NARROWING DOWN THE SELF-DETERMINATION DEBATE DUE TO THE INTERDEPENDENCE BETWEEN TERRITORIAL INTEGRITY AND REMEDIAL SECESSION*

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Keywords: remedial secession, self-determination, territorial integrity, self-defense, subjects of international law.

Remedial Secession in Law and Politics

International law's lack of effective enforcement mechanisms and limited impact on state policies are well-known facts. Power and politics solve most conflicts, not the law – especially when stakes are as high as in territorial disputes. Too often governments and scholars intentionally misinterpret and dilute the law in political arguments. But this should not prevent us from filtering out the misleading arguments and trying to eliminate uncertainty and ambiguity of international law to the maximum extent possible.

There is an opportunity of narrowing down the debate over the applicability of territorial integrity and self-determination by examining the connection and correlation between the right of peoples to self-determination and their international legal status. This connection helps demonstrate that prohibiting remedial secession in international law would cause fundamental legal self-contradictions. At the same time, the right to self-determination cannot be interpreted in an extreme and limitless manner.

Remedial secession is claimed to be a right of all peoples to secede unilaterally from their parent states in case the latter severely and/or systematically violates their fundamental rights (e.g. evident discrimination against an ethnic group, policies aimed at the change of demographic balance in a certain region etc.). Remedial secession is in fact a victimized population's right to use force or the jus ad bellum. But before doing so, the oppressed people, as well as the international community, should explore all other means of ceasing the violations and preventing the worst crimes. Only after the failure of domestic means and international efforts can secession be implemented as a remedy of last resort.

Remedial secession is neither codified precisely in international law nor is it denied by any international document or court decision. Most scholars favor the neutrality argument with regards to legality of self-determination, best described by James Crawford: "[S]ecession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally".[1]

When issuing an advisory opinion on the Kosovo case, the International Court of Justice (ICJ) deemed it unnecessary to resolve the question whether or not there is a right to remedial secession in international law, and so did the Supreme Court of Canada as well in its 1998 judgment on the Quebec Case.[2] However, there is a substantial amount of arguments and interpretations of existing laws supporting the concept. It is supported indirectly by some international documents and the state practice of the last seven decades. Remedial secession is recognized directly in the 1921 report of the League of Nations on the Åaland Islands question and in the 1994 decision of the African Commission on Human and Peoples' rights,[3] as well as in the statements of 11 states submitted to ICJ for the Kosovo case.[4] Additionally, many scholars call

* Հոդվածն ընդունվել է 05.02.20:
Հոդվածը տպագրության է երաշխավորել խմբագրական խորհրդի անդամ, պ.գ.թ., դոցենտ Վ. Պետրոսյանը: 13.02.20:

for its formal recognition or claim it is already an established international right.[5] These arguments come on top of the existing international documents in support of self-determination in general.

Remedial secession finds indirect but very strong support in the Friendly Relations Declaration (1970), which reflects customary international law. The so called 'safeguard clause' of the document reads as follows:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[6]

This 'safeguard clause' sheds light on the uneasy correlation between the right to self-determination and the principle of territorial integrity. While reaffirming territorial integrity and political unity of states, the resolution also adds a precondition – states have to act in compliance with the principle of self-determination and represent its entire population without discrimination. Therefore, this provision is often read a contrario and it is claimed that if a state ignores the right to self-determination, deliberately prevents a part of its population from being represented by the government, then territorial integrity and political unity of such a state can be "dismembered or impaired." A severe, systemic violation of the rights of an ethnic group is a clear example of such a violation. The wording of this clause was later reaffirmed in the 1993 Vienna Declaration and Programme of Action.[7]

The arguments supporting remedial secession are well presented and explained by many scholars, so there is no need for us to go into further detail.[8]

Legal Personality and Duties of Peoples in International Law

Before going further to the main arguments, we must first agree (or disagree) on the existence of the following principle: a personality – physical or juridical, cannot have any duties under the law without having at least one full-fledged right. If an entity does not have a single right under international law, then the latter cannot be a subject of international law, and therefore cannot have duties as well. The entity must have at least some basic space of freedom of actions in order to enable the law to set legal limitations. This should be considered as a general principle of law, true for both domestic law and international laws accordingly. Otherwise, the relevant laws would be as illegitimate as slavery and colonization – both outlawed right after World War II.

Because self-determination and human rights are a relatively new phenomena in international relations, the status of peoples under international law is still unclear in many aspects. A bit more than a century ago only "civilized" nations were considered to be subjects of international law, and peoples would have no single international right as distinct entity.[9] Back then, international law had nothing to do with the rights and duties of those struggling for secession. Secession was an internal matter of each state, as were all the other forms of revolutions. Nowhere in the past can we find an international norm that would oblige the peoples to respect the territorial title or territorial integrity of parent states. At the same time, 'legalizing' secession before the 1928 Kellogg–Briand Pact would be of little practical significance, since the use of force used to be a legitimate part of state sovereignty, and states were free to use force against peoples both before and after their secession and international recognition.[10] Peoples used to secede from states before the term 'self-determination' was invented for international law, and if someone is denying the right to self-determination or remedial secession, he or she ought to prove that at a certain point in history, peoples have become international legal personalities or

have been obliged to respect the territorial integrity of states. Moreover, even if peoples are subjects of international law, it does not mean per se that international law prohibits remedial secession.

International law refers to a number of rights for peoples in the context of human rights, self-determination and decolonization, but are these full-fledged rights? Can individuals or peoples implement these rights without their government's prior approval or are they guaranteed with any sanctions or remedies? In most cases (if not all) the answer is no – they cannot, and without the mentioned elements any presumed right is rather a privilege not secured from arbitrarily withdrawal or violation. Thus, referring to such rights to counter remedial secession is hypocritical. Below is a detailed look into each of these presumed rights. There are four set of rights that can potentially be sufficient enough for the claim that peoples cannot violate territorial integrity:

1. *International Human Rights Law (IHRL)*
2. *Internal self-determination*
3. *Decolonization*
4. *External self-determination*

First, one may argue that individuals and peoples are protected by the International Human Rights Law (IHRL), reflected in the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR)[11]. But are IHRL norms sufficient enough to claim that peoples must respect state territorial integrity? Both ICCPR and ICESCR reaffirm in the first article that "All peoples have the right of self-determination", and referring to the documents that have codified the right to self-determination while claiming that this very right is non-existent would per se be a self-contradictory argument[12]. Moreover, if a case of remedial secession arises, it already means that the given state has been severely violating IHRL at first place – forcing an entity to secede, and such states should not have an opportunity to make the case for territorial integrity by referring to the IHRL laws they themselves violate.

Technically, IHRL documents are interstate treaties that neither create international rights for individuals nor grant them international legal personality. Each state undertakes an obligation under ICCPR "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[13] However, these are obligations towards the other signatories and the international community, not their citizens. Thus, the corresponding rights for citizens remain within the scope of parent state's domestic authority. As for ICESCR, it only sets objectives, not duties for states. Unlike ICCPR, ICESCR does not require to "respect and to ensure" the rights, but merely to "take steps […] with a view to achieving progressively the full realization of the rights recognized in the present Covenant"[14].

Second, peoples are claimed to have a right to internal self-determination. There seems to be a consensus that the right to internal self-determination is a customary international law, and it is illegal inter alia to abolish autonomies.[15] However, internal self-determination is again not a guaranteed right:[16] No provisions about internal self-determination are being incorporated in the domestic law, nor are they granting peoples a right to either unilaterally establish an autonomy or enlarge the scope of their administrative authority. In fact, state governments do not really consider such a right to exist – they simply cease any demands for a greater autonomy as a blatant violation of an existing constitution. A right means the ability to do something. Whenever the implementation of a right needs another entity's consent and approval in advance, it is a privilege rather than a full-fledged right. And whenever a non-international entity makes a request for a greater autonomy and addresses it to its government, is turns into a regular domestic matter that is regulated by the domestic law, rather than international law. Hence, internal self-determination is also not a sufficient international right.

Third, another common argument is the exclusiveness of decolonization: peoples have a right to decolonization presumably as the only legitimate way of external self-determination. However, all the former colonies have gained independence by the end of 1980s, and the UN currently lists only 17 non-self-governing territories, subject to decolonization, with about 1.7 million population in total[17]. Therefore, claiming decolonization to be the only avenue of self-determination means only 1.7 million people currently have such a right, which would in fact suggest that the right to self-determination no longer exists. As for the potential of new cases of colonization, it is not only very unlikely, but also implies severe violation of a number of other international norms before even getting close to colonization (e.g. aggression, violation of the principle of territorial integrity, human rights and humanitarian law violations, including the laws on occupation, as well as crimes against humanity). Hence, by the time a territory is colonized again, all the wrongful acts of the aggressor state would already have been covered by other norms of international law.

Finally, by excluding IHRL, Internal self-determination and Decolonization through the process of elimination, we are left with only one potential right that might be referred to in order to prove that peoples are subjects of international law. We have narrowed down the choice to the potential right to external self-determination. The latter's widest interpretation is the right to a unilateral secession, and the narrowest interpretation is remedial secession. This also means that the recognition of a wide interpretation would also mean a per se recognition of a right to remedial secession as well.

As a reminder, the objective of looking at all these potential rights was to find out if peoples have at least one full-fledged right to be eligible for being legal personalities, i.e. subjects of international law. If this is not the case, then international law cannot limit their actions – including the right to conduct remedial secession. But since we have addressed and excluded all the rights but self-determination and remedial secession, it turns out that in order to claim that international law prohibits remedial secession, one must admit the existence of that very right. This brings us to the conclusion that it self-contradictory to claim that that international law prohibits remedial secession.

On the other hand, self-determination and remedial secession should not be totally unregulated by international law. This would mean peoples have no international right, including self-determination. But that is definitely not the case – there are too many precise references to the right to self-determination to disregard them all. Moreover, remedial secession perfectly aligns with the principles of human rights protection, democracy and natural law, while territorial integrity is the last 'line of defense' for the oppressive states in finding justifications for their illegal actions.

Remedial Secession as a Right Deriving from Self-Defense

Remedial secession is mostly considered as a specific type of self-determination. However, there is another, no less important fundamental right that lies behind remedial secession – the right to self-defense.[18] The right to self-defense of each individual against an eminent threat is present in most (if not all) domestic criminal codes.[19] At the same time, international law recognizes the right to self-defense for all states.[20] As Yoram Dinstein puts it, "Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense".[21] This is a tremendous state and non-state practice and opinio juris to claim that self-defense is a universal right, and that all individuals of the world have a right to self-defense in certain circumstances. That also enables all the peoples, as groups of individuals, to execute such a right collectively.

The only way oppressed peoples can protect themselves from the parent state's severe violations is to force away all the components of said state. This naturally turns into secession from the abusive state and creation of a new government to replace the expelled agencies. Here

the self-defense component of remedial secession arises even earlier than that of self-determination.

Remedial secession is not only a right, but also a sanction, a remedy of other essential rights in the non-hierarchical system of international law. Remedial secession is by itself the last resort of protection for victimized ethnic groups. Even if the international community develops effective mechanisms of human rights protection, they may fail one day, too. And if they do, peoples can still resort to their last resort remedy. As long as states and peoples exist, there is a hypothetic chance of oppression against peoples, thus they will not lose their remedial right, no matter how seldom it is applied in the future. Therefore, not only cannot remedial secession be prohibited now, but also in the foreseeable future.

Narrowing Down the Debate

How can all these arguments help interpret the law? First of all, they may help further narrow down the debate by filtering out some theories about the supremacy of territorial integrity over self-determination in general and remedial secession in particular. The ICJ has already indicated in the Kosovo case that "the scope of the principle of territorial integrity is confined to the sphere of relations between States" thus dismissing the claims that "a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity" [22]. We could go beyond and state that not only declarations of independence, but also the act of remedial secession as such is not prohibited by any international norm, including the principles of territorial integrity, political unity and inviolability of borders.

Second, a precise recognition and codification of remedial secession by international law is not a precondition for its legality. If peoples have no international legal personality, and the matter of remedial secession lies outside the scope of international law, then international law will simply be not in the position to regulate or impose duties, preconditions or limitations on the actions of seceding entities. On the other hand, from the perspective of the domestic law remedial secession is not only the ultimate safeguard of vital political rights but also an ultimate self-defense measure justified by the criminal codes of all states[23].

In fact, the current regulations are as good as a recognition of remedial secession, because the key elements of the right are already reflected both in international law and in state practice. We also have the element of potential legal consequences – sanctions and other measures pro et contra certain course of actions. On one hand, the fact that remedial secession can never be prohibited is more than enough to claim that individual or collective international sanctions can never be taken against peoples by reason of conducting remedial secession. On the other hand, existing regulations on human rights and use of force are already good enough to take measures in favor of secession movements. The UN Security Council has the authority to intervene with Chapter VII measures and has an established practice of using this power to address humanitarian crisis. Thus, it can intervene both before and after remedial secession is recognized. Certainly, the legal and political significance of the recognition of remedial secession should not be underestimated. However, recognition will only outlaw what is already outlawed by the existing regulations – gross and systematic human rights violations, and will not change the politically driven nature of Security Council's decision-making process.

Another important aspect of remedial secession is the potential help from third party states. Here again some existing instinctual documents already enable external support to remedial secession movements. Although international law prohibits the interference into internal affairs of states, it also obliges the states to "prevent and punish" genocides, "promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples" and the peoples in pursuit of the exercise of this right "are entitled to seek and to receive support in accordance with the purposes and principles of the Charter[24]. But even if we assume that

international law does prohibit such an external support to, that has no impact on the rights and duties of a seceding entity itself. Peoples must be recognized as a subject of international law before they could be obliged to refrain from seeking and receiving external help. And as discussed before, such a recognition also comes with the recognition of the right to remedial secession itself.

Normally, external help is of vital importance, as secession movements are mostly weakened by parent state's oppression. Very seldom do the great powers and neighboring states remain neutral towards secession conflicts. But those taking sides are mostly motivated by self-interest, not law and order. Thus, codifying remedial secession would not provoke extra interventionism.

A Fair Social Contract

By following the principle that peoples cannot have any duties under the law without having at least one full-fledged right, we used the method of elimination, we analyzed all the potential rights that peoples can have and came to the conclusion that remedial secession is the minimal required right to consider peoples as subjects of international law. Regardless of whether or not peoples are subjects of international law, remedial secession is in a win-win position in either case – it may be recognized to a greater or lesser extent, but in no case can it be prohibited.

This is also a major political argument for its precise recognition through codification in an international convention out a UN resolution. Leaving peoples out of the scopes of international law grants them almost unlimited choice of actions – including secession, rather than diminishing their rights, and the ambiguity around the right to self-determination undermines the global stability, not vice versa.

Remedial secession may be used to reconcile the opposing views in the self-determination versus territorial integrity debate. Peoples should be recognized as the ultimate subjects of international law that have authorized respective states to act on their behalf. A codified social contract with 'safeguard clause' may lie at the bottom of the relations between peoples and states, recognizing precisely the right to remedial secession, but prohibiting any other types of unilateral secession.

Interestingly, there is no need to draft new provisions for this 'security clause' – all the necessary provisions and wordings are already available in various international documents. A unanimous UN resolution could proclaim this 'social contract' between states and peoples[25]. It would be very appropriate to begin such a resolution with the first line of the UN Charter: "We the peoples of the United Nations determined…"

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7. World Conference on Human Rights, *Vienna Declaration and Programme of Action* (1993), I.2.
8. *See supra* note 5.
9. *See e.g.* Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention* 16 German L.J. 384-415, at 406 (2015), Fisher *supra* note 5, at 267-269.
10. Signed in 1928, *General Pact for the Renunciation of War* was the first multilateral document ever to outlaw the use of force for dispute settlement and to "renounce [the recourse to war] as an instrument of national policy in their relations with one another".
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12. *Id.* at common art. 1.
13. ICCPR, *Id.*, art. 2
14. ICESCR*, supra* note 11, art. 2.
15. *See e.g.* Simon, *supra* note 5, at 119-131.
16. *See e.g.* Buchanan, *supra* note 5, at 342.

17. UN, *Non-Self-Governing Territories*, Committee of 24, at http://www.un.org/en/decolonization/nonselfgovterritories.shtml (Last viewed on Jan. 16, 2017)
18. *See* Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 LEIDEN JO INT'L L 95-108, at 101-102 (2011):"[I]nternational law has [...] received some structural elements from criminal law. Where secession is depicted as a means of last resort, as the *ultima ratio* in a 'state of necessity', the debate is conducted within this criminal-law paradigm. Just as self-defense under Article 51 of the UN Charter is a justification for the resort to military force that would otherwise violate Article 2(4), secession might be construed as a 'defense'." *See* also Jens David Ohlin, *The Right to Exist and the Right to Resist*, in FERNANDO TESON (ED.), THE THEORY OF SELF-DETERMINATION, 70-93, at 86 (Cambridge University Press, 2015).
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25. *See* Ablan *supra* note 5, at 236-243 (The author also suggests the General Assembly to authorise the ICJ to decide on all the disputes related to self-determination); see also Brewer *supra* note 5, at 283, Roth, *supra* note 9, at 408.

SUMMARY

Narrowing Down the Self-Determination Debate Due to the Interdependence between Territorial Integrity and Remedial Secession

Makar Melikyan

This article is an attempt to narrow down the debate around the right to self-determination and the principle of territorial integrity. Studying the connection between the right of peoples to self-determination and their international legal status brings to the conclusion that neither territorial integrity, nor remedial secession can exist in international law without the other one. The following principle is applied – if an entity does not have at least one right under international law, then it also cannot have international duties. Therefore, respect for parent state's territorial integrity may be mandatory only in case the right of peoples to remedial secession is recognized. And since any prohibition of remedial secession will cause substantial legal self-contradictions, it is suggested that codifying remedial secession would not only help strengthen international peace and stability, but also reconcile the opposing views in the self-determination *versus* territorial integrity debate.

ԱՄՓՈՓԱԳԻՐ

Ինքնորոշման շուրջ տարամեկնաբանությունների շրջանակի նեղացում տարածքային ամբողջականության և «անջատում հանուն փրկության» դոկտրինի միջև առկա փոխկապակցվածության վերհանման միջոցով

Մակար Մելիքյան

Բանալի բառեր՝ անջատում հանուն փրկության, ինքնորոշում, տարածքային ամբողջականություն, ինքնապաշտպանություն, միջազգային իրավասուբյեկտություն:

Այս աշխատությունում մենք փորձ ենք կատարում նեղացնելու ինքնորոշման իրավունքի և տարածքային ամբողջականության սկզբունքի շուրջ առկա տարամեկնաբանությունների շրջանակը: Ժողովրդի ինքնորոշման իրավունքի և նրանց միջազգային իրավական կարգավիճակի միջև կապի ուսումնասիրությունը բերում է եզրակացության, որ ո՛չ տարածքային ամբողջականությունը, ոչ էլ «անջատում հանուն փրկության» դոկտրինը չեն կարող գոյություն ունենալ միջազգային իրավունքում առանց մեկը մյուսի: Կիրառվում է հետևյալ սկզբունքը. եթե որևէ սուբյեկտ չունի առնվազն մեկ միջազգային իրավունք, ապա այն նաև չի կարող ունենալ միջազգային իրավական պարտավորություններ: Հետևաբար, պետության տարածքային ամբողջականության նկատմամբ հարգանքը կարող է պարտադիր լինել ժողովուրդների համար միայն այն դեպքում, եթե ճանաչվի վերջիններիս՝ անհրաժեշտության դեպքում հանուն փրկության բաժանման դիմելու իրավունքը: Եվ քանի որ հանուն փրկության բաժանման ցանկացած արգելք հիմնարար հակասություններ է առաջացնում միջազգային իրավունքի ներսում, մենք ենթադրում ենք, որ հանուն փրկության բաժանման իրավունքի կոդիֆիկացումը ոչ միայն կամրապնդի միջազգային խաղաղությունն ու կայունությունը, այլև կնպաստի ինքնորոշման և տարածքային ամբողջականության վերաբերյալ հակադիր տեսակետների հաշտեցմանը:

РЕЗЮМЕ

Сужение рамок дискуссий вокруг самоопределения посредством выявления взаимосвязи между территориальной целостностью и доктриной "отделение во имя спасения"

Макар Меликян

Ключевые слова: ремедиальное отделение, самоопределение, территориальная целостность, самозащита, международная правосубъектность.

Эта статья является попыткой сузить круг противоположных интерпретаций самоопределения и территориальной целостности. Изучение связи между правом народов на самоопределение и их международно-правовым статусом приводит к выводу, что ни территориальная целостность, ни доктрина ремедиального отделения не могут существовать в международном праве одна без другой. Применяется следующий принцип - если субъект не имеет хотя бы одного международного права, то он также не может иметь международных обязанностей. Следовательно, уважение территориальной целостности государства может быть обязательным для народов только в случае признания их права народов на ремедиальное отделение при необходимости. И поскольку любой запрет на ремедиальное отделение создаст существенные внутренние противоречия в международном праве, мы предполагаем, что кодификация ремедиального отделения не только укрепит международный мир и стабильность, но и поспособствует примирению противоположных взглядов в дискуссиях о самоопределении и территориальной целостности.