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# **Secession and Referendum**

*A new Dimension of International Law on Territorial Changes?*

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# Contents

<b>Contents</b>	<b>5</b>
<b>Introduction</b>	
<b>1. Research Question and Preliminary Remarks</b>	<b>12</b>
<b>1.1 Secession between international and domestic law</b>	<b>13</b>
<b>1.2 Secession and/or autonomy under domestic law</b>	<b>17</b>
<b>1.3 Is international law giving some guidelines to secessionist processes?</b>	<b>19</b>
<b>1.4 Secession and territorial referenda: a complex interplay</b>	<b>20</b>
<b>2. Methodology and Structure</b>	<b>22</b>
<b>2.1 Methodology</b>	<b>22</b>
<b>2.2 Structure</b>	<b>23</b>
<b>Chapter 1</b>	
<b>Only a colonial peoples' right? Trajectories of self-determination in International law</b>	
<b>1. From a Political Principle to a Legal Rule</b>	<b>26</b>
<b>1.1 Self-determination after World War I</b>	<b>27</b>
<b>1.2 Self-determination and the Mandate System in the Covenant of the League of Nations</b>	<b>28</b>
<b>2. The purport of self-determination in the UN Practice</b>	<b>32</b>
<b>3. Self-Determination in human rights law: individual and collective nature of the right</b>	<b>37</b>

<b>3.1 The role of case-law in establishing a legal right to self-determination</b>	<b>39</b>
<b>3.2 Human Rights Bodies and Self-Determination</b>	<b>42</b>
<b>4 Controversial issues on self-determination: (too) many claimants?</b>	<b>44</b>
<b>4.1 Still in search for a definition of people</b>	<b>44</b>
<b>4.2 Minorities and indigenous peoples: do they have a right to self-determination?</b>	<b>46</b>
<b>5. Self-determination beyond decolonization: contemporary meanings</b>	<b>50</b>
<b>6. Conclusion</b>	<b>53</b>
<b>Chapter 2</b>	
<b>The Contested Right to Secede</b>	
<b>1. Secession in international law: a word in search of a definition</b>	<b>59</b>
<b>1.1 Agreed secession in the federation between Eritrea and Ethiopia</b>	<b>62</b>
<b>1.2 The Scottish example of secession by consent</b>	<b>63</b>
<b>1.3 Defining unilateral secession</b>	<b>65</b>
<b>2. Legal approaches to secession</b>	<b>67</b>
<b>2.1 Prohibition of secession under international law</b>	<b>67</b>
<b>2.2 Neutrality of international law towards secession</b>	<b>69</b>
<b>2.3 The remedial right theory</b>	<b>69</b>
<b>3. International due requirements for secession</b>	<b>87</b>
<b>3.1 The ban on the use of force</b>	<b>90</b>
<b>3.2 The respect of the <i>uti possidetis juris</i> principle</b>	<b>92</b>
<b>3.3 The role of territorial referendum</b>	<b>95</b>
<b>3.4 Crimea</b>	<b>96</b>
<b>4. Dis-entangling secession from self-determination: a proposal</b>	<b>99</b>

<b>4.1 Secession and self-determination: different terms with different meanings</b>	<b>101</b>
<b>4.2 Possible units entitled to seek secession</b>	<b>107</b>
<b>5. Conclusions</b>	<b>110</b>
<b>Chapter 3</b>	
<b>Territorial Referenda: Will of the People and Statehood in International Law</b>	
<b>1. Plebiscites and referenda: two terms for two types of popular consultations</b>	<b>116</b>
<b>2. At the origins of popular consultations on territorial changes: the plebiscites</b>	<b>118</b>
<b>2.1 Main requirements of the Plebiscites carried out after World War I</b>	<b>119</b>
<b>2.2 The League of Nations and popular consultations: the Plebiscite in the Saar Basin</b>	<b>124</b>
<b>2.3 The plebiscites under the Versailles Treaty: a critical assessment</b>	<b>126</b>
<b>3. The UN and plebiscites held during the decolonisation period</b>	<b>127</b>
<b>3.2 Western Sahara</b>	<b>133</b>
<b>3.3 East Timor</b>	<b>136</b>
<b>4. The focus of the research: territorial referenda</b>	<b>140</b>
<b>4.1 Arguments in favour of an international legal obligation to conduct a referendum to validate a territorial change</b>	<b>143</b>
<b>4.2 Arguments against the role of territorial referenda in international law</b>	<b>147</b>
<b>5. Territorial referenda as the first step towards negotiations: the case of Quebec</b>	<b>156</b>
<b>5.1 Quebec and Canada: between coexistence and secession</b>	<b>157</b>
<b>5.2 Reference Re Secession of Quebec: the interplay between territorial referenda and negotiations</b>	<b>159</b>
<b>6. Negotiating secession for Scotland</b>	<b>163</b>

<b>6.1 Scotland towards a devo-max option</b>	<b>163</b>
<b>6.2 Territorial referendum in the Edinburgh Agreement</b>	<b>164</b>
<b>6.3 The Scottish referendum and international law on territorial changes</b>	<b>166</b>
<b>6.4 A model for territorial referenda: requirements of the Scottish referendum</b>	<b>167</b>
<b>7. Constitutionalising secession through referendum (I): the case of Uzbekistan</b>	<b>169</b>
<b>8. Constitutionalising Secession through Referendum (II): the secession of Catalonia</b>	<b>172</b>
<b>8.1 Catalonia in the storm: the years 2006-2017</b>	<b>174</b>
8.2 From binding to non-binding referendum	179
<b>8.3 The Spanish Constitutional Court's ruling 259/2015</b>	<b>180</b>
<b>8.4 Territorial referenda, secession and the right to decide in the Catalan debate: elements in favour and against the consolidation of the <i>opinio juris</i></b>	<b>182</b>
<b>8.5 The October 2017 Referendum and the opposition of the Spanish central Government</b>	<b>185</b>
<b>9. The referendum in Crimea: an international legal perspective</b>	<b>188</b>
9.1 The (mis)use of referendum in Crimea	189
9.2 Legal grounds for the referendum in Crimea: a difficult interpretation	191
<b>10. Conclusions</b>	<b>193</b>
<b>Chapter 4</b>	
<b>Requirements for a free and fair territorial referendum..and beyond</b>	
<b>1. Introduction</b>	<b>198</b>
<b>2. Montenegro: acquiring statehood through a referendum</b>	<b>199</b>
<b>2.1.The organisation of the referendum in Montenegro: between international and domestic law</b>	<b>201</b>

<b>2.2 Code of Good Practice on Referendums</b>	<b>206</b>
<b>3. Procedural standards of the Referendum in Crimea</b>	<b>209</b>
<b>3.1 The Venice Commission and the referendum in Crimea: further consolidation of international standards</b>	<b>210</b>
<b>4. Between intervention and recognition</b>	<b>213</b>
<b>4.1 Theories of recognition</b>	<b>214</b>
<b>4.2 International responses to territorial referenda</b>	<b>217</b>
<b>5. Conclusions</b>	<b>225</b>
<b>5.1 Requirements for holding territorial referenda</b>	<b>226</b>
<b>5.2 Recognition, statehood and secession through referendum: a thorny relationship</b>	<b>227</b>
<b>Conclusions</b>	
<b>1. Secession: old but new phenomenon</b>	<b>231</b>
<b>2. Territorial referendum in international law</b>	<b>234</b>
<b>3. Secession and referendum in international law: the attempt to solve the puzzle</b>	<b>239</b>
<b>4. Conclusions</b>	<b>243</b>
<b>List of Abbreviations</b>	<b>244</b>
<b>Bibliography</b>	<b>246</b>
<b>Acknowledgments</b>	<b>260</b>



## Introduction

Secession and territorial referendum. At a first glance, it seems a very bad-matched couple. How can the right to secede come to terms with one of the most important means used to enhance popular aggregation? Although the matching sounds strange, it can be noticed that secession and territorial referendum share at least one feature: both of them are at the border between international and domestic law. As far as the former is concerned, secession entails the relationship between the central government and sub-national units and, where successful, it acquires importance from the point of view of international law on States' creation. As regards referenda, they are not new to international law: they were used extensively after the first World War within the framework of the League of Nations to re-draw boundaries on the basis of the nationality principle. Then, they gain new momentum during the nineties with the dissolution of Yugoslavia and the Soviet Union.<sup>1</sup>

In this general framework, the opportunity to link secessionist movements to territorial referenda is given by the last decade's State practice, which seems to confer a high value to territorial referenda by perceiving them as a means to legitimate territorial re-apportionments. Suffice it to mention a few examples: in 2009 Curacao voted for partial autonomy from the Netherlands through a referendum; in 2011 South Sudan declared independence after a referendum; and lastly in March 2013, the inhabitants of the Falkland Malvinas decided to maintain their status as Overseas Territory of the United Kingdom in a referendum.<sup>2</sup> Moreover, 2014 started with the debated territorial referendum held in the Ukrainian region of Crimea<sup>3</sup> continued with the Scottish<sup>4</sup> referendum dated 14 August and ended with the failed attempt by

<sup>1</sup> See Y. Beigbeder: "Referendum" in Max Plank Encyclopedia of Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law9780199231690e1088?rskey=C5ibck&result=9&prd=EPIL>, last visited 2 February 2015.

<sup>2</sup> A. Peters: "The principle of *uti possidetis iuris*" in C. Walter (eds.), *Secession and Self-Determination in International Law*, Oxford, 2014, p. 134.

<sup>3</sup> The events in Ukraine led to a huge debate among international legal scholars, due to the variety of legal issues raised by the secessionist struggle of the Crimean inhabitants, ranging from the right to secede to the ban on the use of force and non-intervention by third States. To have an overview of the most striking legal questions surrounding Crimea's independence it's useful to have a look at *Opinio juris Blog*, at <http://opiniojuris.org/2014/03/06/really-violate-international-law-crimea-hold-referendum-secession/> and at *Questions of International Law*, at <http://www.qil-qdi.org/category/zoom-out/?cat=19>, which devote a specific section to the topic.

<sup>4</sup> S. Tierney: "Legal Issues Surrounding the Referendum on Independence for Scotland", *European Constitutional Law Review*, 2013, vol. 9, n.3, pp. 359-390.

the inhabitants of Catalonia to resort to popular consultation to gain independence from Spain.<sup>5</sup> The age of seceding referenda, as it could be labelled, has not terminated yet. In 2017, when this research was about to be completed, Catalonia had just held a referendum about secession from Spain, in which over 90% of the votes supported independence.<sup>6</sup>

### 1. Research Question and Preliminary Remarks

In light of the above, the research question of the thesis will be whether according to international law the referendum is either a sufficient or a necessary condition for secession, or both.<sup>7</sup> Since the research aims at discovering if there is an obligation to conduct a referendum to secede, grounded in the international legal order, it partly leaves aside an analysis of the theories about statehood and recognition in international law, which will be proper of a study focusing on the debate over democratic statehood in international law. Considering that practice of secession is so varied, the fact that the only common facet is that sub-units claim that with a referendum they can legitimately constitute themselves as independent has to be underlined and cannot be ignored. However, while leaving the in-depth study of legal issues relating to recognition and creation of statehood to another piece of research, some topics such as the respect of the principle of effectiveness<sup>8</sup> and of the Montevideo criteria,<sup>9</sup> are

<sup>5</sup> E. R. Bartlett Castellà: “*Scotland and Catalonia: Two Historic Nations Challenge a Three Hundred Year- Old Status Quo*”, American Journal of Social Sciences, 2014, vol.3, n.4, pp. 63-75.

<sup>6</sup> The government of Catalonia published the official results of the referendum. Figures show that 90.8% of the vote casted were in favour of independence, although the turnout was 42%. The declaration of independence signed by the Prime Minister of Catalonia Puigdemont has been freezed at the time this research was finished. [http://www.catalangovernment.eu/pres\\_gov/AppJava/government/pressnotice/303544/catalan-self-determination-referendum.html](http://www.catalangovernment.eu/pres_gov/AppJava/government/pressnotice/303544/catalan-self-determination-referendum.html). Alongside the freezing of the declaration, on Feb. 2019 12 people were put on trial in front of the Supreme Court for their participation to the events leading to 2017 secession. These include also Oriol Junqueras, former Catalan Vice President, charged for his connection to the administration of the 2017 referendum.

<sup>7</sup> See A. Peters: “*Populist International Law? The Suspended Independence and the Normative Value of the Referendum on Catalonia*”, EJILTALK, Blog of the European Journal of International Law, 12 October 2017, <https://www.ejiltalk.org/populist-international-law-the-suspended-independence-and-the-normative-value-of-the-referendum-on-catalonia/>

<sup>8</sup> The pivotal role of effectiveness against the existence of international rules governing the establishment of States dates back to the Kelsenian theory of the legal fact. For the establishment of States, Kelsen claims that, “*ce qui est décisif, et seul décisif, c’est l’effectivité de l’autorité nouvelle, c’est l’efficacité de l’ordre nouveau*” See H. Kelsen: “*La naissance de l’Etat et la formation de sa nationalité. Les principes, leur application au cas de la Tchécoslovaquie*”, Rivista Italiana di Diritto Internazionale, 1929, vol. 3, p. 620. In the same vein see also A. Ruiz, Gli Enti Soggetto dell’Ordinamento Internazionale, Milano, 1951, pp. 178-179; V.D. Degan: “*Création et disparition de l’Etat (à la lumière de trois fédérations multiethniques en Europe)*”, Recueil des Cours, 1999, vol. 279, p. 227. In 1991 the Badinter Commission restated that “*the existence or disappearance of a State is a question of fact*”, thus confirming that international law does not have a key role in States’ creation. In other words, international law regulates neither the process of evolution of a simple group into a new entity, nor the existence of an

not ignored in this thesis. For secession, in fact, recognition remains crucial, “*if not for statehood as such, then for the ability of an emerging State to actualize its statehood through international intercourse and membership in international relations*”.<sup>10</sup> For instance, if we were to find that secession carried out via referendum receives positive responses by the members of the international community only when conducted in a pacified manner and in compliance with certain international standards, we might even argue that the referendum could compensate for the lack of consent to secession by the parent State. As a result, the focus will be on states’ responses to secession, depending on how and under which circumstances the popular consultation is conducted. Two major cases can be detected: international reactions to seceding referenda conducted (i) in a pacific framework within well-established democracies and (ii) in the context of the use of force and intervention by a third party, even in countries where minority rights are respected. For both groups, a further issue of distinction is whether or not referenda are held in compliance with procedural requirements. A study of international reactions in the cases above mentioned will help shed light on the possible emergence and consolidation of an international rule pursuant to which secession can lawfully occur through a referendum.

### 1.1 Secession between international and domestic law

In the opening it was affirmed that secession and referendum have a double nature, as they lie at the intersection between international and domestic law. The inquiry into the double nature of the right to secede will be conducted from the international legal perspective, but EU law and to a certain extent constitutional law issues will not be set aside. International legal scholars approaching seceding movements adopt different perspectives. At one side of the spectrum, for instance, a broad notion of secession can be embraced, one which encompasses cases of both separation and dismemberment, so that secession takes place every time a new entity is formed from a pre-existing State. At the other side, it could be considered, citing Kohen, that “*secession is the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter*”.<sup>11</sup> Between 2001 and 2003 the Consortium on International Dispute Resolu-

established State, provided that it *de facto* exists. Bandinter Commission, Opinion n. 1, reprinted in European Journal of International Law, 1992, vol. 1, p. 182-183.

<sup>9</sup> The new subject of international law has to effectively establish itself satisfying the criteria for statehood set in the Montevideo Convention. The 1933 Montevideo Convention requires a State to have a defined territory, a permanent population and a government. Those are commonly referred to as the “*classical statehood criteria*”. *Montevideo Convention on the Rights and Duties of States*, signed on 26 December 1933, entered into force on 26 December 1934, reprinted in The American Journal of International Law (Supplement), 1934, vol. 28, p. 75.

<sup>10</sup> See M. Weller: “Secession and Self-Determination in Western Europe. The Case of Catalonia”, 19 October 2017, <https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/#more-15619>

<sup>11</sup> As M. Kohen explains, “in cases where the parent State consent to separation, the process is that of devolution rather than secession. See M.G. Kohen: “*Création d’Etats en droit international contem-*

tion initiated a series of Regional Conferences on self-determination and secession – in Europe, USA, Commonwealth and Russia- promoted by the International Law Association and other leading international institutes such as the Asser Institute. Each regional conference adopted a final document focusing on a definition of secession and self-determination under current international law. The Western Conferences defined secession as arising “*whenever a significant portion of the population of a given territory being part of a State, expresses by word or deed the wish to withdraw from the State and become a State in itself or become part of another State*”.<sup>12</sup> The Commonwealth Conference opposed that definition, claiming that 1) the absence of any reference to self-determination could lead to consider secession as merely separatism; 2) secession, like self-determination, is inscribed to people, not to a portion of the population; 3) the definition lacks any sort of imposition to secessionist movements, such as the respect for the constitution of the parent State in order to be considered legitimate, so that even actions contrary to national and international law could be legitimated. Lastly, the American Conference drafted another definition recognizing the right to secede “*where the population of a territory is subjected to gross, discriminatory and continuing violations of fundamental rights directed against secessionist groups*”.<sup>13</sup>

Regional differences in the interpretation and the application of international law are not uncommon but it is still possible to make some remarks: (i) contrary to the views expressed by the Commonwealth Conference, seceding attempts usually are not grounded on the Constitution of a State, unless the Constitution itself provides for cases of separation of part of the territory. Moreover, (ii) seceding struggles are frequently carried out by sub-national units whose rights are respected and usually constitutionally guaranteed. Lastly, (iii) the process towards secession is a constant flux, so that it may well be that the parent State eventually gives its consent to the territorial change under certain conditions.

The present study will address each one of these issues, with a view to present a notion of secession which responds to the recent practice in this field. In any case, differences between the definitions are to be justified by the unclear status of secession under international law. The major challenge facing legal researchers about secession is that there are no international instruments upon which one can rely to define secession, no provisions directly defining and regulating it. While it is true that no right to secede exists under international law as it now stands, this does not imply that international law prohibits secession. In the words used by the Canadian Supreme Court in the *Reference Re Secession of Quebec* case, “*international law contains neither a right of unilateral secession nor the explicit denial of such right*”.<sup>14</sup> Arguably, States have an interest in converting neutrality of international law into a

*porain*”, Bancaja Euromediterranean Courses of International Law, vol. 6, Pamplona, Centro Internacional Bancaja para la Paz y el Desarrollo, 2002, p. 571.

<sup>12</sup> J. Dahlitz (ed.), *Secession and International Law. Conflict Avoidance – Regional Reappraisals*, United Nations, New York, Geneva, 2003, pp. 75-85.

<sup>13</sup> *Ibid.* p. 84.

<sup>14</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, 20 August 1998, reprinted in *International Law Reports*, 1998, n. 161, p. 576 and ss., para.61.

ban on secession, justifying this approach by virtue of the fact that secession endangers territorial integrity. This is demonstrated by the reluctance to use the term secession in the international arena: in the 1978 *Vienna Convention on Succession of States in respect of Treaties*, art. 34 sets no distinction between devolution and secession. Rather, the wording used is “*separation of part of a State*”.<sup>15</sup> In addition, in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (hereinafter the *Declaration on Friendly Relations*) principle V states that “*the emergence into any other political status freely determined by a ‘people’ constitutes a mode of implementing the right to self-determination, in addition to the establishment of an independent State, the free association with or integration in an independent State*”.<sup>16</sup> The *Declaration on Friendly Relations* refers to the *establishment* of an independent State, not to secession.<sup>17</sup>

However, principle V gives the chance to set out some legal problems linked to the definition of secession, notably (i) the relationship with the right to self-determination and (ii) the reasons upon which secession relies. Starting from the latter point, over the last decade the international community has witnessed several examples of secessionist movements. Although the claim on statehood is often based upon a mixture of arguments encompassing violation of human rights or the right to self-determination, the ultimate *ratio* of separatism may vary. Sometimes, struggles were aimed at establishing a new State, as was the case with Kosovo, South Ossetia or South Sudan. Some other times, for example in the case of the Crimean region within Ukraine, independent struggles arose from the will to become part of another State, namely the Russian Federation.

States’ views on claims to statehood are too different to draw a common line, yet there is a hypothesis towards which a considerable group of scholars as well as some states have converged: it is secession in response to serious violations of human rights referred to above. This theory is known as the theory of *remedial secession*,<sup>18</sup> according to which a sub-national group is entitled to secede from the parent State only when human rights of its members are seriously breached. Apart from its strict link with human rights law, the remedial right theory takes strength from a specific event: the secession of Bangladesh<sup>19</sup>. According to Crawford,<sup>20</sup> Bangladesh is the

<sup>15</sup> *Vienna Convention on Succession of States in respect of Treaties*, signed at Vienna on 23 August 1978, entered into force on 6 November 1996. See United Nations, Treaty Series, vol. 1946, p. 3.

<sup>16</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (Declaration concerning Friendly Relations), annexed to the General Assembly Resolution A/Res/2625 dated 24 October 1970.

<sup>17</sup> See M. G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge, 2006, pp. 4-5.

<sup>18</sup> See L.M. Frakel: “*International Law on Secession: New Rules for a new Era*”, *Huston Journal of International Law*, 1992, n. 14, pp. 521-564; D. Murswieck: “*The Issue of a Right to Secession – Reconsidered*” in C. Toumuschat (ed.) *Modern Law of Self-Determination*, Dordrecht-Boston-London, 1993, pp. 38-39; S. Van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?*, Cambridge, 2013.

<sup>19</sup> L. Bucheit, *Secession: the Legitimacy of Self-Determination*, New-Haven- London, 1978 p. 198; T.D. Musgrave *Self-Determination and National Minorities*, Oxford, 1997, p. 189.

only case of successful secession occurred in the past decades and this is one of the factors influencing the support for the remedial secession. Whatever the case might be, current examples of secession have given a new impetus to the debate on international law on territorial changes.<sup>21</sup> Although the remedial right theory has been acquiring increasing support, recent attempts to secede such as those carried out by Scotland or Catalonia, have occurred in States where sub-national communities have been respected and protected. Moreover, it has been observed above that secession is a complex process through which the attitude of the parent State varies and may even turn into a consent to secession, such as in the case of Scotland. As a result, an accurate scholar has to start the inquiry assuming that the clear-cut answers are almost impossible. These struggles towards secession cannot be included neither in the concepts of *remedial secession* nor in the framework of self-determination as a legal title grounded in the international legal order. The study therefore will question the legal soundness of the remedial right theory. Regarding the relationship with self-determination, Toumushat defines the right to self-determination as “*a child of the General Assembly*”.<sup>22</sup> As it will be showed in the next Chapter, this claim finds its roots in the consistent practice of the UN which focused on self-determination of peoples, especially since the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.<sup>23</sup> However, self-determination as perceived within the framework of the UN does not include the right to establish an independent State for sub-national units of a sovereign State which are free to participate on the public State affairs.<sup>24</sup>

While international law still remains indecisive over secession, national legal orders may provide much more clear-cut answers. Needless to say, secession is legal when provided for by the Constitution of a certain State. Although the subject-matter of the present inquiry belongs to the international legal order, it is important to give a brief reappraisal on how domestic legal orders approach the phenomena of secession, since it is useful for acquiring a comprehensive view of the legal problems at stake. The Constitution of Burma dated 1947, for instance, granted such a right to

<sup>20</sup> See J. Crawford, *The Creation of States in International Law*, 2006, pp. 110- 120, as well as the Report “*State practice and International Law in Relation to Unilateral Secession*” prepared for the Department of Justice of Canada in the case Reference Re Secession of Quebec, reprinted in A. Bayesfky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned*, The Hague- London- New York, 2000, pp. 3-65.

<sup>21</sup> See, among the others, A. Tancredi: “*La Crisi in Crimea*”, *Diritti Umani e Diritto Internazionale*, 2014, vol.8, pp. 485-487, as well as the huge contributions referred to in footnote 3.

<sup>22</sup> C. Toumushat: “*Secession and self-determination*” in M. G. Kohen, *Secession: International Law Perspectives*, cit., p. 37.

<sup>23</sup> *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted by General Assembly Resolution 1514 A/Res/1514 on 14 December 1960.

<sup>24</sup> Scholars supports this view. See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge, 1995, p. 61; A. Kiss “*The Peoples’ Right to Secession*”, *Human Rights Law Journal*, 1986, n. 7, p. 168; A. Pellet: “*Quel Avenir pour le Droit des Peuples à Disposer d’eux même?*”, *El Derecho Internacional en un Mondo en Transformacion: Liber amicorum en Homenaje al Profesor Eduardo Jimenez de Arechaga*, Montevideo, 1994, pp. 255-276; H. Hannum: “*Rethinking Self-Determination*”, *Virginia Journal of International Law*, 1993, n. 34 p. 1, at pp. 45-47.

minorities settled within the Union of Burma. In particular, minority groups were entitled to exercise their right to secede ten years after the entry into force of the Burmese Constitution.<sup>25</sup> The 1977 Constitution of the Soviet Union, then, provided for a right of secession for the Soviet Republics.<sup>26</sup> Through these examples secession acquires a purely domestic dimension, which may lead to reconsider it as one among the possible means for facing territorial changes, plainly regulated by the legal system. Mancini in fact points out that it is necessary to adopt a comprehensive approach to secession, one that encompasses both its revolutionary and its institutionally conservative dimensions if we really want to understand it thoroughly.<sup>27</sup> In light of these assumptions, the study does not leave aside those cases in which the parent State has accepted the unilateral claim for secession by a sub-unit, either through the establishment of a procedure under domestic law or through a special agreement. Accordingly, a comprehensive approach requires not to look at secession as an isolated phenomenon, which entails only the creation of new States in international law, but rather as a part of a broader dynamic between a State and its sub-national communities. From this perspective, secessionist claims concern both international and domestic law, in that the central government may either consider secession forbidden, or as one of the rights conferred upon the sub-national communities, subject to the necessary legal rules.<sup>28</sup> Indeed, domestic law may set alternative solutions to secession which may nonetheless take into account and satisfy the requests of seceding entities.

## 1.2 Secession and/or autonomy under domestic law

Secessionist groups want their uniqueness to be recognized for a variety of reasons: their particular historical development as a community, their religion or culture. The ethnic composition of many States is indeed not homogeneous.<sup>29</sup> sometimes multi-ethnicity is the result of historical territorial re-apportionments, such as in the case of Ukraine where the region of Crimea was historically Russian. Some other times ethnic diversity is embedded in the concept of statehood itself, like in the African continent where tribalism was the primitive form of statehood but it is still visible in contemporary States. The fact that practice gives many examples of secessions occurring in multi-ethnic States does not imply that minorities only resort to secession.

<sup>25</sup> D. Raič, *Statehood and the Law of Self-Determination*, The Hague- London- New York, 2002, p. 313.

<sup>26</sup> J. Hadley: “*The Way Opened, the Way Blocked: Assessing the Contrasting Fates of Chechnya and Kosovo*” in A. Pavković and P. Radan (eds.), *On the Way to Statehood: Secession and Globalization*, Hampshire, 2008, p. 86.

<sup>27</sup> S. Mancini: “*Secession and Self-Determination*”, in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 482- 499.

<sup>28</sup> P. Radan: *Secessionist Referenda in International and Domestic Law*”, *Nationalism and Ethnic Politics*, 2012, vol.18, pp. 8-21.

<sup>29</sup> J. Summers: “*Democracy, Minorities and International Law*”, *International Journal on Minority and Group Rights*, 2009, vol.16, n. 2, pp. 266-268.

Indeed, the request of minorities is primarily autonomy and not secession,<sup>30</sup> firstly searched at the internal level, and if not, through separation from the parent State. Acknowledging diversity and enacting specific rules to safeguard the collective uniqueness of a sub-national unit is a welcomed solution to avoid secessionists struggles. The most functioning measures are constitutional arrangements granting policy decision-making autonomy to portion of territories. According to Raič, territorial autonomy is a form of self-determination in that it enables the sub-national groups to affirm their uniqueness but at the same time it represents a concession made by the central government to pursue internal stability.<sup>31</sup> On the same pattern, Hannum states that autonomy serves as a “*means of reinforcing their own sub-unit identity beyond that of being merely citizens of the State*”.<sup>32</sup> Granting autonomy empowers the group to enact specific legislation to set its annual budget, or to manage cultural and social affairs. In the Socialist Federal Republic of Yugoslavia (SFRY), for example, there were two autonomous provinces alongside six federal republics.<sup>33</sup> Another example is the Crimean region, with a different degree of autonomy compared to the other Ukrainian regions, on the basis of which the people of Crimea could establish their own institutions in order to promote their traditions, language and culture.<sup>34</sup>

In this framework, does International Law play an active role? In fact, States enjoy a wide discretion because the matter is confined to the domestic arena, provided that they respect fundamental human rights of the individual. The most popular choice to respond to seceding claims seems to be that of negotiating a new territorial settlement, through a process involving also a referendum. State practice confirms that negotiations followed by constitutional referenda with a view to settle a different territorial structure are frequent, Belgium, Canada and Ethiopia to mention only a few examples.<sup>35</sup> The Basques in Spain enjoy territorial autonomy on the basis of the organic law 3/1979<sup>36</sup> of 18 December 1979. Greenland was granted autonomy by the *Greenland Home Rule Act*, Danish Act n. 577<sup>37</sup> dated one year before. The Green-

<sup>30</sup> J. Castellino: “*International Law and Self-Determination. Peoples, Indigenous Peoples and Minorities*” in C. Walter (ed.), *Secession and Self Determination in International Law*, cit., pp. 27-54.

<sup>31</sup> D. Raič, *Statehood and the Law of Self-Determination*, cit., p. 281-283.

<sup>32</sup> H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Philadelphia, 2011, p. 474.

<sup>33</sup> For a comprehensive view on the formation, internal structure and dissolution of the SFRY see S. Trifunovska (ed.), *Yugoslavia Through Documents: From Its Creation to Its Dissolution*, Dordrecht- Boston-London, 1994.

<sup>34</sup> See A. Peters: “*The Crimean Vote of March 2014 as an Abuse of the Institution of Territorial Referendum*”, forthcoming in C. Calliess (ed), *Liber amicorum Torsten Stein* (2015), currently available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2463536](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463536), last visited 4 February 2015.

<sup>35</sup> P. Radan: “*Secession: a Word in Search of a Meaning*”, cit., p. 18-34.

<sup>36</sup> *Organic Law 3/1979 of 18 December on the Statute of Autonomy of the Basque Country* dated 18 December 1979, available in the on-line database of the European University Institute, Project European Union Democracy Observatory on Citizenship, <http://eudo-citizenship.eu/databases/national-electoral-laws/?search=1&name=&level=Regional&country=Spain&submit=Search>.

<sup>37</sup> *Greenland Home Rule Act, Act No. 577*, dated 29 November 1978, available [http://www.stm.dk/\\_p\\_12712.html](http://www.stm.dk/_p_12712.html), site of the Danish Prime Minister’s Office.

landers have appointed a Commission tasked with drafting recommendations on separation and a new *Home Rule Bill*. In one of its recommendations the Commission stated that people from Greenland were not struggling for independence tout court, but for “*an identity of their own, or rather for better possibilities of strengthening and developing their identity through increased self-responsibility*”.<sup>38</sup> Art. 11 of the Constitution of Moldova, then, recognizes the autonomy of the Gagauz region. The preamble of the Gagauz Autonomy Act - which enables the establishment of the autonomous region- defines the granting as a *manifestation of the right to self-determination*.<sup>39</sup>

In the examples above self-determination is exercised within the borders of the State. When the requests for more autonomy are not followed by the parent State and independent struggles persist, the right to secede may come into play. In other words, secession would not be perceived as an extension of self-determination, but as an autonomous title. In Chapter 2 this position is advanced in detail.<sup>40</sup>

### 1.3 Is international law giving some guidelines to secessionist processes?

So far it was seen that contrary to what one may think of secession, i.e. that it is a one-spot event whereby a new entity is born out of a pre-existing one, secession is a dynamic process which finds its roots in the domestic arena and may, eventually, reach the international arena. Taking the definition given by Crawford “*secession is the process by which a particular group seeks to separate itself from the State to which it belongs, and to create a new State*”.<sup>41</sup> It is precisely the interpretation of secession as a continuous process that is the point of departure of this study.

Pragmatically, secession is an internal issue up until the central government either accepts separation on the basis of domestic rules or manages to control the dialogue with the secessionist group. However, when the tensions between the parties are likely to put at risk the stability of the international system, in particular when there are serious violations of human rights, there is a growing trend in scholarly literature<sup>42</sup> that maintains that international law may - in the vests of a “guardian”, require the respect of a certain procedure. According to Tancredi, these rules can be collectively labelled the *due process for secession*, an emerging rather than an established set of international rules on State creation in cases of secession. The respect of procedural requirements, the argument continues, does not result in an international legal title to create a new subject of international law. The creation of state-

<sup>38</sup> D. Raič, *Statehood and the Law of Self-Determination*, cit., p. 285.

<sup>39</sup> See J. Chinn and S.D. Roper: “*Territorial Autonomy in Gagauz*”, *Nationality Papers*, vol. 26, n.1, 1998, p. 87.

<sup>40</sup> A. Tancredi, *La Secessione in Diritto Internazionale*, Napoli, 2001, p. 24.

<sup>41</sup> J. Crawford, *The Creation of States in International Law*, Cambridge, 1997, p. 85.

<sup>42</sup> A. Tancredi, *La Secessione in Diritto Internazionale*, cit., p. 699, citing for a first elaboration of the procedural approach, *inter alia*, T. Franck: “*Communities in Transition: Autonomy, Self-Governance and Independence*”, *Proceedings of the American Society of International Law* 1993, p. 261.

hood will still be evaluated against the benchmark of effectiveness and statehood criteria. By contrast, when the set of rules forming the *due process* is not respected, there is, according to the model, an obligation not to recognize the entity born out of a process of secession. Being the due process a procedural legal institute, in case a newly born State does not comply with it, it will not be *non-existent*. Rather, that State will lie in isolation, unable to establish international relations with the other states.<sup>43</sup> Chapter 2 will be particularly devoted to show that the *due process* combines the application of the following legal rules, (i) the ban on intervention by third parties (ii) the respect of the *uti possidetis iuris*, according to which the creation of a new State must occur within the previous existing administrative boundaries and (iii) the resort to territorial referenda.<sup>44</sup> It will be seen that even the most recent cases of secession satisfy the *normative due process*, provided that the application of this model is not limited to cases of grave breaches of human rights, but expanded to attempts to secede occurring in states with well-established mechanisms for minority protection and freedom of expression.

### 1.4 Secession and territorial referenda: a complex interplay

In connection to the normative due process, it remains to be seen how the couple secession – territorial referendum may impact on territorial changes, i.e. if a sub-unit can lawfully secede by referendum. Arguably, the subject matter of the research leads to ask firstly how a referendum may impact on international law. Is it only a domestic tool? In the opening of this introduction we have argued that just like the double nature of secession, referenda on territorial changes seem to start acquiring a crucial position in international law. The analysis of the role of referendum in international law on territorial changes and its link to secession is not a new task for international legal research.<sup>45</sup> In the second half of the nineties legal experts started to focus on whether “*the will to statehood has begun to develop into a prerequisite for statehood*”.<sup>46</sup> The analysis of referenda was inspired by the process of the dissolution of the USSR, by the events in the SFRY and by the examples of Eritrea or Kosovo. In the USSR, for instance, Georgia, Turkmenistan, Ukraine and Uzbekistan all resorted to territorial referenda to legitimate their choice of independence.

However, practice and scholars' positions are far from being clearly set. On the one side, as Cassese affirmed in 1995, referenda should be the way to be followed to

<sup>43</sup> See for the latest considerations about the model A. Tancredi: “*Secessione e Diritto Internazionale: un'Analisi del Dibattito*”, *Diritto pubblico comparato ed europeo*, 2015, n. 2, pp. 473-474

<sup>44</sup> Although the present research will focus mainly on the resort to territorial referendum, intervention by third parties will be dwelled upon with in the last chapter in the context of international law about recognition.

<sup>45</sup> T. D. Grant: “*A Panel of Experts for Chechnya: Purposes and Prospects in light of International Law*”, *Virginia Journal of International Law*, 1991, n. 40, pp. 145-248; C. Hillgruber: “*The Admission of new States to the International Community*”, *European Journal of International Law*, 1998, vol.9, pp. 491-520.

<sup>46</sup> T. D. Grant: “*A Panel of Experts for Chechnya*”, *cit.*, p. 201.

give legality to territorial changes.<sup>47</sup> It is not tantamount to say that territorial referenda affect substantially international law on territorial changes and confer to people a legal title to secede. Rather, it means that referenda might “procedurally intervene” in seceding processes as hinted at above. Although practice does not allow to maintain that popular consent confers a legal title to secede, the wording of the Supreme Court of Canada in the *Re Reference Secession of Quebec* case that it cannot be ignored is still valid today.<sup>48</sup> The intrinsic value of a referendum lies in its ability to give a shared answer to a question. A majoritarian vote may be analysed from different points of view in social sciences: from a legal point of view, for instance, in terms of compliance with the rule of law and established legal standards. Such a striking role under domestic law cannot be ignored by international law on territorial changes, in particular by the international legal order, where individuals and their rights play a fundamental role in the progressive development of the law.

On the other side, according to Peters “*from a purely normative perspective, the best procedure for establishing a State boundary is a referendum conducted among the interested populations under international supervision*”.<sup>49</sup> Peters goes beyond the principle of *uti possidetis juris* and its value under international law, arguing that a free and fair vote can serve as a legitimating factor in settling new boundaries. In Peters’ view *uti possidetis* maintains an important role as a starting point for popular consent because any territorial referendum needs to rely on established borders. Furthermore, Peters has developed her approach by maintaining that “*as a matter of customary international law a free territorial referendum is emerging as a procedural condition sine qua non for territorial changes*”.<sup>50</sup> The Badinter Commission in its Opinion n.4 on Bosnia Herzegovina (B-H) seems to support this view when it states that “*the will of the peoples of B-H to constitute B-H as a sovereign and independent State cannot be held to have been fully established. This assessment could be reviewed if appropriate guarantees were provided by the republic applying for recognition, possibly by means of a referendum of all citizens of B-H without distinction, carried out under international supervision*”.<sup>51</sup> The preference for the tool referendum is justified, *inter alia*, by the fact that a referendum represents a peaceful but very powerful way for the secessionist group to confront with the parent State, in that it gives to the central government a clear expression of the will of a certain sub-

<sup>47</sup> Cassese, *Self-Determination of Peoples*, cit., p. 191.

<sup>48</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., at p. 221 “*the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada*”.

<sup>49</sup> A. Peters: “*The Principle of Uti Possidetis Juris*”, in C. Walter, *Secession and Self-Determination in International Law*, cit., p. 133.

<sup>50</sup> A Peters: “*Sense and Nonsense of Territorial Referenda in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea’s Alteration of Territorial Status under International Law*” published by the blog of the European Journal of International Law, <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referenda-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/> (last visited 8 January 2015).

<sup>51</sup> Badinter Commission, Opinion n. 4, reprinted in *International Legal Materials*, 1992, vol. 31, p. 1488 ff. See also S. Terrett, *The Dissolution of Yugoslavia and the Badinter Commission*, Aldershot, 2000.

national unit. Along this line of thought, the study will underline the possible links between referenda and negotiations involving the seceding unit, the parent State and all the interest stakeholders.

## 2. Methodology and Structure

The study follows the traditional pattern of selection and interpretation of (i) legal acts (ii) practice and (iii) scholarly literature. However, a typical feature of the research is its cross-cutting nature. Since the field of territorial changes and secession lies at the intersection between national and international legal orders, constitutional practice and comparative constitutional analysis is all the more relevant to find principles of law. Hence, the thesis relies on materials from a varied assortment of sources, ranging from international legal instruments and case-law– including the ICJ, Human Rights' Bodies and domestic courts chosen on the basis of their relevance to the subject matter of the research- to states' declarations and doctrine.<sup>52</sup>

### 2.1 Methodology

The thesis follows an empirical approach and looks at the various instances of the interrelation between secession and referendum in international law. Since we shall analyse the existence of a process for creation of statehood characterised by secession and referendum, cases study lie at the core of this work. With more than 300 sovereignty and territorial referenda held since the eighteen century, a selection is unavoidable. The examples analysed in the following pages are Quebec, Montenegro, Scotland, Crimea and Catalonia, albeit other situations such as that of the region of Karakalpakstan within Uzbekistan, Kosovo, Abkhazia and Ossetia, will be concisely analysed as well. In particular, the complexity of the case of Crimea justifies its analysis at three different stages: (i) when dealing with secession, (ii) with the analysis of referendum in international law on territorial changes and (iii) with recognition of an entity born out of a seceding referendum. The selection made can be motivated on several grounds: for Scotland, Crimea and Catalonia, they are the most recent examples and quite similar in timing, thus the road to find elements for the consolidation of an international rule necessarily has to involve their inquiry. Secondly, the case of Quebec is so far the only one in which a domestic Court clearly discussed the use of a referendum to secede and with regulation of this process in

<sup>52</sup> Among the sources, those references which may have been useful to develop the main argument, but that were mentioned either briefly in the core text or just in the footnotes, are not included in the bibliography. An example are the resolutions of the United Nations pertaining to the violation of art. 2(4) of the UN Charter within the framework of the decolonization, such as in the case of Timor or West New Guinea. This choice is mandated by the high interdisciplinary nature of the research which requires the researcher to circumscribe the area of study. In this sense, some issues, i.e. the possible critiques that could be advanced against the referendum, in particular the fact that its widespread use could amount to the domination of the majority against the minority within a State, will not be studied as they are worthy of a thorough analysis that is left to other publications.

international law. By the same token, Montenegro has reached independence throughout a referendum with a high involvement of the international community. In the main cases study, secession originates in the context of a democratic system pursuant to which freedom of expression and minority protection are ensured. This element is important in light of the legal justifications adduced by sub-units vis-à-vis the parent State, be those secession as a remedy to serious injustices, the exercise of their right to self-determination or the expression of a right to decide on their status. Throughout an inquiry about the legal soundness of each argument, the research will explore the relationship between secession and referendum and more generally the role of popular consultations in international law on territorial changes.

## 2.2 Structure

The inquiry begins from the right to self-determination and its current status under international law. *Chapter 1* explores the boundaries of the right to self-determination with special emphasis to the evolution of the understanding of the right. From a right belonging to colonies, substantially equated to independence, the right to self-determination can be also exercised within the borders of the parent State. In this second dimension, the exercise of the right to self-determination has been progressively linked to concepts of democratic statehood and the rule of law.

*Chapter 2* discusses the approach of international law towards secession, with a particular focus on the procedural requirements for carrying out a secession, that may be in the way of consolidation at the international level. The Chapter can be subdivided into two parts: the first one covers the normative framework for secession, with a critique to the remedial secession theory and the rational underpinning the support for the application of a *normative due process*. The second one presents an attempt to disentangle secession from self-determination, arguing that secession is not a particular form of the exercise of the right to self-determination. In other words, the Chapter adopts the *normative due process* referred to above vis-à-vis the exercise of an autonomous right to secede.

*Chapter 3*, then, goes to the core of the inquiry. When it is affirmed that there is a trend in consolidation in international law about the use of the referendum to redraw the borders of states, one of the most common arguments is that popular consultations about territorial changes are quite an old practice, beginning from the plebiscites held after the French Revolution. Recalling that the main question is whether referenda legitimate per se a secession and whether there is a procedural obligation to resort to referenda, *Chapter 3* begins from the analysis of the plebiscites carried out after the World War I. If plebiscites can be considered the ancestors of territorial referenda, then it could be even argued that there is sufficient practice and *opinio juris* establishing referenda as the legitimating tool to carry out a secession. In the Chapter, the main differences between plebiscites and referenda are listed. Then, throughout the cases of Quebec, Scotland, Karakalpakstan, Catalonia and Crimea, the contours of the legal status of referenda in international law on territorial changes are defined.

*Chapter 4* follows the main inquiry and focuses on the procedural requirements for a free and fair territorial referendum. Always adopting an empirical approach, Mon-

tenegro together with Crimea serve as the cases study for discerning the internationally consolidated standards for the conduct of a territorial referendum. In so doing, special attention is devoted to the practice of the Council of Europe in light of its role in the field of democracy through the rule of law. Once the procedural requirements have been established, attention is paid to what happens following a referendum about secession, notably to the reactions by the international community and more in general to the law on the recognition of statehood. In this part, other cases study such as Abkhazia, Ossetia, together with some remarks about Catalonia will be presented to the extent relevant for the subject matter of the Chapter.

*Chapter 4* will lead to the general *Conclusions* to the research, in which one and each piece of the puzzle collected in the previous chapters will be put together. The author hopes that, through the following investigation, the research can contribute to the development of a systematic approach and, in some small part, to the shedding of light on the controversial international law questions on territorial changes and the use of tools for the expression of the will of the people.

## Chapter 1

# Only a colonial peoples' right? Trajectories of self-determination in International law

The present Chapter explores the historical evolution of the right to self-determination and its contemporary legal status under international law. Firstly, the topic will be introduced by describing the historical origins of self-determination that can be traced back to the American and French revolution. It will be shown how self-determination was affirmed as a political principle and eventually evolved into a legal right. Then, the Chapter will analyse the general features of the right to self-determination focusing in particular on the most controversial issues arising from its enforcement.

The assumption guiding the inquiry is that international law acknowledges the existence of two dimensions of the right to self-determination, internal and external.<sup>53</sup> The former is generally defined as the right of all peoples “*to exercise those rights and freedoms which permit the expression of the popular will*”.<sup>54</sup> External self-determination, by contrast, was firstly conceived as leading to independence, due to its ties to the decolonization period. However, the external dimension has never been clearly defined because its enforcement clashes with the territorial *status quo* of the international community.

Self-determination involves not only peoples and States but also other actors – e.g. international, regional courts - as well as international organizations. It can thus be analysed from a variety of perspectives. The point of view chosen for the present analysis is the double dimension of self-determination in international law. Referring to a double dimension of the right to self-determination is not tantamount to claim that there are two kinds of self-determination. International law acknowledges one right to self-determination. However, this right can be enforced in two directions, on the one hand towards the management of internal affairs and on the other hand externally towards creation of statehood. Pragmatically, it is the latter direction

<sup>53</sup> The distinction between internal and external self-determination has been often criticised. Weller for example argues that it is a questionable distinction whose effect is complicating the interpretation of the right. By splitting the concept into two parts, one could even come to the conclusion that self-determination is not a continuous right that is applicable to circumstances concerning both the identity and the governance of a State. See M. Weller, *Escaping the Self-Determination Trap*, Cambridge, 2008, p.23.

<sup>54</sup> See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., p. 53.

that touches upon the desire of sub-national units to secede from the parent State and the one which may include the use of territorial referendum.<sup>55</sup>

## 1. From a Political Principle to a Legal Rule

A reappraisal on the evolution of self-determination cannot but begin from the development of the Western political thought on the relationship between citizens and their sovereign. It was during the eighteenth century – with the American and French Revolution – that the idea of government based on an exchange of guarantees, i.e. consent to be governed for security guarantees, gained momentum. Despite the fact that the two revolutions were influenced by the age of the Enlightenment, - thus they were mainly devoted to individualism and equal rights- the American and the French revolution set the roots for the affirmation of the principle of self-determination after World War I.

In this general framework, two notions lie at the basis of the principle of self-determination: peoples' sovereignty and ethnicity.<sup>56</sup> The former was the driving force in the American and French revolution: gradually, populations started to oppose the authority and legitimacy of the central government that was considered *alien* from them. The Declaration of Independence of the United States of America dated 4 July 1776 reads as follows: “*whenever any form of government becomes destructive (...) it is the Right of the People to alter or abolish it, and to institute a new Government*”.<sup>57</sup> Accordingly, here popular sovereignty becomes the idea justifying the destruction of an existing central authority and its replacement by a new one. In broader terms, this line of reasoning opens the door for a role of the people in the making of the State. The other concept influencing self-determination is ethnicity.<sup>58</sup> In fact, belonging to an ethnic group is one of the milestones in the path towards the making of a nation. The awareness of being part to the same community is in fact a constant feature of all self-determination claims. In the aftermath of the revolutions, then, liberalism and nationalism shaped the evolution of the principle of self-determination. Liberalism emphasizes the internal dimension of self-determination due to its demand for a representative government. Finally, nationalist ideology advocates for people's choice of their status in the international community and thus it supports the external dimension of self-determination.<sup>59</sup>

<sup>55</sup> This choice should not be misunderstood. It does not pretend to be the best approach to self-determination, nor a complete one. In the context of the present research, the legal analysis provided will be as detailed as it is needed to understand the following chapters.

<sup>56</sup> For supporters of this view see. S. F. Van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?*, Cambridge, 2013, pp.14-17.

<sup>57</sup> *Declaration of Independence of the United States*, 4 July 1776, quoted in J. Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Leiden-Boston, 2007, pp. 95-96.

<sup>58</sup> S. Van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?*, cit., p. 16.

<sup>59</sup> *Ibid.*

## 1.1 Self-determination after World War I

The first references to self-determination are to be found in Lenin and Wilson's political discourse. Although the perspectives of the two statesmen were inspired by different political ideologies, they still share some aspects and eventually merged into the notion of self-determination under international law. Therefore, this section will give a reappraisal of Lenin and Wilson's political thought about self-determination first.

Lenin's conception of self-determination interrelates with free access to economic resources: the ultimate ratio of self-determination is in fact the spread of socialist revolution. In this perspective, "*the interest of capitalist development and of the freedom of class struggle will be best served by secession in cases of subjugation by an oppressor*".<sup>60</sup> According to Cassese, three major elements can be set out from Lenin's idea: first, ethnic and national groups can resort to self-determination to freely determine their own destiny. Secondly, self-determination should serve as a guiding principle for inter-States relations, e.g. by prohibiting territorial annexations carried out without, or contrary to the results of, popular consultations. Hence, it ultimately regulates territorial changes within the international community. Lastly, self-determination cannot but clash with imperialism because its application stems from the principle of freedom. Therefore, its enforcement allows for independence from external powers. This last element is of particular importance, because it will be reiterated by the USSR at the UN in the aftermath of World War II.<sup>61</sup>

From the aforementioned, it can be inferred that in Lenin's conception the external dimension of self-determination was predominant, although the rationale underpinning the principle rests internal, namely the right of people to freely determine their political status and have access to economic resources. The external dimension of self-determination was less present in Wilson's political thought if compared to that of the soviet leader, or at least there was less trust in its real application. Wilson's perspective of self-determination found its roots in democratic political thought as developed during and after the American Revolution. For Wilson, self-determination was best realized through self-government because only a democratic form of government could give to a community the chance to administer itself while ensuring compliance with fundamental rights. The ultimate consequence of the implementation of this idea would be a long-term peace for the international community.

On January 8, 1918 Wilson delivered a speech to a joint session of the US Congress<sup>62</sup> in which he addressed the post war settlement: based on his idea of self-determination he claimed that nations should be established by well-defined communities living in a determined territory. Although self-determination was not mentioned during the speech, Wilson himself confirmed later in the so called Fourteen

<sup>60</sup> V.I. Lenin: "*The Right of Nations to Self-Determination*", in Lenin, *Collected Works*, Moscow, 1964, quoted by D. Raić, *Statehood and the Law of Self-Determination*, cit., p. 186.

<sup>61</sup> A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., p. 16.

<sup>62</sup> T.W. Wilson: "*An Address to a Joint Session of Congress*", in A.S. Link (ed.), *The Papers of Woodrow Wilson*, Princeton, 1984, p. 102.

Points Address to the Congress that self-determination in his view was not an empty word but “*an imperative principle of action*”.<sup>63</sup> The notion of self-determination had an international dimension, to say that it was supposed to apply at the international level, while surprisingly there is no mention of the manner in which it could apply in the USA. It seems as if Wilson wanted to convey the idea that self-determination was nothing more than a political principle, highly dependent on the post-war situation in Europe. In other words, self-determination in Wilson’s words was not yet a principle under international law: it was a political principle to manage international relations. This is confirmed by the fact that self-determination was defined in vague terms: whilst the principle could be applied to the claims of specific ethnic groups, no clarification was really given as to who was entitled to take advantage of it – e.g. only ethnic sub-national units, or even small communities or groups. Moreover, there was no reference to the existence of corresponding duties owed by other States, be they the Allies or the defeated powers.

Nevertheless, the definition provides some hints with respect to the strong link between internal and external self-determination. In Wilson’s discourse internal and external self-determination are inextricably linked. By requiring the establishment of governments based on consent of the governed, the internal dimension of self-determination was present. By arguing that sub-units with common ethnic characters should be allowed to govern their own territory the external dimension of self-determination was affirmed. Yet, it must be noted that in the aftermath of the second World War, on the practical plan, the application of the principle of self-determination was problematic due to the coexistence of many small nationalities within the borders of existing States, above all in Central and Eastern Europe. A straightforward application of the principle could in fact lead to thousands of small States and hinder the maintenance of peace and stability, not to mention the strategic interests of the great powers.

### **1.2 Self-determination and the Mandate System in the Covenant of the League of Nations**

The difficulties linked to the *mise en pratique* of the principle of self-determination can be seen in the subsequent practice of the League of Nations. The American draft proposal<sup>64</sup> on self-determination was not accepted and the final version of the Covenant of the League of Nations<sup>65</sup> does not mention self-determination, probably due

<sup>63</sup> The Fourteen Points Address was delivered to the Congress 8 January 1918 and Wilson stressed that “*self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril*”. See D. Raić, *Statehood and the Law of Self-Determination*, cit., p. 182. The full text is available through the on-line repository of Yale Law School University, [http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp)

<sup>64</sup> The USA draft proposal suggested that Art. 10 should refer to self-determination to justify territorial readjustments “*by reason of changes in present racial conditions and aspirations or present social and political relationships*”. See. D.H. Miller, *The Drafting of the Covenant*, vol. 2, New York and London, 1928 quoted by D. Raić, *Statehood and the Law of Self-Determination*, cit., p. 194.

<sup>65</sup> *Covenant of the League of Nations*, reprinted in League of Nations Official Journal, 1920, p. 3.

to States' fear for the consequences it could have on the geopolitical system at that time. However, mandates were established with the purpose of guiding colonies of the defeated powers towards welfare and self-government, thus in line with the principle of self-determination. The League of Nations was entitled to act as a supervisor of the system, which was composed by three different types of mandate, depending on the level of self-administration granted to the formerly colonized territories. The highest level of autonomy was enjoyed by A mandates, such as Turkey, Central Africa and German territories; B mandates had some form of autonomy, while C mandates, such as South West Africa, needed a broad supervision by advanced nations.<sup>66</sup> Despite the fact that these territories were still subject to some level of external control, the Mandate System marked the emergence of a new approach to the management of non-advanced territories, that shifted from subjugation toward administration carried out with the ultimate aim of establishing self-government.

Moreover, the League of Nations engaged itself in the protection of minorities and ethnic groups alongside the Mandate System. In this field, the League acted as a forum for negotiation on minority rights for the adoption of bilateral or multilateral treaties<sup>67</sup> on the issue. After the First World War, in fact, minorities' protection was not the subject of any universal legal instrument, albeit within the framework of the League some special Committees were established. They were tasked with monitoring compliance with the obligations concerning protection of minorities as envisaged by the relevant treaties. At the very beginning of its creation, the system of the League of Nations charged with a right to petition only the members of the Council of the League.<sup>68</sup> However, the exercise of the right was soon extended to minorities themselves and also to states which had no representative in the Council.<sup>69</sup> Then, if the claim passed an initial scrutiny and it was verified that there could be a violation of minorities' rights as envisaged by the treaty at stake, the petition could be examined by the Council. In practice, only a few petitions ever reached the Council- e.g. the disputes for Vilna in 1922 or Memel dated 1923, or the Åland Island case. The latter in particular require the League to confront itself with the application of the principle of self-determination and even with secession.

<sup>66</sup> J. Crawford, *The Creation of States in International Law*, Cambridge, 2006, pp. 741-745.

<sup>67</sup> See for instance the conventions providing for minority protection such as the Convention related to Upper Silesia, dated 15 May 1922 and several pledges to ensure the rights of minorities made to the League of Nations by Finland (1921), Albania (1921) or Estonia (1923) to mention only a few. See for references P. Hilpold: "*The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment*", Max Planck Yearbook of United Nations Law Online, 2013, vol.17, pp. 87-124.

<sup>68</sup> The powers of the League of Nations with respect to protection of minorities were not included in the Covenant of the League and other bilateral and multilateral agreements were not conclusive on the issue. Thus, as it is observed by Sierpowsky, it was necessary to build up procedures *ex novo*. See S. Sierpowski: "*Minorities in the System of the League of Nations*", P. Smith, *Ethnic Groups in International Relations*, 1991, New York, pp. 12-20; see also J. Stone: "*The Legal Nature of the Minorities Petition*", *British Yearbook of International Law*, 1931, vol. 12, pp. 76-94.

<sup>69</sup> Following the Italian Representative's Report (Tittoni's Report) on petitions and minority protection, the Council on 25 October 1920 adopted a resolution to that purpose. See *Report Adopted by the Council of the League* on 20 October 1920 in League of Nations, *Protection of Linguistic, Racial and Religious Minorities by the League of Nations*, 1929, Geneva, pp. 6-12. See for an account about minority rights in the League on Nations S. Sierpowski: "*Minorities in the System of the League of Nations*", cit., *ibid*.

### 1.2.1 The Åland Island Case

As far as the facts are concerned, the case involved Sweden, Finland and the Åland Island. The small island was administered as part of the Finnish province of Russia, whilst Sweden could only argue to have exercised sovereignty in the past. After Finland declared independence from Russia, in 1919 the Ålanders organised their own plebiscite which resulted in a clear majority in favour of uniting with Sweden.<sup>70</sup> In light of the opposition by Finland and the support by Sweden, the petition came in front of the Council. Sweden, in particular, claimed that the Åland Island should decide about its status with a plebiscite. Unconventionally, two reports were issued about the legal questions surrounding the Åland case. Firstly, the Council of the League appointed a Committee of Jurist (hereinafter Committee), to determine whether the question put by the Ålanders belonged only to the domestic legal domain, thus outside of the scope of the Covenant of the League of Nations.

Self-determination was a central issue because the Committee needed first to determine whether the right claimed by the people of the Åland island existed under international law. According to the Committee, self-determination could not be viewed as a right under positive international law at that time. In spite of having an important role to play in modern political thought, it was not mentioned in the relevant legal instruments but only in some bilateral treaties. This was not sufficient to prove its status as an established legal right in international law.<sup>71</sup> In this sense, the argument about the use of plebiscites was completely set aside. The conclusion of the Committee was focused on the fact that the dispute “*does not refer to a definite established political situation, depending exclusively upon the territorial sovereignty of a State*”.<sup>72</sup> It was for every sovereign State “*which is definitely constituted*”<sup>73</sup> to grant or refuse the right to self-determination to sub-communities living within its borders.<sup>74</sup> Hence, precisely because the demands of the Ålanders were developed “*at a time when Finland had not yet acquired the characters of a definite entity*”,<sup>75</sup> there could still be an argument for the admissibility of the case. As Cassese observes, the application of the principle of self-determination came back in the business because Finland could not be deemed a totally sovereign State.<sup>76</sup> In this sense,

<sup>70</sup> F.D. Scott, *Sweden, The Nations History*, University of Minnesota Press, 1988, pp. 500-504.

<sup>71</sup> League of Nations, *Report of the International Commission of Jurists*: “*Although the principle of self-determination of peoples plays an important role in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treatise cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations*” reprinted in *League of Nations Organization Journal, Special Supplement*, 1920, n.3, para. 5.

<sup>72</sup> League of Nations, *Report of the International Commission of Jurists*, cit., p. 14.

<sup>73</sup> League of Nations, *Report of the International Commission of Jurists*: “*Generally speaking, the grant or the refusal of such a right (to separate themselves from the State of which they form part) to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of every State which is definitely constituted*”, para. 5.

<sup>74</sup> *Ibid.*

<sup>75</sup> League of Nations, *Report of the International Commission of Jurists*, cit., p. 14.

<sup>76</sup> A. Cassese, *Self-Determination, a Legal Reappraisal*, cit., pp. 27-30.

Crawford aptly underlines that the Committee admitted that self-determination could apply to territories that are detached from the parent State: the degree of control exercised by Finland was so blatant that the unit was in effect a non-self-governing territory, subject to a *carence de souveraineté*.<sup>77</sup> Following the report of the Committee, the Council of the League appointed a Commission of Rapporteurs for the purposes of developing some practical recommendation. The Commission of Rapporteurs took the chance to express its views about self-determination and substantially confirmed the interpretation given by the Committee. Self-determination, rather than being a rule of international law, was a principle of justice and liberty which had been interpreted in different ways by the members of the international community. In the case at stake, the Åland Island should remain with Finland, but the country had to enforce the guarantees for minorities' protection provided under the Finnish 1920 Autonomy Law.<sup>78</sup> In other words, as long as Finland granted some form of autonomy to the Ålanders, their rights were protected. Hence, the Commission of Rapporteurs ruled out the hypothesis of unconditional secession,<sup>79</sup> albeit it draw a line between the lack or failure of the kin State to ensure protection of minorities and secession as a last resort.<sup>80</sup> In cases of serious mistreatment and violation of minorities treatise, the Commission continued, the possibility of extreme actions was foreseen, taken as a last resort measure. This approach anticipates the one which will be analysed in the next Chapter, notably the remedial right theory for secession.

Going back to the subject matter of this Chapter, in order to better assess the role of the Åland case in the context of a legal reappraisal on self-determination, it is worth noting that the two Reports set down some of the characteristics required for a group to be considered a minority such as sharing the same language and culture or religion and being capable to administer itself. For the first time, an international body was putting down the basic features for acknowledging the existence of a distinguished group among the people of a nation. Therefore, the work of the League of Nations in this field should not be underestimated, as it probably paved the way for the better regulation of minority issues in international law which eventually started since the end of the Second World War As Cassese maintains “*a policy line was put forward which the world community, to some extent, took up and, indeed, which might yield even more fruit in the future*”.<sup>81</sup> This view is confirmed by the ICJ case-law on Namibia and the construction of a wall in Palestine, respectively. In both cases the Court, while expressing its view on the development of international law of self-determination, held that the ultimate aim of the “*sacred trust*” referred to by Art. 22 of the Covenant was the self-determination of the peoples concerned.<sup>82</sup>

<sup>77</sup> J. Crawford, *The Creation of States in International Law*, cit., p. 126.

<sup>78</sup> See Official Journal of the League of Nations, September 1921, pp. 701-702.

<sup>79</sup> League of Nations, *Report of the International Commission of Rapporteurs* presented to the Council of the League, 16 April 1921, League of Nations Document B7/21/68/106, VII, pp. 22-23.

<sup>80</sup> League of Nations, *Report of the International Commission of Rapporteurs*, cit., pp. 21; 28.

<sup>81</sup> A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., p. 33.

<sup>82</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 267*, Advisory Opinion, 1971, ICJ Reports

## 2. The purport of self-determination in the UN Practice

The fruits of the contribution brought by the League of Nations in the Åaland island case were picked up by the United Nations since the very beginning of its activity. Self-determination was in fact mentioned among the purposes of the UN in the UN Charter. Art.1 (2) reads: “*the Purposes of the United Nations are: [...] to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.*”<sup>83</sup>

Undoubtedly, several merits of the United Nations with respect to the enforceability of the right to self-determination can be recognized: (i) the codification of the principle in an international legal document; (ii) its crystallization in international legal discourse and practice of the States; (iii) its wide application in the context of formation of new subjects of international law. However, there are also some pitfalls. The most important one is that the principle was not defined in the Charter: its main features thus have to be discerned from practice. Given that practice concerns mainly the independence of colonies, this strict interrelation with the decolonization period begun to be seen as an intrinsic feature of self-determination.

In the next sections it will be shown that (1) the contribution of the United Nations is considerable with respect to the evolution of a general right to self-determination in the international legal order while (2) in practice the purport of self-determination appears to be narrowed to the decolonization context. The use of self-determination in the Charter raises several questions, indeed. It could be questioned whether self-determination applies to States or also to the inhabitants of a territory, whether it acknowledges a broad notion of people – which could include even small communities within a State – or whether the target has to be only colonies. Following our approach that focuses on the dichotomy between internal and external self-determination, this section argues that at first the UN championed self-determination in its external dimension, a sort of right to decolonization. However, after colonies were dismantled, self-determination ended up to be supported mainly in its internal dimension.<sup>84</sup> In the Charter of the United Nations, self-determination was a principle, finally codified in an international instrument, but still a political principle. It could not constitute the legal basis of a claim because it was not precisely defined. Its characterization as a legal entitlement came as a consequence of many other elements, like the spread of human rights in international law. It was the combination

1971, para 52-53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para.70.

<sup>83</sup> Reference to self-determination was sponsored by the USSR for Art. 55 as well, although the Soviets would have liked to include self-determination also in the operative provisions dealing with administration of territories. Such proposal, however, was opposed by the colonial powers of the time. As a counterbalance, colonial powers strongly supported the clear affirmation of the principle of non-interference in domestic affairs (Art. 2 (7)). As a result, no reference to self-determination can be found in chapters dealing with either the administration of non-self-governing territories or trusteeships.

<sup>84</sup> It merits to mention here that even by looking at the *travaux préparatoires*, no support for a right to external self-determination can be found outside the colonial dominions, as showed by H. Quane in “*The United Nations and the Evolving Right to Self-Determination*”, *International and Comparative Law Quarterly*, 1998, vol. 47, pp. 540-545.

of General Assembly resolutions, human rights treaties, and international case-law that turned self-determination into a right under international law.

The development of the notion of self-determination in the UN practice rests on a combination of factors: not only the references contained in the Preamble of the UN Charter and the General Assembly's practice, but in particular the application of Chapters IX and XX, devoted to the Trusteeship System and to non-Self-Governing territories. On the one hand, the trusteeship system indirectly contributed to affirm the right to self-determination among peoples because the entrusted powers were asked to guide those territories to independence. On the other hand, non-self-governing territories were supposed to develop progressively autonomous forms of self-government, on the basis of the peoples' political aspirations.<sup>85</sup>

In this general legal framework, the chance for the UN to adopt relevant documents in the field was given by the rising of the movement of the non-aligned countries. In particular, in 1955 the representatives of Eastern European and African-Asian countries assembled in Bandung strongly asked for a speedy end of colonialism.<sup>86</sup> Five years later the UN General Assembly managed to adopt the *Declaration on the Granting of Independence to Colonial Countries and People* annexed to Resolution 1514<sup>87</sup> which is considered a landmark piece for the study of self-determination in the UN practice, together with resolution 1541<sup>88</sup> adopted one day later and resolution 1564<sup>89</sup> establishing a special committee on decolonisation.<sup>90</sup> The Declaration annexed to resolution 1514 above mentioned did not come out of nothing, but was the ultimate step after a number of resolutions adopted by the Assembly that had mentioned the right to self-determination.<sup>91</sup> In addition, though the *Universal Decla-*

<sup>85</sup> D. Raić, *Statehood and the Law of Self-Determination*, cit., pp. 203-205.

<sup>86</sup> The Conference of Bandung was a meeting hosted by the Indonesian city between 18-24 April 1955. The meeting assembled Asian and African countries united under the idea of African Asian solidarity against the bipolar system.

<sup>87</sup> *Declaration on the Granting of Independence to Colonial Countries and People* (hereinafter also the *Declaration on Colonial Peoples' Independence*), annexed to General Assembly Resolution 1514 (XV), adopted on 14 December 1960, available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/1514\(XV\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514(XV))

<sup>88</sup> General Assembly, Resolution 1541, *Principles which should guide Members in Determining whether or not an obligation exists to transmit the information called for under art. 73 of the Charter*, adopted on 15 December 1960.

<sup>89</sup> General Assembly, Resolution 1564 adopted on 27 November 1961.

<sup>90</sup> As regards the right to self-determination in international law, its legal status has been consolidated by a series of documents, the majority of which will be scrutinised briefly in this Chapter, such as, inter alia, the (1) Helsinki Final Act adopted by the Conference on Security and Cooperation in Europe (hereinafter CSCE) in 1975, (2) the African Charter of Human and Peoples' Rights of 1981; (3) the CSCE Charter of Paris for a New Europe adopted in 1990; (4), and the Vienna Declaration and Programme of Action of 1993. The latter will be analysed in the next Chapter in the inquiry about the legal basis surrounding the theory of remedial secession.

<sup>91</sup> See among the others, UN Doc. A/Res/37/42, 3 Dec. 1982; UN Doc. A/Res/38/16, 22 Nov. 1983; UN Doc.; A/Res/39/18, 25 Nov. 1984; UN Doc. A/Res/40/24, 29 Nov. 1985; UN Doc. A/Res/41/100, 4 Dec. 1986; UN Doc. A/Res/42/94, 7 Dec. 1987; UN Doc. A/Res/43/105, 8 Dec. 1988; UN Doc. A/Res/44/80, 8 Dec. 1989; UN Doc. A/Res/54/155, 29 Feb. 2000. To have a comprehensive overview of the work of the GA in promoting self-determination, it's worth visiting the specific section devoted to it in [http://www.un.org/en/decolonization/ga\\_resolutions.shtml](http://www.un.org/en/decolonization/ga_resolutions.shtml).

*ration of Human Rights*<sup>92</sup> contains no reference to self-determination, an implicit mention of the means to enforce this right can be found. For instance, art. 21 states that “*the will of people shall be the basis of the authority of government*”. Admittedly, the wording suggests the acknowledgment of a human right to self-determine – here mostly in its internal aspect.<sup>93</sup>

As regards the *Declaration on Colonial Peoples’ Independence*, the issue at stake is quite clear: the rationale underpinning the adoption of the document was to bring independence to as many people subject to external subjugation as possible. Although the resolution opposes colonialism in all its forms and calls for its eradication, it does not go as far as to declare that self-determination is an absolute right, the application of which cannot be limited. Self-determination is in fact encapsulated into the principle of territorial integrity, thus it is still subject to a strict control. Moreover, the fact that self-determination was considered a right belonging to *all* peoples, by virtue of which they were entitled to *freely determine their political status and freely pursue their economic, social and cultural development* raises many interpretative doubts because no definition of people was provided.<sup>94</sup>

The 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (hereinafter *Declaration on Friendly Relations*),<sup>95</sup> then, contains a section dedicated to self-determination. The right to self-determination is acknowledged as belonging to peoples, but the overarching nature of the principle of territorial integrity is clearly affirmed.<sup>96</sup> The wording of the *Declaration* as well as its structure support this view, since territorial integrity is placed within the very first preamble’s clauses.<sup>97</sup> Almost twenty years later, this position is confirmed in the

<sup>92</sup> *Universal Declaration of Human Rights*, adopted on December 10 1948, General Assembly Resolution 217A (III), UN Doc. A/810.

<sup>93</sup> D. Shelton, “*Self-Determination and Secession: the Jurisprudence of International Human Rights Tribunals*” in J. Dahlitz, *Secession and International Law*, cit., p. 49; see also A. Cassese, *Self-Determination of Peoples*, cit., p. 92.

<sup>94</sup> *Declaration Granting Independence*, supra: Art. 1 “*The 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 the world peace and co-operation*. Art. 2 *All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*.” The problematic definition of people under international law will be tackled in the next section of the Chapter.

<sup>95</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations annexed to the General Assembly Resolution A/Res/2625 dated 24 October 1970* (hereinafter *Declaration on Friendly Relations*). Principle 1 enshrines “[...] *the right of all peoples freely to determine, without external interference, their political status and to pursue their economic, social and cultural development*’ as well as the duty of every State ‘to respect this right in accordance with the provisions of the Charter’”.

<sup>96</sup> However, it will be shown in the next chapter that the *Declaration on Friendly Relations* has been interpreted as providing for the first time for a right to secede in case of denial of fundamental rights.

<sup>97</sup> *Declaration on Friendly Relations*, cit., preamble: “...*Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State, Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integri-*

opinions of the Arbitration Commission<sup>98</sup> established by the European Commission during the dissolution of the Former Yugoslavia. The Commission recognized not only the right to self-government of the former federal units, but stressed that the making of a new nation had to be in compliance with the principle of *uti possidetis juris*. In other words, the preservation of existing boundaries – hence indirectly also of the territorial integrity-comes first, even when claims for independence are at stake. Opinion n. 1 confirms this assumption as it reads “*it is well established that, whatever the circumstance, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except when States concerned agree otherwise*”.<sup>99</sup>

From the stand point of the double nature of the right to self-determination, the *Declaration on Friendly Relations* seems to endorse mainly the external dimension of the right. Nevertheless, a reference to internal self-determination can be found in the form of peoples’ right to participate to the domestic affairs of their State, regardless of race, creed, religion and colour. By enlarging the categories for which a certain policy may be considered discriminatory, the *Declaration* extended the sphere of application of the right to self-determination to include also internal forms of government, thus to a certain extent it introduced internal self-determination among international rules.<sup>100</sup> Hence, the dichotomy of the right to self-determination clearly presents itself in the *Declaration*. The *Declaration* explains that external self-determination can take place through three different modalities,<sup>101</sup> namely: 1) the establishment of a new independent sovereign entity; 2) free association with another independent State and 3) integration with an independent State.<sup>102</sup> Yet it is important to point out that association and integration can take place only with a previ-

*ty or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations*” and Principle 1, opening: “(the GA) Solemnly proclaims the following principles: The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations”

<sup>98</sup> The Arbitration Commission is known as Badinter Commission, for its President Robert Badinter. It was appointed by the European Economic Community on the 27<sup>th</sup> August 1991 with a vague mandate, namely to rule by means of binding decisions upon request from “valid Yugoslavian authorities”. The Commission finally gave four opinions on the requests of: Lord Carrington, President of the Peace Conference (Opinion No. 1); the Serbian Republic, using the Conference as intermediary (Opinions Nos. 2 and 3) and the Council of Ministers of the EEC (Opinions Nos. 4 to 7) respectively. See Chapter 3 at pp. 148-155.

<sup>99</sup> Badinter Commission, *Opinion n. 1*, International Legal Materials, 1992, n. 31, p. 1498 ff., para 1.

<sup>100</sup> In particular, vis-à-vis the situation in South Africa, with the *Declaration* the international community was taking a stand against people’s subjugation and non-representation in State’s institutions on the grounds of racial and religious discrimination.

<sup>101</sup> *Declaration on Friendly Relations*, cit.: “*The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people*”.

<sup>102</sup> Examples of the three modalities are, to mention only a few, the cases of the Netherlands Antilles and Suriname, North Borneo and Sarawak, or the federated states of Micronesia and Palau.

ous approval by the peoples concerned as reference to the “*freely expressed will*” shows.<sup>103</sup>

In spite of being only a blatant affirmation, it was the first time that an international document acknowledged the value of popular consent in a broad context. This further corroborates the view that the *Declaration on Friendly Relations* took the debate to a new level by building a bridge between, on the one side, self-determination which results into independence and on the other side internal forms of participation in governmental affairs. In the case of self-determination applied within the borders of the State, the *Declaration* opposes the politics of those States which deny the participation of groups based on their race, creed or colour. As far as the external dimension of self-determination is concerned, the wording of the *Declaration* is not clear enough to allow us to say that it takes a decisive step towards establishing external self-determination in the form of secession.<sup>104</sup> This depends also by the intrinsic nature of General Assembly’s resolutions. They are not binding upon the member States, therefore, although there are elements testifying that self-determination was becoming a legal right, the vagueness of the formulation makes it problematic to hold that with the practice of the General Assembly the principle of self-determination gained the status of a legal right. Perhaps, it is more appropriate to claim that the action of UN marked a change in the approach in that self-determination is not used to justify the action of the mandate powers, but is something belonging to peoples, the inhabitants of certain territories. As Suksi put it “*the doctrine of self-determination was at least originally used to undermine the right of acquisition of territories by means of conquest, which seldom paid any attention to the interests of people living in the territory in question*”.<sup>105</sup>

### **3. Self-Determination in human rights law: individual and collective nature of the right**

The framework just mentioned changed from 1960 onwards, when the international community has faced the emergence of self-determination within human rights law. That self-determination was becoming a predominant issue within the international debate could be easily seen by looking at the exponential growth of admissions to the UN of former colonies between 1960 and 1990. First conceived as a political principle declared in the UN arena, self-determination has acquired the status of a legal right due to its inclusion in human rights instruments as well as through international jurisprudence. In particular, the ICJ has played a pivotal role in the definition of the boundaries of the right to self-determination, whilst human rights bodies

<sup>103</sup> *Declaration on Friendly Relations*, cit., principle 1: “*To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned*”.

<sup>104</sup> See Chapter 2 pp. 72-76.

<sup>105</sup> M. Suksi: “*Keeping the Lid on the Secessionist Kettle- a Review of Legal Interpretations concerning Claims of Self-Determination by Minority Populations*”, *International Journal on Minority and Group Rights*, 2005, vol. 12, p. 197.

have not relied so much on self-determination, albeit they have tried to set out its basic features as a human right.<sup>106</sup> In this sense, the inclusion of the right to self-determination in the cluster of human rights properly defined raises some problems. It is important to recall that the right to self-determination was introduced in international law in vague terms and its legal contours rest difficult to grasp. Self-determination has a strong political dimension that in fact goes against the clarity and preciseness required to define a legal title, especially a human right.

The major step toward the acquisition of the status of right was taken in 1966 with the adoption of the *International Covenant on Civil and Political Rights*<sup>107</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>108</sup> Art.1 (1) common to the Covenants reads as follows “*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”.<sup>109</sup> The sphere of application of the right to self-determination as envisaged in the Covenants has been the subject of a continuous debate. Most scholars however agree that the application of self-determination in the treaties cannot be restricted to colonial independence any more. As Crawford alleges, art.1 refers to *all peoples* and paragraph three specifies that the phrase is to be interpreted as including colonial peoples. Hence, art. 1 cannot be narrowed only to colonies. Further support for this assumption can be found in paragraph two: if self-determination was an entitlement of colonial people only, one of the consequences would be that only those people would have the right to permanent sovereignty over natural resources. Admittedly, this view has not found any confirmation in practice or doctrine so far.<sup>110</sup>

The wording of para. 1 further suggests that people should be free to choose their political status, not only in the form of external self-determination, but also by having a government without external interference or manipulation. In fact, art. 1 addresses the political as well as the cultural and social status, those being notably typical elements of internal dimension of the right to self-determination. Thus, it could

<sup>106</sup> See D. Shelton: “*Self-Determination and Secession: the Jurisprudence of International Human Rights Tribunals*”, cit., pp. 47-71.

<sup>107</sup> *International Covenant on Civil and Political Rights*, December 16 1966, UN General Assembly Resolution 2200 (XXI), UN Doc. A/6316, reprinted in *International Legal Materials*, 1967, vol. 6, p. 368 ff.

<sup>108</sup> *International Covenant on Economic, Social and Cultural Rights*, December 16 1966, UN General Assembly Resolution 2200 (XXI), UN Doc. A/6316, reprinted in *International Legal Materials*, 1967, vol. 6, p. 360 ff.

<sup>109</sup> Para. (2) and (3) recites as follows: “2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.* 3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations*”.

<sup>110</sup> J. Crawford, *The Creation of States in International Law*, cit., p. 112.

be inferred that the Covenants open the door for a focus on internal self-determination in the aftermath of colonialism.<sup>111</sup>

As it can be inferred from art. 1, the link between other human rights and self-determination is twofold: on the one hand, enjoyment of self-determination is connected to political rights, such as freedom of expression, the right to vote, or freedom of association. On the other hand, self-determination requires pursuing personal, social development, benefiting from the natural resources and gathering economic stability.<sup>112</sup> Pursuant to art. 25 of the ICCPR, then, every citizen has the right to, *inter alia*, “vote and be elected [...] and to have access to public service in his country” thus confirming the strong reliance on government by consent. Lastly, to a certain extent the wording of art. 25 can be combined with the one then used in the *Friendly Relations Declaration* because it implies a right to have a government representative of the population.<sup>113</sup> Such a broad understanding of the right to self-determination outside the colonial context is to be regarded as a great victory for the UN system, taking into account the strong opposition of many States manifested during the drafting and after the adoption of the Covenants. Indeed, some States tried to make reservations to art. 1 in order to limit its scope of application. India for example made a reservation to art. 1, to the effect that the right to self-determination pertains only to peoples under foreign domination and it is not relevant to “sovereign independent States or to a section of a people or nation”.<sup>114</sup>

This additionally corroborates the idea that the Covenants were deemed to have set some rights and duties not established before. Despite this strong contribution, from a pure legal stand point the wording used in the Covenants is not clear on self-determination of peoples. The Covenants leave unanswered the questions concerning the modes of exercising self-determination and the meaning of people. The right to self-determination is not explicitly narrowed down to its internal or external dimension and the *travaux préparatoires* reveal that clear terms were avoided for purpose. Many proposals to include clear phrases such as “the right to establish an independent State or to choose its government” were presented,<sup>115</sup> but the member States opted for leaving the notion of self-determination open. Secondly, the formulation of self-determination as a right possessed by all peoples continues to raise daunting questions, since the definition of peoples is not fixed independently of the entitlement to self-determination. In other words, it remains open when a group can

<sup>111</sup> See S. F. van den Driest, Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?, cit., pp. 39-45; A. Cassese, Self-Determination of People. A legal Reappraisal, cit., p.101.

<sup>112</sup> See Art. 1 supra note 37. See contra J. Crawford, The Creation of States, cit., who argues that internal self-determination is a “summary of other rights”, although he comes to the same conclusion with respect to the broad sphere of application of internal self-determination.

<sup>113</sup> M. Suksi: “Keeping the Lid on the Secessionist Kettle”, cit., p. 201.

<sup>114</sup> See on the website of the Permanent Mission of India to Geneva <http://www.pmindiaun.org/pages.php?id=867>

<sup>115</sup> For a commentary on the ICCPR see S. Joseph, J. Shultz, M. Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary, 2<sup>nd</sup> edition, Oxford, 2005, pp. 497-511.

be labelled as a *people*.<sup>116</sup> Not surprisingly, taking into account the events undergone by the continent, the *African Charter on Human and Peoples Rights* is the only document championing self-determination as a basic human right. Art. 20 (1) sets forth the unquestionable right to self-determination belonging to peoples, though what is meant by peoples is not specified. The article encompasses also an internal dimension of self-determination when it reads “*shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chose*”. As remarked by Raic, the formulation of art. 20 (1) of the *African Charter* represents a major supportive point in the characterisation of self-determination as an inalienable and continuing right. The right to self-determination is in fact disentangled from its dependence on colonialism and recognised in its entirety, so that it can be deemed to be a continuous right inseparable from the exercise of the other human rights.<sup>117</sup>

### 3.1 The role of case-law in establishing a legal right to self-determination

The consecration of self-determination as a legal entitlement of people is to be found in the ICJ and Human Rights Bodies’ case-law.

For the ICJ, it took some time to recognise the nature of self-determination as a norm of positive international law. Sometimes, indeed, the Court avoided any reliance on self-determination even in cases in which one party had explicitly invoked this right in its memorial.<sup>118</sup> The first reference to self-determination was made in the Advisory Opinion on *Namibia*. The General Assembly (hereinafter also GA) had requested the ICJ to give an opinion on the right of South Africa to maintain a governmental authority on Namibia. The Court confirmed the existence of the right to self-determination in modern international law, but it did not take a stand on what the components of the right were.<sup>119</sup>

In the *Western Sahara*<sup>120</sup> Opinion, the ICJ further clarified the forms and procedures for realizing the right to self-determination. The Court did not use the word

<sup>116</sup> B.R. Roth: “*Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*”, *Melbourne Journal of International Law*, 2010, n.11, pp. 393-396.

<sup>117</sup> See D. Raic, *Statehood and the Law of Self-Determination*, cit. pp. 232-235; citing also A. Rosas: “Internal self-determination”, C. Tomuschat (ed.), *Modern Law of Self-Determination*, cit., p. 225. Furthermore, art. 21 takes inspiration from common Art. 1(2) of the Covenants in that it guarantees all people the right to freely dispose of their wealth and natural resources.

<sup>118</sup> In the case *Right of Passage over the Indian territory*, for example, India had invoked the right to self-determination in its memorial, but the Court ignored that allegation. See ICJ, *Right of Passage over the Indian territory (Portugal v. India)*, ICJ Reports 1960, p.6 and S. Oeter: “*Self-Determination*” in B. Simma (ed.) *The Charter of the United Nations*, Oxford, 2002, pp. 324-325.

<sup>119</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 267*, Advisory Opinion, 1971, ICJ Reports 1971, p. 16.

<sup>120</sup> ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports 1975, p. 6. The case originated from the irredentism of Morocco and Mauritania against Spain that was the major power involved due to its control over Western Sahara. The Court was asked to provide an opinion on two main questions: (i) whether Western Sahara was a *terrae nullius* – not belonging to any sovereign authority- at the

right but opted for the term principle. Nevertheless, by claiming that self-determination was an entitlement of peoples, the Court went short of delineating the content of the right. Although it was more concentrated on the proceedings for the realization of the right<sup>121</sup> rather than on its content as a legal entitlement, the Court referred to the application of the *right* to self-determination. The views expressed in the *Namibia Opinion* with respect to non-self-governing territories were confirmed<sup>122</sup> and the right to self-determination of peoples was affirmed notwithstanding claims of control brought by Morocco and Mauritania in the specific case.<sup>123</sup>

The *East Timor*<sup>124</sup> judgment is a striking case for the impact of the pronouncement of the Court on the international community. The Court concluded that it had no jurisdiction to rule on the case, yet the approach of the ICJ to the right to self-determination of the East Timorese, coupled with the strong efforts of the international community towards establishing self-government for the East Timorese undoubtedly paved the way for the referendum for independence of the island under the UN supervision. As far as the Court's decision is concerned, it took the chance to distinguish between holders and duty bearers of the right to self-determination under international law. The Court maintained that the right to self-determination of peoples is *one of the essential principles of contemporary international law*<sup>125</sup> and inferred from it that it had evolved into an *erga omnes*<sup>126</sup> right. Nevertheless, the ICJ

time of Spanish arrival and (ii) what, or if there, were legal ties between the region and Morocco or Mauritania.

<sup>121</sup> This is demonstrated i.e. by taking Recital 55 of the Advisory Opinion. The Court focuses on the fact that the application of the right to self-determination *requires a free and genuine expression of the will of the peoples concerned* but does not specify who these people are.

<sup>122</sup> At para. 54 the ICJ recalls its main views expressed in the Advisory Opinion on Namibia by direct reference to the Opinion, at p. 31: "*the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them*".

<sup>123</sup> The principle that self-determination is firmly established in international law in particular in relation to former colonies is further supported by the Separate Opinions annexed to the Judgment. See. J. Crawford, *The Creation of States in International Law*, cit., p. 121-124, citing the opinion of Judge Dillard.

<sup>124</sup> ICJ, *East Timor (Portugal v. Australia)*, ICJ Reports 1995, para. 29. See also C. Drew: "*The East Timor Story: International Law on Trial*", *European Journal of International Law*, 2001, vol. 12, pp. 651-684.

<sup>125</sup> ICJ, *East Timor (Portugal v. Australia)*, ICJ Reports 1995, at para. 29 reads as follows "[...] *The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I. C.J. Reports 1971, pp. 31- 32, paras. 52-53; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law*"

<sup>126</sup> The categorization of some international rules into *erga omnes* obligations belongs to the ICJ Judgment in the *Barcelona Traction* case. According to the Court, there are two sets of norms under international law: (i) norms which arise only in relationships between parties and are reciprocal in nature and (ii) norms which put on States obligations incumbent towards the international community taken as a whole. Those latter must be fulfilled regardless the behavior of the other parties and above all they give rise to a claim for execution which belongs to all the other members of the international community. ICJ, *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)* 1970, ICJ Reports 1970, para. 33-34. The ICJ did not expressly said that the right to self-determination had acquired the status of *jus cogens* norm, yet the International Law Commission in the Draft Articles on Responsibility

did not qualify what the implications of such *erga omnes* nature were. The *Opinion on the Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory* sheds some light on the matter, because the Court stated that “given the character and importance of the rights and obligations involved, [...] all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the occupied Palestinian territory”.<sup>127</sup> The Advisory Opinion is of particular relevance, indeed, because the case falls outside the framework of decolonization. The standing issue was the legality of the armed attack, occupation and subsequent events caused by the Israeli presence in Palestine, which resulted in a denial of the right to self-determination to the Palestinians. The Court reaffirmed its previous jurisprudence on the status of self-determination, confirming that: “the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] of their right to self-determination”.<sup>128</sup> Again, the Court did not provide a comprehensive account on the right to self-determination, but it is interesting to observe that neither the lack of definition of people nor the cumbersome substantive nature of self-determination outside colonialism were considered to be major impediments to the existence of the right. In other words, notwithstanding the debate on its peremptory character,<sup>129</sup> the respect and realization of the right to self-determination seem to be considered a *condicio sine qua non* for the respect of human rights, to a certain extent an unquestionable<sup>130</sup> right as recalled by the *African Charter*. In this framework, the right to self-determination acquires an overarching importance for the realization of the individual and acts as a precondition for the fulfilment of the other fundamental human rights. Although one could conclude that as such the right to self-determination cannot be limited in its application, the real caveat for its realization is the *uti possidetis juris* doctrine, which guided the process of decolonization by ensuring that boundaries established during the colonization period would be maintained, as stated by the Court in the *Frontier Dispute*.<sup>131</sup>

To conclude, the role of the ICJ has been fundamental in determining the nature of self-determination under international law: it is considered an international legal rule

of States for International Wrongful Acts confirmed its qualification as a peremptory norm of international law. See International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts*, UN Doc. A/CN.4/L.602/Rev.1, July 26, 2001, p. 113. However, the debate on the *jus cogens* nature of the right to self-determination is not exhausted among international scholarship. See M. Saul: “*The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*”, *Human Rights Journal*, 2011, n.11, pp. 609-644.

<sup>127</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter *Construction of a Wall*), Advisory Opinion of 9 July 2004, ICJ Reports 2004, para 159.

<sup>128</sup> ICJ, *Construction of a Wall*, *cit.*, para. 88

<sup>129</sup> See footnote 74.

<sup>130</sup> See African Charter on Human and Peoples’ Rights, at Art. 20: “All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination”.

<sup>131</sup> ICJ, *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, 22 December 1986, ICJ Reports 1986, paras. 520-525.

and obligations flowing from it are of an *erga omnes* nature. Nevertheless, it has to be noted that the ICJ still has a cautious attitude towards the consequences of the application of the right. A common feature of the majority of the cases handled by the ICJ is that self-determination was never spelled out in clear words, despite the fact that it was the subject of extensive debate in the cases presented and in the opinions submitted to the Court. While there is an area – decolonization- where the bearers of and the context for the right are set without dispute, there are no clear-cut answer to the questions concerning the contemporary meaning of self-determination. This is confirmed by the approach adopted by the Court in the case of the *Declaration of Independence* issued by Kosovo,<sup>132</sup> in which the Court considered that there was an evolution in international law “*in such a way as to create a right to independence for peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation*”, but did not go further.<sup>133</sup>

Moreover, it should not be underestimated that in legal scholarship some argue that the human rights approach to self-determination is not consistent with practice. For Castellino, there is a clash between self-determination included in the ICCPR and States’ approach to this right. Hence, considering self-determination an individual human right is highly risky. In the Covenants, self-determination has been framed as a human right on the basis of which the other rights can be built upon. On the contrary, the approach undertaken by States’ is tied to the classical interpretation of self-determination characterized by the linkage between self-determination and independence, or more generally, claims to statehood. Therefore, although the right to self-determination has been included also in the international human rights’ discourse, one has to bear in mind that State practice remains traditional.<sup>134</sup>

### 3.2 Human Rights Bodies and Self-Determination

Moving to human rights bodies, the UN Human Rights Committee acting on the basis of art. 40 of the ICCPR has provided some interpretative guidelines on the right to self-determination, with a view to promote the implementation of the Covenant. In its General Comment n. 12, in particular, the Committee maintained that art. 1 recognizes a right to self-determination to all peoples and claimed that its implementation is “*an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights*”.<sup>135</sup> By virtue of the right to self-determination, the Committee continues, all peoples can freely pursue their economic, political status and social development. On the other

<sup>132</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports 2010, p. 403.

<sup>133</sup> See S. Oeter: “*Self-Determination*”, in B. Simma (ed.), *The Charter of the United Nations*, cit., p. 328.

<sup>134</sup> J. Castellino: “*Territorial Integrity and the Right to Self-Determination: an examination of the Conceptual Tools*”, *Brooklyn Journal of International Law*, 2007-2008, vol. 33, p. 503 ff.

<sup>135</sup> General Comment n. 12, para.21, available at <http://www.refworld.org/docid/453883f822.html> [accessed 23 April 2015].

hand, States have an obligation to allow the exercise of the right, by taking positive actions to further the realization of and respect for self-determination.

Further comments given by the body specify that the right to self-determination belongs to peoples but cannot be exercised by everyone. In the General Comment n. 23, the Committee called upon State parties and individuals filing complaints under the *Optional Protocol to the Covenant* not to interpret art. 1 as referring also to minorities.<sup>136</sup> Since minorities' rights are set forth by art. 27 of the ICCPR, complaints concerning minorities can be submitted only when a violation of art. 27 is at stake and not when art. 1 is violated. It is important to observe that whilst art. 27 lists a set of rights that in principle do not prejudice State sovereignty and territorial integrity and are individually enforceable, self-determination (i) is exercised by a people and (ii) inevitably hinders the *status quo*.<sup>137</sup> Hence, the need to narrow as much as possible its legal enforceability. The rationale underpinning the reasoning of the Committee has to be found in the different legal nature and the ultimate *ratio* of the rights. Self-determination acquires the status of human right in the Covenants, yet it is a special human right. Individuals are in principle the bearers of the right, but it can be exercised by people, therefore its nature is more collective than individual. Minorities' rights, on the contrary, have a collective nature but are individually enforceable. Therefore, they can only submit claims for those rights enucleated in art. 27.

#### 4. Controversial issues on self-determination: (too) many claimants?

In the previous sections it was showed that although self-determination has been addressed to all peoples, thus going beyond the colonial context, the strong linkage to that period hinders its full exercise outside colonialism. In other words, the international community seems to have never come to terms with self-determination as general right along clear lines. The main dilemma lies in determining who else, apart from colonies' inhabitants, can exercise the right to self-determination.

This section will put the stress on the position that there is an issue on minorities and indigenous peoples undergoing the debate on self-determination. For minorities it seems less problematic to affirm that they do not enjoy a right to self-

<sup>136</sup> General Comment No. 23(CCPR/C/21/Rev.1/Add.5), para. 50: "*In some communications submitted to the Committee under the Optional Protocol, the right protected under art. 27 has been confused with the right of peoples to self-determination proclaimed in Art. 1 of the Covenant*" See General Assembly Official Records, 1994, Supplement n. 40, p. 107.

<sup>137</sup> *Ibid.*: "*Art. 27 of the Covenant (on Civil and Political Rights) provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to a minority group and which is different from, and additional to, all other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant [...]. The Covenant draws a distinction between the right to self-determination and rights protected under Art. 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part of the Covenant*".

determination, as already hinted at in the previous section. The interplay between self-determination and indigenous people is more intricate because the notion of indigenous people is in itself controversial. That is to say that the notion shares some features with the that of minority and some other with that of people. However, case-law and international documents point out that indigenous people are entitled to exercise the right to self-determination, at least in its internal dimension of self-government within their own State.

#### 4.1 Still in search for a definition of people

A distinguished contribution to the inquiry on new trajectories of self-determination has been given by Summers, who focused on the role of peoples in international law through an extensive perusal on current doctrine and practice. As he argues, there is no current definition of people<sup>138</sup> in international law, although people has been referred to as the basic unit entitled to exercise self-determination since the development of Wilson and Lenin's proposals.

Due to the lack of clarity surrounding the application of self-determination, it may be useful to look at official declarations given by States. An important chance for stating their views is given to States during oral proceedings in front of the ICJ.<sup>139</sup> States submission have a great significance in the discourse about self-determination, not only because there is no international norm which defines the scope and context of application of the right, but also because even among legal scholars the debate is a never ending one.<sup>140</sup> As already referred to above, the ICJ has been called several times to express its views on the status of self-determination under international law, the latest being when the General Assembly requested an opinion on legal issues linked to self-determination for the construction of a wall in

<sup>138</sup> A further clarification is necessary. At the risk of redundancy, the term used is always people, not population. In fact, the term people cannot be confused with population, which is a broader concept encompassing groups of individuals not necessarily identified within a territory. That is to say that the term does not carry a national value within itself.

<sup>139</sup> When the ICJ is asked to provide an Advisory Opinion, it usually invites States to submit written observations as well as to participate to the oral phase in order to express their views on the legal questions raised by the request. Written and oral submission can help the ICJ in ascertaining where international law stands with respect to the issue at stake. Being so important as they are, one could expect that those States in favor of a progressive interpretation of international law take the chance to provide as much and detailed information as possible. Indeed, for the Advisory Opinion on the independence of Kosovo, declarations were vague in terms of the exercise of external self-determination and limited themselves to recognize a right of secession only as a remedy. See Written Statements from Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia and Switzerland, 19 April 2009, at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>. See also J. Vidmar: "Remedial Secession in International Law: Theory and (Lack of) Practice", St Anthony's International Review, 2010, vol. 6, p. 37.

<sup>140</sup> As it has been underlined by the representative of the Netherlands during oral statement in front of the ICJ in the Advisory Opinion on Kosovo, in such cases "There is an abundance of literature on the law of self-determination. It provides a wealth of material, including on the exercise of the right to external self-determination. It is informative, but it may not be authoritative". See Oral Statement by the Representative of the Netherlands, 10 December 2009, <http://www.icj-cij.org/docket/files/141/15734.pdf>, para. 9.

the Palestinian territory<sup>141</sup> and for legality of the unilateral declaration of independence issued by Kosovo.<sup>142</sup> In the latter case, the issue of self-determination and the right to secession came into play prominently: a specific section will dwell with the case of Kosovo in the Chapter about secession, but for the purposes of this Chapter it is interesting to observe that States referred to the inhabitants of Kosovo as *people* without substantiating their assumption on international legal grounds. Instead, they relied on previous agreements: i.e. the Netherlands claimed that the word *people* has been used in the Rambouillet Agreements or in UN documents, while Albania referred to the constitutional framework for provisional self-government of Kosovo promulgated by the Special Representative of the UN Secretary-General.

Even outside of the UN framework, no definition of *people* has been adopted. Notwithstanding the fact that the African continent has been directly concerned with issues of self-determination, the *African Charter on Human and Peoples' Rights* does not provide a definition of the term. Interestingly, in the Comments to the Charter the absence of a definition was justified by claiming that it was “*to avoid a difficult discussion for the drafters*”.<sup>143</sup> However, the African Commission has had the chance to clarify what has to be understood by *people*. In the case *Kevin Mgwanga Gunme et al v. Cameroon*<sup>144</sup> *people* from Southern Cameroon claimed that they had suffered a denial of their right to self-determination during the 1961 UN plebiscite for independence and the process of adoption of the Constitution which followed. In its counter-claim Cameroon addressed the issue of whether the inhabitants of the South were a *people* and relied basically on an ethno-anthropological argument. Cameroon maintained that Southern inhabitants could not be considered a *people* since no “*ethno-anthropological argument can be put forward to determine the existence of a people of Southern Cameroon, the Southern part being of the large Sawa cultural area, the northern part being part of the Grass fields' cultural area*”.<sup>145</sup> Accordingly, Cameroon took advantage of the cultural differences within national sub-units in the southern region to develop its argument. However, cultural differences are not a prerogative of southern Cameroon only, but are very common in the African continent. This is why on a more general scale, the argument does not seem to be so powerful, and perhaps it should not have been pre-

<sup>141</sup> ICJ, *Legal Consequences the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ. Reports 2004, p. 136.

<sup>142</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, cit.

<sup>143</sup> *Report of the Secretary General on the Draft African Charter on Human and Peoples' Rights*, CM/1149, 1981, at para. 13, cited by M.K. Addo: “*Political Self Determination within the Context of the African Charter on Human and Peoples' Rights*”, *Journal of African Law*, 1998, n. 32, p. 184. The author regards the choice as an “*aberration of responsibility*”. However, it may have been also an attempt not to limit the scope of application of the right to self-determination envisaged by Art. 20 in times when many different communities were struggling for independence.

<sup>144</sup> African Commission on Human and Peoples' Rights, *Kevin Mgwanga Gunme et al v. Cameroon*, case n. 266/2003, decided on 27 May 2009, available at <http://caselaw.ihrda.org/doc/266.03/view>

<sup>145</sup> *Supra* para. 168.

sented as the main reason justifying the definition of people for the purposes of the right to self-determination.

In its judgment, the Commission embraced an approach similar to that of Cameroon, but ended up with a different assessment, by opting for a broader interpretation of the term people. In line with previous statements given in the context of the UN Agencies, in particular by UNESCO, the Commission found that the Southern Cameroonians could be considered a people “*because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity*”.<sup>146</sup>

One of the major merits of the definition is probably that it combines two kinds of elements: objective elements – such as common language and territory – and subjective ones, the most peculiar being the will to live together. A group can qualify as the bearer of the right to self-determination as long as it has a common self-consciousness of belonging together. In this line, the definition suggested by the Commission manages to combine requirements of the will to live together and form a distinct political unit, with common history. As a result, the Commission escapes from the need to clarify whether the territorial or the ethnic link point out if sub-groups such as minorities or indigenous can be considered people.

#### **4.2 Minorities and indigenous peoples: do they have a right to self-determination?**

The undergoing tensions between a colloquial and a possible legal understanding of the term people is best exemplified by the debate on the interpretation of what constitutes a minority or an indigenous group. Neither of the two, again, have a generally accepted definition. However, scholarly literature and international practice help shed some light on the issue. For minorities' rights, many scholars have adopted the definition given by Capotorti.<sup>147</sup> Minority within international law means “*a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language*”. Hence, minorities are 1) individuals sharing specific characteristics with respect to culture and national origins; 2) numerically a small group, recognized as such by their own parent State. Arguably, the key passage of the definition lies in the shift from a collective approach to an individual one: the focus is not on the group taken as a whole, but on the individual, who enjoys rights as part of a minority. Moreover, the HR Committee accepted claims based on art. 27 but not on art.1, as it was seen before. The common denominator vis-à-vis the ap-

<sup>146</sup> Ibid. para 179.

<sup>147</sup> F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, New York, 1991, p. 96, cited by J. Castellino: “*International Law and Self-Determination. Peoples, Indigenous Peoples and Minorities*” in C. Walter (eds.), Secession and Self-Determination in International Law, cit., p. 35.

proach to the term people seen in the 1966 Covenants in our view is that minorities' rights are perceived as individual in nature. Being self-determination a collective right, as such minorities are not the bearers of this right. Instead, the members of a minority enjoy specific rights such as the right to use their own language or preserve their own traditions. As Meijknecht aptly notes, rights are granted to the members of the minority group taken singularly. In spite of the fact that the rights belonging to minorities under international law can be exercised by the minority group as such, from a legal stand point those rights are *individual* human rights.<sup>148</sup>

This rather confused panoramic is mirrored by the legal status of indigenous people. While minorities' keep on struggling to be the bearers of the right to self-determination in international law, indigenous' claim has succeeded, though with many safeguard requirements.<sup>149</sup> On a purely legal basis, indigenous people might be considered a hybrid subject, because they share some characters with minority groups, but they are also called *people* and the term inevitably raises questions related to self-determination. The *Study of the Problem of Discrimination against Indigenous populations*<sup>150</sup> – commissioned by the UN to Martinez Cobo does not help in clarifying if indigenous people are entitled to self-determination. It focuses on “*indigenous communities, peoples, and nations*” but then alleges that indigenous people form a “*non-dominant sector of the society and are determined to preserve, develop and transmit to future generations their ancestral territories, as peoples, in accordance with their own cultural patterns, social institutions and legal systems*”.<sup>151</sup> Neither do help the two major documents that set forth the main legal features of indigenous rights under international law, notably the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* adopted in the framework of the International Labour Organization (ILO) and the UN *Declaration on the Rights of Indigenous Peoples*.

The ILO Convention provides a definition of indigenous people in art. 1(2), which relies on two major elements: 1) the historical descent from the populations of a certain country or region at the time of conquest or colonization and 2) preservation of some or all of their own peculiarities.<sup>152</sup> However, the Convention has been ratified

<sup>148</sup> A. Meijknecht, *Towards International Personality: the Position of Minorities and Indigenous Peoples in International Law*, Antwerpen/Groningen/Oxford, 2001, p. 171.

<sup>149</sup> For the sake of clarity, it can be underlined that reasons for different outcomes for indigenous and minorities stand outside the realm of the law. As it often happens with international law, different perceptions of a certain topic by the States lead to different outcomes under the international legal order. In particular, minorities' issues have always been conceived as being more dangerous and too difficult to dwell with, but this argument goes beyond the scope of the present study. See for an updated analysis W. Kymlicka: “*Beyond the Indigenous/Minority Dichotomy?*” in S. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford, 2011, pp. 183-208.

<sup>150</sup> *Study of the Problem of Discrimination against Indigenous populations. Conclusions, Proposals and Recommendations* by J. R. Martinez-Cobo, 1986, UN Doc E./CN.4/Sub.2/1986/7/Add.4.

<sup>151</sup> *Ibid.*, at p. 29.

<sup>152</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, International Labour Organization, adopted 27 June 1989, art. 1(2): “*peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or geographical region to which their country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of*

by a few States, due to the difficulties in formulating a definition which would generate general consensus. Therefore, it cannot be viewed as a contribution to the crystallization of corresponding international customary rules.

In 2007 the UN adopted the *Declaration on the Rights of Indigenous Peoples*<sup>153</sup> (UNDRIP). The adoption of the document was championed by the UN as a great achievement due to the length of time it took to reach an agreement. However, many voices argue that the general provisions of the *Declaration* cannot capture the new developments regarding the role of indigenous peoples in the international community.<sup>154</sup>

Art. 1 grants to indigenous peoples the right to “*the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law*”, and art. 3 states that “*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”. If read together with art. 4 establishing that indigenous may enforce their right to self-determination in matters related to their internal affairs,<sup>155</sup> the *Declaration* clearly puts emphasis on the internal dimension of self-determination. In other words, indigenous people are bearers of the right to self-determination, but for them the content, the substance of the right is limited to the internal dimension of self-determination. In particular, in art. 4 the right to autonomy figures as the principal means of implementing self-determination for indigenous people and even more clearly it reiterates the principle of respect for territorial unity of the State. Indigenous’ right to negotiate their political status and access to political institutions of the State, in fact, embodies the right to internal self-determination.

As regards external self-determination, the strong emphasis on territorial integrity and peace provided by art. 46 of the UNDRIP does not support an interpretation in favour of such a right for indigenous peoples. Avoiding any impairment of existing States’ “*territorial integrity or political unity*”, the UNDRIP does not leave much space for external self-determination. This conclusion is further supported by looking at word order of articles 3 and 4. Since indigenous people are provided with “*the*

*their own social, economic, cultural and political institutions*”. It is important to note that the Convention does not mention the right to self-determination.

<sup>153</sup> *Declaration on the Rights of Indigenous Peoples*, annexed to General Assembly resolution 61/295 dated 13 September 2007, UN Doc. A/RES/61/295. The *Declaration* passed over the dissenting votes of the US, Canada, Australia and New Zealand.

<sup>154</sup> Fitzmaurice for examples alleges that to understand the legal position of indigenous peoples it would be better to shift the debate from international law to national legal discourse, because the forms of protection provided by States are more likely to be effective for indigenous. Major effectiveness is linked to the fact that each indigenous community is different from the others and the parent State is the closest subject able to act on a case-by-case basis. Hence, generalization under international law are counter-productive. See M. Fitzmaurice: “*The Question of Indigenous Peoples’ rights: a Time for Reappraisal?*” in D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law*, Cambridge, 2013, pp. 349- 376.

<sup>155</sup> *Declaration on the Rights of Indigenous Peoples*, Art. 4: “*indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions*”.

*right to autonomy or self-government in matters relating to internal and local affairs*”, it is unlikely that reference to *political status* in art. 3 can be read as meaning sovereign independence.<sup>156</sup>

Turning to case-law on indigenous and minorities’ rights, it remains inconsistent, albeit some remarks can be made. In the 80ies the Inter-American Commission established under the American Convention on Human Rights (IACHR) dealt with the right to self-determination of the group of Miskito Indians leaving in Nicaragua.<sup>157</sup> Miskito filed a complaint to the Commission in which they claimed the central government was depriving them of access to natural resources and was denying their right to self-determination. The Commission acknowledged the status of self-determination as a right of people in international law but concluded that this is not tantamount to say that each and every ethnic group may advance claims against the parent State.<sup>158</sup> International practice shows that liberation struggles are acknowledged to colonial peoples, while groups living in metropolitan areas are entitled to other forms of protection. Interestingly however, the Inter-American Court on Human Rights (IACtHR) has taken the chance to develop a notion of *individual self-determination* with respect to indigenous peoples’ right. In *Loayza Tamayo v. Peru*, the Court acknowledged the existence of an individual right to have a life plan (*proyecto de vida*) which can be discerned into the right to self-determination. In fact, it entails both the self-actualization of the person concerned and the possibility of reaching his/her goals without unjustified obstacles.<sup>159</sup>

In light of the above, it can be safely concluded that the entitlement and content of self-determination for minorities and indigenous people is another sign of the fact that there is still much ambiguity surrounding the definition of peoples entitled to claim the right to self-determination. The structure of the ICCPR is revealing of the ambiguity surrounding self-determination as an individual and group right. While art. 1 champions the collective nature of self-determination – notably by reference to *all peoples*- art. 27 contains a provision on minorities which is constructed in individual terms by the use of *persons*. Within the same international Covenant, two different understandings coexist and neither of them is further clarified in the text.<sup>160</sup>

<sup>156</sup> See B.R. Roth; “*Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*”, *Melbourne Journal of International Law*, 2011, vol. 11, pp. 1-47.

<sup>157</sup> AS, Inter American Commission, *Report of the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser. L/V/II, 29 November 1983. See B.H. Creston, A. Grea (ed.), *Human Right in the World Community: Issues and Action*, III edition, Philadelphia, 2015, pp. 231-233.

<sup>158</sup> OAS, Inter American Commission, *Report of the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, in part II, at para. B (8): “...this does not mean that it recognizes the right of self-determination of any ethnic group as such”.

<sup>159</sup> IACtHR, *Loayza Tamayo v. Peru*, Judgment of 27 November 1998, Reparations, Ser. C. NO. 42, para. 147.

<sup>160</sup> S. Mancini: “*Rethinking the boundaries of democratic secession: liberalism, nationalism, and the right of minorities to self-determination*”, *International Journal of Constitutional Law*, 2008, vol. 6, pp. 557-558.

Arguably, this is one of the major obstacles to the consolidation of a clear international rule. Nonetheless, considering self-determination as a collective right, international law seems to distinguish between the entitlement of indigenous people and minorities. Unlike minorities rights which are individual in nature – albeit they are enjoyed in community with others- indigenous rights are accorded within the framework of peoples’ rights. Thus, indigenous people are entitled to exercise the right to self-determination, though in its internal dimension only. In other words, the distinguishing feature is the legal character of the rights at stake and this depends on the purport of the rules considered. On the one side, the purpose of minorities’ rights is to enable individuals belonging to a minority to preserve and protect their identity within the community of the State. On the other side, indigenous rights are granted to allow them to develop their specific society and social structures alongside that of the parent State.<sup>161</sup> Given this reappraisal on current ambiguities surrounding the bearers of the right to self-determination, it remains to be seen what self-determination has ended up to be outside its “natural environment” of decolonization.

### 5. Self-determination beyond decolonization: contemporary meanings

The more the decolonization was about to end, the more there was a gradual shift in international legal documents towards a different understanding of self-determination.<sup>162</sup> Two trends can be distinguished: (i) the increasing attention paid to the internal dimension of self-determination; (ii) the focus on the link between internal self-determination and principles of democratic governance.

Within the European area, legal issues related to self-determination and minorities’ rights came to the forefront later than in the international arena. It was the division of Germany that brought the matter in the European political and legal debate. The Organization for Security and Cooperation in Europe (OSCE) was the first body involved, when the Federal Republic of Germany proposed that a provision on self-determination be included in the 1975 *Helsinki Declaration*.<sup>163</sup> The rationale underpinning the German proposal was “to help create a state of peace in Europe in which the German nation can regain its unity in free self-determination”.<sup>164</sup> The *Helsinki Declaration* in principle VIII refers to self-determination by affirming the obligation of the State parties to “respect the equal rights of peoples and their right to self-determination”. Moreover “by virtue of the principle of equal rights and self-

<sup>161</sup> M. Fitzmaurice: “*The Question of Indigenous Peoples’ Rights: a Time for Reappraisal?*”, cit., p.356.

<sup>162</sup> See the monograph by D. Raic, *Statehood and the Law of Self-Determination*, cit. See also J. Fisch: “*Peoples and Nations*”, A. Peters, B Fassbender (eds.), *The Oxford Handbook of History of International Law*, 2012, pp. 27-49.

<sup>163</sup> *Final Act of the Conference on Security and Cooperation in Europe*, 1 August 1975, art. 8, from now on *Helsinki Declaration*. The complete version can be found in the annex to T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord*, Montclair, 1979, pp. 161- 195.

<sup>164</sup> See *Helsinki Declaration*, Doc. CSCE/1/PV.3, p. 26.

*determination, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development*". Accordingly, three features may be discerned: (i) due to the absence of colonial dominions in the European area, the right to self-determination envisaged in the *Helsinki Declaration* applies to peoples living in independent States; (ii) by affirming that the right *always* applies to people, the *Helsinki Declaration* stresses its continuing nature. In addition, (iii) special emphasis is put on the requirement of *full freedom* of people to choose their own political status. The ultimate purpose of the formulation in this sense becomes the development of a pacified European area, as it was proposed above by the Federal Republic of Germany. In particular, attention should be given to the word order with respect to "*full freedom to determine*", as it seems to refer to the internal as well as the external status of a sub-unit. The *Helsinki Declaration* has been read in literature as introducing elements of democratic process and respect for the rule of law in the debate on the exercise to self-determination in both its internal and external dimension.<sup>165</sup> It does so by extending the limits of the interpretation of self-determination to cover human rights law, that was developing in that period.

Arguably, the greatest achievement of the *Declaration* is that it "*drew a clear connection between the exercise of self-determination and the existence of other human rights in a more forceful way than previous documents*".<sup>166</sup> The interconnection between self-determination and human rights law has progressively been expressed through the relationship between self-determination and democracy. The common argument is that there exists an intrinsic linkage between self-determination and certain principles of democratic governance.<sup>167</sup> In particular, some scholars maintain that the right to self-determination in its internal dimension "*may require that governments generally have a democratic basis*".<sup>168</sup> In other words, it is argued that self-determination claims are basically claims for exercising people sovereignty through a democratic form of government. This also in light of the process of dissolution of the SFRY and the dismemberment of the USSR which helped the dissemination of democracy as a system of government.<sup>169</sup>

<sup>165</sup> D. Raic, *Statehood and the Law of Self-Determination*, cit., especially p. 231; 235.

<sup>166</sup> A. Xanthaki, *Indigenous Rights and United Nations Standards. Self-Determination, Culture and Land*, Cambridge, 2007, pp. 148-149.

<sup>167</sup> J. Salmon: "*Internal Aspect of the Right to Self-determination: towards a Democratic Legitimacy Principle?*" in C. Tomuschat (ed.) *Modern Law of Self-Determination*, cit., pp. 253-282; J. Vidmar, *Democratic Statehood in International Law*, cit., pp. 242-252.

<sup>168</sup> D. Harris, *Cases and Materials on International Law*, VII edition, London, 2010, p. 104. In this sense, for example, one could look at the making of the Republic of Montenegro as an exercise of internal self-determination. As pointed out by Mancini, in 2003 Serbia and Montenegro introduced art. 60 of the Constitution whereby secession was consented. It could be argued that the revision of the Constitution was the result of application of the right to self-determination in its internal dimension. See on this S. Mancini: "*Rethinking the boundaries of democratic secession: liberalism, nationalism, and the right of minorities to self-determination*", cit., p. 575.

<sup>169</sup> T. Franck: "*Legitimacy and Democratic Entitlement*", G. Fox, B. Roth (eds.) *Democratic Governance and International Law*, Cambridge 2001, pp. 25-47; for a critical analysis J. Vidmar, *Democratic Statehood in International Law*, cit.

Nevertheless, for another group of scholars the establishment of a democratic government is not covered under the umbrella of the right to self-determination.<sup>170</sup> It would be too pretentious to claim that democratic governance and especially its procedural elements are necessary for the realization of self-determination. A quest for democracy may well be the main desire of a community – the 2011 Arab Spring points in this way indeed.<sup>171</sup> However, international law leaves to the discretion of states the choice of their form of government. Nonetheless, we can agree that internal self-determination is related to constitutional principles of government exercised by the people and respect for fundamental human rights. An argument in this line can be found in the judgment of the Canadian Constitutional Court on the secession of Quebec:<sup>172</sup> the Court’s definition of self-determination reads as follows “*a peoples’ pursuit of its political, economic and social development within the framework of an existing State*”.<sup>173</sup> Hence, self-determination is assimilated to the enjoyment of individual human rights which are guaranteed “*within the framework of an existing State*”, that is to say the domestic legal order, in particular by the constitution. In a like manner, it can be argued that the right to self-determination can be enforced by means of democratic governance – the latter being also regulated by constitutional norms.

What about external self-determination? For the crystallization of a customary norm about self-determination, the combination of the resolutions of the United Nations, the *Declaration on Friendly Relations*, the *Helsinki Final Act*, the *African Charter on Human and Peoples’ Rights* play a pivotal role. These last three documents just-mentioned do not limit the right to self-determination to situations of decolonization only. External self-determination is presented as an entitlement of people of existing sovereign States and of sub-groups. Nevertheless, the main features of the right are not detailed. It was already explained that this vagueness finds its roots in the clash between territorial changes brought by self-determination claims and the principle of territorial integrity. This is not tantamount to say that no conclusion can be drawn: the *Declaration on Friendly Relations*, for instance, is quite clear in considering all the inhabitants of a State as the bearers of the right and adds that decisions about the means to associate or integrate with another State should be based on consultation. Outside colonialism, the inhabitants of a State have a right to self-determination and international law will not question any form of dissolution, association or integration decided by *all* inhabitants of the State. By contrast, the issue whether also sub-units

<sup>170</sup> For a persuasive argument about the loosening commitment to democracy by the international community A. Magen: “*The Democratic Entitlement in an Era of Democratic Recession*”, Cambridge Journal of International and Comparative Law, 2015, vol. 4, pp. 368-381.

<sup>171</sup> See D. Amoroso arguing that recognition of the insurgents in the framework of the Arab Spring as the sole legitimate representative of the people implies a prior positive judgment of the fulfillment of the right to self-determination in its internal dimension. D. Amoroso: “*Il Ruolo del Riconoscimento degli Insorti nella Promozione del Principio di Auto-determinazione Interna: Considerazioni alla luce della ‘Primavera Araba’*”, Federalismi.it, October 2013, pp. 22-31.

<sup>172</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, 20 August 1998, in International Law Reports, 1998, n. 161, p. 576 ff.

<sup>173</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 126.

of the State have a right to external self-determination is controversial. As Driest explains “in these instance, there appears to be a clear conflict between the exercise of this right, which is aimed at territorial change, and the principle of territorial integrity and *uti possidetis*, which are aimed at maintaining the territorial status quo”.<sup>174</sup>

## 6. Conclusion

The principle of self-determination was not born under the luckiest stars. It is well known that when Wilson proposed to re-draw the map of Europe after World War I on the basis of self-determination, the USA Secretary of State Lansing expressed his concern about the proposal, claiming that it was “loaded with dynamite”.<sup>175</sup> It is also obvious that self-determination is appealing for people, because it is rooted in the idea of government for and by the people. As Berlin puts it, its attractiveness can be explained by “our desire to be recognized as free and, somehow, authentic humans. Being governed from the outside would imply being less than fully free and, therefore, being less than fully human”.<sup>176</sup>

In this Chapter it was demonstrated that Lenin and Wilson’s ideas of self-determination can still be found in the contemporary meaning of self-determination. On the one hand, the right to self-determination is a collective right strongly inspired by the idea of government by consent. It is this idea that guides peoples’ claims for participation in domestic affairs and eventually for statehood. On the other hand, in contemporary practice about territorial disputes, self-determination is not confined to political rights, but has a broader area of application, i.e. enjoyment of economic rights and access to natural resources in a very similar manner to its original formulation after World War I. Then, it was shown that self-determination has evolved from a political principle to a legal tenet inside and outside the frame of colonial domination. This goal was achieved thanks to the combination of practice (GA resolutions and States’ declarations) and human rights treaties, notably the 1966 Covenants and the *Helsinki Declaration*. International jurisprudence, especially from the ICJ, further attempted to clarify the contours of the right to self-determination. However, although the ICJ maintained that the right to self-determination is one of the essentials principles under contemporary international law, the borders of its application beyond the colonial context remain mostly unsettled.<sup>177</sup> This is confirmed by the fact that while doctrinal debate on the definition of self-determination is huge, States refrain from reaching an agreement on the definition. Arguably, States take

<sup>174</sup> S. F. van den Driest, Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?, cit. p. 93.

<sup>175</sup> R. Ansing, The Peace Negotiations: a Personal Narrative, 1921, Paris, p.7, quoting from a note that he had written in December 1918.

<sup>176</sup> I. Berlin: “Two Concepts of Liberty”, in I. Berlin (ed.), Four Essays on Liberty, 1969, Oxford, pp. 7-58.

<sup>177</sup> As Drew referred to it, self-determination outside colonialism is plagued by an excess of indeterminacy both in terms of scope and content. See C. Drew: “The East Timor Story: International Law on Trial”, cit., p.658.

advantage of the vagueness of the law because it permits a broader range of interpretations and can therefore be applied to different situations.<sup>178</sup> In sum, the right to self-determination is widely viewed as part of the *jus cogens*<sup>179</sup> bulk of norms, but only as far as its core meaning is concerned, namely when it is applied to colonial and non-self-governing territories. The external dimension is established as an exception to the doctrine of territorial unity and therefore is very narrow in its application. While self-determination “*enjoyed a period of relative conceptual stability during the Cold War, its content, especially when it comes to the formation of territorial polities, remains heavily contested*”.<sup>180</sup>

The background of the emergence of the legal right to self-determination – notably colonialism – still exercises control over its current enforcement. The fact that self-determination was championed by the movement for decolonization of the 1960s helps in understanding why self-determination still finds its core meaning in freedom from subjugation. The phrasing of most of international documents addressing self-determination confirms this view in that by virtue of this right people “*freely determine their political status and freely pursue their economic, social and cultural development*”.<sup>181</sup> When taken to the extreme, the linkage between self-determination and decolonization has led scholars to argue that outside of the colonial context self-determination becomes a procedural right, rather than a substantial right. It does not entail a right to self-government, not at all to secede, but it confers to communities a right *to be heard*.<sup>182</sup> In support of these assumptions, Klabbers notes that when judicial or non-judicial bodies have been instructed with cases involving self-determination, they have refrained from addressing the point in punctual terms, although they have sometimes clarified its purports. From the Advisory Opinion on Namibia<sup>183</sup> onwards, the ICJ has ascertained the substantial nature of the right to self-determination, but no clear conclusions have been drawn from such a strong affirmation. The Separate Opinion of Judge Ammoun confirms this view: although the right to self-determination is considered a substantial right, the Judge re-

<sup>178</sup> See S.P. Sheeran: “*International Law, Peace Agreements, and Self-Determination: The Case of the Sudan*”, *International and Comparative Law Quarterly*, 2011, n.60, p. 458.

<sup>179</sup> J. Summers, “*The Status of Self-determination in International Law: A Question of Legal Significance or Political Importance*”, *Finnish Yearbook of International Law*, 2003, vol. 14, p. 283; A. Cassese, *Self-Determination of Peoples. A legal Reappraisal*, cit., p.134. However, see J. Crawford: “*International Crimes of States*”, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 411 for critiques on the consequences of overlapping the *jus cogens* status of self-determination with the *erga omnes* nature of the right championed by the ICJ in the East Timor case.

<sup>180</sup> Z. Oklopčić: “*Constitutional Politics of Secession: travelling from Quebec to Montenegro (and Back?)*”, in A. Packovic and P. Radan, *Ashgate Research Companion to Secession*, cit., p. 132.

<sup>181</sup> UN General Assembly’s *Declaration on the Granting of Independence to Colonial Countries and Peoples*, cit., paras. 1 and 2. Furthermore, as the *Declaration on Friendly Relations* states, freedom has to be interpreted in broad terms, thus people are free to choose whether they want to give rise to a new independent entity, to integrate or associate with another State.

<sup>182</sup> J. Klabbers: “*The Right to be Taken Seriously: Self-Determination in International Law*”, *Human Rights Quarterly*, 2006, vol. 28, p. 189.

<sup>183</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), ICJ Reports 1971, p. 16.

calls that on the basis of this right no less than fifty States gained independence after the II World War, which is a clear reference to the link between self-determination and the end of colonialism.<sup>184</sup> In Klabbers' words "*while it was unproblematic to think of a right to self-determination to support decolonization, the postcolonial world would warrant a different approach*".<sup>185</sup> The ones who would find support for their self-determination claim by the international community would be (i) colonies genuinely understood, (ii) peoples under foreign occupation – see the non-self-governing territories enlisted by the UN- and (iii) peoples under a racist regime i.e. South Africa. In addition, Weller refers to *secondary colonies*, to mean units that could be genuinely defined colonies but which exercised their right with delay, due to external intervention, such as East Timor.<sup>186</sup>

The major problem with self-determination is that the main rationale underpinning its affirmation, the idea of freedom, clashes with domestic and international stability since it favours the breakup of States and thus hinders the balance of power among the members of the international community. Cassese explains this point in clear terms when he affirms that "*self-determination is attractive so long as it has not been attained; alternatively, it is attractive so long as it is applied to others. Once realized, enthusiasm dies fast, since henceforth it can only be used to undermine perceived internal and external stability*".<sup>187</sup> These contrastive features do not seem to be doomed to change: according to Summers the dichotomy between internal and external self-determination best serves the interests of the international community in that it avoids the domain of one single interpretation and weakens the existence of a right to secede.<sup>188</sup>

However, as this Chapter has tried to outline, if one can distinguish between internal and external aspects of the right, it is still possible to support the existence of the right to self-determination, albeit mainly in its internal dimension.<sup>189</sup> It was demonstrated that the preference for internal self-determination finds its rationale in the wish to consolidate and preserve the domestic legal system, democratic governance and constitutional guarantees. This trend is supported by reference to the case of secession of Quebec, when the Canadian Supreme Court affirmed that the Quebecers had the right to self-determine in the sense of negotiating the adoption of appropriate rules for their participation to the Canadian political life.<sup>190</sup> As a consequence, external self-determination is relegated to hypothesis of denial of fundamental human rights, a form of violence that justifies the will of the people to establish a new

<sup>184</sup> Judge Ammoun's Separate Opinion, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, supra, para. 75.

<sup>185</sup> J. Klabbers: "*The Right to be Taken into Account*", cit., p. 195.

<sup>186</sup> M. Weller, *Escaping the Self-Determination Trap*, cit., p. 36.

<sup>187</sup> A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., pp. 5-6.

<sup>188</sup> J. Summers: "*The Internal and External Aspects of Self-determination Reconsidered*", in D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law*, Cambridge, 2013, pp. 247-249.

<sup>189</sup> V. Lanovoy: "*Self-Determination in International Law: a Democratic Phenomenon or an Abuse of a Right?*", *Cambridge Journal of International and Comparative Law*, 2015, vol. 4, p. 392.

<sup>190</sup> J. Summers: "*The Internal and External Aspects of Self-determination Reconsidered*", cit., p. 240.

State rather than to negotiate a new form of autonomy. It will be seen in the next Chapter that this hypothesis is the focus of the remedial right theory. By contrast, recent practice - such as in the cases of Scotland, Catalonia or Crimea - might suggest that if one wants to argue that self-determination can still be in evolution, the argument has to be framed along different lines. In particular, a broader interpretation of self-determination in its internal dimension seems to take place. The realisation of a community of individuals within the borders of the State is not limited to participation to the management of public affairs, but encompasses social inclusion, fiscal benefits and property rights. In other words, a human rights oriented understanding of the internal dimension of self-determination seems to arise, with an emphasis on a broader bulk of rights, such as participatory rights, social inclusion and property rights. As it will be seen in Chapter 3, the “right to decide” claimed by the people of Catalonia can be said to reflect the new pattern followed by the right to self-determination in liberal and democratic contexts.<sup>191</sup>

Nevertheless, from a purely legal perspective the exact nature of internal self-determination remains controversial, and whether there is a positive right in international law to internal self-determination may be disputed.<sup>192</sup> What can be pointed out is that there is an increasing number of international documents making direct or indirect reference to democracy, as if this principle lies at the heart of internal self-determination.<sup>193</sup> In a statement before the Third Committee of the General Assembly dated 1984, the representative of the UK, referring to the apartheid regime, maintained that “*The issues of racism and self-determination are related. [...] The South African system is particularly obnoxious [...] because the majority of South Africa’s people are denied any effective role in running the society in which they live. That is, they are denied the right of self-determination*”.<sup>194</sup> Moreover, the European experience with the application of the right to self-determination in former Yugoslav republics has been considered as having “modernised” the principle of self-

<sup>191</sup> See D. Turp: “*Catalonia’s “Right to Decide” Under International, European, Spanish, Catalan And Comparative Law*”, Report of Experts for the Institute for Research on Self-Determination of Peoples and National Independence, n.1, September 2017, pp. 55-68.

<sup>192</sup> H. Hannum: “*Rethinking Self-Determination*”, Virginia Journal of International Law, 1993, n. 34. pp. 2-69.

<sup>193</sup> T.W. Simon: “*Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo*”, Georgia Journal of International and Comparative Law, 2011-2012, n. 40, p.124.

<sup>194</sup> See United Kingdom Materials on International Law, 1984, printed in British Yearbook of International Law, 1984, p. 431, referring to the U.K. representative R. Fursland at the Third Committee of the General Assembly of the UN on 12 October 1984. Besides, it has been argued by political scientists that the action of the UN has been often driven by a will to restore democracy. The distinguishing factor is restoration: given that the legal contours of the right to internal self-determination are not defined in international law, the international community would be prone to act only when this right has been granted – in a variety of forms- and then denied, whilst it will remain immovable when self-determination has never been granted. Cases of Haiti, East Timor, and even Libya would support this view. See, among the others, R. Rich: “*Bringing Democracy into International Law*”, Journal of Democracy, 2001, vol. 12, p. 31; see also T. Franck: “*The Emerging Right to Democratic Governance*”, American Journal of International Law, 1992, vol. 86, p. 85-91 (arguing that the international community can only invoke collective enforcement measures against governments that oppress their peoples in limited circumstances).

determination stressing its internal dimension.<sup>195</sup> Interaction between democracy and self-determination has increased with the progressive developments in human rights law and is considerable with respect to certain democratic principles, such as that of politic participation pursuant to art. 25 ICCPR. However, this is not tantamount to say that democracy is a necessary condition for the realisation of self-determination.<sup>196</sup> The absence of clear limits between self-determination and democratic expression of the will of the people, in particular, may lead to a misinterpretation of self-determination: units seeking separation instrumentally use the self-determination argument, but they are not entitled to self-determination. What they seek, in fact, is a legal title to secede.

<sup>195</sup> See on this point P. Pazartis: "*Secession and International Law: the European Dimension*", M.G. Kohen, *Secession in International Law*, cit. p. 367.

<sup>196</sup> V. Lanovy: "*Self-Determination in International Law, a Democratic Phenomenon or an Abuse of a Right?*", cit., pp. 388-396.



## Chapter 2

### The Contested Right to Secede

The first issue that arises when dealing with secession is the question “what are we really talking about?”. Conceptual quarrels are frequent for international rules on territorial changes and in this field different interpretations may lead to different attributions of rights and duties to the parties. When a State dissolves, e.g. it disappears as a legal entity, succession to the treaties to which it was a party has to be decided either on the basis of the *tabula rasa* principle or throughout negotiations between the post dissolution entities. For secession, a new entity comes into being without the disappearance of the parent State. Succession to treaties will be managed between the newly formed entities and the pre-existing State. Moreover, withdrawal of a portion of territory can be also followed -in principle- by the request by the seceding entity to be incorporated into another State, instead of becoming a new entity on its own.

From the above, it would be easy to conclude that scholars are using different terms to refer to the same thing, since the final outcome of secession and dismemberment is the same. Here lies the claim that semantic quarrels weight a lot in this field of international law. One of the differences between the two above-cited phenomena lies in the process, not in the outcome. While dismemberment usually originates from a decision of the government, secession often originates at a lower level, notably from people. Then, it can be accepted or opposed by the central government. It is not tantamount to say that secession cannot stem from a governmental decision. As it will be shown below, Eritrea in 1979 or the attempt by Scotland in 2014 are typical examples of agreed secession. However, before the signature of the agreement, secession began from the will of the people who rebelled against the denial of autonomy by the Ethiopian central government, and from the Scottish long-standing independence claims respectively.

#### 1. Secession in international law: a word in search of a definition

The parallel between secession and dismemberment serves to introduce our approach to secession: for the purposes of the present research, secession will be viewed both as a fact and as a process, but the focus will be on the latter. Interestingly, Judge Yusuf in his Separate Opinion appended to the ICJ Advisory Opinion on the independence of Kosovo refers to the declaration of independence as “*part of*

*process to create a new state*” and continues “*the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own state involved a violation of international law*”.<sup>197</sup> Arguably, the Judge seems to understand creation of statehood as a process, albeit the acquisition of statehood by Kosovo remains a factual instance. As such, the separate opinion goes against the position expressed by leading scholars, i.e. Pellet, that “*secession is, however, a fact*”<sup>198</sup> with no reference to the process of secession. The procedural approach, presented by distinguished scholars,<sup>199</sup> is in our view more accurate than the one focusing only on the outcome of secession. As anticipated in the Introduction, the phenomenon of secession straddles the distinction between domestic and international law. Due to the varied circumstances surrounding secessionist struggles, secession has been studied on a case-by-case basis. With a view to determine what we are talking about, it is useful to recall some of the definitions anticipated in the Introduction. For Kohen, secession is “*the creation of a new independent entity through the separation of part of the territory [...] of an existing State, without the consent of the latter*”.<sup>200</sup> The distinguishing factor is the consent of the State. Admittedly, apart from neutral territories – such as Antarctica- nearly all portions of the globe are subject to the sovereign power of a State. It is easily predictable then, that territorial changes occur at the expenses of an existing State. That is why it has been contented by many authors that consent is the distinguishing element for secession.

Although it could be argued that when the central government consents to the reapportionment the case falls into the domestic sphere of sovereignty of the parent State, this view should not prevent from labelling that process as one of secession. Potentially, it could be better understood as a “secession by consent” or as a “separation”. In these case, anyway, when the kin State consents to loose part of its territory, there is few space for international law. Undoubtedly, if the parent State consents to the creation of a new entity and recognizes it, questions of legal personality in international law triggered by the newly born entity are less complicated. Since the former parent State is the most witnessed by the establishment of a new entity, once it has accepted it, it would be less cumbersome for the other members of the international community - at least from a political standpoint- to recognize it.

In this framework, Anderson has suggested that once the outcome of secession is separated from the process, it is possible to distinguish between two basic types of secession: consensual and unilateral.<sup>201</sup> Consensual secession occurs when the par-

<sup>197</sup> ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Separate Opinion by Judge Yusuf, 22 July 2010, ICJ Reports 2010, p. 619 ss.

<sup>198</sup> A. Pellet: “*Kosovo. The Question Not Asked*”, M. Milanovic and M. Wood, *The Law and Politics of the Kosovo Advisory Opinion*, Oxford, 2015, p. 274.

<sup>199</sup> M. G. Kohen, *Secession: International Law Perspectives*, cit., p.14 arguing that “*secession is not an instant fact. It always implies a complex series of claims and decision [...] which may – or may not lead to the creation of a new State*”. A. Tancredi, *La Secessione nel Diritto Internazionale*, cit., pp. 669-714 and his contribution “*A Normative Due Process in the Creation of States through secession*” in M.G. Kohen, *Secession: International Law Perspectives*, cit., pp. 171-207.

<sup>200</sup> M.G. Kohen, *Secession: International Law Perspectives*, cit., p. 3.

<sup>201</sup> G. Anderson: “*Secession in International Law and Relations: What are we really talking about?*”, *Loy. L.A. International and Comparative Law Review*, 2012-2013, pp. 350-352.

ent State consents to the withdrawal of the territory, either by following a specific procedure provided for by national law, or by negotiations in absence of specific provisions regulating secession. In the case of Quebec, i.e., the Canadian Supreme Court stated that future decisions on the status of Quebec would have to be based on a constitutional amendment about secession to be negotiated thereafter.<sup>202</sup> For the Court, however, it was the referendum in Quebec in which an overwhelming majority expressed the wish to separate from Canada that triggered an obligation to negotiate a new territorial settlement.<sup>203</sup> In this case, secession started as a unilateral demand, but after the referendum it was deemed to be negotiated in case of a positive vote towards separation. This topic belongs to the next Chapter, where it will be showed that the use of referendum blurs the line between unilateral and consensual secession. Nevertheless, the example stresses the fact that if secession is studied from a procedural perspective, it may well be the case that the process begins as unilateral and then changes into a negotiated one. In this process, international law might be involved as indicated further in this Chapter- section 3.

Despite the fact that at first glance the possibility that secession be carried out following negotiations seems a rare find, it is feasible and indeed not so unconventional. It has actually happened that secession was foreseen during negotiations between the parties, i.e. for the separation of Southern Ireland from the UK in 1922<sup>204</sup>, and for the attempt by Scotland in 2014. Before the Scottish referendum on independence was held in September 2014, the representatives of Scotland and UK committed themselves to accept the result of the vote cast, whatever this would be. Although the majority of voters eventually were in favour of staying within the Union, in case of a clear vote cast for independence London would have been bound by the agreement to accept the Scottish secession.<sup>205</sup> The Scottish case sounds similar to the separation of Norway from the Union with Sweden in 1904, indeed. In the latter, the Norwegians were called to approve separation through a plebiscite, whose turnout was clearly in favour of seceding. Sweden, on its part, had pledged to respect and give effect to the outcome of popular consultations.<sup>206</sup> In light of the above, practice about negotiations following a unilateral quest for secession is not rare. To further support the argument presented so far, it is necessary to have a deeper look at practice. First, with the secession of Eritrea from Ethiopia and secondly with the Scottish attempt to secede from the UK.

<sup>202</sup> Supreme Court of Canada, *Reference re Secession of Quebec*, 20 August 1998, para. 87. See also P. Radan: “*You Can’t always Get what you Want: the Territorial Scope of an Independent Quebec*”, *Osgood Hall Law Journal*, 2003, n. 41, p. 629-633.

<sup>203</sup> See Chapter 3 at pp. 157-161.

<sup>204</sup> Separation from the United Kingdom occurred through the issuance of the *Irish Free State (Agreement) Act* passed by the British Parliament on 31<sup>st</sup> March 1922, see <http://www.historicaldocuments.org.uk/documents/doc00005-000.html>

<sup>205</sup> See section 1.2 below for an in depth analysis.

<sup>206</sup> G. Anderson: “*Secession in International Law and Relations*” cit. p. 352; see also R. A. Young: “*How do peaceful Secessions Happen?*”, *Canadian Journal of Political Science*, 1994, pp. 773-792. Yet, there are many differences between plebiscites and referendum, which will be discerned of in the next Chapter.

## 1.1 Agreed secession in the federation between Eritrea and Ethiopia

Eritrea<sup>207</sup> had been placed under British trusteeship after World War II. In 1953, the UN managed to set a federation between Eritrea and Ethiopia, but coexistence was difficult to put in practice.<sup>208</sup> Eritrea considered itself autonomous; it had its own Constitution and its elected government. On the other hand, Emperor Selassie never accepted Eritrea's autonomy and championed a centralized control by Addis Ababa. After the decision to abolish the federal status of Eritrea in 1962, violent guerrillas broke down. At this point, further developments were shaped by the Cold War balance of power: when Selassie was replaced by Menghistu, the American presence in the federation was replaced by the USSR, which supported the fight of Addis Ababa against Eritrea's rebels.

It took thirty years to Eritrea to gain secession from Ethiopia. The success of the process was highly dependent on the Cold War out comings and the approach taken by Addis Ababa after Menghistu was overthrown. In fact, when the Front for the Liberation of Tigri, the biggest Ethiopian movement, managed to replace Menghistu (May 1991), the party adopted a favourable approach towards Eritrea's claims. Thus, a phase of dialogue between the parties started: with the London Agreement dated 27 May 1991 Ethiopia *de facto* accepted the independence of Eritrea. Nonetheless, at the Conference for Peace and Democracy held on July 1991 it was agreed to hold a referendum under UN supervision within two years, to confirm the London Agreement. In 1993 a clear vote cast in favour of independence led to the formation of a transitional government in the hand of the political party "Peoples' Front for Democracy and Justice" (PFDJ).<sup>209</sup> The new *status quo* received international recognition when the OAU accepted Eritrea as a member. However, the independence acquired in the nineties has not pacified the country, which is still troubled by internal conflicts for access to natural resources.

From this brief historical reappraisal, how can we frame the case of Eritrea? It could be maintained that Eritrea is a post-colonial secession example achieved by means of agreement. It could be opposed that the case originated from the Italian renunciation of all its rights and duties vis-à-vis the Eritrean colony. Hence, Eritrea could still be viewed under a colonial lens. This argument does not take into account that from the very beginning the liberation movement challenged the withdrawal of autonomy ruled by Selassie and did not rely on colonial arguments during the seceding process. In other words, the secession of Eritrea cannot be included among the

<sup>207</sup> On the Eritrean case there is a huge literature. See for references: A. Tancredi, *La Secessione nel Diritto Internazionale*, cit., pp. 539-542; M. Haile: "*Legality of Secession: the Case of Eritrea*", *Wisconsin International Law Journal*, 1987, p. 75 ff.; E. Gayim, *The Eritrean Question. The Conflict between the Right of Self-Determination and the Interests of States*, Uppsala, 1993.

<sup>208</sup> The assessment of the status of Eritrea was devolved to the Commission for Eritrea, established by the General Assembly and composed by 5 members: Burma, Guatemala, Norway, Pakistan and South Africa. The decision to constitute an autonomous unit federated with Ethiopia was taken without any popular consultation but only on the basis of the UN *Report of the United Nations Commission for Eritrea*, 1950, UN General Assembly Official Records A/1285, Fifth Session, 1950, Suppl. n.8.

<sup>209</sup> K. Sturman: "*Eritrea: a Belated Post-Colonial Secession*", A. Pavković and P. Radan (eds.), *The Ashgate Research Companion on Secession*, Routledge, 2013, p.497-498.

latest examples of exercise of colonial self-determination. Rather, the distinguishing character of the case is that there was an agreement between the parties. Once it was reached, the international community pushed for a further legitimisation through a referendum to be conducted under international supervision. In this sense, it can be argued that the Eritrean case is one of consensual secession in which the people wanted to gain independence as a reaction to the denial of autonomy on the part of the federal government. Moreover, it cannot be ignored that the agreement was put under the scrutiny of the people. Pushed by the international community to adopt an agreement to this aim, it was the manifestation of the will of the people that made effective the reapportionment. More than 30 years after, the Scottish referendum gives even more emphasis to popular consultations.

## 1.2 The Scottish example of secession by consent

Since one of the distinctive features of the case is that there was an agreement to hold a territorial referendum on independence, the Scottish attempt to secede from the UK will be tackled in the Chapter devoted to practice on territorial referendum. Nevertheless, given that it involves secession, in this section the basic features of the case will be presented.

The end of the Kingdom of Scotland dates back to 1707, when the *Acts of Union* declared the territory part of the United Kingdom. The *Union Act* abolished the Parliament of Scotland, yet the Scottish preserved their different administrative system, distinct civil society, legal system, thus in broad terms their own sense of nationality.<sup>210</sup>

Nationalism emerged in the late 19<sup>th</sup> century, but in the first phase it was aimed at increasing self-governing powers or to a certain extent a federal United Kingdom. Divergences between supporters of the above mentioned “gradual” independence view, and those ones calling for a radical solution, have been a characteristic feature of the Scottish National Party since its constitution in 1935. This internal struggle influenced the relationship with the UK. There were phases of strong opposition due to a revive of nationalism – such as in the 80ies- followed by times of peaceful coexistence with London. The latter were made possible by a series of power-concessions made by the British Government, the most important one being the devolution process.<sup>211</sup> The process of devolution was marked by the referendum hold in 1997 by which the people of Scotland voted for the establishment of a Scottish Parliament, granted with powers on tax law. The UK answered to this strong manifestation of the will of the people with the 1998 *Scotland Act*. The act was aimed at conceding more autonomy with a model similar to the subsidiarity one developed by the EU. Not only was the Parliament established, but also the new Scottish Executive. The Scottish Parliament can legislate on certain matters such as administrative

<sup>210</sup> M. Keating: “*Scottish Independence*”, A. Pavković and P. Radan (eds.), *The Ashgate Research Companion on Secession*, Routledge, 2013, pp. 519-521.

<sup>211</sup> For an extensive study on the different phases undergone by the Scottish National Party and its implications on the relationship with London see I. MacLean and A. MacMillan, *State of the Union: Unionism and the Alternatives in the United Kingdom since 1707*, Oxford, 2005.

issues or health, whilst London retains the authority for, *inter alia*, fiscal matters and foreign policy. Moreover, the UK continues to be the only one enjoying international legal personality, thus representing the interests of Scotland abroad. Territorial integrity issues should be retained by the British Parliament, for the Union with the UK is a reserved matter. That is why it was necessary to negotiate a further agreement on possible independence.

The attempt to independence by Scotland has been described as a consensual process towards statehood. To be more accurate, it should be clarified that it began as a unilateral attempt to secede but it was eventually framed as an hypothesis of negotiated secession/separation.<sup>212</sup> At the very beginning and for a long time, in fact, the UK opposed any question of legality of the Scottish secession. Under Section 5 of the *Scotland Act 1998*,<sup>213</sup> the Scottish Parliament is not vested with the authority to hold a referendum for independence.<sup>214</sup> The Scottish government in fact went on cautiously to affirm that the Parliament had the power to authorise a consultation. In January 2012 a *Draft Referendum Bill*<sup>215</sup> was adopted by the Scottish Parliament – commonly referred to as Holyrood. The United Kingdom initially challenged the legitimacy of the decision, arguing that Holyrood had no power to authorise a referendum and blending the possibility of adjudication in front of the Supreme Court. However, negotiations between the Governments were fruitful and in October 2012 they signed the *Edinburgh Agreement*.<sup>216</sup> Attached to the agreement there is a *Draft Order in Council*, whereby the Scottish government was authorised to legislate on a referendum to be held by the end of 2014. According to the *Edinburgh Agreement*, Great Britain committed itself to accept the turnout of the referendum. Thus, in case of a vote in favour of independence, the UK would have had the duty to recognise the new independent Scotland. That was not the case because the Scottish voted to remain within the United Kingdom.

Although Scotland chose not to secede, the case shows at least three elements. Firstly, the Scottish claim can be labelled *unilateral*, to mean that it originated from long lasting popular manifestations in support of independence without the consent by the parent State. Nevertheless, the Scottish case is also one of secession by consent if one wants to follow the terminology used above. Both parties committed themselves

<sup>212</sup> See S. Tierney: “*Legal Issues Surrounding the Referendum on Independence for Scotland*”, European Constitutional Law Review, 2013, p. 94 ff.

<sup>213</sup> Scotland Act, Section 5, Schedule 5, Part I, Section 1(b): “*The following aspects of the constitution are reserved matters, that is [...] the Union of the Kingdoms of England and Scotland*”, Scotland Act (1998), c 46. Moreover, under section 29, Under Section 29 (Legislative competence), “*an Act of Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament*”.

<sup>214</sup> M. Goldoni: “*Il referendum sull’indipendenza scozzese*”, Quaderni Costituzionali, 2012, n. 3, p. 632 ss.

<sup>215</sup> The Bill was elaborated on the basis of public consultations whose results were presented in the governmental paper ‘*Your Scotland, Your Referendum: A Consultation Document*’, Scottish Government, 25 January 2012 <http://www.scotland.gov.uk/Publications/2012/01/1006>.

<sup>216</sup> *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

to respect the terms of the agreement they have signed. Secondly, the fact that secession was conceived in the absence of a domestic rule for this purpose is per se a good sign. Absent an internal rule, it could be held that by allowing the people of Scotland to decide, the UK seemed to think that secession is not contrary to international law. Thirdly, there is the emphasis put on popular will. It drives us back to the exercise of free will pointed out by the ICJ when dealing with self-determination<sup>217</sup> and reiterated by the international community in the Ethiopian case. In sum, Scotland is another case in which a unilateral claim to secession was dwelt with procedures of democratic governance, with a focus on popular participation.

However, it does not seem that the parties felt the need to resort to a territorial referendum because international law asked for that. In fact, there is scarce reliance on international legal arguments. In this sense, the case of Scotland cannot be viewed as a contribution to the establishment of a customary rule about the use of territorial referendum by seceding entities.<sup>218</sup> Anyway, it may have a great significance from a procedural point of view, not only for the process of secession, but also for the modalities for holding a territorial referendum, that will be studied in Chapter 3 and 4.

### 1.3 Defining unilateral secession

The complex and varied panoramic displayed above leads us to move back to Anderson's argument.<sup>219</sup> Unilateral secession takes place when the parent State opposes the seceding attempt of its citizens, but it does not necessarily have to involve the use of force. According to Crawford, secession is the "*creation of a State by the use or threat of force without the consent of the former sovereign*".<sup>220</sup> Arguably, unilateral secession *may* occur by resorting to military means or threatening to use them, but that should not be considered a *conditio sine qua non* for unilateral secession. Suffice it to refer to Katanga, Biafra, or Bangladesh that have been labelled by the majority of scholars<sup>221</sup> as cases of secession and all implied the use of force. Attempts to secede such as those carried out in Tibet with respect to China also support this view.

<sup>217</sup> See Chapter 1 at pp. 39-43.

<sup>218</sup> T. W. Waters: "*For freedom alone: Secession after the Scottish Referendum*", Nationalities Papers, 2016, vol. 44, n.1 p. 133.

<sup>219</sup> In Anderson's structure, unilateral secession can take the form of colonial and non-colonial secession. Successful examples of colonial secession mentioned are, among the others, the Democratic Republic of Vietnam from Indonesia or Algeria from France. For non-colonial successful secession, reference is made to Eritrea, South Sudan, Bosnia- Herzegovina, Montenegro. For Bosnia-Herzegovina, however, it does not seem to be a case of secession. As it will be shown in Chapter 3, the Badinter Commission defined it a case of dissolution, whereby the SFRY ceded to exist. See G. Anderson: "*Secession in International Law and Relations*", cit., p. 354.

<sup>220</sup> J. Crawford, *The Creation of States in International Law*, cit., p.375.

<sup>221</sup> See: J. Crawford, *supra*, pp. 403-418; A. Pavković and P. Radan, *Creating New States: Theory and Practice of Secession*, Aldershot, 2007, p. 103; J. Dugard and D. Raić, *The Role of Recognition in the Law and Practice of Self-Determination*, cit., pp. 120-123; C. Griffioen, *Self-Determination as a Human Right. The Emergency Exit of Remedial Secession*, Utrecht, 2010, pp. 123-124.

However, there were other cases of seceding quests that did not involve the use of force. Indeed, over the last decade the number of unilateral secessions attempted to or carried out without the use of force has been increasing and cannot be underestimated. Bougainville, the current situation in Catalonia or the requests from Hong-Kong, to mention the most famous, consist of popular manifestations where military means are avoided.<sup>222</sup> Few cases may not be enough to support the existence of a general rule, but there are only a few cases of secession by military means as well. Therefore, one should not underestimate that even unilateral secession can be developing through new lines and take place without military means. Furthermore, the breakup of a State, or simply of part of its territory, is a protracted process during which the attitudes of different stakeholders like the government may vary a lot.<sup>223</sup> In particular, in the next Chapter it will be seen that the referendum can impact on the lack of consent by the parent State: it may well happen that once a referendum has been carried out, the government consents to embark on negotiations to find a solution to the seceding requests, such as in the case of Scotland or Canada.

In light of the different approaches mentioned above, for the present study it seems accurate to take the definition of secession advanced by Dahlitz, with some changings taken from Kohen and Crawford's approach. Hence, secession can be viewed as *"the process by which a portion of the population of a given territory, being part of a State, expresses the wish by word or by deed to become a sovereign State in itself or to join with and become part of another sovereign State"*.<sup>224</sup>

This kind of definition avoids to consider secession only a factual instance, by which a new subject of international law arises.<sup>225</sup> Rather, it acknowledges the complex nature of this phenomenon and leaves a room to all the possible subsequent developments, in particular following the consent by the parent State. The main point of this Chapter is that the process by which a portion of territory *"expresses its word ...or*

<sup>222</sup> To be more precise, during the 1st October 2017 referendum in Catalonia, violent clashes occurred between police forces and the unarmed crowd protesting against the attempt by the central government of Madrid to crackdown the seceding referendum. Although the use of force did not reach the highest threshold, nearly 850 injured citizens were registered at the end of the day of the vote. See [https://elpais.com/elpais/2017/10/03/inenglish/1507025584\\_438952.html](https://elpais.com/elpais/2017/10/03/inenglish/1507025584_438952.html)

<sup>223</sup> A. Peters: *"The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum"*, cit. p. 266.

<sup>224</sup> The original definition elaborated by J. Dahlitz is: *"Whenever a significant proportion of the population of a given territory, being part of a State, expresses the wish by word or by deed to become a sovereign State in itself or to join with and become part of another sovereign State"*. See J. Dahlitz (ed.), *Secession and International Law*, cit. p. xviii.

<sup>225</sup> A factual approach is to be appreciated in the field of international law on statehood, given that it relies on practice. However, it has been pointed out by scholars, e.g. Fleiner, that a factual approach could boost many secessionist movements to establish *de facto* governments and *de facto* control over a territory, convinced that they will get recognition by the International Community. The shortcoming of this practice would be a disastrous effect on the balance of power and the stability of the whole international community. See T. Fleiner: *"The Unilateral Secession of Kosovo as a Precedent in International Law"*, U. Fastenrath, R. Geiger, A. Paulus (et. al.), *From Bilateralism to Community Interest, Essays in Honour of Judge Simma*, Oxford, 2011, p. 886

*deed*” can be regulated by international law. The *normative due process of secession*, as it has been labelled by Tancredi,<sup>226</sup> goes in this direction.

## 2. Legal approaches to secession

The starting point for the study of the legal approaches to secession is the theory of neutrality of international law towards secession.<sup>227</sup> The neutral approach has gained much support in literature, whilst among states the picture is more fragmented, given the clash between secession and territorial integrity. Yet the neutral approach is not the only possible one. At least three positions may be distinguished: (i) international law prohibits secession; (ii) international law does not regulate secession; (iii) there is a right to secede as a remedy of last resort from serious injustices. Alongside the second group, which is the one advocating for the neutrality of international law, it is possible to distinguish the *normative due process* approach. This approach postulates that there is a trend on consolidation in general international law aimed at regulating the process of secession, albeit as a fact secession rests outside the realm of the law.

### 2.1 Prohibition of secession under international law

At the extreme side of the spectrum lies the argument of those scholars who maintain that international law prohibits secession. The assumption is rooted in two arguments: first, States are the masters of the international legal order which has been built up to help the relations between the members of the international community, so it could never allow for disaggregation of one entity. Second, given the first point, one of the basic principles of international law is that of territorial integrity, that prevails over the attempts to secede. The attitude of States towards secession supports this view, in that they rely on a wide range of arguments – from GA resolutions to human rights’ protection – to justify their opposition to secession. In other words, there is an *ex post facto* resort to international law in this field.<sup>228</sup> The argument is persuasive, but only to a certain extent. The lack of rules on secession could be interpreted as a prohibition, but secession is not prohibited under international law. Absent a rule prohibiting secession, in principle an entity may seek to secede, do so and give birth to a new State with its own legal personality. In other words, claiming that an entity created through secession is unlawful is a mistake.

However, this is not tantamount to hold that an entity would never come into being in violation of international law. Unlawful entities try to establish themselves quite often in international practice. If an entity comes into being in violation of the fun-

<sup>226</sup> A. Tancredi, *La Secessione in Diritto Internazionale*, cit., p. 669.

<sup>227</sup> The neutrality argument tested to the extreme is presented by J. Crawford, who argues that “*secession is a legally neutral act the consequences of which are, or may be regulated, internationally*”. See J. Crawford, *The Creation of States in International Law*, cit., p. 390.

<sup>228</sup> A. Martinenko: “*The Right of Secession as a Human Right*”, *Annual Survey of International & Comparative Law*, 1996, vol. 3, <http://digitalcommons.law.ggu.edu/annlsurvey/vol3/iss1/3>

damental rules of the international community, that entity can be considered unlawful. In particular, an entity would be unlawful if it is formed after a process entailing the use of force; violations of fundamental human rights; an apartheid policy; a genocide or ethnic cleansing policy. It might be the case that the entity born out of one of the above violations displays the requirements for statehood, yet all the other states may be under an obligation “*not to recognise this illegal authority and not to entertain any diplomatic relationship with it*”. This statement is an excerpt of Security Council resolution 217 of November 20, 1965.<sup>229</sup> The resolution addressed the situation in Rhodesia and after having condemned the spread of violence in the region, it called upon the member states not to recognize the usurpation of powers carried out by the Southern Rhodesian authorities. In Rhodesia, the minority government established between 1965 and 1979<sup>230</sup> was conducting a racist policy against the majority of the population. The strong denial of the right to self-determination led the Security Council to label the Smith Government as an illegal authority,<sup>231</sup> considering the 1965 declaration of independence unlawful. Another example is Northern Cyprus. On 20 July 1974 the Turkish Republic deployed its forces in Cyprus with the aim of protecting the Turkish minority after the *coup d’Etat* organised by Greek military officials of the Cypriot army<sup>232</sup>. Admittedly, Turkey intervened with military means to support the formation of the Northern Republic of Cyprus.<sup>233</sup> In 1983, the Security Council addressed the Declaration of the Turkish Republic of Northern Cyprus in resolution 541 and considered it “*as legally invalid and calls for its withdrawal*”.<sup>234</sup> International disapproval can be seen also in the attitude taken by the international community towards the Republic Srpska, for alleged commission of acts of genocide. The variables upon which the fate of the nascent entity depends are both the effective possession of the requirements of statehood and recognition by the other members of the international community.<sup>235</sup> This is because international law does not provide for a clear regulation of seceding attempts: here comes the theory of neutrality of international law towards secession.

<sup>229</sup> Security Council (hereinafter SC) resolution 217, UN. Doc. SC/RES/217 dated 20 November 1965, para. 3.

<sup>230</sup> The case acquired an international dimension in 1965 when Southern Rhodesian representatives issued a declaration of independence and ended in 1979 with the return of the British governor.

<sup>231</sup> See SC/RES/217, cit., para. 3. See also J. Crawford, *The Creation of States in International Law*, cit., pp 128-130.

<sup>232</sup> On the same day, the Security Council passed resolution 353 that requested in para. 4 “*the withdrawal without delay from the Republic of Cyprus of foreign military personnel present otherwise than under the authority of international agreements*”.

<sup>233</sup> See Symposium, *Cyprus: International Law and the Prospects for Settlements*, ASIL Proceedings, 1984, p. 107 ff.; Z. M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, Oxford, 1983 and R. MacDonald: “*International Law and the Conflict of Cyprus*”, *The Canadian Journal of International Law*, 1981, p.3 ff.

<sup>234</sup> See SC /RES/541 dated 18 November 1983, para. 2. See also SC/RES/550 dated 11 May 1984.

<sup>235</sup> The distinction between entities claiming territorial reappropriations against the will of the kin State has been elaborated by M. Weller, who lists the basic features of the privileged and the unprivileged entities on the basis of whether they have or not a right to self-determination. See sections 4-5 of this Chapter. See M. Weller, *Escaping the Self-Determination Trap*, Cambridge, 2008.

## 2.2 Neutrality of international law towards secession

A consistent group<sup>236</sup> considers international law neutral to secession, to mean that the international legal order does not accept neither prohibits it. In other words, groups may resort to secession, anyway international law does not accord to them any privilege, so that the entity enjoys no legal right.<sup>237</sup> That is not tantamount to say that international law does not have to face seceding instances. Rather, neutrality of the international legal order means that there is no rule on secession that can be contravened by an entity seeking separation from the parent State. The rationale underpinning this position is that secession is still a matter of internal, or international politics. The right to secede is beset by too many questions to be easily managed in modern international law terms. It is a collective right but what constitutes a people defies definition. Moreover, after the right has been accomplished there comes the question of how to redistribute rights and duties<sup>238</sup> and seems that assessing the problem of secession in legal terms would lead to an impasse. In this view, secession should rest in the realm of power politics, where there is a case by case analysis. Against this assumption, the development of international human rights law –with particular emphasis on democracy and the rule of law – has led to the elaboration of a theory opposing the neutral approach. The so called remedial right theory, analysed below, aims at filling in the normative gaps left by the theory of the neutrality of international law towards secession, notably by distinguishing (i) the bearers and (ii) the conditions for the exercise of, the right to secede.

## 2.3 The remedial right theory

Secession has been framed along different lines, ranging from law to morality. This is due to the fact that the will to secede is rooted in the people's perception of their government, and it is shaped by moral considerations as well. The remedial right

<sup>236</sup> See J. Crawford: *"The Right to Self-Determination in International Law: its Development and Future"*, P. Alston (ed.) *Peoples' Rights*, Oxford, 2001, p. 50; T. Franck: *"Post-Modern Tribalism and the Right to Secession"*, C. Brolmann, R. Lefeber, M. Zieck (eds.), *Peoples and Minorities in International Law*, Boston-Dordrecht-London, 1993, vol. III, p. 125 ff.; R. Higgins: *"International Law and the Avoidance, Containment and Resolution of Disputes"*, *Recueil des Cours de l'Académie de droit international de la Haye*, 1991 vol. V, Dordrecht, 1993, pp. 9-342; C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, 1993; P. Hilpold: *"Self-Determination in the 21<sup>st</sup> Century. Modern Perspectives for an Old Concept"*, *Israel Yearbook on Human Rights*, 2005, n. 36, pp. 247-269.

<sup>237</sup> J. Crawford: *"The Right to Self-Determination in International Law: its Development and Future"*, cit., p. 50; M. Weller, *Escaping the Self-Determination Trap*, cit., p. 32.

<sup>238</sup> This line is followed i.e. by T.W. Simon: *"Remedial Secession: What the Law Should Have Done, From Katanga to Kosovo"*, *Georgia Journal of International and Comparative Law*, 2011-2012, vol. 40, p. 105. Moreover, some commentators argue that consent of the State is always needed, either through negotiation or prior or after a declaration of independence. This, in particular, would discourage the consolidation of a rule on secession under international law. The premise of this argument is that the absolute character of self-determination is confined to hypothesis of colonialism and in non-colonial contests the principle of territorial integrity prevails over it. Thus, without the consent of the kin State a new entity cannot come into existence. See for an overview J. Vidmar: *"Remedial Secession: Theory and (Lack of) Practice"*, *St. Antony's International Review*, 2010, vol.6, pp. 37-56

theory postulates that a sub-unit has the right to secede from the parent State as a remedy to the serious breaches of its human rights. Although very popular, the remedial right theory generates contrastive reactions. The cause-effect relationship between violations of human rights of a collective of individuals located in a territory and the right to separate that territory created by the theory is to be taken with caution.<sup>239</sup> Many critiques have been advanced, from its misleading moral value to its scarce application in practice. Christakis for example opines that the theory is idealised, claiming that remedial secession is a sort of security exit for unjustified claims to self-determination.<sup>240</sup> In the next pages, firstly the theoretical framework and the normative ground surrounding the theory will be developed. Lastly, its application will be tested. It is assumed that the existence of a right to remedial secession in international law is questionable, albeit there are some sporadic signs in international practice which could support the application of the right.

Starting from the theories, for remedial right theorists<sup>241</sup> secession may be justified and may be feasible for a segment of the population as a response to serious and continuous violations of human rights. The remedial secession theory aims at overcoming the normative *vacuum* left by the neutral approach. It does so by arguing that 1) the condition for the exercise of a right to secede is the serious and continuous breach of fundamental rights of the individuals on the part of the parent State. The subjects entitled to exercise the right are 2) those groups settled in a territory that has been unjustly taken by the parent State. In sum, secession may be justified as a response to serious and continuous violations of human rights.<sup>242</sup> Thirdly, 3) secession has to be a remedy of last resort. For Buchanan in particular, the right to secede as a remedy mirrors the Lockian approach to revolution, albeit the latter was carried out by the population as a whole. The rationale underpinning the remedial right theory is that secession is a remedy of last resort in response to serious injustices. Recalling the dichotomy between the internal and external dimension of self-determination presented in the previous Chapter, in the remedial right theory the two

<sup>239</sup> K. del Mar: “*Rather than providing a remedy, remedial secession constitutes an acknowledgment of the inability of the international community to prevent extreme ethnic violence, and its invocation as a last resort amounts to a renunciation of the utility of human rights and other international legal rules in such situations*”, “*The Mith of Remedial Secession*”, in M.G. Kohen (ed.), *Territoriality ad International Law*, Cheltenham-Northampton, 2015, p. 516.

<sup>240</sup> See T. Christakis: “*Self-Determination, Territorial Integrity and fait accompli in the Case of Crimea*”, forthcoming in *ZaöRV/Heidelberg Journal of International Law*, 2015, Vol. 75, issue 1.

<sup>241</sup> See A. Buchanan, *Secession: the Morality of Political divorce from Fort Sumter to Lithuania and Quebec*, Boulder CO, 1991; A. Buchanan: “*Secession*” *Stanford Encyclopedia of Philosophy*, cited by M. Seymour: “*Internal Self-Determination and Secession*”, A. Pavković and P. Radan (eds.), *The Ashgate Research Companion on Secession*, cit., pp. 394-395; W. Norman, “*The Ethics of secession as the regulation of secessionist politics*”, N.M. Moore, *National Self-Determination and Secession*, Oxford, 1998, pp. 34-61.

<sup>242</sup> See A. Buchanan, *Secession: the Morality of Political divorce from Fort Sumter to Lithuania and Quebec*, Boulder CO, 1991; A. Buchanan: “*Secession*” *Stanford Encyclopedia of Philosophy*, cited by M. Seymour: “*Internal Self-Determination and Secession*”, A. Pavković and P. Radan (eds.), *The Ashgate Research Companion on Secession*, cit., pp. 394-395; W. Norman, “*The Ethics of secession as the regulation of secessionist politics*”, N.M. Moore, *National Self-Determination and Secession*, Oxford, 1998, pp. 34-61.

aspects are deeply intertwined. The injustices taken into account in fact amount to persistent denial of internal self-determination. Denial of internal self-determination serves as a ground to justify secession, which is presented as a form of self-determination.<sup>243</sup> If a State fails to include all different collectives of individuals in the government and carries out human rights abuses against a certain group, the theory postulates that the State's entitlement to territorial integrity falters and the collective of individuals can carry out a secession. As Buchanan explains, it is a sort of remake of the concept of independence assisting colonies.<sup>244</sup>

Two of the leading theorists of secession as a remedy are the above-mentioned Buchanan and Buchheit. The reasoning of Buchheit originates in the assessment of the condition of the group seeking secession. He argues that as long as a very serious threshold of violations of fundamental rights is not reached, States keep enjoying their privileged position vis-à-vis the secessionist entity, due to the combination of the principles of sovereignty and territorial integrity. Besides, the parent State may still solve the dispute with the rebellious unit by granting them a different form of autonomy. When a serious threshold is passed, secession becomes the legitimate tool to protect the fundamental rights of the group concerned.<sup>245</sup> Although Buchheit's reasoning never denies the prominent role of the State in territorial changes, it seems as if the distinguished author opts for an individual-centred than for a State-centred approach. It is a persuasive argument, because it looks at the increasing role of individuals in international law – already in 1993. Anyway, part of its power is lost due to the lack of clarity in explaining which groups can invoke this remedial right to secede. In a theory that focuses on serious human rights abuses, the prospect of who is entitled to claim a violation is of the most importance.

At a first glance, the argument coming out from the remedial right theory is very persuasive, at least from a moral point of view. It might appear too drastic, but it is not. Supporters of the remedial right theory do not neglect that a right to secede may be justified on other grounds. Buchanan opines that there might be some “special rights to secede”:<sup>246</sup> secession may find its legal basis in example in the grant of autonomy by the parent State to the sub-unit, or in an agreement between the State and a federated entity. The main assumption of the remedial theory is that outside the above mentioned exceptions, there is no general right to secede. Only secession as a remedy is possible. The right is not triggered unless the State is unjust.

<sup>243</sup> This is the majoritarian view embraced by, *inter alia*, L.C. Bucheit, *Secession: the Legitimacy of Self-Determination*, cit., pp. 88-97; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit. pp. 118-120; H. Hannum, “*Rethinking Self-determination*” *Virginia Journal of International Law*, 1993, p. 17; D. Raic, *Statehood and the Law of Self-Determination*, cit., p. 321. See also for a *contrario* arguments S. Smis, *A Western Approach to the International Law of Self-Determination: Theory and Practice*, pp. 138-140, unpublished PhD Thesis, 2001, cited by S.F. van Den Driest, *Remedial Secession. A right to external self-determination as a remedy to serious injustices?*, cit., p. 141.

<sup>244</sup> The distinguished author has argued that a group whose rights have been seriously violated should be recognised by the international community “*to have a claim right to repudiate the authority of the state and to attempt to establish its own independent political unit*”. A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford, 2004, p. 335.

<sup>245</sup> L.C. Buchheit, *Secession: the Legitimacy of Self-Determination*, cit., p. 222-223

<sup>246</sup> A. Buchanan: “*Theories of Secession*”, cit., p. 32.

In sum, three conditions must be satisfied: (1) serious breaches of fundamental rights of the individuals potentially threatening the existence of the group itself (2) the group is settled in a territory that has been unjustly taken by the parent State and (3) it has to be a remedy of last resort. In addition, there are some collateral conditions to be satisfied by the new entity, such as giving guarantees that it will respect human rights and will cooperate with the parent State for succession to treaties, debt recovery etc. However, the legal characterisation of the requirements mentioned above is all the more problematic. In a situation of conflict between a sub-group and the central government, it may be very difficult to assess who is carrying out violations, because the seceding entity can be violent as well. Moreover, the notion of last resort is per se subject to exploitation, if a critical date to secede is not clearly established.<sup>247</sup>

### 2.3.1 Law references for the remedial right theory: only a a *contrario* reading?

To find elements on a remedial right to secession in international law four different layers have to be considered: (i) treaty law and acts of international organisations,<sup>248</sup> (ii) decisions and opinions from domestic and international judicial bodies, (iii) State practice and to a certain extent (iv) scholarly literature.<sup>249</sup> One of the main root causes of the critiques to the remedial right theory is that the reasoning developed by legal scholars to support it is based on a *a contrario* reading of international documents. In particular, the remedial right theory stems from the inverted interpretation of the *Declaration on Friendly Relations* and the extensive interpretation of the *Vienna Declaration and Program of Action*. For case law, the report of the Committee of Jurists for the Ålaand case and the judgement of the Canadian Supreme Court on the secession of Quebec are the main references, together with practice related to Bangladesh.

#### 2.3.1.1 Treaty law and acts of international organisations

Starting from treaty law, treaties do not help in demonstrating an entitlement to remedial secession vested on sub-units within a State, because none of them set a clear definition of, or prohibit secession. Although scholars focus extensively on the *Declaration on Friendly Relations* and on the *Vienna Declaration and Program of Ac-*

<sup>247</sup> K. Del Mar: “*The myth of Remedial Secession*”, cit., pp. 516-519.

<sup>248</sup> Among the sources of international law, custom has not been forgotten. Customary rules are not listed because it would have been redundant to mention that the right to secede is contested in its existence by the community of States. In the Introduction, as well as in the opening of this chapter, it was pointed out that the lack of practice and the opposing attitudes of the states prevented from the elaboration of a general international rule on secession.

<sup>249</sup> An extensive analysis with the same structure has been carried out by S. F. van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?*, cit., pp. 223-253, with an exhaustive perusal of practice and custom about remedial secession, concluding that a right to remedial secession is not regulated under international law, albeit the theory is supported by some actors. The rationale underpinning the structure of the perusal for the author is to follow art. 38 of the ICJ devoted to the sources of international law.

tion, these are acts adopted by international organisations, not treaties. Nevertheless, some commentators have found elements of a new trend in the practice of human rights bodies, such as the Committee on Racial Discrimination established in the framework of the *Convention on the Elimination of Forms of Discrimination* (hereinafter *Convention*).<sup>250</sup> In the General Recommendation XXI the Committee stated that “*in the view of the Committee, international law does not recognize a right of peoples to unilaterally declare secession from a State [...] This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned*”.<sup>251</sup> The wording suggests a denial of the right to secede, yet by looking at the Report on the implementation of the *Convention* by the Commission on Human Rights, the statement delivered by one member stresses a different view. It was affirmed that if a sub-unit within a State wants to change its status, it could do so in three established cases, namely 1) when the Constitution established a right to self-determination; 2) when all parties concerned agreed to secession and 3) when that part of the population was denied their basic economic, cultural, social and political rights.<sup>252</sup> The latter point seems to hint at remedial secession, yet one voice does not make a rule. The main legal basis for the development of the remedial right theory is the *Declaration on Friendly Relations* adopted with resolution 2625 of the General Assembly, on 24<sup>th</sup> October 1970. In the previous Chapter, the *Declaration on Friendly Relations* was analysed with a view to prove how it extended both the sphere of application and the meaning of the right to self-determination of peoples beyond the borders of colonialism. In this section, it is appropriate to focus on Principle VII,<sup>253</sup> commonly referred to as the safeguard clause.

The principle reads as follows:

*“Nothing in the foregoing paragraph shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial*

<sup>250</sup> *International Convention on the Elimination of all forms of Racial Discrimination*, adopted on 21 December 1965, entered into force 4 January 1969, reprinted in UN Treaty Series 1965 n. 660.

<sup>251</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 21: “*The right to self-determination*”, 8 March 1996, U.N. Doc. A/51/18, annex VIII, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, 2003, p. 209.

<sup>252</sup> S. F. van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?*, cit., p. 102, citing the Commission on Human Rights, *Report of the United Nations seminar to assess the implementation of the International Convention on the Elimination of all Forms of Racial Discrimination with particular reference to article 4 and 6*, UN Doc. E/CN.4/1997/68/Add.1, para 27.

<sup>253</sup> Interestingly, the wording of the principle is the result of a huge debate among the representatives in the GA. Many proposals were presented but they were all colliding. On the one side there were States – the UK and USA sponsored a resolution-, which supported a universal definition of the right to self-determination as to include also a right to democracy. On the other side, representatives of Poland, Kenya or Burma strongly opposed the Anglo-Saxon proposal because it would have opened the way to secession every time there is a different form of government. All the drafting proposals were superseded by the Italian draft at the end. The wording elaborated by the Italian delegation gained consensus due to its “balancing” character, in that it affirmed the duty of the States to give representation to all peoples, but preservation of territorial integrity had to remain the main concern of the community of States. See UN Doc. A/AC. 125/Sr/8.

## Secession and Referendum

*integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal right and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”.*

Preliminary reference to territorial integrity is a sign of the *Declaration*'s attachment to the preservation of the *status quo*. However, the principle applies to “sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”. The inverted reading of the safeguard clause gives one chance to underscore the primacy of territorial integrity: territorial integrity can be set aside every time a State does not possess “a government representing the whole people without distinction of race creed or colour”. Hence, Cassese argues that secession might be warranted where, “the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement [...] there must be gross breaches of fundamental human rights”.<sup>254</sup> Compared to the description of remedial secession given by Buchheit, it can be observed that they share the same conclusion, but Cassese approaches the theory from the opposite perspective. Cassese takes as a focal point the State and focuses on the safeguard clause of the *Declaration on Friendly Relations* adopting a text-oriented interpretation. This is not tantamount to say that he underscores the role of the individual, right the opposite actually. Individuals remain the subjects of non-discrimination issues, the nucleus of the provision, but territorial integrity is the starting and the ending point of the safeguard clause. This interpretation given seems to fit better the realm of international law and relations, for it acknowledges a role of the people, whilst remaining linked to the primary interest of the States. The preservation of territorial integrity, in fact, opens the paragraph.<sup>255</sup> Other scholars have followed the same pattern: Weller i.e. suggests that a right to remedial secession will arise where “the central government persistently and systematically represses a territorially organised, and perhaps also constitutionally recognised, segment of the population [...]” or subjects that group to “persistent and discriminatory exclusion from governance”.<sup>256</sup>

The 1993 *Vienna Declaration* adopted at the UN World Conference on Human Rights<sup>257</sup> insists on the principle that territorial integrity can be set aside under specific circumstances. While at a first sight the Declaration could be viewed as a copy and paste of the *Declaration on Friendly Relations*, a closer look reveals some differences. Firstly, there is a clearer distinction between the right to self-determination

<sup>254</sup> A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, cit., pp.119–120.

<sup>255</sup> *Ibid.*

<sup>256</sup> M. Weller, *Escaping the Self-Determination Trap*, cit., p. 59.

<sup>257</sup> *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993.

of peoples under colonial dominion or foreign occupation and all the other hypothesis. The paragraph devoted to the right to self-determination of people under colonial dominion is constructed as a specification of the general affirmation that “*the World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights*”.<sup>258</sup> Secondly, the subject is the whole people, not only people under domination, but communities in general. Moreover, it applies a larger human rights approach since it refers to any kind of discrimination. Paragraph 2 of Part I recalls the *Declaration on Friendly Relations* and the Charter of the United Nations, when it provides that the right to self-determination “*shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal right and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind*”. The high level of protection given to the individual vis-à-vis the sovereign power of the State may be interpreted as a sign of the boost of human rights’ law, with a strong emphasis on non-discrimination and on citizens’ participation in the domestic affairs. However, pretending that the saving clause permits remedial secession would be overly expansive.<sup>259</sup> The assumption that the two Declarations leave the message that people has a right to participate to the management of domestic affairs and that there are values fundamental for the international community is to be shared, but there are no sufficient elements to go so far as to a right to secede. Therefore, the most convincing interpretation seems to be that of Cassese, who underlined that only under exceptional circumstances the *Declaration on Friendly Relations* could be interpreted as linking external to internal self-determination.<sup>260</sup>

### 2.3.1.2 Case-law

In looking at case-law supporting the remedial secession theory, the pronouncement of the Canadian Supreme Court in the case *Re Reference Secession of Quebec* plays a pivotal role.<sup>261</sup> For it is the only case a Supreme Court ruled on an explicit claim to

<sup>258</sup> *Vienna Declaration and Programme of Action*, cit., at I.2.2 “*Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right [...] to realize their inalienable right of self-determination*”.

<sup>259</sup> See in this line K. Del Mar: “*The Myth of Remedial Secession*”, cit., who defines remedial secession “*a legal myth*”, at p. 529.

<sup>260</sup> A. Cassese, *Self-Determination of Peoples: a Legal Reappraisal*, cit., p. 120.

<sup>261</sup> For an exhaustive perusal of the the significance of domestic courts’ decision to customary international law as well as the proper role of domestic courts in the international legal order see, *ex plurimis*, D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, And Persuasion*, Oxford, 2011; Tzanakopoulos: “*Domestic Courts in International Law: The International Judicial Function of National Courts*”, *Loyola of Los Angeles International and Comparative Law Review*, 2011, vol. 34, pp. 133- 168; A. Tzanakopoulos, C. Tams: “*Domestic Court as Agents of Development of International Law*”, *Leiden Journal of International Law*, 2013, vol. 26, pp. 531-540.

secede and tackled all the questions presented without reservations, even after 20 years it remains the masterpiece in this field. The Court does not accept the remedial secession theory, but still takes a stand in favour of exceptions to the respect of territorial integrity. In the words of the Court, “*a right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. [...] The other clear case where a right to external self-determination accrues [apart from colonial situations] is where a people is subject to alien subjugation, domination or exploitation outside a colonial context*”. The common view is that the Canadian Supreme Court is opening the way to secession when it acknowledges that for many commentators “*when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as last resort, to exercise it by secession*”.<sup>262</sup> Nevertheless, the Court does not embrace fully this position and further clarifies that “*it remains unclear whether this [...] proposition actually reflects an established international law standard*”.<sup>263</sup>

Vidmar, however, contends that one should not overestimate the Court’s view, since in the economy of the judgement the paragraph concerning the remedial right to secede remains an *obiter dictum*. The Court concluded that the hypothesis of serious violations did not apply to the case of Quebec, therefore a remark was not necessary to reach a decision. Given the rarity of case law dealing with secession, the fact that in the judgment the Supreme Court is sceptical about this possibility leaves few space to the hypothesis of remedial secession. Although reference to secession can be found also in international case-law of the ECtHR, such as in *Loizidou vs. Turkey*<sup>264</sup>, the observations fall in the category of *obiter dictum*. Therefore, Vidmar maintains that the real existence of case-law surrounding a remedial right to secede is doubtful. The analysis of the documents shows that if one wants to find a right to secede, the focus shall be on customary law. However, the *opinio juris* is too fragmented and State practice does not leave open much space for clarity.

### 2.3.2 Practice test for the remedial right theory

For Buchanan, State practice demonstrates that territorial integrity is not absolute, but it applies only to States conducting themselves legitimately. The reaction of the international community to cases of violations of peremptory norms of international law is the main supportive argument. Condemn for the Apartheid Regime in South

<sup>262</sup> Canadian Supreme Court, *Reference re Secession of Quebec*, cit., para.131, p. 285.

<sup>263</sup> Ibid. para. 132.

<sup>264</sup> In the case of *Loizidou v. Turkey*, Judges Wildhaber and Ryssdal affirmed in the concurring opinion: “*In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy*”. See European Court of Human Rights: *Loizidou v Turkey*, Judge Wildhaber concurring Opinion, joined by Judge Ryssdal, 1997, 23 ECHR p. 535, cited by J. Vidmar: “*Remedial Secession in International Law: Theory and (Lack of) Practice*”, cit., p. 39.

Africa was one of the first proofs that a government might lose its legitimacy if it engages in serious violations of international law. The establishment of a safe zone for the Kurds during the Iraqi war on April 1991 was justified on the grounds of alleged genocide policies carried out by Iraq against the Kurds. In both cases, States' behaviour has not been considered legitimate when they (i) deprive the population or part of it of their fundamental rights, or (ii) exhibit racism.<sup>265</sup> In these cases, territorial integrity is not absolute because the State is not conducting itself legitimately. However, the examples mentioned before do not involve directly issues of secession. A good point thus is presented by claiming that State practice does not help that much in shedding light over the remedial right to secede.<sup>266</sup> Lack of practice is usually justified on the grounds that each case is different. Admittedly, it does not come as a surprise that each case is different, due to the fact that secession stems from the interrelation between State and its people. This interrelation is peculiar of every single attempt to secede because it is influenced by social factors, history and a number of considerable variables which go against normative generalisation. States take advantage of the case-by-case argument to avoid the consolidation of practice towards secession.

Nevertheless, it is in our view important not to underestimate critics to the remedial right theory. For instance, Shaw warrants about the consequences of devoting a big power in the hands of a State sub-unit on the basis of an *a contrario* reasoning only.<sup>267</sup> The special nature of the case at hand was one of the major arguments used for the case of Kosovo's declaration of independence, against the application of the remedial secession theory. Anyway, before being engaged in the legal analysis of secession of Kosovo, it seems more appropriate to give a reappraisal of the secession of Bangladesh. Going back until the events that struggled Pakistan in 1971 is necessary because both the community of States and majority of scholars label this as a remedial secession example.<sup>268</sup>

### 2.3.2.1 Bangladesh

The facts originating the secession of Bangladesh can be summarised briefly as follows: Bangladesh constituted the east part of Pakistan, but it was a region detached from the rest of the country by a portion of Indian territory of about 1000 miles. Separation from Pakistan was not only a matter of territory, indeed. East and West Pakistan used different languages, had different traditions and social structures. In

<sup>265</sup> A. Buchanan: "Theories of Secession", Philosophy and Public Affairs, 1997, vol. 26, p.39.

<sup>266</sup> J. Vidmar, Ibid., p. 39; K. Del Mar: "The Myth of Remedial Secession", cit., p. 517, clarifying that examples of interventions by the international community in cases such as Libya or Syria are quite different from the hypothesis surrounding remedial secession.

<sup>267</sup> M. N. Shaw: "Peoples, Territorialism and Boundaries," European Journal of International Law, 1997, vol.8, pp. 478-507.

<sup>268</sup> See in this line J. Dugard and D. Raic, The Role of Recognition and Practice of Self-Determination, cit., pp. 120-123 or C. Griffioen, Self-Determination as a Human Right. The Emergency Exit of Remedial Secession, cit., pp. 123-124. Also in the view of Crawford Bangladesh is the only case of successful secession, see J. Crawford, The Creation of States, cit., p. 415.

sum, they could be considered different sub-units within a State. From 1947, when Pakistan became independent from the UK in the first phase of the de-colonization, the central government adopted discriminatory provisions towards the Bengalese. In fact, there were no Prime Ministers of Bengalis origins – the only one was substituted after three days- and the population could not participate to the public affairs management, i.e. only 10% could serve in the army. The will to gain more autonomy on the part of the Bengalese became clear when the democratic party -Awami League- received huge support in the parliamentary elections and presented some proposals for a federal structure of Pakistan. The answer of the central government was suspension of the National Assembly's inaugural session in March 1917. Perception by the Bengalese of being excluded from the management of public affairs converted their desire of autonomy into independence struggles. In an escalation of violence that culminated in West Pakistan launching air attacks against civilians, the Awami League on 10 April 1971 proclaimed the independence of Bangladesh.<sup>269</sup> Interestingly, the international community did not take a clear stand against the use of force by Pakistan. While the UN focused on humanitarian aid, the answer of the member States was given on a singular basis, in that many decided to suspend trade agreements with Pakistan.<sup>270</sup> No resolution of condemn by the Security Council was adopted.<sup>271</sup> This element from a legal stand point supports the thesis that events in Bangladesh were considered a purely internal issue.<sup>272</sup> However, secession of Bangladesh acquired an international character when a third party, India, intervened to protect the Bengalese. Arguing that military intervention was justified under the grounds of 1) legitimate self-defence in response of some attacks received on its territory and 2) protection of the Bengalese population whose fundamental rights had been seriously breached, the Indian intervention was the key factor for the success of the secession. Without such an involvement by a third power, the small population of East Pakistan could not have manage to defeat the Pakistani army.<sup>273</sup> Again, on the part of the UN there was no formal condemn due to the Russian veto.<sup>274</sup> The General Assembly met to adopt resolution 2793<sup>275</sup> which called for the withdrawal of the Indian forces, but did not refer to secession. Neither the Security Council

<sup>269</sup> A. Pavković and P. Radan, *Creating New States: Theory and Practice of Secession*, cit., pp. 105-108.

<sup>270</sup> V.P. Nanda: "*A Critique of the UN Inaction in the Bangladesh Crisis*", *Denver Law Journal*, 1972, p. 53 ff.

<sup>271</sup> Proposals to address the issue were made by the Secretary General U. Thant, but were refused. The action taken was that of establishing an International Commission of Jurists tasked with providing a legal assessment of the events. See Press Release of the International Commission of Jurists, 16 August 1971, pp. 3-4 cited by A. Tancredi, *La Secessione nel Diritto Internazionale*, cit., p. 357.

<sup>272</sup> V.P. Nanda: "*Self-Determination Outside the Colonial Context: the Birth of Bangladesh in Retrospect*", *Houston Journal of International Law*, 1979, n. 71, pp. 72-74. See also S.F. van den Driest, *Remedial Secession. A right to external self-determination as a remedy to serious injustices?*, cit., pp. 276-278

<sup>273</sup> H. Hannum: "*Rethinking Self-Determination*", cit., p. 49.

<sup>274</sup> With resolutions A/RES/2793 (7 December 1971) and SC/RES/307 (21 December 1971) the General Assembly and Security Council respectively limited themselves to recall the general obligation to respect the territorial integrity of Pakistan and called for a withdrawal of foreign armed force from the territory of Pakistan.

<sup>275</sup> UN General Assembly, A/RES/2793, adopted on 7 December 1971.

adopted binding resolution that condemned the use of force by India, due to the veto by Russia. Bangladesh succeeded in seceding, it was immediately recognized by India and other members of the international community, albeit most of the States waited until Pakistan itself had recognized the newly born entity. Even the UN admitted Bangladesh in 1974<sup>276</sup>, few months after recognition by Pakistan.

From the above, some conclusion on international responses towards secession may be elaborated. Firstly, in principle the case of Bangladesh satisfies the requirements set forth by the remedial secession theory. The Bengalese were settled in a well-defined portion of territory, suffered from serious injustices and were deprived of their right to participate in the public life of the State. Further, the human rights violations carried out during the civil war support the hypothesis of remedial secession. However, difficulties in framing the case from a legal stand point stem from the armed intervention by India. On the one hand, the international community did not seem to be prone to recognise a right to unilateral secession of the Bengalese, as it is demonstrated by the fact that secession and self-determination were not mentioned in the UN documents on the case. On the other hand, the majority of the States recognized Bangladesh after recognition from Pakistan as if they were merely acknowledging a *fait accompli*. The argument in favour of a *fait accompli* is supported also by the fact that the Indian intervention was not condemned, even though it lasted until after Pakistan had recognised Bangladesh.<sup>277</sup> In other words, it could be argued that the secession of Bangladesh can be used instrumentally to support both remedial secession and the suspicious approach by States towards this hypothesis. While academia considers it a case of successful unilateral claim to remedial secession, States' approach remains vague, albeit many elements point in the direction of remedial secession. Within this twofold approach, it has already been argued that it seems more precise to focus on states' attitude instead of scholarly literature. Arguably, the fact that Bangladesh was admitted to the UN only after Pakistan recognised it in 1974 does not leave much room for an entitlement to secede to remedy the state's unlawful behaviour. This view is further supported turning to the case of Kosovo.

<sup>276</sup> See SC resolution 351, dated 10 June 1974 followed by General Assembly resolution 3203, dated 17 September 1974 on admission of Bangladesh to the UN.

<sup>277</sup> A. Tancredi, *La Secessione nel Diritto Internazionale*, cit., pp. 360-362.

### 2.3.2.2 Kosovo

The case of Kosovo adds further uncertainty to the debate over remedial secession and states creation in international law. The international community has in fact supported the argument of the *suus generis* nature of the case not to make it a precedent in the field of the exercise of a right to secede. Even after the ICJ Advisory Opinion on the declaration of independence dated 2010, Kosovo continues to raise contrasting opinions as to whether statehood stemmed from an instance of remedial secession or it has to be considered only a special case in light of the singular history of the Balkan area and the role of the UN.<sup>278</sup>

The prominent view among States is that Kosovo's experience is inapplicable as a precedent to other secessionist movements. The distinctive feature of the making of Kosovo is its uniqueness. Interestingly, neither the Kosovar authorities issuing the independence declaration pretended it to be an established precedent in international law. During ICJ proceedings they expressly affirmed that Kosovo was a special case arising from Yugoslavia's non-consensual break-up and it was not a precedent for other situations. Such express denial of any validity as a precedent is a clear indicator of the absence of a shared *opinio juris* in this field and from the international legal standpoint it runs against the consolidation of custom.<sup>279</sup> Admittedly, it is difficult to take a position. International legal scholars lack sufficient elements to claim that Kosovo amounts as a precedent. In particular, the fact that the combination of NATO intervention and UN administration has not been replied elsewhere weighs against its applicability in other contexts. In the next paragraph the case will be presented and then commented, but at this stage only for the purposes of the inquiry on the right to secede. Although having been recognised by 111 States, Serbia has not yet recognised Kosovo. The case, thus, intertwines also with legal issues surround-

<sup>278</sup> Scholarly literature on Kosovo is huge. To mention only a few, J. Summers, "*Kosovo: from Yugoslav Province to Disputed Independence*", in J. Summers (ed.) *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights*, Leiden-Boston, 2011, pp. 3-51; M. Weller, *The Crisis in Kosovo 1989-1999. Documents and Analysis*, Cambridge, 1999. Although focused on the Advisory Opinion of the ICJ, general overview on the struggle of Kosovo can be found in: M. Vashakmadze and M. Lippold: "*Nothing but a Road towards Secession? The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*", *American Journal of International Law*, 2011, n.105, p. 301-332; T. Christakis: "*The International Court of Justice Advisory Opinion on Kosovo. Has International Law something to say about Secession?*", *Leiden Journal of International Law*, 2001, vol. 24, p. 73 ff.; L. Gradoni, E. Milano (ed.), *Il Parere della Corte Internazionale di Giustizia sulla Dichiarazione di Indipendenza del Kosovo*, Padova, 2011; P. Hilpold (ed.), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010*, Danvers, 2012; K. Oellers-Frahm: "*Problematic Question or Problematic Answer? Observations on the ICJ'S Advisory Opinion concerning Kosovo's unilateral declaration of independence*", *German Yearbook of International Law*, 2011, n. 53, pp. 793-830; A. Tancredi: "*Il parere della Corte internazionale di giustizia sulla Dichiarazione d'Indipendenza del Kosovo*", *Rivista Italiana di Diritto Internazionale*, 2010, vol.3, pp. 994-1052.

<sup>279</sup> A Tancredi: "*Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia*", cit., pp. 38-62.

ing recognition. Therefore, the analysis of the ICJ Opinion will be narrowed to the sections concerning self-determination and remedial secession.<sup>280</sup>

### 2.3.2.3 From the former Yugoslavia to independence: a brief sketch on the Republic of Kosovo

A brief sketch on the birth of the Republic of Kosovo is unavoidable in order to frame the case into appropriate legal categories.

After the II World War Kosovo was deemed to be an autonomous region, although it was acknowledged that there were strong ethnic ties with the Albanians. The same argument was put for Vojvodina that was considered autonomous but strictly linked to Hungary. Despite bids made by Macedonia and Montenegro, Kosovo was put under Serbia's control through an act of the Serbian Parliament.<sup>281</sup> In 1974, the SFRY recognized Kosovars' quests for autonomy by declaring Kosovo and Vojvodina provinces within the SFRY. This meant that Kosovo was not under the legal jurisdiction of Serbia any more. Thus, Kosovo was granted with representation and voting rights on federal decisions, albeit it remained located within the Republic of Serbia.<sup>282</sup> The turning point for the status of Kosovo is represented by the constitutional changes enacted in 1989. Under emergency rule, Kosovo's legal and economic capacity was restored under the Serbian control. Then, in 1990 Serbia revoked the autonomous status of Kosovo. The legality of this decision was highly debated within the international community, because under art. 302 of the SFRY Constitution a change of status could only result from mutual agreement within the parties.<sup>283</sup> The provision suggests that the relationship with the SFRY was the first element to be considered when evaluating a potential change of Kosovo's status. The relationship with Serbia came only after it. In other words, Serbia's claim over Kosovo was only partly legitimate. In fact, it is surprising that at the Dayton peace process the relationship between Kosovo and Serbia was all left in the hands of the Serbs, rather

<sup>280</sup> For the study of the legal issues arising with respect to recognition see *ex plurimis*, J. Dugard, "Recognition and secession (357)", Collected Courses of The Hague Academy of International Law, The Hague Academy of International Law. Consulted online on 03 August 2017 <[http://dx.doi.org/10.1163/1875-8096\\_pplrde\\_ej.9789004227316.009\\_222.3](http://dx.doi.org/10.1163/1875-8096_pplrde_ej.9789004227316.009_222.3)> first published online: 2013pp. C. Ryngaert, S. Sobrie: "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia", Leiden Journal of International Law, 2011, vol. 24, pp. 467-490, H. Hannum: "The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?", Leiden Journal of International Law, 2011, vol. 24, pp.155-161.

<sup>281</sup> T.W. Simon: "Remedial Secession: What the Law Should Have Done, From Katanga to Kosovo", cit., p.115.

<sup>282</sup> R. Bideleux & I. Jefferies, *The Balkans: A Post-Communist History*, Routledge, 2007, p. 529.

<sup>283</sup> SFRY, Constitution, art. 302: "[...] enacting legislation for the entire territory of the Serbian republic (i.e., including Vojvodina and Kosovo) [should be] on the basis of mutual agreement of the assemblies of all three units" cited by T.W. Simon: "Remedial Secession: What the Law Should Have Done, From Katanga to Kosovo", cit. p. 114.

than being cautiously analysed in light of the status of Kosovo under the SFRY Constitution.<sup>284</sup>

As said, the conflict broke down in March 1989 in response to the constitutional amendment voted by Belgrade, which transferred the autonomous powers of the territory to Belgrade. The auto-convened provincial Kosovar Assembly on 2 July 1990 proclaimed the independence of Kosovo within the framework of the Confederation of Yugoslavia, entitled to the same constitutional protection of the other constituent republics. On September 7, 1990, a provisional Constitution for Kosovo was drafted and approved by members of the former representative Assembly. Former representatives then managed to organise a referendum, whose turnout expressed a clear vote cast in favour of independence from Belgrade. The referendum was championed by Kosovo as the legitimizing element of the secessionist struggle, but only Albania recognize its independence.<sup>285</sup>

In light of the above, some early remarks might be useful: in the nineties, secession was seen among the Kosovars as a tool to withdraw from the control of the Serbs, but they wanted to remain within the Federation of Yugoslavia. It was only in 2008, after the dissolution of FY, the escalation of human rights violations, NATO intervention and the establishment of international administration under the UN that the region declared its independence. At this point it remains to be proved whether the declaration of independence stemmed from a unilateral secession claim of last resort.

### **2.3.2.4 Self-determination, unilateral secession and the remedial right theory: which one applies in Kosovo?**

States participating in the ICJ proceedings for the Opinion on Kosovo often defined it a *suis generis* case,<sup>286</sup> a formula which runs against the application of remedial secession in the case at stake, as well as against its consolidation among general international law rules.<sup>287</sup> The remedial right theory could apply to Kosovo on the grounds that the people of the province have suffered from serious injuries and have been deprived of their autonomous status within the SFRY by Serbia. It is assumed that the situation of Kosovo is a special case, in particular due to NATO intervention and the UN interim governance under res. 1244.<sup>288</sup> However, it cannot be denied

<sup>284</sup>T. W. Simon: “*Remedial Secession: What the Law Should Have Done, From Katanga to Kosovo*” cit.; A. Ernst: “*Fuzzy Governance: State-Building in Kosovo Since 1999 as Interaction Between International and Local Actors*”, *Democracy and Security*, 2011, n. 7, pp. 125-126.

<sup>285</sup>M. Weller, *The Crisis in Kosovo 1989-1999. Documents and Analysis*, Cambridge, 1999, p. 64 ff.

<sup>286</sup> See in particular the written statements of Denmark, p. 6; Estonia, p. 11; France, p. 4.; Germany, p. 26; Ireland, p. 12; Japan, p. 5; Latvia, p. 2; Luxembourg, p. 3; Poland, p. 22; Slovenia, p.2.

<sup>287</sup>K. del Mar: “*The Myth of Remedial Secession*”, cit., p. 532, affirming that “*the reasons given for an application were descriptive rather than normative*”.

<sup>288</sup> After NATO bombings to force the Serb government to withdraw its forces from Kosovo, the Security Council met to address the situation and finally referred to it as a threat to peace and stability of the international community. Adopting res. 1244, the SC authorised an international civil and military presence in the territory through the United Nations Interim Administration Mission in Kosovo (UNMIK)

that some elements run in favour of the application of the remedial secession theory. In particular, the fact that people of Kosovo were organized under an established authority, that they were displaced by Serbia<sup>289</sup> and that so far Kosovo has been recognized by 111 States. In this sense, questions may be raised on the appropriateness of critiques made by some commentators, who pointed out that the Kosovar population did not exhaust all the other possible remedies before claiming secession. According to this view, Kosovo cannot rely on the remedial right to secede, because it claimed independence and resorted to referendum early in 1989, when other solutions such as negotiation with Serbia had not been explored.<sup>290</sup> The argument is lacking for two elements. Firstly, when a country is facing internal struggles the line between effective measures provided for by the law and political discourse is very liable. The parent State may always claim that it is willing to grant autonomy rights, but this political strategy might not be followed by effective action towards negotiations. Moreover, if the parent State is carrying out violations of human rights against the seceding entity, proposals for autonomy on its part appear less legitimate.<sup>291</sup> In addition, when the situation was about to collapse the UN guided the negotiations between the parties with a view to establish a form of autonomy for the Kosovars *within* Serbia. However, given the risk of spread of violence in all the Balkans and Eastern Europe, it was clear that that solution was not feasible any more.<sup>292</sup> That was the time when the idea of secession and independence of Kosovo started to gain wide support. On the same pattern, it cannot be affirmed that res. 1244 of the Security Council mandated the return of Kosovo to Serbia. As noted by Weller, not only the resolution recalled the principle of respect for territorial integrity solely in the preamble<sup>293</sup> and not in the operative, but also it did not establish a future settlement. Rather, it was concerned with a *pro-tempore* solution in advance of a final solution<sup>294</sup>. In the words of Borgen, “*resolution 1244 neither promotes nor prevents Kosovo secession*”.<sup>295</sup>

and NATO’s Kosovo force (KFOR). The resolution dealt with the final political status of Kosovo: firstly, it fixed to nine years the presence of UN administration and in the meantime, it provided for negotiation between the parties to determine what would be the final status of Kosovo.

<sup>289</sup> For an account of human rights violation undergone by the Kosovars see Un General Assembly Resolution 48/153 dated 20 December 1993 on the *Situation of Human Rights in the Territory of the Former Yugoslavia*, paras 17-19.

<sup>290</sup> W. R. Slomanson: “*Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule*”, *Miskolc Journal of International Law*, 2009, n. 6, pp. 20-22.

<sup>291</sup> See on this point T.W. Simon: “*Remedial Secession: What the Law Should Have Done, From Katanga to Kosovo*”, *cit.*, p.128.

<sup>292</sup> In this sense, negotiations led by UN Special Envoy for Kosovo Martti Ahtisaari concluded that Kosovo would gain supervised independence, having considered and rejected all other option like, among the others, returning to Serbian sovereignty or forming a union with Albania. When Kosovo unilaterally declared independence in 2008, it committed to implement the Ahtisaari Plan which also included the appointment of an International Civilian Representative (ICR).

<sup>293</sup> UN Security Council S/RES/1244, adopted 10 June 1999, preamble: “*Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia*”.

<sup>294</sup> M.Weller, *Escaping the Self-determination trap*, *cit.* p. 140.

<sup>295</sup> C. J. Borgen: “*Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition*”, *American Society of International Law: ASIL INSIGHT*, February 2008, p. 3, <<http://www.asil.org/insights/2008/02/insights080229.htm>

Looking at States responses to the secession of Kosovo, explicit mention of a right to remedial secession is a rare find. As mentioned before, States are very reluctant to label a case as an example of secession, given its potential to be a precedent for other sub-units. This argument was clearly presented by Serbia during Security Council meetings, when it was pointed out that “*there could be dozens of Kosovo in the world, and all of them are lying in wait for Kosovo’s act of secession to become reality*”.<sup>296</sup> Moreover, some States considered that the primacy of principles of international law such as State sovereignty and territorial integrity excluded in any case an acknowledgment of a right to unilateral secession.<sup>297</sup>

No support for the Kosovars’ claims of self-determination or remedial secession is found in statements by those States that recognised Kosovo. In fact, the recurrent reasons adduced were of a political nature - i.e. considering stability for the Balkans<sup>298</sup> or concluding that recognition of the State was the only feasible solution at that point. Thus, statements by States avoided support from international law rules. Even for highly sensitive matters such as human rights violations or the chance to interpret res. 1244 in favour of secession of Kosovo, legal issues were not explored in depth. As noted by Driest, however, Albania and the United Arab Emirates expressly claimed the existence of a right to self-determination for the Kosovars and based their statement of recognition in light of their right to self-determination.<sup>299</sup>

Proceedings<sup>300</sup> at the ICJ provide a good insight on the remedial secession theory. Many States touched upon the legal standing of a right to secession as a response to serious injustices, albeit framing the case of Kosovo as a special one.<sup>301</sup> The argu-

<sup>296</sup> Statement by President Tadic at the UN Security Council 5850th meeting, 11 March 2008, UN Doc. S/PV.5850, cited by S. F. van den Driest, Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?, cit., pp. 236-237.

<sup>297</sup> See i.e. statements by the Russian Federation and Vietnam at the 5839<sup>th</sup> meeting of the SC, in UN Doc S/PV.5839

<sup>298</sup> See for instance the statement made by Germany which claimed that further negotiations would have been useless. “*The German Government is convinced that after so many years, further negotiations would not have resulted in a breakthrough*”. On the same pattern, the Turkish representative hoped that “*the independence of Kosovo will present an opportunity for the enhancement of stability and confidence among the countries in the region*”.

<sup>299</sup> Statement by Prime Minister of Albania, Berisha: “*the Government of Albania considers the creation of the State of Kosovo as a historical event, sanctioning the right of Kosovo citizens for self-determination*”, 24 April 2008. See also statement by the United Arab Emirates: “*recognises Kosovo in accordance with its firm support for the principle of the legitimate right to self-determination*”, 14 October 2008. See for references Driest p. 242

<sup>300</sup> Advisory Opinions are envisaged by artt. 65-68 of the ICJ Statute. According to Art. 66 (2) “*The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question [...]*”. Moreover, any State willing to participate may ask to do so. In practice, after a request for Advisory Opinion is filed, the Court draws up a list of entities entitled to participate in the proceedings by submitting written statements. Usually those statements are published at the beginning of the oral proceedings.

<sup>301</sup> See Arcari M., Balmond L. (eds.), *La déclaration d’indépendance du Kosovo à la lumière de l’avis de la Cour Internationale de Justice du 22 juillet 2010*, Milan, 2011.

ment that Kosovo was a special case was supported by many intervening States<sup>302</sup> and opposed not only by Serbia, but also by Cyprus, Argentina and Bolivia. The common position of the latter three states was that no matter how the majority of States labelled the case, the existence of Kosovo proved that the international community consented to the fracturing of a State.<sup>303</sup> Alongside written comments, the Dissenting Opinion annexed to the judgement by Judge Koroma pointed in the same direction, stressing the chance that “*the Court’s opinion will serve as a manual for secessionist groups*”.<sup>304</sup> Kosovo itself brought the secessionist argument only after it had been mentioned by many States. It claimed to be entitled to secede given “*the decade of deliberate exclusion for governing institutions and violations of basic human rights*”.<sup>305</sup> The wording suggests that secession was conceived as the last measure to be taken in light of continuous violations suffered by the unit.

With respect to the arguments adduced to justify secession by Kosovo, scholarly literature has distinguished between two groups of States submitting written and oral statements. Those that presented arguments in favour of the remedial secession theory all justified their position on the grounds of an *a contrario* reading of the *Declaration on Friendly Relations*, or on the *Vienna Action Plan* and on case-law related to the Åland case and the secession of Quebec. However, no State considered the right to self-determination to include an unconditional right to secede. Germany is an exception in this sense, since it took a stand towards a right to external self-determination outside the colonial contest. In its written statements it stressed that “*there would be no remedy for a group which is not granted self-determination that may be due to it under international law. The majority in the State could easily and with impunity oppress the minority, without any recourse being open to that minority*”.<sup>306</sup> This is not tantamount to recognise a general right to secede. Germany claimed - as many other countries like Estonia, the Netherlands, Finland or Ireland, although giving different explanations<sup>307</sup> - that under exceptional cases denial of in-

<sup>302</sup> The uniqueness of the case was expressly presented as an argument by Saudi Arabia, Austria, Denmark, France, Norway, the Netherlands and the UK. In the report of the USA State Department, the uniqueness of the case affects the legality and legitimacy of the secession of Kosovo to the extent that no other seceding entities can rely on this precedent.

<sup>303</sup> See, *inter alia*, Written Comments of Serbia, 17 July 2009, paras. 128-139; Written statement by Bolivia, 17 April 2009, para. 1; Written Comments by Argentina CR 2009/26 December 2009, paras. 30-31; Cyprus, Records, CR 2009/29, 7 December 2009, para. 57.

<sup>304</sup> ICJ, *Accordance with International Law of the Declaration of Independence by Kosovo*, Advisory Opinion, cit., Dissenting Opinion by Judge Koroma, para. 4.

<sup>305</sup> ICJ, *Advisory Opinion on the Declaration of Independence by Kosovo*, cit., Further Written Comments of Kosovo, 17 July 2009, para. 4.40

<sup>306</sup> ICJ, *Advisory Opinion on the Declaration of Independence by Kosovo* Written Statement of Germany, 15 April 2009, p. 34.

<sup>307</sup> The Written Statement of the Netherlands, i.e. revolved around State responsibility for breaches of peremptory norms of international law. Along this line, a serious breach of the right to self-determination would lead to justify unilateral secession. In other words, the latter would be the consequence of a violation of a particular peremptory norm- self-determination. See ICJ, *Advisory Opinion on the Declaration of Independence by Kosovo*, Written Statement of the Netherlands, 17 April 2009, para 3.11.

ternal self-determination may justify quest for independence.<sup>308</sup> Interestingly, Russia was the only one to argue in express words that there is a right to remedial secession, albeit subject to tough restriction. Para. 88 of the Russian written statements reads: “the “safeguard clause” ... may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question.”<sup>309</sup>

How did the ICJ respond? In the Judgment, the ICJ never resorted to self-determination and consciously avoided all possible references to Kosovars’ right to self-determination. For the Court, proceedings demonstrated that no *opinio juris* can be found on the contemporary scope of self-determination and the existence of a right to secede. It was observed that written and oral submissions by States taking part in the proceedings “showed radically different views”<sup>310</sup> on the purport and application of self-determination beyond decolonisation and on a right to unilateral secession.<sup>311</sup> The silence of the ICJ has been criticised both in literature and by judges<sup>312</sup> taking part in the case. If in the idea of the Court, parsimony in the legal reasoning was the best solution to avoid conflict, in reverse the reticence of the ICJ has ended up in boosting secessionist attempts. As Peters claims, “the *Advisory Opinion* did have the reverse effect of a bad precedent through its silence”.<sup>313</sup> Some remarks are reasonable, given that the ICJ really had one of the best opportunities ever to express its view about secession and self-determination. Nevertheless, it should be born in mind what the role of the Court is. Notably, it is called by the Statute to decide on disputes between states and to answer the legal question submitted to it in

<sup>308</sup> Nevertheless, the linkage between internal self-determination and secession may be misleading, in that it may lead to believe that the holders of the right to self-determination are the same of those of the right to secede. See on this point this chapter, para. 6.

<sup>309</sup> ICJ, *Advisory Opinion on the Declaration of Independence by Kosovo*, Written statement of Russia, p. 31, para 88. The statement strengthens the link between secession and self-determination by stating at para. 90 “outside the colonial context, international law allows for secession of a part of a State against the latter’s will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned is continuously subjected to most severe forms of oppression that endangers the very existence of the people”.

<sup>310</sup> ICJ, *Advisory Opinion on the Accordance with International Law of the Declaration of Independence with respect of Kosovo*, cit., para. 82.

<sup>311</sup> *Ibid.*

<sup>312</sup> See Declaration of Judge Simma, paras. 2-3 and Separate Opinion of Judge Sepúlveda-Amor, para. 35 claimng that “the scope of the right to self-determination, the question of ‘remedial secession’ [...], the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions”.

<sup>313</sup> A. Peters: “Has the *Advisory Opinion*’s finding that Kosovo’s Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?”, M. Milanovic and M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, Oxford, 2015, p. 11. Moreover, express mention of the case of Kosovo as a bad precedent during the proceedings came from Argentina, Cyprus and Azerbaijan.

case of an advisory opinion. Thus, it is not supposed to act as a scholar – tackling issues because they are very much disputed.<sup>314</sup>

Although it can be aptly noted that the Court has lost one of the most important chances to shed light over the legal framework surrounding territorial changes, one can hardly find a shared opinion on the topic among the international community. Hence, the case of Kosovo neither denies nor confirms the acceptance of the remedial right theory in international law. On the one side, the Court has not dismissed the remedial secession theory; on the other side, the argument of the *suis generis* nature of the case cannot be rejected as such. Serious breaches of human rights and denial of autonomous powers by the central government occurred in Kosovo, but the interim governance established by the UN internationalised the issue. Hence, from the legal stand point the administrative power of the then State of Kosovo was put in a grey area. This makes the case an *unicuum*, which can hardly be used to support or dismiss the consolidation of a rule.

### 3. International due requirements for secession

In the opening of this Chapter, particular emphasis has been put on the advantages of distinguishing between a procedural study of secession and secession as a factual instance. Moreover, it was observed that although one could expect that secession hijacks only the territorial integrity of multi-ethnic states with a troublesome past, recent examples of attempts to secede show that separatist movements currently oppose also well-established democracies.<sup>315</sup> It was also pointed out that when international law looks at secession as a process, it might be interested in regulating it. It is now time to see why it would be interested and how it would do so. This argument has been presented by Tancredi, who has elaborated a *normative due process for se-*

<sup>314</sup> See A. Pellet: “Kosovo: the Question not Asked”, M. Milanovic and M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, cit., p. 269.

<sup>315</sup> Some independence movements aimed at secession have developed also in the Hawaii Island. Legal issues stemming from the definition of the Hawaiian people have been brought in front of the Supreme Court in the case *Rice v. Cayetano*, 528, US SC, (495) 2000. The Court was called to render its judgement on the distinction between native and non-native Hawaiian provided for by the Congress in the Joint Resolution adopted at the first session in 1993. A native Hawaiian is “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii”. The Hawaiians contested the validity of the referendum held on 1959, which declared that the island would be part of the USA. The grievance relied on the fact that those individuals settled in the island from one year were allowed to vote, thus the election could have been vitiated. The Supreme Court found that there could be a contrast between the fifteenth amendment and the definition of the natives. The main argument was that in order to let the natives exercise their right to internal self-determination – that is to say to participate in the affairs of the community- the community was holding an election on racial discrimination. See B. M. Lusignan: “One of These Things is Not Like the Others? A Comparative Analysis of Secessionist Movements in Vermont, Quebec, Hawaii and Kosovo”, 15 April 2009, available at SSRN: <http://ssrn.com/abstract=1385764>.

*cession*<sup>316</sup> by discerning what he sees as the permanent features of practice and *opinio juris* about secession at the international level. Before entering into the details, some preliminary remarks are necessary. Firstly, the *normative due process* does not aim at being a set of rules providing a legal entitlement to statehood. It is rather “*a normative course*”.<sup>317</sup> Secondly, the premise for the legal study of secession is slightly different from that defended by Tancredi in his monograph. The distinguished commentator refers to *secessionist self-determination*, that is to say that separation occurred through secession can still be considered a form of external self-determination.<sup>318</sup> By contrast, this study attempts to disentangle secession from self-determination from a purely ontological perspective and from an international legal one, as will be illustrated in section 5. In so doing, *the normative due process* will be used to describe how international law might step in in the process of secession by sub-units which do not enjoy the international right to self-determination. The *normative due process* is applied as a normative course to explain the current developments about secession in the international community, outside of the hypothesis of serious violations of human rights. Hence, in this framework the emphasis will be on the potential use and impact of the free expression of the will of the people through a referendum. In the next Chapter, then, it is verified whether there are sufficient elements to claim that according to international law a referendum may legitimise per se a secession or whether there is an international obligation to conduct a referendum to secede. Thirdly, claiming that secession is better studied as a process does not entail that secession is not a fact. It was already pointed out that secession is often viewed as a political fact. If so, the argument continues, the international legal order does only take for granted the formation of a new entity, provided that it is able to effectively establish itself.<sup>319</sup>

If one were to fully agree with this argument, however, some precedents in the international legal arena could not be explained. The recognition requirements set by the Badinter Commission for the Former Yugoslavia,<sup>320</sup> the cases of Abkhazia or South Ossetia, the reaction of the international community to the Crimean referendum go against a complete absence of international rules in this field. In those cases the international debate always resolved around themes of human rights respect, denial of the use of force and the expression of will of people, while remaining an-

<sup>316</sup> A. Tancredi, *La Secessione nel Diritto Internazionale*, cit., pp. 669-714 and the contribution “*A Normative Due Process in the Creation of States through Secession*” in M.G. Kohen, *Secession: International Law Perspectives*, cit., pp. 171-207.

<sup>317</sup> A. Tancredi: “*Some Remarks on the Relationship between Secession and General International Law in light of the ICJ Kosovo Advisory Opinion*”, P. Hilphold, *The Advisory Opinion of the Declaration of Independence of Kosovo*, cit., p. 80.

<sup>318</sup> In the first elaboration of the *normative due process*, it seems that the distinguished commentator supported the adoption of the *remedial secession theory*, although a precise scrutiny of the pitfalls of the theory is provided. Recently, the position of the author vis-à-vis the legal soundness of remedial secession has been more critical. See on this point A. Tancredi: “*Secessione e diritto internazionale: un’analisi del dibattito*”, *Diritto Pubblico Comparato ed Europeo*, Aprile-Giugno 2015, n.2, pp. 449-478.

<sup>319</sup> See this Chapter para 2.2.

<sup>320</sup> See Introduction to this study, pp. 11-24 and Chapter 3 pp. 143-152.

chored to the principle of effectiveness.<sup>321</sup> Although it is not free from ambiguities, the *normative due process* has the prize of capturing the three above mentioned issues, which repeatedly arise in the analysis of states' reactions against secessions. Therefore, the model meets the purposes of the present study.

Another advantage of the model lies in the ability of the author in contextualising the interest of the international community toward secession with the “*domestic*” nature of secession itself. Tancredi observes that the international community has become more and more concerned with those events which may seriously endanger its common values, such as international peace and stability.<sup>322</sup> Human rights violations and foreign intervention have been shaping the reactions of the international community to instances of secession. It holds true for Bangladesh,<sup>323</sup> but also for Kosovo. Here in particular the intervention by NATO has casted many doubts and the normative framework of the actions taken by the Atlantic alliance as well as by the SC is still debated. The 2014 secession by Crimea has triggered again questions of international law just mentioned. It is not surprising that one of the most striking arguments brought by Russia to justify the increase in Russian militias in Ukraine was the necessity to secure a free referendum protecting fundamental human rights of citizens holding a Russian passport and/or Russian speaking citizens living within Ukraine.<sup>324</sup> Therefore, even without clear international rules on unilateral secession, it seems that some guidelines on how secession should proceed are provided by the international legal order, with the aim of avoiding that secessionist struggles lead to an escalation of violence.

The ultimate purpose of the international action would be to avoid that further divergences between the parties give rise to an escalation of violence which could threaten the peace and stability of the international system.<sup>325</sup> In other words, the basic idea is that secession has such a strong potential to destabilise the international community that it would be in the interests of the States to set up rules to guide this

<sup>321</sup> This argument was put forward already in front of the Canadian Supreme Court, see. A. Buchanan (ed.) *Self-Determination in International Law. Quebec and Lessons Learned*, cit., p. 269. The cases of Abkhazia and South Ossetia will be scrutinized in Chapter 4 due to their relevance for legal questions surrounding recognition in international law. At this stage, it suffices to mention that the two regions have been struggling for independence from Georgia since 1992. South Ossetia declared independence after the end of the 1991-1992 South Ossetia war against Georgia. Abkhazia followed after two years, in 1994. Although Georgia considers them a part of its sovereign territory, both regions enjoy the support of the Russian Federation. In 2008, the international recognition of Kosovo led to a revival of tensions culminating in a conflict, involving also Russian militias sided with the separatist regions. With the help of the Russian Federation, the 2008 war ended with the expulsion of the Georgian militias from both territories and with Russia's recognition of Abkhazia and Ossetia as independent entities. Nevertheless, recognition by the Russian Federation has remained mostly isolated, so that it is common to refer to Abkhazia and South Ossetia as unrecognised States.

<sup>322</sup> A. Tancredi, “*A Normative Due Process in the Creation of States through Secession*”, in M.G. Kohen, *Secession: International Legal Perspectives*, cit., p. 188-190.

<sup>323</sup> See this Chapter, para. 2.3(b)(ii).

<sup>324</sup> See V. Tolstykh: “*Reunification of Crimea with Russia: a Russian Perspective*”, *Chinese Journal of International Law*, 2014, vol. 13, pp. 879-886. For the purposes of secession, the case of Crimea will be tackled in the next para 3.4.

<sup>325</sup> A. Tancredi: “*A Normative Due Process in the Creation of States through Secession*”, cit., pp. 171-207.

process.<sup>326</sup> Secession in fact threatens the existing territorial balance and the geopolitical assessment of the international community. Even though struggles occur at the domestic level, they have the potential to endanger the international community. This results in international law guiding the process of secession from the parent State. Here is the *normative due process theory*.

If one embraces the *due process theory*, it is not surprising that the attempted secession by Scotland was managed by the parties with a step-by-step process, based on negotiations and popular consultations. In this case in fact the UK pledged to accept secession, proving that there could be cases in which states might be prone to rule on secession and even to recognise it, in particular throughout a referendum. Support for a normative understanding of seceding processes could come also from the ICJ method of approaching the question posed by the General Assembly in the Kosovo case: the Court analysed separately the questions of if, and how, states are created in international law. The ICJ evaluated the question from the point of view of legality and refrained to use notions of legal nullity or invalidity. The opinion is developed on a double path: on the one side the ICJ claims that declarations of independence are not per se in breach of a specific international rule.<sup>327</sup> Just before, the ICJ at para. 81 had claimed that a declaration may be illegal if held in connection with a violation of a peremptory norm of international law. The Court in fact stated that “*the illegality attached to the declarations of independence thus stemmed [...] from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)*”. The idea therefore could be that a fact – notably the creation of a State- could be also legally characterised. In the model, Tancredi enucleates three *due* requirements: 1) the ban on the use of force; 2) respect of the principle of *uti possidetis juris* and 3) resort to popular consultation.

### 3.1 The ban on the use of force

The main argument is that secession cannot take place through a breach of the *jus cogens* norm prohibiting military action. This view is supported by looking at (i) general international law, law of treaties and international documents; (ii) case-law and (iii) State practice. We have already come across the rule prohibiting the use of force several times in the previous pages: military support was tolerated by interna-

<sup>326</sup> A. Tancredi: “*A Normative Due Process in the Creation of States through Secession*”, in M.G. Kohen, *Secession: International Law Perspectives*, cit., pp. 171- 207. The position does not deny that that secession retains a strong domestic dimension. As Tancredi underlines, in the context of self-determination a *normative due process* is not new to international law, given that decolonization was guided by the *uti possidetis* principle. Normative regulation of the making of new States therefore is rather a novelty for the international legal order.

<sup>327</sup> ICJ, *Accordance with International Law of the Declaration of Independence with respect to Kosovo*, cit., para. 88 “*the Constitutional framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly’s request*”.

tional law in the context of decolonisation but is prohibited in non-colonial situations.

The prohibition to military intervene during secessionist conflicts stems from the combination of *jus cogens* rules and the ban on interference in domestic foreign affairs.<sup>328</sup> The principle of territorial integrity reinforces the prohibition, in that, using the words of the ICJ in the Advisory Opinion on Kosovo “*it addresses inter-State relations*”.<sup>329</sup> Prohibition of armed intervention is acknowledged by many international instruments: not only by the *Declaration on Friendly Relations* mentioned before, but also by the declaration on the *Definition of Aggression*. At art. 5.3 the *Declaration* reads “*no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful*”.<sup>330</sup> Support for the illegitimacy of secession carried out with the use of force by third parties can be found also by looking at the law of treaties, in particular to succession to treaties. Article 6 of the *Convention on Succession to treaties*<sup>331</sup> reads “*the present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations*”. The same provision can be found in the *Convention for the Succession to Archives, Property and Debt*<sup>332</sup> at art. 3. Hence, rules on succession apply to new entities created in compliance with general rules of international law, in application of the principle *ex inuria ius non oritur*.

For case-law, international courts have been confronted with legal questions about the use of force many times and scholarly literature analysing international decisions is huge.<sup>333</sup> While focusing on the issue at this point would shift the attention from the subject of the present research, it is interesting to mention some latest pronouncements. Firstly, the ICJ Advisory Opinion on Kosovo could run in favour of

<sup>328</sup> For the sake of clarity, it has to be pointed out that in international law aggression and foreign intervention are subject of two different rules, albeit the two are sometimes closely linked. Here non-intervention is used to ease the reading with a view to include all the hypothesis of the use of force *minoris generis*, which play a fundamental role for the success of secession. Those hypotheses have been pointed out by the ICJ in *Military and Paramilitary Activities against Nicaragua (Nicaragua v. United States of America)*, 1986, reprinted in ILM, 1986, vol. 25, p. 1023, para. 242 and 246.

<sup>329</sup> On this point: A. Tancredi, *La Secessione in Diritto Internazionale*, cit., p. 674; A. Pellet: “*Avis Juridique sur certaines questions de droit international soulevée par le renvoi*”, in A. Buchanan (ed.), *Self-Determination in International Law, Quebec and Lessons Learned*, cit., para. 19, T. Christakis: “*Self-Determination, Territorial Integrity and fait accompli in the Case of Crimea*”, cit.

<sup>330</sup> UN General Assembly, *Definition of Aggression*, annexed to resolution 3314, adopted by consensus on 14 December 1974, <http://daccess-ods.un.org/TMP/1552411.61584854.html>

<sup>331</sup> *Vienna Convention on Succession of States in Respect to Treaties*, done at Vienna on 23 August 1978. Entered into force on 6 November 1996. United Nations, Treaty Series, vol. 1946, p. 3 ff.

<sup>332</sup> *Vienna Convention on Succession of States in Respect to State Property, Archives and Debts*, done at Vienna, on 6 April 1983, Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, vol. II (United Nations publication, Sales No. E.94.V.6).

<sup>333</sup> See for international law and the use of force the latest contributions: M. Weller (ed.) *The Oxford Handbook of the Use of Force in International Law*, Oxford, 2015; C.D. Gray, *International Law and the Use of Force*, III ed., 2008. For the role of the International Court of Justice’s case-law on the use of force: C.D. Gray: “*The International Court of Justice and the Use of Force*”, C.J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice*, Oxford, 2013, pp. 237-262; J.A. Green, *The ICJ and Self Defence in International Law*, Oxford-Portland, 2009.

the regulation of secessionist processes. The Court explicitly focused on the unlawful use of force in international relations. The fact that the creation of new entities should not occur with the use of force is not to be intended as a statement of purpose, as the ICJ further substantiates its position. The Court's view is supported by reference to practice, in particular with res. 787<sup>334</sup> addressing the conflict in Bosnia-Herzegovina.<sup>335</sup> Secondly, the European Court of Human Rights (ECtHR) has recently confronted itself with issues of military support and armed conflict too. Called to judge upon cases involving Armenia and Nagorno-Karabakh on the individual right to access to property, the Court has reinforced the interpretation of the general international law rule on military support and on independent entities in armed conflicts. The Court analysed the military involvement of Armenia within the attempt to secede carried out by Nagorno-Karabakh and concluded that, although the composition of the forces that occupied Nagorno-Karabakh could not be clearly established, "*it is hardly conceivable that Nagorno-Karabakh [...] was able, without the substantial military support of Armenia, to set up a defense force [...] that [...] conquered the whole or major parts of seven surrounding Azerbaijani districts*".<sup>336</sup> Judge Pinto de Albuquerque qualifies the responsibility of third states giving military support to the seceding entity in the following terms: "*the presumption against secession is even more forceful if it came about by means of the use of force, since this contradicts the customary and treaty prohibition of the use of force acknowledged by the 1928 General Treaty for the Renunciation of War, Article 10 and 11 of the 1933 Montevideo Convention on the Rights and Duties of States and Article 2 § 4 of the UN Charter*".<sup>337</sup>

### 3.2 The respect of the *uti possidetis juris* principle

The principle of *uti possidetis juris*<sup>338</sup> postulates that the creation of a new State must occur within the previous existing administrative boundaries. This rule was

<sup>334</sup> See SC/RES/787, dated November 16 1992

<sup>335</sup> A. Tancredi: "*Some Remarks on the Relationship between Secession and General International Law in light of the ICJ Kosovo Advisory Opinion*", P. Hiplhold, The Advisory Opinion of the Declaration of Independence of Kosovo, cit., p. 81.

<sup>336</sup> European Court of Human Rights (hereinafter ECtHR), case of *Chiragov and Others v. Armenia*, Grand Chamber, 16 June 2015, application no. 13216/05, and of *Sargsyan v. Azerbaijan*, Grand Chamber, 16 June 2015, application no. 40167/06.

<sup>337</sup> Ibid, Separate Opinion by Judge Pinto de Albuquerque, p. 151.

<sup>338</sup> The principle of *uti possidetis juris* has been the subject of a huge literature. See among the others: G. Nesi, *L'Uti Possidetis nel Diritto Internazionale*, Padova, 1996; M.N. Shaw: "*The Heritage of States: The Principle of Uti Possidetis Juris Today*", British Yearbook of International Law, 1996, n. 67, pp. 97-101; S.R. Ratner: "*Drawing a Better Line: Uti Possidetis and the Borders of New States*", American Journal of International Law, 1996, vol. 90, p.590 ff. For our purposes, it is useful to recall its basic characteristics. The principle concerns the limits of (i) the countries belonging to the same colonial empire and (ii) the countries which already enjoyed an international status, disentangled from the colonial contest. It has been derived from the practice established by former Spanish colonies of Latin America, but subsequent practice and case-law has extended its scope of application to contests of dissolution as well as of secession. The ICJ in *Frontiers Dispute, (Burkina Fasu v. Mali)* at para. 20 confirmed its

consistently applied during the decolonisation period, yet part of the academia has put forward the argument of an unsolvable conflict between self-determination and *uti possidetis*. How can the right to self-determination, which is based on freedom of choice by the people, come to terms with the maintenance of boundaries established by the colonial powers? In this view the principle would even favour the spreading of secessions, because sub-units would be more prone to rebel against unjustified persistence of colonial boundaries.<sup>339</sup> However, the argument is not persuasive. Arguably, the different purport of *uti possidetis* and self-determination might avoid conflicts between the two. While self-determination revolves around the choice of external and internal status, *uti possidetis* concerns the territory of the nascent State only.<sup>340</sup> This should not lead to claim that the principle of *uti possidetis* comes into the arena only once the right to self-determination has been put in practice, as a sort of consequence to the exercise of the right to self-determination.<sup>341</sup> Such approach would be too restrictive. Territoriality is an inextricable component of the right to secede as well as of the exercise of external self-determination. Sub-units seeking independence advance claims on a portion of territory, in light of historical or cultural link with that portion of land. Although we have already showed that the notion of people cannot be constructed around the territorial element only, secessionist movements are territorial in nature. Arguably, the territory under which the secessionist struggle develops is often a constitutionally recognised one— see Scotland and the UK or South Tyrol for Italy.<sup>342</sup> In other words, it is a domestic border that could become the new international border.<sup>343</sup>

In this line, Vidmar aptly underlines that “*new international borders are not colonial-like arbitrarily drawn boundaries, but rather are historically realised lines delimiting self-determination units [...] and for this reason it cannot be expected that*

overall application by stating that: “*it is a general principle which is logically connected with the phenomenon of the obtaining of independence wherever it occurs*”.

<sup>339</sup> S. R. Ratner: “*Drawing a Better Line: Uti Possidetis and the Borders of New States*”, cit., pp. 616-617.

<sup>340</sup> Of this view: A. Peters: “*The Principle of Uti Possidetis*”, C. Walter (ed.), *Secession and Self-Determination in International Law*, Oxford, 2014, pp. 130-133; S.F. van der Driest, *Remedial Secession. A right to external self-determination as a remedy to serious injustices?*, cit., p. 93; M.N. Shaw: “*The Heritage of States. The Principle of Uti Possidetis Juris Today*”, cit., pp. 97-101.

<sup>341</sup> T. Franck, R. Higgins, A. Pellet, M Shaw and C. Tomuschat: “*The territorial integrity of Quebec in the Event of Attainment of Sovereignty*”, in A. Buchanan (ed.), *A.F. Bayefsky, Self-Determination in International Law. Quebec and Lessons Learned*, The Hague-London-Boston, 2000, pp. 241-304.

<sup>342</sup> See Chapter 1, pp. 44-46. For the Italian region of Trentino South Tyrol, at the end of the I World War the actual province of Bolzano saw a clear majority of German speaking inhabitants, whilst in the part of Trento the majority was Italian. The peace treaty of Saint-Germain established the cession to Italy of both Trentino and South Tyrol. For the latter, in particular, geographical reasons were at the basis of the incorporation and were counterbalanced by the pledge by the Italian government to take particular measures to protect the German speaking minority. The South-Tyrolese separatist movement grew up during the fascist period, when the regime adopted repressive measures towards the German speaking minority. Regardless of the quests for separation, South Tyrol remained Italian even after the II World War. The autonomy statute adopted in 1949 was considered inadequate by the minority and a long period of tensions characterized the years between 1960 and 1990. The quarrel was solved only when the parent State in the late 90ies granted a large form of self-government to the region. See for an overview O. Peterlini, *Autonomia e Tutela delle Minoranze nel Trentino Alto Adige*, Bolzano-Trento, 2000.

<sup>343</sup> A. Tancredi, *La Secessione nel Diritto Internazionale*, cit., p. 639.

*such a State could be newly created*".<sup>344</sup> By contrast, the approach illustrated before seems to fail to capture the role of guidance that the *uti possidetis* offers during the development of the process of secession and for State creation. If *uti possidetis* was not in force, whenever a separatist unit located within established administrative borders manages to extend itself to other parts of the parent State's territory—through whatever means, including conquest—, those extended frontiers would be the borders of the new entity. Interestingly enough then, the principle of territorial integrity would enhance instability, because it would protect the new frontiers. This possibility is clearly dismissed by the jurisprudence of the ICJ on the *uti possidetis* principle. In the dispute *Burkina Faso v. Mali* the ICJ held that the purpose of *uti possidetis* "is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power".<sup>345</sup> When addressing the principle, the Court confronted itself with one of the major questions surrounding *uti possidetis*, notably the time for its application. One may argue that the frontiers should be frozen from the moment a new entity is formed. But then, determining when a new State is actually born is difficult in practice. Following the ICJ Judgement in *Burkina Faso v. Mali*, the *uti possidetis* rule should be applied to the State "as it is".<sup>346</sup> However, if we look at practice in the case of dissolution of the Former Yugoslavia, deviations from the approach of the ICJ can be found. The Badinter Commission was more cautious in applying *uti possidetis juris* to the dissolution of the former Yugoslavia, albeit it reaffirmed its application in case of dissolution of States.<sup>347</sup> Given the difficulties intrinsic in approaching the dissolution of a federation, in particular in framing into clear legal categories different situations of (i) secession, (ii) dismemberment and (iii) succession of States, the Commission felt the need to justify the application of *uti possidetis* by relying on the Yugoslav Constitution.<sup>348</sup> The *uti possidetis* principle was encapsulated into the domestic level and linked to public consultations. The Constitution in fact stated that modification of boundaries within the Republics of the Federation might take place based on the consent of people concerned.<sup>349</sup> Moreover, the frontiers not to be modified were considered the initial ones and not the ones standing at the moment of independence.

<sup>344</sup> J. Vidmar, *Democratic Statehood in International Law*, cit., p. 14.

<sup>345</sup> ICJ, *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, cit. p. 554. See also ICJ, *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, 1992, ICJ Report 1992, p. 383 ff.

<sup>346</sup> ICJ, *Frontiers Dispute (Burkina Faso v. Mali)*, para. 23, p. 566, referring to the *photograph* of the existing State.

<sup>347</sup> See Badinter Commission, Opinion n.3, 11 January 1992, reprinted in *International Legal Materials*, 1992, vol. 31, p. 1499.

<sup>348</sup> Badinter Commission, Opinion n. 3, cit., p. 1500 "the principle applies all the more readily to the Republics since the second and fourth paragraph of the Constitution of the SFRY stipulated that Republics' territories and boundaries could not be altered without their consent".

<sup>349</sup> According to Art. 5 of the Constitution of the SFRY the Republics' territories and boundaries could not be altered without their consent. See. C. Navari: "Territoriality, Self-Determination and Crimea after Badinter", *International Affairs*, 2014, vol. 90, pp. 1299-1318; P. Radan: "Post-Secession International borders: a Critical Analysis of the Opinion of the Badinter Arbitration Commission", *Melbourne Law Review*, 2000, vol. 24, pp. 50-76.

As Tancredi maintains, the Badinter Commission declared that Croatia was established as a sovereign State from 8 October 1991,<sup>350</sup> after a three-months suspension of the declaration of independence (from 25 June 1991) for the Brioni cease-fire Agreement for Bosnia and Herzegovina. By contrast, statehood was formally acquired only after the results of the independence referendum, notably on 6 March 1992. The borders of the States were those established before the acknowledgment of statehood by the Commission. In fact, at the time of acquisition of statehood, Croatia had lost control of part of its territory, while on the territory of Bosnia and Herzegovina the Republic Srpska had been created. This confirms the hypothesis that for the international community the borders to be guaranteed by the *uti possidetis* principle are fixed once the process of dissolution / secession or other territorial reapportionment begins.<sup>351</sup> It does not come as a surprise that the international community rejected the secessionist claims advanced by the Serbians living in the Republic of Croatia and Bosnia Herzegovina respectively. States' support for internationally recognized borders implied respect for the pre-existing federal boundaries of the SFRY. In sum, although sometimes the application of *uti possidetis* has casted some doubts – e.g. the critical date for application in the case of dissolution of SFRY- the principle remains a guide for territorial changes and its application supports the assumption that “*the emergence of a State – at least from a procedural viewpoint- does not happen in a law-free zone but is embedded in international prescriptions*”.<sup>352</sup>

### 3.3 The role of territorial referendum

The last requirement can be found in the tendency of secessionist movements to legitimate their claim to independence by resorting to referenda – such as in cases of Eritrea, South Sudan, Crimea and Scotland. At this point it would be premature to gather insight into the legal status of territorial referendum in international law. This Chapter is aimed at giving a legal reappraisal about secession, with a view to engage in the discussion about the role of referenda in the context of seceding claims in the next Chapter. Nevertheless, it is important to stress that according to the *normative due process theory*, the referendum is a procedural step which adds legitimacy to the quest for secession. One element which further corroborates this view is the fact that when it was not held, the international community requested territorial referendum, thus confirming the importance attributed to it. An example of this trend can be seen in the Comprehensive Peace Agreement of 2005 between Sudan and South Sudan that was drafted under the support of the UK and USA with a view to secure popular consultation for any territorial change. Before that, the EU area saw the increase in

<sup>350</sup> Badinter Commission, Opinion n.11, 16 July 1993, International Legal Materials, 1993, vol. 32, p. 1588.

<sup>351</sup> A. Tancredi, *La Secessione in Diritto Internazionale*, cit., pp. 701-703.

<sup>352</sup> A. Tancredi: “*In search of a fair balance between the inviolability of borders, Self-Determination and Secession in International Law*”, in M. Nicolini, F. Palermo, E. Milano (eds), *Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution*, Leiden, 2016, p.100.

importance of territorial referendum with the work of the Badinter Commission. Opinion n.4<sup>353</sup> in fact indirectly requested a referendum for territorial reapportionment between Bosnia and Herzegovina, as will be explained in the next Chapter. Questions about the legal value of territorial referendum in international law arise prominently in the aftermath of the 1<sup>st</sup> October 2017 referendum in Catalonia, but have already jumped at the top of international law debates in the wake of the crisis in Ukraine in 2014. The residents of the Ukrainian region of Crimea decided through a referendum to be incorporated into the Russian Federation, after having issued a declaration of independence to secede from Ukraine. While the debate in Catalonia is ongoing at the time this research is finalised, the case of Crimea is a good test for the *normative due process*, because it involves all the normative requirements mentioned so far, notably the use of force, territorial boundaries and popular will.

### 3.4 Crimea

Internal turmoil that evolved in Ukraine since 2014 led to a renewal of the debate over secession, self-determination and territorial changes in international law.<sup>354</sup> Among scholars, the case has been the chance for some commentators to re-affirm that there is no right to external self-determination outside the colonial contest.<sup>355</sup> Others instead have contended that there could have been a legitimate claim to self-determination, but that the alleged use of force by Russia, being a violation of a peremptory norm of international law, has rendered unlawful all the subsequent developments of the case.<sup>356</sup> During debates at the Security Council for example, not only Russia but also Kyrgyzstan and the Democratic People's Republic of Korea argued that Crimea had not been annexed by Russia.<sup>357</sup> Rather, on the basis of historical ties with Russia, it was held that the latter could not but take into consideration the genuine will of self-determination expressed by the citizens of the region. This argument can be contested from a legal standpoint, not only because it does not provide for a

<sup>353</sup> Opinion n.4 on Bosnia Herzegovina (B-H) it states that “[...] *the will of the peoples of B-H to constitute B-H as a sovereign and independent State cannot be held to have been fully established. This assessment could be reviewed if appropriate guarantees were provided by the republic applying for recognition, possibly by means of a referendum of all citizens of B-H without distinction, carried out under international supervision*”. See Badinter Commission, Opinion n. 4, cit., p. 1491.

<sup>354</sup> The secession of Crimea did not put an end to internal instabilities in Ukraine, indeed. Separatist leaders in the regions of Donetsk and Luhansk organized a referendum on 11 May 2014 and on the basis of a clear vote cast (89%) in favour of incorporation asked to the Russian government to take the necessary steps for the annexation of the Popular Republic of Donetsk. Russia has not accepted the request so far.

<sup>355</sup> T. Christakis: “*Self-Determination, Territorial Integrity and fait accompli in the Case of Crimea*”, cit.

<sup>356</sup> G. Wilson: “*Crimea: Some Observations on Secession and Intervention in Partial Response to Müllerson and Tolstykh*”, Chinese Journal of International Law, 2015, vol.14, pp. 217-223; J. Vidmar: “*Crimea's Referendum and Secession: Why it Resembles more Northern Cyprus than Kosovo*”, Blog of the European Journal of International Law, 20 March 2014, <http://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/>

<sup>357</sup> See statements during the discussions at the SC for the then failed adoption of SC res. 189/2014, in UN Doc. S/PV.7138, 15 March 2014 as well as the reactions to to the referendum in Crimea in UN Doc. S/PV. 7144, 19 March 2014.

legal basis for secession, but mainly because it is subject to manipulation. To rely on historical roots raises compelling questions as to how far back in time one has to go to justify a self-determination claim, or what kind of linkage would justify the claim.<sup>358</sup>

Before looking at the Crimean crisis in light of the *normative due process* model, a brief summary of the case is necessary. Crimea is an autonomous region within the republic of Ukraine, whose special status is constitutionally guaranteed. The Constitution grants the region the right to legislate through the Crimean Parliamentary Assembly, though autonomy is granted mainly for administrative matters. Art. 132 of the Constitution expressly states that Ukraine is a unitary and indivisible State.<sup>359</sup> Moreover, it has to be born in mind that in 1992 Crimea voted for remaining with Ukraine. The debate on the historical Russian roots of the people of Crimea was further closed with the sign of the Minsk Agreement between Russia and Ukraine in 1992.<sup>360</sup> The agreement provided for a military basis of Russia in Crimea, but affirmed the will of the parties to respect the territorial integrity of Ukraine, thus closing any hypothesis of a claim of the territory on the part of Russia.

During a serious domestic crisis originating from the impasse in the signature of the Association Agreement with the EU, which led to the destitution of President Yanukovich,<sup>361</sup> the rising of protests in Crimea led to an escalation of violence with the involvement of Russian military. March 2014 was marked by Crimea's rush for secession. On the 11<sup>th</sup> of March 2014, a declaration of independence<sup>362</sup> was issued and within only five days the population of Crimea was called to decide on its status. On 16 March 2014 the referendum was held at the presence of Russian military forces. Arguably, the declaration of independence was a necessary step in order to circumvent the constitutional provisions on territorial changes. According to art. 73 of the Ukrainian Constitution, changes to the territory could be decided only by a

<sup>358</sup> The French representative at the Security Council session commented that, i.e., “*After all, Crimea was Russian for 170 years but a vassal of Turkey for three centuries. We know only too well that anything can be justified by history, particularly the unjustifiable*”. See S/PV.7138, 15<sup>th</sup> March 2014, cit. fn. 354.

<sup>359</sup> Constitution of Ukraine, Verkhovna Rada of Ukraine, June 28, 1996, amended on December 8, 2004 by Law n. 2222-IV, Art. 132: “*The territorial structure of Ukraine is based on the principles of unity and indivisibility of the state territory*”, available in English on the web site of the Ukraine Constitutional Court [www.ccu.gov.ua/doccatalog/document?id=12084](http://www.ccu.gov.ua/doccatalog/document?id=12084)

<sup>360</sup> Treaty of Friendship, Cooperation and Partnership between the Russian Federation and Ukraine, May 31, 1997.

<sup>361</sup> The procedure by which Yanukovich was overthrown has been labelled by many legal scholars as being unconstitutional. While the Constitution required a qualified majority of the votes in the Assembly, the decision was taken with a simple majority. See among the others A. Peters: “*Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law*” published by the blog of the European Journal of International Law, <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-underinternational-law/>.

<sup>362</sup> See P. Hilpold: “*Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History*”, Chinese Journal of International Law, 2015, vol. 14, pp. 237–270 and B.R. Roth: “*The Neglected Virtues of Bright Lines: International Law in the 2014 Ukraine Crises*”, ILSA Journal of International and Comparative Law, 2014-2015, vol.21, pp. 317-323.

vote of the *whole population*. By declaring independence unilaterally instead of reverting to the government to apply art. 73, Crimea aimed at excluding itself from the application of the proviso and then vote to join Russia. The clear vote cast in favour of joining Russia was followed by the adoption of the treaty of adhesion on 18 March, further ratified by the Russian Assembly on 20 March 2014.

Given this brief sketch, it is possible to test the application of the *normative due process* in the case at stake. Many elements prove that the secession of Crimea generated in the international community the reaction foreseen by the model. However, the outcome of the seceding attempt by Crimea also highlights some pitfalls of the *due process* approach. The use of force by a third party combined with the violation of territorial integrity were the arguments used to support condemn for the secession of Crimea and non-recognition of the unlawful territorial reapportionment. On the one hand, before the referendum some members of the Security Council sponsored resolution 189/2014.<sup>363</sup> After reference to art. 2.4 of the UN Charter in the preamble, the resolution continues as follows: “*no territorial acquisition resulting from the threat or the use of force shall be recognised as legal*”. In the operative, the SC reaffirms its commitment in guaranteeing the independence and territorial integrity of Ukraine “*within its internationally recognised borders*”. Recalling the ICJ advisory opinion on Kosovo, the principle of territorial integrity is addressed to inter-State relations. Hence, non-State actors are not bound by it, but the same does not hold true for States. This is why Russia was under the obligation not to deploy armed forces to ensure the conducting of the referendum. Alongside this argument, it is interesting to observe how the SC addresses the status of the Ukrainian sub-units: the Council refers to “*rights of persons belonging to minorities*”. In the previous Chapter it was demonstrated that minorities have not succeeded in their struggle for self-determination, as opposed to a right to internal self-determination for indigenous people.<sup>364</sup> Hence, the wording suggest that the drafters were indirectly taking a stand against the secession of Crimea, regardless of issues of use of force by third parties. On the other hand, the draft resolution was not adopted due to the veto of Russia, but the General Assembly on 27 March 2014 passed a very similar resolution - n. 68/262<sup>365</sup>-, which resembles the SC draft in its main operative clause. In fact, it calls upon the States: 1) “*to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine’s borders through the threat or use of force or other unlawful means*”, and 2) “*not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status*”. In principle, all these elements confirm the applicability of the *normative due process* approach to the case of Crimea. However, given the breach of one of the *due process* requirements, secession should

<sup>363</sup> UN Security Council Draft Resolution S/2014/189 dated 15 March 2014.

<sup>364</sup> See Chapter 1, para. 4.2.

<sup>365</sup> UN General Assembly, A/RES/68/262, Territorial Integrity of Ukraine, adopted on 27 March 2014. [http://www.un.org/eng/ga/search/view\\_doc.asp?symbol=A/RES/68/262](http://www.un.org/eng/ga/search/view_doc.asp?symbol=A/RES/68/262)

not have been recognised. More than three years after the referendum, what is the status of Crimea? Crimea has been incorporated into the Russian Federation. Although the annexation has not been formally recognized by the members of the international community,<sup>366</sup> it seems as if the territorial reapportionment has been accepted as a *fait accompli*. It is in this sense that Crimea puts seriously into question the validity of the *due process* model. The theory postulates that the effect of the violation of one of the due process requirements is the non-recognition by the international community. However, in the case of Crimea, public denunciation of the annexation has turned into acceptance over time.

The impact of the referendum in Crimea is controversial, indeed. Overall, the case confirms that often the absence of international legal rules results in a situation of indeterminacy. It also shows the relationship between law and power in the international arena. Pragmatically, it might be the case that a territorial dispute is solved by States through the use of force, albeit this is in contravention to one of the pillars of international law. For the purposes of this research it is nonetheless important to remark that the case runs in favour of the consolidation of an international law rule according to which the referendum is a due procedural step towards secession. Notwithstanding that the referendum was carried out with the alleged support of Russian forces, the fact that this precise tool was used to “hide” annexation may confirm that territorial referenda are conceived as the means to overcome the legitimacy gap of secession in international law. As it will be seen in the next Chapter, further developing this line of thought to claim that the referendum alone can create a legal title to secede would be too extreme. However, the case of Crimea puts the emphasis on (i) the role of a referendum when carried out properly in a free and fair manner and (ii) the fact that the referendum is used as a means to build a legal title to secede as such. In this sense, the next section will attempt to outline that secession cannot be equated with the title to self-determination.

#### **4. Dis-entangling secession from self-determination: a proposal**

In the section dedicated to the secession of Kosovo, it was observed that the ICJ was reluctant to touch the issue of the application of the right to self-determination in the instant case. In fact, the Court seems to consider that the case does not involve the exercise of the right to self-determination. Para. 82 mentions cases outside the context of application of the right to self-determination, notably reading as follows:

*“The Court has already noted [...] that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation,*

<sup>366</sup> The only formal declaration came from the Ambassador of Nicaragua to the Russian Federation, but it has been reported by Russian sources only. See <http://www.kyivpost.com/content/ukraine/nicaragua-recognizes-crimea-as-part-of-russia-341102.html>.

## Secession and Referendum

*the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question*<sup>367</sup>

In this sense, it does not seem to be problematic to claim that the Court avoided to face the case of Kosovo as an exercise of self-determination. Although the question of how to label the creation of Kosovo is left unanswered by the Court, the question submitted by the General Assembly is not approached from the perspective of a self-determination dispute. The Court states “*during the eighteenth, nineteenth and twentieth, there were numerous instances of declarations of independence often strenuously opposed by a State from which independence had been declared. Sometimes a declaration resulted in the creation of a State, at other it did not*”.<sup>368</sup> Interestingly enough, the Court does not mention independence as the result of a self-determination struggle. It could be further observed that the Court mentions the *Western Sahara Opinion* and the *Namibia* case with respect to self-determination only in the opening of the part on general international law.<sup>369</sup> By contrast, the ICJ case-law in the same field demonstrate a consistent quotation of the two cases each time that the Court was approaching a self-determination claim,<sup>370</sup> as it was i.e. in the 2004 Advisory Opinion on the *Construction of a Wall in the Occupied Palestinian Territory*.<sup>371</sup>

To further complicate the picture, the discourse used by seceding sub-units and by scholars often presents the right to self-determination as including also secession in its external dimension.<sup>372</sup> Moreover, it was showed before in the text that the remedial secession theory links self-determination to secession. One can find that the groups in Catalonia consistently referred to their right to self-determination,<sup>373</sup> so as the people from Abkhazia or from Crimea.<sup>374</sup> However, reference to the right to self-determination is not always supported by conclusive arguments; in particular, there is scarce reliance on international law, the focus being on how the domestic system of the parent State addresses groups’ rights as human rights.<sup>375</sup> If one looks at the

<sup>367</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence with Respect of Kosovo*, cit., para. 82.

<sup>368</sup> Ibid. para 79.

<sup>369</sup> Ibid.

<sup>370</sup> J. Summers: “*The Kosovo Declaration*”, C. Walter (ed.) *Self-Determination and Secession in International Law*, cit., p. 250.

<sup>371</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit., para. 88.

<sup>372</sup> M. Weller, in example, advocates for a *right to remedial self-determination*. See M. Weller, *Escaping the Self-Determination Trap*, cit., p. 59.

<sup>373</sup> See the declarations by the Podemos group at <https://plaza.podemos.info/debates/753> and the attitude of the Secretary General towards the issue [http://internacional.elpais.com/internacional/2015/10/30/actualidad/1446231111\\_709046.html](http://internacional.elpais.com/internacional/2015/10/30/actualidad/1446231111_709046.html)

<sup>374</sup> See for Abkhazia, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/07/here-what-the-research-reveals-about-the-violence-in-nagorno-karabakh/> and for Crimea: <http://www.jurist.org/forum/2015/05/Larry-Eaker-self-determination.php>.

<sup>375</sup> See on this point N. Torbisco Casals, *Group Rights as Human Rights*, Dordrecht, 2010, pp.147-201.

outcome of the Scottish attempt to separate from the UK, the claims were not based on international law arguments.<sup>376</sup> They were a mixture of identity issues and calculations of self-interest.<sup>377</sup> It would be reasonable at this point to question if resort to the self-determination argument is only instrumental. In other words, is it possible to disentangle self-determination from secession and to try to outline two different entitlements?

Before engaging in this effort, some points need to be clarified. The attempt to outline an autonomous title to secede aims at re-framing territorial claims in the context of the current challenges to the international community. The following lines do not aim at demonstrating the existence of a right to secede in international law. It was already showed that such a claim can be supported only with arguments based on moral rather than legal considerations and while this would serve the needs of the political discourse, it does not serve the purpose of the present study.<sup>378</sup> Instead, this section aims at underlining that currently, territorial changes are justified on the basis of other grievances – such as broader social participation or fiscal control procedures- alongside the major role of identity claims. It is assumed that international law might be in the way of acknowledging this trend by paying due regard to attempts to separation carried out throughout a clear manifestation of the will of people. In fact, the way claims are brought is also changing, with a strong reliance on rights to be exercised within democratic regimes, like the above-mentioned social participation. Along this line it could be possible to leave aside self-determination as it has been generally understood, all the more so self-determination in the sense of a right to secession.

<sup>376</sup> See the opinion elaborated by Crawford and Boyle upon request of the UK Government, in which the authors observe that the issue of a new Scottish State would depend on an arrangement between the governments. See J. Crawford and A. Boyle: “*Opinion: Referendum and Independence of Scotland, International Law Aspects*”, Annex to HM Government’s Paper, Scotland Analysis: devolution and the Implications of the Scottish Independence, February 2013, para. 1.

<sup>377</sup> T. M. Waters argues “*We can expect that future independence movements – as past ones – will be governed in significant part by calculations of economic and social self-interest*”, in “*For freedom alone: Secession after the Scottish Referendum*”, cit., p. 137.

<sup>378</sup> A remarkable contribution which takes into account morality, but is well developed around legal arguments is given by Koskiennemi. Koskiennemi has developed a theory of self-determination which looks at secession as a component of self-determination. According to the author, there are two theories of self-determination: one is the classical understanding of self-determination and the other is a more romantic approach. While the former is guided by the idea of creation of States and State structures, the latter is a secessionist model in which the individual is fighting for himself. The difference lies in the purpose of each model. The romantic outlook, in particular, seeks self-fulfilment. If that can be achieved by secession, that would be the way. In other words, the romantic model aims at reaching a form of identity. The more the world has become multipolar, the more people feel the need to have a new form of identity. The State-centred system is endangered by these claims. Arguably, this is a sound reasoning justifying secession as an element of self-determination, but it lacks enough legal supportive points. Rather, it seems to rely on the huge literature on the moral need to have a right to secede, which goes back to the idea that the individual shall try to pursue its wishes even though it implies separation from an existing state. See M. Koskiennemi: “National self-determination today: problems of legal theory and practice”, *International and Comparative Law Quarterly*, 1994, vol. 43, p. 250-257.

Hereby is an attempt at outlining two main differences between self-determination and secession, notably a) their ontological meaning; b) their application *rationae personae*.

#### 4.1 Secession and self-determination: different terms with different meanings

Tomuschat argues that “*knowing that the substance of self-determination invariably implies the right to establish a sovereign and independent State [...] no one would have to engage in difficult legal arguments to draw the conclusion that the right to secession constitutes a necessary component of the right to self-determination*”.<sup>379</sup> The distinguished author takes a stand in favour of the existence of a right to secede, but refers to the substance of self-determination. Admittedly, what is the substance of self-determination, is not that clear from a legal standpoint.

The argument developed by Tomuschat can be dwelt with from two points of view. On the one side, one can assume that the meaning of self-determination corresponds to that developed throughout the UN-led decolonisation process.<sup>380</sup> However, it is generally understood that the struggle for independence was not an example of secession.<sup>381</sup> Relying on Scharf’s<sup>382</sup> contributions on secession, Sterio<sup>383</sup> recalls that independence of colonial territories is not secession. In practice self-determination has been exercised by units which were part of European overseas dominions to gain independence. A self-determination unit in colonial times is a territory separated from the mainland (according to the so-called salt-water theory), governed by the motherland but distinct from it by history and social structures. Once the colonial period ended, the principle of self-determination became closer to the basket of human rights, operating mainly within the territory of an existing State.<sup>384</sup> The inclusion of the right to self-determination in the 1966 Covenants had the potential to justify groups’ claims. There is a growing literature arguing that the substance of self-determination has evolved over the last decades and that its legal contours have changed.<sup>385</sup> This line of thought has been championed in particular by

<sup>379</sup> C. Tomuschat: “*Secession and Self-Determination*”, in M.G. Kohen, *Secession: International Law Perspectives*, cit., p. 24.

<sup>380</sup> See Chapter 1, pp. 76-87.

<sup>381</sup> M. Weller, *Escaping the Self-Determination Trap*, cit., p. 23; U. Burten, *Minorities, Minority Rights and Internal Self-Determination*, London-Dordrecht-New York, 2015, p. 194; A. Cassese, *Self-Determination of Peoples, a Legal Reappraisal*, cit., p. 50; M.G. Kohen, *Secession: International Law Perspectives*, cit., pp. 1-5

<sup>382</sup> M.P. Scharf: “*Earned Sovereignty: Judicial Underpinnings*”, *Denver Journal of International Law and Policy*, 2003, n.31, p. 379 ff.

<sup>383</sup> M. Sterio: “*On the Right to External Self-Determination: ‘Selfistans’, Secession, and the Great Powers’ Rule*”, *Minnesota Journal of International Law*, 2010, vol. 19, pp. 137-176.

<sup>384</sup> Suffice it to recall here that the Human Rights Committee in 1984 in its General Comment n. 12 stated that “*the realisation of the right to self-determination is an essential condition for the effective guarantee and observance of individual human rights*”. See “*General Comment n. 12 on Self-Determination*”, in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, 1994, UN Doc HRI/GEN/1/Rev.1, 12.

<sup>385</sup> See for references J. Castellino. “*International Law and Self-Determination. Peoples, Indigenous Peoples, and Minorities*”, C. Walter, A. von Ungern-Sternberg et al. (eds.) *Self-Determination and Se-*

scholars addressing minorities and indigenous' rights' issues and in principle it is not erroneous. The evolutive interpretation is an established practice in international law. Suffices to mention here the interpretation of the ECHR as a living instrument.<sup>386</sup> In example, the interpretation of the right not to be discriminated under art. 14 has been extensively enlarged to cover discrimination purported on the basis of sexual orientation, which surely was not envisaged in the drafting of the Convention in 1950.<sup>387</sup> A human rights oriented understanding<sup>388</sup> of self-determination puts emphasis on a broader bulk of rights, such as participatory rights, social inclusion, property rights,<sup>389</sup> which can be satisfied within the borders of a State. The consequences of this trend are clear: whenever there are cases where domestic policies systematically work to the disadvantage of one sub-unit within a State whilst benefiting another, the understanding of self-determination as a classic human right could lead that group to claim independence. Therefore, States have tried to avoid the danger of groups' claims by focussing on other arrangements which could preserve territorial integrity while satisfying sub-units' needs, i.e. enhancing the internal dimension of self-determination through granting autonomy or a federal structure. This way, a collective of individuals does not need to seek secession in order to realise

cession in International Law, cit.; M. Suksi: "*Keeping the Lid on the Secession Kettle – a Review of Legal Interpretations concerning Claims of Self-Determination by Minority Populations*", International Journal on Minority and Group Rights, 2005, vol. 12, pp. 189–226.

<sup>386</sup> The first mention of evolutive interpretation of the Convention was given by the Court in *Tyler v. United Kingdom* (Appl. N. 5856/72), Judgment, 25 April 1978, Series A. no.26, para 31. See in general on ECHR as a living instrument G. Letsas: "*The ECHR as a living instrument: its meaning and legitimacy*", A. Foellesdal, B. Peters, G. Ulfstein, *The European Court of Human Rights in a National, European and Global Context*, Cambridge, 2013, pp. 106, 141.

<sup>387</sup> See, among the others, ECHR: *EB v. France* (Appl. No. 43546/02) Judgment, 22 January 2008, para. 91; *X and Others v. Austria* (Appl. No. 19010/07), Judgement, 19 February 2013; *Vallianatos and Others v. Greece*, (Appl. No. 29381/09 and 32684/09) Judgement, 7 November 2013.

<sup>388</sup> This is not tantamount to say that there are two different rights of self-determination. There is only one self-determination, still it can be exercised in different contexts. See Chapter 1 pp. 26-27. In this sense, scholars often mention the declaration of the ICJ Judge Khan in the *Namibia* case, to claim that there is no internal dimension of the right to self-determination. Referring to the hearing of a South African official on the possibility that south west Africans' self-determination be restricted to autonomy and self-government within the State, the Judge affirmed that "*this in effect means a denial of self-determination as envisaged in the Charter of the United Nations*". Although purposely vague, the declaration offers useful points for debate. Arguably, it shows how the right to self-determination has been established as a contextual-dependent right in international law. As already stressed, colonialism weight in its definition. Therefore, it could be maintained that self-determination has ended its era. However, the inclusion of this right in the 1966 Covenants invalidate such a conclusion. Self-determination exists, but, as Judge Khan leads us to think, its understanding has changed. As it was showed in the previous Chapter, the self-realisation of the individual has been boosted by the development of human rights law and has affected self-determination as well. In ultimate analysis therefore, the wording of the declaration corroborates the idea that if self-determination has changed to the extent that there is no need to separate from the parent State, then secession is following a different path. See ICJ, *Legal Consequences for states of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276* (1970), cit., Declaration of President Sir Muhammad Zafrulla Khan, p. 63, cited by U. Burten, *Minorities, Minority Rights and Internal Self-Determination*, cit., p. 194.

<sup>389</sup> In this sense N. Torbisco Casals, *Group Rights as Human Rights*, pp. 43-58; see also W. Kimlycka, *Politics in the Vernacular*, Oxford, 2011.

itself. Each individual can pursue his/her personal development at best also within the borders of the State.

Moreover, international documents and states' practice about self-determination support the idea that self-determination and independence were interchangeable for colonies, whilst the current interpretation of self-determination is better conceived as the self-realisation of the individual within the borders of the State. In the Canadian Supreme Court's judgement on the secession of Quebec, the report prepared upon request of the government of Quebec developed an argument towards the separation between self-determination and a right to independence. Equivalence between self-determination and right to independence has been opposed by claiming that "*while the ability to exercise a choice undoubtedly lies at the very heart of the principle of self-determination, it does not at all follow that sovereignty constitutes in every case one of the elements of this choice*".<sup>390</sup> In the report, self-determination is labelled as a context-dependent principle, to mean that outside of colonial situations it is inappropriate to use it as the basis of a right to achieve independence at the expense of the parent State's integrity. Rather, its main implication is found in the right of a people to "*participate in its future*".<sup>391</sup>

Secession, by contrast, seeks to break the relationship between people and sovereign power at the basis of self-determination, both theoretically and pragmatically. For the latter, territory is the primary factor for secession.<sup>392</sup> The territorial element is fundamental for seceding claims, whilst it acquires a different value in self-determination claims. Quite often, it has been underlined that internal self-determination aims at fostering the rights of a group, therefore the internal dimension is usually referred to as the non-territorial approach to self-determination.<sup>393</sup> Members of national sub-units may claim their right to participate in the political and social affairs of their country, albeit they are spread over the whole territory of the State. In example, people belonging to the roma ethnicity in Hungary are sparsely settled in the country, but this does not prevent them from seeking to be recognized by the parent State as the bearers of specific protection. By contrast, the rationale underpinning the attempts to secede is different. Secession stems from the group's premise that they do not possess a State on their own, therefore contested territory is a major issue.<sup>394</sup> In the case of secession, international law puts emphasis

<sup>390</sup> Expert Report elaborated upon request of the government of Quebec prior to the Reference by T. Franck, R. Higgins, A. Pellet, M. Shaw and C. Tomuschat, reprinted in A.F. Bayefsky (ed.), *Self-Determination in International Law. Quebec and Lessons Learned*, The Hague-London-Boston, 2000, p. 241-248.

<sup>391</sup> *Ibid.*

<sup>392</sup> M. Shaw: "*Self-Determination, Human Rights and the Attribution of Territory*", U. Fastenrath, R. Geiger, A. Paulus, et. Al (eds.), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*, cit., p. 603.

<sup>393</sup> See U. Barten, *Minorities, Minority Rights and Internal Self-Determination*, cit., p. 197.

<sup>394</sup> See on this point the analysis of Brilmayer, claiming that "*the normative force behind secessionist arguments derives instead from a different source, namely the right to territory that many ethnic groups claim to possess. [...] The mere fact that the secessionist group constitutes a distinct people does not by itself establish a right to secede. To be persuasive a separatist argument must also present a territorial*

on the territorial element by opposing the principle of territorial integrity to the alleged right of the group to secede. Contested territory is therefore the main point of reference for secession.

The argument can be further supported by revolving to the French expression for self-determination. The term “*droit des peuples à disposer d’eux mêmes*” suggests that the right to self-determination is above all a right to choose. It empowers its bearers to decide on their status, both internally and externally. Secession, by contrast, implies the creation of a new entity from a pre-existing State or the incorporation into another entity, but the kin State continues to exist as a legal entity in international law. The making of the new nation is often considered a one-shot opportunity, to mean that there is only one succeeding attempt to secede.<sup>395</sup> By contrast, self-determination has been addressed as a continuous right: Rosalyn Higgins, i.e., has extensively argued that self-determination is a constant entitlement. It could only be so, in her view, given that it is the right necessary to ensure a free choice by the people on their social cultural and economic development<sup>396</sup>.

On the basis of the aforementioned, the intrinsic nature of secession and self-determination appears to be different. Being self-determination the *droit des peuples à disposer d’eux memes*, it can be implemented also through a series of different arrangements. Self-determination conflicts do not have to end up necessarily with independence. In fact, the idea that self-determination conflicts can be resolved with autonomy settlement has been finding growing support in practice and scholarship, above all in Europe. It is not by chance that the international community quickly accepted the dissolution of Czechoslovakia and the Soviet Union, which occurred through agreement among the central authorities<sup>397</sup>. Many EU countries- Italy; Belgium or Spain<sup>398</sup>- have been trying to reconcile groups claims i.e. minorities claims, by forms of autonomy. This has led scholars to claim that “*State practice with regard to secessionist movements witnessed in Europe does not support the existence*

*claim*”. L. Brilmayer: “*Secession and Self-Determination. A Territorial Interpretation*”, Yale Law Journal, 1991, vol. 16, pp. 177-179.

<sup>395</sup> See M. Weller: “*there is no secession from secession*” in M. Weller: “*Settling Self-Determination Conflicts: Recent Developments*”, European Journal of International Law, 2009, vol. 20, p. 113. The assumption, however, is not fully convincing: it was already observed in the text that one risk of the application of the remedial secession theory is that by giving to a sub-unit the chance to separate from the parent State, small collective of individuals located in the sub-unit may claim the same.

<sup>396</sup> R. Higgins, *Problems & Process – International Law and How We Use It*. Oxford, 1994, p. 120. On the opposite side of the spectrum see Hannum, claiming that once self-determination has been exercised, it cannot be claimed again. H. Hannum: “*Rethinking Self-Determination*”, cit., p. 23-34.

<sup>397</sup> S. Oeter: “*Recognition and non-Recognition with regard to secession*”, in C. Walter A. von Ungern-Sternberg et al. (eds.), *Secession and Self-Determination in International Law*, cit., pp. 59-61.

<sup>398</sup> Autonomy in particular implies that the sub-unit is granted with original decision making powers with respect to certain devolved competencies. Italy, in particular, has granted a special status of autonomy to South Tyrol, through the adoption of the 1971-1972 Autonomy Statute; Belgium has provided for social arrangements for the Brussels region and regions such as Basque country, Catalonia or Andalusia become autonomous under the 1978 Constitution of Spain. For a study on autonomy see H. Hannum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights*, Philadelphia, 1990; M. Suksi (ed.) *Autonomy: Applications and Implications*, The Hague, 1998; M. Finaut: “*Can Autonomy Fulfil the Right to Self-Determination*”, Geneva Papers, 6 October 2009, [www.gcsp.ch/download/2693/70808](http://www.gcsp.ch/download/2693/70808)

of a right to secession as an aspect of self-determination”.<sup>399</sup> The General Recommendation XXI of the Committee on the Elimination of Racial Discrimination<sup>400</sup> does not link secession to self-determination. Rather, it distinguishes between secession, which is not recognised under international law, and other arrangements “reached by free agreements of all parties concerned”.<sup>401</sup> Weller lists nine different categories of self-determination settlements<sup>402</sup>: 1) trading self-determination for autonomy or enhanced local self-government;<sup>403</sup> 2) regionalism, federalisation or union with confirmation of territorial unity; 3) deferring a substantive settlement while agreeing to a settlement mechanism;<sup>404</sup> 4) balancing self-determination claims;<sup>405</sup> 5) agreeing on self-determination but deferring implementation<sup>406</sup>; 6) establishing a *de facto* State;<sup>407</sup> 7) supervised independence;<sup>408</sup> 8) conditional self-determination;<sup>409</sup> 9)

<sup>399</sup> P. Pazartzis: “*Secession and International Law: the European Dimension*”, M.G. Kohen (ed.), *Secession in International Law*, cit., p. 371.

<sup>400</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXI on the right to self-determination, UN. Doc. A/51/18, annex VIII at 125.

<sup>401</sup> M. Weller: “*Settling Self-Determination Conflicts: Recent Developments*”, *European Journal of International Law*, cit., pp. 113-120.

<sup>402</sup> *Ibid.* p.115

<sup>403</sup> In particular, the hypothesis of trading refers to the common practice of governments granting autonomy or reviewing the structure of the State into a federation to accommodate the claims of minority groups. Autonomy arrangements of this type proliferated in Western Europe in the aftermath of the Cold War – e.g. with constitutional arrangements in Spain, Italy or Belgium. Then, it spread worldwide with the Aceh of West Papua in Indonesia, or Miskitos in Western Nicaragua, Kurds in Iraq or Tuareq in Turkey. However, autonomy was often granted within the framework of the indissoluble unity of the State. The case of Hong-Kong in this sense is revealing: Hong-Kong enjoys a high degree of autonomy on the Basis of the Basic Law n. 4 dated 1990, but it is still an “*inalienable part of China*” ex artt. 1-2. See Basic Law on the Hong-Kong Special Administration Region of the People’s Republic of China, Decree n. 26, 4 April 1990.

<sup>404</sup> Deferring the issue might be a solution when the parties accept neither federalisation nor secession. Deferral does not imply maintenance of the *status quo*, but that each part retains its legal position. Deferring the settlement might allow them to enter into negotiation. This was the example with the Brioni Agreement, under which Croatia and Slovenia agreed to suspend the application of their declaration of independence.

<sup>405</sup> Balancing claims is a more subtle way to address self-determination claims. It consists of acknowledging that there is a self-determination claim, but the claim is addressed by the parent State in a way that preserves its sovereignty as well. One example is the Agreement for Independence of Northern Ireland.

<sup>406</sup> This solution provides for an interim period under which the settlement is decided. A first type of interim period is designed to allow for campaigning or administrative affairs. This was the case of the peace plan for self-determination of the People of Western Sahara, which provided for a referendum to be held within four years from the settlement of the plan. See S/2003/565 Annex 2 para. 1. A second kind of interim period is a sort of transition period at the end of which the parties know that a territorial reapportionment will occur, i.e., with the referendum for secession in Montenegro.

<sup>407</sup> This kind of settlement consists in creating an entity without an acknowledged *de jure* status. In other words, two cases can be summarized: 1) an agreement about the *de facto* configuration of the State or 2) an third party offers to act as guarantor for territorial stability of the *de facto* entity, like the role of the EU in the preservation of the territorial boundaries of Abkhazia and South Ossetia.

<sup>408</sup> Kosovo is a case of supervised independence. In principle the self-determination claim is accepted, but it is subject to certain restrictions and conditions. In particular, the entity temporarily lacks full sovereignty.

constitutional self-determination. The *mise en practice* of secession and self-determination read along these paths could not be more different. Secession and self-determination have different intrinsic features and lead to different results: these two elements alone would suffice under strict legal scrutiny to affirm that the overlapping of the notions is misleading, yet the other major difference lies in the application *rationae personae*.

#### 4.2 Possible units entitled to seek secession

Absent a binding definition of people, international legal practitioners drive their attention on practice. As it was observed in the first Chapter, in the definition of people the territorial element comes first, alongside language, culture or ethnicity, which count more in the self-conceptualisation of the unit per se. It does not come as a surprise that “colonial peoples” claiming independence lived in a territory detached from the mother land. In other words, it seems as if the maxim “*un État, un peuple*” is still valid.<sup>410</sup>

The bearers of self-determination are difficult to determine because there is no established definition of people, let alone those of secession. There is no legal international document recognizing a right to secede in international law, so there cannot be an internationally agreed definition about the bearers of the right to secede. Interestingly enough, it can be observed that the unit entitled to claim secession is defined after secession has been exercised. Looking at secessionist claims, the process of validation of the new State is unique since international law does not give a group the right to separate from the parent State. Secession seems to follow an inverse process of recognition compared to that of self-determination. Unlike the latter, if a group succeeds in seceding, it will be acknowledged as a people of a new State only after the State has been already constituted, to mean that it satisfies the requirements of statehood in international law and it has established relations with the other members of the international community.<sup>411</sup>

Since many contrasting elements can be found both in State practice and in international documents, should we simply acknowledge that there is no unit which can claim a right to secede? Here practice and law seem to follow different paths. In the previous pages the study has recalled the rationale underpinning the grievances of

<sup>409</sup> Conditional self-determination is an interesting example, because it has a double dimension. When conditionality is external, the opportunity for the entity to acquire independence is conditional to an external event. The Statute of the Autonomous region of Gagauzia, i.e., establishes that Gagauzia has a right to external self-determination “*in case of change of status of Moldova*”. By contrast, with internal conditionality, the self-determination unit can achieve its goals only following an established procedure—such as guidelines for recognition of the former Yugoslavian cases by the members of the EU.

<sup>410</sup> M.G. Kohen : “*Sur quelques vicissitudes du droit des peuples à disposer d’eux-mêmes*”, J. Salmon (ed.), *Droit du pouvoir, pouvoir du droit : mélanges offerts à Jean Salmon*, Bruxelles, 2008, pp. 970-980; R. Higgins: “*International Law and the Avoidance, Containment and Resolution of Disputes*”, *Recueil des Cours de l’Académie de droit international de la Haye*, 1991 vol. V, Dordrecht, 1993, pp. 9-342, at p. 178.

<sup>411</sup> “*c’est l’Etat qui crèra le “peuple” au sens juridique du term, non l’envers*”, see M.G. Kohen : “*Sur quelques vicissitudes du droit des peuples à disposer d’eux-mêmes*”, J. Salmon (ed.), *Droit du pouvoir, pouvoir du droit : Mélanges Offerts à Jean Salmon*, cit., p. 265.

recent movements seeking secession. In Catalonia, for instance, the people feel impeded to realise themselves because, i.e., the Catalan language is not taught in school, there are no Catalans in the main governmental position, etc. These claims differ from those based on serious violations of human rights.

Therefore, we can distinguish two paths. On the one side, there is secession in response to massive violations of basic human rights of a certain group, but the remedial secession theory is questionable under strict legal terms. While the *a contrario* reading of the *Friendly Relations Declaration* is considered an authoritative interpretation of the Charter by distinguished scholars,<sup>412</sup> the way the majority of states which submitted written or oral statements in the ICJ advisory opinion on Kosovo recalled the remedial secession theory was not consistent.<sup>413</sup> The ICJ in fact acknowledged differences in the *opinio juris*. By contrast, the case-law of the African Commission of Human and Peoples' Rights mentioned above acknowledges that human rights violations create situations where the persecuted group becomes entitled to create its own sovereign entity.<sup>414</sup> In light of the purpose of this section, a potential danger resulting from this interpretation is the blurring line between secession and the internal dimension of self-determination. The written statement by Germany in the ICJ Advisory Opinion on the independence of Kosovo is revealing in this sense. In particular, the statement reads as follows: "*There are those who say that outside a colonial context which is not at issues here – a right to secession never exists. This, however, would also render the internal right of self-determination meaningless in practice. There would be no remedy for a group which is not granted self-determination that may be due to it under international law. The majority in the State could easily and with impunity oppress the minority*".<sup>415</sup> The statement resumes the basic misunderstanding surrounding legal inquiry on territorial changes based on self-determination. Self-determination does not generate an exceptional entitlement to secession outside the colonial context as we have just explained, but rather gives the right to choose a status, be it independence or not. Internal self-determination violations may trigger as a response a right to secede, but only as a last resort and when connected with massive human rights violations, if one embraces the theory of remedial secession.

On the other side, recent claims to secede such as those presented by the Catalan region, by Scotland, Crimea or Quebec suggest a slightly different understanding of self-determination in its internal dimension. In particular, claims to secede more and

<sup>412</sup> G. Arangio Ruiz, *The UN Declaration on Friendly Relations and the System of Sources of International Law*, Leiden, 1979, pp. 73-88; I. Brownlie, *Principles of Public International Law*, cit., p. 581.

<sup>413</sup> See this Chapter at section. 2.3.

<sup>414</sup> See in particular: African Commission on Human and Peoples' Rights (i) *Kevin Mgwangwa v. Cameroon*, n. 266/03, 2009, para. 199; (ii) *Katangese Peoples' Congress v. Zaire*, n. 75/92, 1995, at para 6 "*In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire*".

<sup>415</sup> ICJ, German written Statement no. 54 for the Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence of Kosovo, cit., 15 April 2009, pp. 34-35.

more originate from a combination of identity issues – which remain the basic pillar- and minor grievances such as lack of social inclusion or fiscal benefits. From the legal standpoint, no indication of the subjects of a right to secede in this framework can be found. Only a people exercising a right to self-determination could choose to give birth to a new nation. What can be proposed, on a speculative plan, is to refer to what Weller defines an “*unprivileged unit*”. For Weller, a *privileged unit* is assisted by international law in gathering independence, since it is entitled to self-determination. That is the case of classical self-determination units – colonies- or people subject to foreign occupation or racist regimes. The international legal order not only recognizes the claim of these groups, but it safeguards their struggles by e.g. prohibiting third states to provide military support to the parent State.

This is not to say that the *unprivileged unit* is against international law. The unprivileged unit is not in itself internationally unlawful. The point made by Weller is that the unprivileged unit does not possess the requirements to claim a right to self-determination. The international legal order does not oppose its claim, but is silent to them.<sup>416</sup> The entity does not enjoy any right in its attempt to obtain statehood.<sup>417</sup> Although international law lacks a formal definition of what constitutes a colonial unit, General Assembly resolution 1541 could guide the research. According to principle IV, territories entitled to decide on their status are those “*geographically separate and (is) distinct ethnically and/or culturally from the country administering it*”.<sup>418</sup> By contrast, the *unprivileged unit* is situated within the State and often it already enjoys a proper internal status that in principle does not justify its struggle. It might coincide with a minority, but it is not necessarily a minority group. Weller aptly observes that claims by the *unprivileged unit* are not in breach of a norm of international law, but it rests within the domestic jurisdiction of the State to deal with the unit.<sup>419</sup> Here comes the issue of how claims are brought. The increasing linkage between international law and concepts of democratic statehood and human rights theory could serve the purposes of linking secessionist claims to democratic participation and human rights in general.<sup>420</sup> Along this line of thought, the most important tool to foster the autonomous title to secede would be a territorial referendum, carried out in compliance with basic international standards. In sum, territorial referenda would render less unprivileged the secessionist entity.<sup>421</sup> The collateral effect of the referendum would also be that of strengthening the legitimacy of secession in the

<sup>416</sup> See M. Weller, *Escaping the Self-Determination Trap*, cit., pp. 23-45.

<sup>417</sup> *Ibid.* at p. 33

<sup>418</sup> General Assembly, GA/RES/1541 dated December 15 1960, *Principles which Should Guide Members in Determining whether or not an obligation exists to transmit information called for under art. 73*, Principle IV “*prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and (is) distinct ethnically and/or culturally from the country administering it*”.

<sup>419</sup> M. Weller, *Escaping the Self-Determination Trap*, cit., p. 25.

<sup>420</sup> See A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., pp. 255-280; J. Vidmar, *Democratic Statehood in International Law*, cit., pp. 151-168. A. Pellet: “*Democratic Secession from a Multinational State*”, *Journal of Ethics*, 2002, pp. 558-586.

<sup>421</sup> A. Buchanan: “*Democracy and Secession*”, M. Moore, *Nationalism and Self-Determination*, cit., pp. 14-25.

eyes of the international community, given the role recognition plays in case of secession.

However, the existence of an *unprivileged unit* remains at the moment only an academic hypothesis. While it convinces on a pragmatic level, it lacks enough legal supportive arguments. International law sides only on the side of the privileged unit, to mean the group that proves itself to be a people. This happens, in example, when the Constitution of the parent State recognises the presence of more than one people in its territory.<sup>422</sup> In all the other cases, international law does not offer any sort of protection to the group that seeks to separate from the kin State. We have demonstrated that secession cannot be perceived as a dimension of self-determination, thus a sub-unit claiming to separate from the kin State cannot in principle resort to the self-determination argument, unless the State consents or the unit is recognised – by the Constitution, by domestic Courts- to be a people. From the point of view of international law, there is no other unit entitled to secede or claim a territorial reapportionment. Caution should be used when linking secession and democratic principles. It would be erroneous to argue that a State is legitimate only if it is a democratic one.<sup>423</sup> The last assumption has been attracting consistent support in the international community, but from the point of view of the law it remains far from being verified. It should be born in mind that neither the oldest democracies are immune from secessionist claims – e.g. the UK. The Arab spring, then, shows that people may rebel against an established power without necessarily wishing to have democracy after. Nevertheless, the practice of associating legitimate statehood with democratic statehood cannot be simply wished away. If the principles of democratic statehood together with the broader understanding of self-determination referred-to so far will gather more strength through State practice and international binding documents, this development might boost the acknowledgement of new established procedures to carry out a territorial change, even when secession is at stake. In that case, international law might be on the side of movements calling for a territorial change by relying in particular on the value of the referendum.<sup>424</sup>

<sup>422</sup> As it was shown for Eritrea and Ethiopia. See this Chapter pp. 52-53.

<sup>423</sup> See D. Copp: “*Democracy and Communal Self-Determination*”, J. Mac Mahan and R. McKim (eds.), *The Morality of Nationalism*, New-York-Oxford, 1997, p. 16. D. Philpott: “*In Defense of Self-Determination*”, *Journal of Ethics*, 1993, vol. 105, p. 352-355. See also A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., arguing that the unit of the right to self-determination in the end is the individual. The latter argument will be presented in the next chapter.

<sup>424</sup> The logic consequence of the proposal elaborated thus far would be analysing what happens once an entity has been created throughout a unilateral secession. The issue of recognition plays a pivotal role in the success of a secession. However, since the subject of this piece of study is the interrelation between secession and territorial referendum, it seems more accurate to deal with recognition at the end of the research and only to a very limited extent. Introducing the topic at this stage and then coming back to it elsewhere in the text would be overly confusing.

## 5. Conclusions

This Chapter has tried to develop a systematic approach about the contested issues surrounding secession in international law. It was showed that (i) neutrality of international law is not the only possible choice for legal scholars approaching secession and (ii) the *normative due process* model helps in understanding the ongoing trends in international law on secession because it enables the researcher to overcome the neutral approach of international law vis-à-vis secessionist struggles. However, the model is not totally free from ambiguities, so that secession still in 2017 rests in a legal *vacuum*. Among scholars, the *remedial right theory* has gained support over the time, due also to the impact it has on human rights law. As regards states' approach to the theory, the picture is more blurred. The international community has proven not to be blind to massive violations occurring within the territory of a State. Anyway, the idea that under specific circumstances these violations may trigger a right to secede cannot but be opposed by the majority of the states. In this Chapter some critics have been advanced to the theory: overall, the rationale underpinning the *remedial secession theory* has some backsides, in that the theory offers a solution for separation, not for cohesion, even though secession was actually the result of lack of social cohesion. Arguably, difficulties in applying the *remedial right theory* originate from different grounds: on the one hand, there is no agreement on who is the bearer of the right to secede, given that for self-determination itself there is no definition of people. Legal inquiry on these topics is quite rare, indeed. There are few documents upon which scholars could rely and the issue is inextricably linked with minorities' and indigenous rights, so that it is difficult to restrict the scope of the analysis. Good insights could come from the description of people developed in a 1989 report of UNESCO. At the International Meeting of Experts the discussants elaborated a description – not a definition- of the main requirements a group should possess to consider itself a people. A people can be found when there is a group of individual human beings 1. “*who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life*”. The group has to be 2. “*of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State; 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly*”. Lastly, 4. “*the group must have institutions or other means of expressing its common characteristics and will for identity*”.<sup>425</sup> States have not embraced the description probably due to the fact that many groups could rely on it. Although the third requirement of self-consciousness is difficult to be proven by a claimant, the others -if interpreted broadly- would allow many sub-units to call themselves “people”. On the other

<sup>425</sup> UNESCO, *Report of the International Meeting of Experts on further Study of the Concept of the Rights of Peoples*, Paris 27-30 November 1989, SHS-89/CONF.602/7, p. 8.

hand, the obstacle is the lack of practice. As it was showed, Bangladesh was admitted to the UN only after Pakistan had recognised it. For Kosovo, the critical date for claiming a right to secede casts doubts on the applicability of the *remedial right theory*. Nevertheless, critiques as to the lack of practice and the concentration of the precedents over a brief period – the 90ies with the end of the Cold War- should be taken with caution too. It would be pretentious to expect abundant practice in an area as exceptional as that of secession and creation of statehood. While domestic conflicts in which the right to self-determination or to secede are invoked are frequent, the success of those struggles is not as common due to the competing factors influencing the final outcome. By contrast, some authors have even contended that the cases of Kosovo - or Abkhazia and Ossetia could show the inexistence of the theory: Oeter for instance, uses the maxim “*hard cases make bad law*” to mean that the uniqueness of these cases does not change the law, but even worsen it. Cases study cannot help in proving the applicability of the *remedial secession* as they are too specific and generalisations are not practicable.<sup>426</sup> Even when secession is justified by exceptional causes, third States have pushed for a concerted answer with the parent State by means of negotiation.<sup>427</sup>

In light of the above, this Chapter has found the *normative due process theory* persuasive. The theory presents a convincing alternative to the neutral approach towards secession, without totally refusing it. In fact, the *normative due process* focuses on the procedure of secession, but it confirms that the respect of procedural requirements does not create a legal title to establish a new subject of international law. In other words, the analysis does not touch upon the validity of the principle of effectiveness and the fulfilment of the criteria for establishing statehood. International practice supports the soundness of the model, in that seceding units consistently resorted to referenda to justify their claim, compliance with the *uti possidetis* principle was ensured as well as the prohibition of the use of force. Even though the case of Crimea puts into question the soundness of the *normative due process*, the legality of secession in the case at stake is superseded by what qualifies as an unlawful annexation.

In this Chapter, the procedural set of requirements for secession at the international level was applied to recent cases of secession. The decision was grounded on the premise that secession is not a declination of self-determination. Disentangling secession from self-determination is not only appropriate, but also necessary with a view to better frame the current trends about secession and self-determination in practice. Secession and self-determination are not only ontologically different, but they are also covered by different rules. More and more, claims for separation are based on arguments of respect for the rule of law and protection of human rights, especially in the context of minority rights, which have never lost their importance

<sup>426</sup> S. Oeter: “*Recognition and non-Recognition with regard to secession*”, in da C. Walter (eds.), *Secession and Self-Determination in International Law*, cit., pp. 59-61.

<sup>427</sup> S. Oeter: “*Recognition and non-Recognition with regard to secession*”, in da C. Walter (eds.), *Secession and Self-Determination in International Law*, cit., p. 64; J. Vidmar, *Democratic Statehood in International Law*, cit., pp.734-740.

for territorial changes, due also to the consolidation of the role of the European Union.<sup>428</sup> In this framework, one requirement of the *due process* of secession arose prominently: the referendum. Hence, it is now time to see whether the referendum is a necessary and sufficient condition for secession.

<sup>428</sup> P. Pazartis: "*Secession and International Law, the European Dimension*", M.G. Kohen, *Secession in International Law*, cit., p. 371.



## Chapter 3

# Territorial Referenda: Will of the People and Statehood in International Law

To begin this Chapter, a brief step back to the Introduction is needed. In the first pages, it was contended that territorial referenda lie at the intersection between international and domestic law. Not only, political scientists too have focused their attention on the use of referendum, merely from the point of view of the decision-making process leading to a referendum for territorial changes. In these terms, territorial referenda trigger legal principles of both international and constitutional law with respect to self-determination and sovereignty, because of the interrelation between peoples' wishes and creation of statehood. In particular, self-determination gets into the arena due to the continuous reliance on this right by sub-units seeking to organise a territorial referendum.<sup>429</sup> As regards sovereignty, the constitution of a State might itself define the terms and conditions for resort to referendum in cases of territorial reapportionment. This is what happened in the case of Burma,<sup>430</sup> whose Constitution envisaged a possible reapportionment validated by a decision of the people. In the following pages therefore constitutional law issue will be tackled when needed. The main purpose of this chapter, in fact, is to inquiry on whether according to international law a referendum is sufficient to legally justify a territorial change, or rather it has to be held every time a territorial change in the form of secession occurs without being a sufficient condition for secession. A norm legitimising secession is absent in international treaty law, all the more so a norm legitimising secession through a referendum. Therefore, to answer the research questions it is necessary to look at custom: in particular, it has to be found if referenda have histor-

<sup>429</sup> This view was presented in the Introduction, with the example of Moldova. It was recalled that Art. 11 of the Constitution of Moldova recognizes the autonomy of the Gagauz region. The Gagauz Autonomy Act enables the establishment of the autonomous region, albeit still an integral part of Moldova ex art. 1(1). According to the same provision, the granting of autonomy is a "*manifestation of the right to self-determination*". See P. Järve: "*Gagauzia and Moldova: Experiences in Power Sharing*", M. Weller, B. Metzger (eds.), *Settling Self-Determination Issues*, cit., pp. 320-323 and D. Raic, *Statehood and the Law of Self-Determination*, cit., p. 286.

<sup>430</sup> In the Introduction to this study – pp. 6-7- it was claimed that the Constitution of Burma, dated 1947, granted the right to secede to minorities settled within the Union of Burma. In particular, minority groups were entitled to exercise their right to secede ten years after the entry into force of the Burmese constitution

ically been consistently used to legitimise a secession or at least a territorial change as well as whether a *opinio juris* already exists.

Scholarly literature has considered that custom based on the use of referenda was rooted in plebiscites established under the 1919 Versailles Treaty.<sup>431</sup> The present Chapter will begin from 1919, but will end up disregarding the scholarly consideration just mentioned. As a preliminary remark, the number of plebiscites and referenda carried out since the end of WW I is so big that it could be as such the object of a research. Hence, a selection of consultations is required. This will inevitably leave some readers with perplexity and is subject to criticism, even when selection criteria are provided. The criteria used for choosing plebiscites in this research is grounded on an analysis of the monograph by Wambaugh, who gave an exhaustive perusal of all the plebiscites conducted on the basis of the Treaty of Versailles and Saint Germain.<sup>432</sup> The rationale guiding the selection lies in the wish to tackle cases at the opposite side of the spectrum, that is to say which had either (i) a very negative effect on the communities within the area and on the definition of the borders of States or (ii) a positive impact over the community and ended up to constitute a model of best practices for popular consultations about territorial changes, as precisely documented by Wambaugh. From the analysis it will be discerned that there is no sufficient proof to claim that the use of popular consultations is compulsory for territorial changes. As a consequence, referenda are not a compulsory requirement for unilateral secession. Nevertheless, in light of the similarities shared by referenda and plebiscite, there are elements to claim that referenda may become a necessary step for secession, although for the formation of a general rule more practice and *opinio juris* is needed.

International law discourse about territorial referenda is relatively recent, given that before the “waves” of independence undergone in the Soviet Union and the former Yugoslavia, the main issue at stake was the resort to plebiscites. Indeed these terms – plebiscite and referendum- are often mentioned interchangeably when referring to popular consultations on territorial issues under international law.<sup>433</sup> The present study rejects this tendency. In the next pages, it is assumed that consultations conducted between 1918 and 1935 should be considered plebiscites, which are different from referenda in terms of 1) legal basis; 2) majority requirement; 3) effects of the consultation. Moving forward in time, over the last two decades, preference has been given to the word referendum on a twofold basis. The increase in democratic forms of government has fostered the use of referendum worldwide. The referendum, in fact, has been considered the principal means of direct democracy. Second-

<sup>431</sup> See next section.

<sup>432</sup> S. Wambaugh, *Plebiscites since the World War*, Carnegie, 1933 and for an up to date account of the referenda carried out worldwide see the database of the Centre for Direct Democracy related to the Law School of the University of Zurich in Switzerland, at [https://www.c2d.ch/inner.php?table=dd\\_db&link\\_id=61&parent\\_id=61](https://www.c2d.ch/inner.php?table=dd_db&link_id=61&parent_id=61)

<sup>433</sup> See i.e. the reappraisal about the referendum given by Y. Beigbeder for the Max Plank Encyclopaedia of Public International Law, last updated June 2011, available online through the Oxford Public International Law browser, at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1088>

ly, and by contrast, the word plebiscite echoes the resort to popular consultations typical of dictatorial regimes.<sup>434</sup>

## 1. Plebiscites and referenda: two terms for two types of popular consultations

The difference between plebiscites and referenda is subtle. In fact, as anticipated, historically the terms have been used interchangeably. A first semantic distinction can be found in the words of de Visscher. Referring to the different modalities to ascertain the will of the people, de Visscher argues that the term *plébiscite international* belongs only to a specific type of popular consultation. It includes consultations that find their legal basis in either a multilateral or a bilateral treaty. Plebiscites held following a decision of an international organisation also fall in this category. Moreover, according to de Visscher, the distinguishing feature of a *plébiscite international* should be the control by an international committee composed by representatives of States not affected by the territorial change at stake.<sup>435</sup> For Muller, then, plebiscites usually are non-binding polls, whilst a referendum with an overwhelming majority “*automatically brings the government to enact laws*”.<sup>436</sup>

The term referendum has become the main expression of direct democracy, especially through the huge practice collected within the Swiss legal system.<sup>437</sup> When Switzerland became a Federation, the referendum was constitutionally regulated as the device used by the people to (i) make political decisions, or (ii) deny consent about the adoption of a norm.<sup>438</sup> It can be initiated by the people in accordance with the terms and conditions established for by the Constitution.<sup>439</sup> Another example is Australia. Referenda are regulated by the Constitution, while plebiscites can be organized on the basis of the *Commonwealth Electoral Act 1918* in combination with

<sup>434</sup> Ibid.

<sup>435</sup> P. de Visscher : “*Le Plébiscite International*”, F. Delpérée (Ed.), *La Participation Directe du Citoyen à la Vie Politique et Administrative*, Travaux des XXIIes Journées d’études juridiques Jean Dabin, Bruxelles, 1986, p. 144, cited by I. G. Sen, *Sovereignty Referenda in International and Constitutional Law*, New York- Dordrecht-London, 2015, p. 72.

<sup>436</sup> R.A. Müller: “*Self-Determination in International Law and the Demise of Democracy*”, *Columbia Journal of Transnational Law*, 2003, vol. 41, p. 631.

<sup>437</sup> Alongside referenda established under each cantonal system, the Constitution of the Swiss Confederation envisages three types of referenda. The *initiative populaire référendaire* under art.139 allows 10000 citizens to request a partial modification of the Federal Constitution. The *referendum facultatif* gives Swiss citizens the right to express their views about a law adopted by the federal Assembly. It requires a minimum threshold of 50000 signatures to be reached within 50 days from the publication of the act. Lastly, the *referendum obligatoire* at art. 140, calls Swiss nationals to vote before the Parliament proceeds with a constitutional modification. On the average, Swiss nationals vote four times per year. See [www.eda.admin.ch](http://www.eda.admin.ch).

<sup>438</sup> L. Leduc, *The Politics of Direct Democracy: Referenda in Global Perspective*, Petersborough, 2003.

<sup>439</sup> K.W. Kobak, *The Referendum: Direct Democracy in Switzerland*, Aldershot, Brukfield, 1993, pp. 20-35. N. Abdelgabar: “*International Law and Constitutional Making Process: the Right to Public Participation in the Constitutional Making Process in post-Referendum Sudan*”, *Verfassung und Recht in Übersee*, 2013, vol. 46, n. 2, pp. 131-151.

specific regulations adopted by the Parliament. A referendum under art. 128 of the Australian Constitution is used to approve a proposed revision of the Constitution, once the Parliament has passed the resolution.<sup>440</sup> Referenda are structured on a yes or no basis and require a double majority, notably a positive vote by both the majority of the voters in States and the majority of the voters of the country.<sup>441</sup> Plebiscites, instead, can be organized by the Australian Electoral Committee under sec.7A of the *Commonwealth Electoral Act 1918*, as amended by 2007 *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill*.<sup>442</sup> The amendment allows the Electoral Committee to undertake any plebiscite on the amalgamation of any local government body in Australia, as well as on issues of public interest, such as social rights or public utilities, i.e. transportation.

Although this study supports their differentiation, the interchangeable use of the terms plebiscite and referendum at the domestic level can be partially justified by the fact that in some countries a combination of plebiscites and referendum is used. Another example is the already mentioned UK's referendum required to carry out the devolution of powers to Scotland and Wales. The decision to hold a referendum was taken in the process of adoption of the *Devolution Act*<sup>443</sup> and the entry into force was subject to popular approval, albeit referenda are not envisaged under the British system since they are perceived as infringement of the sovereignty of the Parliament. Turning to the international level, instead, the roots of the interchangeable use of the terms plebiscites and referenda for territorial changes date back to the end of World War I. A summary of the main differences between these two types of consultation can be found below.

## 2. At the origins of popular consultations on territorial changes: the plebiscites

Practice on popular consultations about territorial changes dates back to the French Revolution. Between 1791 and 1792 many territories were incorporated among France's possessions after a plebiscite: Comtat-Venaissin and Avignon, Savoy, Mulhouse and Rhineland are only a few examples.<sup>444</sup> Plebiscites were carried out also for the unification of Italy (1860-1870) and for the transfer of the Swedish island of Saint Benthèlem to France in 1877.<sup>445</sup> In this general overview, further

<sup>440</sup> Commonwealth of Australia Constitution Act, 9 July 1901 as amended by the *Constitution Alteration (Referendums) Act 1977*.

<sup>441</sup> Commonwealth of Australia Constitution Act, cit., section 128, [http://www.aec.gov.au/elections/referendums/Referendums\\_Overview.htm](http://www.aec.gov.au/elections/referendums/Referendums_Overview.htm)

<sup>442</sup> Commonwealth Electoral Amendment (Democratic Plebiscites) Bill, Act. N. 157, 24 September 2007, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r2868](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2868)

<sup>443</sup> See Chapter 2 pp. 63-65.

<sup>444</sup> See Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections*, Dordrecht, M. Nijhoff, 1994., pp. 78-80.

<sup>445</sup> Y. Beigbeder: "*Referendum*", Max Plank Encyclopaedia of Public International Law, cit.

proof of the role played by popular consultations can be inferred from the Draft Constitution of France of 1793. It reads as follows : “*La République française renonce solennellement à réunir à son territoire des contrées étrangères, sinon d’après le vœu librement émis de la majorité des habitants, et dans le cas seulement ou les contrées qui sollicitent cette réunion ne seront pas incorporées et unies à une autre nation, en vertu d’un pacte social, exprimé dans une constitution antérieure et librement consentie*”.<sup>446</sup> Although the paragraph puts emphasis on the free will of the people, during the French Revolution plebiscites did not occur in a pacific atmosphere. Popular consultations were organised with military troops standing in the territory, thus it is hard to imagine that the people could express their choice freely. Besides, as noted by Beigbeder, before World War I, many annexations – such as those carried out by the USA in Louisiana, Florida or Texas and by Prussia in Schleswig in 1867 – did not take place with a plebiscite.<sup>447</sup> Hall’s comment on the utility of plebiscites in international law is illuminating in this sense. The distinguished commentator observed that “*the principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted in International Law, and cannot be adopted into it until title by conquest has disappeared*”.<sup>448</sup> German lawyers such as Hotzendorf and Liever maintained that plebiscites were wrong because they subjected the minority to the rule of simple majority without protection.<sup>449</sup> Other commentators pointed out that for cession of territories, the consent was not needed: Alvarez opposed the use of plebiscites by stressing that each time they were used in European countries; it was because the concerned annexing State felt confident about the result of the vote. Whenever there might be chances of adverse result, the population of the territory concerned was not consulted.<sup>450</sup> New trends emerged after the end of the First World War, albeit the issue of consent will be a constant within the debate over territorial changes.

<sup>446</sup> Art. 2, Title XIII of the Draft Constitution presented by the Condorcet to the National Convention on 15 February 1793.

<sup>447</sup> Y. Beigbeder, *International Monitoring of Plebiscites*, cit., p. 79.

<sup>448</sup> W.E. Hall, *International Law*, Oxford, 1880, p. 40.

<sup>449</sup> B. He: “*Referenda as a Solution to the National-Identity/boundary Question: An Empirical Critique of the Theoretical Literature*”, *Alternatives*, 2002, vol. 27, at p.67 citing P. Goodhart, *Referendum* London, 1971, pp. 107-108.

<sup>450</sup> See F.L. Jones: “*Plebiscites*”, *Transactions of the Grotius Society*, Vol. 13, *Problems of Peace and War*, Papers before the Society in the Year 1927, p. 167, referring to the Circular by the Peruvian Foreign Office on the Arica and Tacna Question titled “*Perù and Chili*” dated 1901. The region of Tacna and Arica was one of the approaches of Perù and Chile to the Pacific. The treaty of Ancon (1833) established that sovereignty on the region would have to be decided by a plebiscite, to be organised within ten years from the signature of the treaty. Both States wanted exclusive sovereignty over the area, and the dispute lasted so long that it was eventually agreed to solve it through an arbitration procedure, with the American Arbitrators JJ Pershing and W. Lassiter appointed by the USA President C. Coolidge. The arbitrators picked up the rules of the Ancon treaty and proposed a new plebiscite. See the Report of International Arbitral Awards at [http://legal.un.org/riaa/cases/vol\\_II/921-958.pdf](http://legal.un.org/riaa/cases/vol_II/921-958.pdf). Once again the parties were not able to agree on the terms for the organisation of the plebiscite. A solution to the dispute came only with the negotiations conducted by F. Kellogg, who managed to bring the parties to sign the Lima agreement in 1929. See on the dispute J.F. Wilson, *The United States, Chile and Peru in the Tacna and Arica Plebiscite*, New York, 1979.

## 2.1 Main requirements of the Plebiscites carried out after World War I

After World War I the debate over popular consultations revolved around setting the borders of the defeated powers. The relevant peace treaties signed at the end of the war are the Versailles Treaty between the victorious powers and Germany, and the Treaty of Saint-Germain between the Allies and Austria. In particular, plebiscites developed with regard to the redrawing of boundaries with France, Belgium and Poland. At the Paris Peace Conference, resort to popular consultations to settle frontiers dispute was considered the corollary of the principle of self-determination introduced by Wilson.<sup>451</sup> The premise was that the peoples' right to decide their international status could be put into practice through plebiscites. In the first Chapter, it was showed that while for Lenin self-determination involved secession through the use of force, Wilson's approach focused on peaceful achievement of self-determination. For Wilson, self-determination was to be realised by means of a plebiscite and in conformity with reports issued by international commissions of experts.<sup>452</sup> The Wilsonian being the prevailing view, territorial realignments found their basis in an international agreement, be it a multilateral treaty, a peace treaty or even a bilateral agreement.<sup>453</sup>

In a nutshell, plebiscites consisted in the approval of a decision. Thus, they were not directly the expression of a wish by the population was not empowered per se to give rise to the obligation by the State to accept the new territorial status.<sup>454</sup> In fact, it could well happen that territorial changes were not formally included in the peace treaties. The fate of many territories was decided with secret treaties between the major powers, albeit those same territorial allocations were discussed during the peace negotiations.<sup>455</sup> This holds true for Schleswig, Allstein, Upper Silesia and Saar Basin, but also for the attempted plebiscites in Teschen and Vilna. In addition, it seems as if plebiscites were not considered definitive pronouncements on the borders of the State, since the final binding decision was left to a body apart, notably the Council of the League.<sup>456</sup> Thus, they were practically merely consultative.

<sup>451</sup> See Chapter 1 section 1.1.

<sup>452</sup> A. Cassese, *Self-determination of Peoples. A Legal Reappraisal*, cit., p. 21.

<sup>453</sup> S. Wambaugh, *Plebiscites since the World War*, cit., pp. 440; A. Peters: "*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*", cit., pp. 255–280.

<sup>454</sup> On this point A. Peters: "*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*", cit., pp. 255-259 and the contribution to the EJIL Blog, "*Sense and Nonsense of Territorial Referenda in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law*", April 16, 2014, <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referenda-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>.

<sup>455</sup> For example, between 1915 and 1917 Russia signed with the Allies a Treaty by which it was promised Constantinople and the Dardanelles. In exchange, Russia pledged to leave the Alsace-Lorraine to France and the Saar Coal Basin. Moreover, Russia the UK and France would divide among themselves Syria and Mesopotamia. See for reference V. Mainetti: "*Les traités secrets en Droit International*", P. Zen-Ruffinen (ed.), *Le secret et le Droit*, Zurich, 2004, pp. 399-420.

<sup>456</sup> M. Suksi, *Bringing in the People*, cit., p. 245.

The basic requirements for holding a plebiscite can be derived from the third part of the Versailles Treaty. As anticipated, the Versailles Treaty required frontiers “*to be fixed in conformity with the wishes of the population*”<sup>457</sup> for: 1) Schleswig and Holstein,<sup>458</sup> the borders between Germany and Denmark; 2) Allstein, Marienwerder, Sopron and Upper Silesia, the borders between Poland and Germany<sup>459</sup> and 3) the region of the Saar, which was put under the administration of the League of Nations.<sup>460</sup> Plebiscites established by the Versailles Treaty should i) take place in a neutralised territory; ii) be held under the supervision of neutral international forces, that is by States not directly interested in the territorial re-apportionment; iii) be formulated through a multi-choice question; iv) be conducted with the establishment of an international commission for monitoring the plebiscite.<sup>461</sup> In fact, the task to organise popular consultations was given to an international commission.<sup>462</sup>

<sup>457</sup> Versailles Treaty, signed at Paris, July 5, 1920. The formulation is reiterated in the provisions regulating the holding of each plebiscite. In particular at art. 35 “*The League of Nations shall decide on the sovereignty under which the territory is to be placed, taking into account the wishes of the inhabitants as expressed by the voting*” referring to the Saar plebiscite; art. 47 “*In order to make in due time permanent provision for the government of the Saar Basin in accordance with the wishes of the populations, France and Germany agree to the provisions of Chapter III of the Annex hereto*”; section five ruling on the Alsace Lorraine, at the preamble reads as follows “*The High Contracting Parties, recognising the moral obligation to redress the wrong done by Germany in 1871 both to the rights of France and to the wishes of the population of Alsace and Lorraine*”; art. 94 for East Prussia: “*In the area between the southern frontier of East Prussia, as described in Article 28 of Part II (Boundaries of Germany) of the present Treaty, and the line described below, the inhabitants will be called upon to indicate by a vote the State to which they wish to belong*”.

<sup>458</sup> Versailles Treaty, cit., artt.109-110.

<sup>459</sup> Ibid. artt. 88, 94-97 with annexes.

<sup>460</sup> Other plebiscites, such as that of Klagenfurt, were established under the *Treaty of Saint-Germain*. Lastly, there were two attempts to hold popular consultations in Teschen and Vilna. See *Treaty of Saint-Germain*, signed at Saint-Germain-en-Laye (Paris), September 10, 1919, entered into force on July 16, 1920, art. 50.

<sup>461</sup> See M. Suksi, *Bringing in the People*, cit., 1993, pp. 242-243; I. G. Sen, *Sovereignty Referenda in International and Constitutional Law*, cit., pp. 79-82.

<sup>462</sup> The system used for Eupen and Malmedy derogated to this model. According to the Versailles Treaty, cit., art. 34: “*During the six months after the coming into force of this Treaty, registers will be opened by the Belgian authority at Eupen and Malmedy in which the inhabitants of the above territory will be entitled to record in writing a desire to see the whole or part of it remain under German sovereignty. The results of this public expression of opinion will be communicated by the Belgian Government to the League of Nations, and Belgium undertakes to accept the decision of the League*” The voters were required to choose between two registers to be signed in, one for Germany and one for Belgium respectively. However, transcriptions were controlled by the Belgian authorities only. Indeed, the Versailles Treaty stipulated that “*Germany renounces in favour of Belgium all rights and title over the territory comprising the whole of the Kreise of Eupen and of Malmedy*”. In practice, the population was called to register once sovereignty over the territory had already been transferred to Belgium. Moreover, no period of pre-election silence was envisaged. See-F.L. Jones: “*Plebiscites*”, cit., p. 169

### 2.1.1 Neutralisation of territory and appointment of an International Commission

Plebiscites were realised through the neutralisation of the territory at stake, by means of withdrawal or reduction of the presence of the troops of the concerned States. While the idea of drafting a provision on the holding of popular consultation in a bilateral treaty dates back to 1857, when the plebiscites in Wallachia and Moldavia were established by agreement between the victorious powers and Turkey<sup>463</sup> - the neutralisation of a territory was a novelty. Each plebiscite established under the Versailles Treaty asked for the evacuation of the German troops so that the territory could be placed under the authority of an international commission.<sup>464</sup> For Wambaugh, the insistence of the international community on the evacuation of armies from the occupied territories before the proposed vote was a “*proof of how definitely the world repudiated the idea that a plebiscite should merely sanctify a fait accompli*”.<sup>465</sup>

As far as the establishment of the international commission is concerned, the body was tasked with general powers of administration, that is to say with all necessary tools to ensure the freedom, fairness and secrecy of the vote.<sup>466</sup> According to Wambaugh,<sup>467</sup> three fundamental principles governed the commissions established to administer plebiscites. First, they should not change the *status quo* of the territory, thus being as much discrete as possible. Second, they should “*leave as much as possible to local citizens*”.<sup>468</sup> Finally, they should ensure that third parties acted as “*possible guardians of their own interests*”.<sup>469</sup> It can be concluded that international commissions for plebiscites were conceived as temporary, *ad hoc* bodies, tasked only with the powers necessary to ensure an effective and expeditious consultation. The general powers granted to the commissions should not lead to underestimate their role. For instance, in highly contested territories such as for the plebiscite in Upper Silesia, the commission “*enjoy all the powers exercised by the German or the Prussian Government, except those of legislation or taxation*”.<sup>470</sup> The powers given to the commission seem very extensive, to the extent that it could also remove officials

<sup>463</sup> S. Wambaugh, *A Monograph on Plebiscites (with a Collection of Official Documents)*, Oxford, 1923, pp. 110-130; E. Brahm: “*Election Monitoring*”, G. Burgess and H. Burgess (eds.), *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder, 2013, available online <http://www.beyondintractability.org/eric-brahm.jsp>.

<sup>464</sup> S. Wambaugh, *Plebiscites since the World War*, cit., p. 451.

<sup>465</sup> S. Wambaugh, *Plebiscites since the War*, cit., p. 445.

<sup>466</sup> Y. Beigbeder, *International Monitoring on Plebiscites*, cit., p. 81.

<sup>467</sup> S. Wambaugh, *Plebiscites since the World War*, cit., p. 450.

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

<sup>470</sup> See Versailles Treaty, cit., annex to Section VIII. By contrast, the Treaty of Saint-Germain did not give to the established commission for plebiscites general powers of administration. Thus, the commission nominated for the plebiscite in Klagenfurt had only the duty to control that the territory was administered impartially. However, given that the Saint Germain treaty called the commission to ensure freedom and secrecy of the vote, in practice the Commission enjoyed huge powers as well. See on this point S. Wambaugh, *Plebiscites since the World War*, cit., p. 453-455.

from office in case of maladministration. The commission in fact removed two judges, one public prosecutor and some low-ranked officials.<sup>471</sup> The powers attributed are the expression of a considerable credit given to the Commissions, and is a sign that they were considered essential to guarantee the avoidance of frauds.

### 2.1.2 Eligibility to vote and legal value of the vote

Twenty years old was the minimum age requirement, thus, regardless of gender, all those who resided in the concerned territory at the date of the signature of the treaty which set the border dispute could vote.<sup>472</sup> Nevertheless, the universal suffrage should not lead to think that the wishes of the people were considered the decisive element for setting the disputes. Votes were, as mentioned above, consultative. The story of Upper Silesia clearly shows this. Access to natural resources in the region was the underpinning reason of the quarrels between Germany and Poland. Germany claimed that historically the region had never been under the authority of Poland, notwithstanding the fact that part of the population spoke Polish. The Allied powers had to acknowledge that Poland had no legal claim for cession of Upper Silesia, but in order not to give to Germany a considerable source of power for reconstruction, they declared that the destiny of Upper Silesia should be decided on the basis of a plebiscite.<sup>473</sup>

The plebiscite of 20 March 1921 was in favour of Germany, but figures were so varied among the communes that the Allied Council deferred the case to the Council of the League. Political considerations, such as the need to ensure some possessions to Germany with a view to avoid the development of revenge policies, weighted more than the final results of the plebiscite. The Allied powers wanted to punish Germany, but were well aware that with a view to guarantee a lasting peace some concessions to the defeated power needed to be accepted. Basing its decision on a combination of geographical and economic arguments as well as on the results of the plebiscites, the Council established that Germany would be assigned the industrial area, while Poland the rural one, notably the biggest portion of territory.<sup>474</sup> Admittedly, the results of the plebiscite were taken into consideration, but they were not the decisive element.

In addition, there were also cases in which the international community failed to hold popular consultations. In this sense, the main pitfall of the Versailles system is exemplified by Vilna and Teschen. For Vilna, the League of Nations was meant to be involved in the organisation of the plebiscite, but the vote did not take place.<sup>475</sup>

<sup>471</sup> Ibid.

<sup>472</sup> Y. Beigbeder, *International Monitoring of Plebiscites*, cit., p. 81; G.S. Kaeckenbeeck: “*Upper Silesia Under the League of Nations*”, *The Annals of the American Academy of Political and Social Science*, 1946, vol. 243, pp.129-133.

<sup>473</sup> Versailles Treaty’s art. 88 and the six regulations annexed to laid down the conditions for the organisation of public consultation in Upper Silesia. See also H.F. Armstrong: “*Versailles: Retrospect*”, *Foreign Affairs*, 1 October 1932, vol. 11, pp. 173-189.

<sup>474</sup> F.L. Jones: “*Plebiscites*”, cit., p. 169.

<sup>475</sup> M. Suksi, *Bringing in the People*, cit., pp. 242-243.

After the independence of Lithuania, Vilna had been declared the capital of the country, but Poland had a claim over it and advanced its troops until the city was occupied. In September 1920, the Council of the League managed to bring the parties to sign a cease-fire and establish a demarcation line, together with a “*demarcation force*”.<sup>476</sup> During the negotiations the Council proposed a plebiscite for Vilna to set definitely the dispute. A peace agreement was signed, yet Poland and Lithuania made it last briefly due to divergences on how to execute it and on the holding of a plebiscite, that Poland accepted with resistance. Fights between the parties gain momentum again in 1925. In 1927 the Council managed to pacify the area, but the price to pay was the cancellation of the plebiscite. Diplomatic means superseded any prospect of popular consultation for the area.<sup>477</sup>

Indeed, Vilna was not the only example of failed plebiscite. Teschen is another example. The area was contested between Poland and Czechoslovakia for historical, economic and ethnic reasons. When World War I ended, Czech and Polish authorities signed a temporary agreement<sup>478</sup> with a view to sign a final treaty on the issue. Territorial borders were supposed to mirror the division between ethnic communities, but the exercise resulted in an economic advantage for Czechoslovakia, that had the best areas in terms of resources. Frictions between the parties developed after the decision by the government of Poland to hold parliamentary elections in the area under its control, opposing the existing delimitation of frontiers. Troops by both parties were mobilized at the frontiers and three days before the elections the Czechoslovak troops invaded the Polish territory. The affair was resolved at the Paris Peace Conference, when the issue was deferred to the Supreme Council of the League. Unsurprisingly, an international plebiscite commission was appointed, tasked with organizing a popular consultation. Polish and Czechoslovak troops were withdrawn and they were replaced by troops of States not affected by the dispute, notably France and Italy. However, withdrawal of the troops together with the chaotic situation created by the collapse of the Austro-Hungarian Empire led to internal riots which the Allies were not able to quell. As a result, it was impossible to hold the plebiscite and the matter was referred to the Council of the League.<sup>479</sup> Like for Vilna, a diplomatic solution was preferred to the holding of a plebiscite. What do the cases just mentioned show? They demonstrate that although plebiscites were envisaged by the Versailles treaty, they were conceived as one among the possible tools to be used to solve frontiers disputes. In fact, they were not universally organised for frontiers disputes and their results were balanced with foreign politics needs. Therefore, it might be argued that there was no perceived legal obligation concerning plebiscites about territorial changes. However, this is not tantamount to say that at the international level they gradually disappeared. In fact, the organisation and

<sup>476</sup> See Y. Beigbeder, *International Monitoring of Plebiscites*, cit., pp. 190-192. In particular, the author refers to the demarcation force as the ancestors of the peace-keeping operations.

<sup>477</sup> Y. Beigbeder, *ibid.* See A. E. Senn, *The Great Powers, Lithuania and the Vilna Question 1920-1928*, Leiden, 1966, pp. 47-60.

<sup>478</sup> The agreement was signed on November 5 1918, before Poland declared independence on the 28th of October 1918.

<sup>479</sup> S. Wambaugh, *Plebiscites since the World War*, cit., p. 550-554.

management of the plebiscite in the region of the Saar, dated January 1935, was a success for the League of Nations as will be showed in the next paragraph.

## **2.2 The League of Nations and popular consultations: the Plebiscite in the Saar Basin**

In the introduction to this Chapter, it was pointed out that except for the Saar Basin plebiscite, consultations were not carried out under the League of Nations auspices. Moreover, it was just anticipated that the experience of the Saar plebiscite was successful. The fact that the international community demanded to ask for the expression of the wishes of the population and managed to solve the dispute has to be highlighted. On the one hand, it is a sign of the changes occurring within the international community, which started to work on a multilateral rather than bilateral basis - as it was seen with the other plebiscites involving the redefinition of borders. On the other hand, the success of the Saar Basin exercise supports the view that international monitoring, when carried out properly, can effectively ensure a peaceful territorial change.<sup>480</sup>

Firstly, a brief reappraisal of the facts: France had demanded that Saar Basin should become part of its territory as compensation for the losses sustained during the War. The Allies decided that the Saar region should be placed under the international supervision of the League of Nations.<sup>481</sup> After fifteen years, the question of sovereignty would be solved by calling the Saarlanders to a plebiscite. The vote was carried out under the auspices of the League with a huge organisation. An international commission of five members was nominated to supervise the vote, together with a plebiscite commission of experts.<sup>482</sup> The plebiscite commission was made of States not affected by the dispute, notably Sweden, the Netherlands and Luxemburg. The same countries deployed 950 officials to safeguard the conduct of the vote under a British commander. It was, indeed, the first and last time an international monitoring

<sup>480</sup> Beigbeder however observes that the success of the Saar Plebiscite was counterbalanced by a big failure for the League in the Sanjak case between 1937 and 1938. Sanjak was a district in the north of Syria that was claimed by Turkey in light of the presence of a considerable Turkish minority. Following quarrels with France – the trustee country- Turkey asked the Council of the League to consider the situation in the Sanjak. The League decided that the area should remain part of Syria, but that it should enjoy substantial autonomy. The League of Nations was supposed to organise elections for the Sanjak government, but the Turkish minority with the help of Turkey made the work of the League impossible by several boycotts. As a result, France and Turkey organised their own commissions to replace the League's one and conducted the elections in 1939, whose turnout was in favour of the Turkish party. The role of the League was superseded in this case. See Y. Beigbeder, *International Monitoring of Plebiscites*, cit., pp. 88-89.

<sup>481</sup> Art. 39 of the Versailles Treaty established: “*Germany renounces in favour of the League of Nations, in the capacity of trustee, the government of the territory defined above. At the end of fifteen years from the coming into force of the present Treaty the inhabitants of the said territory shall be called upon to indicate the sovereignty under which they desire to be placed*”.

<sup>482</sup> S. Wambaugh, *The Saar Plebiscite*, Harvard, 1940, pp. 316-325. See also G. Scott, *The Rise and Fall of the League of Nations*, New York, 1973, pp. 60-63.

mission under the aegis of the League of Nations was instructed.<sup>483</sup> Besides, a Supreme Plebiscite Tribunal and eight district tribunals were put in place. The district tribunals in particular were created to protect the inhabitants against injustices on account of their attitude during the electoral campaign.

The vote took place on 13 January 1935. The plebiscite's question was made of three alternatives. The Saarlanders were asked to choose between 1) maintenance of the trusteeship regime; 2) union with France and 3) union with Germany. The results showed a preference for Germany. As observed by Wambaugh, although the process leading to the plebiscite was not perfectly managed – there were interferences by the German supporters to boycott the election campaign – the Saar experience has to be considered a success for the League and the whole international community. Some features contributed more than others to guarantee the successful organisation of the plebiscite: the process was not controlled by the Allies, but by neutral parties; police forces were also nominated from neutral countries, to ensure the free and fair conduct of the plebiscite. In fact, Wambaugh reports that the absolute secrecy of the ballot and domestic order were guaranteed.<sup>484</sup> The plebiscite in the Saar Basin in fact may be taken as a model for a free and fair plebiscite and is the closest to modern territorial referenda, where the requirements of freedom of expression and fairness of the vote play a fundamental role.

### 2.3 The plebiscites under the Versailles Treaty: a critical assessment

Overall, it can be argued that the plebiscite system set by the treaty of Versailles presented many pitfalls but had also some merits, such as the emphasis put on international monitoring and the neutralisation of the territory. Several reasons justify a partial criticism: firstly, whilst the treaty of Versailles called for the organisation of the plebiscites, the whole process was carried out on a case-by-case basis. Moreover, the Versailles treaty itself provided for hybrid forms of plebiscites, such as in the case of Eupen and Malmédy.<sup>485</sup>

Anyway, the main feature which comes out of the analysis of plebiscites is their consultative nature. Having a look at scholarly reactions to the use of plebiscites for territorial changes corroborates this view. Proceedings of international law conferences of that time highlight that plebiscites were looked at with suspect by legal scholars, who took a stand in favour of other methods of setting frontier disputes.<sup>486</sup> In principle, the idea of following the wishes of the population was not rejected, but

<sup>483</sup> For a comprehensive account of the plebiscite in the Saar Basin see S. Wambaugh, *The Saar Plebiscite*, cit., p. 316-325.

<sup>484</sup> S. Wambaugh, *Plebiscites after the First World War*, cit., p. 506.

<sup>485</sup> See fn. 463.

<sup>486</sup> Alongside those related to international monitoring, contemporary scholarship has awarded some merits to the plebiscite system outside of frontier disputes. In particular, Knop has aptly observed that plebiscites contributed to enhancing the participation of women in domestic political affairs, given that they were given suffrage in all the Versailles popular consultations. See. K. Knop, *Diversity and Self-Determination in International Law*, 2002.

its possible outcomes raised adverse reactions. Minority treaties together with an increase in domestic law guarantees were considered more effective in favouring peaceful relations among the nations. Moving forward to the second World War, President Roosevelt when referring to the possible popular consultation for Croatia claimed that they were a “*method not of necessity a final one. The whole point of this is that peaceful determination is a continuing process*”.<sup>487</sup>

Nevertheless, a positive stance can be taken with respect to some procedural requirements emerging from practice about plebiscites. Wambaugh in particular summarised the main features which, according to her, should be used with a view to ensure a free and fair consultation.<sup>488</sup> Firstly, plebiscites must be held with the formal agreement of the interested parties. The agreement must also clearly rule on the neutralisation of the territory at stake: 1) the area should be put under international control and 2) all the troops of the interested states should be withdrawn. The voting should be controlled by a plebiscite commission, and suffrage must include men and women, illiterates and prisoners. According to Wambaugh,<sup>489</sup> the vote would be better secured if the plebiscite commission had full administering powers. These powers should be granted in considerable advance to increase among the people the “*confidence that a sovereignty change is possible*”.<sup>490</sup> Besides, *ad hoc* police force could safeguard the activity of the commission. By contrast, when this requirements are not respected, the plebiscite is probably going to exacerbate the conflict and unlikely to leave to a long-standing territorial reapportionment.<sup>491</sup>

### 3. The UN and plebiscites held during the decolonisation period

The existing mistrust towards the holding of popular consultations for territorial disputes was increased by the widespread use of plebiscites by totalitarian regimes.<sup>492</sup> Hence, the immediate aftermath of World War II marked a step backwards in the use of popular consultations. No provision on popular consultations either in the form of plebiscite or of referenda can be found in the Paris Peace Treaties. Between

<sup>487</sup> The text is an extract of a Letter wrote by President Roosevelt to the American Representative to the Vatican, printed in Papers of President Franklin D. Roosevelt, Secretary's File (box 76), Hyde Park Library, quoted by R. A. Miller: “*Self-Determination in International Law and the Demise of Democracy?*”, Columbia Journal of Transnational Law, 2003, vol. 41, p. 629.

<sup>488</sup> S. Wambaugh, Plebiscites since the World War, cit., p. 506. These same standards have been utilised also to describe the main features of the decolonisation's popular consultations by Y. Beigbeder, International Monitoring of Plebiscites, cit., p. 87

<sup>489</sup> S. Wambaugh, Plebiscites since the World War, cit., p. 506

<sup>490</sup> Ibid. See also table 3.1 providing the full list of requirements, in Y. Beigbeder, International Monitoring of Plebiscites, cit., p. 87.

<sup>491</sup> Ibid.

<sup>492</sup> Examples of plebiscites held under the dictatorial regimes were the Anschluss plebiscite in Austria (10 April 1938); the plebiscites held in Italy on 24 March 1924 and 24 March 1934 where the voters were asked to say yes or no to a list of deputies elaborated by the Prime Minister. Other plebiscites were held after WW II, i.e. on 1968 in Greece the dictatorship of Colonel Papadopoulos held a consultation to legitimise his coup d'État. See C. Cassina: “*Alle origini del plebiscito 'dei moderni'*”, Giornale di Storia Costituzionale, 2009, vol. 18, p. 90.

1945 and 1960 only two plebiscites were conducted: one for the Oder-Neisse area and the second Saar plebiscite, both concerning territorial reapportionments linked to the second World War.<sup>493</sup>

It was with the strengthening of the action of the UN in the decolonisation process that popular consultations gain momentum again. According to the UN Charter, popular consultations might occur for: (i) non-self-governing territories<sup>494</sup> and (ii) trusteeships as established under Chapter XII of the Charter.<sup>495</sup> In principle, the ultimate aim of popular consultations differed from one system to the other. Whereas for trusteeships independence was the ultimate aim, elections in non-self-governing territories were a tool to secure consent about a certain level of autonomy and independence as such was not clearly envisaged.<sup>496</sup> However, the more the UN engaged in guiding the decolonisation process, the more the duality blurred, as the right to self-determination was affirmed for all peoples.<sup>497</sup> The position of the UN with respect to territorial referenda changed over the decolonisation period. Shortly after the end of WW II, the organisation was not much concerned with the status of non self-governing territories, so sometimes it failed to act as a supervisor, such as in the cases of Puerto Rico<sup>498</sup> or the Netherlands Antilles.<sup>499</sup> However, in the middle of the

<sup>493</sup> The latter, in particular, was a decisive consultation that shaped the fate of the region. In 1954 France and Germany agreed on a Statute for the administration of the Saar, according to which the area was to be administered under the auspices of the Western Union. The status was submitted to the population for consent, but the ballot's turnout was against the new statutory settlement. The results of the ballot therefore forced Germany and France to negotiate a new agreement, whereby France ceded the Saar to the Federal Republic of Germany. See the Treaty between France and Germany, 27 October 1956, BGBl, 1956, vol. II, S. 1587 cited by M. Suksi, *Bringing in the People*, cit., p. 249.

<sup>494</sup> UN Charter, Chapter XI, artt. 73-74.

<sup>495</sup> UN Charter, artt. 75-85.

<sup>496</sup> Art. 73 of the Charter applies to all territories subject to sovereignty of another country regardless of the will of the people concerned, as those people are considered unable to govern themselves, it does not mention independence as it addresses "*peoples (who) have not yet attained a full measure of self-government*". By contrast, States acting as trustees according to art. 76 had the duty to "*promote [...] their progressive development towards self-government or independence as may appropriate to the particular circumstance of each territory and its peoples and the freely expressed wishes of the peoples concerned*". The vague character of Chapter XI has been attributed to the influence of France and the UK in the drafting due to their necessity to safeguard colonial possessions. See U. Fasternath: "*Chapter XI. Declaration Regarding Non Self-Governing Territories*" in B. Simma (eds.), *The Charter of the United Nations*, Oxford, 2002, pp. 1089-1091.

<sup>497</sup> I. Sen, *Sovereignty Referendum in International and Constitutional Law*, Cham-Heidelberg- New York- Dordrecht- London, 2015., pp. 55-56.

<sup>498</sup> The model chosen by the USA to deal with the former Trust Territories of the Pacific Island – including also New Caledonia- has been commonly referred to as "Freely Associated States". That is to say that these territories can become independent nonetheless they may leave to the USA the control of certain sovereign competencies such as defence and security. In other word, the premise was the continuation of control by the administering State, albeit with different sovereignty arrangements. The inhabitants of Puerto Rico have been called repeatedly to express their choice on their legal status, notably in 1967, 1991, 1993, 1998 and 2012. However, the status of Puerto Rico is somehow still in a vacuum, as demonstrated by the fact that it is the subject of reports of the GA issued on February 2016. The status of the island has been shaped by a series of popular consultations. In 1993 a plebiscite was held, almost with the same requirements of the previous dated 1967. It envisaged three options: the commonwealth association with the USA, a limited form of statehood and independence. Only 4% of the vote casts was in favour of the latter, whilst the commonwealth was the most popular choice. However, the majority

sixties the big push for the decolonisation required a change of approach by the organisation. The UN did not accept new status of territories decided without UN-led consultations:<sup>500</sup> the referendum in French Somaliland was refused by the UN on the ground, *inter alia*, that France had not accepted the UN supervision. Practice on the

was not above 50%, so that on 13 December 1998 another consultation was held. This time the options were four, because there was also the possibility to choose the “none of the above” option. This was ultimately the choice of the majority of the voters: in other words, people from Puerto Rico did not want to be in partnership with the USA, neither to be independent. However, the movement towards independence took strength and in July 2005 with another election 84% of the voters called for a unicameral legislature for Puerto Rico. The Supreme Court however stopped the process by ruling that a constitutional amendment on the composition of the Assembly could not be imposed by an election. Although the Court impeded the reform, the vote was a clear sign for the government of the USA, which put pressure on the Task Force for Puerto Rico established in 1998 in order to monitor the bilateral relationship. The Task Force has been firm in claiming that only two paths are possible: 1) full independence of Puerto Rico; 2) a limited form of statehood with the USA. It was on this basis that the Task Force recommended to resort to a plebiscite no later than in 2006. Delays in the implementation of the report by the USA – probably due to the feeling that Puerto Rico was more in favour of independence – lasted until 2012, when a popular consultation was finally held. This plebiscite was structured through multiple questions. Two main choices were presented: a) stay with the USA in Commonwealth of Association; b) indicate another form of statehood between 1) independence; 2) a limited form of participation to the commonwealth or 3) a different status within the commonwealth. The 55% of the vote casts was against statehood, but there was no agreement on the alternative. This is why the status of Puerto Rico is considered to be in vacuum both from an international and a domestic law standpoint. However, the issue is considered a domestic one although the UN remains seized through the activity of the General Assembly. Geo-strategic considerations weight in the analysis of the legal status of Puerto Rico, due to its position for the control of the pacific area by the USA. The case therefore demonstrates that even for the pillars of the UN activity in the decolonisation process – such as the management of trust and non-self-governing territories- the organisation has failed to act as a supervisor. See. I. Sen, *Sovereignty Referendum in International and Constitutional Law*, cit., p. 64 and p. 85 and the report by the GA Special Committee, dated 22 June 2015 on the Status of Puerto Rico, A/AC.109/2016/L.13, published on February 26, 2016.

<sup>499</sup> The UN did not supervise the passage to self-government of the Netherlands Antilles. Already in 1951 the government of the Netherlands expressed at the UN their desire that the Antilles not been considered a self-governing territory any more. Delisting of the Antilles from the list of non self-governing territories occurred in 1955, with resolution 955 of 15 December. Further change of status in the Antilles did not involve the UN either. In 2010 there was a serious change since the Antilles dissolved and the Kingdom of the Netherlands is now made of four countries: the Netherlands, St Martin, Curacao and Aruba. For Curacao and St Martin, however, a transitional period was envisaged to acquire complete independence, therefore they continue to be assisted by the Netherlands.

See A.B. Van Rijn: “*Dimensions under International Law Linked to the Dissolution of the Netherlands Antilles*”, *Netherlands Yearbook of International Law*, 2009, vol. 15, pp. 75-119; A.J.P. Tillema, *The Netherlands Antilles and Aruba, a Study in Self-Determination*, The Hague, Institute of Social Studies, 1989.

<sup>500</sup> In the case of French Togoland, France had scheduled a referendum for 28 October 1956, which took place under its supervision. However, the ballot was not endorsed by the UN due to the questions put to vote. The choices were on the one side (a) remaining a trust territory and on the other side (ii) stay with France enjoying a wider level of autonomy. Thus, there was no option for independence. The vote cast was in favour of remaining with France with a percentage of 93%, but the UN opposed the vote because of the lack of the option on independence. See A/RES/1046, dated 23 January 1957. Togoland remained a trust territory until the UN-led election of an Assembly which was tasked to decide on the future status of Togoland. The country became independent in 1960. See on the topic: A. Cassese, *Self-Determination of Peoples*, cit., p. 76; I.G. Sen, *Sovereignty Referenda in International and Constitutional Law*, cit., p. 98.

UN monitoring activity is huge<sup>501</sup> and would fall outside the scope of the present research, because UN-monitoring concerns self-determination popular consultations. The previous Chapter has already explained that (i) only secession and not self-determination is the main theme of the research, all the more so since (ii) it was demonstrated that secession is not a form of self-determination. However, if one wants to investigate whether a customary norm on territorial referenda in international law could be at least in the way of consolidation, it is important to prove that popular consultations have preserved their basic features through time. Therefore, at least some brief critical remarks on the practice of UN-led popular consultations are unavoidable.

In the context of the decolonisation, the will of the people and creation of statehood raised complex legal questions. The United Nations, guided by the principle of self-determination enshrined in the Charter, attempted to build a system of territorial changes based on popular consultations. In the next section it will be showed that the international organisation partly failed to do so, because its approach was not always consistent. Popular consultations held under the auspices of the UN find their rationale in one of the purposes of the UN Charter, as expressed by art. 1(2). According to the provision, the UN has to develop friendly relations among nations based on respect for the principle of equal rights and self-determination. For this purpose, as we have seen in Chapter 1, when the UN dealt with the status of colonies and non-self-governing territories, it required that free association of colonial territories or integration with an independent State occur through a free and voluntary choice, in compliance with the principles of sovereign equality and self-determination.<sup>502</sup>

The analysis will be narrowed to only four cases – West New Guinea, Western Samoa, Western Sahara, East Timor- presented in chronological order. The selection criteria is the role of the popular consultation in the process towards independence. The cases tackled are in fact those in which the referendum was considered fundamental, or those in which the UN easily gave up on its use. Needless to say, it could be counter argued that some cases are omitted because they do not support the argument. Quite the opposite, the case of Western Samoa precisely serves as a counterexample. Moreover, the selection itself will show a blurred panoramic: although the UN-led popular consultations are best qualified as plebiscites, it is argued that they also share many features with referenda used by the modern systems of democracy. Hence, in the next pages the term plebiscite will be preferred, but it is important to recall that the related legal documents make a frequent use of the term referendum too.

<sup>501</sup> Plebiscites under the auspices of the United Nations hold between 1956 and 1991 include: Togoland, Gilbert and Ellis Island; British Cameroon; Equatorial Guinea; the Mariana Islands; French Somaliland; Western Samoa; the Trust territories of the Pacific Islands; the Marshall Islands; Palau; Ruanda-Urundi, the Federated States of Micronesia and Namibia. See Y. Beigbeder: “*Referendum*”, Max Plank Encyclopaedia of Public International Law, cit.

<sup>502</sup> See Chapter 1 at pp. 36-42.

### 3.1 West New Guinea and Western Samoa<sup>503</sup>

The status of West New Guinea has remained unresolved ever after Indonesian independence from the Netherlands. In 1954 Indonesia brought the issue of the legal status of West New Guinea before the General Assembly. In 1961, the Netherlands announced that it would allow the inhabitants to decide on their sovereignty by a plebiscite and asked the UN to administer it. However, Indonesia refused the proposal. The UN Secretary General Thant acting as a mediator managed to bring the parties to sign an agreement in 1962, by which the UN was entrusted with temporary executive authority until 1963, when powers would be transferred to Indonesia. This was the first time in history that the UN had extensive executive authority through the UN Temporary Executive Authority. Nevertheless, the agreement did not include the holding of a plebiscite. Instead, it was established that the population could express its wishes by consultations with the appointed representatives in councils. In July 1969, lastly, 1026 delegates were selected to vote for the legal status of West New Guinea and chose the exercise of authority under Indonesia. As pointed out by Beigbeder, it could be argued that the UN accepted and was part of, a passage of authority which was not in compliance with self-determination as generally understood with universal and secret suffrage.<sup>504</sup> Quoting again Beigbeder, “*the UN appeared at times more concerned with its goal of decolonisation [...] than about the options of self-determinations to be offered to the people*”.<sup>505</sup>

To further complicate the picture, the attitude of the UN towards Western Samoa’s independence lies at the opposite side of the spectrum. Although the will of the people and the expectations of the trust State soon converged to independence, the UN asked for a popular consultation. Besides, the consultation shares more characters with referenda rather than plebiscites. Samoa was included among the UN Trust Territories in 1946,<sup>506</sup> when the GA consented to its administration by New Zealand. Independence claims were brought to the UN and to the government of the New Zealand by Western Samoa early in 1947. Although the proposal was substantially ignored by the International Organisation and the trust State,<sup>507</sup> New Zealand undertook substantive steps to guide Western Samoa to independence, such as the creation

<sup>503</sup> The studies of West New Guinea and Western Samoa are tiny file reports in the big volume of UN practice about non self-governing and trust territories. It was decided to group them under the same heading, however, because they can be seen as the two sides of the same coin. Focusing on the role of popular consultations in the UN-led decolonisation process, it can be observed that for West New Guinea the UN renounced to resort to popular consultations although there was all the need to do so. While for Western Samoa the organisation insisted on the necessity for the people to express their choices by referendum, albeit the wishes of both the people of the island and the parent State were almost clear and convergent.

<sup>504</sup> Y. Beigbeder, *International Monitoring of Plebiscites*, cit., p. 141.

<sup>505</sup> *Ibid.* p. 144.

<sup>506</sup> Trusteeship Agreement n. 115, 13 December 1946, UN Treaty Series vol. 8, 1947, pp. 72-88. See for an overview of the texts on mandates and trusteeships R.M. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study*, 1955, Leiden-Boston.

<sup>507</sup> Report of the Trust Council by the UN Mission to Western Samoa and Annexes, T/46/add.1, repository.un.org

of the Samoa High Commission to promote the interests of Samoa in several fields, from economics to security.

This brief review of facts should suffice to demonstrate that New Zealand did not want to impede Samoa's path to independence. One could thus predict that New Zealand would continue to grant Western Samoa further autonomy until it became independent. That was what actually happened, but the UN was not persuaded by the relationship between New Zealand and the trust territory.<sup>508</sup> The 1959 UN Mission underlined that under the UN system self-government independence should be attained in compliance with the freely expressed wishes of the people. In other words, for the UN a plebiscite was desirable even though there were clear manifestations from both parties towards self-government. The attitude of the UN could be justified by looking at the modalities for electing the representatives for the Legislative Assembly of Western Samoa. The restricted suffrage undermined the principle of freely and universal expression of the will championed by the UN. As such, the "mistrust" displayed by the UN and the request to hold a plebiscite with universal suffrage confirm the approach of the organisation towards issues of self-determination, such as it was with French Togoland. The Trusteeship Council had refused to monitor the French proposed plebiscite, arguing that the vote was not valid because the question *référendaire* did not include the option of independence.<sup>509</sup> In order to implement the request of the GA, New Zealand supervised the elections in consultation with the UN Plebiscite Commissioner<sup>510</sup>. The question put to the voters was thus framed: "*Do you agree with the Constitution adopted by the Constitutional Convention on 26 October 1960? Do you agree that on 1 January 1962 Western Samoa should become an independent state on the basis of the Constitution?*"<sup>511</sup> Elections took place on 9 March 1961 and 82.8% of the people voted for independence as well as for the new Constitution.<sup>512</sup> On the basis of the result of the ballot, the UN resolved that the Trust Agreement would cease to be in force and Western Samoa acceded the UN as a new member State.<sup>513</sup>

To sum up, it seems as if popular consultations in Samoa share many features with referenda envisaged by the legal systems of modern democracies recalled at the beginning of this Chapter. The question envisages clearly the option of independence as territorial referenda usually do. Moreover, the importance given to the necessity of a public consultation might be interpreted as a sign of attention to the people's wishes and not only as a formality. In addition, questions concerning the Constitution were never dealt with in plebiscites' practice. Plebiscites, indeed, concerned the change of sovereignty and not constitutional questions. Referenda on the contrary

<sup>508</sup> Y. Beigbeder, *International Monitoring of Plebiscites*, cit., pp. 136-138.

<sup>509</sup> See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., pp. 75-76.

<sup>510</sup> UN, GA resolution 1569, 18 December 1960, operative 4 establishing a UN Plebiscite Commissioner.

<sup>511</sup> *Ibid.* operative 2.

<sup>512</sup> Y. Beigbeder, *International Monitoring of Plebiscites*, cit., p. 139.

<sup>513</sup> With SC/RES/399, 1 December 1976, the Security Council requested the General Assembly to vote for the admission of Western Samoa. The GA with resolution 31/104 dated 15 December 1976 admitted Western Samoa as new UN member.

are often expressly prescribed to ascertain the will of the people about constitutional reviews.<sup>514</sup> From the cases above, some early conclusions can be drawn. West New Guinea and Western Samoa testify the ambivalent attitude adopted by the UN. West New Guinea testifies that the concern of the UN was primarily decolonisation and less importance was paid to the modalities to reach this goal. By contrast, with Samoa the UN seemed to really care for popular consultations. These difference is rooted in the specificities of each case: on the one side, the attitude of the Netherlands was so contrastive that probably the international organisation found the only practicable way in supporting the path towards independence without a referendum. On the other side, in the case of Western Samoa the UN seemed to be intransigent towards the parent State, as if it did not trust its conduct. The plebiscite in this framework provided a hard evidence of the wishes of the people, which could not be ignored. So far, therefore, a common pattern is difficult to see.

### 3.2 Western Sahara

For the purposes of this study, the importance of Western Sahara lies in the fact that the ICJ was called to render an Advisory Opinion on the situation and developed an interesting argument on the respect of people's wishes. Although this case too falls in the cluster of the exercise of the right to self-determination, it is interesting for the way the ICJ conceived the use of popular consultations outside the decolonization context.

As regards the background of the case<sup>515</sup>, both Morocco and Mauritania claimed a title over Western Sahara, in particular on ethnic and historic grounds. Western Sahara had been a colony of Spain from 1884 until 1966, when Spain consented to start a process of decolonization in application of the right to self-determination of peoples.<sup>516</sup> The GA took advantage of Spain's favorable attitude and by res. 2229<sup>517</sup> invited Spain to "*determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara [...] the procedures for the holding of a referendum under United Nations auspices with a view to enabling the in-*

<sup>514</sup> See section 1 of this Chapter.

<sup>515</sup> The outcomes of the situation in Western Sahara have been the subject of a extensive research, still active among scholars. For the historical background see S. Simon: "*Western Sahara*" in C. Walter, A. von Ungern-Sternberg, and K. Abush (eds.), *Self-Determination and Secession in International Law*, cit., pp.256-272. Whereas, for the ICJ Judgment as well as for legal issues arising from the status of Western Sahara see G. Zyberi, *The Humanitarian Face of the International Court of Justice, its contribution to interpretation and developing of international Human Rights and Humanitarian Law Rules and Principles*, School of Human Rights Research Series, vol. 26, Antwerp- Oxford-Portland, 2008, pp. 100-134.

<sup>516</sup> Although Western Sahara deposits of phosphates were a fruitful resource for Spain, the power of the independence movement, the Polisario Front have become too strong that for the colonial power the administration had many drawbacks.

<sup>517</sup> General Assembly Resolution 229 dated 1 December 1966, para. 4. The proposal was reiterated, as Cassese reports, in several further resolutions, in particular in resolutions 2354; 2438; 2591; 2711. See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., p. 214-217 as well as at pp. 88-95.

*digenous population of the territory to exercise freely their right to self-determination*". Therefore, the question was how the principle of self-determination should operate, if it could only result in the political independence of the territory or in integration into one of the two claimants. Morocco and Mauritania pushed against the referendum, and General Assembly in 1976 approved resolution 3292 on the future status of Western Sahara. The General Assembly called upon Spain to hold a referendum and requested the ICJ to give an Advisory Opinion answering the following question: "*Was Western Sahara at the time of colonization by Spain a territory belonging to no-one? And if so, what were the legal ties between this territory and the kingdom of Morocco and Mauritania?*"

The main questions of international law arising from the request were 1) the application of the principle of self-determination, 2) legitimacy of third parties claims over a territory and 3) legal issues pertaining to the *terrae nullius* status of a territory. For the first question, the wording used by the Court suggests that the ICJ meant to promote the interpretation of the principle of self-determination as embraced by the UN for the decolonization process. The Court acknowledged the "*important place of decolonisation, under the aegis of the United Nations, in the present evolution of International Law*"<sup>518</sup> and inferred that a law of decolonization was in formation. This law of decolonization found its main guide in the principle of self-determination, yet certain aspects of its application remained unclear and *de lege ferenda*.<sup>519</sup> Given this uncertainty, the Court did not engaged thoroughly in setting the standards for the application of self-determination.<sup>520</sup> This view is supported by the absence of specifications both about the meaning of people and – above all - of the exceptional circumstances<sup>521</sup> that in the view of the judges justify the avoidance of popular consultation. The Court observed that the GA enjoyed discretion with regard to the modes of application of the right to self-determination (para. 71) and then moved to the modalities for conducting popular consultations. The Court contended that "*the validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances*".<sup>522</sup> Regardless of the modalities used, the Court clarified that for self-determination to be realised, people's expression of the will has to be a) free i.e. (ei-

<sup>518</sup> ICJ, *Western Sahara, Advisory Opinion*, cit., Judge Petren's Separate Opinion, p. 110.

<sup>519</sup> J. Crawford, *The Creation of States in International Law*, cit., p. 124.

<sup>520</sup> In this line, A. Cassese, *Self-Determination of Peoples: A legal reappraisal*, cit., p. 89; Y. Beigbeder, *International Monitoring of Plebiscites*, cit., p. 120.

<sup>521</sup> ICJ, *Western Sahara, Advisory Opinion*, cit., p. 73: "...such exceptional circumstances are possible and could exist, but they do not appear to be present in this case so as to do away the salutary principle of ascertaining of the freely expressed will of the people".

<sup>522</sup> ICJ, *Advisory Opinion, Western Sahara*, cit., para 59, p. 25.

ther said to be “expressed without interference”) and b) genuine, thus it should be only the will of the people concerned.<sup>523</sup>

However, it is hard to claim that the ICJ considered popular consultations in the form of referendum essential for the exercise of the right to self-determination. Otherwise, it could be well expected that the judgement had spent some more sections on the legal value of referenda. Rather, popular consultations were conceived as one of the tools to resort to when facing territorial disputes. That said, was the ICJ referring to a plebiscite or to a referendum? The model used for Western Sahara is closer to that of plebiscite more than referendum. Nearly all the requirements discerned for plebiscites can be found in the Secretary General implementation plan drafted pursuant to resolution 621 of 20 September 1988 and approved by the Security Council. The plan provided for (i) a transitional period (2) under the UN auspices, which would end up with (3) a referendum in which the inhabitants of Western Sahara would be called to choose between independence and integration with Morocco.<sup>524</sup>

In the framework of the decolonisation, the Advisory Opinion contributed to establishing territorial referenda as an accepted tool to ascertain the will of the people, but at the same time it acknowledged that there might be some exceptional circumstances justifying the avoidance of a consultation. The affirmation of referenda as a method to determine the will of the people does not lead to its affirmation as a compulsory means to resort to in cases of territorial reapportionments.<sup>525</sup> In this sense, it is interesting to look at Judge Boni’s concurrent opinion, as the Judge took a different stand with respect to the role of referendum. In his view, it would have been better to consult the Western Saharawi people by a UN-led referendum.<sup>526</sup> Hence, it would have been upon the people themselves to decide whether to stay with Morocco or Mauritania. Other scholars<sup>527</sup> shared this position, criticising the “mild” attitude of the UN towards Western Sahara.<sup>528</sup>

<sup>523</sup> Ibid. para 55: “*The above provisions, in particular paragraph 2 [defining self-determination], thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned*”. See also D. Raić, *Statehood and the Law of Self-Determination*, cit., p. 212.

<sup>524</sup> Y. Beigbeder, *International Monitoring of Plebiscites*, cit., p. 193; I. Sen, *Sovereignty Referendum in International and Constitutional Law*, cit., pp. 100-102.

<sup>525</sup> A. Cassese: “*The International Court of Justice and the Right of Peoples to Self-Determination*”, pp. 351-353 and J. Crawford: “*The General Assembly, the International Court of Justice and Self-Determination*”, pp. 585-606, V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jeggings*, Cambridge, 1996.

<sup>526</sup> ICJ, *Western Sahara, Advisory Opinion*, cit., Judge Boni Separate Opinion, p. 165: “*the solution which I advocate [...] obligation of consultation of the inhabitants in pursuance of GA resolution 1514*”.

<sup>527</sup> See A. Cassese, *Self-Determination of Peoples*, cit., p. 218, A. Gardner: “*Self-determination in the Western Sahara: Legal opportunities and Political Roadblocks*”, *International Peacekeeping*, 2000 vol. 7, pp. 115-138 and M. Sterio, *The Right to Self-Determination under International Law. Selfistsans, Secession and the Rule of Great Powers* (hereinafter *Selfistsans, Secession and the Rule of Great Powers*), London-New-York, 2015, p. 92.

<sup>528</sup> As regards the second question asked to the ICJ – what legal ties existed between Western Sahara, Morocco and Mauritania- the Court found that although some ties could be verified, such as the historical ones, they were not enough to support the Spanish position. The Court refused to consider Western Sahara a *terrae nullius* and recognised the role of Spain as administration power. Hence, it called upon Spain to organise the referendum in Western Sahara as required by the GA resolution 2229 para. 8. By

Looking at the current legal status of Western Sahara, one could regret that neither the UN, nor the Court expressed in strong terms the need for a referendum, since the status of the territory has remained in a vacuum ever since. Following the Advisory Opinion, Spain renounced all the claims of sovereignty over the territory. From there on, Morocco and Mauritania have been in dispute to acquire control over Western Sahara. In 1979, however, Mauritania gave up its claim, leaving the territory under the effective control of Morocco. The self-proclaimed government of the Polisario Front has proclaimed itself the legitimate authority of the region and as of 2017 it has been recognised by nearly 90 countries. On a pragmatic level, the situation in Western Sahara is still unresolved; regardless of the action of the UN in the region and the call for a popular consultation. Therefore, the Western Sahara status allows us to point out that when a referendum is not held, the territory is likely to remain the object of an unresolved dispute. In spite of the fact that this argument would support the consolidation of a rule concerning referendum for the territorial changes, the absence of concrete steps to solve the situation does not allow for clear-cut conclusions.

### 3.3 East Timor

The case of East-Timor is remarkable for at least one reason: it lies at the crossing between different legal issues arising from the role of the UN during and after the decolonization period. Before becoming independent in 2001, East Timor had had several legal statuses.<sup>529</sup> Colonial dominion of the Kingdom of Portugal, East-Timor was recognized as non-self-governing territory under the administration of Portugal. Thus, its status was monitored by the UN Committee of the 24.<sup>530</sup>

The question of self-determination of the East-Timorese officially acquired importance from the end of 1974, when Portugal decided to start a program for the decolonization of its territories. In July 1975,<sup>531</sup> when the Portuguese Council enacted the *Constitutional Law 7/75*, according to which “*the Portuguese State shall entrust*

establishing that Western Saharans had a right to self-determination and that the territory was not a *terrae nullius*, the Court gave itself an exit door not to deal with the legality of Morocco and Mauritania’s claims. See M. Sterio, *Selfstans, Secession and the Rule of Great Powers*, cit., pp. 89-92.

<sup>529</sup> For M. Weller, the case of East Timor is one of self-determination exercised by a secondary colony. With the letter, the distinguished commentator refers to “*entities that were entitled to colonial self-determination in the first place. However, when they were at the very point of administering the act of self-determination, they were forcibly incorporated into another State. The holding of a referendum in East-Timor and its independence are therefore an example of colonial self-determination in the classical sense*”. See M. Weller: “*Why the Legal Rules on Self-Determination Do Not Resolve Self-Determination Disputes*”, M. Weller, B. Metzger (eds.), *Setting Self-Determination Disputes*, cit., pp. 25-26.

<sup>530</sup> The Special Committee of the Situation with Regard to the Implementation of the Declaration on the Granting of Independence of colonial countries and Peoples is better known as Committee of the 24 due to the number of its members. It was tasked with the duty to guarantee the implementation of resolution 1514 – adopted on 14 December 1961- and can also make recommendations to the countries on the way to their independence. Every year it updates the list of the non-self-governing territories.

<sup>531</sup> R. Clark: “*The Decolonisation of East-Timor and the UN Norms on Self-Determination and Aggression*”, *Yale Journal of World Public Order*, 1980, p. 2 ff.; K. Sutter: “*East-Timor and West Irian*”, *Minority Rights Group Report* n. 42, London, 1982; A. Tancredi, *La Secessione in Diritto Internazionale*, cit., pp. 579-596.

*the political future of East Timor to a Popular Assembly*”, establishing that the legal status of the island was to be defined by a secret and universal referendum to be held in October 1976.<sup>532</sup> However, the fight between the two main political factions in East Timor - the Timor Democratic Union (UDT) and the Revolutionary Front of Independent East Timor (FRETILIN) - gave rise to a civil war and the FRETILIN unilaterally declared the independence of East Timor on 28 November 1975. With the aim of preventing independence from taking place and considering that there were also groups calling for integration with Indonesia, Indonesia occupied East Timor on 7 December 1975.<sup>533</sup> The UN condemned<sup>534</sup> Indonesia’s formal incorporation of East Timor as its 27<sup>th</sup> province. Claims by Indonesia on the legality of the invasion justified on the grounds that the East-Timorese had freely chosen integration were rejected as well. Therefore, resolutions 384<sup>535</sup> and 389<sup>536</sup> of the Security Council, while reaffirming the UN support for the people’s right to self-determination, called upon Indonesia to withdraw its troops.<sup>537</sup> Although Portugal opposed the act carried out by Indonesia claiming that the East-Timorese had not been free to exercise their right to self-determination, the overall impression was that the change of status of East-Timor was already considered a *fait accompli*.<sup>538</sup> Thus, East-Timor’s status was dormant, occupied by Indonesia but still considered by the UN as a non-self-governing territory. The watershed of the situation in East-Timor occurred in February 1991, when Portugal presented a memorial to the ICJ. Portugal asked the ICJ to exercise its jurisdiction over the alleged violation by Australia of the right of Portugal over the so called Timor Gap.<sup>539</sup> In particular, Portugal

<sup>532</sup> Portuguese Council of the Revolution Constitutional Law 7/75, 17 July 1975, Portuguese Official Gazette 1<sup>st</sup> Series No. 163. The text can be found in H. Krieger (ed.), *East Timor and the International Community: Basic Documents*, Cambridge, 1977, pp. 34-35.

<sup>533</sup> I. Sen, *Sovereignty Referendum in International and Comparative Law*, cit., pp. 101-103.

<sup>534</sup> The UN expressed its deploration for what was considered an unlawful occupation with resolution of the General Assembly n. 3485, December 12 1975; 31/53 dated December 1, 1976; 32/34 dated November 28 1977. In these resolutions it is clear that for the GA incorporation by Indonesia could not occur “*inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence*”.

<sup>535</sup> SC/RES/384/1975 22 dated 22 December 1975, paras. 1-2.

<sup>536</sup> SC/RES/389/1976 dated 22 April 1976, para. 2.

<sup>537</sup> C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge, 2010, pp. 334-338.

<sup>538</sup> A. Cassese, *Self-Determination of Peoples: A legal reappraisal*, cit., pp. 223-224. Some States recognised Indonesia’s sovereignty – such as Australia, Morocco, Bangladesh, Iran, Jordan, Malaysia, India, Oman, the Philippines, Saudi Arabia, Singapore, Suriname and Thailand. Other, like the EU member States, by contrast, denied Indonesia’s sovereignty over East-Timor. See C. Stahn, *Law and Practice of international Territorial Administrations*, cit., p. 335

<sup>539</sup> The Timor Gap is a gap in the Australian- Indonesian maritime border, with considerable petroleum resources. Once Indonesia invaded East-Timor, quarrels with Australia arose deeply because both claimed sovereignty over the area. Initially the dispute seemed to be settled with the signature of the *Treaty between Australia and Indonesia on the zone of Cooperation in an area between the Indonesian Province of East-Timor and Northern Australia*, the so called Timor Gap Treaty, signed on 11 December 1989, entered into force on 9 February 1991. However, Portugal intervened two weeks after the treaty came into force, by filing a request to the ICJ against Australia. With the request, Portugal asked the Court, inter alia, to: “*adjudicate and declare that, inasmuch as it has excluded ad is excluding any negotiation with Portugal as the administering power of the territory of Timor, with respect to the exploita-*

tried to challenge the admissibility of the Timor Gap Treaty between Australia and Indonesia, alleging that the agreement legitimized Indonesia's annexation of East-Timor and violated the right to self-determination.

As observed by Stahn, "*neither the ICJ nor the international community finally resolved the issue*".<sup>540</sup> The right to self-determination of East-Timorese and the popular consultation required for its realization found their basis in a bilateral agreement between Indonesia and Portugal. Due to domestic contingencies, the Indonesian government consented to start negotiations with Portugal. On 5 May 1999 the two countries managed to sign the New York Agreement, which constituted the legal basis for the referendum on independence of East Timor.<sup>541</sup> As it was stressed for post-war plebiscites, the request for popular consent was born out of a political compromise between sovereign States. This is clearly demonstrated by looking at the wording of para. 5 and 6 of the preamble of the agreement which, on the one hand recognized "*Indonesian sovereignty over East-Timor*", and on the other acknowledged its status of non self-governing territory. With the agreement the parties authorized the Secretary General to organize and conduct a popular consultation. The population of East-Timor would be called to choose between independence and remaining with Indonesia with a special status.

Conditions for holding of the referendum were established by two supplementary agreements: 1) the Modalities Agreement, ruling about basic issues regarding the referendum question and the date of the consultation; 2) the Security Agreement focusing on measures to secure a good environment for the consultation which had to be implemented by Indonesia.<sup>542</sup> Lastly, with art. 2 of the New York Agreement the United Nations was given competence on the organisation of the referendum through the mission UNAMET.

According to the Modalities Agreement, the question to be put to the voters was: "*Do you accept the proposed special autonomy for East-Timor within the unitary State of the Republic of Indonesia? Or do you reject the proposed special autonomy for East-Timor, leading to East-Timor separation from Indonesia?*"<sup>543</sup> Persons entitled to vote had to be at least 17 years old and be either a) born in East-Timor; 2) born outside East-Timor with one parent born in the island; c) have a spouse who falls in one of the two categories.<sup>544</sup> The UN was put in charge of the campaign and registration process. However, the Security Agreement expressly stated that "*responsibility to ensure a secure environment*" as well as general maintenance of law and order rested within the appropriate Indonesian security authorities. No interna-

*tion of the continental shelf in the area of the Timor Gap, Australia has failed and is failing in its duty to negotiate in order to harmonise the respective rights in the event of a conflict on of claims over maritime areas*". See ICJ, *Case Concerning East Timor (Portugal v. Australia)*, cit., para. 3, p. 8. See on the judgment in particular M.C. Maffei: "*The case of East-Timor before the International Court of Justice-some tentative comments*", *European Journal of International Law*, 1993, vol. 4, p. 223 ff.

<sup>540</sup> C. Stahn, *Law and Practice of International Territorial Administrations*, cit., p. 336.

<sup>541</sup> The text of the *Agreement* is reproduced in UN Doc. S/1999/513, Annex I. For an analysis of the *Agreement*, see J. Marker, *East-Timor, A Memoire of the Negotiations for Independence*, London, 2003, p.194.

<sup>542</sup> I. Sen, *Sovereignty Referendum in International and Constitutional Law*, cit. p. 102

<sup>543</sup> *Modalities Agreement*, cit., point B.

<sup>544</sup> *Ibid.* point C.

tional police force was envisaged and the mandate of the Indonesian police was limited to the maintenance of law and order. Nonetheless, the UN Secretary General would make “available a number of civilian police officers to act as advisers”<sup>545</sup> to the Indonesian police. But most importantly, the agreement further required “the absolute neutrality of the Indonesian armed forces”.<sup>546</sup> With a view to ensure neutrality and free expression of the will of the people, a Commission on Peace and Stability was established on 21 April 1999. The Commission was supposed to work in cooperation with the UN to elaborate a code of conduct by which all parties should abide. Therefore, the UN was the international organisation given extensive powers of control, administration and supervision of the referendum. That is why the Security Council on 11 June 1999 established the UNAMET with resolution 1246.<sup>547</sup> The results of the August 1999 ballot showed a clear majority for independence, but were followed by episodes of violence undertaken by local militia groups with the support of the Indonesian army. President of Indonesia Habibie, facing this escalation of violence and under high international pressure, requested the UN to build up an international peace force in Timor.<sup>548</sup> On 25 October 1999 the Security Council established the UN Transitional Administration in East-Timor (UNTAET),<sup>549</sup> responsible for bringing peace and order in the post-referendum context. Issues concerning transitional justice would fall outside the scope of this research, therefore we will not get into detail on this aspect. However, it is worth mentioning that the mission was empowered with general administration responsibilities and executive powers. UNTAET was thus able to bring East-Timor to elections for the Constituent Assembly on 30 August 2001, and the island finally became independent in 2002.<sup>550</sup>

What conclusions can be drawn from the referendum in East Timor? Firstly, from the facts reviewed so far it seems that the UN managed the case of East-Timor from the perspective of a decolonization process.<sup>551</sup> Although no concrete steps were taken against the occupation by Indonesia, the resolutions devoted to the legal status of

<sup>545</sup> Security Agreement, cit., art. 4.

<sup>546</sup> Agreement regarding the security art. 1.

<sup>547</sup> Resolution establishing the United Nations Mission in East Timor, SC/RES/1246, 11 June 1999. See I. Martin, A. Mayer-Reck, *The United Nations and East-Timor: from Self-determination to State building*, *International Peacekeeping*, 2005, vol. 12, pp. 112-145. R. Narayan: “*The East-Timor Crisis*”, *China Report*, 2000, vol. 36, p. 93; G. Robinson: “*East-Timor. Ten Years on: Legacies of Violence*”, *Journal of Asian Studies*, 2011, n. 70, pp. 1007-1020.

<sup>548</sup> Tancredi mentions the letter of President Habibie, referred to in the UN doc S/1999/976 dated 14 Sept 1999. The document was a report of the mission delegated by the SC in Jakarta and Dili. A. Tancredi, *La Secessione in Diritto Internazionale*, cit., p. 592.

<sup>549</sup> To stop the escalation of violence the UN deployed 11000 troops in East-Timor in October 1999, whose action prepared the ground for the settlement of UNTAET. See for an in depth analysis J. Chopra: “*Building State failure in East-Timor*”, *Development and Change*, 2010, vol. 25, pp. 979-992.

<sup>550</sup> I. G. Sen, *Sovereignty Referenda in Constitutional and International Law*, cit., p. 105; J. M. Sorel: “*Timor Oriental: un résumé de l’histoire du droit international*”, *Revue General de Droit International Public*, 2000, pp. 37-51.

<sup>551</sup> K. Nordquist: “*Autonomy, Local Voices and Conflict Resolutions. Lessons from East-Timor*”, *International Journal of Minority and Group Rights*, 2013, vol. 20, pp. 107-117 at p. 111.

the territory championed the right to self-determination of East-Timor.<sup>552</sup> This is further supported by the fact that the territory was delisted from the list of non-self-governing territories only when it acquired independence in 2001. With a view to find practice in support of a general international law rule on referenda about territorial changes, one would expect the consultation in East Timor to be a referendum tout court. By contrast, in this case as well many elements of the popular consultation recall those of a plebiscite. First, art. 2 of the New York Agreement allows the Secretary General to “*arrange for a popular consultation by means of a direct, secret and universal ballot*”.<sup>553</sup> It does not use the word referendum. Second, the same agreement shows that the decision to ascertain the will of the people was taken by the interested powers under a bilateral agreement. In this line, recent studies on constitutional and independence referendum have focused on the lack of input by the East-Timorese, observing that “*the negotiations that generated East-Timor’s referendum law lacked East-Timorese input and were dominated by Indonesian representatives*”.<sup>554</sup> Lastly, the referendum was championed by the UN as a free one,<sup>555</sup> but the role of the Indonesian authorities casts many doubts, given the acts of the military personnel allegedly responsible of practices of intimidation against the population. One of the results of the lack of participation by the people would have been the instability and escalation of violence during and after the popular consultation.<sup>556</sup> Moreover, the fact that the security of the ballot was ensured by a country (Indonesia) directly concerned by the territorial change does not help in guaranteeing a free and fair consultation.<sup>557</sup>

In sum, there are too many undefined positions and counterarguments about the use of popular consultations in the field of decolonisation. Practice of UN-led consultation is partially undefined. Popular consultations held during the decolonisation period were not decisive in principle, passive, consultative and facultative. As Crawford observes: “*in the vast majority of cases the progress to self-government or independence was consensual. It occurred with the agreement of the State responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that State and local leaders.*”<sup>558</sup> Popular

<sup>552</sup> See the above mentioned res. 3485 (December 12, 1975); 31/53 (December 13, 1976); together with res. 32/34 dated 28 November 1977; 33/39 13 December 1978; 32/57 dated 11 November 1980, and the *Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, East-Timor Working Paper* prepared by the Secretariat, UN Doc. A/AC.109/2026 issued on 22 June 1995,

<sup>553</sup> Agreement between Indonesia and Portugal date 5 May 1999, cit., art. 2.

<sup>554</sup> See C. Stephens: “*Maximising Consent: Operationalising Reciprocity in Secession Referenda*”, University of Queensland Law Journal, 2015, vol. 34, p. 154.

<sup>555</sup> I. Martin, *Self-Determination in East-Timor. The UN, the Ballot and International Intervention*, Boulder- London, 2001.

<sup>556</sup> Ibid.

<sup>557</sup> See on this point V. Epps claiming “*Everyone now knows that the ballot was not free from violence and intimidation, but no one doubts that Indonesia would not have signed the May, 1999 agreement without such a provision, and the people of East Timor refused, often at great personal cost, to be intimidated*”. V. Epps: “*Self-Determination after Kosovo and East-Timor*”, ILSA Journal of International and Comparative Law, 2000, vol. 6, p. 453.

<sup>558</sup> J. Crawford: “*State Practice and International Law in Relation to Secession*”, cit., p. 9

consultations could be considered a tool to implement the 1960 *Declaration on the Granting of Independence*. However, their non-consistent application has prevented their affirmation as the established means to solve territorial disputes. In other words, plebiscites were not felt as compulsory for colonies reaching independence. It remains to be seen if and how the law evolved during the nineties.

#### 4. The focus of the research: territorial referenda

A huge debate on the use of popular consultations for territorial changes arose in the 90ies. It began with the independence of the Baltic Republics and reached its peak with the independence of the other twelve Soviet Republics and the dissolution of SFRY, due to the widespread use of referendum to justify the new borders settlement. It was during this period that referenda became an issue of research also for international legal scholars.<sup>559</sup> In the previous pages, we attempted to verify if territorial referenda have been part of international practice since a long time. If so, in fact, there would have been elements supporting the existence of a general international rule based on practice and *opinio juris*. However, it was shown that popular consultations in the form of plebiscite were different from referenda, and that the attitude of the UN with respect to territorial changes and will of the people in the framework of decolonization was ambivalent. Hence, why currently there is a consistent practice about the resort to territorial referenda, and on the basis of which rule?

Referenda concerning secession can have different legal basis: 1) constitutional; 2) established by international agreement and 3) unilateral.<sup>560</sup> As it was anticipated in the Introduction, examples of constitutional referenda on territorial changes allowing for secession are rare, yet some can be found in the constitutions of the USSR and Burma.<sup>561</sup> Referenda on territorial changes established by an international agreement<sup>562</sup> are more common, and may also be used to determine whether a territory should remain under the sovereignty of another State. e.g. the case of France with referenda in Mayotte.<sup>563</sup> Finally, there are referenda carried out unilaterally by a sub-

<sup>559</sup> See i.e. the Doctoral Thesis by A. Peters about territorial referenda dated 1994 “Dasgebietsbezogene Referendum im Völkerrecht im Licht der Staatenpraxis nach 1989”, Baden-Baden, 1995.

<sup>560</sup> I. G. Sen, Sovereignty Referenda in International and Constitutional Law, cit., pp. 42-44.

<sup>561</sup> See Introduction, pp. 16-17. Burma and the USSR are not the only cases of constitutionally guaranteed right to secede. Another example can be found in the constitutional provisions concerning the Uzbek autonomous region of Karakalpastan, which will be considered in section 7.

<sup>562</sup> These can be either multilateral or bilateral, such as in the case of the Memorandum between the UK and Scotland or of the Agreement between Ethiopia and Eritrea already mentioned. Agreements with a rebellious faction – i.e. the agreement between Sudan and South Sudan – fall in this group as well. See Chapter 2, at sec. 3.3.

<sup>563</sup> After the adoption of the 1958 French Constitution, the Indonesian archipelago of Comoros – including Mayotte, Grande Comoros, Moneti and Anjouan – was confirmed as *territoire d'autre mer*. From there on, France gradually consented to greater degrees of autonomy to the territory, which culminated in a joint declaration dated 1973. By the agreement, it was foreseen that after a 5 years period of transition, the Comoros should vote on their future status through a referendum. The popular consultation actually took place earlier, due to the independent claim brought by the Comorian President Abdallah.

unit without a solid legal basis. These category includes the recent cases of Crimea and Catalonia, and for the purpose of this research, we may call these *unilateral territorial referenda*. Scholarly literature has engaged in many further classifications, which however are not essential for the research at stake.<sup>564</sup> What deserves attention is that from the year 2014, referenda are back in the business of international law. The secession of Crimea from Ukraine, the attempt to independence of the people of Scotland and the worsening of the dispute between Spain and the region of Catalonia put on the table many legal questions again. Before this period, international legal scholars had seen a “wave” of independence referenda between 1990 and 1992 with the ex-soviet republics and the states born out of the former Yugoslavia.<sup>565</sup>

With law 74-965 dated 23 November 1974, France agreed on holding a referendum one month later. Overall, the vote cast was clearly in favour of independence – 94.57% of the voters, but counting each island separately people from the island of Mayotte voted for staying with France. This difference marked the beginning of a long-standing dispute between Comoros and France over Mayotte. Paris decided that a draft of Constitution would have been put to referendum in each island, and Grande Comoros reacted by declaring independence for the whole archipelago. In 1975 France recognised the independence of Comoros island, with Law 765-560 dated 3 July 1975, except for Mayotte. In a double round referendum in 1976 Mayotte confirmed its choice of staying with France, albeit its status moved from that of *collectivité territoriale* to a *collectivité départementale*. Further referenda have not changed this status, which is highly debatable for international law. The General Assembly has given voice to the majoritarian opinion of the member states on the illegality of the link with France. After the two consultations held in 1976, the GA with resolution A/RES/31/4 dated 21 October 1976 rejected all the subsequent referenda or popular consultations that France could further organise. Thereinafter, with resolutions A/RES/35/42 dated 28 November 1980 and A/RES/41/30 dated 3 November 1976 the GA considered the referendum “*null and void*”. The situation is still unresolved, unclear from a legal standpoint. In 2000 France and representatives of Mayotte signed the Paris Agreement, according to which a referendum should be organised on the changing status of the island towards that of *Departmental Collectivity*. The new status was accepted by a 72.94 % of the vote cast. Yet another changing occurred in 2009, when the Mahorais decided by referendum to become an Overseas French Department governed by Article 73 of the French Constitution. Although claims by the Comoros continue, several elements allow to argue that the territory is recognised as part of France: firstly, there has been a decrease in the attention of the GA to the topic as demonstrated by the fact that i.e. in 2014 the question on the status of Mayotte was not included in the agenda for the sixty-ninth session. See <http://www.un.org/press/en/2014/ga11551.doc.htm> Secondly, from 1 January 2014 the EU considers Mayotte as outermost region, pursuant to the European Union Council decision 2012/419/EU, indirectly assuming that the territory is French.

<sup>564</sup> See in particular the classifications made by I. G. Sen, *Sovereignty Referenda in International and Constitutional Law*, p. 65-66 citing G. Sussman: “*When the Demos Shapes the Polis. The Use of Referendum in Settling Sovereignty Issues*”. [www.iandriinstitute.org](http://www.iandriinstitute.org). Sussman divided referenda into six categories, to include those strictly territorial and those related to sovereignty. Three different kinds of territorial referenda are envisaged: 1) *Independence Referenda*; 2) *Upsizing/Incorporation Referenda* and 3) *Border Referenda*, the latter concerning popular consultations to solve territorial disputes. Then, there are 4) *Status Referenda*, to mean those used to deal with either colonial dominions or trustee territories; 5) referenda on *transfer of sovereignty*, organised in order to decide on transfer of state competences, i.e. to supranational entities such as the European Union or sub-national units as in the case of the devolution in the UK. Lastly, there are 6) *secession/downsizing referenda*, which are specifically conceived to facilitate the territorial change, also in the form of secession.

<sup>565</sup>The dissolution of the Federation of Yugoslavia offers some examples of referenda about territorial changes. According to the 1974 Constitution of the SFRY, the federation was composed by six republics: Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro and Macedonia. Among the Republics, Slovenia and Croatia declared independence after a territorial referendum—Slovenia on December 23, 1990 and Croatia on May 19, 1991 respectively. Macedonia organised a referendum (September 8,

Then, the issue of referendum appeared seldom, with Montenegro's independence in 2006 and with the creation of South Sudan in 2011. Besides, the referendum was even missing in the cases of Czechoslovakia and Kosovo.

Tierney<sup>566</sup> observes that there are two features about the creation of States which most contributed to make referenda so attractive for seceding entities. Firstly, with the referendum, the sub-unit has the invaluable chance to gather attention on an issue of concern for itself. Secondly, the ballot implies showing the very identity of the people or the demos. The referendum has the potential to aggregate people, thus reinforcing claims to statehood and popular sovereignty. As Tierney further observes "*as an event the referendum seems to mobilise a sub-State group as a people. The aspirations for self-determination and the action of self-determination merge into one another*".<sup>567</sup> Perhaps the most important feature is what Tierney defines its *moral force*. That is to say that referenda have an added value: the renowned importance they have as a tool to ascertain the will of the people adds a particular strength to claims of independence based on the result of a ballot. From a legal standpoint, however, the moral force has no bearing, at least *de lege lata*. The debate over the value of unilateral territorial referenda revolves around two questions: 1) the legal value of referenda used by seceding entities, which are not entitled to claim a right to self-determination,<sup>568</sup> and 2) what requirements should those referenda comply with. This second point will be the subject of the next Chapter; it is now time to see which are the arguments adduced to justify the obligation to conduct a referendum to validate a secession.

1991) asking whether the will of the people was in favour of independence or for an association of sovereign states of Yugoslavia. Bosnia-Herzegovina hold a referendum after independence had been declared, following the Opinion of the Badinter Commission on its recognition. By contrast, no referendum was held in Serbia, which claim itself to be the successor of the SFRY and did not feel the need to ask for popular consent on independence. See D. Raic, *Statehood and the Law of Self-Determination*, cit., pp. 356-361.

<sup>566</sup> Ibid, p. 533.

<sup>567</sup> Ibid, p. 534.

<sup>568</sup> States that emerged between 1987 and 1993 sought to justify their movements with "self-determination referenda", as observed by Beidbeger, who refers without distinction to plebiscites and referenda. Cassese however observes that the twelve Soviet republics did not have a right to self-determination because they have been illegally put under the sovereignty of the Soviet Union. Their case therefore was more one of restoration of the previous status. Quite a different avenue was followed in SFRY: the Badinter Commission in 1992 considered it a case of dissolution, yet it could be argued that Slovenia and Croatia carried out a secession by referendum because the declared independence in 1991 after a territorial referendum. See A. Cassese, *Self-Determination in International Law. A Legal Reappraisal*, cit., 143-145.

#### 4.1 Arguments in favour of an international legal obligation to conduct a referendum to validate a territorial change

A leading scholar supporting the legality of secession by a free and fair territorial referendum is Anne Peters, who has been studying practice on referenda in international law since the breakup of the former Yugoslavia.<sup>569</sup>

Peters develops her argument beginning from self-determination. The key point is the individualistic interpretation she gives of the right to self-determination: it is this interpretation that justifies the inclusion of a democratic component into self-determination struggles and eventually justifies secession through referendum.<sup>570</sup> On the same line, Philpott opines that self-determination understood as a right to secede is grounded in the value of individual autonomy. He argues that “*self-determination promotes democracy for a group whose members first claim to share an identity for political purposes, and second, seek a separate government, as opposed to a larger portion of representatives in their current State’s government*”.<sup>571</sup> A thorough analysis of Peters’ position enables us to analyse the main legal arguments supporting the necessity to resort to referenda to validate a seceding attempt. In other words, two main issues underpin her argument: an individual concept of self-determination and the democratic component of self-determination. The combination of the two results in the resort to democratic secession by sub-units.

As it was mentioned in the Introduction, the concept of democratic statehood is gaining an important place in the international legal debate.<sup>572</sup> The international community has progressively seen the flourishing of democracies worldwide. Regardless of the effective implementation of a democratic form of government, the international community has championed the value of democracy. The strengthening of the validity of democratic principles with respect to the law of statehood is the framework in which Peters develops an individualistic conception of self-determination. This is not tantamount to say that self-determination is not conceived as a collective right. The argument, rather, rests on the acknowledgment that since there is no established definition of people in international law, any legal qualification remains vague.<sup>573</sup> In normative terms, for Peters to make self-determination

<sup>569</sup> Although not big, the group of scholars supporting this position includes also other distinguished commentators. For Scelle, i.e., referenda can be part of customary international law about territorial changes given the consolidated tradition of resorting to plebiscites. In other words, popular consultations have gradually become a constant in international practice. This idea leads Franck to speak about the “coherence” of the principle of self-determination in international law. See T. Franck: “*The Emerging Right to Democratic Governance*”, *American Journal of International Law*, 1992, vol. 86, pp. 52-55.

<sup>570</sup> A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., pp. 263-264.

<sup>571</sup> D. Philpott: “*In Defense of Self-Determination*”, *Journal of Ethics*, 1995, vol. 105, p. 357.

<sup>572</sup> See for a full account on the topic J. Vidmar, *Democratic Statehood in International Law*, cit.; see also J.J. Paust: “*Self-Determination: a Definitional Focus*”, Y. Alexander, R.A. Freidlander (eds.), *Self-Determination, National Regional and Global Dimensions*, Westview, 1980.

<sup>573</sup> A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., p. 259.

practically operable it is preferable to ascribe it to persons.<sup>574</sup> At the very essence of collective rights, there is the idea that they are enjoyed by individuals in a community. As Peters claims, “*any collective right is supportive and ultimately derivative of the individual group members’ interests, needs and rights*”.<sup>575</sup> Taken to the extreme, this line of thought would justify seceding attempts within territories born out of a secession. Peters does not deny the existence of possible deviations. Instead, she claims that once exercised, the individualistic conception of the right to self-determination has to be implemented with the creation of a new entity.

Small minority groups are unable to build functioning political communities, since it would be practically very difficult for them to form an autonomous entity which possesses the requirements of a State. Mostly, it would be almost impossible in practical terms for small communities to claim to be states as political entities constituted with a population and a territory. With this caveat, for Peters the individual is the focus of the research, in that each member of a group has the right to be part of a community that guarantees his/her well-being.<sup>576</sup> The modalities to exercise this right are summarised in this way “*the international legal obligation to conduct a territorial referendum flows from the principle of self-determination of peoples*”.<sup>577</sup> Once the individual dimension of the right has been acknowledged, it remains to be seen how the democratic standards can kick in. The democratic component according to Peters is incorporated in the concept of self-determination, given that the principle developed alongside that of popular sovereignty.

In the first Chapter, the inquiry about the right to self-determination begun from the Wilsonian idea of the principle. It was showed that in its early understanding, self-determination concerned the principle “*that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty as if they were property*”.<sup>578</sup> Thus, external self-determination was strictly linked with popular sovereignty, although the democratic component was interpreted and applied only with respect to independence during the decolonisation period. The democratic principle, Peters contends, was already on stage after WW I, when plebiscites were hold in application of the Versailles Treaty.<sup>579</sup> Piece by piece, state practice has in fact conceived the right to self-determination as linked to the principle of democracy. Thus, Peters contends that “*it is generally acknowledged that the right to self-determination should be exercised democratically*”.<sup>580</sup> Interestingly enough, Peters gives a prominent role to the secession of Kosovo in the definition of the democratic element of the right to self-determination, and in particular to the statement made by Switzerland.

<sup>574</sup> Ibid.

<sup>575</sup> Ibid. p. 260.

<sup>576</sup> Ibid. pp. 260-261.

<sup>577</sup> Ibid. p. 264.

<sup>578</sup> W. Wilson, Address to the Senate, January 22, 1917, point 6, available at Woodrow Wilson library, [www.woodrowwilson.org](http://www.woodrowwilson.org)

<sup>579</sup> See A. Peters, *The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, cit., p. 266.

<sup>580</sup> Ibid., p. 264.

The basic assumption made by Switzerland concerns the status of Kosovo, which is that of “*non self-governing territory as defined by Crawford*”.<sup>581</sup> In the monograph on States creation in international law, Crawford outlines that alongside the re-known status such as non self-governing territories or trust territories, there is another unit entitled to self-determination. When an area is part of a metropolitan State, but it has been governed in such a way as to make it in effect non-self-governing, it is a territory subject to “*a carence de souveraineté*”.<sup>582</sup> This kind of unit is entitled to self-determination, all the more so if it has suffered from human rights abuses. According to Switzerland, the close ties between self-determination and fundamental rights are undeniable in the Kosovo affaire. Among the bulk of fundamental human rights, prevalence is given to the principle of equality and the consolidation of democratic statehood in international law. These principles are shaping the relationship between central governments and territorial sub-units. In the view of Switzerland, the first and foremost democratic principle is that the demand for self-determination has to be expressed with a majority vote. Taking advantage of its outstanding tradition of popular consultations, Switzerland claims that “*the demand for self-determination can only be considered if the majority of the population living in the territory concerned declare that they are in favour of self-determination*”.<sup>583</sup> Hence, the main point in support of the declaration of independence was the democratic election of the representatives taken on 17 November 2007. The elections held in compliance with the principle of equality, ensuring participation of all the people concerned were the basis for the appointing of the representatives, and indirectly the legitimate basis for the declaration issued by Kosovo on 17 September 2008.<sup>584</sup>

Although Peters is right in using this supportive argument, a careful scrutiny of the statement shows that Switzerland focussed on the *democratically elected* requirement of the representatives of Kosovo, without being crystal clear on the issue of the legal value of referendum. Peters herself shares the view that the democratic quality of the status laid in the election of representatives.<sup>585</sup> Arguably, this argument belongs to the realm of domestic law, and it touches upon international law only to the extent that the international documents such as the ICCPR guarantee a right to multiparty system.<sup>586</sup> Therefore, it cannot as such support the democratic statehood ar-

<sup>581</sup> Written Statement by Switzerland for ICJ, *Accordance with International Law of the Independence Declaration of Kosovo*, Advisory Opinion, cit., dated 17 October 2008, (hereinafter written statement submitted by Switzerland) para. 77.

<sup>582</sup> See Chapter 1 at sec. 1.2.1 J. Crawford, *The Creation of States in International Law*, cit., p. 126.

<sup>583</sup> Written Statement by Switzerland, cit., para. 78.

<sup>584</sup> The People’s of Kosovo declaration read as follows: “*We, the democratically elected leaders of our people, declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people*”. The declaration is available at the official website of the Republic of Kosovo, with an updated list of the countries that have recognized Kosovo. See. [http://www.assembly-kosova.org/common/docs/Dek\\_Pav\\_e.pdf](http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf)

<sup>585</sup> A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., p. 266.

<sup>586</sup> As Vidmar opines “*neither art. 21 of the Universal Declaration of Human Rights nor art. 25 of the ICCPR specifically requires multiparty elections or establishes a specific link between elections and government formations*”, J. Vidmar, *Democratic Statehood in International Law*, cit., pp. 21-22

gument. Moreover, in the opening of the Chapter it was opined that a referendum acquires an international value when it has consequences at the international level, notably in the creation of statehood, or when it finds its legal basis in the international legal order, e.g. when it is provided for by a treaty. In the case of Kosovo, the process started with the election of the delegates and ended with the declaration of independence. Although there is an issue for democratic secession, formally there was no referendum for territorial change in Kosovo as it was, in example, in Scotland or in Crimea. To conclude, the arguments presented by Peters are very persuasive because of their strong moral force. Identity issues as well as the role of the individual in the international legal order touch upon sensitive lines. However, from a legal standpoint the distinguished commentator's claim is questionable, albeit it has to be championed for the attempt to favour the progressive development of international law.<sup>587</sup>

## 4.2 Arguments against the role of territorial referenda in international law

In the following pages the argument will be walked through a) international documents concerning widespread use of territorial referenda – i.e. the opinions of the Badinter Commission on ex-Yugoslavia; b) case law- with the judgement of the Supreme Court of Canada. Then, the inquiry will turn to the cases of Scotland, Catalonia and Crimea. The empirical approach of the study leads to conclude that referenda are not compulsory, nor there is an international rule pursuant to which they are a necessary step in the process of secession. However, there are some elements suggesting that referenda may become a necessary requirement for secession, provided other conditions are met. In particular, it is observed that despite some differences, negotiations were customary linked to referendum about territorial changes.<sup>588</sup> This is not tantamount to say that an international law norm in this sense is already consolidated. There is no sufficient practice and established *opinio juris* yet. Nevertheless, there is a trend in this direction which cannot be underestimated. In this sense, support for the position just taken will be found also by recalling the examples of few constitutions allowing for secession under particular circumstances. The possibility for territorial referenda to establish a duty upon the concerned parties to start negotiations for a new territorial settlement was advanced by the Supreme Court of Canada in the Opinion concerning the attempt to secede by Quebec.<sup>589</sup>

<sup>587</sup> In fact, the author herself opts for arguing for the emerging right to democratic referendum.

<sup>588</sup> It is rather simple to grasp the absence of the case of Montenegro (2006). Montenegro is of a fundamental importance for any international law study on secession and referenda. However, the salient facets of Crimea and Montenegro concern the requirements of the popular consultation held thereto, in particular the establishments and the respect or violation of international standards for a free and fair territorial referendum. Therefore, it seems more appropriate to use Crimea and Montenegro as cases study for the analysis of the standards for a free and fair territorial referendum.

<sup>589</sup> See on *Reference Re Secession of Quebec* the huge literature: A. F. Bayefsky, *Self-determination in International Law: Quebec and Lessons Learned*. Legal Opinions Selected and Introduced by Anne F. Bayefsky, The Hague, 2000; R. Howse and S. Choudhry: “*Constitutional Theory and the Quebec Secession Reference*”, *Canadian Journal of Law and Jurisprudence*, 2000, vol. 13, pp.143-170; N. Verrelli and

However, before the Supreme Court issued its opinion, the international community had already been confronted with a wave of territorial referenda during the dissolution of SFRY.<sup>590</sup>

### 4.2.1 Referenda in the context of the dissolution of the SFRY

Considering that many States coming out of the Federation resorted to a referendum to declare independence, and the support given by the international community through the Badinter Commission, it could be claimed that during this period the referendum has definitely become a compulsory tool with respect to international law on territorial changes. This position does not seem verified. Referenda were used in a period of severe breaches of fundamental rights, in an internal armed conflict between ethnic factions. A fundamental goal, therefore, was to reach the pacification of the area. The dissolution of the SFRY in fact boosted the affirmation of international law in the field of respect of minority rights and of democratic principles. Moreover, no binding document establishing an obligation to conduct a consultation was adopted. Nevertheless, it has to be acknowledged that the referenda carried out between 1991 and 1993 weighted considerably in the progressive formation of a procedural obligation to use the referendum to legitimise territorial changes, at least in the context of serious ethnic conflicts.<sup>591</sup>

The dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) has been thoroughly analysed by social sciences scholars. From an international legal standpoint, secession and the democratically expressed will of the people widely interrelate in the making of the nations born out of the dissolution of the SFRY. Arguably, this interrelation belongs primarily to the realm of constitutional law. People living in one of the nations composing SFRY<sup>592</sup> were entitled to the right of self-determination both in its internal and external dimension. The 1974 Constitution envisaged the option of secession, albeit a specific provision granting a right to secede was absent. The peoples of the Federation were in fact entitled to self-determination “including secession”.<sup>593</sup> Interestingly, the constitution introduces the use of the term *nation*, to mark the difference from the two provinces included in SFRY, Ko-

N. Cruickshank: “Exporting the Clarity Ethos: Canada and the Scottish Independence Referendum”, *British Journal of Canadian Studies*, 2014, vol. 27, pp.195-217.

<sup>590</sup> The research intentionally omits the USSR, in light of the legal qualification of the case. It could be argued that it is a case of dissolution just like the Yugoslav one. However, the case of the SFRY could be also viewed as a hybrid. It is a case of dissolution, but it is also possible to label it secession at least for the first two republics declaring independence, notably Slovenia and Croatia. The USSR was instead a typical example of dissolution of a Federation. Of this opinion, A. Cassese, *Self-Determination in International Law, a Legal Reappraisal*, cit., p. 131.

<sup>591</sup> M. Qwrtrop, *Referendum and Ethnic Conflict*, cit., pp. 47-70.

<sup>592</sup> Constitution of the SFRY, art. 1: “*The Socialist Federal Republic of Yugoslavia is a federal State having the form of a State community of voluntarily united nations and their Socialist Republics, and of the Socialists Autonomous Provinces of Vojvodjina and Kosovo*”. Text available in H. Krieger (ed.), *The Kosovo Conflict and International Law, An analytical documentation 1974-1999*, Cambridge, 2001.

<sup>593</sup> Constitution of the SFRY, 1974, preamble and General Principle I “*The peoples of Yugoslavia, on the basis of the right of every people to self-determination, including the right to secession, on the basis of their common struggle and their will freely declared in the People's Liberation War and Socialist Revolution*”.

sovo and Vojvodina.<sup>594</sup> Recalling the distinction introduced in Chapter 2 on units entitled to secede, it could be asserted that SFRY was composed by i) the population of the Republics that could be labelled as a privileged unit, entitled to seek separation in application of the appropriate constitutional provisions. Then there were ii) the autonomous provinces which could be considered unprivileged units since they were not entitled to secede. It would be reasonable to expect a distribution of competences reflecting the different label of nation and province and republics, quite the opposite, in practice the autonomous provinces had wide powers including police control over their territory.<sup>595</sup>

When the conflict in SFRY broke out, the international community had to face the problems arising from the different degree of powers referred to above. The body specifically established to deal with legal issues arising from the events in Yugoslavia was the Arbitration Commission founded by the European Commission (EC), also called the Badinter Commission.<sup>596</sup> It was created under the auspices of the Conference on Yugoslavia, founded by the European Commission (hereinafter EC) on 27 August 1991.<sup>597</sup> Its mandate was extensive and not clearly defined: it included answering to questions related to recognition of States, minority rights and succession to treaties. Although its opinions were not legally binding, the documents of the Badinter Commission are generally regarded as authoritative statements of international law on territorial changes and creation of statehood.<sup>598</sup> The Badinter Commission paid due regard to the role of referenda about territorial changes, but did not go that far as to support their binding role. Rather, the Opinions of the Commission had a pivotal role in the consolidation of general democratic principles in the creation of

<sup>594</sup> According to the 1974 Constitution, SFRY was made of six Republics: Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro and Macedonia. Alongside the Republics, two provinces were included: Kosovo and Vojvodina.

<sup>595</sup> See D. Raic, *Self-Determination and the Law of Statehood*, cit., pp. 332-336. As it was observed in the previous Chapter, the high degree of autonomy boosted the claims of the provinces during the process of dissolution, in particular in the case of Kosovo.

<sup>596</sup> A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, cit., pp. 270-273.

<sup>597</sup> With the spread of the crisis in Yugoslavia, the Ministers of the Member States of the EC met extraordinarily in Brussels on 27 August 1991 and adopted a Declaration on Yugoslavia. The Declaration established the EC Conference for Peace in Yugoslavia; at the same time the ministers announced their intention to establish an arbitration procedure within the framework of the Conference. Although in principle the Badinter Commission was meant to be an arbitral body, it acted as a consultation one. The need for the Member States of the European Community to favour the pacification of the region became impellent in June 1991, when Slovenia and Croatia declared independence and an armed conflict spread out of the region. See on this topic R. Lukic and A. Lznch, *Europe from the Balkans to the Urals, The disintegration of Yugoslavia and the Soviet Union*, 1996, Oxford; S. Lawrence Eastwood: “*Secession: State Practice and International Law after the Dissolution of the Soviet Union and Jugoslavia*”, *Duke Journal of Comparative and International Law*, 1993, vol. 3, pp. 299-349.

<sup>598</sup> A. Pellet: “*Note sur la Commission d'Arbitrage de la Conference Europeenne pour la Paix en Yougoslavie*”, *Annuaire Française de Droit International*, XXXVII – 1991, pp.329-348; S. Oeter: “*Dissolution of Yugoslavia*” in *Max Planck Encyclopedia of Public International Law*, 2011 available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1370> (last visited 20 November 2016); M.C.R. Craven: “*The European Community Arbitration Commission on Yugoslavia*”, *The British Yearbook of International Law*, 1996, vol. 66, pp. 335-412.

statehood. Hence, referenda in the discourse of the Opinions are considered one among the tools to increase the legality of a secessionist claim.

The Commission was asked questions by Lord Carnington - President of the Peace Conference- by the Serbian Republic and by the Council of Ministers of the ECC. The questions concerned how to label the process of territorial change undergoing in Yugoslavia (Opinion 1); the identification of frontiers (Opinion 2); the right of the people of Serbian origins in Croatia and Bosnia-Herzegovina to self-determination (Opinion 3); and the recognition of the Republics of Croatia, Macedonia and Slovenia (Opinions 4 to 7). The Badinter Commission was thus called to verify whether they satisfied the conditions laid down by the Council of Ministers. The Opinions could take advantage of the documents elaborated by the EC, in particular of the *EC Guidelines on Recognition*<sup>599</sup> and on the *Charter of Paris*.<sup>600</sup> Notwithstanding the different subjects of the Opinions, three main trajectories can be identified in the documents of the Commission: 1) the application of the principle of democracy; 2) rule of law; 3) human rights – in particular protection of minorities.

The framework in which the opinions shall be included is given by the way the Commission itself labelled the creation of new entities from the SFRY. Before focusing on the role given by the Commission to territorial referenda, it is necessary to contextualise the use of referenda between 1991 and 1993 in Yugoslavia. The Badinter Commission considered that the Yugoslav Federation was in the process of dissolution. Opinion no. 1 dated 7 December 1992 concerned specifically the issue of secession. Two different position were presented: for Serbia, the Republics which had declared independence had seceded from the SFRY. At the other side of the spectrum, there was the view of the other Republics, that no secession took place. The case was one of disintegration, so the Republics were to be considered equal successors of the SFRY.<sup>601</sup>

Opinion 1 upheld the argument of the Republics, but gave its own interpretation as to how international law on territorial changes applied to SFRY. The Commission based its understanding on the situation undergoing in SFRY on several grounds.

<sup>599</sup> The Council of Ministers had already drawn off a series of conditions that new entities had to satisfy in order to be recognised by the member states of the EU. On 16 December 1991 the member states of the European Commission adopted the *Declaration on the Guidelines on the Recognition of New States in Eastern Europa and Soviet Union*. The Declaration incorporated the pleadings of the members to accept the principles set in the *Helsinki Final Act* of 1975 and in the 1990 *Charter of Paris*. According to the latter, in particular, the signatories committed themselves to “*build, consolidate and strengthen democracy as the only system of government of our nations [...] Democratic government is based on the will of the people, expressed regularly through free and fair elections*”. Hence, the Badinter Commission could not but refer extensively to the document and base its Opinions on the bulk of principles laid down therein. See D. Raic, *Self-Determination and the Law of Statehood*, cit., pp. 165-167.

<sup>600</sup> *Charter of Paris: for a new Europe: a new era of Democracy Peace and Unity*, signed in the framework of the CSCE by thirty-four of its members, adopted on November 21, 1990. The purport of the *Charter* was establishing a framework to enhance the respect for human rights and security in Europe. The text is available in *International Law Materials*, 1990, vol. 30, p. 190 and ff.

<sup>601</sup> Badinter Commission, Opinion 1, 7 December 1990, Introduction. See J. Crawford, *The Creation of States in International Law*, cit., pp. 336; 704-706. On the debate over dissolution or secession see also P. Radan: “*Post-secessionist International Borders: a Critical Analysis of the Opinions of the Badinter Arbitration Commission*”, *Melbourne University Law Review*, 2000, vol. 24, pp. 54-58.

Relying on a factual interpretation of statehood, the Commission acknowledged that the creation of Slovenia, Croatia and Macedonia “*is a question of fact*”.<sup>602</sup> For the Commission, these facts originated from the failure of the parties to reach a different territorial settlement.<sup>603</sup> In particular, Opinion 1 states that “*the authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization*”.<sup>604</sup> From this perspective, the option of dissolution comes as the only available one and there is no need to talk about secession. In this framework, the Commission builds its opinions on the recognition of the Yugoslav Republics.

#### 4.2.1.1 Slovenia and Croatia: referenda and secession in practice

As regards Slovenia, on 23<sup>rd</sup> December 1990 a referendum about independence opened the way to the 1991 *Declaration on Independence and the Adoption of the Foundational Constitutional Instrument*.<sup>605</sup> The referendum question was the following: “*Shall the Republic of Slovenia become a sovereign and independent State?*”<sup>606</sup> Figures showed that the 88% was in support for independence. In light of its approach to the dissolution in SFRY, it is not surprising that the Commission considered the referendum a sort of reaction to the failure of Slovenia and SFRY to negotiate a different federal arrangement.<sup>607</sup> The Opinion in fact recites: “*Following the plebiscite, after various proposals and attempts to agree on changes in the Socialist Federal Republic of Yugoslavia (SFRY) had come to nothing, the Assembly of the Republic of Slovenia adopted a Declaration of Independence on 23 June 1991, based on 'a unanimous proposal by other parties, groups or delegates represented in Parliament.'*”<sup>608</sup> The Commission puts emphasis on the various proposals and attempts to agree on changes to the SFRY and as a consequence, any reasoning about secession in international law – even a negotiated one – becomes meaningless. It

<sup>602</sup> Badinter Commission, Opinion 1, cit., para. 1(a).

<sup>603</sup> It has been argued that since the Declaration of Independence of Slovenia and Croatia came before the acknowledgement by the Badinter Commission that Yugoslavia was in the process of dissolution, Croatia and Slovenia unilaterally secede from SFRY. For the purposes of the present Chapter, this legal inquiry is not fundamental. even if the The very fact that the Commission has considered it a dissolution has a negative impact on the main idea of popular consultation as a tool for legitimising the territorial change. It does not come as a surprise then, that the major concern for the Commission was the respect of minority rights and the creation of statehood through the rule of law.

<sup>604</sup> Ibid. para. 2(c).

<sup>605</sup> Declaration of Independence of the Republic of Slovenia, Foundational Constitutional Instrument on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 1/91-1, 25 June 1991 available at [www.uradni-list.sl/vip-akti/119-d-0007.pdf](http://www.uradni-list.sl/vip-akti/119-d-0007.pdf). See J. Vidmar, Democratic Statehood in International Law, cit., pp. 176-178.

<sup>606</sup> *Plebiscite on the Sovereignty and Independence of the Republic of Slovenia Act*, 22 November 1990, art. 2. Art. 3 clarified that the decision to establish an independent state was to be taken only with the positive vote of the majority of those eligible to vote.

<sup>607</sup> J. Vidmar, Democratic Statehood in International Law, cit., p. 177.

<sup>608</sup> Badinter Commission, Opinion no. 7, 11 January 1992, para. 1.

seems that the main concern is the respect for the rule of law and the principle of democracy, taken as a benchmark for assessing the legitimacy for the declaration of independence. This assumption is supported by the attitude of the Commission in evaluating the compliance of the declaration with the EC Guidelines. Unsurprisingly, the Commission pays due regard to art. 81 “*of the new constitution of 23 December 1991 which provides for universal equal and direct suffrage*”.<sup>609</sup> The requirements of universal and secret suffrage, which are a sign of respect for the principle of democracy, is the real concern.

Attention for minorities is even more salient in case of Croatia. In its Opinion n.5 devoted to recognition of Croatia, the Badinter Commission had before it the chance to consider two attempts of creation of statehood: one carried out by Croatia one and the other by Krajina. On 5 April 1991 the President’s decree on the call for referendum on independence of the Republic of Croatia set the referendum date on 19th May 1991. The question référendaire was the following: 1. “*Do you agree that the republic of Croatia, as a sovereign and independent state which guarantees the cultural autonomy and civil liberties of Serbs and members of other nationalities in Croatia, shall enter into an association of sovereign states together with other republics (according to the suggestion of the republic of Croatia and the republics of Slovenia for solving of the crisis in the SFRY)?* 2. *do you agree that the republic of Croatia shall remain in Yugoslavia as a unitary federal state (according to the suggestion of the republic of Serbia and the Socialist republic of Montenegro for solving of the site crisis in the SFRY?)*.”

In its Opinion n. 5,<sup>610</sup> the Commission seemed to be prone to accept the results of the referendum, no matter if the community of Serbian origin boycotted the referendum. Thus, when called to render its opinion about the possibility to recognise Croatia as a sovereign an independent entity the referendum was taken in due account, but was not considered a crucial element. This is further supported by the fact that the Commission was by contrast concerned that Croatia adequately protected minority rights in order to be recognized as a sovereign and independent State, like it was with Slovenia.<sup>611</sup> The value of territorial referenda was left aside, and the Commission seemed to be guided more by the results it wanted to achieve – secure recognition after independence- that it did not even complain about the fact that the referendum by Croatia was not as clear as that organised in Slovenia.<sup>612</sup>

Going back to Krajina, with the Brioni Agreement<sup>613</sup> the declaration of independence of Croatia remained ineffective for three months, but internal quarrels between

<sup>609</sup> Badinter Commission, Opinion no. 7, cit., para. 1.

<sup>610</sup> Badinter Commission, Opinion no. 5, 11, January 1992.

<sup>611</sup> D. Raic, *Statehood and the Law of Self-Determination*, cit., p. 349; J. Vidmar, *Democratic Statehood in International Law*, cit., p. 179.

<sup>612</sup> In particular, the question was ambiguous because it called the voters to decide between independence and association with Slovenia. The prospect of an association was very unlikely, as demonstrated by the fact that Slovenia and Croatia were the first to declare independence Vidmar, i.e., opines that association probably was not desired by the two parties, but the option was necessary to counterbalance the strong independence propaganda supported by the Croatian representatives. See J. Vidmar, *Democratic Statehood in International Law*, cit., p. 178.

<sup>613</sup> See Chapter 2, p. 94-95.

different ethnic factions never stopped. The population of Serb ethnic origin – being a minority of 10% - opposed the declaration and proclaimed itself the Kninska Krajina, whose main aim of Krajina was unification with Serbia. In dealing with recognition of Croatia, Opinion 5 of the Badinter Commission approached the Krajina problem from the side of protection of minorities. In other words, the Commission did not engage in an inquiry on the legality of the creation of Krajina. However, it affirmed that the Constitution of Croatia should incorporate the provisions of the Draft Convention of the Conference on Yugoslavia<sup>614</sup> which relate to minorities' protection.<sup>615</sup> Arguably, protection of minorities included the treatment of the minority in the territory of Krajina. So far therefore, it can be concluded that the Banditer Commission did not consider referenda a crucial, let alone compulsory, passage towards independence. Opinion 4 described in the section below at a first glance could contravene this approach, but a more careful scrutiny suggests that the Badinter Commission's concern remains above all the respect and application of the principle of democracy, rather than the use referenda.

#### **4.2.1.2 Bosnia-Herzegovina: a request for referendum to legitimise independence?**

Art. 1 of the Constitution of the Socialist Republic of Bosnia and Herzegovina described the Republic as made of three constitutive nations: Muslims, Serbs and Croats. The Parliament of Bosnia and Herzegovina declared independence through a resolution on 14 October 1991, without resorting to a referendum.

The Badinter Commission, asked to determine whether the Republic could be recognized in the framework of the EC Guidelines, had to deal with the thorny issue of minorities living within Bosnia-Herzegovina. Firstly, the Commission recalled that on the basis of art. 1 of the Constitution, Bosnia-Herzegovina was constituted of Muslims, Croats and Serbs respectively. Citizens of each of these three ethnic groups were considered a people on its own. However, the Commission said, the acknowledgment of a multi-ethnic composition in the Constitution did not entitle the population of Serbian ethnicity to constitute a State on its own. Arguably, the Commission was indirectly throwing a spear against the self-proclaimed Republic Srpska. Given the tensions between minority groups, the creation of Bosnia-Herzegovina was not fully in compliance with international standards such as protection of minorities or respect for the rule of law. Thus, the Badinter Commission called for a referendum to take place among the whole people of the Republic. In particular, it held that *“the will of the peoples of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established. This assessment could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum*

<sup>614</sup> *Draft Convention of the Conference on Yugoslavia*, adopted at The Hague on 4th of October 1991, UN DOC S/23169. The *Draft Convention* was elaborated during the Peace Conference on Yugoslavia under the guide of Lord Carrington. The Convention encompasses respect of human rights and above all of ethnic groups and address also the quest for territorial autonomy within the federation.

<sup>615</sup> Badinter Commission, Opinion no. 5, 11 January 1992, para. 3.

*of all the citizens of the SRBH without distinction, carried out under international supervision”*.<sup>616</sup>

On the one side, the express request for a referendum shall not be underestimated. In light of the principles guiding the work of the Commission – rule of law, democracy and protection of minorities- explicit reference to referendum is important. Since there was no constitutional provision on the issue, the Commission has probably grounded its reasoning in international law and practice. On the other side, the wording suggests that that of the Commission is an endorsement to a *potential organisation* of a referendum. If the Commission wanted to convey the idea that the referendum was the established tool to legitimise a territorial change, then it probably would have asked SRB-H to carry out a referendum. In this case, in addition, an exhaustive perusal would have been necessary to motivate its choice, but such perusal is lacking in the Opinion. In fact, Bosnia-Herzegovina implemented the request of the Badinter Commission and held a referendum. Nevertheless, doubts could be casted about how the referendum was organised, as well as about the value the government was really attaching to it. The referendum question was the following: “*Are you in favour of a sovereign independent Bosnia-Herzegovina, a State of equal citizens and of peoples of Bosnia-Herzegovina – Muslims, Croats, Serbs- and others who live in it?*”<sup>617</sup> Moreover, the referendum was boycotted by the Serbian minority. The group -30% of the population- was included in the quorum of those eligible to vote, but did not vote. Therefore, the figure of 63% that were in favour of independence does not take into account a 30% of the population non taking part to the vote. Is it really an example of universal and freely expressed popular consent as the Commission asked for in Opinion n.4? No, but the international community did not take measures nor criticised it. Why? Vidmar opines that the international community did not pay regard to the boycott of the Serbian minority because 1) prevalence was given to the principle of “majority decides” and 2) even considering the boycott, respect for the *uti possidetis* prevented any modification of the frontiers from within to take place.<sup>618</sup> In other words, the result to be reached was so important that the procedural requirement for a referendum could be left aside.

#### **4.2.1.3 Final remarks on referenda in Yugoslavia**

In sum, it would be too far stretched to claim that with the Badinter Commission’s opinions the referendum gained the role of an established tool to legitimise secession. A reasonable analysis of the Opinions as a whole, shows that the real issue of concern was that the new Republics were founded on the rule of law and upon a constitutionally-based system of protection for minorities. The example of Bosnia-Herzegovina allows for a two-fold conclusion: on the one side, the referendum with Opinion n.4 has gone a step forward from a mere consultation, which characterised

<sup>616</sup> Badinter Commission, Opinion 4, cit., para. 4.

<sup>617</sup> *Decree on the Call of the Republic’s Referendum for Affirmation of the Status of Bosnia and Herzegovina*, Official Gazette of the Republic of Bosnia-Herzegovina No. 2, 1992. See J. Vidmar, *Democratic Statehood in International Law*, cit., p. 181.

<sup>618</sup> J. Vidmar, *Democratic Statehood in International Law*, cit., p. 96.

most of the plebiscites in the aftermath of the first WW. However, the international community has not taken the necessary steps to make it the subject of an international law rule. There are, in fact, cases in which the referendum was not carried out but statehood was acquired. As already observed, the case of Kosovo does not fully support the necessary role of referendum for unilateral secession. The elected members of the provisional institutions of Kosovo issued the declaration of independence without any referendum.<sup>619</sup> Fleiner rightly opines that not only there was no referendum in Kosovo, but the Serbian community was not consulted either. This has led some commentators to claim that the experience of Kosovo runs against any democratic model of secession.<sup>620</sup> By contrast, Mc Corquodale opines that series of events undergone by Kosovo may fall in the category of “*special circumstances*” referred to by the ICJ in the Western Sahara Advisory Opinion.<sup>621</sup> Hence, a referendum was not necessary. The argument is not fully persuasive. It is quite difficult to include the specificity of the creation of Kosovo under the label of special circumstances for a self-determination unit. On the one side, in Western Sahara the principle of people’s consent has so far not been implemented. Rather, it could be observed that once the institutions of Kosovo started to be operative, the Constitution was drafted establishing in art. 2 that the sovereignty stems from the people and belongs to the people.<sup>622</sup> Somehow therefore the provision counterbalances the absence of a clear manifestation of the will of the people expressed through a vote and more in general the uncertainties as to how people’s consent may lawfully impact on a territorial reappointments.<sup>623</sup>

Overall, in the case of Yugoslavia the result was more important than the means used to reach it, just as we have explained for the attitude of the United Nations towards plebiscites organised during the decolonisation period. This is clearly showed by the fact that in Czechoslovakia there was no referendum. The decision was negotiated by the concerned governments. Hence, no input or direct participation of the people concerned was envisaged. Czechoslovakia ceased to exist on 31 December

<sup>619</sup> In fact, Kosovo hold a referendum. It was a secret one and it took place from 26 to 29 September 1991. The *question référendaire* was about the establishment of an independent State and rights to establish an alliance with sovereign Yugoslavia. The 87% of the population participated and 99.87% favour independence. Recognized by Albania and rejected by Serbia, this was for the people of Kosovo another proof of the Serbian refusal of their right to self-determination.

<sup>620</sup> T. Fleiner: “*The Unilateral Secession of Kosovo as a Precedent in International Law*”, U. Fastenrath, R. Geiger, A. Paulus et. al (eds.), *Form Bilateralism to Community Interest. Essays in Honour of Bruno Simma*, cit., p. 877.

<sup>621</sup> R. Mac Corquodale: “*Self-Determination: a Human Rights Approach*”, *International Comparative Law Quarterly*, 1994, vol. 43, p. 857 and ff.

<sup>622</sup> Constitution of the Republic of Kosovo, art. 2(2): “*The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of this Constitution*”, available only at <http://www.assembly-kosova.org/common/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf> H. Dijkstra: “*The Planning and Implementation of the Rule of Law Mission of the European Union in Kosovo*”, *Journal of Intervention and Statebuilding*, 2011, vol. 5, pp.193-210.

<sup>623</sup> S. Tierney: “*Sovereignty and Crimea. How Referendum Democracy Complicates Constituent Power in Multinational States*”, *German Law Journal*, 2015, vol. 16, p. 532.

1992. The day after, Czech Republic and Slovakia were proclaimed independent and were both admitted to the UN on the 19<sup>th</sup> of January 1993. The Czech and Slovak Federal Republic ceased to exist after the political agreement between the Prime Ministers of each Republic was reached. Therefore, the process found its legal basis in an understanding between governments rather than in popular consultations. Although the terms of the negotiation remain largely obscure, the establishment of Czech Republic and of Slovakia did not raise oppositions by the international community. The process appeared to be quite short and straight forward, once the parties have reached an agreement. On 31 December 1992 the Czechoslovak Ministry of Foreign Affairs announced that by the end of the day the Czechoslovak membership to the UN would cease, in light of the dissolution of the Federation.<sup>624</sup> The two newly born states subsequently applied for UN membership and were admitted already in January 1993.<sup>625</sup>

Arguably, the case of Czechoslovakia seems to fall outside the focus of this research. In particular, there was an agreement among the governments, an element which was missing in the other cases above tackled; in fact, the lack of negotiations was one of the arguments used by the Badinter Commission to justify its approach to the Opinion on the legal status of the federation. Whilst from the bulk of Opinions the referendum arises at least as a favourite tool, the case of Czechoslovakia shows that practice is so varied and case specific that generalisations are difficult. Despite the fact that the creation of new states from the SFRY was the result of the “*universally legally accepted position that the SFRY no longer existed*”,<sup>626</sup> anyway the Badinter Commission paid significant attention to independence referenda. To sum up, there are no solid grounds to claim the consolidation of a general rule allowing secession via referendum, but two elements can be highlighted from the above: 1) when it seems that the will of the people has not been assessed, the referendum is deemed to be the best tool to guarantee access to statehood – see Opinion n.4. Secondly, 2) with Slovenia and Croatia –notably the only two cases which could be considered unilateral secession- referenda deeply interrelate with the resort to negotiations with the parent State. These same elements are doomed to come up in details in the next pages.

### **5. Territorial referenda as the first step towards negotiations: the case of Quebec**

After the Opinions of the Badinter Commission, the topic of the interrelation between referenda and secession in international law became less relevant, at least at the international level. Needless to say, secession has not disappeared, not only in

<sup>624</sup> M.P. Scharf: “*Musical Chains: the Dissolution of States and membership in the UN*”, Cornell International Law Journal, 1995, vol. 28, p. 192; J. Malenovsky: “*Problèmes juridiques lié à la partition de la Tchécoslovaquie*”, A. F.D.I, 1993, vol. 39, pp. 305-318.

<sup>625</sup> Security Council Resolutions 800/1993 and 801/1993 further confirmed by the resolution of the GA n. 47/221 and 47/222 date 19 January 1993.

<sup>626</sup> J. Vidmar, Democratic Statehood in International Law, cit., p. 176.

the context of heinous ethnic conflicts. In the Introduction, it was stressed that the majority of the constitutions do not grant a right to secede. Therefore, whenever a Court finds the need to face a quest for secession, it might also look at international law for some interpretative guidelines, absent a specific domestic provision on territorial changes. It has happened quite few times in the past, but in 1998 the opinion rendered by the Supreme Court of Canada on the secession of Quebec became a milestone in the analysis of secession and referendum both domestically and internationally. From an international standpoint, the pronouncement of a Constitutional Court is important for the consolidation of the *opinio juris*, all the more so in the field of secession where opinions are very rare.

For the purposes of the present study, *Reference re Secession of Quebec* is important for a) the *obiter dictum* concerning the remedial right to secede; b) the role assigned to referenda and possible legal obligations descending from it and c) the analysis of the impact on the international community of a secession carried out by a referendum. The study has already dealt with the first point,<sup>627</sup> whilst recognition will come in the final Chapter. Therefore, it is time to get deeper insight into territorial referenda in the Opinion of the Supreme Court. In particular, this section will advance the position that the Court derived from unilateral territorial referenda a duty of all the interest parties to negotiate a solution to the demands of the seceding unit. Although the focus is territorial referenda, a brief historical reconstruction of the relationship between Quebec and Canada cannot be avoided. This seems a reasonable choice with a view to give the reader all the basis to develop a critical approach to the argumentation and the model developed by the Court.

### 5.1 Quebec and Canada: between coexistence and secession

Quebec's separatist movement is rooted in a longstanding will to gain more autonomous powers, in particular to preserve its French heritage and in general its cultural distinctiveness. It has been opined that the history of the relationship between Quebec and Canada is a history of lost opportunities.<sup>628</sup> In fact, the government of Canada could have involved the people of Quebec more actively during the salient moments of its constitutional history - i.e. for the issue of the repatriation<sup>629</sup> - for the purpose of negotiating a specific settlement for the region.<sup>630</sup>

<sup>627</sup> See also A. Tancredi, "A Normative Due Process in the Creation of States through secession" in M.G. Kohen, *Secession: International Law Perspectives*, cit., p. 157.

<sup>628</sup> M. Chevrier, "Le fédéralisme canadien et l'autonomie du Québec: perspective historique", study for the Ministry of Foreign Affairs, 1996, p. 160-168. <http://collections.banq.qc.ca/ark:/52327/bs43059>

<sup>629</sup> The notion of *repatriation* refers to the relationship between Canada and the UK. Until the second half of the 90ies, Canada was not entirely sovereign, since the Westminster Parliament still had control over the adoption of constitutional amendments, which required its final adoption to be enacted. The process of repatriation was specifically aimed at "transferring" full sovereignty upon Canada, through amendments to the legislation governing the relationship with the UK. For extensive literature on Quebec and Canada see D. Haljan, *Constitutionalising Secession*, Oxford, 2014, p. 300.

<sup>630</sup> M. Chevrier: "Le fédéralisme canadien et l'autonomie du Québec: perspective historique", *ibid.*

The 1976 election to head of provincial government of the pro-secession party *Parti Québécois* (hereinafter PQ) marked the beginning of the revival of the idea of an independent Quebec. Several measures aimed at promoting the use of French language were enacted, such as those concerning the posting of signs in French.<sup>631</sup> It should be born in mind that Quebec is granted a special status: its citizens benefit from a special legal system applying the French civil code, as well as of fiscal benefits. The regional government has extensive powers on immigration and the capacity to enter into international agreements. As Mac Millan opines, the separatist movement initially could not rely on a disproportionate treatment by the federal government. The trigger point was when Quebec felt that it had not been considered in the constitutional reform. Hence, it started to claim that the federal government did not care about the French province.<sup>632</sup> The revision<sup>633</sup> of the constitution concerned, *inter alia*, the power of the region of Quebec to veto a constitutional reform. Quebec was denied the power to have a say in the adoption of constitutional reforms, neither it was empowered to enact laws on specific matters such as the teaching of languages. The PQ gained particular strength when the *Act Respecting the Future of Quebec*<sup>634</sup> was adopted. The act was the beginning of a procedure towards independence, marked by the attempt to establish an economic agreement with the rest of Canada. The bill provided for a referendum asking the people of Quebec the following question: “Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?”. The results of the October 1995 consultation were against secession.<sup>635</sup> Nevertheless, the separatist party embarked itself on a “neverendum campaign”<sup>636</sup> and at this point the government of Canada in September 1996 decided to ask the Supreme Court to render its opinion on three questions, ranging from the le-

<sup>631</sup> K. Mac Millan: “*Secession Perspectives and the Secession of Quebec*”, *Tulane Journal of International and Comparative Law*, 1999, vol.7, p. 347; S. Dion: “*Explaining Quebec Nationalism*”, R.K. Weaver (ed.), *The Collapse of Canada?*, 1992, Washington, pp. 77-112. After the refusal by Canada to recognise a special status for Quebec, in 1980 a first provincial referendum was organised. The question did not envisage secession, but an economic association with the federal government. The people of Quebec were not asked whether they wanted to secede, but the referendum concerned the mandate to the government to negotiate with the rest of Canada an arrangement towards independence, beginning with an economic association. For an exhaustive perusal of the history and implications of the attempt to secede by Quebec see R.K Weaver (ed.), *The Collapse of Quebec?*, cit., pp. 20-35

<sup>632</sup> K. Mac Millan: “*Secession Perspectives and the Secession of Quebec*”, cit., pp. 349-350, S. Dion: “*Explaining Quebec Nationalism*”, cit., p. 116.

<sup>633</sup> *Constitution Act*, approved by HM Queen Elisabeth on 17 April 1982.

<sup>634</sup> Bill n.1, *Act Respecting the Future of Quebec*, introduced in the National Assembly in Quebec in 1995. See H. W. Mac Lauchalan: “*Accounting for Democracy and the Rule of Law in the Quebec Secession Reference*”, *Canadian Bar Review*, 1997, vol. 76, pp. 155-185 as mentioned by J. Summers, *Peoples in International Law*, cit., p. 418.

<sup>635</sup> As noted by K. Mac Millan, the results put the light on a hidden debate among the citizens of Quebec: figures - 50. 58% yes against 49.42% of the votes casted for the no side- show a deep debate about the future political status of the region. See K. Mac Millan: “*Secession Perspectives and the Secession of Quebec*”, cit., p.351.

<sup>636</sup> M. MacLaren: “*Trust the People? Democratic Secessionism and Contemporary Practice*”, *German Law Journal*, 2015, vol. 16, p. 638.

gality of unilateral secession in international law to the possible conflict between international and the domestic law.<sup>637</sup>

## 5.2 Reference Re Secession of Quebec: the interplay between territorial referenda and negotiations

The questions asked to the Supreme Court were the following:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?<sup>638</sup>

Hence, the Court was asked to ascertain, *inter alia*, whether international law granted directly to Quebec a right to unilaterally secede from Canada and precisely if this right derived from the right to self-determination of the people of Quebec. It is in this framework that the role of territorial referenda had to be scrutinised. The main steps of the *ratio decidendi* of the Court can be summarised as follows: firstly, the Court ascertained that there is no right to unilateral secession under the Canadian law. Secondly, looking at international law, the Court proceeded from the assumption that current international law considers the right of self-determination to be fulfilled in its internal dimension. From this point, the Court mentions the possible application of the remedial right theory.<sup>639</sup> The argument rests on a hypothetical level: even assuming the validity of the theory of remedial secession, the latter could not

<sup>637</sup> Interestingly enough, the government of Quebec refused to take part in proceedings. Thus, the Supreme Court ordered that an *amicus curiae* was appointed. For the collection of documents and transcriptions of written statement of the parties see. A. Buchanan (ed.) *Self-Determination in International Law. Quebec and Lessons Learned*, cit.

<sup>638</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 2. The questions were posed by the Governor in Council by way of the Order in Council P.C. 1996-1497, dated September 30, 1996.

<sup>639</sup> *Ibid.*, para 126 “*The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination — a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state*”. The Court then continues asserting that under some cases the external dimension may take the form of secession. This position seems to confirm the idea developed in Chapter 2 of this study on the need to disentangle secession from self-determination. Arguably, if secession and self-determination were the same right, there would have been no need to clarify this point. For the Court there is one case in which self-determination in its external dimension may coincide with secession: the hypothesis of the right to remedial secession. The latter includes all those cases on which the “*right to self-determination internally is somehow being totally frustrated*” as already observed thoroughly in Chapter 2.

be invoked in the case at stake. The people of Quebec cannot claim they do not have access to government, or cannot pursue their social and economic development within their region, or the whole state of Canada.<sup>640</sup> Since Canada is a “*sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples*”<sup>641</sup>, the wishes of people of Quebec are not justified vis-à-vis international law. The Court does not take a stand in favour of unilateral secession, rather it supports negotiated secession. The triggering feature is that for the Court, secession is to be addressed by a revision of the Constitution.<sup>642</sup> Since unilateral secession per definition takes place bypassing any constitutional amendment, for the Court it is prohibited.<sup>643</sup> One would expect the argument to end here, whilst it is noteworthy that the Court goes beyond this legal finding and approaches secession from a procedural point of view too.<sup>644</sup> Looking at the process, the Supreme Court addresses the issue of secession from the stand point of the legitimacy that territorial referenda could add thereto. Accordingly, the Supreme Court necessarily has to ensure the balancing of competing interests under a constitutional perspective, thus the analysis of territorial referenda is carried out from this level. At para. 151 the Court states: “*Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec.*”

A democratic vote on its own cannot override the principles of the rule of law, federalism and in general the operation of the State apparatus pursuant to the constitutional mandate. Hence, on the one side territorial referenda can only have those effects assigned to them by the Constitution. On the other side, the Court itself acknowledges that since the Constitution grants democratic rights upon the individual, “*the constitutional order could not be indifferent to the referendum*”.<sup>645</sup> The Court does not maintain that the referendum is compulsory with a view to secede, but certainly given that the enforcement of democratic rights has a primary im-

<sup>640</sup> Ibid. para 136: “*The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world*”.

<sup>641</sup> Ibid. The Court does not go as far as to clarify who is the subject of the right to self-determination, nor what is the definition of people. See for an opposite view S. Epps: “*Self-Determination after Kosovo and East-Timor*”, ILSA Journal, 2000, p. 445.

<sup>642</sup> Of this view S. Tierney: “*Popular Constitutional Amendments. Referendums and Constitutional Change in Canada and the United Kingdom*”, Queen’s Law Journal, 2015-2016, vol. 41, pp. 41-72 and S. Mancini: “*Secession and Self-Determination*”, M. Rosenfeld and A. Sajo (eds.), The Oxford Handbook of Comparative Constitutional Law, cit., pp. 499-300.

<sup>643</sup> S. Mancini: “*Secession and Self-Determination*”, cit., p. 497.

<sup>644</sup> Another proof of the fact that the court is looking at the process is the reasoning it develops on recognition, stating that recognition relies in part on the legitimacy of the process by which the emergent state comes into being. See on this point Chapter 4 of this study as well as D. Haljan, Constitutionalising Secession, cit., p. 331.

<sup>645</sup> Supreme Court of Canada, *Reference Re Secession*, cit., para. 151.

portance in the legal order, the Court acknowledges that the referendum is the most effective choice if the sub-unit wants to be listened to.

In light of the above, it seems not too farfetched to claim that the Court is envisaging a legal obligation. Reference to “*reciprocal obligations*”<sup>646</sup> to negotiate a future settlement, is a sign of a legal value entrusted in the referendum. In other words, although it does not say that referendum legitimise secession per se, the Court brings the argument to the next level: provided that the vote on secession is “*free of ambiguity both in terms of the question asked and in terms of the support it achieves*”,<sup>647</sup> the vote triggers the duty of the parties to enter into negotiations. According to the Court, the territorial referendum is the first step of the negotiation process to be conducted in compliance with the Constitution and involving the seceding entity and the central government. The attempt of the Court to “constitutionalise” secession finds its rationale in the assumption that separation of territory in a State based on the rule of law and respect for the principle of democracy can be carried out only by respecting the rights and interests of the people of Quebec as much as those of the people of Canada living outside Quebec.<sup>648</sup> In this sense, the parent State shall involve in the negotiations also the other provinces of the country, alongside its duty to enter into negotiations. Interestingly enough, the Court is precise in ascertaining that the success of negotiations about secession would depend on the parties involved. In other words, all the rights and duties of the interested parties must be guaranteed, be it the parent State, Quebec, the other provinces in Canada or other minority groups which could be affected by the secession of Quebec. All the interested parties have to gather to the negotiation table to discuss the quest for secession by one territorial sub-unit.

The Court derives the duty to negotiate new territorial assessment from the underlying constitutional principles of federalism; democracy; constitutionalism and the rule of law and respect for minorities. These, the argument continues, are the pillars of the legal order of Canada. As Tierney contends, the Court has taken the constitutional principles, has invested them with normative force and transposed them into practical duties.<sup>649</sup> Despite the fact that the Court does not assert that these principles are grounded in international law, the very fact of referring to general principles common to the democratic systems is a sign of an acknowledged trend in this direction within the international community. This is not tantamount to say that *Reference Re* legitimises secession via territorial referenda. Rather, it is the foundation of the constitutional order that demands that when a unilateral expression of the will is manifested, the government and the interested parties enter into negotiations. The Court states that in case of a vote in favour of separation, the procedure to be fol-

<sup>646</sup> Ibid, para. 88.

<sup>647</sup> Supreme Court of Canada, *Reference Re Secession*, cit., para 88.

<sup>648</sup> B. Levites: “*The Scottish Independence Referendum and the Principles of Democratic Secession*”, Brooklyn Journal of International Law, 2015, vol. 41, p.336.

<sup>649</sup> S. Tierney, “*Popular Constitutional Amendment: Referendums and Constitutional Change in Canada and the United Kingdom*”, Queen’s Law Journal, 2015-2016, vol. 41, p. 49.

lowed is that of a constitutional amendment.<sup>650</sup> The aftermath of the negotiations then, belongs to the realm of politics. The role of the referendum is narrowed to a tool which confers further legitimacy on the province's effort to initiate a procedure for secession.<sup>651</sup> Lastly, the Court considered that it was not its duty to further indicate the terms of organization of the referendum, such as the quorum and the formulation of the referendum question, albeit it required the turnout to be based on a clear majority. The *Clarity Act* adopted by the Assembly of Canada will implement the decision of the Court.<sup>652</sup>

From the analysis carried out so far, some general conclusions can be drawn. Overall, it can be observed that the principle underpinning the reasoning of the Court is the principle of democracy, as it was found in the opinions of the Badinter Commission. For the pro-secessionist party, the idea of democracy implies that in case the majority of the people in Quebec votes in favour of separation, the parent State is obliged to recognise the legitimacy of this action. By contrast, the interpretation of democracy advanced by the Supreme Court goes beyond the equation between democracy and majoritarian vote.<sup>653</sup> Democracy must be balanced with the federal nature of the State of Canada, hence “*no one majority is more or less legitimate than the others as an expression of democratic opinion*”.<sup>654</sup> Nevertheless, a clear majority voting for secession cannot be ignored and gives rise to a duty of negotiation. The issue of negotiation – notably the duty to embark on negotiations triggered by the referendum and flowing upon the seceding unit and the parent State- is the real novelty and the challenging affirmation of *opinio juris*. If one limits the focus for the analysis of the judgement to unilateral secession, it can be affirmed that the approach of the Supreme Court confirms the general aversion to the right to unilateral

<sup>650</sup> Ibid, para. 85: “*It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada*”.

<sup>651</sup> Ibid., para. 87: “[...] considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession”.

<sup>652</sup> *Reference Re Secession of Quebec* demanded the definition of a “clear question” and a “clear majority” to the legislative body. The Clarity Act establishes the control of the House of Commons over the question *référendaire* and the majority threshold. In particular, according to Section 1(2), after the government of a province formally adopts an act providing for the seceding referendum, the Parliament has 30 days to evaluate the question and whether it will allow the formation of a clear expression of the will of the people. However, the Act does not establish a specific threshold for the referendum. See *Canadian Clarity Act, an Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada (SCC) in the Quebec Secession Reference*, S.C. 2000, 29 June 2000, sections 1(1)-(2). See also N. Verrelli e N. Cruickchank: “*Exporting the Clarity Ethos: Canada and the Scottish independence Referendum*”, *British Journal of Canadian Studies*, vol. 27, n. 2, pp. 195-215; S. Tierney, *Constitutional Referendums, The Theory and Practice of Republican Deliberation*, Oxford, 2012, pp. 234-235.

<sup>653</sup> K. Mac Millan: “*Secession Perspectives and the Secession of Quebec*”, *Tulane Journal of International and Comparative Law*, 1999, vol.7, pp. 354-355.

<sup>654</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 66.

secession. In this sense, negotiations become fundamental, because they might serve as a mitigating factor against/for the dangers of an unilateral act.<sup>655</sup>

Arguably, the duty to negotiate a new settlement lies at the heart of the relationship between the central government and the territorial sub-units. However, one should not be tempted to interpret the position of the Court as an assurance of the success of secession carried out by a negotiation. The Court states that the interested parties should negotiate a future settlement, but it *does not* say that they are bound to agree to the request to secede, even if this stems from an overwhelmingly majority of votes. That is why the Opinion, whilst not running in favour of the consolidation of a substantial international law rule on secession and referendum, clearly weights a lot in the development of a procedural mechanism to carry out a secession in a well-established democracy.<sup>656</sup> The fact that the main points defended in the judgement has been replied in other cases confirms its validity, as it will be seen in the next sections.

## 6. Negotiating secession for Scotland

The relationship between referendum and negotiations in the context of secession laid down in *Reference Re Secession of Quebec* has gain momentum again when the United Kingdom consented to the organisation of a referendum about the Scottish independence. The very decision of the UK to allow a referendum on the territorial change demonstrates that i) secession is not considered illegal, neither at the international nor at the domestic level; ii) territorial referenda carried out following an established procedure in compliance with determined standards are considered *the appropriate tool* for giving legitimacy to a secession. Moreover, the grievance put forward by the people of Scotland confirms the pattern referred to in the previous Chapters, where it was opined that self-determination has been framed along broader lines in comparison to its original understanding. For all these reasons, the present research cannot but analyse the Scottish attempt to secede, though it is not a pure example of unilateral secession.

### 6.1 Scotland towards a devo-max option

In Chapter 2 it was contended that the history of the Scottish nationalism is one of alternative waves of support for separatism. In light of the interpretation of self-determination advanced in this research, Scotland's experience of attempted secession best exemplifies how the broadening of the bulk of rights included in the right to self-determination may impact on territorial claims. It can be recalled that the people of Scotland had profited from a process of devolution of powers, so that in 1998 a Scottish Parliament and a Scottish Prime Minister were established. It was

<sup>655</sup> S. Dion: "Secession and the Virtues of Clarity", *Ottawa Law Review*, 2012-2013, vol. 44, pp. 405-418.

<sup>656</sup> D. Haljan, *Constitutionalising Secession*, cit., p. 326.

also observed that devolution per se was not deemed to open the door to secession, but rather it created legislative obstacles to secession.<sup>657</sup> While Scotland acquired more legislative powers with respect to social policy and economy through the 1998 *Scotland Act*, decisions concerning the borders of the United Kingdom were outside of its legislative competence. Tierney opines that the 1998 *Scotland Act* envisages a “*retaining model of devolution*”,<sup>658</sup> that is to say that even though the Scottish Parliament is granted legislative authority, Westminster preserves its authority to enact laws for Scotland. The matters falling within the competence of the Parliament of the United Kingdom are expressly listed in the Act, whilst all the others are subject to the law-making power of the Scottish Parliament. Among the other, the Scottish Parliament is empowered to, *inter alia*, implement international and EU legislation and the decision to hold a referendum is not per se reserved to Westminster.<sup>659</sup> In Section 5, the powers devolved to the Scottish Parliament are balanced by retaining in the hands of the British Parliament the responsibility to conduct external relations.<sup>660</sup> Lastly, despite the fact that the Scottish legislative body has a wide range of devolved competencies, its legislation is conceived as subordinate, to mean that in case of non-compliance with EU law or with the ECHR the act enacted could be annulled by the British Supreme Court.

## 6.2 Territorial referendum in the Edinburgh Agreement

As previously noted, consent by the UK to a Scottish referendum on independence was preceded by a huge debate concerning the competence to call a referendum.<sup>661</sup> The Parliament of the UK threatened to challenge the legality of the Referendum Bill<sup>662</sup> adopted by the Scottish Parliament.<sup>663</sup> However, the dispute between Westminster and Scotland was not resolved through judicial means, but by way of negotiation. Interestingly enough, the approach of the Scottish government between 2012 and 2014 gradually changed from an irredentist<sup>664</sup> - which manifested itself in the

<sup>657</sup> B. Levites: “*The Scottish Independence Referendum and the Principles of Democratic Secession*”, cit., p. 394.

<sup>658</sup> S. Tierney: “*Popular Constitutional Amendment. Referendums and Constitutional Change in Canada and the United Kingdom*”, Queen’s Law Journal, 2016, vol. 41, p. 50.

<sup>659</sup> B. Giupponi; H. Hofmeister: “*The day after the Scottish Referendum: Legal Implications for other European Regions*”, Liverpool Law Review, 2015, vol.36, p. 213.

<sup>660</sup> *Scotland Act 1998*, sec. 7(1) *International relations, including relations with territories outside the United Kingdom, the European Union] (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters. (2) Sub-paragraph (1) does not reserve—(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law.*

<sup>661</sup> See Chapter 2 at pp.64–65.

<sup>662</sup> Scottish Parliament, Bill n. 25, Session 4, 2013.

<sup>663</sup> See Chapter 2 p. 65 and S. Tierney: “*Legal Issues Surrounding the Referendum on Independence for Scotland*”, European Journal of Constitutional law, 2013, vol.9, pp n. 34.

<sup>664</sup> The 2009 report issued by the UK Commission on Devolution, called *Calman Commission*, already labelled the devo-max option incompatible with the Union of Scotland and the UK. See “*Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*”, Final Report of the Commission on Scottish Devolution (the Calman Commission), June 2009,

bid to carry out a referendum without an authorization of the UK Parliament- to a conciliatory spirit.

The governments of Scotland and the UK reached an understanding with the *Edinburgh Agreement*<sup>665</sup> dated 15 October 2012. The salient facets of the treaty concern both the organisation and the requirements for a referendum about the secession by Scotland. A *memorandum of agreement* is annexed thereto, together with a draft *Order in Council*, that is to say the secondary legislation that needed to be adopted by the UK executive and Parliament to implement the decisions reached with the Agreement. The draft *Order in Council*,<sup>666</sup> pursuant to section 30 of the 1998 *Scotland Act*, devolves to the Parliament of Scotland the competence to adopt the necessary legislative provisions for the organisation of the referendum in 2014.<sup>667</sup> The legal basis for the organisation of the referendum stems from the combination between the *Edinburgh Agreement*, the draft *Order in Council* and domestic implementing legislation adopted by Scotland. In the *memorandum of agreement*, the parties commit themselves to work together “to ensure that a referendum on Scottish independence can take place” and list the main features that the popular consultation is deemed to respect.<sup>668</sup> Then, the agreement ends with a pledge to cooperate to accept the results of the ballot as it reads as follows: “*The United Kingdom and Scottish Governments are committed, [...], to working together on matters of mutual interest and to the principles of good communication and mutual respect. [...]. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.*” Therefore, regardless of the results, it is the *Edinburgh Agreement* which per se legitimises the referendum. As a consequence, the legal effects flowing from the territorial referenda in UK cannot be found in the international legal order. Rather, they belong to domestic law. Eventually however, that by the Scottish people remained only an attempt. The vote took place on 18 October 2014: nearly 85% of those eligible participated to the referen-

<http://www.commissiononscottishdevolution.org.uk>. The 2012 Act granting further exclusive competence to Scotland was not enough to calm the wishes for independence, as it is confirmed by the publication at the end of the same year of the consultation paper “*Your Scotland, Your Referendum: A Consultation Document*”. The document aimed at defining the subsequent steps for holding an independence referendum as well as the procedural requirements to comply with. See Scottish Government, “*Your Scotland, Your Referendum: A Consultation Document*”, 25 January 2012 <http://www.scotland.gov.uk/Publications/2012/01/1006>. Accessed 23 July 2016.

<sup>665</sup> *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

<sup>666</sup> UK Parliament, *Order in Council*, modification of Schedule 5 of the *Scotland Act 1998*, 2013 (S.I. 2013/242). The Order modifies schedule 5 to the 1998 Scotland Act concerning reserved matters. In particular, it amends the section providing an exception to the reservation on the calling and holding of a referendum on independence of Scotland. However, it does so at the condition that specific requirements are met, notably the time framing of the poll, the uniqueness of the ballot and supplementary provisions regarding the campaign broadcast and finance.

<sup>667</sup> *Scotland Act 1998*, cit., section 30 para. 30.

<sup>668</sup> See the next par.

dum, among which 55.3% chose the no option, while the pro-secessionist side got the 44.7%.<sup>669</sup>

### 6.3 The Scottish referendum and international law on territorial changes

From the standpoint of the consolidation of custom on referenda about secession, it is noteworthy that the legitimacy of the referendum has never been contested either by Scotland or by the UK. In fact, the parties discussed mainly on the requirements that the consultation should fulfil as well as on the principles of State continuity and succession arising from the then separation of Scotland.<sup>670</sup> Even more important is the commitment of the parties to work together after the outcome of the vote, whatever this would be. Regardless of the fact that the parent State consented to the independence option, the idea that after the referendum the parties may seat at the table of negotiation resembles that advanced by the Supreme Court of Quebec in *Reference Re Secession of Quebec*.

It could be opposed that the case of Scotland is too influenced by the culture and political discourse of the UK, based on a consolidated consensus on the role of the people and the value of the rule of law.<sup>671</sup> The position is convincing, but should not be overestimated. Despite the unique background of the consolidation of democracy in the UK, although the formation of the Union itself is peculiar, the fact remains that the procedure established by the agreement is negotiation-referendum-negotiation in case of pro-secessionist majority of the vote cast. Notably, the Electoral Commission established to monitor the process towards the referendum had recommended the parties to agree on the terms of a future negotiation at the end of the referendum.<sup>672</sup> Moreover, after the defeat of the pro-independence party a commission was appointed by the UK Prime Minister (“the Smith Commission”) to draft a framework agreement for further devolution of powers to Scotland. In this framework, what is noteworthy for international law scholars is the process towards secession and after. The Commission was appointed even though in principle the victory of the unionists made inessential the consultation between the parties. Accordingly, it is the procedural aspect which is taken in due consideration and in this context the resort to negotiations seems to be considered unavoidable, irrespective of the results of the vote. This cannot but run in favour of the consolidation of a procedural rule in international law on legal effects triggered by a territorial referendum. Quite inter-

<sup>669</sup> See for further information <https://www.gov.uk/government/topical-events/scottish-independence-referendum/about>

<sup>670</sup> See on this topic “*Opinion: Referendum on the Independence of Scotland. International Law Aspects*”, instructed by the Foreign and Commonwealth Office, the Cabinet Office and the Office of the Advocate General of Scotland to Prof. J. Crawford and A. Boyle on issues of international and EU law arising from the eventual secession of Scotland. The opinion is annexed to HM Government’s Paper, Scotland Analysis: devolution and the Implications of the Scottish Independence, 10 December 2012.

<sup>671</sup> N. Barber: “*After the Vote: Regulating Future Independence Referendums*” UK Constitutional Law Association, 21 March 2014 <http://ukconstitutionallaw.org/2014/03/21/nick-barber-after-the-vote-regulating-future-independence-referendums/> cited by T.M. Waters: “*For Freedom Alone: Secession after the Scottish Referendum*”, cit., p. 128.

<sup>672</sup> T.M. Waters: “*For Freedom Alone: Secession after the Scottish Referendum*”, cit., p. 130.

esting in this sense is to see how the process of secession through referendum was conducted. The next section is therefore devoted to the requirements established for the 2014 independence referendum in Scotland.

#### 6.4 A model for territorial referenda: requirements of the Scottish referendum

The *Edinburgh Agreement* set the basic parameters for the organisation and holding of the referendum and left to the Scottish Parliament the adoption of the implementing legislation. Although Scotland had the duty to set the specific process rules for the referendum, para. 2 of the memorandum of agreement reads as follows: “*principles underpinning the existing framework for referendums held under Acts of the UK Parliament – which aim to guarantee fairness – should apply to the Scottish independence referendum*”. The government of the UK paid special regard to the question référendaire and relied on the role of the Electoral Commission established according to the 2000 *Political Parties, Elections and Referendums Act*<sup>673</sup> (hereinafter *PPERA*) to ensure a free and fair consultation.<sup>674</sup> The Commission played a notable role in the definition of the question référendaire, leading to the revision of the first proposal by Scotland. On the basis of the *Edinburgh Agreement* the referendum should 1) have a clear legal base; 2) be conducted as to command the confidence of Parliaments, governments and people, and 3) deliver a fair and decisive expression of the views of the people in Scotland and a result that everyone will respect.<sup>675</sup> In fact, as regards the requirements for a free and fair territorial referendum, the focus was on (i) the enfranchisement (ii) its territorial application and (ii) the question *référendaire*. The referendum was deemed to be a one shot opportunity to decide on Scotland’s future status, to mean a decisive expression of the will of the people. Needless to say that in practice after the vote the question of Scottish independence has remained one of the hot issues in the agenda of the government. Since the referendum about the withdrawal of the UK from the EU, proposals for a second referendum on independence of Scotland -applying the same implementing legislation- have come back in the political agenda.<sup>676</sup>

Following the *Draft Order in Council*, Scotland adopted two implementing acts: the *Scottish Independence Referendum Act*<sup>677</sup> and the *Scottish Independence Referen-*

<sup>673</sup> UK, *Political Parties, Elections and Referendums Act, 2000*, c.41.

<sup>674</sup> S. Tierney: “*Legal Issues Surrounding the Referendum on Independence for Scotland*”, *European Constitutional Law Review*, 2013, vol. 9, n.3, pp. 359-390.

<sup>675</sup> *Edinburgh Agreement*, cit., “*The governments are agreed that the referendum should: have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, governments and people; deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect*”.

<sup>676</sup> After the referendum of the UK resulted in the decision to withdraw from the EU, in October 2016 the Scottish government opposed the validity on the *Edinburgh Agreement* on the grounds of a significant and material chance of circumstances. Therefore, the Scottish government has elaborated a new consultation paper for the drafting of a new Referendum Bill. A draft proposal is available to the public, with a view to gather comments by the citizens of Scotland on how the referendum would run. <http://www.gov.scot/Resource/0050/00507743.pdf>

<sup>677</sup> *Scottish Independence Referendum Act*, ASP 2013, c. 14.

*dum Franchise Act*.<sup>678</sup> As far as the definition of the question is concerned, the *Edinburgh Agreement* states: “the question must be fair, easy to understand and capable of producing a result that is accepted and commands confidence”<sup>679</sup>. The early proposal by the Scottish Government was the following: “Do you agree that Scotland should be an independent country?”. It was contested by the Electoral Commission, on the grounds that it was framed in such a way to favour a positive answer.<sup>680</sup> The final version was in fact clear and straightforward: “Should Scotland be an independent country? Yes/No”. For the *Referendum Act*, a simple majority was necessary to validate the decision for secession. Following *Reference Re Secession of Quebec*, which required a clear majority of votes cast, the choice of a simple majority could be criticised, although as it was seen above, neither the judgement of the Supreme Court nor the *Clarity Act* define the threshold for a clear majority. Practice in Europe thus does not show a common pattern.<sup>681</sup> The White Paper<sup>682</sup> issued by the Scottish government asserts that from the international legal standpoint there is no binding requirement on a qualified majority, relying on the Venice Commission’s *Code of Good Practice for Referendum*, which did not require a specific majority.<sup>683</sup> Therefore, in principle there were no obstacles for choosing a simple majority requirement.

Instead, the issue of the enfranchisement is quite remarkable. The Memorandum of Agreement established that “all those entitled to vote in Scottish Parliamentary and local government elections should be able to vote in the referendum”.<sup>684</sup> With the *Franchise Act*, Scotland decided to enfranchise all the voters from the age of 16, who resided in Scotland at the moment of the referendum. The extension of the minimum age to vote in the referendum can be subsumed from the will of the Scottish Government to allow all those concerned by the secession to have their say in the process. Therefore, the Scottish people residing abroad were not allowed to take part to the vote whilst EU and Commonwealth citizens residing in Scotland were allowed to vote.<sup>685</sup> Participation to the consultation was massive and although the results were against independence, the referendum has had a huge impact on Scotland, more than expected. The pro-secessionist presence in the British Parliament has increased, so that the legislative process is expected to be more negotiated within

<sup>678</sup> *Scottish Independence Referendum Franchise Act*, ASP 2013, c. 13.

<sup>679</sup> *Edinburgh Agreement*, cit., para.5.

<sup>680</sup> See A. Black: “Scotland Independence: SNP Accepts Call to Change Referendum Question” BBC, 20 January 2013, <http://www.bbc.com/news/uk-scotland-scotland-politics-21245701>.

<sup>681</sup> The legal questions arising from the adoption of different quorum will be tackled in the next chapter. Suffice it to mention here M. Qvortrup, who opines that qualified majorities may not be the most effective solutions and historically were used to hide obstructionist aims. Matt Qvortrup: “Referendums on Independence, 1860-2011”, *Political Quarterly*, 2014, vol.85, p. 64.

<sup>682</sup> The Scottish Government, *Your Scotland, Your Referendum*, cit.

<sup>683</sup> *Ibid.*, par. 1.21-1.22: “In 2006 the Venice Commission published a voluntary Code of Good Practice for Referendums setting out the views of this Council of Europe Commission on best practice for referendums. Article 7 of the Code states that minimum turnout requirements and abnormal majority thresholds are not advisable. In the Scottish Government’s view this is the correct approach”.

<sup>684</sup> *Edinburgh Agreement*, Memorandum of Agreement, cit., par. 9.

<sup>685</sup> B. Levites: “The Scottish Independence Referendum and the Principles of Democratic Secession”, cit., p. 398.

Westminster.<sup>686</sup> Moreover, the *Scottish Bill* dated 2015 granted the Scottish Parliament more powers in major issues, such as taxation. Therefore, the referendum ultimately helped the people of Scotland to gain more autonomy. It also demonstrated the attitude of the parent State to follow a reasonable procedure to enhance internal self-determination in a way that secession became less appealing.<sup>687</sup> It could be argued that the legal order of the UK guarantees more safeguards against secession, because it is flexible enough to answer positively to the demands of autonomy. The absence of a written Constitution and as a consequence the fact that in principle there is no constitutional procedure to be followed to change the boundaries of the kingdom is an important factor. Nevertheless, from the point of view of the process, the Scottish example supports the view that the referendum is conceived to be in a cause effect relationship with negotiations to be held between the parent State and the seceding unit. Frankly, the relationship between referenda and negotiations is also part of the legal tradition of UK and Northern Ireland. According to the *Ireland Act*<sup>688</sup> Northern Ireland may not cease to be part of the UK unless the majority of the people of Northern Ireland so declares in a poll. If so, however, the proposal has to be submitted to the Parliament to be enforced “*through negotiations between her majesty and the government of Ireland*”. A brief sketch on those countries in which secession is possible confirms that the referendum is the tool chosen to validate a territorial change or to start a procedure of negotiations.

## 7. Constitutionalising secession through referendum (I): the case of Uzbekistan

Very few Constitutions expressly tolerate secession. Alongside those already referred to, namely Ethiopia,<sup>689</sup> Burma,<sup>690</sup> St. Kitts and Nevis,<sup>691</sup> it is noteworthy to

<sup>686</sup> B. Davies: “*Popular Participation and Legitimacy in Constitutional Change*”, *Liverpool Law Review*, 2015, vol. 36, pp. 277-297; <sup>686</sup> B. Giupponi; H. Hofmeister: “*The day after the Scottish Referendum: Legal Implications for other European Regions*”, *Liverpool Law Review*, 2015, vol. 36, pp. 211-235.

<sup>687</sup> T. Y. Patrick: “*The Zeitgeist of Secession amidst the March towards Unification: Scotland, Catalonia, and the Future of the European Union*”, *Boston College International and Comparative Law Review*, 2016, vol. 39, p. 215.

<sup>688</sup> Northern Ireland Act, 19 November 1998, Chp. 47-1998 art. 1(1-2), available at <http://www.legislation.gov.uk/ukpga/1998/47/contents>.

<sup>689</sup> See Chapter 2, pp. 62-63.

<sup>690</sup> See Introduction pp.17-18.

<sup>691</sup> As regards St. Kitts and Nevis, in the Introduction to this research it was anticipated that the island of Nevis had resorted to a territorial referendum in 1997 to achieve independence from Saint Christopher, but the majority of the votes cast refused such option. A further reference to the legal basis for the 1997 popular consultation is helpful in this chapter. According to section 143 of the Constitution “*The Nevis Island shall cease to be federated with the island of St. Christopher and accordingly that constitution shall no longer have effects*”. The Constitution of St Kitts and Nevis allows for the withdrawal of Nevis, but requires 1) a positive vote by the 2/3 of the Nevis Assembly and 2) a popular consultation of the population of Nevis whose turnout must be of 2/3 in favour of independence. Liechtenstein has adopted a similar model: according to art. 4(2) of the 1921 Constitution, any of the municipalities composing the country can secede on the initiative of the majority of the municipality itself. On the same line, sections 338-343 of the Constitution of Papua New Guinea provides for the possibility for Buganville to decide

mention the example of the Republic of Karakalpakstan, the autonomous Republic within Uzbekistan, which is granted the right to secede in the Constitution of the parent State.<sup>692</sup>

The republic of Uzbekistan declared independence from USSR in August 1991.<sup>693</sup> As part of the USSR Uzbekistan was composed by 11 Oblast and one Autonomous Soviet Socialist Republic: the Karakalpastan ASSR. This structure was maintained after the independence. Despite being the biggest region of Uzbekistan – it covers 37% of the total area- Karakalpakstan is the one with the slightest majority of people of Uzbek origin.<sup>694</sup> The variety of ethnic roots characterising the inhabitants of the region has boosted national claims, particularly as soon as Uzbekistan underwent a demographic growth. In this framework, the Karakalpak national movement<sup>695</sup> – called Khalk Mapi, in particular, has gathered the attention by the central government, given its wide support among the population of Karakalpakstan.

The 1993 Constitution<sup>696</sup> of Uzbekistan recognises the special status of Karakalpakstan. The ensemble of the rules devoted to Karakalpakstan shows that although it is acknowledged as an Autonomous Republic, it is nonetheless part of Uzbekistan. As regards citizenship, for example, art. 21 of the Constitution states that “*a citizen of the Republic of Karakalpakstan shall be a citizen of the Republic of Uzbekistan*”. Chapter XII of the Uzbek Constitution addresses the status and powers of the Republic of Karakalpakstan: pursuant to articles 70-75 as well as to the provisions envisaging the distribution of powers contained in the other chapters of the Constitution, Karakalpakstan enjoys wide autonomy. The Republic has its own government in place, Parliament, Supreme Council and a cabinet of ministers, thus it works as an independent country. Moreover, it has a separate judiciary.<sup>697</sup> According to art. 70, Karakalpastan is a sovereign republic with its own Constitution, but the latter is re-

about its political status through a consultation involving the whole population. See P. Radan: “*Secession in Constitutional Law*”, The Ashgate Research Companion to Secession, cit., pp. 334-343.

<sup>692</sup> The panoramic on Constitutions granting a right to secede will continue with Montenegro. The case will be used as a linking point to move our attention to the standards for a free and fair territorial referendum, thus it is left to the next Chapter.

<sup>693</sup> The Supreme Soviet adopted a statement on the *State Independence of the Republic of Uzbekistan* on 31 August 1991, together with a *Law on the Foundations of State*. See A. K. Said (ed.) *Constitutional Law of the Republic of Uzbekistan*, Collection of Normative Acts, Tashkent, 1995, I, pp. 94-97, cited by R. Mullerson; M. Fitzmaurice; M. Andeans (eds.) *Constitutional Reform and International Law in Central and Eastern Europe*, The Hague-London, 1998, p. 28.

<sup>694</sup> Other non-Uzbek indigenous residents in the region are Kazakhs, Tajiks, Kyrgyz and Turkmen. See S. L. Batalden, *The Newly Independent States of Eurasia: Handbook of Former Soviet Republics*, Phoenix, 1993, p. 167.

<sup>695</sup> The specific character of Karakalpakstan is that it was not part of Uzbekistan historically. During the tsarist period the region was known as Turkestan, and granted independence only in 1925 as an autonomous Oblast, part of the Kazakh ASSR. It was incorporated into Uzbekistan in 1936, after 6 years under the jurisdiction of the Russian Soviet Federated Socialist Republic. See for the history of Uzbekistan till recent times N.J. Melvin, *Uzbekistan, Transition to Authoritarianism*, Singapore, 2005.

<sup>696</sup> *Constitution of Uzbekistan*, Bulletin of the Supreme Council of the Republic of Uzbekistan, 1993, No. 1.

<sup>697</sup> R.R. Hanks: “*A separate Space? Karakalpak Nationalism and Devolution in Post-Soviet Uzbekistan*”, *Europe-Asia Studies*, 2000, vol. 52., pp. 939-953.

quired to be in accordance with the Constitution of Uzbekistan.<sup>698</sup> Hence, in practice the status of Karakalpastan rests ambiguous.<sup>699</sup> Since it is defined as sovereign, one would expect it to have legal autonomy. By contrast, art 72<sup>700</sup> of the Uzbek Constitution states that domestic legislation of the central government is binding on the territory of Karakalpastan, and the judiciary as well is supervised by the Supreme Court of the Republic of Uzbekistan, as established under art. 110.

The Constitution of Uzbekistan grants to Karakalpkastan a general right to secede via referendum in art. 74.<sup>701</sup> The entitlement to secede is framed under general terms, so that one has to look at the whole section of the Constitution to understand the relationship between the republic and the parent State.<sup>702</sup> The decision towards secession has to follow the procedure laid down in art. 78, which states: “*The joint conducting of the Legislative Chamber and the Senate of the Oliy Majlis of the Republic of Uzbekistan shall include:[...] 6.admission of new state formations into the Republic of Uzbekistan and approval of decisions to secede from the Republic of Uzbekistan*”. Therefore, secession may take place provided that two conditions are satisfied: 1) there is a referendum pursuant to art. 74 and 2) the Government of Uzbekistan approves the decision. Interestingly enough, the Constitution mentions both the referendum and approval by the parent State. Is this another element in support of the duty to negotiate envisaged by the Supreme Court of Canada in *Reference Re Secession of Quebec*? The answer is partly positive. Although clearly affirmed, the right to secede is balanced by the wording of art. 78 establishing that the borders and the territory of Karakalpakstan may not be changed unless the republic of Uzbekistan has expressed its consent. The right to decide is vested in the people of Uzbekistan, thus, only the republic taken as a whole can decide on the administrative and territorial structure, albeit according to art. 74 “*the territory and boundaries of the Republic of Karakalpakstan may not be altered without its consent*”. Moreover, art. 75 reads as follows: “*disputes between the Republic of Uzbekistan and the Republic of Karakalpakstan shall be settled by the way of reconciliation*”. Imagine the case of a dispute arising from the division of competences for the organisation of a referendum about secession, or on the results of the ballot: art. 75 would apply, so the two parties should negotiate a solution. Although there is no constitutional demand for referenda, like in the case of Quebec, the example of Karakalpakstan adds credit to the broader assumption that referendum is the favourite tool to carry out a “legal” procedure for secession in countries based on the rule of law. At this point, it re-

<sup>698</sup> Constitution of Uzbekistan, cit., art.71: “*The Republic of Karakalpakstan shall have its own Constitution. The Constitution of the Republic of Karakalpakstan must be in accordance with the Constitution of the Republic of Uzbekistan*”

<sup>699</sup> R.R. Hanks: “*A separate Space? Karakalpak Nationalism and Devolution in Post-Soviet Uzbekistan*”, cit., p.941.

<sup>700</sup> Constitution of Uzbekistan, cit., art. 72: “*Laws of the Republic of Uzbekistan shall be binding on the territory of the Republic of Karakalpakstan*”.

<sup>701</sup> Constitution of Uzbekistan art. 74: “*The Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan*”.

<sup>702</sup> I.G. Sen, Sovereignty Referendum in International and Constitutional Law, cit., p.142.

mains to be seen to what extent popular consultations can serve the purposes of a pure unilateral claim for secession.

## 8. Constitutionalising Secession through Referendum (II): the secession of Catalonia

Through the past few years, the political and legal debate in Spain has been shaped by the *Catalan question*. The *Catalan question*, indeed, is still ongoing and at the time this research is published the next episode is almost unknown. On 1<sup>st</sup> October 2017 the 90 % of the people of Catalonia chose to become independent, after several months of serious tensions with the central government in Madrid. The referendum took place pursuant to the *Law on the Self-Determination Referendum –Llei del Referèndum d'autodeterminació*<sup>703</sup> – adopted in September 2017. In the explanatory memorandum, the decision to unilaterally call for a referendum is depicted as a democratic response to the frustration developed within the Catalan region. The quest for secession is considered the ultimate choice, in light of the failure of the previous attempts to negotiate with Madrid and of the breaking of the constitutional pact of 2006 occurred through the denaturing of the 2006 Autonomy Statute by the Spanish Constitutional Court.<sup>704</sup>

The attempt to secede carried out by the *provincia autonoma* in fact has resulted in a bilateral quarrel with the Constitutional Court of Spain and the grounds for ruling on the unconstitutionality of Catalonia's decision to separate are rooted in constitutional law. However, the Catalan Question is not only a domestic one. An accurate scrutiny demonstrates that the focus of the quarrel is within the notion of legality and respect of the rule of law, as Torbisco and Krisch<sup>705</sup> observed. In this framework, part of the supportive points elaborated by the regional Government of Catalonia (also called *Generalitat*) to justify its right to decide its status originates in the principles of international and EU law. For instance, the 2017 Law on Referendum is deemed to find its legal basis in the 1966 Covenants ensuring the right to freedom of expression as well as in the internationally consolidated principle of democracy.<sup>706</sup> Besides, the judgments of the Spanish Constitutional Court are worth studying also from an international law perspective, in terms of consolidation of jurisprudence and *opinio*

<sup>703</sup> Departament de la Presidència. *LLEI 19/2017 del referèndum d'autodeterminació*, 6 September 2017. For the English version see the report *The Catalan Independence Referendum: An Assessment Of the Process Of Self-Determination*, Report of the International Group of Experts for the Institute of Research on Self-Determination of Peoples and National Independence (hereinafter IRAI Report), n.1, September 2017, pp. 75-89.

<sup>704</sup> Explanatory Memorandum to the *Law on Referendum*, annexed to the IRAI Report, cit., pp. 75-76.

<sup>705</sup> See the comment by N. Torbisco Casals and N. Krisch on EUROPP, the blog of the London School of Economics, titled "*Using Spanish law to block Catalonia's independence consultation may simply encourage Catalans to construct their own 'alternative legality'*", 4 November 2014, available at <http://blogs.lse.ac.uk/europpblog/2014/11/04/using-spanish-law-to-block-catalonias-independence-consultation-may-simply-encourage-catalans-to-construct-their-own-alternative-legality/> ( last visited 3 November 2016)

<sup>706</sup> See the Explanatory Memorandum to the *Law on Referendum*, cit., p. 75.

*juris*. In particular, it is interesting to highlight the similarities and differences with the arguments developed by the Supreme Court of Canada in *Reference Re Secession of Quebec*. Ultimately this kind of reconstruction of the background of the case could help in better understanding the current developments in Spain.

Both Catalonia and Quebec underwent periods in which the respective communities were looked at suspiciously by the central government. In the case of Catalonia, the dictatorship of Franco was characterised by a push for a single national identity, which resulted in a repression of sub national cultures. Against this background, the perception of the citizens living in Catalonia of possessing a separate identity was solidified.<sup>707</sup> Thus, Catalan nationalism silently acquired strength<sup>708</sup> and when the regime ended, Spain found itself a deeply divided nation. In this framework, the drafters of the 1978 Constitution had to find a balance between the need of national unity and the wishes of sub-national groups.<sup>709</sup> The normative solution was found with the establishment of the “*comunidades autonomas*” including Catalonia, Basque Country and Galicia.<sup>710</sup> These self-governing communities were nevertheless part of the indivisible nation under art. 2 of the Constitution.<sup>711</sup>

Immediately after the adoption of the Constitution, the region of Catalonia was granted autonomy through the 1979 Statute of Autonomy.<sup>712</sup> The text of the Statute has to be approved by the people through a referendum. Since the adoption of the

<sup>707</sup> Until 1469 Catalonia was a sovereign political entity. Merging with the Spanish Crown ended up to be an unfavourable choice: initially Catalonia maintained its institutions of self-government, namely the Parliament and the Government. However, in 1640 the tensions between the Castilians emerged and Catalonia was defeated. As a result of the defeat, the citizens of Catalonia were gradually banned from participation in almost every significant sector of the public life. This brief historical account tells a lot of how deeply rooted the sense of autonomy has been in the community. In 1931, the struggle for autonomy led to the adoption of a special status for Catalonia under the Constitution of the new Spanish Republic. The Statute of autonomy gave the people of Catalonia self-government rights on sensitive issues, such as linguistic policies, until the overthrow of the government by Franco. See C. Mir: “*The Francoist Repression in the Catalan Countries*”, *Catalan Historical Review*, 2008, vol.1, pp. 133-147. For a historical review of the Catalan nationalism see M. Guibernau: “*Secessionism in Catalonia: After Democracy*”, *Ethnopolitics*, 2013, vol. 12, pp. 368-393.

<sup>708</sup> M. Castells, *The Power of Identity*, 2010, Oxford, pp. 47-48.

<sup>709</sup> J. Ruiperez Aramillo: “*La nueva reivindicación de la secesión de Cataluña en el contexto normativo de la constitución española de 1978 y el tratado de Lisboa*”, *Teoría y Realidad Constitucional*, 2013, n. 31, pp. 151-136.

<sup>710</sup> The 1978 Constitution of the Kingdom of Spain establishes a quasi-federal stated, composed of 17 *comunidades autonomas* each granted with its own Parliament.

<sup>711</sup> Constitution of Spain, Constitutional Official Gazette (CEBOE) n. 311, 27 December 1978, art. 2: “*the Constitution recognises the indissoluble unity of the Spanish nation, recognises and guarantees the right to self-government of the nationalities and regions of which it is composed*. Translation available at Gobierno de Espana, [www.lamoncloa.gob.ec](http://www.lamoncloa.gob.ec)

<sup>712</sup> According to the Constitution of Spain the *comunidades* are enabled to adopt their own statutes. Art. 143(2) reads as follows: “*The right to initiate the process towards self-government lies with all the Provincial Councils concerned or with the corresponding inter-island body and with two-thirds of the municipalities whose populations represent at least the majority of the electorate of each province or island. These requirements must be met within six months from the initial agreement to this effect reached by any of the local Corporations concerned*”. Public Diplomacy Council of Catalonia, *Catalan History in 15 Episodes*, report available at <http://www.cataloniavotes.eu/history> (last visited Nov. 20, 2015) [<http://perma.cc/E93E-WJF6>]

Statute of Autonomy of Catalonia<sup>713</sup> the support for the Catalan nationalist coalition (*Convergència i Unió*) has grown constantly and the party has lead Catalonia to become an important actor, in particular in comparison to other regional entities in Europe. Therefore, the region has been able to extend its self-government powers to acquire exclusive competence in matters such as health, education environment and even police functions.<sup>714</sup> The separatist movement gain new momentum in 2006, when the revision of the Statute of Autonomy was adopted by the people of Catalonia and then partially declared unconstitutional by the Constitutional Court<sup>715</sup>. The revised statute clearly manifested the signs of the independence desires of the regional government, since early in the preamble Catalonia was in fact defined as a nation.<sup>716</sup> The allegations of sovereignty of Catalonia made by the regional government triggered the reaction of the Parliament in Madrid which challenged the revision in front of the Constitutional Court. Accordingly, this moment marked the formal beginning of the *Catalan question*.

### 8.1 Catalonia in the storm: the years 2006-2017

The dispute between Catalonia and the parent State acquired international relevance between 2013 and 2015, but it dates back to 2010, when the Constitutional Court declared unconstitutional several parts of the revised Statute of Autonomy of Catalonia. The high relevance of the judgement can be observed by looking at the explanatory memorandum annexed to the 2017 *Law on Referendum*, which justifies the decision to schedule a binding referendum, *inter alia*, expressly referring to the “denaturing of the 2006 Statute [...] by ruling 31/2010 of the Spanish Constitutional Court”.<sup>717</sup>

The draft revised Statute was submitted to the Spanish Parliament, which partially amended it.<sup>718</sup> Then, the citizens were called to express their consent on the proposal through a referendum. Although the turnout was very low, the majority of the vote casted - 75% - accepted the text. Nevertheless, the Spanish conservative party challenged the Statute in front of the Constitutional Court. Four years after the constitu-

<sup>713</sup> Generalitat de Catalunya, *Estatuto de Autonomia de Catalonia*, BOE n. 30178, 1979, hereinafter Statute of Autonomy of Catalonia, [www.gencat/genelarat/eng](http://www.gencat/genelarat/eng).

<sup>714</sup> M. Rosenfield, *The Identity of the Constitutional Subject. Selfhood, Citizenship, culture and Community*, 2010, Routledge.

<sup>715</sup> *Revised Statute of Autonomy of Catalonia*, adopted by Organic Law 6/2006, 19 July 2006, official translation in English available at <http://web.gencat.cat/en/generalitat/estatut/estatut2006/>

<sup>716</sup> *Revised Statute of Autonomy of Catalonia*, Preamble: “In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality”.

<sup>717</sup> See the Explanatory Memorandum to the *Law on Referendum*, cit., p. 76.

<sup>718</sup> The adoption of the Catalan Statute was contrasted by the *Partido Popular*. The party collected 4 million signatures to ask for a referendum on secession of Catalonia which should involve all the citizens, but the government of Madrid refused the request.

tional challenge was filed, the Court with the ruling 31/2010<sup>719</sup> invalidated fourteen provisions of the Statute and gave its interpretation for other twenty seven provisions, thus fostering the irredentists feelings. Before the Court ruled on the constitutional question, the Parliament of Catalonia had already enacted law 4/2010 on new procedures for holding referenda pursuant to art. 122<sup>720</sup> of the Statute of Autonomy, in particular on advisory and consultative referenda on major political issues, as foreseen by art. 22 of the Constitution of Spain. Law 4/2010 introduced the participatory public consultations, to mean non-binding consultations on sensitive political issues which did not require the prior authorization by the central government. Predictably, the Government challenged the law and the Court eventually decided for the interim suspension in application of art. 161 of the Spanish Constitution. Although law 4/2010 was found in compliance with the Constitution, the Constitutional Court declared that all popular consultation required the authorization of the Spanish Government.

### 8.1.1 The very beginning: the Constitutional Court Ruling STC 31/2010

Although not specifically devoted to the legal issues arising from a secession carried out through a referendum, the 2010 judgment of the Constitutional Court is important for framing better the case of Catalonia, as well as for understanding the various legal strategies that the regional government has tried in order to achieve independence.

The Court in 2010 outlawed the use of the word *nation* in the preamble of the Statute of Autonomy.<sup>721</sup> From the legal standpoint only Spain is a nation, thus it would be unconstitutional to label a *provincia autonoma* a *nation*. The declaration of unconstitutionality, in the view of the Court does not prevent the people of Catalonia to perceive themselves as a nation for their historical, economic and linguistic ties,<sup>722</sup> provided that such perceptions are not translated into legally binding proposals. When examining the challenge brought against art. 7 of the Statute of Autonomy, the Court concluded that “*the citizens of Catalonia should not be mistaken for the sovereign people, conceived as ‘the perfect unit to attribute constituent powers, un-*

<sup>719</sup> Spanish Constitutional Court, *Sentencia del Tribunal Constitucional*, (hereinafter STC) 31/2010, 28 June 2010, available at [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2015\\_023/2010-02502STC.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2015_023/2010-02502STC.pdf)

<sup>720</sup> Statute of Autonomy of Catalonia, art. 122: “*The Generalitat has exclusive power over the establishment of the legal system, the modalities, the procedure, the implementation and the calling, whether by the Generalitat or by local bodies, acting within their jurisdiction, of public opinion polls, public hearings, participation forums and any other instruments of popular consultation, with the exception of those provided for by Article 149.1.32 of the Constitution. According to article 149.1.32 of the Constitution, the State has the exclusive competence of authorizing popular consultations through the holding of referendums*”.

<sup>721</sup> Constitutional Court of Spain, STC 31/2010, 28 June 2010. The judgment is available at <https://www.tribunalconstitucional.es/es/jurisprudencia/ResolucionTraducida/31-2010,%20of%20June%2028.pdf>

<sup>722</sup> V. Ferreres Comella: “The Spanish Constitutional Court Confronts Catalonia’s Right to Decide”, *European Constitutional Law Review*, 2014, vol. 10, p. 575.

derlying the Constitution and the legal order”<sup>723</sup>. Since the acknowledgement of nationality was included in the preamble of the Statute, the Court limited itself to reaffirm that it does not have legal effects, thus it does not endow the region of Catalonia with sovereign powers beyond those specifically established in the Constitution. The reaction of Catalonia was on the one side the implementation of the judgment, with the adoption of a new text. On the other side, the public opinion started to question the legitimacy of the Constitutional Court. In 2012 popular manifestations spread under the formula “*Catalonia, the next European State*”: the Catalan Parliament took advantage of this wave and managed to adopt resolution 5/X (either called *Declaration on the Sovereignty of Catalonia*), expressing the need for the people of Catalonia to decide about their legal status with a popular consultation.<sup>724</sup> The *Declaration on the Sovereignty of Catalonia* sets out a process of transition towards a new independent State. For this purpose, in particular, it establishes the Advisory Council for National Transition, tasked with elaborating a report on the subsequent steps to be taken to achieve complete independence and after.<sup>725</sup> On 8 March 2013, the Spanish Government challenged the resolution before the Constitutional Court. In May 2013, the Court decided on the temporary suspension of the Resolution pending a definitive decision. In March 2014 the Court rendered its decision, which partly upheld the Spanish Government’s claims.

### 8.1.2 Territorial referenda v. democracy in STC 42/2014

Judgment 42/2014 of the Spanish Constitutional Court invalidated Resolution 5/X<sup>726</sup> on several grounds, the most important of which are the ones on the principle of sovereignty and on the so called *right to decide*.<sup>727</sup> Before engaging in the analysis

<sup>723</sup> Constitutional Court of Spain, STC 31/2010, cit.

<sup>724</sup> Parliament of Catalonia, Resolution 5/X adopting the Declaration of Sovereignty and Right to Decide of the People of Catalonia, 23 January 2013. See M. Colomer: “*La Declaració De Sobirania Ja Fa Via Al Parlament*”, ARA.CAT, 22 January 2013, [http://www.ara.cat/politica/declaracio-sobirania-Parlament-CiU-ERC-ICV\\_0\\_851914901.html](http://www.ara.cat/politica/declaracio-sobirania-Parlament-CiU-ERC-ICV_0_851914901.html) [<http://perma.cc/FRH3-SKTP>].

<sup>725</sup> Advisory Council for the National Transition, “*The consultation on the political future of Catalonia*”, report n. 1, July 2013. Available at [http://presidencia.gencat.cat/web/content/ambits\\_actuacio/consells\\_assessors/catn/informes\\_publicats/inf\\_1\\_angles.pdf](http://presidencia.gencat.cat/web/content/ambits_actuacio/consells_assessors/catn/informes_publicats/inf_1_angles.pdf)

<sup>726</sup> The decision of the Court to pronounce itself about the legitimacy of a resolution has been severally criticised. It was highly questioned whether a Resolution could be the object of a constitutional challenge, given that it is unable to produce legal effects. The Court, however, stated that notwithstanding its political nature, the process envisaged by resolution 5/X could have such an important impact on the constitutional order of Spain, that the declaration had legal effects. See G. Marrero Gonzalez: “*Catalonia’s Independence and the Role of the Constitutional Court: Recent Developments*”, *Tijdschrift voor Constitutioneel Recht*, January 2015, p. 87; E. Casana Adam: “*The Independence Referendum and Debates on Catalonia’s Constitutional Future*”, *Tijdschrift voor Constitutioneel Recht*, April 2014, pp. 162-171.

<sup>727</sup> With the notion “*right to decide*” it has to be intended the (political) formula which guides the national movement in Catalonia. The notion is rooted in a combination of historic and legal arguments. For the latter, in particular, it is argued that the principle of self-determination gives legitimacy to the right of the people of Catalonia to decide on their future status. As the secessionist movement gained momen-

of the judgement, it has to be stressed that international law is quite absent in the *fundamentos jurídicos* elaborated by the Court. Nevertheless, the judgment is important for the study of secession and referenda from an international legal standpoint: by focusing on the similarities and differences with other examples of secession involving popular consultations, legal scholars can trace the contours of a trend in international law.

As regards sovereignty, the Court insists on the interpretation of articles 1(2) and 2 of the Constitution, in the sense of an indissoluble unity of the Spanish people. In this framework, the constituent power lies in the hands of the people taken as a whole.<sup>728</sup> A similar interpretation of sovereign power have been advocated by the Canadian Supreme Court,<sup>729</sup> but the consequences derived in STC 42/2014 are different. The Spanish Court in fact infers that not only Catalonia shall not secede, but also it cannot hold a referendum. This is clear in *fundamento jurídico* n. 3, where the Court asserts “*an Autonomous Community in principle cannot unilaterally call a referendum of self-determination to decide on its integration with Spain*”.<sup>730</sup> While in *Reference Re Secession of Quebec* a unilateral territorial referendum *per se* is not excluded, for the Court of Spain such a possibility is unwarranted.<sup>731</sup> This is not tantamount to say that the Court has excluded a territorial change. The Constitution has been interpreted in the jurisprudence of the Court as amendable in all its parts,<sup>732</sup> provided that the whole people of Spain decides on it. A fragmentation therefore is not unconceivable, but it has to be conducted in compliance with the Constitution.<sup>733</sup> As said above, the Court has already advanced this position when it was called to render a judgment on the proposal for referendum by the Basque country. In STC 103/2008 the Court declared unconstitutional the law adopted by the Basque Coun-

tum, the right to decide has been gradually disentangled from that of self-determination. This facet will be tackled in the next pages, however for a general political and legal account see X. Cuadras-Morató (ed.), *Catalonia: a new Independent State in Europe? A debate on Secession within the European Union*, New York, 2016.

<sup>728</sup> Constitutional Court of Spain, STC 42/2014, para. 7 “*Art. 1(2) [...] exclusively attributes national sovereignty to the Spanish people, the perfect unit to hold constituent powers*”

<sup>729</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 85.

<sup>730</sup> Constitutional Court of Spain, STC 42/2014, p. 7 cited by V. Ferreres Comella: “*The Spanish Constitutional Court Confronts Catalonia’s Right to Decide*”, cit., p. 582-583.

<sup>731</sup> J. Ruiperez Aramillo: “*La Nueva Reivindicación de la Secesión de Cataluña en el Contexto Normativo de la Constitución Española de 1978 y el Tratado de Lisboa*”, *Teoría y Realidad Constitucional*, núm. 31, 2013, pp. 151-136.

<sup>732</sup> See the Judgment STC 103/2008 related to the attempt to call a referendum by the Basque country, as mentioned by V. Ferreres Comella: “*The Spanish Constitutional Court Confronts Catalonia’s Right to Decide*”, cit., p. 587.

<sup>733</sup> V. Breda: “*La Devolution de Escocia y el Referendum de 2014: cuales son las Repercusiones Potenciales en Espana*”, *Teoría y Realidad Constitucional*, 2013, vol. 31, pp. 85-86. Part X of the 1978 Constitution encompasses constitutional amendments. Art. 167 and 168 lay down two procedures for amendment, depending on the subject of the revision. Essential reforms of the Constitution, such as those concerning territory, are ruled by art. 168. Four successive steps need to be taken: firstly, i) the proposed amendment has to be approved by a two-thirds majority of the members of the Spanish Parliament and Senate, then ii) the two houses have to be dissolved in order to have iii) new elections. Further, iv) the newly elected houses have to adopt the same proposal by another two-thirds majority. Lastly, the decision has to be ratified through the positive vote of the population with a referendum. Interestingly enough, the Constitution has ever been amended following the procedure established by art. 168.

try that fixed a referendum on independence.<sup>734</sup> The judgment clarifies the *ratio decidendi* of the Court vis-à-vis referenda in the Spanish legal order when it says that only the Spanish government can authorise a referendum pursuant to art. 149 of the Constitution.<sup>735</sup> Therefore, a revision carried out with a different method, even though the Spanish government had consented to it, would be unconstitutional.<sup>736</sup> No additional referenda can be introduced prior to the consultations already required by the constitution in order to adopt a revision.

The Court adapts this approach to ruling 42/2014 about Catalonia: the main issue of disagreement is the assertion by the government of Catalonia that the people of the region has the right to decide because it is a sovereign subject. In resolution 5/X the *Generalitat* consents to “initiate the process to exercise the right to decide so that the citizens of Catalonia may decide their collective political future”,<sup>737</sup> in accordance with, *inter alia*, the principle of sovereignty. The people of Catalonia considers itself “a sovereign political and legal subject”.<sup>738</sup> The right to decide can be constitutionally interpreted if it is narrowed to a political aspiration: the Court asserts that the people of Catalonia has a general right to decide, but not “as a manifestation of a right of self-determination not recognized in the Constitution, or as an unrecognized attribution of sovereignty, but as a political aspiration that may only be achieved through a process that conforms to constitutional legality and follows the principles of “democratic legitimacy”, “pluralism” and “legality”.<sup>739</sup> However, the Court fails to explain in detail the rationale underpinning its opposition to all popular consultations organised outside of this framework, no matter if binding or not. While it recognises the entitlement of the people of Catalonia to exercise the right to decide, it refuses also those consultations which are deprived of legal effect. The latter was eventually the road the *Generalitat* went to follow. The pro-secessionist front did not stop its activity during the period the challenge of admissibility for resolution 5/X was pending, neither once ruling 42/2014 was issued. In January 2014 the *Generalitat* adopted a “Draft Organic Act delegating to the *Generalitat* the power to authorise, call and hold a referendum on the political future of Catalonia”,<sup>740</sup> then submitted it to the Spanish Parliament for approval. Predictably, the Congress refused to adopt the act. As a consequence, all the possible attempts to hold a referendum with the consent of the Spanish Parliament failed. Hence, from the end of 2014

<sup>734</sup>Constitutional Court of Spain, STC 103/2008, 11 September 2008, <https://www.boe.es/boe/dias/2008/10/10/pdfs/T00003-00014.pdf>

<sup>735</sup> Constitution of Spain, 1978, art. 149(1) 32nd: “*The State shall have exclusive competence over (...) [the] authorisation of popular consultations through the holding of referendums*”. Hence for the Court, matters which deeply touch upon the foundations of the State and its constitutional order cannot be decided through a referendum only. Rejecting the position of the Basque Country, the Court asserted that the fundamental pillars of the constitutional order can be modified only following the amendment procedure established in Part X of the Constitution.

<sup>736</sup> Constitutional Court of Spain, STC 103/2008, cit., *fundamento jurídico* n. 4.

<sup>737</sup> Parliament of Catalonia, Resolution 5/X, cit., Preamble to the Declaration of Sovereignty.

<sup>738</sup> *Ibid.*, art. 1.

<sup>739</sup> Constitutional Court of Spain, STC 42/2014, cit., p. 10.

<sup>740</sup> Parliament of Catalonia, Resolution 479/X, 16 January 2014, published in the BOPC, No. 239, 17 January 2014

the *Generalitat* tried to reach separation by way of a popular consultation rather than a binding referendum.

## 8.2 From binding to non-binding referendum

Two days after the results of the Scottish referendum were released, the Parliament of Catalonia adopted Law 10/2014 on popular non-referendum consultation and civic participation.<sup>741</sup> In accordance with resolution 5/X, art. 1 calls for a popular consultation on the future of Catalonia to be held on the next 9 November 2014,<sup>742</sup> exactly two months after the Scottish referendum. The *question référendaire* read as follows: “do you want Catalonia to become a state? If so, do you want that state to be independent?” Arguably, the phrasing of the referendum question did not help in legitimising the separatist goal of the regional government. As Lopez opines, “the inclusion of two questions locates the Catalan case in between an internal self-determination process that would create a federal state and external one that would create an independent state”.<sup>743</sup> Contrary to the question posed to the people of Scotland, the non-binding referendum of 2014 asked voters if they want[ed] Catalonia to be a state and if so, if they want[ed] that State to be independent.<sup>744</sup>

The question does not seem to be clear, nor immediately understandable. The results of the ballot demonstrated the flaws of the wording: as figures show, the independence option was chosen by 80% of votes casted, nearly 2.4 million out of 7.5 citizens participating. However, 10% of the voters were in favour of statehood, but they did not agree on Catalonia becoming an independent State.<sup>745</sup> The reaction of the

<sup>741</sup> Parliament of Catalonia, Law 10/2014, then Decree 129/2014, Official Gazette of the Parliament of Catalonia9 (hereinafter BOPC) n. 6715, 27 September 2014.

<sup>742</sup> After the adoption of the Decree 129/2014 by Catalonia, the Spanish Government filed two appeals before the Constitutional Court both against the decree and the call for the referendum. The Court, quite quickly, suspended the Catalan provision and the popular consultation. Although the government of Catalonia seemed to be willing to continue the process for holding a referendum, one month before the elections the Prime Minister of Catalonia announced that there was no sufficient legal basis to hold the referendum as called for by the Decree. Therefore, the consultation took the form of a “survey without legal implications” that was called participatory process. Upon the subsequent request of appeal by the Spanish Government, the Constitutional Court suspended also the participatory process. Interestingly enough, the suspensive measure was extended to the popular consultation called by the Canaries on the repartition of competences in renewable energies, since the vote was felt as a tool to acquire more competences vis-à-vis the parent State. Nevertheless, the people of Catalonia went massively to vote on 9 Nov. 2014. See G. Marrero Gonzalez: “Catalonia’s Independence and the Role of the Constitutional Court: Recent Developments”, cit., p. 90.

<sup>743</sup> J. López: “A Catalan Perspective: Franchise in a Forbidden Referendum”, contribution to the Citizenship Forum, European University Institute, Robert Schuman Centre for Advanced Studies, Florence, 2014, available at <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1157-independence-referendums-who-should-vote-and-who-should-be-offered-citizenship?showall=&start=5>

<sup>744</sup> B. Levites: “The Scottish Independence Referendum and the Principles of Democratic Secession”, cit., p. 402.

<sup>745</sup> Generalitat of Catalonia, *Resultats Participa2014*, 9 November 2014, <http://participa2014.cat/> (last visited November 20, 2016) [<http://perma.cc/GQ2Y-98MK>]; *Population 1900-2015*, <http://www.idescat.cat/pub/?id=aec&n=245&lang=en>

Parliament of Catalonia exacerbated the dispute with the central government. Following the elections of 27 September 2015, the pro-secessionist party acquired a large majority in Catalonia. On 9 November 2015, the Parliament adopted a resolution establishing a non-subordinated constituent process towards independence. Resolution 1/XI<sup>746</sup> introduced a citizens-led participative process for the uncoupling of Catalonia from Spain, *not subject* to the decision of the institutions of the Spanish State.<sup>747</sup> Needless to say, once adopted in Catalonia the government in Madrid has challenged the resolution in front of the Constitutional Court.<sup>748</sup>

### 8.3 The Spanish Constitutional Court's ruling 259/2015

The submissions of the parties resemble those elaborated for STC 42/2014. In the view of the government, the main ground for admissibility is that the resolution is not simply a declaration of intent, but has legal enforceability, since it gives a clear mandate to start a process of secession.<sup>749</sup> The Resolution, the State Attorney continues, supports a unilateral attempt to dissolve the union of Spain, by declaring itself a sovereign people and considering the Parliament a constituent authority. For all these reasons, the resolution violates art. 2 of the Constitution.<sup>750</sup>

The resolution expressly focuses on the beginning of a political process in Catalonia arising from the election results of 27 September 2015 and draws off the subsequent steps to be taken for achieving an independent Catalonia in the form of a republic.<sup>751</sup> Interestingly enough, the process is described as “*the democratic uncoupling from the Spanish State*”.<sup>752</sup> More nuanced notions – such as *democratic un-coupling* or *citizens led participation process* are preferred to secession and referendum. Arguably, it seems that the *Generalitat* has changed its legal strategy, going even beyond the borders of the Spanish legal order. As art. 6 of resolution 1/XI reads, the Parliament of Catalonia does not recognise the legitimacy of the Spanish Constitutional Court, since the latter has invalidated the Statute of Autonomy, approved by the

<sup>746</sup> Parliament of Catalonia, *Resolution 1/XI*, BOPC no. 7, 9 November 2015.

<sup>747</sup> *Ibid.*, art. 3-5.

<sup>748</sup> *Constitutional Challenge to enactments of the Autonomous Communities* (Title V, Organic Law on the Constitutional Court, *Ley Orgánica del Tribunal Constitucional*, hereinafter “LOTCC”) n. 6330-2015, 11 November 2015.

<sup>749</sup> The State Attorney asserts that the resolution is challenged because “*it must be interpreted as a whole, as a systemic package, ordering secession from Spain by unconstitutional and undemocratic means*”. Constitutional Court of Spain, STC 259/2015, 2 December 2015, BOE no 10, 12 January, 2016, para. 2 (a).

<sup>750</sup> *Ibid.*, para.2(d): “*the challenged Resolution is also irreconcilable with Article 2 CE, to the extent that it clashes directly with the very foundations of the Constitution, the indissolubility of the Nation, and the indivisibility of the homeland of all Spaniards. Attributing sovereignty to the Catalan people, as a constituent authority, means attributing to it the right to secession which it could exercise if it had the inclination to do so; i.e., it means conferring the power to dissolve, at its sole bidding, what the Constitution proclaims to be indissoluble, and divide what it declares indivisible*”.

<sup>751</sup> Resolution 1/XI, *cit.*, art. 2.

<sup>752</sup> *Ibid.*, art. 6: “*The Parliament of Catalonia, as the depositary of sovereignty and the expression of the constituent power, reiterates that this Chamber and the process of democratic uncoupling from the Spanish State*”.

people through a referendum. Again, the text puts emphasis on democratic principles. By art. 9 in fact the Parliament “*declares its willingness to begin negotiations in order to implement the democratic mandate to create an independent Catalan State in the form of a republic, and it agrees to make this known to the Spanish State, to the EU and to the international community as a whole*”.

In this framework, territorial referenda have become less central in the decision of the Constitutional Court, whose focus rests the definition of sovereign people. In the words of the Court “*the sovereignty of the nation, vested in the Spanish people, necessarily entails the unity of the Nation*”.<sup>753</sup> The Court reiterates the reasoning developed in 2014, but seems to embrace a stricter position, as it is showed by the repetitive use of terms such as “unequivocal meaning” or “indisputable unity” throughout the ruling. The rationale underpinning this approach can be found in the different wording of Resolution 1/XI itself. Unlike that of 2014, the *Sovereignty Declaration* of November 2015 excludes any constitutional procedure of amendment. Therefore, the Court agrees with the argumentation of the Government that although the Resolution proclaims itself only a declaration of intent, it is capable of having legal effects.<sup>754</sup> The fact that it is aimed at commencing a process of secession from Spain cannot be underestimated. The Court does not declare unconstitutional the simple manifestation of the separatist wishes by a sub-unit, nor the fact that the unit might seek secession. However, the process for reaching this goal has to be founded in the Constitution.<sup>755</sup> In other words, the sub-unit may enter into a political dialogue with the central government, and then follow the constitutional provisions for the revision of the Constitution. Although the Constitution cannot be interpreted as permitting secession, the Court aptly re-proposes the interpretation given in STC 103/2008 in Ground 2, when it said that every single provision of the Constitution is amendable, provided that it is not issued/ proposed through an activity that infringes the principles of democracy, fundamental human rights, or the rest of the constitutional mandates.<sup>756</sup>

<sup>753</sup> Ibid., para. 4(a).

<sup>754</sup> Constitutional Court of Spain, STC 259/2015, cit., *fundamento juridico* n. 2 “*Firstly, since the challenged Resolution “solemnly declares the beginning of the process to create an independent Catalan State in the form of a republic”, and “proclaims the opening of a ... constituent process to lay the foundations for the future Catalan constitution”, within an announced framework of “uncoupling” from the Spanish state, it is capable of producing legal effects, as these statements could be understood as the acknowledgement that the bodies and entities which the Resolution entrusts with carrying out these processes—the Parliament and the Government of the Autonomous Community in particular—have “powers inherent to sovereignty that go above and beyond the powers derived from the autonomy afforded by the Constitution to the different nationalities that make up the Spanish nation” (STC 42/2014, Ground 2)*”.

<sup>755</sup> Constitutional Court of Spain, STC 259/2015, cit., *fundamento juridico* n. 7: “*An Autonomous Community’s Parliament cannot set itself up as a source of legal and political legitimacy, unlawfully taking matters into its own hands in order to violate the constitutional system on which its own authority is based. In doing so, the Parliament of Catalonia would be undermining its own constitutional and statutory foundations*”

<sup>756</sup> Constitutional Court of Spain, STC 103/2008, 11 September 2008, cited in STC 159/2015, *fundamento juridico* n.7 “*only the citizens, acting necessarily on the completion of the reform process, can hold supreme power; in other words, the power to modify the Constitution itself without restrictions*’

#### **8.4 Territorial referenda, secession and the right to decide in the Catalan debate: elements in favour and against the consolidation of the *opinio juris***

Judgment 259/2015 analyses the relationship between democracy and secession from a specific perspective. Quite often, the present research has presented the interplay between secession and democracy under positive terms. Already in the Introduction it was contended that constitutionalising secession by means of the rule of law and majority decision-making could in fact lead to a decrease in the tensions related to separatist movements.<sup>757</sup> Against this background, the Spanish Court seems to consider the hypothesis of democratic secession a violation of the founding principles of the constitutional order, unless it is carried out as an amendment of the Constitution. Otherwise, for the Court the democratic secession proposed by the people of Catalonia amounts to a misleading, deceptive use of the principle of democracy on the part of the autonomous region. In par. 5 of judgment 259/2015, the Court states that “*democratic legitimacy cannot be placed at odds with constitutional lawfulness to the detriment of the latter [...] in a democratic conception of power there is no other legitimacy than that established by the Constitution*”.<sup>758</sup> Although the Court has never rejected the right to decide per se, constitutional norms prevail, irrespective of the fact that the right to decide is vested in the people by the legal order itself. In other words, the infringement of the Constitution stems from the attribution of sovereignty<sup>759</sup> by an Autonomous Community, while the right to decide can be constitutionally interpreted.

*(STC 103/2008, of 11 September, Ground 2). Each and every constitutional provision is amendable, provided that the amendment “is not prepared or defended through an activity that infringes the principles of democracy, fundamental rights or the rest of the constitutional mandates”*

<sup>757</sup> See Introduction pp. 17-18.

<sup>758</sup> Constitutional Court of Spain, SCT 259/2015, cit., *fundamento jurídico* n.5.

<sup>759</sup> A similar reasoning based on the respect of the principle of popular sovereignty and territorial integrity of the State has been advanced by the Russian Constitutional Court. Given the instabilities following the dismemberment of the USSR, within the ex-Soviet Union there was a proliferation of separatist movement. In particular, constitutional challenges were issued against the laws adopted by Tatarstan in 1991 and against the attempt to secession by Chechnya. Both Tatarstan and Chechnya had refused to sign the 1992 treaty for the establishment of the Russian Federation, claiming that it did not granted to them enough decentralised powers. As regards Tatarstan, between 1991 and 1992 the Republic adopted a bulk of legislation purported to a sort of confederative system with Russia. Not only a constitutional revision established Tatarstan as a sovereign State not subject to the authority of Russia, but also a referendum was scheduled for March 1992. The question asked to the citizens was whether they wanted Tatarstan to have relations with the Russian Federation and the other Republics on an equal basis. The call for the referendum animated the reaction of Moscow and a constitutional challenge was filed to the Court. The Constitutional Court declared the unconstitutionality of the provisions calling a referendum and establishing the sovereign State of Tatarstan. Irrespective of the judgment by the Court, Tatarstan went on to hold a referendum, so that tensions with Moscow reached a peak at the end of 1992. While the Federation was undergoing serious challenges, Tatarstan in 1993 boycotted two popular consultations of the whole federation’s population. Hence, president Yeltsin decided to start negotiations with the representatives of Tatarstan. The turning point was the changed approach by Tatarstan, whose representatives become less keen on discussing about secession. Unlike Chechnya, Tatarstan chose to negotiate a solution for the highest degree of autonomy, and abandoned the purely separatist quest for being recognised independent. Therefore, on 21 March 1994 Tatarstan and the Russian Federation signed a treaty recognising the Constitution of Tatarstan and enumerating the areas in which the republic has exclusive competence, together with those subject to the joint authority by Russia and Tatarstan. See on

Considering the judgements delivered by the Court so far on the Catalan question, the argumentation is persuasive. An accurate legal scholar should refrain from interpreting the answers of the judiciary as a denial of secession. The issue of concern does not seem to be secession in itself, but the broader cause-effect relationship between sovereignty and the right to decide. While acknowledging the right to decide of the people of Catalonia, the Court refuses that this right is triggered by the sovereign nature of the people of the *provincia autonoma*. From an international legal standpoint, in fact, the position of the government of Catalonia could have been better framed. As the Court points out, the people of Catalonia wishes to detach itself from Spain. Sovereignty cannot be attributed prior to this step. This position is convincing: if secession is aimed at creating a new sovereign entity, it is difficult to see how the people of Catalonia can claim to be already sovereign. Unfortunately, the instances forwarded by Catalonia concerning the right to decide and sovereignty have not been extensively explained.

#### 8.4.1 Right to decide or right to self-determination?

The white paper elaborated by the Consell Assessor (Advisory Council on National Transition) of Catalonia in 2013 is rather confusing when it comes to the legal basis of the right to decide. As regards the role of popular consultations, the arguments advanced are confusing too. Ranging from historical legitimacy<sup>760</sup> to domestic law, the paper approaches international law at distance. It gives explicit reference to post-communist practice of referenda on sovereignty or independence, but it does not engage in a clear legal analysis. It simply asserts that on the basis of these examples, “*directly consulting the affected people is a widely accepted democratic procedure for resolving this kind of situation, which enables it to be done in accordance with the international parameters of non-violence and democratic appropriateness*”.<sup>761</sup> No mention is given of the sources of international law promoting these parameters, so that the argument is not fully persuasive. Moreover, in the section devoted to international and EU law, the Advisory Council clearly observes that there is no international rule prescribing compulsory referendum on territorial changes. The issue, the paper continues, is considered basically a democratic one.<sup>762</sup> The most salient

Tatarstan D.A. O’Brien: “*Lessons from Tatarstan and Chechnya*”, in S. Ortino, M. Zagar et al (eds.), *The Changing Faces of Federalism: Institutional reconfiguration in Europe from East to West*, Manchester-New York, 2005, pp. 52-54. As regards Chechnya, the Judgment of the Constitutional Court of Russia in the framework of the prosecution of the Chechen Conflict in 1993 takes in due account international law, but focuses mainly on remedial secession and the law of armed conflict. While it is noteworthy that the Constitutional Court foresees the obligation for national institutions to comply with international Law, the merits of the case fall outside the scope of this section. See for references and for an analysis of the judgment P. Gaeta: “*The Armed Conflict in Chechnya before the Russian Constitutional Court*”, *EJIL*, 1996, vol. 7 pp. 563-570.

<sup>760</sup> Government of Catalonia, White Paper “*The National Transition of Catalonia*”, Barcelona, 2014, p. 24. According to the paper, the claim by the the people of Catalonia is particularly legitimate given the history of the nation, in particular on the grounds that the region was an independent nation historically.

<sup>761</sup> *Ibid.*, p. 25.

<sup>762</sup> *Ibid.*, p. 26.

facet, then, is the stance that the use of referendum can be justified in light of several international and European principles, notably democracy, self-determination and protection of minorities. Although they are not judiciable, they “*as contained in art. 10 of the Spanish Constitution, require the public authorities of the Spanish State to reinterpret the precepts that regulate referenda and popular consultation as such*”.<sup>763</sup> However, the nexus between the norms that regulate referenda and the so called European principles is absent from the argumentation. All the more so, it has been opined that self-determination appears seldom in the discourse and is deemed to have been replaced by the right to decide.<sup>764</sup>

In fact, it cannot but be observed that the propaganda of Catalonia on the right to decide shows some pitfalls: although the latest reports of experts<sup>765</sup> seem to detach the right to decide from the right to self-determination, eventually, the right to self-determination has come back in the business of the Catalan question in the 2017 *Law on the Self-Determination Referendum*.<sup>766</sup> Still the right to decide could be found in line with the procedural approach adopted for secession in Chapter 2. It ascribes to a determined community the title to define its own juridical and political status, through a majority decision-making process.<sup>767</sup> This way, the right to decide seems also in line with the understanding of self-determination proposed in Chapter 1, as it should be better considered an evolution of the right to self-determination in its internal dimension.<sup>768</sup> The rationale underpinning the right to decide is a political aspiration – i.e. to gain more autonomy, or to reach independence in case further autonomy is precluded. Yet, the notion is not only political, being intertwined with the right to freedom of expression and to participation in political issues. Although international law does not seem in the way of recognising such a right as such, it is worth to underline that the right to decide has a strong procedural connotation. It may not yet be equated to a concrete legal title, but it expresses the sub-unit’s will to decide through a democratic vote.

<sup>763</sup> Ibid., p. 27.

<sup>764</sup> P. Bossacoma; H.L.Bofill: “*The secession of Catalonia: legal strategies and barriers*”, in X. Cuadras-Morató (ed.). *Catalonia: A New Independent State in Europe?*, New York, 2016, pp. 107-148.

<sup>765</sup> See the latest report on the topic: “*Catalonia’s Legitimate Right to Decide*”, Report by International Experts (Levrat N., Antunes S., Tusseau G., Williams P.) invited by the Ministry of Foreign Affairs of Catalonia, 2017, [exteriors.gencat.cat/web/.../FULL-REPORT-Catalonias-legitimate-right-to-decide.pdf](http://exteriors.gencat.cat/web/.../FULL-REPORT-Catalonias-legitimate-right-to-decide.pdf) The report also lists some cases of referendum for secession which are considered the expression of the right to decide.

<sup>766</sup> *Ley del referéndum de autodeterminación* (hereinafter *Law on the Referendum*), n. 19/2017, 6 September 2017, DOGC núm. 7449A de 06 de September 2017, English translation at [http://exteriors.gencat.cat/web/.content/00\\_ACTUALITAT/notes\\_context/Llei-del-Referendum\\_ENGLISH.pdf](http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Llei-del-Referendum_ENGLISH.pdf)

<sup>767</sup> J. Lopez: “*From the Right to Self-Determination to the Right to Decide*”, *Quaderns de Recerca*, 2011, n.4, UNESCO-Catalonia, pp. 21-22.

<sup>768</sup> J.M. Vilajosana: “*The Democratic Principle and Constitutional Justification of the Right to Decide*,” cit., p. 61; D. Turp: “*Catalonia’s “Right to Decide” under International, European, Spanish, Catalan and Comparative Law*”, in *The Catalan Independence Referendum: An Assessment Of the Process Of Self-Determination*, Report of the International Group of Experts for the Institute of Research on Self-Determination of Peoples and National Independence, n.1, September 2017, pp. 55-72.

## 8.5 The October 2017 Referendum and the opposition of the Spanish central Government

The manner in which the judiciary has faced the progressive affirmation of the right to decide might have contributed to the escalation of tensions with Madrid. At a first glance, the Constitutional Court of Spain seems to follow the line traced by the Supreme Court of Canada, when it considers that an indisputable wish for territorial change triggers the duty of the interest parties to negotiate an alternative territorial reapportionment.<sup>769</sup> However, the different approach of the Spanish Court becomes striking when the *ratio decidendi* is developed. The overarching principle of constitutional loyalty requires to follow the mechanisms of review provided for by the Spanish Constitution. That is to say that, despite the possibility for the people of Catalonia to resort to a seceding referendum is not excluded, the only popular consultation practicable is that scheduled at the end of the constitutional procedure of revision, as confirmed by art. 168. This way, the Court seems to neglect every prospect of negotiated referendum. As Lopez opines, through its case-law the Constitutional Court is rejecting a broad interpretation of art. 92 and art. 150 of the Constitution, which would allow at least a consultative referendum about secession.<sup>770</sup> According to art. 92, in fact, “*political decisions of special importance*” may be the object of a consultative referendum. Moreover, art. 150 establishes the possibility for the State to transfer or delegate legislative powers to Catalonia. Therefore, the flexibility demonstrated by the Supreme Court of Canada in approaching a sensitive issue such as a secession is not found in the reasoning of the Constitutional Court of Spain, albeit both Courts start from the same assumptions. While for the Canadian Supreme Court the referendum is an instrument of legitimacy in the quest to secede – because it is the expression of one of the four cornerstones of the legal order, notably democracy- the Court of Spain follows a different pattern. In the *ratio decidendi* of the Spanish Constitutional Court, the right to decide is detached from questions of sovereignty on the territory. At most, the right to decide could be triggered once the procedures for reviewing the Constitution have been implemented. In other words, the expression of the will of the people outside the framework of the constitutional provisions would not be an exercise of democracy, it would violate the principle of democracy itself.

The position of the Court is perhaps too extreme. Holding a non-binding referendum cannot be considered a violation of the Constitution.<sup>771</sup> By contrast, and notwithstanding the different constitutional architecture, the reasoning developed in *Reference re Secession of Quebec* is more convincing. Territorial referenda are a strong

<sup>769</sup> Constitutional Court of Spain, STC 259/2015, cit., *fundamento jurídico* n.7: “As we made clear in STC 42/2014 (Ground 4), there is room in our system for ideas to be put forward that seek to modify the foundations of our constitutional order, provided that this is not prepared or defended by way of an activity that violates the principles of democracy”.

<sup>770</sup> L. Payero Lopez: “The ‘Citizen Participation Process’ in Catalonia: Past, Present And Future”, Liverpool Law Review, 2015, vol. 36, pp. 252-253.

<sup>771</sup> J.M. Vilajosana: “The Democratic Principle and Constitutional Justification of the Right to Decide,” Revista d’Estudis Autònoms i Federals, 2014, vol. 19, p. 70.

manifestation of the popular will which cannot be ignored, as is demonstrated by the widespread use of this tool in practice showed in the previous pages. Moreover, the continuous resistance by the government and the judiciary to let the people of Catalonia hold a non-binding referendum could even hint at the fact that these kind of consultations trigger legal effects, otherwise it is difficult to understand the refusal for non-binding consultations. Unfortunately, the response of the parent State to the exercise of the right to decide has been an implacable opposition, which in turn seems to have led to an instrumental use of the free expression of the will/ right to decide argument by Catalonia. The Constitutional Court suspended<sup>772</sup> the *Law on the Referendum*, aggressive police actions and forcible closure of polling station characterised the period before the vote. By using violence against the exercise of fundamental democratic rights, the central government served the cause of the Catalan region.<sup>773</sup> Ultimately, the heavy-handed response by Madrid drove the people of Catalonia towards independence even more, an element which differentiates the case of the Spanish region from that of Scotland.<sup>774</sup>

Catalonia hold a referendum on independence on 1<sup>st</sup> October 2017 which resulted in a clear majority in favour of secession. At the moment this research is finished, the situation seems loaded with much more dynamite. The way the referendum was conducted casts some doubts over the real possibility by the autonomous region to use it as the basis for a declaration of independence, which was signed by Puigdemont on 10<sup>th</sup> October 2017, but immediately suspended.<sup>775</sup> As far as procedural requirements are concerned, in fact, there are some merits and pitfalls. For the merits, the question was clear and precise, in sharp contrast to the one asked in 2014. The people of Catalonia were asked “*Do you want Catalonia to be an independence State in the form of a Republic?*”<sup>776</sup> The question thus provides a model of clarity and requires a yes or no answer. Nevertheless, there are other elements for discussion. Firstly, the turnout was about lower than 50%, arguably not a satisfactory result although the *Law on the Referendum* does not provide for a qualified majority requirement. Furthermore, the franchise provided by the *Law on the Referendum* differs from common practice. Pursuant to art. 6, all those persons with the right to vote in the elections to the Parliament of Catalonia are entitled to vote.<sup>777</sup> Even Catalans

<sup>772</sup> For the latest developments of the case law see, *ex- plurimis*, Constitutional Court of Spain, *Auto 114/2017*, 18 July 2017; *Auto 127/2017*, 21 September 2017; *Auto 124/2017*, 19 September 2017; *Auto 123/2017*, 19 September 2017 in BOE n. 229, 22 September 2017.

<sup>773</sup> See the critics by UN Human Rights representatives reported by the Guardian at <https://www.theguardian.com/world/2017/sep/28/un-rights-experts-criticise-spanish-efforts-to-block-catalan-vote> and the high relevance of the issue among the public opinion at <https://www.nytimes.com/2017/10/02/world/europe/catalonia-independence-referendum-eu.html>

<sup>774</sup> N. Caspersen: “*The Catalan Independence Referendum: Conflicting Claims and International Responses*”, *The Catalan Independence Referendum: An Assessment Of the Process Of Self-Determination*, cit., pp.21-36.

<sup>775</sup> See the Official Statement delivered by Puigdemont to the Catalan Parliament [http://www.catalangovernment.eu/pres\\_gov/AppJava/government/news/303583/official-statement-president-political-situation-catalonia.html](http://www.catalangovernment.eu/pres_gov/AppJava/government/news/303583/official-statement-president-political-situation-catalonia.html)

<sup>776</sup> *Law on the Referendum*, cit., art. 4.2.

<sup>777</sup> *Law on the Referendum*, cit, art. 6(1): “*All those persons with the right to vote in the elections to the Parliament of Catalonia shall be able to vote. Those Catalans resident abroad whose most recent regis-*

resident abroad were allowed to take part to the referendum, provided their most recent registration to vote was in Catalonia. Although in practice expats did not take part to the referendum, the formulation gives rise to some uncertainties, since it leaves open the question about who is a Catalan with recent registration. Other elements casting some doubts concern the administration of the Electoral Commission and the organisation of the vote. For the former, the fact that pursuant to art. 19 the Electoral Commission shall be appointed by absolute majority of the Catalan Parliament does not seem to be in line with the impartiality required for this body, recalled also in art. 1 of the *Law on the Referendum*.<sup>778</sup> Moreover, it is fundamental for the referendum that both sides are equally represented, while the *Law on the Referendum* is silent in this sense, neither there is any reference to campaign financing.<sup>779</sup> For the latter, i.e. organisation of the referendum, the legality of the vote is also tainted by the measures undertaken by the government of Madrid. The seizure of ballot boxes, voting papers and voting lists during the days prior to the referendum casts some doubts over the legality of the vote. In light of the turnout of the referendum, of the procedures followed for the organisation and administration of the vote, as well as the rather confusing approach by the *Generalitat Catalana* to the legal justifications for the independence, the case of Catalonia leaves many open questions. The most important one concerns the instrumental use of the referendum to cover the absence of a legal title for the territorial change. This kind of “manipulative” use of the referendum, due to the crucial role this tool has acquired for the expression of the will of the people, can be found also in the case of Crimea, although in a very different framework.

## 9. The referendum in Crimea: an international legal perspective

In Chapter 2 the factual background of the case of Crimea was explained. In particular, it was showed that March 2014 was marked by a serious domestic crisis in Ukraine, from which the rush of Crimea towards secession originated. In the previous Chapter the narrative of the events in Crimea was instrumental for testing the application of the *normative due process* model.<sup>780</sup> From the analysis of the facts it was inferred that, at a first glance, the case puts seriously into question the *normative due process*. However, what happened in Crimea is better conceived as an annexation, rather than an example of secession. Nevertheless, a section about the referendum in Crimea is unavoidable, if only because it was the latest case in which the referendum was practically carried out. Moreover, from the reactions of the international community to the vote it is possible to infer some conclusions over the value of territorial referendum in international law. For the sake of clarity, the Crimean

*tration to vote was in Catalonia shall also be entitled to vote, provided that they comply with the legally stipulated requirements and have formally requested to take part in the vote”*

<sup>778</sup> See for the analysis of the compliance of the Catalan referendum with international practice concerning referenda M. Qvortrup: “*A Comparative Perspective on Referendums on Independence and the Proposed Catalan Referendum of October 1st, 2017*”, IRAI Report, cit., pp. 37-54.

<sup>779</sup> Ibid.

experience can be distinguished in two distinct acts. On the one side, there is the adoption of the declaration of independence prior to the referendum, on 11 March 2014. On the other side, there is the referendum and its result supporting joining the Russian Federation, followed by an agreement for the incorporation of Crimea into the Russian Federation.<sup>781</sup>

The Supreme Council of Crimea had scheduled a referendum already at the end of February 2014. In light of the powers devolved to it by the Constitution, the Council was empowered to propose normative acts also about holding a referendum on the status of Crimea. The escalation of the tensions between the Autonomous Republic and the parent State favored the rapid overflowing of the events. Before the referendum – which took place on 16 March 2014- on 11 March the Supreme Council and the Sevastopol City Council jointly issued the declaration of independence in Crimea.<sup>782</sup> If one wants to consider Crimea an example of secession, probably has to limit the analysis to the five days which passed from the declaration of independence to the referendum of 16 March.<sup>783</sup> On 6 March 2014 the Supreme Council of Crimea adopted the resolution “*On the all-Crimean referendum*”: the date of the referendum was anticipated to the next 16<sup>th</sup> March. The question posed to the people of Crimea was the following: “1) *Do you support the reunification of the Crimea with Russia as a subject of the Russian Federation?*; 2) *Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of the Crimea as part of Ukraine?*”<sup>784</sup> Nearly all the voters – 96,77%- who participated to the referendum choose the first option to join Russia. On the side of the Russian Federation, the incorporation was legally grounded on the “*Federal constitutional law no. 6-FKZ on the procedure on admission to the Russian Federation and on the creation of a new subject within the Russian Federation*”<sup>785</sup> dated 17 December 2001. The process was completed with the signature of the “*Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on Creation of New Federative Entities within the Russian Federation*” on March 18, 2014.<sup>786</sup> At the domestic level, the Russian legislative body further had to adopt two *ad-hoc* laws, namely the “*The Federal Constitutional Law On Admitting to the Russian Federation the Republic of Crimea and*

<sup>781</sup> A. Pronin: “*Republic of Crimea. A two day State*”, Russian Journal of International Law, 2015, vol. 3, pp. 134-135.

<sup>782</sup> See C. Navari, Territoriality Self-determination and Crimea after Badinter, International Affairs, 2014, vol. 90, p. 1135.

<sup>783</sup> A. Pronin: “*Republic of Crimea. A two day State*”, cit., p. 135.

<sup>784</sup> See V. Bilkova: “*Territorial (Se)cession in light of recent events in Crimea*”, in E. Milano, F. Palermo, Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution”, Leiden, 2016, p. 209.

<sup>785</sup> The Law implements art. 65(2) of the Constitution of the Russian Federation providing that accession of another territory to the federation has to be realised through the procedure of the federal constitutional law. See E. Milano: “*The non-recognition of Russia’s annexation of Crimea: three different legal approaches and one unanswered question*”, Questions of International Law, 11 May 2014, <http://www.qil-qdi.org/the-non-recognition-of-russias-annexation-of-crimea-three-different-legal-approaches-and-one-unanswered-question/>.

<sup>786</sup> A. Pronin: “*Republic of Crimea. A Two Days State*”, cit., p.135.

*Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol,*” and the “*Federal Law On Ratifying the Agreement between the Russian Federation and the Republic of Crimea on Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation New Constituent Entities*”.<sup>787</sup>

## 9.1 The (mis)use of referendum in Crimea

From the above, it can be seen that the case of Crimea displays many different facets. It can be studied from the perspective of constitutional and international law. From the latter point of view, then, there arise a variety of different legal issues, since the case involves questions of secession, popular consultation, annexation and use of force. In this Chapter, the focus will be narrowed to how the referendum was used to secede from Ukraine and to the justifications adduced by the people of Crimea and by the Russian Federation, the other player involved in the events. The case will be tackled also in the next Chapter, on a two-fold basis: (i) to see whether the referendum meets the procedural legal standards applicable to territorial referendum and (ii) the relevance of Crimea with respect to the international law of recognition, by looking at the reactions of the international community to the referendum.

Although the standards for a free and fair territorial referendum are the subject matter of the next Chapter, the first thing that lips out of the analysis of the Crimean case is the distinctive question *referéndaire*: if compared to the ones used for Quebec or Scotland, as well as to the question proposed for the 1<sup>st</sup> October referendum in Catalonia, the question does not contain a yes or no alternative and it is composed by a double option such as in the 2014 consultation in Catalonia. The voters were asked to answer yes to one of the two questions. In *Reference Re Secession*, the Supreme Court of Canada demanded that the question put to the voters had to be clear.<sup>788</sup> The same line was followed in the *Edinburgh Agreement*, in which the UK conditioned the realization of the referendum to the use of a clear and straightforward question. The subject of the question in the Crimean referendum is even more peculiar, since the voters are asked whether they want to become part of another subject of international law. Arguably, these features bring us back to the model of the plebiscites, rather than to the referendum used by sub-units to seek secession. It is not by chance that the representative of Ukraine during an OSCE meeting in March 2017 claimed that in 2014 Crimea organized a “*illegal plebiscite [which] violated the Ukrainian legislation, international norms and fell short of democratic standards, established by the OSCE and the Council of Europe*”.<sup>789</sup> Recalling that

<sup>787</sup> See for references: *Laws on admitting Crimea and Sevastopol to the Russian Federation* (press release), <<http://eng.kremlin.ru/acts/6912>> cited by E. Milano: “*The non-recognition of Russia’s annexation of Crimea: three different legal approaches and one unanswered question*”, *Questions of International Law*, 11 May 2014, cit.

<sup>788</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 93.

<sup>789</sup> OSCE, Speech delivered by the Ukrainian Representative at the 1137th meeting of the Permanent Council, 16 March 2017, PC.DEL/358/17, <http://www.osce.org/permanent-council/307196?download=true>.

the search for popular consent was one of the basic features of plebiscites, the architecture of the referendum in Crimea is similar: the community was asked to confirm a decision which appears<sup>790</sup> to have been already taken and confirmed by such a high majority that some doubts can be casted over the validity of the consultation itself.<sup>791</sup>

The second distinctive element is the bizarre relationship between the referendum and the declaration of independence. The extensive practice including the UN-led popular consultations supports the existence of a cause effect relationship between referendum and declarations of independence. That is to say that the referendum precedes the declaration of independence, since it is chosen as the sound legal basis for the acquisition of statehood. By contrast, Crimea already called itself independent. In a like manner, a confusing argumentation has been previously found in the case of Catalonia, where resolution 1/XI of the *Generalitat Catalana* already called the region a sovereign entity before having held a referendum about secession. Nevertheless, the criticism for Catalonia can be mitigated by the fact that the *Generalitat* has been seeking secession only after the failure of negotiations about increasing autonomy. By contrast, the case of Crimea is a very peculiar one, because it was instrumental in joining the Russian Federation. Hence, substantially the referendum in Crimea does not add many elements to the practice for the consolidation of the use of the referendum to legitimize secession. Rather, it has a high significance from a procedural perspective. The very fact that the community has decided to resort to a referendum corroborates the view that such a tool would have gained consensus also from the other members of the international community. In particular, the case of Crimea helps the consolidation of practice and *opinio iuris* about the resort to a referendum respecting certain conditions, as it will be seen in the next Chapter.

### 9.2 Legal grounds for the referendum in Crimea: a difficult interpretation

Moving now to the legal grounds adduced for justifying the 2014 vote<sup>792</sup>, these vary a lot. Alongside historical motivations, the people of Crimea as well as the Russian

<sup>790</sup> It has to be born in mind that despite three years after the secession of Crimea the facts are almost clear to the public, the sequence of events is still shrouded in mystery because of the lack of official information. Hence, the use of the conditional is unavoidable. See for comments about the organisation of the referendum the OSCE Parliamentary Assembly concluding that the referendum was "conducted in an environment that could not be considered remotely free and fair." OSCE Parliamentary Assembly, Baku Declaration and Resolutions: "*Resolution On Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation*", 23rd Annual Session, 28 June-2 July 2014.

<sup>791</sup> P.R. Gregory: "*Putin's "Human Rights Council" Accidentally Posts Real Crimean Election Results*," Forbes, 5 May 2014, <http://www.forbes.com/sites/paulroderickgregory/2014/05/05/putins-human-rights-council-accidentally-posts-real-crimean-election-results-only-15-voted-for-annexation/>.

<sup>792</sup> The declaration of independence by Crimea mentions the advisory opinion of Kosovo to support the legality of the declaration. It reads "[...] taking into consideration the confirmation of the status of Kosovo by the ICJ [...] which says that unilateral declarations of independence by a part of the country doesn't violate any international norm" Still, the reference is misleading, because Crimea's declaration of independence relied upon the use of force by a third party and was linked to the subsequent referendum. Whilst in the case of Kosovo there was no referendum to reach independence.

Federation have held that the freely expressed will of the people was (i) an application of the right to self-determination and/or (ii) a response to serious violation witnessed by the parent State.<sup>793</sup> As regards the latter, even adopting a very progressive stance and claiming that the right to remedial secession exists in international law, it is quite difficult to demonstrate that it applies to Crimea. The use of referendum to justify secession as a remedy is unpersuasive. In particular, two criteria form the roadblock to Crimea's right to legally secede from Ukraine: 1) the absence of massive violations against the Crimean minority and 2) the lack of exhaustion of all remedies to find a negotiated solution with the parent State. Firstly, it has not been proven that the people of Crimea witnessed oppressive violation of their rights. In March 2014, the OSCE High Commissioner on National Minorities reported to have found no evidence of violations or threats to the Russian-speaking population.<sup>794</sup> The adoption of the Language Act<sup>795</sup> by the central government whose main purport was reducing the use of the Russian language within the provinces of the country cannot alone reach the threshold of seriousness of human rights abuses required by the remedial right theory. Secondly, the remedial right theory postulates that all existing remedies have to be exhausted before secession takes place. By contrast, there was no genuine attempt by the government of Crimea to settle the dispute internally, albeit the Ukrainian government had manifested its willingness to negotiate a new form of extended autonomy.<sup>796</sup> As regards the right to self-determination, the people of Crimea were not explicit in claiming they had a right to self-determination. It was rather the Russian Federation that labelled the referendum and declaration of independence *inter alia*, as an expression of the right to self-determination. In particular, the statement by president Putin in the aftermath of the referendum is remarkable. The President recalled that "*as it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination*".<sup>797</sup> Along the same line, the Russian representative in the SC declared that through the expression of the free will, the people of Crimea have exercised "*what is enshrined in the Charter of the United Nations and a great number of fundamental international legal documents—*

<sup>793</sup> The need to protect the Russian speaking population from grave violations of their right was expressed by President Putin in his speech dated 18 March 2014, at <http://eng.kremlin.ru/news/6889>. See also V. Tolstykh: "*Reunification of Crimea with Russia: A Russian Perspective*", cit., pp. 879–886; G. Wilson: "Crimea: Some Observations on Secession and Intervention in Partial Response to Müllererson and Tolstykh", *Chinese Journal of International Law*, 2015, vol. 14, pp. 217–223.

<sup>794</sup> OSCE, "*Developing situation in Crimea alarming*", Press release from the speech by the OSCE High Commissioner on National Minorities, 6 March 2014, available at [www.osce.org/hcnm/116180](http://www.osce.org/hcnm/116180).

<sup>795</sup> The legislative architecture for protection of language differences can be found at Verkhovna Rada of Ukraine: "*On Principles of the State Language Policy*", <http://zakon4.rada.gov.ua/laws/anot/en/5029-17>.

<sup>796</sup> S. van der Driest: "*Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*", *Netherlands Journal of International Law*, 2015, vol. 62, pp. 329–363.

<sup>797</sup> Address issued by the President of the Russian Federation on 18 March 2014, available at <http://eng.kremlin.ru/news/6889>.

*their right to self-determination*”.<sup>798</sup> As a consequence, the Russian Federation could not but accept the decision by Crimea and sign a treaty of incorporation.

This study has already explained the ontological and substantial difference between self-determination and secession.<sup>799</sup> Positive international law does not encompass a right to secession as a dimension of the right to self-determination. Besides, the right to self-determination in its external dimension pertains to a people in case of subjugation, external intervention and racial discrimination: all these features do not seem to be realised in the case of Crimea. In this sense there is some coherence in the approach of the government of Crimea, which manifested its will to join Russia and did not claim explicitly a right to self-determination in its external dimension. By contrast, the instrumental use of the self-determination argument appears clear from the Russian position. Moreover, it remains highly questionable whether the people of Crimea actually qualify as a people in its international legal connotation.<sup>800</sup> As it was explained in Chapter 1, the group shares some identifiable objective features, but within Crimea there are also some other groups such as Crimean Tatars which could qualify as a minority group, thus entitled to exercise the right to self-determination in its internal dimension only.<sup>801</sup> More correctly, it could be claimed that Crimea typically qualifies as an *unprivileged unit*,<sup>802</sup> that is to say that it is not entitled to self-determination. Thus, it tries to increase its legitimacy through democratic means, in order to gather international support. Following this view, the use of the referendum to secede in the case of Crimea would be of the utmost importance for the consolidation on an international rule. However, two elements hinder this position: unprivileged units seeking secession do not resort to the use of force, neither require the use of force by a third party. In fact, the annexation and the referendum by Crimea can be considered outlaw, being them an outcome of the illegal intervention by the Russian Federation. After the referendum was held and Crimea joined Russia, the international community condemned the popular consultation stating that it had no legal effect.<sup>803</sup> Thus, the referendum was considered an invalid act, void of any legal consequence and the situation resulting from annexation to Russia was devoid of any legal basis. The fact that the referendum was considered null is not tantamount to say that territorial referendum per se do not have a value. Right the opposite, the value attached to the referendum can be demonstrated by comparing international reactions to the 2014 Crimean referendum with those af-

<sup>798</sup> UN Security Council, UN Doc. S/PV.7144, 19 March 2014, p. 8.

<sup>799</sup> See Chapter 2 at section 4.

<sup>800</sup> S. van der Driest: “*Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*”, cit., p. 360.

<sup>801</sup> S. van der Driest: “*Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*”, cit., p. 350.

<sup>802</sup> See Chapter 2 at pp. 108-110.

<sup>803</sup> See, *ex plurimis*, the statement by the White House Press Secretary M. Fitzwater: “*Ukrainians Vote for Independence*” Washington DC, 2 December 1991, US Department of State Dispatch, 9 December 1991 and Commission on Security and Cooperation in Europe, Report: “*Ukraine’s Referendum on Independence and Presidential Elections*”, 01 December 1991, [https://www.csce.gov/international-impact/publications/report-ukraines-referendum-independence-and-presidential-election?&&&sort\\_by=field\\_date\\_value&page=4](https://www.csce.gov/international-impact/publications/report-ukraines-referendum-independence-and-presidential-election?&&&sort_by=field_date_value&page=4)

ter the 1991 Ukrainian referendum. In that case, the international community welcomed the exercise of democracy by the Ukrainian people and underlined the good practice in conduct of the referendum.<sup>804</sup>

In light of the above, it can be safely concluded that whilst the referendum was not organised because the Autonomous Republic of Crimea considered itself protected by an international customary rule, there was at least the idea that the international community would have been more prone to accept a secession if carried out through the democratic expression of the will of the people. Overall, the case of Crimea shows how states may use the fragilities of international law as an instrument of their politics. Nevertheless, from a procedural point of view the referendum in Crimea has some role to play in the making of a general international norm. In the absence of a legal entitlement, a group may try to gather legitimacy from the procedure followed to obtain a new legal title. As it will be seen in the next chapter, the international community condemned the *way* the referendum was organised, not the use of the referendum *per se*. In other words, it could be held *a contrario* that the case of Crimea supports the role of the referendum as a necessary step towards secession, provided that procedural standards are satisfied.

## 10. Conclusions

This Chapter has gone to the heart of the research. Starting with a historical overview and passing through a legal inquiry of selected cases, the Chapter has highlighted the pitfalls and the potential advantages of the use of referenda in the context of territorial changes in international law. The question we have tried to answer is whether territorial referenda are a sufficient, or only a necessary element for the creation of a new entity through secession. The answer coming out of the research is in the negative, although practice shows some elements in support of a necessary role of the referendum. The argumentation was developed with a multi layered approach. Firstly, it was clarified which kind of popular consultations the study was referring to. Secondly, indications of a general international law rule were searched, through *opinio juris* and practice, in particular in the cases of Quebec, Scotland, Catalonia and Crimea. Further elements were found in the interpretation of the few constitutions recognising a right to secede. Nevertheless, the research did not stick to the negative answer to the main questions. While conducting the inquiry about the existence of a customary rule, a procedural aspect common to most of referenda conducted in well-established democracies arose, notably the obligation triggered by the referendum to conduct negotiations flowing upon the parent State and the sub-unit. The first part of the study has tried to convey the idea that not all popular consultations have the same nature. In fact, assuming that an international law rule on unilateral secession through referendum finds its origins in the consultations carried out

<sup>804</sup> A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., p. 279.

after WW I is not fully persuasive. Plebiscites and referenda have many common aspects; they are even used interchangeably. However, their *ratio* seems to be different. International law plebiscites were carried out after WW I on the basis of the Versailles treaty. Their legal basis was an international agreement whereby the major powers have already established the division of the territories. Plebiscites, therefore, were basically votes on consent. During the decolonisation period, UN-led consultations followed mostly the same model. Rightly so, because consultations were not necessarily considered binding. By contrast, referenda held during the dissolution of SFRY in principle represent a watershed in the road to the consolidation of an international rule about seceding referenda. They were called by the sub-units in the Federation, most of them had an established majority threshold and the Badinter Commission paid due regard to the legitimising role of referendum in the creation of statehood. The study demonstrated that despite being important for the consolidation of an *opinio juris* and practice about secession and referenda, popular consultations held from the dissolution of the SFRY until the last years, do not display enough similarities. The Badinter Commission itself was mostly concerned with protection of minorities and respect for the rule of law. Arguably, the context of ethnic conflict in Yugoslavia weights a lot in the formulation of the Opinions. It was with the case of Quebec that the research reached a new point: the Supreme Court of Canada looks at Quebec's proposed secession from a procedural standpoint, arguing that the seceding entity and the parent State have to follow some kind of *due process* before Quebec may secede from Canada. Both parties, the argument continues, are under an obligation to conduct fair negotiations, albeit there is no obligation of result. The Scottish case, where the *Edinburgh Agreement* expressly provides for negotiations after the independence referendum supports the point just explained. In other words, a sort of democratically-lead secession, closer to a devolution, could be in the way of consolidation in international law. Upon the parent State there is also the obligation to call at the negotiation table all the other interest parties, such as the representatives of the other regions of the country. For this purpose, the fact that the people of Quebec, or Scotland, did not secede is of less importance, because the importance lies in the process. Two cases do not make a rule, yet from a certain point of view, also the case of Catalonia runs in favour of the assumption above. The refusal by the government of Madrid and the rigid position of the judiciary against non-binding referendum in Catalonia could be interpreted a sign of awareness of the legitimising power of this tool. In other words, the denial of the value of referendum demonstrates that the democratic process is important. Although the referendum is becoming more and more necessary in the process of secession, it needs to be "encapsulated" in the framework of the respect of other conditions, such the adoption of a specific procedure for its organisation and the opening of negotiations on the basis of its results. Recalling the case of Crimea, the fact that the referendum was considered null is not tantamount to say that territorial referendum could not be the lawful procedural step towards independence. As it will be showed in the next Chapter in the section devoted to international reactions, states' declarations supported a free and fair territorial referendum. Thus, the opposition to the Crimean referendum was grounded on the violation of the procedural standards for the holding of territorial referendum, alongside other violations of international law linked to the use of force

by a third party. As far as the obligation to negotiate a territorial change is concerned, its main features can be described as follows. *Reference Re Secession* addresses to the parent State the obligation to open a meaningful negotiation once a clear territorial referendum is done, whilst both parties have the duty to participate in good faith. However, it clearly requires all the interest parties to participate: not only the sub-unit and the government, but also all the other regions of the country. Interestingly enough, also the *Edinburgh Agreement* binds the parties to engage in negotiations whatever the result of the Scottish referendum. Moreover, the Spanish Court in STC 259/2015 suggested that the people of Catalonia could enter into negotiation with the government and follow the Constitution to modify the territorial assessment.<sup>805</sup> Read along these lines, there are already many supportive points for the consolidation of an international rule. The obligation to negotiate does not extend to the results of the negotiations, albeit there remains an obligation to negotiate in good faith. The Supreme Court of Canada itself excluded that it was the duty of the Court to establish what should be the result of the negotiations,<sup>806</sup> because those belong to the realm of politics. Lastly, practice also gives some tips over the subjects entitled to organise a referendum. Sub-units claiming secession in these cases can be identified objectively as communities: they have their own Parliament ruling on a majority basis, an established territory, language and history on their side. Even in case of Crimea's referendum it has been opined that the region could well organise a referendum. The unlawfulness of the fact does not lie in the referendum, but in the annexation.<sup>807</sup> By contrast, it would be too farfetched to claim that a rule in this sense is already consolidated in practice. Many elements rebut this process. In the case of *Western Sahara* the ICJ itself has acknowledged that referenda might be not always be necessary,<sup>808</sup> a statement which runs against the consolidation of the role of referenda in international law, albeit the Court did not clarify under which circumstances the referendum is not needed.<sup>809</sup> In sum, practice suggests that referenda are neither a sufficient nor a necessary condition for secession under international law.

Taking the case of Scotland, the distinguishing factor in the attempt to secede by Scotland is the consent of the parent State, an element that vitiates the value of the Scottish case for the consolidation of an international law rule allowing unilateral secession through referendum. Undoubtedly, the fact that the country had in force a law on referendum has facilitated the steps towards the popular consultation: the Scottish government followed the guidelines of the *Edinburgh Agreement* and the requirements of the *PPERA* to organise and hold the independence referendum. The clarity about the procedure to follow, as well as a clear agreement on all the issues concerning the organization and the effects of the referendum served as a precondition.

<sup>805</sup> Constitutional Court of Spain, STC 259/2015, cit., *fundamento jurídico* 7, p. 185

<sup>806</sup> B. Stankovski: "Is There an Obligation to Negotiate Secession in International Law? From Reference re Secession of Quebec to Kosovo Advisory Opinion and Beyond", ESIL Research Paper, Conference Paper No. 13/2015, vol. 6 n.5, <http://www.esil-sedi.eu/node/1187>

<sup>807</sup> J. Vidmar: "The Annexation of Crimea and the Boundaries of the Will of the People", cit., pp. 365-383.

<sup>808</sup> ICJ, *Western Sahara*, cit., para. 59.

<sup>809</sup> J. Vidmar, *Democratic Statehood in International Law*, cit., p. 247.

tion for the development of a genuine debate between the no and yes side. This ultimately fostered a meaningful deliberation. Overall, the argument concerning the interrelation between popular consent and self-determination should be taken with caution. Claiming that there is a right vested in the people to retrieve consent to the government is one thing. Claiming that this right may extend to the chance of secession from the parent State is another thing and it means confusing the human right to political participation with the right to self-determination.<sup>810</sup> On the same line, if it is assumed that territorial referenda are a means to express statehood, it could be asked why Palestine has never resorted to a popular consultation. No clear indications can be found on this matter, but it could be opined that the community living in Palestine has a strong degree of international legitimacy that the people itself may feel they do not need to hold a referendum to demonstrate their will to become a State. Besides, their claim is already recognized to a certain extent. Furthermore, the avoidance of a territorial referendum may be a way to remain flexible in negotiating with the other party, instead of blocking the dialogue in the contest between statehood and non-statehood.<sup>811</sup> By contrast, the argument on legal effects triggered by referenda is more convincing. It lies on a more solid legal basis than the argument that a referendum may per se legitimise secession. For instance, the Committee for the Elimination of Racial Discrimination has stated that despite international law had not recognised a general right of peoples to unilaterally secede, the door could be open for a sort of consensual secession achieved “*through arrangements reached by free agreements of all parties concerned*”.<sup>812</sup> In other words, it does not seem to be too pretentious to claim that if the secession of Crimea was conducted on the model of Scotland, or of Quebec, it would have been more defensible also from the point of view of international law. The legal argumentation cannot go further.

The idea we have tried to convey is that a referendum has such a strong moral force that it is becoming more and more necessary for territorial changes and that it could trigger an obligation to negotiate a different settlement. Even without an explicit provision in the domestic legal order, the source of the obligation to start negotiations could be rooted in international law on the basis of practice and *opinio juris*. It is a long way, but practice is moving in that sense. This argument should not be misunderstood: from the beginning of the Chapter – when the difference between referenda and plebiscites was laid down- it was opined that not all referenda are the same. It was also mentioned above that in order to become a necessary step for secession, the referendum has to be linked to the respect of other requirements. The cases referred to so far have considered only a free and fair territorial referendum. Therefore, it is now time to move to the analysis of the requirements of a free and fair territorial referendum.

<sup>810</sup> See *Diergaardt Et Al. V. Namibia*, Communication n. 760/1997, UN Doc. CCPR/C/69/D/760/1996 6 September 2000, Individual opinion by M. Scheinin “*The right to political participation does not provide the citizens with a right to self-determination*”, para. 10.8.

<sup>811</sup> Of this view D. Scheindlin: “*Phantom Referendums in Phantom States: Meaningless Farce or a Bridge to Reality?*”, *Nationalism and Ethnic Politics*, 2012, vol. 18, p. 81.

<sup>812</sup> Committee for the Elimination of Racial Discrimination, *General Recommendation n.21*, UN. DOC A/51/18, 23 August 1996 para. 6.

# Chapter 4

## Requirements for a free and fair territorial referendum...and beyond

### 1. Introduction

The previous Chapter almost concluded the study on the interrelation between referenda and secession in international law. Whilst the research has found that there is no international rule according to which a referendum is sufficient, or necessary, for secession, it cannot but be observed that there is a trend in practice to resort to territorial referenda. In this framework, the position of the Canadian Supreme Court has been found particularly persuasive, when it states that the referendum in support of secession triggers the obligation of the parties to negotiate a new territorial settlement.<sup>813</sup> Although the obligation displayed in *Reference Re Secession of Quebec* is not yet established at the international level, the previous Chapter showed that there are many elements in support of the progressive consolidation of a rule in this direction.

So far the legal analysis has focused on the referendum as an instrument of secession, without any further detail about which type of territorial referendum could better serve the purposes of a seceding sub-unit. Only when dealing with Scotland it was held that the Scottish independence referendum could act as a model for compliance with international standards for territorial referenda. The role of the procedural requirements was anticipated at the beginning of Chapter 3. In light of the practice of the plebiscites set forth by the Versailles treaty, already in 1919 Wambaugh drew a list of due requirements for an efficient plebiscite on the basis of popular consultations' merits and pitfalls.<sup>814</sup> The inquiry about the due standards of a territorial referendum is not marginal: whilst the result of a consultation is always likely to exacerbate conflicts, when properly organised a referendum can be also a peaceful means to settle disputes.<sup>815</sup>

Moreover, the procedure used to organise and hold a referendum may influence the responses by the international community to the search for statehood by the se-

<sup>813</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., paras. 152-153.

<sup>814</sup> See Chapter 3 at pp. 120-121.

<sup>815</sup> M. Qvortrup: "The Regulation of Ethnonational Referendums: A Comparative Overview", in M. Qvortrup, *Referendums and Ethnic Conflict*, 2014, Pennsylvania, pp. 125-126.

ceding sub-unit. The ICJ itself in the opinion on *Western Sahara* did not refer to the expression of the will of the people in general, but to the “*freely exercised will of the people*”.<sup>816</sup>

It has to be clarified that not all the modalities of a referendum derive from binding international standards. Some may be better viewed as best practices. Overall, the existing international standards on territorial referendums can be considered “open-textured”, because they are based on the practice of many countries. However, some core principles can be said to form part and parcel of international customary law. Preserving the empirical approach adopted so far, this Chapter will devolve special attention to the cases of Montenegro and Crimea, in which the debate about the standards for a referendum about secession arose prominently. As far as the October 2017 referendum in Catalonia is concerned, since this research is finalised in the immediate aftermath of the vote, at this stage a complete assessment of the referendum is not possible.

The progressive consolidation of international standards is grounded in the combination between the practice of the Venice Commission of the Council of Europe and the reactions by the members of the international community. In this sense, the study of the procedural standards for a territorial referendum joints the inquiry about the reactions of the international community to secessions carried out via referenda. The compliance with standards for a free and fair referendum can shape the reactions of the international community, from recognition to non-recognition or condemn. For this purpose, reactions to the referendum in Crimea as well as to the shortcomings of the referendum in Catalonia will be mentioned. Hence, the Chapter will end with some remarks on international responses<sup>817</sup> to a secession occurred through a referendum.

## 2. Montenegro: acquiring statehood through a referendum

One of the fairest procedures for secession was carried out for the change of status of Montenegro. The secession by Montenegro is rooted in the scheme set forth by the Constitution of the Union of Serbia and Montenegro.<sup>818</sup> Nevertheless, in the path towards the independence of Montenegro, a pivotal role is played by the interrelation between international and domestic law. It was with Montenegro that the international community, through the European Union<sup>819</sup> and the Council of Europe,

<sup>816</sup> ICJ, *Western Sahara*, Advisory Opinion, cit., recital 55 referring to the right to self-determination states that it “*requires a free and genuine expression of the will of the peoples concerned*”.

<sup>817</sup> See Introduction at pp. 14-16.

<sup>818</sup> *Charter of the Union of Serbia and Montenegro*, 4 February 2003, Official English translation at [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=67383&p\\_count=96687](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=67383&p_count=96687)

<sup>819</sup> It was held that the progress made by the parties towards the agreement on a federation can be ascribed to the perceived prospect of membership to the European Union (then Community). The Federation of Yugoslavia had a cooperation agreement with the EU until its break up. The agreement was substituted in 2001 with the Association Agreement with the Yugoslav Republic of Macedonia. See Council of the European Union, *Stabilisation and Association Agreement between the European Communities*

started the debate on international standards concerning territorial referenda. The Venice Commission of the Council of Europe and OSCE issued a series of opinions on the legislation in Montenegro which constitute the key reference for discerning the procedural standards for a referendum.<sup>820</sup>

Somehow interestingly, the history of the access to statehood of Montenegro started and ended with a referendum. In 1992, a referendum decided that Montenegro would be part of the Federation of Yugoslavia.<sup>821</sup> In 2006, a referendum opened the way to the independence of the country, so that on 26 June 2006 Montenegro became a member of the UN.<sup>822</sup> The socialist republics of Serbia and Montenegro converged in the Federal Republic of Yugoslavia after the 1992 referendum. The Montenegrin separatists boycotted the consultation, thus the referendum left with many political instabilities. The relationship between Serbia and Montenegro was facilitated by the European Union, as coexistence was not easy with Montenegro trying to distantiate itself from central control. The EU promoted the adoption of the 2002 *Belgrade Agreement*<sup>823</sup> which put the basis for the Constitution of the Federation between Serbia and Montenegro. As observed by Mancini, “*the Constitutional Charter of the Union of Serbia and Montenegro was adopted following the procedure stated in the 1992 Constitution of the Federal Republic of Yugoslavia, yet the process was not totally domestic because the EU promoted and monitored it*”.<sup>824</sup> The constitutional structure of the Federation partly resembled that of the Yugoslav Federation, because it included a right to secede for Serbia and Montenegro. In fact, art. 60 ruled that each party within a three-years period had the right to secede, provided that a referendum was held.<sup>825</sup> In case of vote against secession, a second ref-

*and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part*, 26 March 2001.

<sup>820</sup> Since the hypothesis of secession was enshrined by the Constitution of Montenegro, the case has more relevance for constitutional studies. However, in light of the intensive involvement of the international community in the definition of the procedures to carry out the secession, the next pages will provide a focus on this specific aspect. For a comparative constitutional analysis of the use of referenda see S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Decision Making*, Cambridge, 2012.

<sup>821</sup> S. Dormanovic: “*Montenegro: A Miracle in the Balkans*”, *Journal of Democracy*, 2007, vol. 18, pp. 152-153.

<sup>822</sup> United Nations, A/RES/60/264, dated 28 June 2006 upon request of the SC, S/RES/1691, 22 June 2006.

<sup>823</sup> The Agreement was signed by the President of the FRY and those of the Republics of Serbia and Montenegro together with their respective Prime Ministers. The agreement fixed the main principles for structuring the relations between Serbia and Montenegro. Its main points relate to, *inter alia*, the drafting of the Constitutional Charter of the future Federal Union between Serbia and Montenegro and the entitlement to change status, vested in both Republics. See Agreement on Principles of Relations between Serbia and Montenegro within the State Union, 14 March 2002, Council of the European Union S0047/02.

<sup>824</sup> S. Mancini: “*Secession and Self-Determination*”, *The Oxford Handbook of Comparative Constitutional Law*, cit., p.492; see also S. Mancini “*Ai Confini del Diritto: Una teoria Democratica sulla Secessione*”, *Percorsi Costituzionali*, 2014, vol. 3, pp. 623-637.

<sup>825</sup> The Constitution of Montenegro dated 1992 at art. 2 required that any change of frontiers shall be decided upon by citizens in a referendum. Besides, the Serbian Constitution at art. 4 established that “*any change in the boundaries of the Republic of Serbia shall be decided upon by citizens in a referendum*”.

erendum could not be held before three years from the previous one.<sup>826</sup> Interestingly enough, the article expressly foresees the decision to secede by Montenegro when it refers to succession of international legal personality, thus confirming that the drafters of the Constitution already had in mind that the most likely to trigger art. 60 in order to leave the Union would have been Montenegro.<sup>827</sup>

Further regulation for the popular consultation was to be decided through domestic legislation and it is here that the international community stepped in. The involvement of international actors such as the OSCE, UE and the Venice Commission concerned both the inter-State level— notably the relationship with Serbia— and the enactment of domestic legislation to enable the organisation of the vote. The High Representative of the EU Mr. Solana witnessed the adoption of the 2005 agreement amending the Constitutional Charter whereby “*the member state organising a referendum will cooperate with the EU on respecting international democratic standards*”.<sup>828</sup> Reference to international democratic standards is a sign of the impact of the subsequent developments of international law of statehood following the dissolution of the SFRY. The requirement confirms the progressive consolidation of the principle of democracy, but also marks the involvement of external actors in the making of the State of Montenegro. Quoting Sen, the legal framework for the Montenegrin referendum could be defined as an “*eclectic mixture of various elements, from International law, federal and local constitutional laws and several legal provisions on a statutory level*”.<sup>829</sup>

## 2.1. The organisation of the referendum in Montenegro: between international and domestic law

The tricky questions regarding the organisation of the referendum in Montenegro concerned (i) the legal effects flowing from the consultation and (ii) administrative issues such as the franchise and majority requirement. For the former, the Constitution was not clear about whether the referendum was a final vote on independence or it was necessary for the legislative body to confirm the result of the vote. The Constitutional Court in 2002 solved the question asserting that the referendum would have a final and binding nature.<sup>830</sup> At the other side of the spectrum, the franchise

<sup>826</sup> Constitutional Charter of the Union of Serbia and Montenegro, cit., art. 60: “*Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro. The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum. Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor*”.

<sup>827</sup> J. Vidmar, *Democratic Statehood in International Law*, cit., p. 169.

<sup>828</sup> Amendments to the Constitutional Charter of the State Union of Serbia and Montenegro, 29 June 2005, cited by I. Gokhan Sen, *Sovereignty Referendums*, cit., p.122.

<sup>829</sup> I. Gokhan Sen, *Sovereignty Referendums in International and Constitutional Law*, cit., p. 131.

<sup>830</sup> In fact, when Montenegro adopted the 2001 *Law on referendum* (see fn.835), the movement for the preservation of the State Union challenged the admissibility of the law in front of the Constitutional Court. The party argued that the law was not compliant with art. 119 of the Constitution, according to

and the quorum became the long-standing issues for the referendum until the *Law on the referendum on the State Legal Status* was adopted by the Montenegrin Government on 1 March 2006.<sup>831</sup> The drafting process saw the decisive involvement of EU, OSCE and the Council of Europe: in order to better understand the normative standards referred to by the international actors to help Montenegro in building the legal framework for the referendum, it is useful to tackle more in the depth the 2005 *Opinion on the Compatibility of the legislation in Montenegro* adopted by the Venice Commission –hereafter “*Opinion on the Compatibility*”.

### 2.1.1 Focus: the Venice Commission Opinion

The *Opinion on the Compatibility* was issued upon the request of the Assembly of the Council of Europe. It tackles three major areas: 1) the level of participation to the vote; 2) the majority requirement and 3) criteria for eligibility to vote.<sup>832</sup>

Before turning to the substance, it merits mentioning here the methodology used in the *Opinion*. It is grounded on a balance stricken by the Commission between international practice and the specific circumstances of Serbia and Montenegro. Through this methodology the Commission reaches two objectives: on the one side it gives a perusal of the practice of the members of the Council; on the other side it contributes to the consolidation of the common standards discerned from its comparative analysis. The proposal of a referendum is evaluated through compliance with (i) minimum standards of legality and good electoral practice and (ii) other standards – such as the neutrality of the area- that may impact on international reactions to referendum. The key consolidated standard is that of a free and fair territorial referendum held through democratic elections. All the conditions described in the *Opinion* ultimately serve to guarantee the respect of this standard. For instance, freedom of voters can be fulfilled if the question submitted to the electorate is clear, but also if the framework conditions for a free vote are satisfied. These amount to, *inter alia*, freedom of press, organisation of the referendum by an impartial electoral commission and insurance of the widest possible access to national and international observers.<sup>833</sup>

which, the argument continued, the positive vote of the 2/3 of the Parliament was required to validate the decision of the referendum. The Constitutional Court dismissed the claim, on the ground that it was art. 2 which had to be considered the key legal basis for the referendum. Therefore, the referendum did not require the approval of the Parliament. See OSCE/ ODIHR, *Referendum Observation Mission Final Report*, 4 August 2006, p. 5. See Decision by the Constitutional Court of Montenegro, 17 March 2002, published in Official Gazette of Montenegro 14/2002. See K. Friis, “*The Referendum in Montenegro: The EU’s Postmodern Diplomacy?*”, *European Foreign Affairs Review*, 2007, vol.12, p. 76.

<sup>831</sup> See OSCE/ODIHR, *Referendum Observation Mission Final Report*, cit., p.5.

<sup>832</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro concerning the organization of Referendums with Applicable International Standards* (hereinafter *Opinion on the Compatibility of the existing legislation in Montenegro*), CDL-AD (2005)041, 19 December 2005.

<sup>833</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., pp. 5-6.

## Secession and Referendum

Beginning with the level of participation, art. 37 of the 2001 *Law on Referendum*<sup>834</sup> in Montenegro prescribed that “*the decision in a referendum is taken by a majority vote of the citizens who have voted, provided that the majority of citizens with voting rights have voted*”. In expressing its opinion on the issue, the Commission starts from the premise that there are no international binding standards concerning the minimum turnout. Comparative analysis of the legal provisions among the members of the Council of Europe has provided a varied panoramic, with only some States setting a minimum requirement.<sup>835</sup> Thus, in principle there are no obstacles to the maintenance of the threshold established pursuant to art. 37 and the requirements set forth by the *Law on Referendum* are considered in conformity with existing practice.<sup>836</sup>

As regards the applicable majority, then, the Commission observes that neither the Constitution of Montenegro nor that of the State Union mentions this requirement. The comparative constitutional inquiry concerning the other members of the Council of Europe confirms that there is no established practice, because only a few states have a qualified majority. However, the Commission continues, “*the most stringent rules should apply to self-determination referendums*”.<sup>837</sup> The Opinion upholds the *ratio decidendi* of the Supreme Court of Canada and recalls the Canadian *Clarity Act*<sup>838</sup>, which expressly refers to a qualified majority, albeit it does not mention it. On the basis of the aforementioned, the Opinion considers a minimum turnout of 50% to be compliant with the principle of democracy. Such a threshold is also recommended given the thorny relationship between Serbia and Montenegro.<sup>839</sup> The final decision to include also a super-majority threshold of 55%+1 was taken with the crucial push by the EU, which wanted the popular consultation to give a clear and uncontested result.<sup>840</sup> However, the approach of the Commission to the

<sup>834</sup> *Law on referendum* 19, February 2001, Official Gazette of the Republic of Montenegro no.9/01, English translation by OSCE/ODIHR available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2005\)076-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2005)076-e)

<sup>835</sup> In particular, the Commission observes that 12 out of 48 members of the Council of Europe set a 50% minimum threshold, while the other countries display significant differences, with a turnout ranging from 25% to 50%. See, Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., paras. 20-22.

<sup>836</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 27.

<sup>837</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para 33.

<sup>838</sup> Clarity Act, Bill C-20, 29 June 2000, art. 2(3) “*In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province ceases to be part of Canada, the House of Commons should take into account the views of all political parties represented in the legislative assembly of a province whose government proposed the referendum on secession*”.

<sup>839</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 27.

<sup>840</sup> S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Decision Making*, cit., p.188; see also for an extensive overview of the relationship between the EU and the post-Yugoslav Republics B. Rodeljic, *Europe and Post-Yugoslav Space*, New York, 2016.

majority requirement appears ambiguous to some extent.<sup>841</sup> The comparative analysis mentioned above showed that a specific majority is not common among the member states. By contrast, the Commission is of the view that “*the most stringent rules of majority should apply to self-determination referendums*”, without mentioning a definite supporting point for its position. The Commission endorses the *ratio decidendi* of the Supreme Court of Canada to reaffirm that a higher threshold may be necessary,<sup>842</sup> but then it argues that a simple majority strengthened with a minimum turnout is not inconsistent with international law. All in all, the output to be reached seems to be that a negotiated solution among all the stakeholders – Serbia, Montenegro and the EU- on the majority requirement, whatever this would be.<sup>843</sup> In other words, the alleged ambiguity can be justified by the action of the Commission which was aimed at holding a referendum in a pacified and democratic framework, whatever it takes. The European Union as a whole pushed for a double threshold, consisting in a super majority plus a required level for participation.<sup>844</sup> For the super majority, the laws in Montenegro were not conclusive, because they prescribed only that a decision has to be taken by the majority of the people who vote. The 2006 law on the referendum incorporated international suggestions and provided that in order to become independent, the voter turnout should be 50%+1 of the electorate and the support for secession should be at least 55% +1 of those voting yes.

The last issue of concern for the Commission was the criteria for the eligibility to vote. The normative framework used for the 1992 referendum was re-drafted through the guidance of the OSCE<sup>845</sup> and adopted in 2001. Under the domestic law of Montenegro, citizens resident in Serbia do not have the right to vote in elections in Montenegro. Pursuant to art. 7 of the Constitutional Charter of the Union “*a citizen of a member state shall also be a citizen of Serbia and Montenegro. A citizen of a member state shall have equal rights and duties in the other member state as its own citizen, except for the right to vote and be elected*”. Therefore, there was no equality between the political rights of the Montenegrin citizens residing in Serbia and the Serbian citizens residing in Montenegro. The Commission observes that practice of federal states generally allows the exercise of political rights on the basis of the residence.<sup>846</sup> However, although the State Union of Serbia and Montenegro is a single legal subject in international law, the Commission argues that *de facto* it

<sup>841</sup> A. Pakovic, P. Radan (eds.), *On the way to statehood: Secession and Globalisation*, 2008, Aldershot; Burlington; Ashgate, p. 142.

<sup>842</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 36.

<sup>843</sup> *Ibid.*, paras. 29;36.

<sup>844</sup> *Ibid.*, para 62.

<sup>845</sup> Among the international organs involved in the process towards the secession of Montenegro, OSCE was the first player in time. Its observers monitored the 1997 presidential elections and the 1996 elections for the Parliament. The Montenegrin Government probably viewed the involvement of the OSCE as a shield against excessive control by Belgrade. In fact, the organisation was asked to retain an office in Podgorica. Together with its branch devoted to electoral matters (ODIHR) were requested to review and comment on the referendum law.

<sup>846</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 53.

functions as a confederation. Hence, it is not advisable to extend the franchise to the citizens living in Serbia, also in light of the fact that it is “*desirable to apply the same rules for the eligibility to vote in elections and referendum*” with a view to make the Parliament “*accountable to the same electorate as is taking the decision in the referendum*”.<sup>847</sup>

On 1 March 2006 the Montenegrin Government adopted the *Special Law on the Referendum on the State Legal Status*. The law regulated not only the levels of participation and the turnout, but also the establishment of administrative bodies, the financing and the rights of observer groups. The *question référendaire* included in art. 5 reads “*Do you want the republic of Montenegro to be an independent State with full international and legal personality?*”. The question is clear, requires a yes or no answer and presents the object of the consultation, notably independence. A three-tiered model was set for the administration of the referendum according to art. 7. At the national level, the *Republic Referendum Commission* supervised the process and was also tasked with the arbitration of disputes throughout the referendum process.<sup>848</sup> At the local level, 21 municipal referendum commissions and polling boards were established. The result of these efforts was a turnout higher than 86% and a majority of 55,5% choosing independence.

The referendum was found to be in line with international standards for democratic electoral processes by the OSCE and the Council of Europe. OSCE in particular welcomed the organisation, the conduct of the referendum, and confirmed that it “*respected fundamental democratic rights*” and “*in general, met international standards for electoral processes that apply to the holding of referenda*”.<sup>849</sup>

### 2.1.2 Requirements and lessons learned from Montenegro

The case of Montenegro has been viewed both as a model and as a precedent not to be replied. On the one side, many elements testify the success of the model. The referendum campaign was conducted peacefully and without obstacles, the electoral commissions efficiently worked. The question asked, in addition, was clear and precise. The *Report* of the Political Affairs Committee of the Council of Europe expressly called upon the member states to respect the result of the vote. It says “*the decision (of independence) taken in a democratic manner has to be respected*”.<sup>850</sup> The European Union also welcomed the results, recalling that the OSCE Office for Democratic Institutions and Human Rights had confirmed the legality and legitimacy of the vote with respect to international standards for democratic electoral processes.<sup>851</sup>

<sup>847</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 57.

<sup>848</sup> K. Morrison, *Montenegro, A Modern History*, 2009, London, p. 205.

<sup>849</sup> OSCE/ODIHR, *Referendum Observation Mission Final Report*, 4 August 2006, p. 5.

<sup>850</sup> CoE, *Report of the Political Affairs Committee of the Council of Europe*, 27 June 2006, art. 1.

<sup>851</sup> Council of the European Union, *Presidency Declaration on behalf of the European Union on the Declaration of Independence by the Montenegrin Parliament*, 3 June 2006, [http://europa.eu/rapid/press-release\\_PESC-06-81\\_en.htm](http://europa.eu/rapid/press-release_PESC-06-81_en.htm).

On the other side, for the purposes of this research is interesting to mention one critique which concerns the double majority threshold. It suffices to mention that after the referendum the Assembly of the Council of Europe warned not to consider an established practice the majority threshold set for the vote in Montenegro.<sup>852</sup> The Assembly highlighted that the case was a very peculiar one, in which the EU pressured for a 55% threshold “*in a clear political attempt to maintain the State Union*”. It can be inferred that the majority requirement was not seen positively by the other members of the international community. The choice was highly influenced by the EU, which made it for “*overt political reasons and would have created a crisis if the result had been, for instance, 54% while normally the requirement should have been 50% +1*”. Therefore, the threshold should not be considered a precedent for future referenda.<sup>853</sup> Subsequent international practice in fact has followed this line: except for the super majority, the elements discussed in the case of Montenegro were later developed by the Venice Commission in the *Code of Good Practice on Referendums*.

## 2.2 Code of Good Practice on Referendums

The 2006 *Code of Good Practice on Referendum* (hereinafter the *Code*)<sup>854</sup> has been grounded on the *Code of Good Practice in Electoral Matters*.<sup>855</sup> Together with the latter, the *Code*<sup>856</sup> reflects the spread of democracy through Europe, thus the need to set some guidelines common to the members of the Council. One of the major merits of the *Code* is that the Venice Commission grasps the distinctive nature of referenda, if compared for instance with elections. Referenda are a sensitive issue, because they call upon a community to decide about fundamental questions involving public affairs. Committed to the respect of the rule of law, the Commission states that referenda can be organised if and only when they are provided for by the Constitution or a national statute, and when procedural rules are settled.<sup>857</sup> In other words, the normative analysis seems to be tailored to the constitutional legal order. Hence, it could be inferred that once a referendum is grounded on a domestic norm, it is legitimate per se.

Against this assumption, it should be taken into account that the *Code* is not limited to the constitutional range but touches upon international law perspectives as well. In the explanatory memorandum, the Commission conditions the legitimacy of the referendum to the respect of international law. It is clarified that “*irrespective of what national law has to say about the relationship between international and do-*

<sup>852</sup> CoE, *Report of the Political Affairs Committee of the Council of Europe*, cit., art. 12.

<sup>853</sup> Ibid.

<sup>854</sup> Venice Commission, *Code of Good Practice on Referendum*, 19 March 2007, CDL-AD(2007)008.

<sup>855</sup> Venice Commission, *Code of Good Practice in Electoral Matters*, CDL-AD (2002)23rev, 23 May 2003.

<sup>856</sup> For a thorough account of the constitutional guidelines for a referendum see the 2001 *Guidelines for Constitutional Referendums at National Level*, 11 July 2001, COE DOC CDL-INF(2001)10.

<sup>857</sup> Venice Commission, *Code of Good Practice on Referendum*, point I (3)(2)(b)(i)

*mestic law, the substantial formulation of the question cannot contravene international law*”.<sup>858</sup> The position is not developed further, as the *Code* does not list the international rules at stake. Nevertheless, they can be inferred by the general scope and wording of the document. The *Code* enshrines the principles of democracy, human rights and the rule of law. For the purposes of the *Code* are, *inter alia*, to show best practices on referendum, the Venice Commission takes advantage of member states’ regulations to highlight a trend in international law and give some suggestions. The fields touched upon in the *Code* can be grouped in three main thematic areas: 1) organisation and wording of the question; 2) eligibility and 3) monitoring of referenda.<sup>859</sup>

For the first group, the Commission stress that registration should be automatically managed by the government and if not, it needs to be open for a long period, guided by an administrative procedure. The consistency of the form goes hand by hand with the consistency of the content: the clarity of the question is crucial for guaranteeing freedom of opinion. A clear question cannot be misleading.<sup>860</sup> This means that it has to present a clear option between a yes, no, or blank vote. Furthermore, according to the Venice Commission, there should be no exception to vote-counting rules, because they might disadvantage the minorities eligible to vote.

Eligibility to vote, then, has to be based on the residence. In the *Code* the Commission compares the practice of federal states and observes that some of them – such as Switzerland or Bosnia-Herzegovina- acknowledge a double citizenship, notably the federal and the entity one. In these cases, however, political rights are exercised on the basis of residence. This confirms the validity of the residency requirement, but it is not tantamount to say that residency has to be established so far back in time such as the period of 24 months prescribed in the law of Montenegro. A reasonable period of time should not exceed 6 months.<sup>861</sup> The identification of the eligible voters is one of the main points with a view to ensure a meaningful participation. Being the future of the sub-unit the subject of the referendum, Peters opines that tying the right to vote to residence is consistent with the main purpose of a territorial referendum.<sup>862</sup> Overall, the residency principle is consolidated in international practice: it was used in the plebiscites in the aftermath of the First World War and during the UN-led popular consultations. Outside the UN framework, then, the principle was applied to the cases of Montenegro, Scotland and Canada. Recalling the analysis carried out in Chapter 2, it is contended that the principle of *uti possidetis juris*

<sup>858</sup> Venice Commission, *Code of Good Practice on Referendum*, para. 33.

<sup>859</sup> These fields have progressively begun the main clusters for the evaluation of a referendum. See in this sense the *Compilation of the Venice Commission and Reports Concerning Referendums*, 10 March 2017, CDL-PI (2017)001.

<sup>860</sup> Venice Commission, *Code of Good Practice on Referendum*, para. 3.3.i.c.

<sup>861</sup> Venice Commission, *Code of Good Practice on Referendum*, cit., para. 6.

<sup>862</sup> A. Peters: “*The Crimean vote of 14 March 2014 as an abuse of the Institution of the Territorial Referendum*”, cit., p. 268.

should guide the delimitation of the borders.<sup>863</sup> Hence, the administrative borders of the sub-unit should be considered as the demarcation line for the enjoyment of the residency requirement. It could be argued that this model is not completely fair, because it does not involve the whole country's population. By contrast, the creation of the canton Jura in Switzerland involved all the country progressively.<sup>864</sup> However, the example remains an *unicuum* in the international arena.

Further, the Commission estimates the supervision by an impartial body as an asset for ensuring a free and fair referendum. The body should be permanent in nature, tasked with the duty to organise the referendum.<sup>865</sup> In this framework, external actors should be involved only in “*referendum observation exercise*”.<sup>866</sup> Electoral observance should be guaranteed by national and international observers, who should be given the widest opportunity to monitor the organisation of the referendum as well. Controlling the phases prior to the referendum in fact can prevent complaints against the legality of the vote and reinforces the legitimacy of the consultation.<sup>867</sup>

The *Code* also looks at the effects of the referendum, that depend on its binding or consultative nature. The Commission maintains that when a referendum is legally binding, “*for a certain period of time, a text that has been rejected in a referendum may not be adopted by a procedure without referendum*”.<sup>868</sup> Regrettably, the Commission does not enter into the details of the international relevance of the vote, so that it is not clear whether the recommendation not to review the text within a certain period of time flows from a comparative constitutional analysis only, or it is also grounded on some general international law principles. Arguably, the Commission fails to get into the details of the argumentation about the consolidated standards in international law.<sup>869</sup> However, it has to be recalled that in this field, which lies at the intersection between national and international law, comparative constitutional analysis can be an authoritative basis for discerning international tendencies. More-

<sup>863</sup> A. Peters: “*The Crimean vote of 14 March 2014 as an abuse of the Institution of the Territorial Referendum*”, cit., p. 269; C. Navari: “*Territoriality, self-determination and Crimea after Badinter*”, *International Affairs*, 2014, vol. 90, pp. 1299-1318; A. Tancredi: “*In search of a Fair Balance between the Inviolability of Borders, Self-Determination and Secession in International Law*”, in M. Nicolini, F. Palermo, E. Milano (eds.), *Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution*, Leiden, 2016, pp. 90-104.

<sup>864</sup> The creation of the Swiss canton Jura followed a bottom-up model, with a procedure of subsequent referenda. Firstly, the residents of the future canton Jura were called to vote. Then, a series of referenda were organized in the neighboring areas and lastly the entire Swiss population was called to vote. Arguably, the procedure enjoys a high degree of fairness and is an exemplary exercise of democracy. However, it has to be born in mind that it has not been replied anywhere. See W. Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, New-York, 2010, pp. 72-76; P. Boillat, *Jura: naissance d'un État. Aux Sources du Droit et Des Institutions Jurassiennes*, 1989, Lausanne.

<sup>865</sup> *Ibid.* at para. 3.3.2.

<sup>866</sup> *Ibid.* at 3.2.

<sup>867</sup> *Ibid.*, at para. i.3.2.a.xiii.

<sup>868</sup> *Ibid.*, at para., 5(a).

<sup>869</sup> For a critique of the value and compelling nature of the requirements elaborated by the Venice Commission see C. Santulli: “*La Crise Ukrainienne: Position du Problem*”, *Revue General de Droit International Public*, 2014, vol. 118, pp. 799-820.

over, the authority of the standards has been confirmed by the role of the Venice Commission in the crisis in Crimea. The opinion of the Venice Commission about the compatibility of the referendum in Crimea with international standards has been supported by the international community,<sup>870</sup> thus supporting the acknowledgment of the requirements for a free and fair referendum elaborated by the Venice Commission. Germany, for instance, expressed support for the conclusions of the Commission even before the opinion was officially released.<sup>871</sup> Moreover, the acknowledgment of the role of the Commission and of the OSCE with respect to standards for a free and fair territorial referendum has been remarked also in March 2017 by the representative of the Delegation of Ukraine to the OSCE, who argued that the popular consultation in Crimea “*fell short of democratic standards established by the OSCE and the Council of Europe*”.<sup>872</sup> Therefore, it is now time to get into the details of the procedural requirements of the March 2014 referendum in Crimea.

### 3. Procedural standards of the Referendum in Crimea

As it was briefly introduced in Chapter 3, the referendum held in Crimea has been regarded by the majority of the members of the international community as null and void for breaches of 1) the Constitution, 2) the respect for the territorial integrity of Ukraine, as well as of international standards for conducting referenda.<sup>873</sup> In fact, the referendum has given new momentum to the debate over the legitimate standards for a referendum on territorial changes.

Like in the case of Montenegro, the most interesting academic insights can be gathered from practice of the Venice Commission. The referendum in Crimea was embedded with a whole series of problems concerning the question, the final date of the consultation and the relationship with Ukraine, all of which are tackled in the “*Opinion on whether the decision taken by the Supreme Council of the Autonomous*

<sup>870</sup> Only a handful of States have accepted the outcome of the referendum in Crimea: Afghanistan, Armenia, Kazakhstan, Kyrgyzstan, Nicaragua, and North Korea. See M. Fabry: “*How to Uphold the Territorial Integrity of Ukraine*”, German Law Journal, 2015, vol. 16, p. 419.

<sup>871</sup> S. Seibert, German government spokesperson, labelled the referendum illegal and said that it corresponded “*largely to a draft report of the Council of Europe’s Venice Commission*”, 17 March 2014, <https://www.bundestkanzlerin.de/Content/EN/Artikel/2014/03/2014-03-17-krim-statement-sts.html>. See for scholars supporting the role of the Venice Commission in delineating binding international standards for free and fair territorial referendum A. Peters, “*Sense and Non-Sense of territorial Referendums in Ukraine and why the 16 March referendum in Crimea does not justify Crimea’s alteration of territorial status under international law*”, EJIL:Talk!, 16 April 2014, <https://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>; C. Marxsen, with respect of the link between the Opinion on Crimea and the *Code of Good Practice* that “*it nevertheless expresses international standards which in part form hard international law*”, in “*The Crimean Crisis. An International Law Perspective*”, cit., p. 318.

<sup>872</sup> OSCE, Address by the Delegation of Ukraine at the 1137<sup>th</sup> meeting of the Permanent Council, 17 March 2017, Doc. PC.DEL/358/17, <http://www.osce.org/permanent-council/307196?download=true>.

<sup>873</sup> See Chapter 3 at pp. 187-190.

*Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with Constitutional Principles*" –hereinafter the Opinion.<sup>874</sup> Although in the Opinion the imminent referendum is contextualised from the perspective of European constitutional principles, the Commission extensively relies on international standards developed in the *Opinion on the compatibility of the existing legislation in Montenegro* and later in the *Code of Good Practice* to assess the legitimacy of the scheduled referendum.

### **3.1 The Venice Commission and the referendum in Crimea: further consolidation of international standards**

The Opinion condemns the absence of any clear legal basis for the referendum: the unilateral referendum was organised outside of the framework of Ukraine's law.<sup>875</sup> In the second Chapter it was observed that the Autonomous Republic of Crimea enjoyed autonomy only within the borders of the Ukrainian Constitutional order.<sup>876</sup> Whilst the Autonomous Republic is empowered to hold local referenda,<sup>877</sup> the subject matter of the popular consultation cannot contradict the Constitution of the parent State. Since art. 134 of the Constitution of Ukraine enshrines the indivisibility of the country and states "*Crimea is an indivisible part of Ukraine*", the referendum about secession was in manifest violation of the constitutional order.<sup>878</sup>

Secondly, the Commission states that the question was ill framed. As argued in the *Code of Good Practice*, international practice corroborates the view that in order to be valid the referendum has to be based on a clear question.<sup>879</sup> It is useful to recall the wording of the referendum held in Crimea, which was the following "1) *Do you support the reunification of the Crimea with Russia as a subject of the Russian Federation?* 2) *Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of the Crimea as a part of Ukraine?*"<sup>880</sup> The two options appeared as alternatives, that is to say that voters were not asked to say yes or no to each question. Moreover, not only there was no choice for preserving the Constitution in force in March 2014, but the wording in this sense was misleading. The second option put to voters was concerned with the 1992 Constitution, but the

<sup>874</sup> Venice Commission, *Opinion on Whether the Decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles*, CDL-AD(2014)002, 21 March 2014, hereinafter *Opinion on the referendum in Crimea*.

<sup>875</sup> Venice Commission, *Opinion on the referendum in Crimea*, cit., para. 21-22.

<sup>876</sup> See Chapter 2 at sec. 3.4.

<sup>877</sup> Constitution of the Autonomous Republic of Crimea, 6 May 1992, at art. 18.1.7 and 26.2.3, cited by the Venice Commission, *Opinion on the referendum in Crimea*, para. 6.

<sup>878</sup> Venice Commission, *Opinion on the referendum in Crimea*, paras. 7-8.

<sup>879</sup> Venice Commission, *Code of Good Practice*, cit., para. 3.3.i.c.

<sup>880</sup> Council of the Autonomous Republic of Crimea (Verkhona Rada), Resolution "*On the all-Crimean referendum*", 6 March 2014, cited by the Venice Commission *Opinion on the referendum in Crimea*, cit., para.4.

reference was general. Since the text was amended in 1992 to strengthen the ties of the Autonomous Republic with Ukraine, the definite meaning of the second question cannot be detached.<sup>881</sup> On these grounds, the Commission concludes that the question was not worded neutrally.<sup>882</sup>

Thirdly, the framework conditions for the organisation of the referendum were also lacking. The Commission upheld the Opinion adopted for the referendum in Montenegro, where it asked the authorities organising a referendum to implement art. 25 ICCPR as well as art.3 of the First protocol to the ECHR, on the basis of which every citizen shall have the right to vote and be elected in free and periodic elections.<sup>883</sup> Hence, the authorities in Crimea were required to provide objective information, both through media coverage and funding.<sup>884</sup> With a view to guarantee an informed, democratic deliberation, there should be a period of campaign silence, arguably longer than the ten days occurred in the case of Crimea.<sup>885</sup>

In light of the above, the steps undertaken by the central authorities in Crimea did not ensure freedom of expression and informed deliberation. The neutrality of the government was tainted by the fact that three days before the referendum the Parliament of Crimea had declared independence.<sup>886</sup> Moreover, while the pro-secession campaign was supported, manifestations against the separation from Ukraine were obstructed by the government of Crimea.<sup>887</sup> In addition, the area was not pacified given the support by Russian servicemen to the Crimean authorities organising the referendum. Unsurprisingly therefore, international observers from OSCE refused to observe the referendum, in light of its flagrant violations of the constitutional framework of Ukraine.<sup>888</sup>

<sup>881</sup> Venice Commission *Opinion on the referendum in Crimea*, cit., para. 21; J. Vidmar: “*The annexation of Crimea and the Boundaries of the will of the people*”, cit., pp. 381-382.

<sup>882</sup> Venice Commission *Opinion on the referendum in Crimea*, cit., para. 23.

<sup>883</sup> Venice Commission, *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 11.

<sup>884</sup> Venice Commission *Opinion on the referendum in Crimea*, cit., para. 21.

<sup>885</sup> Venice Commission *Opinion on the Referendum in Crimea*, cit., para. 22; See also A. Peters: “*Sense and Non-Sense of territorial Referendums in Ukraine and why the 16 March referendum in Crimea does not justify Crimea’s alteration of territorial status under international law*”, cit.

<sup>886</sup> *Declaration of Independence of the Republic of Crimea and the city of Sevastopol by the Crimean Supreme Council and Sevastopol City Council*, 11 March 2014, see press release <https://www.rt.com/news/crimea-parliament-independence-ukraine-086/>. For the legal perspectives related to the Declaration see the post by C. Marxsen: “*Crimea’s Declaration of Independence*”, 18 March 2014, EJIL:Talk! <https://www.ejiltalk.org/crimeas-declaration-of-independence/>. Another proof of the biased position of the authorities in Crimea can be found in the declarations by the chairman of the Supreme Council of the Autonomous Republic Konstantinov, saying that “*Crimea Will Not Return In the Ukraine*”, See State Council of the Republic of Crimea, Press Release, 11 March 2014, [www.rada.crimea.ua](http://www.rada.crimea.ua).

<sup>887</sup> See on this point A. Catala: “*Secession and Annexation: the Case of Crimea*”, German Law Journal, 2015 vol.16, pp. 581-607; A. Pronin: “*Republic of Crimea: A two-day State*”, cit., pp. 133-142; S. van Der Driest: “*Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*”, cit., pp. 329–363.

<sup>888</sup> A. Peters: “*The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, C. Callies, Staat und Mensch im Kontext des Völker- und Europarechts. Liber Amicorum für Torsten Stein Baden Baden, 2015, p. 277-279.

Lastly, the Commission recalls that no negotiation took place before the declaration of independence of Crimea was issued.<sup>889</sup> As noted in the Opinion on Montenegro, the subject matter of the referendum is of such importance that the Commission would require likewise important for the parties to embark on meaningful negotiations.<sup>890</sup> In fact, the Opinion reads: “*the Venice Commission can only note that no negotiations aimed at a consensual solution took place before the referendum was called*”.<sup>891</sup> This, also in light of the multi-ethnic composition of the population of Crimea.

The position of the Venice Commission brings back to the table the general requirement of negotiations discussed in the previous Chapter. In particular, the wording used in the Opinion advances a model of negotiated secession such as that between Scotland and the UK, characterised by an agreement establishing the organisation of a referendum. Arguably, the Commission seems to adopt a procedural point of view: secession is not considered outlaw per se, the emphasis being put on the modalities through which it is carried out. This position can be interpreted as an endorsement of *Reference Re Secession of Quebec* and adds credit to the conclusions reached in the previous Chapter about the consolidation of an obligation to negotiate a new territorial settlement. It is in light of this findings that the case of Crimea becomes important for the research at stake. Arguably, the referendum held in Crimea has a double role: on the one side, it consolidates the practice of sub-units within States holding referenda to secede. On the other side, the fact that the international community had contested the manner in which the referendum was organised, allows us to safely conclude that there are consolidated requirements for holding a referendum.<sup>892</sup>

Nevertheless, what runs against the use of the example of Crimea as a supporting point is the subject matter of the referendum, combined with the role of the Russian Federation.<sup>893</sup> The legal analysis conducted so far has already hinted at affirming that the territorial acquisition by the Russian Federation was conducted with the use of force and masked with democratic decision-making arguments.<sup>894</sup> Hence, alongside the violation of the standards for a free and fair referendum, it is above all the use of force by a third party which tainted the validity of the vote.<sup>895</sup> There remains

<sup>889</sup> Venice Commission, *Opinion on the referendum in Crimea*, cit., para. 26.

<sup>890</sup> Venice Commission, *Opinion on the referendum in Crimea*, cit., para 25, citing its *Opinion on the Compatibility of the existing legislation in Montenegro*, cit., para. 24.

<sup>891</sup> Venice Commission, *Opinion on the referendum in Crimea*, cit., para. 26.

<sup>892</sup> P. Hilpold: “*Ukraine, Crimea and new International Law: Balancing International Law with arguments drawn from history*”, Chinese Journal of International Law, 2015, vol.14, pp. 260-261.

<sup>893</sup> C. Walter: “*Self-Determination, Secession, and the Crimean Crisis 2014*”, A. von Ungern-Sternberg, K. Abushov, *Self-determination and Secession in International Law*, cit., p. 297.

<sup>894</sup> For the qualification of the conduct of the Russian Federation as an unlawful use of force see V. Bilkova: “*The use of Force by the Russian Federation in Crimea*”, Heidelberg Journal of International Law, 2015, vol. 75, pp 27-49; C. Borgen: “*Kosovo, South Ossetia and Crimea: the Legal Rhetoric of Intervention, Recognition and Annexation*”, *OpinioJuris Blog*, <http://opiniojuris.org/2014/04/02/kosovo-south-ossetia-crimea-legal-rhetoric-intervention-recognition-annexation/>; P. Olson: “*The Lawfulness of Russian Use of Force in Crimea*”, *Military Law and the Law of War Review*, 2014, vol. 53, pp. 18-41.

<sup>895</sup> J. Vidmar: “*The Annexation of Crimea and the Boundaries of the Will of the People*”, cit., p. 366; 367; 376.

an open question concerning what would have happened if Crimea held a referendum to become independent instead of joining the Russian Federation. According to Tancredi's theory of *normative due process*, the main international law guidelines for secession concern a) the prohibition of the use of force; b) the respect of *uti possidetis juris* and c) the use of territorial referenda. If these *due requirements* are not respected – like in the case at stake- there arise for the model an obligation upon the members of the international community not to recognise the newly born entity, even though the sub-unit has successfully seceded.<sup>896</sup> Following the model, it would be reasonable to expect that the international community has not accepted the new claim of title by the people of Crimea - and further by the Russian Federation- and has avoided any action implying the legitimisation of this claim. By contrast, which is the status of Crimea three years after the referendum? Few countries have officially acknowledged the incorporation of Crimea in the Russian Federation,<sup>897</sup> but in practice since 2014 it has been part of Russia. The current situation opens the door to the considerations about one of the thorny questions of international law: recognition.

#### 4. Between intervention and recognition

Although the subject matter of the thesis has been fully explored, a comprehensive analysis requires the author to have a look at what happens after a seceding referendum has been carried out. As it was explained in the Introduction, researching about whether according to international law referenda are a necessary condition for secession implies to focus on international reactions to seceding referenda. In the following pages the analysis will be narrowed to the reappraisal of the reactions in the cases already tackled, together with some other contested attempts to secede such as Abkhazia, South-Ossetia and Transnistria. Common ground for these cases is that referenda were coupled with intervention by a third party. For legal scholars, the fact that the third party was the Russian Federation is of less importance, albeit this practice has alimented some worthy contribution to comparative studies of international law.<sup>898</sup> Much more interesting, instead, is the reaction of the international community to such referenda carried out in territories which see the presence of a third party. As mentioned above, the shortcomings of Crimea highlight how much confusion lies in the application of international law to territorial changes. The legal order is filled

<sup>896</sup> A. Tancredi: “*A Normative Due Process in the Creation of States through Secession*”, M.G. Kohen (ed.), *Secession. International Law Perspectives*, cit., pp. 171-208. See for a previous formulation of the model A. Tancredi, *La Secessione in Diritto Internazionale*, Napoli, 2001, pp. 668-675 and for the latest considerations A. Tancredi: “*Secessione e Diritto Internazionale: un’analisi del Dibattito*”, *Diritto Pubblico Comparato ed Europeo*, 2015, vol.2, pp.449-478. See more in detail Chapter 2 at pp. 77-80.

<sup>897</sup> Based on the declarations by the spokesman of the US Embassy in Russia, the incorporation of Crimea within the Russian Federation has been recognised by Afghanistan, Cuba, Nicaragua, Venezuela, North Korea, and Syria, and Nauru. See [http://www.ecfr.eu/article/commentary\\_why\\_non\\_recognition\\_matters\\_in\\_crimea6043](http://www.ecfr.eu/article/commentary_why_non_recognition_matters_in_crimea6043)

<sup>898</sup> See in particular L. Mälksoo, *Russian Approaches to international Law*, 2015, Oxford, providing a detailed analysis of how the Russian Federation understands international rights and duties.

with many grey areas. As a result, non recognition by the international community was frequently grounded on the violation of peremptory norms and the lack of effectiveness supporting the new entity. Thus, referenda had a very limited impact. Indeed, the analysis of the Crimean case showed that the interaction between the principle of territorial integrity, prohibition of the use of force, unilateral declarations of independence and territorial referenda is complex and so far it has not left space for clear-cut answers. Hence, the following section will begin with a brief account of the theories of recognition and will then proceed with the analysis of recognition of referenda carried out (i) with the use of force by an external actor and (ii) in well-established democracies through pacific means.

#### 4.1 Theories of recognition

The acquisition of legal personality in international law raises contrastive reactions, but mainstream legal scholarship considers that an entity can claim to be a State provided that it satisfies all the requirements set forth by the *Montevideo Convention*.<sup>899</sup> According to the *Convention*, the requirements are the following: a) a well-defined territory; b) a population; c) an effective government and d) capacity to enter into international relations. The first three elements together constitute the effectiveness test which is particularly difficult to overcome, because it requires the State to possess a defined population, territory and an effective government. For the latter in particular, having an effective government implies being able to exercise control over the territory, without the assistance of any other third party, be it the former parent State or a foreign power.<sup>900</sup>

In this framework, the Montevideo Convention assigns to recognition no substantial role. In other words, recognition has no impact on the existence of the State as a legal entity in international law. In literature, this position has been called declaratory theory.<sup>901</sup> The main postulate of the declaratory theory is that recognition is no more than a political declaration having no bearing on the subsistence of a legal entitlement to statehood. By contrast, the international community – especially

<sup>899</sup> *Montevideo Convention on the Rights and Duties of States*, signed on 26 December 1933, entered into force on 26 December 1934, reprinted in *The American Journal of International Law (Supplement)*, 1934, vol. 28, p. 75 ff.

<sup>900</sup> D. Raić, *Statehood and the Law of Self-Determination*, cit., pp. 53-83; T. Christakis: “*The State as a ‘Primary Fact’: Some Thoughts on the Principle of Effectiveness*”, M.G. Kohen (eds.), *Secession: International Law Perspectives*, cit., pp. 138-171.

<sup>901</sup> The literature on this topic is huge. See, *inter alia*, for mainstream legal scholarship: H. Kelsen: “*Recognition in International Law: Theoretical Observations*”, *American Journal of International Law*, 1941, vol. 35, p. 605; H. Lauterpacht, *Recognition in International Law* Cambridge, 1947; J. Dugard, *Recognition and the United Nations*, Cambridge, 1987. For an account of the relationship between self-determination secession and recognition see, *ex plurimis*, D. Raić, *Statehood and the Law of Self-Determination*, Dordrecht, 2002, pp. 39-47; J. A. Frowein: “*Recognition*”, R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, 2000, vol.4, pp. 33-41; T. Grant, *The Recognition of States. Law and Practice in Debate and Evolution*, 1999, pp. 1-82; I. Brownlie, *Principles of International Law*, 6th edition, 2003, pp. 86-88. See also the Badinter Commission’s Opinion 1, finding that ‘*the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory*’. Badinter Commission, Opinion 1, cit. p. 182.

in its early stages- acknowledged recognition as constitutive of the legal personality of the State. To a certain extent, mainstream legal scholarship still discusses the existence of at least some constitutive effects of recognition.<sup>902</sup> Arguably, the Montevideo Convention assigns to diplomatic relations a place among the requirements for statehood, thus it becomes important to determine on the basis of which criteria one State decides to enter into relations with another. Even if recognition is under-valued to a declaration – the argument continues- recognition has been used by States as one among the means to respond to changes in the world public order.<sup>903</sup> Therefore, it seems that there is still some argument for the constitutive theory, albeit the declaratory one prevails. The clash between the declaratory and constitutive theory has never lost its appeal, due to the challenges arising from the globalisation process and the development of other criteria for awarding recognition to a State, such as the respect for human rights and democracy.

The turning point in this sense was represented by the subsequent developments of the war in Yugoslavia. A major shift in the practice of recognition is represented by the *EC Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*.<sup>904</sup> The document sets out some additional criteria for recognition, notably respect for the rule of law, human rights and democracy. It has been held that in so doing, the international community would be acting as a “*regulator of self-determination claims*”.<sup>905</sup> Following this argument, on the basis of the practice of Eastern Europe and the Soviet Union, it could be maintained that recognition was to a certain extent constitutive of the legal personality of the State. However, the analysis of the *EC Guidelines* in its entirety disproves the argument, and supports the view that the *Guidelines on Recognition* did not overturn the international set of rules about recognition. Were the *Guidelines* perceived as a tool to guide States through the first steps of their naissance ? Or were they only deemed to guide the development of diplomatic relations? The second option is more convincing. The Guidelines address “*these new States*” emerging from the dissolution of Yugoslavia and USSR. Moreover, the signatories affirm that “*these new States [...] have constituted themselves [...]*”. Accordingly, the term State is not a chance definition. Rather, it implies that for the international community these new entities were already

<sup>902</sup> S. Oeter: “*Recognition and non-Recognition with regard to secession*”, in C. Walter (eds.), *Self-Determination and Secession in International Law*, cit. pp. 45-68; S. Talmon: “*The Constitutive versus the Declaratory Theory of Recognition: Tertium non Datur?*”, *British Yearbook of International Law*, 2005, vol. 75, pp. 101-181.

<sup>903</sup> See for an extensive and comprehensive analysis T.D. Grant, *The Recognition of States, Law and Practice in the Debate and Evolution*, Westport, London, 1999.

<sup>904</sup> Extraordinary EPC Ministerial Meeting, *Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*, 16 December 1991, reprinted in *International Legal Materials*, 1992, vol.31, pp. 1485-1487. See also C. Ryngaert, S. Sobrie: “*Recognition of States: International Law or Realpolitik? The practice of Recognition in the wake of Kosovo, South Ossetia and Abkhazia*”, *Leiden Journal of International Law*, 2011, vol. 24, pp. 467-490.

<sup>905</sup> S. Oeter: “*Recognition and non-Recognition with regard to secession*”, in C. Walter (eds.), *Self-Determination and Secession in International Law*, cit. p. 62; C. Ryngaert, S. Sobrie: “*Recognition of States: International Law or Realpolitik? The practice of Recognition in the wake of Kosovo, South Ossetia and Abkhazia*”, cit., pp. 467-490.

States, whilst the *EC Guidelines* were a condition for establishing diplomatic relations.<sup>906</sup> This is not tantamount to say that the position in support of a constitutive value of recognition is totally unpersuasive. Indeed, quoting Shaw, in the case of SFRY “*the dividing line between recognition and the criteria for statehood is blurred*”.<sup>907</sup>

With a view to frame this debate in the narrow context of the interaction between secession and referenda, the study takes again the stand from *Reference re Secession of Quebec*. The Supreme Court of Canada correctly approached the issue of recognition pragmatically. The Court argued that “*the ultimate success of [...] a unilateral secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition*”.<sup>908</sup> The Court stressed that success in acquiring statehood depends on two kinds of recognition (i) recognition by the parent State and (ii) by the international community. It would be too far-fetched to claim that for the Court recognition is constitutive of the international personality of a State to be. Above all, in light of the aside “*...the conduct of Quebec and Canada*”, the parent State and negotiations are assigned a cardinal role for the success of an attempt to secede. That of the Court is, rather, a pragmatic interpretation of the extent and limits of the international legal order. The rationale underpinning the opinion seems to lie in the belief that the recognition of a unilateral secession not only expresses a political standpoint, but also supports the decision of the entity, somehow implicitly justifying its claim also in light of international law.<sup>909</sup>

Interestingly enough, the approach of the Court has not remained isolated. Alongside international relations’ scholarship<sup>910</sup> -which has at various times underlined that in a interdependent world recognition has practical effects- international legal bodies have also supported the argumentation of the Supreme Court of Canada. For instance, the *International Independent Fact-finding Mission on the Conflict in Georgia*<sup>911</sup> (hereinafter the *Fact-finding Mission on the Conflict in Georgia*) seems to have embraced the same position when it maintains that “*even if recognition has only a declaratory value, the recognition of an entity as a State by other states can*

<sup>906</sup> In this sense see M. Weller, *Escaping the Self-Determination Trap*, cit., pp. 168-174

<sup>907</sup> M.N. Shaw: “Re: Order in Council P.C. 1996-1967 of 30 September 1996”, A. Beyeysky, *Self-Determination in International Law, Quebec and Lessons Learned*, cit., p. 142-143,

<sup>908</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 155.

<sup>909</sup> B. Stankovski: “*Is there an Obligation to negotiate secession in International Law? From Reference Re Secession of Quebec to Kosovo Advisory Opinion and Beyond*”, ESIL Conference Paper Series 13/2015, vol. 5, p. 14.

<sup>910</sup> J. Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the recognition of contested states*, Oxford, 2012; O. Kessels, B. Herborth: “*Recognition and the Constitution of Social Order*”, *International Theory*, 2013, vol. 5, pp. 155-160; C. Daase, C. Fehl, A. Geis, G. Kolliarokis, *Recognition in International Relations*, Hampshire, 2015.

<sup>911</sup> The *International Independent Fact-Finding Mission on the Conflict in Georgia* was established on 2 December 2008 by a decision of the Council of the European Union, after a cease-fire agreement in Georgia had been reached. The Mission was tasked with the conduct of an international inquiry into the conflict in Georgia. In particular, its mandate was to “*investigate the origins and the course of the conflict in Georgia*”. See European Union, Council Decision 2008/901/CFSP, 2 December 2008.

give a certain evidence of its legal status as a state, although this presumption can be refuted on the basis of facts".<sup>912</sup> In this complex interaction between declaratory and constitutive aspects of recognition, the referendum may play a crucial role in the "the legality and legitimacy of the secession" as expressed in *Reference Re Secession of Quebec*, because it is one of the most important examples the free expression of the will of the people. As it was explained in the previous Chapter, however, the use of this tool may be only the object of a procedural obligation and trigger the duty of the parties to negotiate a new territorial settlement. Therefore, the legitimacy of secession may be enhanced by the referendum against the opposition of the parent State, without touching upon the law on recognition of statehood and principle of effectiveness. In *Reference Re Secession of Quebec* the Court acknowledged the influence of the principle of democracy to international law, especially due to the role of the EU.<sup>913</sup> However, although in principle the democratic statehood<sup>914</sup> argument is convincing, when used to support the incidence of a referendum in the claim for secession it offers little by way of a conclusive response, as it can be inferred from reactions to the use of this tool.

### 4.2 International responses to territorial referenda

As said in the introduction to this section, conclusions about recognition of entities which have successfully unilaterally seceded after a referendum cannot be drawn because there is neither sufficient nor consistent practice to support a sound position. However, States' declarations and practice suggest two main approaches. On the one side, when referendum is carried as a cover for other violations of international law, legal discourse on recognition is centred on the violation of the territorial integrity of the parent State and, at most, of the procedural requirements used to call the popular consultation. On the other side, when the referendum is held in well-established democracies, in a pacified context, it can be argued that the international community steps aside the dispute. The domestic nature of the seceding claim is emphasised, especially the need for the seceding unit and the parent State to negotiate a new territorial settlement encompassing, for instance, the increase of autonomous powers of the sub-unit with a view to avoid separation.

<sup>912</sup> Independent International Fact-Finding Mission on the Conflict in Georgia, Report, 30 September 2009, Vol. II, p. 129, available at [http://www.mpil.de/files/pdf4/IIFFMCG\\_Volume\\_II1.pdf](http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf)

<sup>913</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 143.

<sup>914</sup> D'Aspremont, for instance, observes that the international community has never proposed that a post-conflict government be chosen in other way than through democratic elections. See J. D'Aspremont, *L'État non démocratique en droit international : étude critique du droit international positif et de la pratique contemporaine*, Paris, 2008, pp. 75-80. It is not by chance, the argument continues, that the internationally supervised process of change of status in Montenegro had guaranteed that the State be democratic. See also A. Peters: "Statehood after 1989: Effectiveness between Legality and Virtuality", James Crawford (ed.), *Proceedings of the European Society of International Law*, 2010, vol. 3, p. 10, electronic copy available at: <http://ssrn.com/abstract=1720904>. See also for the aspects concerning a democratic entitlement in International Law C. Pippan: "International Law, Domestic Political Orders, and the 'Democratic Imperative': Has Democracy Finally Emerged as a Global Legal Entitlement?", 2010, Jean Monnet Working Paper 02/10, <http://ssrn.com/abstract=1709503>.

### 4.2.1 Third party intervention

Many examples of referenda carried as a cover for other violations of international law, such as the use of military or paramilitary forces by a third party intervening can be found in the Caucasus region and in the State of Moldova. Practice of non-recognition in the cases of Abkhazia, South Ossetia,<sup>915</sup> Transnistria,<sup>916</sup> or Crimea, is often compounded by non-recognition of a situation created in violation of international law, as well as by the lack of factual independence. The fact that a referendum was used in these cases with a view to secure secession through the expression of the will of the people, stands behind the scenes. The heavy dependence on a single external patron has been a solid ground not to recognise.<sup>917</sup> In other words, non-recognition has been evaluated against the benchmark of *effectivité* and the respect of the Montevideo criteria. For instance, Abkhazia's closeness to the Russian Federation favours the prospect of a future absorption<sup>918</sup> and is seen suspiciously by the community of States.

Anyway, the quest for secession via referendum by the above-mentioned units cannot be over-simplified. Despite being highly dependent on an external actor, the entities' attempt to build democratic institutions is a sign of the importance gathered

<sup>915</sup> As regards Abkhazia and South Ossetia, they were autonomous regions within the USSR, but with the dissolution of the Soviet Union they were granted only the status of semi-autonomous regions within Georgia. In particular, Abkhazia enjoyed the status of autonomous region and Ossetia was an administrative district within Georgia. Claims for independence started in 1989 and were received with strong opposition by the Georgian government. It was the beginning of an age of violent riots with random internal struggles during which Russia often intervened, acting as a mediator between the parties. As a result, Abkhazia and South Ossetia issued a declaration of independence and in 1992 a referendum was held to elect a new government. See T. Bahcheli, B. Bartmann, H. Srebrnik (eds), *De facto States. The Quest for Sovereignty*, London, 2004.

<sup>916</sup> In its attempt to secede from Moldova, Transnistria has organised something like more than seven referenda. The region is a small strip at the border between Moldova and Ukraine. It does not have a uniform population, being composed of a variety of ethnic groups: Russians, Ukrainians and Moldovans. Schiedlin, for instance labels the entity as “*a non-unified people seeking a never-existing entity*”. See D. Schiedlin: “*Phantom Referendums in Phantom States: Meaningless Farce or bridge to Reality?*” cit., p. 71. The long-time dispute with the Moldovan parent State seems to be rooted in economic interests alongside identity issues – especially for heavy steel industries which were located in Transnistria during the Soviet period. The first referendum was held in 1990, organised in the biggest cities of Tiraspol and Bendery and received 96% of support for separation from Moldova. Pro-soviet supporters tried to take advantage of the tensions with the central government to declare the creation of the Transnistrian Moldovan Soviet Socialist Republic, seceding from USSR. A second referendum in 1991 proclaimed the unification of Transnistria with the Soviet Union. However, the latter did not consent to unification. Nevertheless, the existence of strong ties and a form of dependence from a “patron” State is demonstrated by the fact that the Russian Federation has recognised the referenda held in the region and in 2014, in the aftermath of the Crimean referendum, Transnistria asked again to join Russia. Without the consent of the Federation, Transnistria tried to progressively consolidate its governmental institution to establish itself as a State. See H. Blakkisrid, P. KolstØ: “*From secessionist conflict toward a Functioning State: Processes of State- and Nation Building in Transnistria*”, *Post-Soviet Affairs*, 2011, vol. 27, pp. 178-210.

<sup>917</sup> N. Caspersen, *Unrecognized States*, Cambridge, 2012, pp. 86-90.

<sup>918</sup> See in fact the declaration by President Putin in 2008, reported by the International Crisis group, saying “*Abkhazia only needs to be recognised by Russia*”; International Crisis Group, *Abkhazia. Deepening Independence*, 26 February 2010, p.11.

by concepts of democratic statehood in the international legal order.<sup>919</sup> Otherwise, unrecognised entities could try to increase their effectiveness only through the use of military power to gain effective control in their territory. In this framework, it can be argued that organising a referendum is the first step of the strategy pursuant to which the entities try to increase their chances to be recognised, by using the typical tools of modern democratic systems. The further step is unsurprisingly the building up of democratic institutions.<sup>920</sup>

In fact, these same arguments have been used also by the Russian Federation to justify recognition. In the declarations of recognition concerning South-Ossetia and Abkhazia, secession is considered in compliance with “*the Charter of the United Nations, the Helsinki Final Act and the 1970 Declaration on Friendly Relations, [...] equal rights and self-determination of peoples*”.<sup>921</sup> Additional reference to “*a government representing the whole population belonging to the territory*” sounds like the revival of the remedial right theory. Overall, the main arguments adduced by the Russian Federation to justify the support to the nascent entities have been (i) the application of the remedial right theory; (ii) the right to self-determination and (iii) the protection of nationals abroad. For the latter, Russia in particular held that Russian citizens in Georgia were victims of genocidal policies during the 1989-1992 conflict.<sup>922</sup> The idea that the State of nationality intervenes to protect its citizens residing abroad is a powerful one, albeit is grounded more in practice than in international law.<sup>923</sup> However, the review of the facts elaborated by the *Fact-finding Mission on the Conflict in Georgia* highlighted that although Abkhazia’s right to internal self-determination was repeatedly frustrated in the years following Georgia’s independence, the denial of fundamental rights was not as such as to justify a claim to remedial secession.<sup>924</sup> Moreover, Russian approaches to the remedial secession theo-

<sup>919</sup> N. Caspersen: “*Separatism and Democracy in the Caucasus*”, *Survival*, 2008, vol. 50, pp. 113-136

<sup>920</sup> *Ibid.*

<sup>921</sup> See the statement by the Ministry of Foreign Affairs, 26 August 2008, at: <[http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/ff61e0682d1506e1c3257523003f9dd6?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/ff61e0682d1506e1c3257523003f9dd6?OpenDocument)

<sup>922</sup> See for instance the 2008 statement by Russian President Medvedev: “*the actions of the Georgian side cannot be called anything other than genocide*” in *Kommersant Online*, SKP RF Opened a Criminal Investigation into the Killings of Russian Citizens in South Ossetia, August 14, 2008, <http://www.kommersant.ru/doc.aspx?DocsID=1011523&ThemesID=301>; A.K. Niedermaier, *Count-down to War in Georgia*, Minneapolis, 2008, p. 497. See for a complete account *Independent International Fact-Finding Mission on the Conflict in Georgia, Report*, vol. II, cit., pp. 421-428.

<sup>923</sup> The international legal basis for the use of force purported at the protection of nationals abroad remains controversial. Such typologies of armed activities have been justified as an exception to the prohibition of the use of force or as a form of self-defense. In both cases, although the legal contours of the norm are not defined, following the rules about self-defense it can be held that the use of force aimed at the protection of nationals abroad has to be proportionate to the violations witnessed by nationals abroad. See on this line T. Franck, *Recourse to Force, State actions against threats and armed attacks*, 2002, Cambridge, p. 96. See also for a critic of the alleged policy of distribution of passports in the neighboring communities by the Russian Federation P. Spiro: “*Russia’s Citizenship Power-play in Ukraine is Pretty Weak*”, *OpinioJuris Blog*, 7 March 2014 <http://opiniojuris.org/2014/03/07/russias-citizenship-power-play-ukraine-pretty-weak/>.

<sup>924</sup> *Independent International Fact-Finding Mission on the Conflict in Georgia, Report*, vol. II, cit., p. 146.

ry are difficult to disclose. Despite the historical opposition to the exercise of external self-determination outside the colonial contest,<sup>925</sup> the argument put forward for remedial secession was that there can be limited exceptional cases for its application, notably when the life of the people is seriously put at risk.<sup>926</sup> As a result, the international legal order should not oppose the claim to secede by sub-units witnessing abuses from the parent State. In any case, for Abkhazia and South-Ossetia, the position is rebutted by the Report of the *Fact-finding Mission on the Conflict in Georgia*, revealing no substantial deprivation of the right to self-determination to the degree required to trigger the right to remedial secession.<sup>927</sup> This element, coupled with the fact that both Abkhazia and South-Ossetia enjoyed substantial autonomy within Georgia, makes the remedial secession theory not applicable.

It can be easily inferred that in this framework the choice to use a referendum to support the claim for independence has a very little importance. The marginal role assigned to the referendum can be explained also by looking at the *questions référendaires*. The wording in fact sheds some light over the ties with an external patron State. For instance, the seceding referendum in South Ossetia asked the voters the following questions, “Do you agree that South-Ossetia should be an independent State? And 2) do you agree with resolution of 1 September 1991 adopted by the Supreme Soviet of Independent South-Ossetia, about remaining with Russia?”. Likewise, the further referendum held in 2006 read “Should the Republic of South Ossetia retain its current status as independent State, and be recognised by the International Community?”.<sup>928</sup> In Transnistria, the referendum organised on 17 September 2006 asked the voters “1) Do you support the independence of the Moldovan Republic of Transnistria and the consequent free union of Transnistria with the Russian Federation? 2) Do you consider it possible to deny the independence of the Moldovan Republic of Transnistria with consequent integration of Transnistria into Moldova?”. The 2008 declaration by the Russian Foreign Affairs’ Ministry, recalls that

<sup>925</sup> See the judgment of the Russian Constitutional Court on Tatarstan, 13 March 1992, where the Court argued that the principle of self-determination finds a limit in the protection of territorial integrity. Constitutional Court of the Russian Federation, Gazette of the Congress of the Peoples’ Deputies of the RSFSR and the Supreme RSFSR, 1992, n.13, translated in Statutes and Decisions: the Laws of the USSR and its successor States, 1994vol. 30, pp. 32-34. See also N. Ronzitti, *Introduzione al Diritto Internazionale*, 2016, p. 236.

<sup>926</sup> This would be the case of violations flowing from the adoption of genocidal policies, such as those attributed to Georgia by the Russian Federation to justify the intervention in South-Ossetia and Abkhazia. See, Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, vol. II, cit., p. 27; 144-149.

<sup>927</sup> I. Kotchach: “*Self-Determination, Secession, and Sovereignty: South Ossetia’s Claim to Right to External Self-Determination*”, *Journal of International Relations*, 2010, vol. 12, p.126.

<sup>928</sup> C. Filippini: “*Constitutions and Territorial Claims: lessons from the Former Soviet Space*”, M. Nicolini, F. Palermo, E. Milano (eds.), *Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution*, Leiden, 2016, p. 180. In the case of Abkhazia, instead, a referendum concerning independence asked the voters whether they wanted to preserve the Constitution in force, and was followed by the adoption of the *State Act on State Independence of the Republic of Abkhazia* dated 12 October 1999. See J. O’ Loughlin at al.: “*Inside Abkhazia: Survey of Attitudes on a De facto State*”, *Post-Soviet Affairs*, 2011, vol. 27, pp. 1-36.

referenda “*in recognised democratic states [are recognised] as an important legal basis for building civil society*”, but seems revealing of the opportunistic use of the democratic argument.<sup>929</sup>

Most public reactions to the Russian assertions in fact were markedly negative. International organisations and States have found these referenda unpersuasive and not legally binding. Before the 2006 referendum by Transnistria, the head of OSCE mission to Moldova declared that “*the OSCE will not recognise this referendum [...] which calls into question the territorial integrity and sovereignty of the Republic of Moldova, [...] particularly when you consider the suggestive character of the question*”.<sup>930</sup> Along the same line, the spokesman of the EU affirmed that the referendum will not be recognised and will not have international validity.<sup>931</sup> The results of the referendum were ignored by the international community, whose main response was the push toward a dialogue between the parties.

In all cases, confidence building between the parent State and the separatists unit is difficult. As far as Moldova is concerned, the mediation process involving Transnistria, Moldova, OSCE, Russia, Ukraine plus the EU and the USA as observers (the so called 5+2 process) has not reached conclusive results so far. The insistence of the international community for a solution based on more autonomy for Transnistria- for instance on the basis status of Gagauzia - has never been really accepted by Moldovan authorities. However, the 2017 Austrian OSCE Chairperson-in-Office has put the Transnistrian issue among his priorities<sup>932</sup> and the fact that Moldova has signed on July 2016 the Association Agreement with the EU – which pushes for “*a common internal vision on the settlement process*”<sup>933</sup> could help reaching a solution.

For Georgia, on the part of the parent State, opposition to the quest for secession seems to be linked to a variety of reasons involving not only territorial integrity. While in the case of Abkhazia there is an argument as to the ethnic makeup of the region, for South-Ossetia opposition to secession appears to be “*shaped by the acute*

<sup>929</sup> Statement by Russian Minister Lavrov in September 2006 speaking about the incoming referendum in Transnistria, available at <http://www.rferl.org/a/1071331.html>

<sup>930</sup> Statement by K. De Gucht, 20 July 2006, <http://www.osce.org/cio/47534>.

<sup>931</sup> Yearbook of the United Nations, 2006, vol. 60, pp.485-486. The attitude of the international organisations towards the nascent entities is best described by the expression “status neutrality”, used by the OSCE Network of Think Tanks and Academic Institutions in the report *The Future of OSCE*, December 2014, p. 12. The term means that the action of the international organisation – i.e. in the conduct of negotiations- does not preclude any outcome as regards the final status of the territory at stake. However, the territorial integrity of the parent state is given primary protection. While the approach is functional to the normalisation of the dialogue between the separatists and the central government – given the high casualties involving civilians- the neutral position can be considered the expression of the belief by the international community that the issue is a domestic one. See for instance the Statement by the President of the Security Council: “*a comprehensive political settlement of the conflict, including on the political status of Abkhazia, respecting fully the sovereignty and territorial integrity of the Republic of Georgia*”, 2 December 1994, UN Doc. S/PRST/1994/78.

<sup>932</sup> OSCE Press Release “*Transnistrian Settlement Process a priority for Austrian Chairmanship in 2017*”, 6 February 2017, <http://www.osce.org/cio/297981>.

<sup>933</sup> Council of the Union, *Joint Statement Following the Third Association Council Meeting between the European Union and the Republic of Moldova*, 31 March 2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/03/31-statement-eu-moldova/>.

*sense of insecurity arising from a Russian military presence in a territory that cuts right into the heart of Georgia and threatens the capital city Tblisi?*<sup>934</sup> Notwithstanding the Sochi Agreement of 1992,<sup>935</sup> aimed at favouring a shared solution by means of internal self-determination and greater autonomy to the region within the borders of Georgia, the parties have been unable to agree on a common plan so far.<sup>936</sup> On the one side, the Georgian government has failed to answer to the requests of the separatist entities, because too often it has used the force instead of engaging into negotiations. This way, the conflict has been exacerbated. On the other side, Abkhazia and South Ossetia never had a positive approach towards negotiations, interpreting the role of the UN with suspicion, given the expressed predilection by the organisation for the preservation of Georgia's territorial integrity.<sup>937</sup>

#### 4.2.2 Reactions to seceding referenda in well-established democracies

Recognition of a sub-unit which has resorted to a referendum to secede from a democratic parent State – which often guarantees some forms of autonomy to its sub-units- is all the more difficult. Even assuming that the impact of the Montevideo requirements in legal discourse is diminishing, that is not tantamount to state that modern criteria of human rights and respect for the principle of democracy have outclassed the traditional criteria.<sup>938</sup> This is demonstrated by the responses of the members of the international community, who usually leave the issue in the hands of the parent State only. There have been, indeed, cases in which the international community stepped in a territorial dispute and suggested the resort to referendum with a view to acquire statehood. However, the common denominator was the potential ethnic tensions preceding and resulting from the territorial change.<sup>939</sup> For instance, the international community through Opinion n. 4 of the Badinter Commission pushed Bosnia-Herzegovina to hold a referendum “*in order to indicate a democratic mandate for independence*”.<sup>940</sup> The referendum in this case was considered the preferred tool to avoid further tensions. In the case of Montenegro, then, the international community was involved in the path towards the independence of the country from the very beginning and the attitude of the international actors was al-

<sup>934</sup> J.K. Lindsay: “*States’ Responses to Secession*”, *Peacebuilding Journal*, 2014, vol. 2, pp. 28-44.

<sup>935</sup> *Agreement on Principles of Settlement of the Georgian - Ossetian Conflict* signed between Georgia and the Russian Federation in Sochi, 24 June 1992.

<sup>936</sup> I. Kotchach: “*Self-Determination, Secession, and Sovereignty: South Ossetia’s Claim to Right to External Self-Determination*”, cit., pp. 120-127; M. Sterio, *The right to self-determination under International Law: “Selfistans”, Secession and the Rule of the Great Powers*, cit., pp. 145-146.

<sup>937</sup> See for instance resolution 1462 extending the mandate of the UN mission UNOMIG, in which the Council expresses concern for the repeated refusal by Abkhazia to seat at the negotiations’ table. UN S/RES/1462, 30 January 2003.

<sup>938</sup> See on this point J. Vidmar, *Democratic Statehood in International Law*, cit., p. 218 and D. Raić, *Statehood and the Law of Self-Determination*, cit., pp. 151-168.

<sup>939</sup> See D. Bethlehem, M. Weller, *The Yugoslav Crisis in International Law*, 1997, Cambridge.

<sup>940</sup> S. Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation*, 2015, Oxford, p. 72.

ways in support of holding a referendum on independence. The Venice Commission itself, called to express its opinion on the requirements for a valid referendum, anchored its analysis to an exhaustive perusal of the practice of the Council of Europe's member states. In this sense, the use of referenda for territorial changes was not felt as an *unicum* in the international system – i.e. belonging to the Montenegrin Constitutional tradition only- but rather a recognised practice at the international level. Moreover, the chances of recognition of the secession carried out by referendum may ultimately be increased by the presence of neutral observers, who can ensure a *super-partes* monitoring.<sup>941</sup>

However, when the territorial integrity of States with long standing constitutional and democratic traditions is at stake, the attitude of the other States and international organisations changes. Particularly interesting in this sense is the reaction of international organisations, especially the EU, since its main pillars refer *-inter alia-* to the principle of democracy. The answers to the referenda in Scotland and Catalonia are noteworthy in this sense. The Union has so far cautiously avoided to take a stance with respect to seceding demands.<sup>942</sup> However, the 2017/18 developments in Catalonia as well as certain declarations released for the Scottish referendum allows us to infer some conclusions. In 2012, in a letter sent to the UK's House of Lord, President Barroso held that “[...] a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory”.<sup>943</sup> The same position has been endorsed by other institutional representatives including NATO President Van Rompuy.<sup>944</sup> In fact, in the case of Scotland, no official position on the prospect of an independent Scottish State was taken.<sup>945</sup> What has been affirmed is that Scotland would have to ask for accession to the Union as a new entity.<sup>946</sup> Overall, the firm position of the Union is that whenever separation within a member State occurs, the new entity has to start proceedings to accede to the Union. Besides, the reaction by President Barroso to the official results of the Scottish referendum suggests that the EU does not remain completely neutral to territorial changes. In the aftermath of the vote, the EC Presi-

<sup>941</sup> S. Wheatley: “*Modelling Democratic Secession*”, S. Tierney (ed.), Nationalism and Globalisation, 2015, Portland, p. 150.

<sup>942</sup> See on this topic M. C. Eritja: “*The European Union and the Secession of a Territory from an Eu member State*”, Diritto Pubblico Comparato ed Europeo, 2015, vol. 2, pp. 479-502.

<sup>943</sup> The Scotsman, In Full: Jose Manuel Barroso's Letter on EU Membership, 10 December 2012, <http://www.scotsman.com/news/politics/in-full-jose-manuel-barroso-s-letter-on-eu-membership-1-2684237>

<sup>944</sup> See the remarks by NATO President Van Rompuy: “*Third and more personally, I am confident that Spain will remain a united and reliable Member State of the European Union*”, 12 December 2013, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/140072](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140072).

<sup>945</sup> S. Carrell: “*Independent Scotland Should Stay in EU, Says Judicial Expert*”, The Guardian, 28 November 2013, <https://www.theguardian.com/politics/2013/nov/28/independent-scotland-eu-judicial-expert-alex-salmond>.

<sup>946</sup> See on this point the latest declarations by N. Sturgeon on March 2017 concerning the organization of another referendum in the next future, T. Batchelor: “*EU says Independent Scotland would not have Automatic Right to become new Member*”, 13 March 2017, <http://www.independent.co.uk/news/uk/politics/scottish-eu-independence-referendum-scotland-join-queue-membership-apply-a7627201.html>

dent welcomed the decision of the Scottish people to remain with the UK, stating that “*this outcome is good for the united, open and stronger Europe that the European Commission stands for*”.<sup>947</sup> With negotiations over Brexit undergoing, the call for an ever closer Union has been reiterated in October 2017, when Catalonia decided to hold an independence referendum. In the period preceding the referendum, Catalan president Puigdemont sent a letter to the permanent Representative of Spain at the Council of Europe, announcing the will of the Catalan government to organise another referendum on independence.<sup>948</sup> The letter was to be addressed to the Venice Commission, and the answer of the representative is noteworthy. Firstly, he recalled that “*not only the referendum as such, but also the cooperation with the Commission will have to be carried out in agreement with the Spanish authorities*”.<sup>949</sup> Secondly, the letter concludes by stressing that referenda have to be carried out in compliance with the Constitution and the applicable legislation. Once again, the interrelation between referenda and negotiation is at the centre of the argument. Few weeks before the vote, then, the EU left aside its neutrality and sided with the central government, against any attempt to hold a popular consultation in violation of national laws. The spokesman of the European Commission reported that the EU “*will abide by what the Constitutional Court says and what the Spanish Parliament decides*”.<sup>950</sup> The Union would accept a yes by the people of Catalonia “*only in case of a legal referendum*”.<sup>951</sup> At the moment this thesis is completed, the situation in Catalonia is still ongoing, but it can be predicted that few countries will express their position, afraid that public comments would fuel separatism also in other regions of the Union. Among the few to comment the referendum, the Belgian and the Slovenian Prime Ministers called for negotiations and respect for the rule of law.<sup>952</sup> Interestingly enough, the Scottish leader Sturgeon maintained that people “*should be allowed to vote peacefully*”.<sup>953</sup> Once the results of the referendum were published, the European Commission on 2<sup>nd</sup> October issued an official statement, which put the emphasis on the respect of the constitution and the rule of law.<sup>954</sup> Although the Union deployed every kind of use of force, i.e. the aggressive police action and forcible closure of polling stations ordered by Madrid, the internal nature of the dispute remains the primary facet of the Catalan issue. This is clear by the statement’s express

<sup>947</sup> Statement by P. Barroso on the result of the referendum in Scotland, 19 September 2014, <http://www.euintheus.org/press-media/statement-by-president-barroso-on-the-results-of-the-scottish-referendum/>

<sup>948</sup> See the article by Catalan Monitor at <http://catalanmonitor.com/2017/05/31/the-letter-from-puigdemont-to-the-venice-commission-rajoy-has-answered-negatively-to-the-dialogue-offer/>

<sup>949</sup> See, Venice Commission, Letter to the President of the Government of Catalonia, 2 June 2017, <http://www.venice.coe.int/files/Letter%20to%20the%20President%20of%20the%20Government%20of%20Catalonia.pdf>

<sup>950</sup> See declarations released to El Pais, [https://elpais.com/elpais/2017/09/15/inenglish/1505463613\\_515431.html](https://elpais.com/elpais/2017/09/15/inenglish/1505463613_515431.html)

<sup>951</sup> Ibid.

<sup>952</sup> See the latest news at <https://www.theguardian.com/world/2017/oct/01/catalan-referendum-eu-leaders-remain-muted-over-police-crackdown>

<sup>953</sup> Ibid.

<sup>954</sup> [http://europa.eu/rapid/press-release\\_STATEMENT-17-3626\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-3626_en.htm)

reference to the violation of the Constitution by the Catalan authorities organising the referendum.<sup>955</sup> In this sense, the answers of the international community, in particular the declaration on behalf of the EU before the referendum support the position that the referendum is not yet a necessary tool, but it could become so if it is “accompanied” by other conditions, such as domestic legislation or negotiations. The reticence by the international community further supports the understanding of the Catalan attempt as a domestic issue, at least so far. On a purely speculative level, another supportive point could be that on the basis of the results of the referendum the Catalan Government did not implemented the declaration of independence but opted for its suspension.

In light of the above, the reactions of the international community to the seceding referendum in well-established democracies are only partly helpful for legal scholars researching on territorial referenda and secession. The resilience stressed in the approach of the states is a common practice when it comes to the relationship between the parent State and its sub-units. Given that secession is felt as a domestic question, the international community leaves the solution of the dispute to the parent State. However, it can be concluded that if they have to pronounce themselves on the quest for secession by a sub-unit, international organizations and states consider a referendum a proper tool to carry out the process of secession, provided that it respects procedural standards, in particular that is free and fair, and organized in respect of the rule of law. The very fact that referenda have been endorsed in the case of Montenegro, or that the referendum was the tool chosen at the end of the negotiations between the UK and Scotland to mention just a few examples, are only the latest signs of an emerging trend in the international legal order. That is not tantamount to say that the international legal order protects the interests of every sub-unit resorting to a referendum to separate. Although very different, the cases of Crimea and Catalonia show that the referendum cannot subvert the illegality of a conduct, be it caused by the violation of peremptory norms or by the absence of a legal title to secede under domestic law and the consent of the parent State. In this framework, the attempt to secede by Catalonia could turn out to be crucial in shaping the progressive development of international law in this field, or more likely, in confirming the current standing of the law.

## 5. Conclusions

In this Chapter the research topic has been shifted from the study about the referendum as a necessary or a sufficient step to carry out a secession according to international law, to the procedural aspects of the organisation of referenda. Once the requirements for a territorial referendum have been discerned, the last part of the Chapter has focused on the reactions of the international community to seceding referenda. As far as the procedural standards are concerned, the study has departed

<sup>955</sup> The statement reads as follows: “*Under the Spanish Constitution, yesterday's vote in Catalonia was not legal*”, [http://europa.eu/rapid/press-release\\_STATEMENT-17-3626\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-3626_en.htm)

from the premise that while some due requirements for territorial referenda are already well established at the international level, in particular the requirements of freedom and fairness of the vote, the majority of them is better conceived as “best practice” adopted by a considerable number of States.<sup>956</sup>

### 5.1 Requirements for holding territorial referenda

It was highlighted that the Venice Commission has been particularly engaged in developing good practice for referenda. Among the requirements, that of the free expression of the will of people deserves the first place, as it is firmly grounded in international law. The 1966 Covenants, together with the *Declaration on Friendly Relations* as well as case-law by the ICJ ensure a solid legal ground for the assumption. In the *Declaration*, the three modalities for exercising the right to self-determination are always linked to the freely expressed will of the people. For instance, the procedural condition for a free association is the free and voluntary decision of the territorial unit, expressed through an informed and democratic process.<sup>957</sup> The same holds true for the option of integration, which should be the result of the freely expressed wishes of the people concerned.<sup>958</sup> Nevertheless, the freely expressed wishes alone cannot bear the legitimacy of the territorial referendum. In other words, if a referendum does not comply with international standards, it cannot constitute a basis in international law for the territorial change.<sup>959</sup> Some core principles can be said to be part of the international legal order, such as the neutralisation of the territory, universal, equal and secret suffrage and the clarity of the question. In fact, suffices to recall here that for the equal and secret suffrage, a solid legal basis is built by art. 25 of the 1966 Covenants as well as art. 3 of the First Protocol of the ECHR.<sup>960</sup> Besides, practice corroborates the view that seceding referendums are carried out once, involving the seceding unit only. This was the case of UN-led popular consultations, where only the colonial units voted. The franchise set up for the referendum in Montenegro in 2006 also supports this view, since only the Serbian community living in Montenegro was allowed to vote, while the Montenegrin community of Serbia was not.

The other requirement is the neutralisation of the territory. It is assumed that in order to allow the voters to express their free will, the area of the referendum has to be

<sup>956</sup> It has to be remarked that the existence of international standards is not dependent on the consolidation of a customary rule on referenda about secession. In other words, irrespective of the acknowledgment of the international obligation to conduct a referendum to secede, if a sub-unit decides to hold a popular consultation about secession, then the referendum must satisfy certain requirements.

<sup>957</sup> UN, *Declaration on Friendly Relations*, cit., principle VI.

<sup>958</sup> *Ibid.*, principle VII(a).

<sup>959</sup> A. Peters: “*The Crimean vote of 14 March 2014 as an abuse of the Institution of the Territorial Referendum*”, cit., p. 272.

<sup>960</sup> In particular, art. 3 of the First Protocol to the ECHR can be considered one of the pillars of the European Convention protection system, since it enshrines a peculiar facet of the principle of democracy. The importance of art. 3 is confirmed by the jurisprudence of the Court, which reserves it a significant role despite the wording of the article is limited in scope to the election of the legislature. See among the others, ECHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment, 2 March 1987, para. 47.

pacified. Already in 1919, Wambaugh affirmed the necessity of withdrawal of troops of foreign parties from the territory where the plebiscite was scheduled.<sup>961</sup> Further framework conditions ensuring a meaningful participation are usually set forth by domestic legislation. However, in this Chapter it was contended that other requirements can be considered the corollaries of these standards, especially in light of the practice of the Venice Commission. In particular, the referendum campaign should ensure the equality of arms between the opposite sides, freedom of expression and of the media.<sup>962</sup> To sum up, a free and fair referendum must ask a clear question, that is to say a clear question *référendaire* must allow the voters to express a yes or no answer. It is thus advisable to have one single question, as it was in Montenegro or Scotland or Catalonia- which shall be answerable with a yes or a no.<sup>963</sup> Another factor of relevance is the qualified majority of the votes casted and the quorum of participation. Moreover, the referendum has also to ensure 1) voters' registration; 2) freedom of speech; 3) the public declaration of the results and 4) the presence of a neutral electoral commission. Pragmatically, the respect of this standards increases the legitimacy of the claim of the sub-unit not only vis-à-vis the parent State but especially the international community, in terms of recognition. However, precisely for the recognition, this Chapter has highlighted that the situation is blurred.

### **5.2 Recognition, statehood and secession through referendum: a thorny relationship**

As regards international reactions to the organisation of seceding referenda, even assuming that other legal criteria were added to the evaluation of the statehood criteria, in particular the respect for the principle of democracy, it would be overly permissive to assert that the use of the referendum emerged as a binding instrument for achieving statehood. It is well known that Ossetia and Abkhazia held more than one referendum, without being recognised. By contrast, in the case of Kosovo there was no referendum, but statehood has progressively been acquired and recognitions are numerous. Lastly, Czechoslovakia held no referendum as well. Hence, it could be concluded that from the international legal standpoint, if one applies the *ratio decidendi* of the ICJ in the Advisory Opinion on Kosovo, the referendum does not seem to infringe the international legal order, just as the declaration of independence does not violate international law.<sup>964</sup> The fragilities of the international legal order are even more clear if one turns to Crimea. Although the referendum was condemned and the territorial change not recognized, non-recognition gradually evolved into acquiescence of a *fait accompli*.

<sup>961</sup> See Chapter 3, at p.122.

<sup>962</sup> See I. Gokhan Sen, Sovereignty Referendums in International and Constitutional Law, cit., pp. 209-219; 236- 266; M. Qvortrop: "Regulation of Ethnonational Referendums: A Comparative Overview" M. Qvortrop, Referendums and Ethnic Conflict, cit., p.126-137.

<sup>963</sup> Venice Commission, *Code of Good Practice of Referendums*, cit., para. I.3.

<sup>964</sup> Of this view J. Vidmar: "The annexation of Crimea and the Boundaries of the Will of the People", cit., pp. 365-366.

Nevertheless, in terms of procedural obligations there is an argument for the role of the referendum. As it was seen in this Chapter, whilst there is no obligation to conduct a referendum to secede at the international level, seceding referenda have been more and more connected to the opening of negotiations. The argument has been advanced for the exercise of self-determination *in primis*. For instance, Mancini referring to Montenegro opines that negotiations may be interpreted as an exercise of self-determination of the two peoples- of Serbia and Montenegro, in its internal expression.<sup>965</sup> This way, the referendum represents simultaneously the *mise en pratique* of the desire to negotiate a solution and the way to exercise self-determination. Further support is given by the fact that the Constitution demanded a referendum in order to legally secede from the Union of Serbia and Montenegro. In other words, it was the Constitution which build *a priori* a special relationship between negotiations and the holding of territorial referenda.<sup>966</sup>

The same reasoning can be transplanted to the case of secession. Arguably, the strong emphasis put by the EU, OSCE and CoE in a legal and meaningful referendum cannot be justified only by the fact that international actors felt obliged to respect the constitutional mandate. Rather, the referendum seems to be considered the tool whose moral value is able to fill in the legitimacy gap left by the normative *vacuum* of the international legal order with respect to secession.<sup>967</sup> In any case, the referendum is not a sufficient element to create a new entity through secession, even though it is a preferred means for justifying a territorial change. The framework conditions for its organisation as well as the availability of negotiations with the parent State become crucial. In this sense, the referendum held by Catalonia is not only *ultra vires*, but also not in line with current practice of successful exercises of seceding referenda, given the refusal by both parties to embark on meaningful negotiations, in opposition to the cases of in Montenegro and Scotland. In the answer of the Council of Europe to the PM of Catalonia, for instance, it was seen that the interrelation between referenda and negotiation was one of the main arguments. The letter does not detail whether the need to negotiate is grounded in international or constitutional law. However, given that the letter by Puigdemont concerns the pledge to respect the *Code of Good Practice*<sup>968</sup> and given that the answer by the permanent representative recalls this element, it can be inferred that the main point of reference is the practice of the Venice Commission itself.

As mentioned above, the procedures upon which a referendum is organised are very important, because the idea of a free and fair referendum is made operational. Consequently, the credibility of the vote vis-à-vis both the parent State and the interna-

<sup>965</sup> S. Mancini: “*Il Montenegro e la Democrazia della Secessione*”, Quaderni Costituzionali, 2007, n.1, pp.157-160.

<sup>966</sup> Ibid.

<sup>967</sup> M. MacLaren: “*Trust the People? Democratic Secessionism and Contemporary Practice*”, cit., p. 632.

<sup>968</sup> See this Chapter at pp. 203-206.

tional community may be increased.<sup>969</sup> In a declaration prior to the referendum in Crimea in fact, the G7 maintained that the referendum had no legal effect, on the ground that there was no adequate preparation and the territory saw the presence of a foreign party. The States' leaders considered the holding of the referendum in Crimea "*a deeply flawed process which would have no moral force*".<sup>970</sup> For these reasons they affirmed they would not recognize the situation created in Crimea.<sup>971</sup> At the same time, it is interesting to observe that President Obama in expressing his concern for the situation in Crimea, recalled that the referendum would violate Ukrainian law. Any discussion about a referendum must include Ukraine's legitimate govern.<sup>972</sup> What would have happened if Crimea had held a referendum without Russian support and then the Ukraine government had accepted to negotiate a new settlement?

On a purely speculative level, it can be argued that the reaction of the international community would have been different from the mere acquiescence which accompanied the attempt to reach independence by Scotland, above all for geostrategic reasons more than for legal arguments. The main answer probably would have been stepping aside the dispute, provided that the popular consultation ensured the respect of international democratic standards. This topic brings back on the table the monitoring of referenda. International monitoring seems to be the manner in which the international community gets involved into the process of territorial change. The importance attributed to international monitoring can be inferred from the example of Bosnia-Herzegovina. As Peters observes, the referendum in the region of Krajina on 10 November 1991 was not internationally monitored: later, when the Badinter Commission issued Opinion n.4, it held that the wishes of the people had not been clearly established yet.<sup>973</sup> The conclusions of the arbitration Commission corroborate the view that international monitoring helps the subsequent recognition of the referendum by the other members of the international community.<sup>974</sup>

In light of the above, the research has identified two different scenarios. When a referendum is carried out with the support -be it armed or not- of a foreign party, non-recognition by the international community is grounded on the violation of the territorial integrity of the parent State. Then, arguments concerning how the referendum is conducted are adduced. By contrast, the reconfiguration of territorial borders

<sup>969</sup>Mc Corquodale: "*Crimea, Ukraine and Russia: Self-determination, Intervention and International Law*", OpinioJuris Blog, 10 March 2014, <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/>

<sup>970</sup>G7, Leaders Statements, 12 March 2014 [http://europa.eu/rapid/press-release\\_STATEMENT-14-65\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-65_en.htm)

<sup>971</sup>Ibid.

<sup>972</sup>Statement by President Obama on the situation in Crimea, 6 March 2014 available at [http://cnworldlive.cnn.com/Event/Crisis\\_in\\_Ukraine\\_2/108452899](http://cnworldlive.cnn.com/Event/Crisis_in_Ukraine_2/108452899) da CNN cited by J. Ku: "*Does it really violate International Law for Crimea to Hold a Referendum on Secession*", 6 March 2014, OpinioJuris Blog, <http://opiniojuris.org/2014/03/06/really-violate-international-law-crimea-hold-referendum-secession/>

<sup>973</sup>See Chapter 3 at pp. 152-153.

<sup>974</sup>A. Peters: "*The Crimean vote of 14 March 2014 as an abuse of the Institution of the Territorial Referendum*", cit., p. 269.

through a referendum in well-established democracies is left to the discretion of the seceding unit and the parent State, provided that compliance with international standards is ensured. The respect of international standards for a territorial referendum is progressively becoming a *conditio sine qua non* to legitimise the consultations. The high emphasis on the procedure can be also interpreted as a safeguard against the instrumental use of referenda. The referendum held by the people of Catalonia, indeed, could leave many open questions about the pros and cons of territorial referenda. Arguably, referenda may always have a risky ambivalence and in particular foster divisions, as it is demonstrated by the fact that after the Catalan referendum thousands of people rallied across Spain in favour of the opening of unity and the beginning of negotiations.<sup>975</sup> In this sense it could even be even maintained that the democratic nature of seceding referenda should be tested against the need to ensure the widest participation by the people, i.e. of all those resident in the concerned State. In conclusion, the case casts many doubts concerning whether international practice is progressively showing an abuse of the use of the tool referendum and of the understanding of the right to free expression of the will of the people.<sup>976</sup>

<sup>975</sup> See <https://www.ft.com/content/1242db56-ab8a-11e7-aab9-abaa44b1e130>.

<sup>976</sup> See for a discussion on this point with respect to Catalonia A. Peters: “*Populist International Law? The Suspended Independence and the Normative Value of the Referendum on Catalonia*”, 12 October 2017, <https://www.ejiltalk.org/populist-international-law-the-suspended-independence-and-the-normative-value-of-the-referendum-on-catalonia/> and M. Weller: “*Secession and Self-determination in Western Europe: The Case of Catalonia*”, 18 October 2017, [ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/](https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/).



## Conclusions

The role of referenda in the framework of territorial changes is in a constant state of growth: in particular, the combination of referenda and quests for secession has gained momentum again in the previous years. Although the research has determined that the international legal order does not regulate this phenomenon, it has tried to demonstrate that some common patterns suggesting the progressive consolidation of a general rule are traceable. The study has selected the most recent cases of secession (and attempted ones) via referendum, especially Canada, Catalonia, Crimea, Montenegro and Scotland. Keeping in mind (i) the high heterogeneity of the practice, and (ii) the fact that in order to have a consolidated trend more practice and manifestations of the *opinio juris* need to be added, the study began from the premise that in the above-mentioned cases referenda and secession are deeply intertwined. Moreover, the use of referenda for secession often interrelates with arguments of self-determination and democratic statehood. Hence, alongside the inquiry about whether a referendum is a necessary or a sufficient condition for secession in international law, the principal aim of the study was to investigate if it would be possible to shed light on and provide a systematic approach to the blurred panoramic on secession, self-determination and referenda just illustrated.

Some aspects of the research are so problematic that it is difficult to find a conclusive answer. The evidence examined suggests that currently holding a referendum has a very limited incidence on the creation of a new State. Although the referendum is not a sufficient condition for creation of an entity through secession, there is a tendency supporting the view that it may become a necessary condition. In terms of practice and *opinio juris*, the rule is not yet established in international law, nevertheless the inquiry has not reached totally negative results, since it has managed to give a systematic reappraisal of the current state of the art. In particular, the research has concluded that: (i) secession should be disentangled from self-determination; (ii) although there is no obligation to conduct a referendum, practice is consistent in suggesting that referenda may trigger an obligation to negotiate a new territorial settlement flowing upon the seceding unit and the parent State. Finally, (iii) the investigation concluded that despite the fact that the organization of a referendum has only a limited incidence on recognition of statehood, some procedural standards for territorial referenda can be said to form part of international customary law.

## 1. Secession: old but new phenomenon

Needless to say, the starting point of the inquiry was the analysis of secession and its relationship with the right to self-determination. Leaving temporarily aside the former, the research has conceptualized the right to self-determination from a two-fold perspective, notably the internal and external dimension of the right. Although the ICJ maintained that the right to self-determination is one of the essential principles under contemporary international law,<sup>977</sup> the borders of its application beyond the colonial context remain mostly unsettled. The external dimension is established as an exception to the doctrine of territorial unity and therefore is very narrow in its application. In sum, the relics of colonialism still exercise control over the current enforcement of the right to self-determination.<sup>978</sup>

In this framework, Chapter 1 has concluded that outside the concept of external self-determination for colonial units, international law saw the progressive consolidation of the internal dimension of self-determination. International provisions on self-determination are clear on the options available for its exercise, but provide little guidance as to the content of the right. Neither its implications outside decolonization are clarified. Quoting Judge Yusuf, “*the right to self-determination of people has been at the forefront of the humanization and democratization of international law*”,<sup>979</sup> but outside the decolonization period, the right to self-determination seems to be mainly consummated in its internal form. Most recent attempts to secede have confirmed this finding. The quests for separation advanced by Scotland, Catalonia, or Crimea have been based on a broader interpretation of self-determination, in particular of its internal dimension. That is to say that a broader bulk of human rights seems to be incorporated in the notion of self-determination, including, *inter alia*, participatory rights, social inclusion and property rights. More and more, the realisation of a community of individuals within the borders of the State is not limited to participation to the management of public affairs, but encompasses social inclusion, fiscal benefits and property rights. Hence, the study has underlined that if a debate about the right to self-determination is still topical, it can be so only for its internal dimension.

However, such updated understanding of the nature of self-determination leads to infer that secession cannot be considered a dimension of the right to self-determination. This argument has been developed throughout a double path.

<sup>977</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 267*, cit., paras. 52-53; *Western Sahara*, cit., p. 6 and pp. 31-33, paras. 54-59; *East Timor (Portugal v. Australia)*, cit., para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* cit., para 159.

<sup>978</sup> J. Summers: “*The Status of Self-determination in International Law: A Question of Legal Significance or Political Importance*”, *Finnish Yearbook of International Law*, 2003, vol. 14, pp. 270-293.

<sup>979</sup> A.A. Yusuf: “*The role that equal rights and self-determination of peoples can play in the current world community*”, A. Cassese, *Realising Utopia, The Failure of International Law*, Oxford, 2012, p.376.

Firstly, methodologically, Chapter 2 has re-conceptualised the *normative due process* for secession.<sup>980</sup> The *due process* has been tested against the current challenges to international law in the field of territorial changes, such as the increase of seceding aspirations within old and consolidated democracies. The combination of legal rules forming the *due process* requirements listed by Tancredi – a) the prohibition of the use of force; b) the respect of *uti possidetis juris*; and c) the use of territorial referenda- finds support in recent practice and stands the test of time. In the examples of Scotland, Catalonia, Quebec, or Bougainville, to mention a few, secession does not involve the use of force, takes place within the previously established administrative borders and is decided by a referendum. In those cases, the conditions for the exercise of the right to self-determination as provided for by the international legal order are not met and there is no clear evidence of the serious violations of human rights which could justify secession a *ultima ratio*. Although during the day of the referendum in Catalonia aggressive police action and forcible closure of polling stations mandated from the parent State occurred, the gravity of repression is not sufficiently established to meet the threshold required by the *remedial right theory*.<sup>981</sup>

Secondly, going more into detail about the use of secession as a remedy to serious injustices, the research approached critically the *remedial secession theory*, underlying that it needs to be interpreted avoiding any overlapping between the exercise of the right to self-determination with an alleged right to secede.

On the basis of the critiques advanced, the study supports the disentanglement of the concept of secession from self-determination. Not only self-determination should not too easily be equated to the acquisition of statehood, but also the developments of the international legal order, especially with respect to the challenges posed by the continuous evolution of practice, corroborate the view that secession is not a form of external self-determination. The supportive points for this affirmation were explained in Chapter 2 where two main differences between self-determination and secession were highlighted: a) their ontological meaning; b) their application *rationae personae*. Outside colonial situations, the main implication of the right to self-determination is found in the right of a people to “*participate in its future*”.<sup>982</sup> Secession, by contrast, seeks to break the relationship between people and sovereign power at the basis of self-determination, both theoretically and pragmatically. Turning to the French expression for self-determination - “*droit des peuples à disposer d’eux mêmes*”- completed the picture about the disentanglement of secession from self-determination. The French expression suggests that the right to self-determination is above all a right to choose: it empowers its bearers to decide on their status, both internally and externally. Secession, by contrast, implies the crea-

<sup>980</sup> A. Tancredi: “*A Normative Due Process in the Creation of States through Secession*”, cit., pp. 171-207; and by the same author, *La Secessione in Diritto Internazionale*, Napoli, 2001.

<sup>981</sup> M. Weller: “*Secession and Self-determination in Western Europe: The Case of Catalonia*”, 18 October 2017, [ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia](http://ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia).

<sup>982</sup> Expert Report elaborated upon request of the government of Quebec prior to the judgment *Reference Re Secession* by T. Franck, R. Higgings, A. Pellet, M. Shaw and C. Tomuschat, reprinted in A.F. Bayefsky (ed.), *Self-Determination in International Law. Quebec and Lessons Learned*, The Hague-London-Boston, 2000, p. 241-248.

tion of a new entity from a pre-existing State. The structure of the remedial right theory, instead, overlaps the exercise of self-determination with a right to secede: by arguing that a denial of fundamental human rights serves as a ground to justify external self-determination in the form of secession,<sup>983</sup> the *remedial right theory* combines the exercise of internal, external self-determination and secession. However, it does so without a sound legal basis in international law and a scarce practice. In general, the idea that under specific circumstances serious violations of fundamental human rights may trigger a right to secede raises contrastive reactions among states. Moreover, it is the rationale underpinning the theory which does not fully convince: being it anchored to the *a contrario* reading of the *Friendly Relations Declaration* and its *mise en pratique* very scarce, the legal soundness of the *remedial right theory* is not well established in international law. Although it has a strong moral force, the *ratio* of remedial secession has some backsides, in that the theory offers a solution for separation, not for cohesion, even though secession was actually the result of lack of social cohesion.

When even the option of remedial secession is impracticable, sub-units consider the referendum the preferred tool to legitimise their claim. The rationale underpinning the resort to a referendum is quite intuitive: it lies in the broader concept of democratic statehood in international law. Democracy-related arguments have acquired a dominant position in the debate on the international law of State creation.<sup>984</sup> It could be advanced that to a certain extent the idea that a State has to establish itself in compliance with the principles of democracy and the rule of law has been transposed to the quests for separation, by claiming that referenda per se may legitimise secession.<sup>985</sup>

<sup>983</sup> This is the majoritarian view embraced by, *inter alia*, L.C. Bucheit, *Secession: the Legitimacy of Self-Determination*, cit., pp. 88-97; H. Hannum: “*Rethinking Self-determination*” *Virginia Journal of International Law*, 1993, p. 17; D. Raic, *Statehood and the Law of Self-Determination*, cit., p. 3211. See also for *a contrario* arguments S. Smis, *A Western Approach to the International Law of Self-Determination: Theory and Practice*, pp. 138-140, unpublished PhD Thesis, 2001, cited by S.F. van den Driest, *Remedial Secession. A right to external self-determination as a remedy to serious injustices?*, cit., p. 141.

<sup>984</sup> T. Franck: “*The Emerging Right to Democratic Governance*”, *American Journal of International Law*, 1992, vol. 86, pp. 52-55; H. Charlesworth: “*Democracy and International Law*”, *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law, vol. 371, 2014, online access on 24 June 2017, [http://dx.doi.org/10.1163/1875-8096\\_pp1rdc\\_ej.9789004289369.043\\_152](http://dx.doi.org/10.1163/1875-8096_pp1rdc_ej.9789004289369.043_152). See for an opposing view, especially with respect to the consent of the governed J. Crawford: “*Democracy and International Law*”, *British Yearbook of International Law*, 1994, vol. 64, pp.117- 119.

<sup>985</sup> See A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., p. 255-280; T. W. White: “*Referendum in Crimea: Developing international law on territorial realignment referendums*” *Houston Journal of International Law*, 2016, vol. 38, p. 857; I. G. Sen, *Sovereignty Referendums in International and Constitutional Law*, cit., at p. 272 affirms that “*referendums today constitute a vital element in the procedural framework of state creation in international law*”.

## 2. Territorial referendum in international law

Overall, the rise of the referendum in international practice has been nourished by a variety of factors, among which the 1919 plebiscites and the UN-led decolonization process cover a considerable part. Undoubtedly, the referendum has become a preferred means to exercise direct democracy, especially in light of the huge practice developed within the Swiss domestic legal system.<sup>986</sup> Moreover, the revitalization of direct democracy has come side by side with the development of European integration, that has pushed for direct democracy and rule of law mechanisms.<sup>987</sup> Although the research shares these findings, Chapter 3 and 4 have adopted a more systematic approach, with a view to demonstrate that an international rule according to which referenda legitimize *per se* secession is not consolidated yet.

One of the main points of departure for determining whether a referendum is a necessary or a sufficient condition for secession, or both, was the difference between plebiscites and referenda. The study acknowledges that they both fall in the cluster of popular consultations and that, at a first glance, it could be argued that the plebiscites widely used from the end of the first World War onwards are the ancestors of seceding units' territorial referenda. Hence, for international legal scholars there would be sufficient practice and *opinio juris* for the consolidation of a customary rule. A more careful scrutiny suggests that the assimilation of a plebiscite to a referendum is misleading, even if there can always be hybrid examples. In particular, referenda provided for by the majority of the democratic systems are usually organised with a clear *question référendaire* and other specific procedural requirements. With the exception of the difficulties in organising the referendum in Catalonia due to the action of national police force, popular consultations carried out in Montenegro, Canada and Scotland all fulfill these requirements. By contrast, it was the agreement between the interested states, then transposed in the Treaty of Versailles, which set the use of popular consultations to reconfigure the borders of Germany, Poland, Denmark, the former Austrian Empire and Yugoslavia. That is to say that plebiscites were mainly votes of consent about a decision already taken by the victorious powers.

The most important features distinguishing plebiscites from referenda consist of (i) the binding effects usually produced by referenda; (ii) the referendum's clear ques-

<sup>986</sup> S. Tierney, *Constitutional Referendums, The Theory and Practice of Republican Deliberation*, Oxford, 2012, pp.16-18.

<sup>987</sup> See for a comprehensive account on the intersection between international law and democratic governance G. H. Fox: "*The Right to Political Participation in International Law*", G. H. Fox, B. R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, 2000, pp. 48-90. For a European perspective: S. Wheatley: "*Democracy in International Law: A European Perspective*", *International Comparative Law Quarterly*, 2002, vol. 51, pp. 225-247; L. Pech: "*The Rule of Law as a Guiding Principle of the European Union's External Action*", Asser Institute Papers, 2012/3, [http://www.asser.nl/upload/documents/2102012\\_33322cleer2012-3web.pdf](http://www.asser.nl/upload/documents/2102012_33322cleer2012-3web.pdf). For contrastive views see D. Kochenov: "*Law Perspective: Praise underserved. The EU as a Democracy Promoter: a Sceptical Account*", A. Wetzeò. J. Orbie (eds.), *The Substance of EU Democracy Promotion*, Palgrave, 2015, pp. 27-34.

tion, with a yes or no answer (iii) the quorum of participation and quorum of approval. Nevertheless, plebiscites and referenda have always shared at least two elements, notably the neutralization of the territory and the role of international actors. As regards the latter, in the case of plebiscites international commissions ensured effective popular consultations free of frauds, whilst in the case of referenda international monitoring progressively developed as an international practice. The UN-led decolonization process marked the beginning of this practice, however the main instances of the resort to popular consultations in this period remained anchored to the plebiscite model. Indeed, in light of its specific characters and the context in which they were used, plebiscites better served the purposes of colonial units. In the framework of the decolonisation, the claim by self-determination units was solidly anchored to international law. In this sense, the plebiscite served to give more resonance to the exercise of the right to self-determination established under the international legal order. Hence, it could be claimed that there was no need for the plebiscite to trigger binding effects, because the right to self-determination itself posed international obligations upon the members of the international community. As Crawford observes: “*in the vast majority of cases the progress to self-government or independence was consensual. It occurred with the agreement of the State responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that State and local leaders*”.<sup>988</sup> The approach of the UN to the use of popular consultations by colonies does not constitute a solid *opinio juris* on the topic. Throughout a selection of some problematic cases *ex plurimis*, the research has stressed that with the end of colonial dominions as its main goal, the UN was ready to leave aside the step of popular consultations, if it could make easier for the colony to reach independence.

By contrast, for the cases not covered by the right to self-determination, the lack of an established right to secede makes the choice of the appropriate manner for manifesting the desire for secession important. The seceding claim needs to be based on a well-established tool and the referendum, being one of the main expressions of direct democracy, serves this purpose. Moreover, the binding value attached to the referendum is an asset in the hands of the seceding unit when negotiating with the parent State.

From the standpoint of the formation of a general international law rule, it was only at the end of the 90ies that referenda started to consolidate their position in international practice. Arguably, since the dissolution of SFRY and the collapse of the Soviet Union there has been a perception of a continuous external drive to democratisation and here the referendum has come back into the business of international law.<sup>989</sup> Referenda emerged spontaneously with Slovenia’s independence through a referendum in December 1990. After it, other twelve referenda on independence were held in Yugoslavia and the Soviet Union. The emergence of the referendum

<sup>988</sup> J. Crawford: “*State Practice and International Law in Relation to Secession*”, British Yearbook of International Law, 1999, vol.69(1), pp.85 – 117.

<sup>989</sup> N. Caspersen, Unrecognised States. The Struggle for Sovereignty in the Modern International System, Cambridge, 2012, p. 152.

combined with the opinions of the Badinter Commission created the suggestion that by a referendum a sub-unit within a State could legitimately unilaterally secede.<sup>990</sup> The research showed that despite being important for the consolidation of an *opinio juris* and practice about secession and referenda, popular consultations organised in SFRY do not display enough similarities with more recent ones to find a common pattern. On the one side, the common view expressed by the Badinter Commission in Opinion 1 was that the SFRY was a Federation embarked on a process of dissolution.<sup>991</sup> On the other side, even though with Opinion n.4 the referendum has gone a step forward from a mere consultation, a reasonable analysis of the Opinions as a whole shows that the real issue of concern was that the new Republics were founded on the rule of law and upon a constitutional-based system of protection of minorities. In other words, the international community did not take the necessary steps to make the referendum the subject of an international law rule. There were, in fact, cases in which the referendum was not carried out but statehood was acquired.<sup>992</sup>

In sum, the research found that the referendum is currently neither sufficient nor a necessary condition to give rise to a new entity. When there is a pitfall in the legal order, it is clear that the referendum can offer a moment of “apparent” democratic clarity to shed a light over an incomplete set of rules. From an international legal standpoint there are no well-established rules in this field.<sup>993</sup> Taking the stands from the findings above, in the previous Chapters it was observed that there is a clear tendency to consider it a necessary element for secession: it is the case when the referendum respects the set of procedural requirements above mentioned and when other conditions are satisfied, such as the adoption of domestic law regulating secession, or when the negotiations between the parent State and the sub-unit occur. In this sense, the research has advanced the argument that territorial referenda may trigger an obligation to negotiate a new settlement upon (i) the parent State (ii) the sub-unit and (iii) all the interest stakeholders.

The idea of a negotiated secession is all but new in international legal scholarship: it revolves around the assumption that international law could have progressed to the level of requiring the very process of secession to be negotiated.<sup>994</sup> The argument is not only grounded on the application, by analogy, of the duty to pacifically solve disputes but also on practice. For instance, scholarly literature has not focused that much on the fact that the breakaway of Slovenia was preceded by an intensive period of negotiations following the referendum.<sup>995</sup> Negotiations went on even after the declaration of independence, and continued until the other republics massively started to declare independence. Whilst it cannot be held that negotiations were per-

<sup>990</sup> C. Navari: “*Territoriality, Self-Determination and Crimea after Badinter*”, cit., p. 1307.

<sup>991</sup> Badinter Commission, Opinion no. 1, cit.

<sup>992</sup> See Chapter 3 at pp. 153-155.

<sup>993</sup> S. Tierney: “*Sovereignty and Crimea, How Referendum Democracy Complicates Constituent Power in Multinational Societies*”, German Law Journal, 2015, vol. 16, pp. 532-533.

<sup>994</sup> B. Stankovski: “*Is There an Obligation to Negotiate Secession in International Law? From Reference re Secession of Quebec to Kosovo Advisory Opinion and Beyond*”, ESIL Research Paper, Conference Paper No. 13/2015, vol. 6 n.5, <http://www.esil-sedi.eu/node/1187>

<sup>995</sup> Ibid at p.9.

ceived as an international obligation, they are nevertheless a sign of practice. Furthermore, the hesitations of the international community at that time in recognising the entities declaring independence could be explained also by the ongoing negotiation with Belgrade. Against the wishes of the seceding units, Belgrade claimed the unity of the federation could be preserved.<sup>996</sup> Seen from this angle, it can be argued that the duty to negotiate triggered by the referendum falls primarily upon the parent State, the same position which seems to have been embraced by the Supreme Court of Canada in *Reference re Secession*. By claiming that the other members of the Federation would have an obligation to acknowledge and respect the expression of the democratic will, the Supreme Court of Canada does not consider this step an option, but an obligation.<sup>997</sup> The negotiation should be open to all the interest parties – e.g. in the case of Canada the other provinces of the State. It could be claimed that this kind of obligation does not belong to the international legal arena, but is proper of a constitutional analysis.<sup>998</sup> The position is not totally convincing. One of the main assumption of this research has been that both secession and referenda lie at the intersection between constitutional and international law. This assumption impacts on the way legal scholars conduct their inquiry. In particular, the fact that there are no clear rules flowing from the international legal order does not mean that the issue is purely domestic. Rather, as the Venice Commission has done in developing common standards for the conduct of referenda, the inquiry on international principles can take the stand from a comparative constitutional study.<sup>999</sup> In fact, the Supreme Court of Canada does not detail whether this obligation flows from international or domestic law, but looks at the main pillars of the Canadian constitutional order, notably democracy; federalism; the rule of law, constitutionalism and respect for minorities. At para. 54 the Court maintains that the pillars displayed above “*are binding among courts and governments*”, irrespective of their being grounded in the domestic constitutional order. From this position it could be inferred they may have a universal validity.<sup>1000</sup> Actually, if an obligation triggered by the territorial referendum is in the way of formation, it is probably directed internally towards the parent State. That is to say that there would be no obligation flowing upon the other members of the international community in terms of recognition. The internal focus is also justified by the need to ensure that negotiations do not exclude the relevant stakeholders, notably by ensuring the participation of minority groups. In fact, in the Opinion of the Venice Commission on the referendum in Crimea, the Commission stresses the absence of negotiations about a consensual solution among all stakeholders, “*especially with participation of all ethnic groups of Crimea*”.<sup>1001</sup>

<sup>996</sup> Ibid.

<sup>997</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para.88.

<sup>998</sup> J. Vidmar: “*Catalonia. The way Forward is Comparative Constitutional rather than an International Legal Argument*”, 23 October 2017, <https://www.ejiltalk.org/catalonia-the-way-forward-is-comparative-constitutional-rather-than-international-legal-argument/>

<sup>999</sup> See Introduction at p. 22 and Chapter 4 sections 2.1.1 and 3.

<sup>1000</sup> B. Stankovski: “*Is There an Obligation to Negotiate Secession in International Law? From Reference re Secession of Quebec to Kosovo Advisory Opinion and Beyond*”, cit., pp. 3-4.

<sup>1001</sup> Venice Commission, Opinion n. 762/2014, CDL-AD(2014)002, 21 March 2014, para. 22.

This “internal focus” as it could be labelled, can be found also in the case of the referendum in Scotland. The Scottish experience followed the model laid down by the Supreme Court of Canada in *Reference Re Secession of Quebec*: in case of a clear vote cast in favour of secession, that manifestation of the popular will cannot be ignored by the parent State.<sup>1002</sup> However, as the Supreme Court of Canada argued, the obligation to negotiate does not imply an obligation of good result. Needless to say, there remains an obligation to negotiate in good faith, but *Reference Re Secession of Quebec* excluded that it was the duty of the Court to establish which should be the result of the negotiations.<sup>1003</sup> It could be held that the position of the Supreme Court is context-dependent. By contrast, sub-units wishing to secede show sensible differences, depending also on the social and legal order of the parent State. The fact that they significantly vary does not mean they do not share similarities. In the cases of Montenegro, Quebec and Scotland, negotiations were the turning point in the definition of the future territorial arrangement and the process was precisely triggered by the referendum. At the other side of the spectrum, it could be argued that where negotiations are not carried out, the relationship between the sub-unit and the central government, e.g. in Catalonia, is exacerbated. It is noteworthy that following the vote, the EU called for a concerted solution,<sup>1004</sup> and people all over Spain rallied across the country in favour of the opening of negotiations.<sup>1005</sup> In this sense, Sen convincingly argues that referenda “*should be a complementary and finalising element of a more complex pattern of conflict resolution, including patient negotiations, agreement on an elite level and transitory phases*”.<sup>1006</sup> In other words, the prospects of a negotiated secession could serve the purposes of maintaining international stability. In light of the above, it is time to collect all the pieces together and summarize a proposal displayed below.

### 3. Secession and referendum in international law: the attempt to solve the puzzle

The road to the general conclusions about the relationship between secession and territorial referenda in international law passes by the adoption of the *normative due process* and the differentiation developed by Weller between *privileged* and *unprivileged units*. With the notion of *unprivileged units* it has to be intended those units which do not possess the requirements to exercise the right to self-determination, but

<sup>1002</sup> Supreme Court of Canada, *Reference Re Secession of Quebec*, cit., para. 151.

<sup>1003</sup> B. Stankovski: “*Is There an Obligation to Negotiate Secession in International Law? From Reference re Secession of Quebec to Kosovo Advisory Opinion and Beyond*”, cit., p.16.

<sup>1004</sup> Statement on behalf of the EU, STATEMENT/17/3626 [http://europa.eu/rapid/press-release\\_STATEMENT-17-3626\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-3626_en.htm), but see for a different position M. Weller, arguing that Catalonia has already tried all the possible negotiated solutions in “*Secession and Self-determination in Western Europe: The Case of Catalonia*”, 18 October 2017, [ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia](http://ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia).

<sup>1005</sup> See for an account <http://www.elperiodico.com/es/opinion/20171001/nada-sera-como-antes-6319810>.

<sup>1006</sup> I. Gokhan Sen, *Sovereignty Referendum in International and Constitutional Law*, cit., p. 273.

attempt to obtain statehood in a manner which is not in itself internationally unlawful.<sup>1007</sup> The way their claims are brought, then, is highly influenced by the increasing linkage between international law and concepts relating to democracy.<sup>1008</sup> The claims advanced by *unprivileged units* cannot be considered an expression of their right to external self-determination, unless the units manage to prove that they are entitled to self-determination in its consolidated interpretation in the international legal order.<sup>1009</sup> Seceding units like Catalonia, Crimea, Quebec, Abkhazia, together with the others analysed throughout this study, can be labelled *unprivileged*, as suggested by Weller.<sup>1010</sup> Assuming they qualify as *unprivileged units*, their quests are neither protected nor favoured by the international legal order. Hence, unprivileged units need to acquire legitimacy internally and externally: they do so by building and strengthening State institutions and by trying to prove their political viability through the resort to a referendum respectively.<sup>1011</sup>

The high emphasis put in the principle of democracy in international law justifies the preference for the “tool referendum” by unprivileged units.<sup>1012</sup> Even though the referendum *per se* cannot justify secession as the sub-units wish, one further element that could support the consolidation of the procedural role of the referendum in international law can be found in the interrelation between international and constitutional law. In the field of secession, which lies at the intersection between international and domestic law, constitutional practice can be topical for discerning the existence of general principles of law. The mutual influence between international human rights and international law on the one side, and States’ constitutions on the other side may lead to argue that there is an increasing coordination between international and constitutional law.<sup>1013</sup> As Sen aptly observes, “*the current state of sovereignty referendums in contemporary constitutional law must be read in the light of the state-centred approach prevalent in international law and the tendency of states to internalise the referendum within the confines of their own national legal systems*”.<sup>1014</sup> However, this positive view should be completed with some remarks. The existing difficulties for sub-units attempting to acquire statehood following a referendum are best exemplified by the reactions of the international community, which are not consistent and difficult to detect. For instance, Kosovo is largely recognised although it has not carried out a referendum, whilst Abkhazia is still struggling for

<sup>1007</sup> Ibid.

<sup>1008</sup> See A. Peters: “*The Crimean vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*”, cit., pp. 255-280. See also A. Pellet: “*Democratic Secession from a Multinational State*”, *Journal of Ethics*, 2002, pp. 558-586; J. Vidmar, *Democratic Statehood in International Law*, cit., pp. 151-168.

<sup>1009</sup> See Chapter 1.

<sup>1010</sup> M. Weller, *Escaping the Self-Determination Trap*, cit., pp. 23-25.

<sup>1011</sup> D. Scheindlin: “*Phantom Referendums in Phantom States: Meaningless Farce or a Bridge to Reality?*”, *Nationalism and Ethnic Politics*, 2012, vol. 18, p.66.

<sup>1012</sup> N. Caspersen: “*Democracy, Nationalism and (lack of) Sovereignty: the Complex Dynamics of Democratization in Unrecognized Quasi-States*”, *Nations and Nationalism*, 2011, vol. 17, p. 344.

<sup>1013</sup> I. Gokhan Sen, *Sovereignty Referendums in International and Constitutional Law*, cit., p. 272 citing I. Brownlie, *Principles of International Law*, Oxford, 2003, pp. 33–34.

<sup>1014</sup> Ibid.

recognition despite its considerable number of referenda about secession. For the sake of completeness, it has to be observed that despite its importance, the threshold for assessing the effectiveness requirement seems very subjective. A limited degree of effectiveness is ascribed to Abkhazia, but a very low degree of effectiveness was necessary for some states to recognize Kosovo.<sup>1015</sup> In this sense, it can be safely maintained that when the procedure for secession passes from the holding of a referendum in compliance with international standards, secession acquires more legitimacy vis-à-vis the parent State and the international community. However, the immediate aftermath of the 2017 referendum in Catalonia shows that the use of referendum cannot be a sufficient condition for secession. Alongside the doubts surrounding the organisation and administration of the referendum, other “collateral” conditions, such as the adoption of a procedure for secession guided by the rule of law and the negotiation between the parties, do not seem to be verified. Moreover, the fact that the declaration of independence was suspended and not immediately implemented on the basis of the vote could also support this position. As regards states’ responses, when secession is attempted to in a well-established democracy, other states usually refrain from pronouncing themselves on the matter. The idea that a referendum may increase the legitimacy of seceding aspirations concurs to the general view that democracy could become a necessary requirement for a legitimate government. The recognition of insurgents during the Arab Spring is just the last sign of the democratic-entitlement school of thought pervading international law, according to which recognition and non-recognition depend also on the ability by the central government to ensure, *inter alia*, a multi-party system and free periodic elections.<sup>1016</sup> Nevertheless, the increasing legal soundness of these arguments in international law should not be overvalued. Clearly, the progressive development of international law has come to include also principles linked to democratic decision-making. After all, the right to have periodical free elections is nothing new: it was included in the international Covenants already in 1966. However, when secession is at stake, the progressive development of international law is rather uncertain and the democratic decision making argument loses power.

The engagement of the international community in the process of secession by Montenegro as well as the path followed by the Scottish and British government towards the 2014 referendum for independence, support the views expressed by the Supreme Court of Canada regarding the obligation for the interest parties to negotiate a new territorial settlement. In this sense, in particular, the Scottish case emerged

<sup>1015</sup> A. Peters: “Statehood after 1989: ‘Effectivités’ between Legality and Virtuality”, cit., p. 4.

<sup>1016</sup> The original formulation of the democratic entitlement belongs to T. D. Franck: “*The Emerging Right to Democratic Governance*”, cit., p. 46 ff., cited by D. Amoroso: “*Il riconoscimento degli insorti nella promozione del principio di auto-determinazione interna: considerazioni alla luce della primavera araba*”, federalismi.it, 2013, p. 27. See also, *ex plurimis* A. Rosas: “*Internal Self-Determination*” in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Martinus Nijhoff, 1993, p. 225 ff. See for an opposite view A. Magen: “*The Democratic Entitlement in an Era of Democratic Recession*”, Cambridge Journal of International and Comparative Law, 2015, vol. 4, pp. 368-381.

as a model for future cases.<sup>1017</sup> First of all, fair elections - by which a clear majority endorsing secession among the government faction is expressed- should precede any official discussion about a territorial referendum. Secondly, domestic law or a special agreement should establish the obligation to resort to a referendum in order to carry out a secession. Thirdly, in order to guarantee the legality of the vote, procedural standards have to be ensured: the question posed to the voters must be extremely clear. Lastly, there comes the importance of a negotiated solution, agreed among the parent State and the sub-unit, about the steps to undertake on the basis of the results of the vote.<sup>1018</sup>

Arguably, the idea that a referendum might trigger an obligation to negotiate can satisfy also those sceptics about the use of referenda in general. In fact, claiming that the seceding referendum triggers the obligation upon the parties to embark on negotiations could be consistent with the view that referenda alone cannot justify statehood. Rather, there has to be a sound legal basis of another type, such as the dissolution of a State or a negotiated procedure with the parent State in order to give birth to a new entity. From this perspective, the previously mentioned argument by Sen about referenda as an additional tool in the solution of territorial disputes is even more persuasive. In broader terms, the research suggests that one practicable road to foster the progressive development of a right to secede in the international legal order passes through the consolidation of a procedure of negotiated secession. The position is not new<sup>1019</sup> and the cases tackled in this research stressed the importance of its revitalisation. Negotiating secession does not imply overlapping the concepts of unilateral secession and consensual separation. Secession as a factual instance is still a unilateral act undertaken by the seceding-unit only. The fact that secession is voted via referendum shifts the focus on the procedure. The importance of the procedural approach is bolstered by the acknowledgment that not all territorial referenda may be the basis of a territorial change. With a view to become a necessary procedural step for a territorial realignment, the referendum has to comply with certain procedural standards. For the procedural requirements one has to rely especially upon the practice of the Venice Commission, but a preliminary guidance can be also found in the OSCE's 1990 *Charter of Paris*.<sup>1020</sup> Arguably, some other time is necessary for the customary nature of these requirements to be confirmed. The self-referential character of the Council of Europe hinted at in the previous Chapters casts some

<sup>1017</sup> R. Linera, D. Cetra: “*The Independence case in comparative Perspective*”, *The Political Quarterly*, 2015, vol. 86, p. 215.

<sup>1018</sup> *Ibid.*

<sup>1019</sup> S. Courtois: “*Démocratie délibérative et sécession*”, *Revue Canadienne de science Politique*, Décembre 2004, vol. 37, pp. 811–838; M. MacLaren: “*Trust the People? Democratic Secessionism and Contemporary Practice*”, *German Law Journal*, 2015, vol. 16, pp. 631–657; B. Levites: “*The Scottish independence referendum and the principles of Democratic secession*”, *Brooklyn Journal of International Law*, 2015, vol. 41, pp. 373–405; S. Mancini: “*Ai confini del diritto, una teoria democratica della secessione*”, *Osservatorio Costituzionale* 2015, pp.1–9.

<sup>1020</sup> T. W. White: “*Referendum in Crimea: Developing International Law on Territorial Realignment Referendums*”, *cit.*, p. 860.

doubts over the real tenure of international standards.<sup>1021</sup> In particular, the fact that the Council of Europe is an international organisation with a continental spirit, thus leaving aside other global actors such as the Asian countries, could lead to speak about a regional custom. Nevertheless, the critique is partly dismissed by the argumentation developed in Chapter 3 and 4 about the reactions to the referendum in Crimea and could be further confirmed by the Catalan issue. The majority of the members of the international community expressed concern for the violation of the standards for a free and fair referendum by Crimea.<sup>1022</sup> Merging the various positions taken by international organisations and States, it can be safely concluded that the following standards are consolidated: (i) the peacefulness of the area, (ii) the clarity of the question, (iii) freedom of the media and (iv) international observation.<sup>1023</sup>

#### 4. Conclusion

Aspiration to statehood is still a timeless issue and even though international law progressively develops, its evolution in this field is slow and continuously under debate. However, the use of referenda to legitimise secession is a reality that cannot be wished away. Throughout this study, it was stressed that the referendum can be extremely powerful in creating momentum for a secession against the absence of a normative framework established by the international legal order, provided that it is held in compliance with international standards. Nevertheless, the international legal order does not prescribe that (i) referenda are sufficient to lawfully secede or (ii) seceding sub-units are required to schedule a referendum to secede. For the latter point, however, there are enough elements to maintain that a procedural norm in this sense is – at least- already in consolidation.

In concluding this study, it is important to underline that it is not claimed here that procedural standards might substitute the effectiveness test, which remains a very robust argument when it comes to secession.<sup>1024</sup> Nevertheless, for Bosnia-Herzegovina and Kosovo, for instance, recognition of statehood was given irrespective of hardly effective control. The perception of the legitimacy of the claim to statehood depended, *inter alia*, on the democratic requirement of both states.<sup>1025</sup> These same arguments do not seem to have changed: let us recall that among the legal justifications presented by the Russian Federation to support the annexation of

<sup>1021</sup> See for a critique in this direction C. Santulli: “*La Crise Ukrainienne: Position du Problème*”, *Revue General de Droit International Public*, 2014, pp. 799–820 especially at 808.

<sup>1022</sup> See Chapter 3 section 9 and Chapter 4 sections 3 and 4.

<sup>1023</sup> S. Macini: “*Il Montenegro e la Democrazia della Secessione*”, *Quaderni Costituzionali*, 2007, vol. 1, pp. 157-159.

<sup>1024</sup> On this point T. D. Grant, *The recognition of States: Law and Practice in Debate and Evolution*, Westport, 1999, p. 89.

<sup>1025</sup> A. Peters: “*Statehood after 1989: ‘Effectivités’ between Legality and Virtuality*”, cit., citing M. Herdegen: “*Der Wegfall effektiver Staatsgewalt im Völkerrecht: ‘The Failed State’*” in D. Thürer, M. Herdegen and G. Hohloch, *Der Wegfall effektiver Staatsgewalt: ‘The Failed State’*, Heidelberg, 1996, pp. 49- 85.

Crimea, one was the democratic expression of the will of the people.<sup>1026</sup> As Krisch aptly observes, the very fact that the Russian Federation had to come out with justifications in support of its conduct in Crimea suggests that international law matters when territorial changes are at stake.<sup>1027</sup> The easiness with which States exploit some international legal discourses also shows the uncertainty and weakness of international law when it comes to secession. The same holds true for the procedural and substantive conditions for creation of statehood. In this sense, the Crimean case especially shows how much classical rules of international law have come under pressure by new legal arguments linked to democracy and human rights protection. The dangerous *vacuum* of the international legal order gives more space for covering interventionists practices, as well as for the abuse of the use of the referendum, with a view to cover an illegal conduct. The case of Catalonia best exemplifies the dangers connected to the abuse of this tool within well-established democracies. Through in-depth examination of case studies and of the interconnection between secession, self-determination and referenda, the research has intended that the need for a new international law framework on the use of referenda for territorial changes has become even more impellent.

<sup>1026</sup> See the *Executive Order on recognising Republic of Crimea* signed by President Putin on 17 March 2014, which is expressly deemed to be grounded on the freely expressed will of the people <http://en.kremlin.ru/events/president/news/20596>

<sup>1027</sup>N. Krisch: “*Crimea and the Limits of International Law*”, EJILTALK, 10 March 2014, <https://www.ejiltalk.org/crimea-and-the-limits-of-international-law/>.

## List of Abbreviations

AFDI	Annuaire français de droit international
BOE	Boletín Oficial del Estado
AJIL	American Journal of International Law
BYB IL.	British Year Book of International Law
Cal. L.R.	California Law Review
CLJ	Cambridge Law Journal
EC	European Community
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ELJ	European Law Journal
EU	European Union
GA	General Assembly
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HRC	Human Right Council
HRLJ	Human Rights Law Journal
ICJ	The International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILA	International Law Association

## Secession and Referendum

ILCY	International Law Commission
ILM	International Legal Materials
ILM	International Legal Materials
Loy.L.A. Int'l & Comp. L. Rev	Loyola of Los Angeles International and Comparative Law Review
STC	Sentencia del Tribunal Constitucional
UN	United Nations
Va. J. Int. Law	Virginia Journal of International Law
VCLT	Vienna Convention on the Law of Treaties 1969
Y.B. Int'l L. Comm'n	Year Book of the International Law Commission
Yale LJ	Yale Law Journal

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*“Success is not final, failure is not fatal. It is the courage to continue that counts.”*  
W. Churchill

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