express and develop culturally and politically, as they are granted of significant powers in order to promote and preserve their interests[622]. The province of Quebec began to claim for secession after the founding of the Indépendantiste Parti Québécois (PQ) in 1976, which twice called for a referendum in order to secede from Canada[623]. The first referendum was held in 1980, through which the chief of the party, who was also the prime minister of Quebec, René Lévesque asked for a change in the federal association of Canada and Quebec, proposing a bilateral economic association on the model of European Community[624]. Nonetheless, in the 1980 referendum the majority of Quebecoises voters rejected Lévesque proposals (60%), thus rejecting also the secession from Canada[625]. The PQ again called for a referendum in 1995, through which asked people to authorize the national assembly to pass a bill through which it would declared sovereignty. After sovereignty would have been proclaimed, it would have been a transition process that would have led to the draft of a constitution and to negotiations with Canada in order to become independent in one year[626]. The proposals of PQ were again rejected by Quebecoises, who voted "no" for the 50,6%[627]. Even if the claim of secession of the PQ was rejected by Quebecoise people, the federal government asked an opinion to the Supreme Court of Canada on the legality

[621] Id. , pp. 385-386;
[622] HANNA R. M., *Right to Self-Determination in In Re Secession of Quebec*, Maryland Journal of International Law, vol. 23, issue I, 1999, p. 218;

[623] LESLIE P., *Canada: the Supreme Court sets rules for the Secession of Quebec*, Oxford University Press, Publius, volume 28, 1999, pp. 135-136;
[624] Id., p. 136
[625] Ibidem;
[626] Ibidem;
[627] Id., p.137;

of referendum and whether the secession is legal under domestic and international law[628]. The federal government posed three question to the Court. Through the first question, Canadian government ask to the court if "National Assembly, legislature or government of Quebec" could have the right "to effect the secession of Quebec form Canada unilaterally"[629]. In answering to this first question, the Court emphasized that no province has the unilateral right to secede from Canadian federation, but on the other hand, it also argued that secession is legal under Canadian law[630]. In arguing this, the Court provided three rules legitimating secession: first of all, a referendum, "based on clearly-worded question", should have a clear majority of vote in favour of secession, expressing the will of Quebec citizens; then there should be a duty of other provinces of Federation to enter in negotiation with Quebec; finally, secession should be ratify through a constitutional amendment. If a claim of secession satisfy all these three requirements, it can be recognized as legal and legitimate[631]. For what concern the specific case of secession of Quebec, in referring to negotiations between the parties, the Court highlights that they should take into account the interest of "other provinces, federal government, Quebec and also the rights of all Canadians" (par. 96 of the Court *Reference re secession*), adding that they should be guided by some constitutional principles[632]: federalism, democracy, constitutionalism and rule of law. In referring to federalism, the court highlights that it was created to grant significant powers and autonomy to Canadian province, in order to allow them to freely develop culturally and politically. At the same time, such a degree of autonomy does not confer a right to secede, confirming the position of the Court on the unlawfulness of the claims of secession of Canadian provinces[633]. As strictly related to federalism, the principle of democracy highlights that every province has equally legitimate majority, which must be respected as none of them is more legitimate than other[634]. For this reason, according to the court, the expression of the will of the majority in favor of

[628] Id., p,138; Hanna , supra at 579, pp. 218-219;
[629] Ibidem;
[630] Ibidem;
[631] Kreptul, pp.77-79;
[632] These principles also guide the court in its decision of secession of Quebec. Leslie, pp. 139-140; Hanna p. 218
[633] It provides a right to internal self-determination to such a degree as to render unnecessary the exercise of external self-determination and secession.
[634] Hanna, p. 218;

secession must be discussed and negotiated by taking into account all the other majorities composing the Canadian confederation[635]. Nevertheless, majorities are limited by constitutionalism and rule of law[636]. Of course, constitutional law does not meant to limit the expression of the will of people but to create a framework which can influence people in their decision and define "which majority should be consulted", in order to safeguard fundamental rights and freedoms, minority rights and to protect branches of the government, which can be affected by a wrong decision of the majority[637]. In the specific case of Québec's secession, following the above mentioned guiding principles, a majority of Quebecoises in favour of secession, negotiating a compromise with the rest of the majorities of Canada, is required if they wish to amend constitutional law and allow Quebec to secede[638].

The second question presented to the court asked if "international law give to Quebec the right to effect secession from Canada unilaterally". After having reach the conclusion that there is no right to secede provided by Canadian Law, the court analysed the issue in the light of international law[639]. In referring to international law, the court immediately noted the absence of provisions about secession, as international law neither prohibit nor accept a right to unilaterally secession[640]. On the other hand, the Court states that it "places great importance on territorial integrity and leave the creation of a new state to be determined by the domestic law" (par. 109)[641]. According to the court, its decision of prohibit the secession of Quebec is confirmed and accepted by these provision of international law. Moreover, the Court also argues that international law accepts secession only in exceptional circumstances, namely when the right of self-determination is deny or when violation of human rights and oppression are perpetrated against a minority living in the state[642]. This was not the case of Quebec, because the grat degree of autonomy provided to Canadian regions give them the possibility to exercise their internal self-determination. What is

[635] ibidem; Leslie,p.139
[636] Leslie, Ibidem;
[637] Hanna, p. 219;
[638] ibidem;
[639] leslie, 140;
[640] Hanna, p. 221
[641] ibidem
[642] Id., pp. 222-223;

more, Qubecois have also had great access to the government and, above all, have not suffered any oppression of violation of human rights[643]. The court thus concluded that international law confirmed its decision to deny a right to unilateral secession as "International law generated a right to external self determination in exceptional circumstances, manifestly inapplicable to Quebec under existing conditions"[644].

As can be seen, secessionist claims differ in their characteristics for what concerns the reasons, the holders and the methods through which secession is held. In the light of this argument, it seems quietly impossible to find a single, fixed definition of secession and for this reason it is extremely difficult to create a universal legal right of secession. Thanks to the classification, we have understood that there are different ways for approaching secessionist conflict: secession can be seen as the last resort of an oppressed people and for this reason can be legitimize through the exercise of self-determination, with the help of international community which can intervene thanks to the principle of R2P. Secession can also be conceived as the expression of the will of the majority of a group living on a given territory, and can be legitimate by analyzing it in the light of territorial integrity: if it undermine the territorial integrity of the host state in the absence of particularly severe circumstances, it cannot be legitimate, as we have seen in the case of Crimea. Then secession can be also a way to express a territorial claim, through which a people aims to regain the sovereignty over a "stolen" land they owned in the past. In this case again it should be taken into consideration the territorial integrity of the state which is supposed to have "stolen" the land and, also in the light of the principle of uti possidetis, the secessionist claim can be justified or not. By taking into account all these element, after having analysed some of the most relevant secessionist conflict of post-colonial era, as all case have different defining features, we can assert that secession should be approached case by case, as a single definition cannot exist.

[643] id., p. 225
[644] Ibidem.

CONCLUSIONS

"No people must be forced under sovereignty under which it does not wish to live" strongly asserted US President Woodrow Wilson in a message to Russia in 1917[645]. Wilson was one of the first and most relevant advocate of self-determination in the early stages of its development. Even if self-determination sets its origin back to the XVIII century, during the period of the American and French revolutions, it began to be conceived as a principle in international law only in the aftermath of the first world war, when there were the first dismemberments of great empires and the creation of new states, entering the international system. Nevertheless, the exercise of this principle was limited to groups belonging to territory of the Defeated Powers of WWI, namely Ottoman and Austro-Hungarian empires, and for this reason it was not officially recognized by the League of Nations, which did not include it in any of its legal document. This attitude toward self-determination was also confirmed in the Aaland Island case, in which, as we have seen in the first chapter, the two special commission of the League of Nations did not recognized the existence of such a principle for the inhabitants of that territory. With the foundation of United Nations in 1945, after the Second World War, self-determination began to be considered an important element in the operations for dismantling colonialism and colonial empires and began to play a central role in international law. It was considered as a guiding principle for UN action and, as such, it was included in the UN Charter, in article 1, which refers to it as one of the purposes and principles of the United Nation: "develop friendly relations based on equal rights and *self-determination*"[646]. During colonial period, it continued to develop as a legal principle, aiming to entitle colonial people of a right to self-determine themselves in order to develop their own cultural, social and economic interests without the intrusion of alien powers in their internal affairs. Since its goal was to dismantling colonialism, many argued that the principle of self-determination would have not developed outside the colonial context. Nevertheless, United Nations extends its scope also to non-colonial people, transforming it into a legal right, confirmed by its inclusion in the resolution 2625, in which self-determination was considered, without

[645] Message from President Wilson to Russia on the occasion of the visit of the American mission, June 1917;
[646] UN Charter of 1945, Article 1; emphasis added

reluctance, as a right of all people. Many other international legal instruments refer to it as a right of all people, such as the two Covenants of Human Rights of Vienna Declaration of 1993, contributing to increase its importance also beyond the colonial context. Its inclusion in some of the most important instruments of international law contribute to shape the legal status of self-determination, emphasized also by legal practice of ICJ, which, in a number of its cases, referred to it as a legal right of international law. In international law context, self-determination can be conceived as a human right, having an *erga omnes* character, and many scholars argue that it has also a *jus cogens* status. As seen in the first chapter, only few rights can be considered peremptory norms and self-determination is not part of this set of norms because it is limited by other principles of international law, namely the territorial integrity and *uti possidetis* ones. After having analysed self-determination historical backgrounds and its status in international law, it can be argued that self-determination is a multi-faceted right, with an internal and an external dimensions, which can be implemented in several ways. In its earlier stage, during colonial period, self-determination was understood as the right to achieve independence or, at least, autonomy from external powers, highlighting its external aspect, while in the post-colonial period, self-determination changed in scope, starting to be seen also as a right of people to self-determine their status and preserve their identity from oppressive powers within their own state, emphasizing the internal dimension of the right. As seen in the first chapter, during the post-colonial period, both aspect were emphasized: external self-determination was considered in the light of internal one, as the denial of the exercise of internal self-determination legitimate the exercise of the external one. Among the modes of implementation of external self-determination there is also secession, which has been analysed in the second chapter of this thesis.

Secession is another debatable issue of international law, even more controversial then self-determination. The roots of the term can be found in the Latin verb *secedere* composed by the two particles *se*, which means “apart”, and *cedere*, which means “to go”, suggesting that to secede means to go away from something. In the context of international law, secession refers to the withdrawal of a territory from part of an existing state, aiming to create a new state. Starting from the common

roots, different definitions of the concepts have been advanced and have been analysed in the second chapter, by dividing them into two groups, permissive and restrictive ones. Theories of secession only began to be developed in the last decades, as the number of secessionist conflicts increased. And the lack of a theory of secession in the past decades can be seen as a defect of the liberal doctrine of political philosophy, widely spread during the post-colonial period, asserting that secession was an unnecessary item, whose existence would have probably brought to the destruction of the social order of liberal society, characterized by pluralism and fairness, where individuals could live enjoying favorable conditions of existence. Nevertheless, with the growth of the number of secessionist claims, especially after the break-up of Soviet Union and SFRY, many scholars began to focus on this theme, providing a large number of theories which can be grouped in two important categories: Primary Right theories and Remedial Right Only ones. As seen in the second chapter, the first set of theories provides that secession is based on the free choice of people, which, by expressing their will politically, can decide whether to secede or not. This category of theories can be divided into two sub-groups, namely the associative and ascriptive ones. According to the associative theories of secession, a group can secede when the majority expresses a vote in favor for secession. According to scholars advocating these theories, the group may also not share common characteristics, such as identity or common language: in order to secede, the majority in favour of secession is sufficient. The second set of primary theories is the ascriptive one: these theories conversely assert that a people should satisfy some ascriptive characteristics, namely common language, common identity, culture, aspiration, history and so on, in order to claim secession, legitimized by the expression of the will of the majority of that group. At the contrary, Remedial Right Only theories are based on the notion of just cause: according to advocates of this kind of theories, secession can only occur when an ethnic group is suffering abuses and injustice from its host state. In this case, secession is seen as a last resort, a remedy for the group in order to prevent other oppressive action perpetrated by the state. The main aim of these theories was to shape the legal status of secession in order to create a right to secede recognized by international law. Although a right of secession is recognized, at a domestic level, in some constitutions, such as the constitution of Ethiopia or Austria, by analyzing international legal

instruments it has been noted that none of them refers to secession and for this reason the existence of a right to secede is not covered by international law. Despite of this absence, the definition of secession as a remedy against oppressions and injustices has received strong support from many scholars and it has been also implicitly included in some international instruments, such as in the paragraph 7 of the Principle V of Friendly Relation Declaration. Finally, also the ICJ acknowledges the existence of a remedial right to secession, as it used it in a number of its cases, as showed in the second chapter. It is possible to distinguish two macro-categories of secession which included all the other analysed above: consensual secession and unilateral secession. Consensual secession is based on the consent of the host state to the secession of a group. At the contrary, unilateral secession occurs without the consent of the host state, which can lead to very violent conflicts, constituting a danger for international security and stability.

Every secessionist claim has its own defining feature, which can help to find a solution to legitimate it. In the third chapter of this work, defining features have been taken into consideration to classify some of the most relevant conflicts of the post-colonial period, also relying on the principles of international law related to secession and self-determination. It has been possible to distinguish three different categories of secession, ethnical, democratic and territorial ones by analyzing some of the most relevant secessionist conflicts of the last decades, namely Kosovo Declaration of Independence, the case of the referendum of Crimea and secession of Nagorno Karabakh from Azerbaijan. It has been noted that there are different ways for approaching secessionist conflicts: secession can be seen as the last resort of an oppressed people and for this reason can be legitimize through the exercise of self-determination, with the help of international community. Moreover, secession can be conceived as the expression of the will of the majority of a group living on a given territory, and can be legitimate by analyzing it in the light of territorial integrity: if it undermine the territorial integrity of the host state in the absence of particularly severe circumstances, it cannot be legitimate, as we have seen in the case of Crimea. Then secession can be also a way to express a territorial claim, through which a people aims to regain the sovereignty over a “stolen” land they owned in the past. Finally, it

has been noted that among the secessionist claims of post-colonial period, there are also unsuccessful attempt of secession, like the case of Chechnya, Abkhazia and Quebec, that have failed for many different reasons, from the absence of discrimination and oppression to an uncooperative attitude of the seceding group.

While self-determination has a universal character, secession is at the contrary a very vague concept, as has been concluded in the second chapter. This vagueness has been also confirmed by an analysis of some of the most relevant secessionist conflicts of post colonial period. After having analyzed historical backgrounds, mode of exercises, causes of the claims and reactions of the parent states and international community, we have been able to distinguish three different categories of secession, based on the main defining features of each conflict: ethnical, democratic and territorial secession. This classification highlights that every case has its own characteristics, which also make the international community to react in different ways to the outcome of the secessionist process: in some cases it accepts and justify secession, while in other it supports the host state and its territorial integrity. It should be added that international community generally bases its position on the different reactions of the single states composing it, which can have particular interests in the conflicting area, or might be in closely relations with the host state, or support the ethnic group, all elements which influence their behaviour with regard to the conflict. In trying to define secession, another theory can be advanced, suggesting that a right of secession should include all the three elements at the basis of the three above mentioned categories: it should be claimed by an 1) oppressed ethnic group, having an 2) historical claim over a given territory, through a 3) democratic referendum in favour of secession. Nevertheless, the position of the international community will always have a certain degree of influence in the interpretation of these criteria. The best solution to avoid an overly open interpretation of the criteria could be the creation of a superior, independent international authority, taking decisions on these cases by relying only on an impartial observation of the facts. But such a solution does not seem reachable at the moment, and currently, the best solution would be to base opinions on secession on the three abovementioned criteria, trying to be as impartial as possible.

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