Kosovo and International Law

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Edited by

Peter Hilpold

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SECESSION IN INTERNATIONAL LAW: DOES THE KOSOVO OPINION REQUIRE A RE-ASSESSMENT OF THIS CONCEPT?

Peter Hilpold

1. Introduction

Of all the questions, the Advisory proceeding regarding the Legality of the Declaration of Independence has directly or indirectly addressed the one concerning the right to secession has been paid the greatest interest by academic writers and the general public.

UNGA Res. 63/3 of 8 October 2008 by which the ICJ was asked to render an Opinion on the declaration of Kosovo does not mention the right to self-determination or the right to secession. Nonetheless it becomes clear from the object and purpose of this resolution that it aims at an assessment of the events of 17 February 2008 in the Kosovar Parliament on the basis of exactly these principles. At the same time, it is apparent that this procedure should also constitute a stock-taking with regard to the present meaning of these highly dynamic concepts.

Having this clarification in mind it becomes clear that there was enormous explosive potential lying in this procedure and this potential was of a twofold nature: First of all, it was the immediate problem in Kosovo as such that needed to be tackled very carefully as this region is known to be Europe's powder keg. At the backdrop of such a situation both granting and denying a right to self-determination to one or the other group could have far-reaching consequences. On the other hand it was clear that any stance taken in this regard would harbour the danger both of a generalization and of an application on other situations. As a result basic premises of the international law order dating back to the treaty of Westfalia would be put into question. From the very beginning it was tried to tackle this situation by qualifying this situation as "sui generis." Nonetheless, it regularly happens that the Kosovo situation is put into a broader context and used for construing far-reaching customary law concepts.

This whole situation is therefore characterized by two specific areas of interests, the one regarding Kosovo as such, the other concerning the issue of self-determination. As a consequence, several governments were confronted with colliding ambitions and this had clear repercussions on their written statements in the procedure before the ICJ.

It may be the case that the Kosovo Opinion itself did not contribute much to the discussion on self-determination. Nonetheless, it is a matter of fact that the whole procedure has set in motion a discussion that cannot be ignored in any further examination of this concept.

To better assess the relevance of this procedure for the discussion on self-determination it seems to be appropriate to examine first the development of the concept of self-determination in the 20th century.[1]

2. Self-Determination and Secession—The Conceptual Relationship

A present-day discussion on self-determination and secession is always burdened with conceptual uncertainties—and this is the case also for the given one.[2] In the academic world attempts are made to overcome these uncertainties by the introduction of various distinctions such as that between an "external" and an "internal" right to self-determination,[3]

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[1] See also further studies of this author on this subject, for example P. Hilpold, "Der Osttimor-Fall – Eine Standortbestimmung zum Selbstbestimmungsrecht der Völker," 1996; ders., "Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?," in: *Zeitschrift für Öffentliches Recht* 54 (4/1999), pp. 529–602; idem, "Self-Determination in the 21th Century—Modern Perspectives for an Old Concept," in: *Israel Yearbook of Human Rights* 36 (2006), pp. 247–288; idem, "The Right of Self-Determination: Approaching an Elusive Concept through a Historic Iconography," in: *Austrian Review of International and European Law* 11 (2006) (2009), pp. 23–48; idem., "Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens," in: *Zeitschrift für Öffentliches Recht* 63 (2008), idem. 117–141; idem (ed.), *Das Selbstbestimmungsrecht der Völker*, 2009.

The parts of this contribution that concern the development of the concept of self-determination correspond largely to this author's contribution (written in German) in: *ZÖR* (2008), pp. 117 ss.

[2] Among the most authoritative studies and collective writings on the right to self-determination see M. Pomerance, *Self-Determination in Law and Practice—The New Doctrine in the United Nations*, 1982; Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993; C. Brölmann/R. Lefeber/M. Zieck (eds.), *Peoples and Minorities in International Law*, 1993, A. Cassese, *Self-determination of peoples: a legal reappraisal*, 1995.

[3] As it is known, this distinction can be traced back to W. Wengler, "Le droit à la libre disposition des peuples comme principe de droit international," in: *Revue hellenique de*

or an "offensive" and a "defensive" right.[4] Further categories are the "democratic," the "national," the "socialist" and the "colonial" right to self-determination.[5]

Not even in the academic world, however, these classifications are used in an uniform manner. On the level of the concrete political practice one gets the impression that these distinctions are all but unknown. When talk comes about self-determination usually external self-determination is meant. This concept is generally used either to justify the defense of the state's sovereign rights or in the sense of a right to secession (whose factual embedding in international law is, as will be shown, strongly contested).

It has, however, to be highlighted that these conceptual uncertainties are not only the product of a communication problem between theory and practice but to a considerable extent also the outcome of a deliberate strategy followed both by states and international organizations.[6] In fact, in many relevant documents issued by the UN or by regional IOs the concept of self-determination is used in an ambiguous way. It seems that there is a precise intent to create grey areas and double meanings in order to have it both ways and to satisfy interests which are as such diametrically opposed.

It is well-known that the concepts used in this context are interpreted in different ways whereby outright conflicts are created, both on the academic level as on the political one. Nonetheless, no serious attempt to clarify these concepts can be discerned. It may be argued that the reason for this is less incapacity than the lack of a specific will. With all the uncertainties mentioned it is, in fact, easy to attribute a positive meaning to the concept of self-determination. Conferences issuing final documents which refer to the right to self-determination create the impression to be future-oriented, to be directed towards principles which are fairly uncontested and which result directly from UN law or are even outrightly based on imperative norms. All other parts of the

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droit international 10 (1957), p. 27 ss. See also A.V. Lombardi, *Bürgerkrieg und Völkerrecht*, 1976.

[4] As to this latter distinction see D. Murswiek, "Offensives und defensives Selbstbestimmungsrecht – Zum Subjekt des Selbstbestimmungsrechts der Völker," in: *Der Staat* (1984), pp. 524–548.

[5] See also D. Thürer, "Das Selbstbestimmungsrecht der Völker – ein Überblick," in: *AVR* 22 (1984), pp. 113–137.

[6] See P. Hilpold, "The right to Self-Determination: Approaching an Elusive Concept through a Historic Iconography," in: *ARIEL* 11 2006 (2009), pp. 23–48.

respective documents profit from this reference. They are overshadowed by the aura of the right to self-determination and by the impelling necessity to implement this concept. In the wake of this necessity many additional ideas, projects and issues can be promoted that otherwise might have been contested. By this, however, also the internal conflicts characterizing this concept are solidified and carried forward: On the one hand it becomes continuously more difficult to contest the imperative nature of this right, on the other its effective meaning becomes more and more blurred.

On this basis it can be said that in the practice of international law a very restrictive understanding of self-determination prevails. Primary attention is devoted to the so-called external right to self-determination directed, as already stated, primarily to the protection of national sovereignty. The existence of a right to secession is generally denied. The concept of internal self-determination is primarily addressed, under different headings, by the academic world. In general it can be noted that the concept of self-determination of the academic world is far broader than that of the political practice which widely ignores the scope of the relevant theoretical discussion.

3. The Different Meanings of Self-Determination

3.1. *The "Colonial" Right to Self-Determination*

"External" self-determination is composed essentially of two elements: the protection of national sovereignty (a right which would be self-sufficient as such and not necessarily in need of further confortation by a right to self-determination) and the "colonial" right to self-determination. The roots of this latter right can be traced back, in a general sense, to the Charter of the United Nations. More specifically, this right has been brought to life by UNGA Res. 1514 of 14 December 1960 (Declaration on Granting Independence to Colonial Countries and Peoples) as well as by Res. 1541 of the same day ("*Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73[e] of the Charter of United Nations*"). The condemnation of colonization resulting from these resolutions and which found an ever stronger confirmation in the following years was closely related with the recognition of the right to self-determination as a peremptory norm. All too sweepingly, however, this qualification was often extended to the principle of self-determination in general, also outside

the colonial context and covering even ethnic minorities.[7] This approach was, however, bound to fail in view of the unclear scope of the right to self-determination beyond the colonial area. On the other side, the utopian nature of this approach has further contributed to raise doubts about the legal nature of self-determination as such.

3.2. *Is It Possible to Generalize the Colonial Right to Self-Determination?*

The affirmation, often to be found in academic writings that the right to secession should apply also outside the colonial context as decolonization has now come virtually to an end, convinces only at first sight, if at all.

In fact, it is hard to understand why an international norm has to be kept alive by all means even if it has fulfilled its original function or why there should be an outright obligation to look for new fields of application for such a norm.

Similar considerations can be made with regard to the qualification of the right to self-determination as a compulsory norm. Even if we disregard the fact that it is widely unclear what this term should mean and who should identify the existence of such a norm in any case we should avoid to overstate its importance and meaning. The creation of the self-determination norm has been the product of a state consensus as it is true, in the final end, with any international law norm. As a consequence, its meaning has always to be interpreted with an eye to this state practice and consensus.

Furthermore, it has to be remembered that the qualification of colonial self-determination as "secession" is of a very particular nature. Even though the colonies were very closely related to the colonial powers (in an economic, a political and a military sense) it has also to be said that in most cases it was not intended to award to the colonial people and territory the same status the metropolitan people and territory had. Colonialism was rather based exactly on the opposite intent, i.e. on the will to discriminate and to exploit. Even if some colonial powers have, towards the end of the colonial era, formally adopted such an

[7] This approach was primarily chosen in the German and the Austrian area. See P. Hilpold, "Neue Perspektiven der Selbstbestimmung? Möglichkeiten und Grenzen der völkerrechtlichen Verselbständigung von Territorien in Europa," in: P. Hilpold et al. (eds.), *Rechtsvergleichung an der Sprachgrenze*, 2011, pp. 157–196, with further references.

approach, this was not more than a ploy, unsuccessful in the end, to avoid the consequences of de-colonization.[8]

Finally it has to be remarked that even the practice of the former colonies militates against the existence of a general right to secession as these states, once independent, became mostly fervent opponents of such a right.[9] A legal justification for this attitude was sought by reference to the *uti possidetis* principle which was considered to be inimical towards a general right to secession.[10]

3.3. *Arguments against a General Right to Secession Taken from a Legal and a Sociological Point of View*

It may be argued that the so-called right to secession is a right in *statu nascendi* which could not come to life in the first 50 years of the UN's existence due to the anomalies and extraordinary events that characterized this period (in particular colonialism, the East-West-conflict and the North-South-problematic).

On the other hand, is seems more plausible that a general right to secession must be generally estrange to an international legal order whose main rules are crafted by states—and therefore by the primary addressees of these norms.

As it is often said, the main reason for this lies in the fact that the state community is no suicide club.

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[8] This is, in particular, true for France who declared Algeria as part of the French territory and for Portugal who, with a constitutional amendment, qualified in 1951 her colonies, which have become "oversea provinces" in 1933, as part of the metropolitan territory. See M.G. Teles/P.C. de Castro, "East Timor," in: *EPIL*, vol. II, 1995, pp. 3–4 and P. Hilpold, *Der Osttimor-Fall*, 1995, p. 12.

[9] See only the position taken by most third world countries with regard to the secession attempt by the Nigerian region of Biafra. As it is known, this attempt found only little support by the state community in general and by former colonies having become independent after 1945 in particular.

[10] With regard to the uti possidetis principle see M.G. Kohen, "Le Problème des Frontières en Cas de Dissolution et de Séparation d'États: Quelles Alternatives?," in: *Revue Belge de Droit International* (1998), pp. 129–160; A. Gioia, "Recent Decisions by the International Court of Justice Relating to Territorial and Boundary Disputes (1999–2002)," in: *Italian Yearbook of International Law* XII (2002), S. 149–206; G. Abi-Saab, "Le Principe de l'Uti Possidetis – Son Role e ses Limites dans le Contentieux Territorial International," in: M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflish*, 2007, pp. 657–671; J. Vidmar, "Confining New International Borders in the Practice of Post-1990 State Creations," in: *ZaöRV* 70 (2010), pp. 319–356.

Why should states propound the creation of a norm that endangers their very existence as an unity? Also colonies that have become independent see themselves exposed to this danger. Some estimates say that on this way between 1,500 and 3,000 states could come to life. The result would be an outright *pandaemonium*[11] and it is difficult to see how norm-setting on the international level or even alone a coherent application of existing international law should be possible on this basis. The whole system of international organizations which is based on the delegation of decisional powers and their concentration with a few subjects would be totally deligitimized on this basis. This would be even more so the case for a system of collective security like that of the Security Council if, at the same time, the principle of sovereign equality of all states should be upheld. The consequence would be international anarchy or the exercise of a coordination function by some hegemonial powers. Neither could be in the interest of the existing state community.

Furthermore, if we accept a right to secession we would have to accept also a corresponding right to intervention and the prohibition of the use of force would be all but eroded.

3.4. *First Results*

As a first result of the preceding considerations it can be stated that there is no general right to secession. Only in two specific cases, the one regarding colonies, the other territories under foreign military domination, a right to secede finds general approval in international law. These cases regard, however, situations which find world-wide condemnation and they are of such a particular nature that it might be somewhat awkward to speak of secession.

In fact, the underlying situation clearly violated international law and it might be doubted whether a merger between the respective territories had happened at all. Lacking such a merger and being the respective situations blatantly illegal no need is given to take recourse to the concept of secession.

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[11] See, in this context, the statement by UN Secretary-General Boutros Boutros-Ghali in his "Agenda for peace" of 1992: "Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic wellbeing for all would become ever more difficult to achieve." See UN Doc A/47/277, S/24111, para. 17. See also P. Moynihan, *Promoting Justice, Human Rights and Conflict Resolution through International Law, Pandaemonium—Ethnicity in International Politics*, 1993.

The lack of right to secession does not, however, imply that secession would be prohibited. At first sight this might seem astounding. In fact, it could be argued that the State Community might be interested in the introduction of such a prohibition as thereby stability, so the reasoning might go, would be further enhanced. At a closer look this appears, however, to be doubtful even if we ignore the enormous difficulties associated with the implementation of such a prohibition. In fact, it can be argued that the state community has an interest in allowing for some degree of change and flexibility or at least not to prohibit such changes if they are required by modifications in the international order. What interest should the state community have to keep together a state whose citizens no longer identify with this entity and where the "*plebiscite de tous le jours*" no longer ends in favour of that state?[12] The outcome of such an approach would be in stark contrast with basic tenets of the international order. In fact, such a rule would not only tolerate the use of repressive force against dissenting groups but even foster such tendencies. The resulting stability would only be an apparent one: Repression stabilizes a situation only shortly. On a longer term such a policy can foster, on the contrary, extremely destructive developments.

The existing rules on secession as presented here correspond therefore very closely to the possibilities and interests of the state community and their members. A state community interested in stability and the preservation of the status quo accepts also changes that are strongly desired and that cannot be impeded anyway if not at an unacceptable price. Of decisive importance is the definite affirmation of the forces seeking secession, the so-called "ultimate success."[13]

With an ever-growing cohesion of the state community,[14] its growing attitude to speak with one single voice,[15] this community must also be

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[12] See the speech held by E. Renan at the Sorbonne in Paris on 11 March 1882, "Quest-ce qu'une nation," http://pratclif.free.fr/books/renan/nation.html (28 July 2011).

[13] See Th. Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness," in: M. Kohen (ed), *Secession—International Law Perspectives*, 2006, pp. 138–170 (147 s.) with further references.

[14] See in this regard for example Ch. Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century, General Course on Public International Law," *RdC* 281 (1999), pp. 9–438; D. Kritsiotis, "Imagining the International Community," in: *EJIL* 13 (4/2002), pp. 961–992; St. Oeter, "The International Legal Order und its Judicial Function," in: P.-M. Dupuy et al. (ed.), *Völkerrecht als Wertordnung, Liber Amicorum Christian Tomuschat*, Kehl et al.: Engel-Verlag 2006, pp. 583–599 and J. Klabbers/A. Peters/G. Ulfstein (ed.), *The Constitutionalization of International Law*, OUP: Oxford et al. 2009.

[15] See B. Simma, "From Bilateralism to Community Interest in International Law," in: *RdC* 250 (1994) (1997), pp. 217–384.

interested in deciding who will make part of this group in order to make sure that its community values will be preserved and defended in future. A second instrument is that of recognition. As it is known, after 1945 the so-called declaratory theory of recognition has become the prevailing one. According to this theory the state community acts like a notary, a disinterested, neutral third party when certifying the presence of the state elements.[16] Seen from this perspective, recognition operates like an automatism and in the era of sovereign equality of all states and of general outlawing of colonialism very good reasons existed for the adoption of this position. Nonetheless, this approach could not fully convince, at least not for the time after decolonisation has come to its virtual end.

With the dismemberment of Yugoslavia at the latest it has become clear that the act of recognition does not have merely declaratory effects.[17] The traditional theory according to which acts of recognition aiming functionally at a constitutive result (the so-called premature recognition)[18] would be illegal is hard to reconcile with modern practice, characterized, as has been shown, by broad grey areas. On the basis of this theory it was always difficult to establish whether an effective government has already been established on the seceding territory. In such a context, acts of recognition assume in any case a constitutive role. They help to bring about the result they should only certify. They become a self-fulfilling prophecy.[19] It has therefore become clear that states which

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[16] According to the three-elements-theory of Georg Jellinek (Allgemeine Staatslehre, 3th ed. 1900) these elements are, as it is known, a permanent population, a defined territory and an effective government. According to the Convention of Montevideo of 26 December 1933 the capacity to enter into relations with other states has to be added.

[17] See P. Hilpold, "Die Anerkennung der Neustaaten auf dem Balkan. Konstitutive Theorie, deklaratorische Theorie und anerkennungsrelevante Implikationen von Minderheitenschutzerfordernissen," in: *Archiv des Völkerrechts* (4/1993), pp. 387–408.

[18] See in this context for example V. Epping/Ch. Gloria in K. Ipsen (ed.), *Völkerrecht*, 2004, pp. 271 ss.:

> Die völkerrechtliche Anerkennung stellt ein völkerrechtliches Delikt in der Form einer Intervention in die inneren Angelegenheiten eines anderen Staates dar. Auf der anderen Seite bewirkt eine vorzeitige Anerkennung als solche noch nicht die Enstehung eines neuen Staates und auch nicht die Legitimität einer neuen Regierung. Insoweit ist sie völkerrechtlich wirkungslos.

[19] Vgl. in diesem Zusammenhang auch die Feststellung des kanadischen Obersten Gerichtshofs des Jahres 1998: "the validity of a would-be state in the international community depends, as a practical matter, upon recognition by other States." *Reference re Secession of Quebec*, 1998, *SRC* 2 (217), para. 385.

As to the role acts of recognition have played on Kosovo's road to independence see also P. Sevastik, "Secession, Self-determination of 'Peoples' and Recognition—The Case of

are confronted with a request for recognition dispose of a considerable amount of discretion. They are not only free to accept the existence of a fact or not but to mould, at the same time, the structure of the international community.

In recent times recognition has been made more and dependent from additional requirements and conditions. The entity vying for recognition should distinguish itself by particular elements of legitimacy, referring for example, to an adequate measure of human rights protection, membership with specific international organizations, which are of particular relevance for upholding basic values of the state community, the ratification of respective conventions or to the adoption of particular protective measures for minorities.[20]

As a consequence, it can therefore be stated that the act of recognition is not only a technical instrument whose consequences would depend exclusively from factual elements and from the principle of effectivity. It is rather the case that the state community actively intervenes in this process by a conclusive judgment which takes into consideration both legal and political elements.

As a consequence it can neither be said that processes of secession—or, more precisely, the creation of new states—are fully regulated by law nor that the state community would take a fully agnostic attitude in this regard, waiting first for the "ultimate success" on the military field and taking afterwards note of this situation in a purely neutral attitude. By the recognition procedure at least the attempt can be made to steer this whole process and to bring about a result that could be propitious for the resilience and the sustainability of the international peace order. It has, however, to be emphasized again that this development has not resulted in a legalization of secession nor was such a legalization ever intended.

Kosovo's Declaration of Independence and International Law," in: O. Engdahl/P. Wrange (eds.), *Law at War—The Law as it was and the Law as it Should be*, Brill 2008, pp. 231–244 as well as Ch. Tomuschat in this volume.

[20] The most prominent example for such a practice in recent years are the "Guidelines on the Recognition of New States in Eastern Europe and in the Sovjet Union" issued by the EC Foreign Ministers on 16 December 1991, reprinted in *EJIL* 4 (1/1993), Annex 1, p. 72.

4. Secession Seen from the Viewpoints of Legal Philosophy, of Natural Law and of Human Rights

4.1. *General Considerations*

It can thus be said that a right to secession is unknown to present-day international law which is still primarily a legal order governed by the interests of states. Nonetheless, for several years we have been assisting various attempts to prove exactly the existence of such a right, at least for particular situations. These attempts are premised on different considerations. In part they totally ignore the existing positive law, in part, however, they refer to existing rules and put them into a new context whereby the coming into being of a right to secession in extraordinary cases seems to be at least a legal possibility.

According to the view taken here these approaches do not convince in the final end but nonetheless it cannot be ignored that they enjoy broad support in academic literature and in part also in practice. Furthermore it has to be acknowledged that the respective discussion has achieved a considerable intellectual level.

4.2. *Considerations from Political Philosophy*

Especially in the Anglo-American area there are currents in political philosophy which, relying on values and principles of an overarching, constitutional nature, are advocating the introduction of a general right to secession or even maintaining that such a right already exists. The main problem with this approach lies in the fact that it confounds the world that is with the world that ought to be. It portrays subjective, in part even utopian world order models as ideals international law should aspire at or even as mandatory goals. Often the impression is created that these theories are nothing else than a description of existing law.[21]

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[21] See, for example, A. Buchanan, "Uncoupling Secession from Nationalism and Intra-state Autonomy from Secession," in: H. Hannum/E. Babitt (ed.), *Negotiating Self-Determination*, 2006, pp. 81–114; idem, "Self-Determination and the Right to Secede," in: *Journal of International Affairs* 45 (2/1992), pp. 347–365; A. Orentlicher, "Separation Anxiety: International Responses to Ethno-Separatist Claim," in: *YJIL* 23 (1998), pp. 1–78; A. Rubin, "Secession and Self-Determination: A Legal, Moral, and Political Analysis," in: *Stanford Journal of International Law* 36 (2000), pp. 253–270 and D. Philpott, "In Defense of Self-Determination," in: *Ethics* 105 (1995), pp. 352–385, who, towards the end of a 33 page study about this thematic, made the following remark: "Until now, I have discussed when the right might be granted or how it ought to be 'constructed' but have said little

As was written very poignantly by Christian Tomuschat, these approaches are irritanting already by their very narrow intellectual perspective.[22]

Broad attention is given to the political and moral conditions for the exercise of this right to secession while the often problematic consequences of such events are all but ignored.[23] An awkward discrepancy appears: On the one hand this approach seems to be original and genuine and of a seemingly mandatory character. On the other its irrelevance in practice is evident. As far as these approaches are taken at their face value they might even be dangerous. They create hopes without a legal basis and they dismiss elements which are pivotal for an overall evaluation of secession such as the principle of democratic legitimacy which is so dear to the authors of these theories. They create a conceptual nirvana which eventually undermines the substance of self-determination because it creates the impression that self-determination offers everything to everyone. No solution is provided for the frequent cases of overlapping pretensions. On the contrary, if each party takes recourse to the same vague moral principles both will evidence the same stubbornness and the conflict will be further fueled. The consequence will be a continuing stalemate or the final victory of one party and in both cases this outcome may be interpreted as a demonstration that obstinacy and the ruthless fight for one's own goals are winning recipes.

For the international order the consequences will be in any case devastating as thereby basic achievements of the international peace order will be challenged.

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about who is doing the granting and constructing." Unfortunately, also on the remaining pages the author did not give an answer to this latter question.

[22] See Ch. Tomuschat, "Secession and self-determination," in: M. Kohen (ed.), *Secession*, 2006, pp. 23–45 (26).

[23] Ibid. As far as an attempt is made to implement these concepts in practice further inconsistencies come to light and the results convince even less. Allan Buchanan, for example, has argued, on the one hand for the existence of a right to secession of Kosovo on the basis of the 1989 withdrawal of its autonomy. On the other hand he has, however again put into question this right due to the abuse of this autonomy by the Kosovo Albanians. This argument was rightly challenged by Zoran Oklopcic who argued that Albanian resistance had been an answer to Serb repression. At the end the outcome of this whole reasoning is undefinite. See Z. Oklopcic, "Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood," in: *LJIL* 12 (2009), pp. 677–702 (688), referring to A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, 2004, p. 222.

4.3. *Remedial Secession*

As already stated the approach described above is known (and let alone recognized) only by a rather small number of intellectuals. Somewhat different is the situation with remedial secession. More and more the latter seems to become accepted as a sub-category of the general category of secession. Also in the ambit of the advisory proceeding before the ICJ broad reference has been made to this concept.

In this context also the expression "salvation clause" is used. It was the so-called "Friendly-Relations-Declaration" of 1970[24] that first introduced this clause in an official UN document:

> 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.

It may be interesting to note that this clause was introduced by the Italian delegation most probably with an eye to the South Tyrolean question and with the intent to rein in the disruptive forces that self-determination could potentially exercise on state sovereignty. In practice, however, the effects were exactly the opposite as this clause was read "*e contrario*."

In fact, it was argued that this clause implies a right to secession for minorities if the government can no longer be considered to be representative for the population as a whole or even only parts of it. The specific conditions for the exercise of such a right to secession were interpreted differently. A core consensus emerged, however, in the sense that the representation problem had to be, in any case, a serious one. For typical manifestations of such a problem usually reference is made to grave human rights abuses or even to mass-expulsions and genocide.

Such an interpretation of this clause finds ever-broader support, especially among German authors.[25]

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[24] UNGA Res. 2625 (XXV) of 24 October 1970.

[25] The dogmatic foundations for this approach were laid, however, by an author from the US. See L.C. Buchheit, *Secession—the legitimacy of self-determination*, Yale University Press: New Haven et al. 1978 and—for an important German representative of this current—D. Murswiek, "The issue of a Right to Secession—Reconsidered," in:

It seems, however, that the better argument have those authors who argue that the words "without difference as to race, creed or colour" clearly refer to a colonial context.[26]

Subsequently this clause has found its way also in the Vienna Declaration of Human Rights of 1993. At first sight, however, the respective clause might be interpreted differently. In fact, the Vienna declaration refers, on the one hand, to the right to self-determination of colonial peoples and of those under alien domination—a formulation that stands for continuity with the declaration of 1970. The two clauses are, however, not fully identical as a closer look at the 1993 clause reveals:

> 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.
>
> 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 of people to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.
>
> In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Chapter of the United Nations, this 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 rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[27]

Representativity is interpreted here in a comprehensive way, i.e. with reference to the entire population, without confinement to the colonial context or to the problem of foreign domination. Does this mean that

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Ch. Tomuschat (ed.), *Modern Law of Secession*, Martinus Nijhoff: Dordrecht et al. 1993, pp. 21–39 as well as K. Doehring, "Self-Determination," in: B. Simma (ed.), *The Charter of the United Nations—A Commentary*, vol. I, OUP: Oxford 2002, pp. 47–63.

[26] See Ch. Gusy, "Selbstbestimmung im Wandel," in: *Archiv des Völkerrechts*, 1992, pp. 385–410 (394) and A. Cassese, 1995, p. 61.

[27] See World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, A/Conf. 157/23, 12 July 1993.

grave human rights abuses—as the most radical expression of a lack of representation—could put into the question the state sovereignty over the territory were these atrocities take place? Could this clause be interpreted as the basis for a right to secession in the form of an instrument of defense, an *ultima ratio* in case the existence of a people is jeopardized?

Such a conclusion runs counter, first of all, to pragmatic considerations. In fact, one has to ask how such a right should be implemented. Does the respective group have a right to assistance by the UN? To render such a right effective seems hardly to be feasible. The whole practice by the UN of the last half a century runs counter to such a right.[28] The decision by the Security Council to intervene remains of a widely political nature and there is no duty to intervene. To state a "right to be safed" would create a *lex imperfecta* at most which could either be seen as an utopian promise or—even worse—as a pretext for abusive interventions.

Also from the viewpoint of legal theory much militates against the existence of such a claim. First of all, it has to be noted that also this norm is formulated negatively. Its primary purpose seems to be to preserve state sovereignty.

If representativity is granted no basis for a discussion on a right to secession is given, be it the colonial context or beyond. On the contrary, in the presence of the described grave human rights breaches, the provision mentioned does not further specify what would be the legal consequences to be drawn. The respective provision implies surely an at least indirect condemnation of these abuses. States having committed such acts might lose their moral right for absolute integrity but no corresponding conclusion can be drawn for the legal plane. Positively we can draw from this provision a political plea directed towards the state community to respect human rights and in particular to abstain from extensive and serious human rights violations. The Vienna Declaration does not threat the imposition of sanctions that are anyway not available, especially not in an automatic and systematic way. However, this document bears out a further commitment for the state community as a whole to become a community of values. States which do not accept this commitment place themselves outside this community. In view of

[28] For a detailed analysis of the relevant UN practice up to the 1980s see M. Pomerance, *Self-determination in law and practice: the new doctrine in the United Nations*, Martinus Nijhoff: Den Hague et al. 1982.

the particular ways through which the implementation of international law happens,[29] far-reaching and incisive consequences result. In fact, a state which is considered to have violated international law may suffer a severe diminution of its status within the international law and be thereby considerably constrained when pursuing its interests on the international level.

A legal analysis of the salvation clause must therefore lead to a mixed result: On the one hand it would be wrong to use the salvation clause in an *e contrario* approach as an instrument to create a right to secession. It would, however, be equally wrong to qualify this concept as a paper tiger not being able to put any hindrance to the cruel acting of despotic regimes.

This conclusion is further confirmed by subsequent developments. It appears, in fact, that the respective clause has become a fix element of legal and political documents of international institutions and bodies pronouncing themselves on this subject. Therefore it can be said that the inclusion of this clause in the Friendly-Relations-Declaration of 1970 has not been a diplomatic incident and that this clause is neither a text with no practical relevance. This finds confirmation in the fact that two years after the Vienna Declaration this clause has made its way also in the UN Declaration of 9 November 1995, issued to celebrate the 50th anniversary of the foundation of the UN. A further prove to this fact is given by the results of the UN summit of 2005, held to subject the UN system to a profound structural reform. Expectations run high in the time preceding this conference. Especially in view of the widespread human rights abuses on the Balkans and in central Africa it was expected that mechanisms for a more effective intervention would be created for the case that similar events should unfold again. These hopes were further nourished by the courageous and outspoken attitude of then UN General-Secretary Kofi Annan. The result, though not being revolutionary, can be seen as a bold commitment for the states singularly and the state community globally to prevent massive human rights violations.[30] To this end, a so-called

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[29] See H. Neuhold, "Die Einhaltung des Völkerrechts in einer außenpolitischen 'Kosten-Nutzen-Analyse'," in: *GYIL* 19 (1976), pp. 317–351.

[30] With regard to this development see P. Hilpold, "Der UN-Sicherheitsrat – neue Aufgaben, neue Funktionen," in: J. Varwick/A. Zimmermann (eds.), *Die Reform der Vereinten Nationen – Bilanz und Perspektiven*, Duncker & Humblot: Berlin 2006, pp. 33–46.

"Responsibility to Protect—R2P" was created.[31] In many ways, nature and scope of this concept is still rather unclear but a core consensus for the definition of this concept is emerging. On this basis it can be said that no new right to humanitarian intervention has been created but at the same time in case of widespread human rights violations the responsibility of states—individually and jointly—has been strongly emphasized.

This document further emphasizes that the forceful change of borders is not in the ultimate interest of the United Nations and that such changes cannot find any help by this institution. At the same time individuals and groups have to find better protection. In particular, by granting effective participation to all groups it shall be made sure that minority conflicts do not even materialize.

The Outcome Document of the World Summit also refers to the question of minority protection:

> We note that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society.[32]

Similar considerations can be made with regard to the further documents that are usually referred to as a proof for the existence of a right to secession, even if a first look at the relevant paragraphs would suggest a different answer.

Thus in the report of Asbjorn Eide over "Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities" of 10 August 1993 we can find the following statement:

> Only if the representative of the group [living compactly in an administrative unit of the State or dispersed within the territory of a sovereign State] can prove, beyond reasonable doubt, that there is no prospect within the foreseeable future that the Government will become representative of the whole people, can it be entitled to demand and to receive support for a

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[31] See P. Hilpold, "The duty to protect and the Reform of the United Nations—a new step in the development of International Law?," in: *Max Planck Yearbook of United Nations Law* 10 (2006), pp. 35–69; C. Focarelli, "The responsibility to protect doctrine and humanitarian intervention: too many ambiguities for a working doctrine," in: *Journal of conflict and security law* 13 (2008), pp. 191–213; A.J. Bellamy et al. (eds.), *The Responsibility to Protect and International Law*, Martinus Nijhoff: Den Haag 2010, P. Hilpold, "From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?," in: *Liber Amicorum Bruno Simma*, 2011, pp. 462–476 and A. Peters, "The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and its Members," in: *Liber Amicorum Bruno Simma*, 2011, pp. 297–325.

[32] See Outcome Document 2005, A/60/L.1, para. 130.

> quest for independence. If it can be shown that the majority is pursuing a policy of genocide against the group, this must be seen as a very strong support for the claim of independence.[33]

In the General Recommendation no. XXI on the right of self-determination of 8 March 1996, issued by the Committee on the Elimination of Racial Discrimination we find the following remarks:

> The Committee emphasizes that, in accordance with the Declaration of the General Assembly on Friendly Relations, none of the Committee's actions 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 and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour. In view of the Committee international law has not recognized a general right of peoples to unilaterally declare secession from a state. In this respect, the Committee follows the views expressed in the Agenda for Peace (paras. 17 ff.), namely that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.[34]

With regard to the statement cited from the Eide Report it has to be noted that these remarks have to be interpreted in the overall context of the whole report. As becomes evident already from the title of this document, this report aims at the achievement of solutions that further the "peaceful and constructive solution of problems involving minorities" and not the achievement of results that are conducive to political disruptions, for example in the form of an act of secession.

Only if a government systematically discriminates against a minority aiming even at its physical destruction the comprehensive solutions envisaged by the Eide Report are no longer feasible. In this case, secession would be a pragmatic alternative, even though no specific right to carry out such an act can be discerned.

For what concerns recommendation no. XXI it has to be noted that the salvation clause of 1970 cited therein is subject to a considerable restriction. The reference to the Agenda for Peace makes clear that,

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[33] E/CN.4/Sub.2/1993/34, para. 84.

[34] Vgl. Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination (Forty-eight session, 1996), U.N. Doc. A/51/18, annex VIII at 125, Abs. 6.

as far as possible, an excessive fragmentation of the international state community shall be avoided. On a whole, also this provision can be seen as a plea for the introduction of appropriate minority protection measures in order to avoid the breaking up of states.

In recent times advocates of a remedial right to secession are trying to undergird their claims with references to certain judicial decisions. Letting aside the question what dogmatic value is to be attributed to such references it has to remarked that they do not take a definite position with regard to the question whether a right to remedial secession really exists.

In "Re Secession of Quebec"[35] the Canadian Supreme Court has recognized expressly the existence of a right to secession only for the uncontested cases of colonial or other forms of alien domination or foreign occupation. The existence of a right to remedial secession is qualified as a mere possibility and any final answer to this question is eventually left open:

> A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.
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> While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.[36]

A similar conclusion was reached by the Russian Constitutional Court in its judgment of 31 July 1995 in relation to a possible right to secession of Chechnya.[37]

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[35] Reference by the Governor in Council, pursuant to Art. 53 of the Supreme Court Act, concerning the secession of Quebec from Canada, 1998, S.C.R. 217, *ILM* 37 (1998), pp. 1342 ss.

[36] Ibid., para. 134 s.

[37] See A. Tancredi, "A normative 'due process' in the creation of States through secession," in: M. Kohen (ed.), *Secession—International Law Perspectives*, 2006, pp. 171–207 (181).

The Swiss judge and International lawyer Lucius Wildhaber seems, however, to be more prepared to accept such a right. See his commentary on James Crawford's report

5. The Advisory Proceeding before the ICJ Regarding the Kosovo Declaration of Independence

As already mentioned, in the ICJ Advisory Opinion on Kosovo the question of a right to secession is only indirectly addressed and no definite answer is given to this question. The proceeding has offered the opportunity, however, for a comprehensive discussion of this question.

Some states, e.g. the Federal Republic of Germany,[38] have strongly insisted on the existence of a right to remedial secession, emphasizing two conditions:

- First of all, there must be

> an exceptionally severe and long-lasting refusal of internal self-determination by the State in which a group is living. This is not identical, but will often coincide with severe violations of human rights, such as the right to life and freedom, but also the rights of association and assembly. For this condition to be met, it is required that the authorities of the State in which a certain, distinct group is living consistently and over a considerable period of time deny to this group any right to have a say in matters directly concerning it, by denying it any decisional autonomy as well as any meaningful participation in the deliberations on the central level. While this will usually—as in the case of Kosovo—go hand in hand with severe human rights violations, such as suppression of demonstrations of political opposition, arbitrary arrests and imprisonments, torture and maltreatment, it is really the denial of internal self-determination which counts for this argument. As the Supreme Court of Canada has put it, 'the underlying proposition is that, when a people is blocked from the meaningful exercise

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(to which the Canadian Supreme referred) as well as his opinion in the Loizidou case before the European Court of Human Rights (Loizidou v. Turkey, 23 Eur.Ct.H.R: 513, 535, 1996):

> 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 under-represented 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.

This affirmation rests, however, basically on an assumption not corroborated by further elements ("a consensus has seemed to emerge"). In the following sentence, the author seems to put this assumption himself in question ("if this description is correct").

[38] See the written statement no. 54 of 15 April 2009, pp. 32 ss.

> of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession'
>
> (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 134).[39]

– As a second condition it is requested

> that no other avenue exists for resolving the resulting conflict. It follows form the nature of external self-determination as the ultimate remedy to the persistent denial of internal self-determination that it may be exercised only as an *ultima ratio*. This means in practice that other possible ways of remedying the situation must first be exhausted.[40] These other ways may consist in, e.g., negotiations (direct or indirect, with the assistance of facilitators, mediators, or otherwise), or recourse to relevant international organizations and bodies, such as the United Nations. Only when all other possible routes to internal self-determination can be shown to be blocked, the route to external self-determination opens.[41]

All these considerations are not devoid of a certain logic. The individual and the group are bound to the state, according to this position, on a strictly contractual basis. Article 26 of the CCPR, requiring effective participation, is attributed paramount relevance. The theoretical basis of this approach can be found in the groundbreaking work by *Lee C. Buchheit* entitled "Secession" of 1978 which first inspired in Germany *Karl Doehring*[42] and *Dietrich Murswiek*[43] and afterwards was taken up and further developed by *Thomas Franck*[44] und *Gregory G. Fox*[45] who approached

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[39] Ibid., p. 35.

[40] Ibid.

[41] Ibid.

[42] See K. Doehring, "Self-Determination," in: B. Simma (ed.), *The Charter of the United Nations*, OUP: Oxford et al., 2nd ed. 2002, pp. 47–63.

[43] See D. Murswiek, "The Issue of a Right of Secession—Reconsidered," in: Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, pp. 21–39.

[44] See e.g. Th. Franck, *Fairness in International Law and Institutions*, 1995. For a critical analysis see S. Tierney, "The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination," in: *EJIL* 13 (4/2002), pp. 941–960 and P. Hilpold, "The Right of Self-Determination: Approaching an Elusive Concept through a Historic Iconography," in: *ARIEL* 2006 (2009), pp. 23–48.

[45] See G.H. Fox, "Self-Determination in the Post-Cold War Era: A New Internal Focus?," in: *Michigan Journal of International Law* 16 (1994–1995), pp. 733–781. A path-breaking role was played also by the contribution of H.J. Steiner, "Political Participation as a Human Right," in: *Harvard Human Rights Yearbook* 1 (1988), pp. 77 ss. This approach was taken up by many writers who developed it further. See, for example, S. Wheatley, "Democracy in International Law: A European Perspective," in: *ICLQ* 51 (2002), pp. 225–248. The specific minority perspective of the approach was developed in a masterly way

this issue from the viewpoint of the legal and political theory on democracy. Although these contributions constitute an enormous enrichment of international law and political theory they are of no real help for the clarification of the nature of secession. As already demonstrated the theory of remedial secession finds no firms basis in international consent of the state community. The theory of remedial secession finds its appeal in political and pragmatic considerations as well as in the fact that it enhances, at least at first sight, the democratic foundation of the international order and participatory rights of the individuals in the single states. At a closer look, however, also in this regard, doubts arise. What seems to be in theory a precise, logical rule in practice meets with considerable implementation problems. First of all, there are no criteria to state when the denial of internal self-determination is serious enough so that a right to external self-determination should ensue. The same is true with regard to the question whether this denial is definite, whether independence is really the only option and who is responsible for the respective developments. In some particular cases there might be a broad consensus on these questions but more often than not there will be a larger dissent with regard to each of these questions. Furthermore, there is the danger that such a mechanical instrument for the activation of a right to secession might be interpreted by some groups or local governments as an incentive to reject any dialogue with the central government or even to foster a further escalation of violence in the hope to create thereby the conditions that would permit secession. Ruthless individuals, the so-called "ethnical entrepreneurs," could be induced to gamble with the ethnic card. By this way, all too often egoistic interests are pursued without any regard to the toll minorities or also the state as a whole has to bear.

The basic mistake that the authors of the German written statement in the Kosovo advisory proceeding have made is exemplified by the following passage:

> There are those who say that—outside a colonial context, which is not at issue 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

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by P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism," in: Ch. Tomuschat (ed.), *Modern Law of Self-Determination—Towards a Democratic Legitimacy Principle?*, 1995, pp. 111 ss.

> 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.[46]

This statement hints at a basic misunderstanding as to the way international law operates and, more in general, it puts into question the bindingness of central human rights norms.

At least as a rule, states do not obey human rights provision because they fear that otherwise a secession of minority areas would take place (an event which more often than not is factually not even possible). It is rather the mere existence of these international norms that induces states to respect them. In fact, as it is known, the violation of international norms engenders state responsibility with a myriad of possible negative consequences.[47] In this context the loss of territory is not even foreseen. It goes without saying that such human rights abuses would have in most cases also serious consequences on the level of internal level.[48]

There is no basis to qualify remedial secession as a permissible instrument of international law, not even as an "*ultima ratio*."

It is interesting to note that Russia, traditionally a very sovereignty-conscious country, spoke out in favour of a right to remedial secession, although under rather restrictive conditions:

> [T]he Russian Federation is of the view that the primary purpose of the 'safeguard clause' is to serve as a guarantee of territorial integrity of States. It is also true that the 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. Otherwise, all efforts should be taken in order to settle the tension between the parent State and the ethnic community concerned within the framework of the existing State.[49]

These conditions for a remedial secession are not given in the case of Kosovo—at least according to the Russian statement.

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[46] See the German written statement no. 54 of 15 April 2009, pp. 33 ss.

[47] See H. Neuhold, "The foreign-policy 'cost-benefit-analysis' revisited," in: *GYIL* 42 (1999), pp. 84–124 as well as idem, in: *Österreichisches Handbuch des Völkerrechts*, Manz: Vienna 2004, pp. 12 ss.

[48] Only in an absolute dictatorship lacking any independent judicial system such consequences can be excluded.

[49] See the written statement by the Russian Federation of 16 April 2009.

It has further to be said that factual accounts on the last fifteen years' developments in Kosovo vary very strongly and this further evidences how difficult it would be to apply the concept of remedial secession in this case.

The very solid written statement by the British Foreign Office in the Advisory proceeding on Kosovo[50] explains convincingly that a legal basis for a right to remedial secession cannot be found in positive law; it is a purely factual event.[51]

This whole discussion that played—as mentioned—a very important role during the advisory proceeding left its marks also in the ICJ's opinion. The ICJ even refers explicitly to this concept and endows it thereby with a status that is unprecedented in the history of this court. The ICJ did not consider it necessary to deal with this question in more detail as it interpreted the advisory request very narrowly. Nonetheless, even only touching upon this question, the ICJ revealed a rather critical attitude in this regard:

> A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of 'remedial secession' in the face of the situation in Kosovo.
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> 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, 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. Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of 'remedial secession' were actually present in Kosovo.[52]

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[50] See the written statement of 17 April 2009.

[51] Ibid., pp. 92 ss. See also the detailed written statement by Serbia of 17 April 2009. It may be argued that Serbia had politically any reason to reject the concept of remedial secession. On the other hand, the high quality of this document cannot be denied.

[52] See Kosovo Opinion of 22 July 2010, para. 82.

In view of the "radical different views" given in this area it can be assumed that no customary law development has taken place according to which remedial secession would have been provided with a solid legal base.[53]

Upon reading the cited paragraphs the impression could arise that the ICJ limited itself to make a few critical remarks on the concept of remedial secession while skipping the really delicate aspects in this regard. However, such a view would not do justice to this Opinion if we consider both the complexity of the Kosovo problem and the argumentative structure of this—not unproblematic—Opinion.

As it is known, the ICJ circumnavigated all delicate issues of the advisory request by the following two specifications or, respectively, assumptions:

1. The Court had not to examine the correspondence of the Kosovar declaration of independence with international law in a broader sense but only the question, whether such a declaration was lawful per se. On this basis it was easy for the ICJ to find that in general declarations of independence are not prohibited.[54]
2. Of course, what is not prohibited by international law can well run counter to a specific international law rule, in the Kosovo case the regime created by SC Res. 1244/1999. In fact, according to this regime the status question of Kosovo has to be clarified consensually. On this basis, unilateral measures should in any case be inadmissible. The ICJ managed to avoid this question by qualifying as authors of the Declaration of Independence not the Kosovar Provisional Assembly but the single members of this Assembly who, according to the ICJ, acted ultra vires and therefore outside the regime of Res. 1244/1999 to which it was therefore not bound.[55] This was the case even though the UN General-Secretary,

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[53] See in this sense also R. Howse/R. Teitel, "Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its ruling on Kosovo?," in: *German Law Journal* 11 (2010), pp. 841–846.

[54] See Kosovo Opinion of 22 July 2010, para. 79.

[55] Ibid., para. 109:

> The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

> the General Assembly, the neighbouring countries and most of the states which had pronounced themselves on this issue had taken a different view.

Notwithstanding the problematic nature of these assumptions as to their logical and systematic persuasiveness their far-reaching implications have nonetheless to be acknowledged.

In substance, the independence of Kosovo is interpreted as the result of an act of self-determination. According to the ICJ this event has taken place outside the framework of Resolution 1244/1999 and therefore it was not to be further examined as it was a merely factual situation that did not fall into the advisory request. Neither did the ICJ examine whether this event had legal effects but it can be assumed that the Court in this regard simply accepted the operation of the principle of effectivity.

At this point of the analysis we have to ask ourselves, however, why it was possible that a process of self-determination had taken place under such particular circumstances—circumstances that impeded the central government to react in a way governments usually react to secession attempts. This question leads us back to the 1999 intervention by NATO states which was nothing else than an act of humanitarian intervention, even though most states had avoided or outrightly opposed this qualification.

Acts of humanitarian intervention, understood as an exception to the prohibition of the use of force according to Art. 2 para. 4 of the UN Charter are still prohibited by international law if they are adopted unilaterally, i.e. without authorization by the Security Council.[56]

When Yugoslavia brought an action against eight NATO countries before the ICJ this would have been an opportunity to obtain an author-

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[56] See extensively P. Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?," in: *EJIL* 48 (3/2001), pp. 437–467 as well as M. Bothe, "Friedenssicherung und Kriegsrecht," in: W. Graf Vitzthum (ed.), *Völkerrecht*, De Gruyter: Berlin et al. 2010.

It shall not go unmentioned that this case of intervention has prompted many authors to speak of a change of paradigm in international law and to speculate on a rehabilitation of humanitarian intervention. See R. Wedgwood, "NATO's Campaign in Yugoslavia," in: *AJIL* 93 (1999), S. 828–834; J. Delbrück, "Effektivität des UN-Gewaltverbots," in: *Die Friedens-Warte* 74 (1999), pp. 119 ss.; Ch. Greenwood, "Humanitarian Intervention: The Case of Kosovo," in: *Finnish Yearbook of International Law* 10 (1999), pp. 141 ss.; K. Ipsen, "Der Kosovo-Einsatz – Illegal? Gerechtfertigt? Entschuldbar?," in: R. Merkel (ed.), *Der Kosovo-Krieg und das Völkerrecht*, pp. 101–105. Eventually, however, these speculations could not convince.

itative pronouncement on the relevance of humanitarian intervention in international law.[57] The ICJ managed, however, to bypass a substantive pronouncement on this question. Interestingly, during the procedure before the ICJ only Belgium referred to the institute of humanitarian intervention to justify its action.[58]

The right to humanitarian intervention and remedial secession are conceptually very closely related. If the intervention of 1999 has created the conditions for the establishment of an UN administration that has factually opened the door for the secession of Kosovo then not only a firm relationship between intervention and secession is established but these factual events seem also to have become legalized. This seems further to be confirmed by the fact that NATO intervention of 1999 has never been condemned.

At the end, however, this view does not convince. It appears to be too straightforward and too formalistic for a legal order like the international one. It would be wrong to assume that Resolution 1244/1999 has approved the preceding NATO intervention. By this resolution the Security Council has only acknowledged the factual developments on the ground and tried to create the conditions for a new era of peaceful cohabitation between the various groups involved. Neither did the ICJ with its

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[57] Case Concerning Legality of Use of Force (Yugoslavia v. United States of America) (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Portugal) (Yugoslavia v. Spain) (Serbia and Montenegro v. United Kingdom).

[58]
> L'OTAN, le Royaume de Belgique en particulier, était tenu d'une véritable obligation d'intervenir pour prévenir une catastrophe humanitaire qui était en cours et qui avait était constatée par les résolutions du Conseil de sécurité pour sauvegarder quoi, mais pour sauvegarder des valeurs essentielles qui sont elles aussi érigées au rang de jus cogens. Est-ce que le droit à la vie, l'intégrité physique de la personne, l'interdiction des tortures, est-ce que ce ne sont pas des normes érigées au rang de jus cogens? [...] Donc pour sauvegarder des valeurs fondamentales érigées en jus cogens, une catastrophe en cours constatée par l'organisation du Conseil de sécurité, l'OTAN intervient. [...] jamais l'OTAN n'a mis en question l'indépendance politique, l'intégrité de la République de Yougaslavie [...].

See *Legality of Use of Force (Serbia v. Belgium)*, Order of 2 June 1999, ICJ Reports 1999, 10.

For a detailed analysis of the attitude taken by NATO countries in this procedure see A. Prandler, "The Concept of 'Responsibility to Protect' as an Emerging Norm Versus 'Humanitarian Intervention'," in Isabelle Buffard et al. (eds.), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Brill, Leiden, 2008), pp. 711–728 (724).

Opinion of 22 July 2010 intent to interfere with the Kosovo status process and to side by the Albanian majority. The ICJ only took account of a process of self-determination while ignoring the broader legal context. What we have seen on 22 July 2010 is not a presage for a new era but rather the offshoot of an unprecedented action taken by NATO in 1999. NATO intervention of 1999 had been a well-considered action and was the consequence to an extremely serious provocation. This intervention initiated a broad discussion in international law which led to a further strengthening of the overall trend to a "humanization of international law."[59] On the other hand a broad consensus has emerged according to which a revolution in International law development, as the recognition of humanitarian intervention would have been, had not taken place. In this sense also the developments related to the declaration of independence of Kosovo have to be interpreted. It is true that on a factual level these events could be interpreted as an official recognition of remedial secession. It is also true, however, that the ICJ and many UN member states had made every effort to counter the formation of such a rule and to make sure that the Kosovo case should remain a "sui generis" situation. No general principle should be drawn from these events. It is now up to the Kosovar population—and not least to the Kosovar politicians—to prove them worthy for such a "sui generis" treatment. Otherwise all the hopes for a "humanization of international law" would remain a mere illusion and the eternal hope that progress in international law is possible[60] would suffer a renewed disappointment.

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[59] See the title of the book by Th. Meron, *The Humanization of International Law*, Martinus Nijhoff: Leiden et al. 2006.

[60] See R.A. Miller/R.M. Bratspies (eds.), *Progress in International Law*, Martinus Nijhoff: Leiden et al. 2008 (book review by P. Hilpold in: *EJIL* 20 (2009), pp. 1270–1275) and Th. Skouteris, *The Notion of Progress in International Law Discourse*, T.M.C. Asser Press: Den Haag 2009 (book review by G.R. Bandeira Galindo, in: *Melbourne Journal of International Law* 11 (2010), pp. 1–15). For the self-determination context see A. Peters, *Das Gebietsreferendum im Völkerrecht*, Nomos: Baden-Baden 1995.

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