

# Self-determination and Autonomy: Between Secession and Internal Self-determination

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## Abstract

The 20<sup>th</sup> century can be qualified as the century of self-determination. Both politically as legally, the concept of self-determination formed the most important justification for quests for territorial changes. In the present contribution, the many meanings of self-determination and its relationship with the concept of autonomy and with minority rights shall be examined. It shall be shown that although no right to secession outside the colonial context can be discerned the claims for secession to be heard in several parts of Europe are nonetheless of considerable relevance for international law. And contrary to what is mostly held to allow such claims to be expressed may eventually even strengthen state sovereignty.

## Keywords

self-determination – autonomy – minority rights – state sovereignty – Kosovo

## 1 On the Past and Presence Relevance of the Discussion on Self-determination

The 20<sup>th</sup> century can be qualified as the century of self-determination. Both politically as legally, the concept of self-determination formed the most important justification for quests for territorial changes.

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In hindsight, the following element attracts particular attention: Usually when a claim for self-determination was voiced, the justifications for these claims referred far back to the past while the goal the proponents of this quest pursued related to the very near future: a change of borders that should happen swiftly and be irreversible. The changes the act of self-determination should bring about should “consume” this right. The extreme dynamics inherent in the self-determination movement should be replaced by definite stability. Often, however, this last goal was not achieved. Territorial changes following to acts of self-determination formed only the starting point for fresh attempts unleashing new forces directed at further changes. Thereby, the discussion about self-determination never came to a halt but has rather taken continuously new shape. The aspiration for self-determination became the driving force for permanent changes. While before WWI primarily Slavic people of the Habsburg Empire and the non-Turkish people of the Ottoman Empire pursued this quest for self-determination, after WWII this endeavour reached a totally different dimension when peoples under colonial dependence rallied behind this slogan. But even when the colonial self-determination process was all but completed the flame of self-determination did not die out. In fact, in many cases the changes brought about by the world wars meant new injustice, new forms of domination and suppression and new borders not corresponding to the wishes of the people. In part, these changes even made more evident injustice happening in the more distant past.

As will be shown below, for a long time it was much disputed whether this claim was only of a political nature or whether it constituted a right in itself. It can be anticipated that this question cannot be answered with definite security, although there are many indications that the whole development goes in the direction to transform this political postulate into a right in the stricter sense. Independently from the question at which stage we are now in this process, this concept must surely bear out a generally applicable rule if it pretends to be more than the expression of power logics.

It goes without saying that behind any attempt to reformulate content and meaning of the right to self-determination, specific interests were looming that were clothed in a political and a legal formula. In part, epochal transformations such as those associated with the political goals of the entente during WWI were labelled with the positively interpreted term of “self-determination” so as to provide additional legitimacy to these processes. There was undoubtedly a large array of political and legal norms that could potentially be referred to cater for the compelling need to end colonialism after WWII. Self-determination was the most powerful and most colourful of these norms. Continuously new challenges required new approaches. Thus, also former

colonies had to face self-determination claims (for example Morocco and Mauretania in the Western Sahara case, Indonesia in the context of the quest by Eastern Timor for self-determination, Sudan against Southern Sudan, etc.). Differently as it is often portrayed, the right to self-determination has therefore not been an asymmetrical privilege of colonial territories.

A further change of paradigm has taken place with the unravelling of Yugoslavia and the USSR, when self-determination totally distanced itself from the colonial context. The Kosovo case, which will be dealt with further below, brought the discussion on self-determination to that on secession, even though this tendency was strongly resisted by many countries. A similar case is that of Southern Sudan. Here again the push for self-determination was finally successful and brought into life a new state that found even more rapid recognition than Kosovo.<sup>1</sup>

In view of the many facets these developments have taken it was regularly up to academia to bring order and system in this picture. Categories were conceived that often had to neglect part of the factual developments and which very soon lost their relevance. As will be set out in more detail below, the meaning attributed to the term of self-determination in academia and practice is therefore characterized by an inherent contradiction: On the one hand, the intent to categorize necessarily implied the need to create more stability and to structure if not altogether stop this development. On the other hand, self-determination necessarily implies further evolution and the desire to create a “better” and “fairer” international system. To portray this discussion in a broadly used terminology, the call for self-determination, therefore, permanently oscillates between apology (of past factual development) and utopia (the hope to create a fairer, friendlier future).

For the international system, change is a continuous reality. There may be interests and attempts to halt these changes but the hopes to succeed in these attempts are bound to be disappointed as the social reality is subject to ongoing modifications and changes in the international legal system are only mirroring this fact. In this sense, it can be stated that self-determination is only reflecting factual processes. The term “self-determination” has only been

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1 As is well-known, Southern Sudan declared its independence on 9 July 2011 and on 14 July 2011 this newly-born state was accepted as the 193<sup>th</sup> member of the United Nations. This did not, however, end the civil war. Fighting started soon again, even though it took place between different opponents. Thereby, the case of Southern Sudan was also disappointing for those who hoped that secession and the creation of new states would be the king road for the solution of any ethnic and national conflict.

coined to attribute a name to this process. The legal discussion may only steer this process to a certain extent but never influence its basic direction.

The last step in this process up to this moment concerns the call for self-determination in the ambit of existing traditional national states (for example in Great Britain, Spain, but also in Italy). Also in respect to these developments it holds true that they are factual phenomena. It might be true that in such cases reference to self-determination will be useful to describe the ongoing power-struggle between the central state and single sub-national territories but the forces here at work have come into being independently from the academic legal discussion. What is more, it has to be noted that the existing international legal order does not provide any legal basis for such claims. Nonetheless, already at this point it may be remarked that in a more differentiated perspective this statement does not yet mark the end of the discussion even on (external) self-determination.

In fact, there can be no doubt as to the following:

- Even according to the traditional international law perspective that is primarily based on state practice and *opinio iuris* and therefore necessarily more akin to a static international system) self-determination in the form of a declaration of independence is not prohibited.<sup>2</sup> Notably, this holds true also outside the colonial context.<sup>3</sup>
- Even after the successful conclusion of self-determination processes there have been cases of further secessions (such as in Southern Sudan or in Kosovo).
- Also as a legal term “self-determination” is open to the most variegated interpretations. Secession is not the only and arguably not even the most important expression of this term. Reference is here to be made to the concept of international self-determination as an important means to solve struggles between different ethnical and national groups. In this context, farther below it will be examined whether the concession of autonomy might constitute an alternative to “external self-determination” and whether international law contains specific norms that could be related to in this regard.

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2 This was clearly stated by the ICJ in the Kosovo Opinion. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, ICJ, Advisory Opinion, para. 84.

3 See, however, the dissenting opinion by Judge Koroma referred to below.

## 2 The Concepts of Self-determination

While attempting to provide more clarity for the concept of self-determination several expressions of this concept have been distinguished: an “external” right to self-determination and an “internal” one, a “democratic”, a “national”, a “socialist” and a “colonial” right, only to mention a few.

The external right to self-determination results from the delimitation of powers between two entities, two peoples. If these entities are state peoples, the right to self-determination corresponds to the right to territorial sovereignty. Closely associated with this right is the right to territorial integrity and the prohibition of intervention in internal affairs. To define self-determination this way does not, however, add content to the concepts mentioned. At the utmost, the use of the concept of self-determination can here further strengthen the concepts mentioned and give them additional authority.

There is, however, also another meaning to the term “external self-determination” and this refers to the “right” to secession. In this case the opposed parties are the majority nation on the one side and the group trying to secede on the other. The adjective “external” is used here to describe the final consequence the seceding entity aspires at. As will be shown in the following, it is hardly possible to demonstrate that the international legal order really provides for such a right. Of a totally different nature is the so-called “colonial” right to self-determination which has found broad (and in the meantime, universal) recognition since the UN anti-colonialism movement of 1960 at the latest.<sup>4</sup> At the centre of this right stood the granting of independence to colonial countries and peoples. Here, care must be taken not to intermingle different meanings of “colonialism” and in particular to refer to situations of “neocolonialism”. In fact, the UN practice refers to a far stricter meaning. Thus, according to Article 73 para. 3) of the UN Charter, colonial countries have

to transmit regularly to the Secretary-General [...] statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

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4 See UN-Res., *Declaration on Granting Independence to Colonial Countries and Peoples* (1514) as well as UN-Res., *Principle which should guide Members in determining whether an obligation exists to transmit the information called for in Article 73[e] of the Charter of the United Nations* (1541), UN Yearbook, p. 49 ss. as well as 509 ss.

In order to identify the respective territories a list has been drafted that included those territories that traditionally were seen as colonies according to the so-called “salt water theory”.<sup>5</sup>

The decolonization process has now come almost to an end. Only to a very limited extent the legal practice developed in this context was of a more general use for the modern self-determination discussion:

- First of all, the colonial self-determination movement has kept alive and further developed the discussion on self-determination and given an important contribution to enhance acceptability and appeal of this subject.
- For some, this movement paved the way for the discussion on democratic self-determination as it opened the door to colonial peoples and territories to gain independence by a unilateral act. In reality, however, strict limits were set to this unilateral act.<sup>6</sup>

Furthermore, this voluntary act ending the colonial self-determination process should be of a one-time, final and irrevocable nature, elements that hardly coincide with a modern understanding of democratic self-determination as an ongoing, permanent process. Finally, politics, practice and academic writings attributed such a limited understanding to colonial self-determination that the distance towards modern notions of democracy was further enhanced. Self-determination claims voiced within third world countries that had previously gained independence through self-determination were often qualified as the outcome of a colonial plot directed against third world countries as a whole.<sup>7</sup>

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5 In the meantime, this list has been shortened to a few territories whose economic and political importance is, if we except Western Sahara, Gibraltar and the Falkland Island, rather small. See also U. Fastenrath, ‘Article 73’, in B. Simma (ed.), *The Charter of the United Nations – A Commentary*, vol. 2 (OUP, Oxford, 2002), pp. 1089–1096.

6 See Principle VI of the Annex to UN Res. *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73[e] of the Charter* (1541): “A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State”.

7 For a very pronounced statement in this regard see Judge Ammoun in the Western Sahara case (ICJ, 1975) who sided with Morocco in her attempt to retain sovereignty over Western Sahara. For Judge Ammoun the self-determination claim by the Saharui people was legally without substance: “[T] colonizers sought to win over the colonized peoples to their own civilization, in order to bind them more closely to themselves. [...] If this is indeed the explanation for the origin of a certain autonomous way of life on the part of the tribal populations in Western Sahara, one can similarly suppose that the present separatist tendencies [...] are also the result of a foreign presence”. *Sovereignty in*

For the present discussion, far more important is the so-called “democratic” right to self-determination which interestingly is considerably older than the colonial one. The origins of this concept can be traced back to US President Woodrow Wilson (1856–1924). Contrary to what is often stated, the principle of self-determination does not appear in his famous “14 points” presented on 8 January 1918 (and therefore at a moment when WW I was still ongoing) at the US Congress. In these 14 points Wilson had addressed territorial changes that should follow as a consequence of the war.<sup>8</sup> One month later, in his address to the Congress of 11 February 1918, he addressed the principle of self-determination squarely by its name. President Wilson was prudent enough to add some restrictions to this concept: Self-determination shall only be accorded if it leads to no discord and antagonism. Even if it should be possible to clearly determine the people enjoying such a right, if the will of the people should find clear expression and if the corresponding right was uncontested according to objective criteria (for example by reference to previous injustice or to a clearly determinable linguistic and ethnic divide) no automatism could apply as it would always be necessary to judge the overall consequences of the changes aspired at.<sup>9</sup>

Therefore, while exercising the democratic right to self-determination a series of pre-conditions and caveats have to be respected. First of all, it becomes clear that the result of a democratic deliberation will largely depend upon the delimitation of the people entitled to vote and this holds in particular true if the majority principle applies. Furthermore, the Wilsonian request to ponder costs and benefits of any territorial change as to its effects on the overall peace situation introduces a highly speculative element: The question whether a right to self-determination is to be attributed or not is made dependent upon a complex prognosis as to the peace prospects of any decision in this regard. It goes without saying that the final decision will imply a taking of positions that may be difficult to justify in a system governed by the rule of law. This is in particular

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*Abeyance – Self-Determination in Law*, 1975, ICJ, 84. Cited according to N. Berman, ‘Sovereignty in Abeyance: Self-determination in International Law’, 7 *Wisconsin International Law Journal* (1988) pp. 1–108 (101).

- 8 For example, in point 9 the readjustment of the Italian borders is mentioned: “The readjustment of the frontiers of Italy should be effected along clearly recognized lines of nationality”. Was this principle to be followed, so South Tyrol could never have been attributed to Italy.
- 9 Thus, Wilson asked the following: “... that all well defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world”. See President Wilson’s Address to Congress, 11 February 1918.

the case if the factual implementation of the right to self-determination goes hand in hand with acts of violence and the abuse of human rights. If elements can be discerned that are hinting at such a development a strong presumption will apply that the conditions mentioned cannot be fulfilled.

Although, as a consequence, the discussion about self-determination has taken many ramifications (and here, in particular, the colonial and the socialist right to self-determination can be mentioned), the right to self-determination finds in its “democratic”, Wilsonian strand its most important expression.

### 3 People and Nation as the Decisive Factors of Self-determination

Any attempt directed at the exploration of the legal nature and the meaning of the right to self-determination has, first of all, to discern the subjects entitled to exercise such a right. These subjects are “peoples” or, as the term of “national self-determination” seems to imply, “nations”. But what is the specific relationship between these concepts, how are they to be defined and do they (partially or totally) overlap? As of yet, the pertinent academic discussion does not deliver an unequivocal answer to these questions. As far as the discussion about the terms of “people” and “nation” is concerned a great deal of complexity is added by the fact that on the one hand, international law strives for a consistent and possibly unitary definition of these terms and at the other, on the national level, these terms are issued in a widely different way evidencing also a change in meaning over the years. A broader analysis evidences “disrupted continuities” as well as the continuous search for new orientations.<sup>10</sup> Particularly due to different political orientations the meaning attributed to these terms differed widely between the German speaking area (where the formation of a nation state occurred only late in time in European history) and France where, in particular after the French revolution, the whole French people was considered to make part of the nation. This latter understanding of the concept of nation should afterwards also heavily influence the way it was used in the English-speaking world and finally in international law.

It is interesting to note that etymologically the term “nation” refers to “birth”, deriving from the Latin verb “*nasci*”. At first sight, this might imply common

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10 See R. Koselleck, ‘Volk, Nation, Nationalismus, Masse’, in O. Brunner, W. Conze and R. Koselleck (eds.), *Geschichtliche Grundbegriffe, Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 7 (Ernst Klett, Stuttgart, 1992) pp. 141ss. (144).



ancestry, a relationship of blood.<sup>11</sup> Interpreted in a more abstract sense, this act of birth can also refer, however, to a common root of a community and this can be, beyond the common blood line, also be a historical fact or a legal act by which all people living on a certain territory come to make part of the same entity, the same nation.

In default of a common German state, in the German speaking area the concept of “nation” has been used for a long time not in the meaning of “state nation” but in that of “cultural nation” whereby a natural community of people was intended that was united by descend, history, language, culture and religion.<sup>12</sup> The concept of “people” (“*Volk*”) has instead been associated with elements of “meanness”. Thus, from the Latin term “populous” in German the derogatory term “*Pöbel*”, meaning “mob” or “rabble” was derived.<sup>13</sup> Only around 1800 also in the German speaking world the term “*Volk*” became understood as comprising the whole people living on a lasting basis on a certain territory.<sup>14</sup> Afterwards, Herder and Fichte embarked on a romantic glorification of the culturally defined nation which was equated with the people.

In France, Ernest Renan (1823–1892) has discovered the cohesive power of a people constituted nation, an insight which he forcefully gave expression in an often-cited speech before the Sorbonne University on 11 March 1892:

A nation is ... a large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future. It presupposes a past; it is summarized, however, in the present by a tangible fact, namely, consent, the clearly expressed desire to continue a common life. A nation's existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual's existence is a perpetual affirmation of life.<sup>15</sup>

It is evident that this definition mirrors the French conception of the nation or, respectively, the way the French nation was lived. The situation in “Germany”, a

11 See M. Shahabuddin, ‘The ethnic dichotomy of “self” and “other” within Europe: inter-war minority protection in perspective’, in D. French (ed.), *Statehood and Self-Determination* (CUP, Cambridge, 2013) pp. 407–426 (407), referring to W. Connor, ‘A Nation is a Nation, Is a State, Is an Ethnic Group, Is a?’, in J. Hutchinson and A.D. Smith (eds.), *Nationalism* (OUP, Oxford, 1994) p. 38.

12 See L. Palleit, *Völkerrecht und Selbstbestimmung* (Nomos, Baden-Baden, 2008) p. 13.

13 See Koselleck, *supra* note 11, p. 143.

14 *Ibid.*, p. 143.

15 English translation retrieved online at <[web.archive.org/web/20110827065548/http://www.cooper.edu/humanities/core/hss3/e\\_renan.html](http://web.archive.org/web/20110827065548/http://www.cooper.edu/humanities/core/hss3/e_renan.html)>, visited on 1 August 2015.

territory at that time and up to 1871 a territory to be defined only culturally and not legally, was in many ways different.<sup>16</sup> In Germany the term “nation” has an enormous appealing power. The German nation, defined as a cultural entity, and the German people vied for unification and, as a consequence, for political change. Neither Gottfried Herder (1706–1763) nor Gottlieb Fichte (1762–1814) intended to degrade other peoples when they romantically glorified the German people.<sup>17</sup> The primary ambition was rather to create a state for the German people, a goal achieved long before by other nations, in particular by France and Great Britain. In the 19<sup>th</sup> century nationalism that previously was primarily intended at giving any nation a state became rampant, necessarily also provoking contrast and conflict, primarily between France and Germany.

In the aftermath, the destiny of the great European nations heavily influenced also the way the concepts of people and nation were understood and finally also the meaning of self-determination. Those national movements, such as *Italia irredenta* or the German nation after WW I, that had not yet been able to achieve the creation of a state or the correspondence between an existing nation-state and the territory on which a certain nation, defined as a cultural or sociological entity was settling, continued to profess the existence of a pre-state or trans-state nation.

As far as Italy is concerned, ideas of this kind can be re-traced very well in the writings by Pasquale Stanislao Mancini (1871–1888) who, in his speech before the University of Turin, emphasized the importance of the nation as an entity of paramount relevance beyond time and state. For him, the nation defined in this sense was even the most basic element of the international legal order.<sup>18</sup> It is interesting to note that Italy, after the conclusion of the unification process, adopted a strictly positivist attitude towards international law, an attitude often associated with the name of Dionisio Anzilotti (1867–1950) while Mancini is all but forgotten. Only the recent separatist tendencies, in particular in northern Italy, have recalled into memory, at least in some quarters, his name and his thoughts.

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16 Nonetheless, the situation of Germany cannot be compared with that of Italy qualified by Duke Metternich at the beginning of the 19<sup>th</sup> century, in a partisan and self-interested approach, as a “mere geographical concept”. The nation-building process in Germany was surely far more advanced and also had a different geographical background. The Holy Empire was not a state in a legal sense.

17 See Koselleck, *supra* note 11, p. 321; E.D. Weitz, ‘Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right’, *American Historical Review* (2015) pp. 462–496.

18 “Della nazionalità come fondamento del diritto delle genti”.

In Germany and in Austria, to the contrary, the traumatic experience of the peace treaties of Versailles and Saint Germain has given enormous impetus to the discussion about self-determination. For this, President Wilson's programme formed an important starter but in the following the discussion developed a far broader scope and was enriched by "typically German" elements of the nation concept.

When the war events precipitated in 1918 this reverberated also on the political level and in Germany as well as in the Austrian Hungarian Empire a discussion about the concept of self-determination set in that would have seemed impossible only a few months earlier. In the pre-war period German and Austrian international law doctrine and politics, as far as it took notice of this concept at all, interpreted this principle, in particular in view of the multinational character of the Austrian Hungarian Empire, pre-eminently as a basis for realizing internal self-determination and autonomy and not as a possible source for claims for secession or independent statehood.<sup>19</sup> Initially, this subject was of relevance only in Austria-Hungary while in Germany the self-determination discussion was more or less ignored. In the last year of war, however, a radical re-orientation took place. As both external and internal circumstances had completely changed what was previously without or with very limited appeal now appeared to be a last resort to avoid the worst. In Austria-Hungary at once, even the Czech people, previously staunchly pro-Empire, voiced claims for independence while the German group, which was dominant before, now foresaw a loss of its privileges and even discrimination.<sup>20</sup> With military defeat becoming ever more certain and the loss of the position as a world power (Germany) or as a regional power (Austria-Hungary) only being a question of time both countries began to look for help and assistance in the international legal order. In doing so, both countries "discovered" the international (i.e. "external") dimension of self-determination. This way the Middle Powers tried to make the Wilsonian requests for self-determination, which were originally clearly directed against them, less threatening, as self-determination should now become generalized. Self-determination should thereby not only become an instrument to justify the territorial secession from these countries or even their splitting up but it should also be suited to defend the territorial integrity of these states insofar as the respective territories were inhabited by the state nations. Paradoxically enough, within a very short period of time Germany, Austria and Hungary transmuted from sceptics and opponents of an external right to self-determination to its most fervent advocates. In particular,

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19 See Palleit, *supra* note 13, pp. 16ss.

20 *Ibid.*, p. 27ss.

after WW I the German speaking area became renowned for its intense political and academic interest for minority rights and self-determination. The fact that these principles were proclaimed only shortly before by the victorious powers and the prevailing impression that the peace conditions dictated to the vanquished states furnished a strong moral basis for academics and politicians that dealt with this subject while in the Anglo-American area not only no political reason was seen to take heed of these pleas and requests but they were most totally ignored out of linguistic reasons. In fact, the war has brought about a dramatic loss of importance for German as an academic language<sup>21</sup> and especially in the French-speaking area German publications were purposely ostracized. Still the German concept of the “nation” remained totally alien to the Anglo-American and the French world.

Nonetheless, the extensive territorial changes brought about as a result of the war made clear that the national element had to be recognized on the international level. If elements of a nation in an ethnic, cultural or linguistic sense remained without protection by a state adequate alternative protective measures had to be adopted and they could be retrieved in various forms of national self-determination or in the protection of minorities. As is well known, demands going in this direction were satisfied only to a very limited extent. Only in a few cases referendums were organized.<sup>22</sup> As a subsidiary solution some newly created, numerically often very large minorities were offered specific minority protection. To many other minorities, however, such a protection was denied.<sup>23</sup> In those cases where minority protection was granted, these measures often proved to be of limited effect and of no lasting nature. There were no models in the recent history states could refer to and those states which had to accept such protection obligations developed an ever-growing

21 See U. Ammon, *Die Stellung der deutschen Sprache in der Welt* (de Gruyter, Berlin, 2015) p. 102.

22 These cases were, in the immediate aftermath of WW I, North Schleswig, a territory disputed between Germany and Denmark, Danzig, Upper Silesia, the Klagenfurt Basin (contested between Austria and Yugoslavia), Sopron (lying at the border between Austria and Hungary) and, in 1935, the Saar region (claimed both by France and Germany). For a fundamental examination of this subject see S. Wambaugh, *A Monograph on Plebiscites* (OUP, New York, 1920); S. Wambaugh, *Plebiscites Since the World War: With a Collection of Official Documents* (Carnegie Endowment for International Peace, Washington, DC, 1933). See also Y. Beigbeder, *International Monitoring on Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Martinus Nijhoff, Dordrecht, 1994).

23 For example, this was the case with the German speaking population of South Tyrol.

aversion against these obligations.<sup>24</sup> In general it was not intended to afford permanent protection to these minorities but at the utmost to soften the assimilation process which was seen as unavoidable. Only the minority protection provisions in favour of the Swedish speaking population of the Aland Islands constituted an exception in this dismal picture. These provisions proved to be very effective and they outlived the League of Nations system.<sup>25</sup>

#### 4 Self-determination after WW I<sup>26</sup>

##### 4.1 *The Early Practice of Self-determination as Part of the Anti-colonialism Movement*

The entry into force of the UN Charter in 1945 had created a completely new situation to the interwar period. Now, for the first time the principle of self-determination had found entrance in a set of rules of highest ranking reputation and of potentially universal application. The norms on self-determination within the UN Charter, to be found in Articles 1(2) and 55, are, however, rather vaguely formulated and in particular in the first years self-determination was seen as nothing else than as a consequence of national sovereignty and as a pre-condition for the equality of states enshrined in Article 2 para. 1 of the Charter.<sup>27</sup> Other writers highlighted in the following critically that the Charter referred only to a “principle” which could only be seen as a political directive with no legal value.<sup>28</sup> It was therefore up to the anti-colonialism movement to provide this principle with (legal) life. By the two 1960 anti-colonialism resolutions of the UN General Assembly,<sup>29</sup> milestones were set in the juridification

24 See P. de Azcarate, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace, Washington D.C., 1945) and P. Hilpold, ‘The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment’, *17 Max Planck Yearbook of United Nations Law* (2013) pp. 87–124.

25 As to the basis of this extraordinary resilience see M. Suksi, ‘Explaining the Robustness and Longevity of the Aland Example in Comparison with Other Autonomy Solutions’, in *20 IJMR* 2013, pp. 51–66.

26 See extensively on this issue P. Hilpold, ‘Self-determination in the 21<sup>st</sup> century – Modern Perspectives for an Old Concept’, *36 Israel Yearbook on Human Rights* (2006) pp. 247–288.

27 See in this sense the first extensive and very renowned commentary to the Charter by Hans Kelsen. See H. Kelsen, *The Law of Nations* (Stevens, London, 1950) pp. 52ss.

28 See K.J. Partsch, ‘Self-Determination’, in: R. Wolfrum (eds.), *United Nations: Law, Policies and Practice* (Martinus Nijhoff, Dordrecht, 1995) p. 1171, para. 11.

29 “Declaration on the Granting of Independence to Colonial Countries and Peoples”, G.A. Res. 1514 (XV) v. 14.12.1960 and “Principles which should guide members in determining

process of the principle of self-determination. After the principle of self-determination had been enshrined also in the two UN Human Rights Covenants of 1966 the legal character of this concept could no longer be put in question. This fact could not, however, put an end to the discussion about the content of this right and about the subjects entitled to exercise this right. In fact, the respective discussion was now only to start.<sup>30</sup> In the German speaking area theories were developed that stood in stark contrast to the American “mainstream”. The reason behind this German (and Austrian) “*Sonderweg*” can be found in the fact that the “national question” was still unsolved. This was true in two senses: On one hand Germany was still divided in two states (against the manifest will of the majority of the German people) and on the other hand large German minorities lived abroad in states where they were subject to harsh discrimination or they had been driven from their homes and were now living in Germany and with the hope that one day their rights would be restored and their assets returned. Many of these displaced persons continued for a long time to hope to be enabled to return and to obtain restitution or just compensation for the looted property. The Anglo-American and the German (and Austrian) academics dealing with questions of self-determination did not find together in a real dialogue: In the Anglo-American area the German (and the Austrian) contributions to this discussion remained widely unknown already out of linguistic reasons (German contributions to international law are practically no longer read in the Anglo-American world) while in Germany and in Austria the new direction the discussion (and also the legal development) in the field of self-determination had taken, was also stubbornly ignored.<sup>31</sup> The borders between law and politics blurred and thereby hopes were nourished in

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whether or not an obligation exists to transmit the information called for under Article 73e of the Charter”, G.A. Res. 1541 (XV) v. 15.12.1960.

- 30 For a detailed – and very critical – analysis of the United Nations’ contribution to the formation of the right to self-determination see M. Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff, The Hague, 1982).
- 31 See i.a. Th. Veiter, *Nationalitätenkonflikte und Volksgruppenrecht* (Braumüller, Vienna, 1977) p. 175: “The term peoples in the two Covenants refers both as to its origin as with regard to its formulation to peoples in the ethnic sense”. (Translation by this author.) See also O. Kimminich, *Rechtsprobleme der polyethnischen Staatsorganisation* (Grünewald, Mainz, 1985) p. 123; as well as F. Ermacora, *Der Minderheitenschutz im Rahmen der Vereinten Nationen* (Braumüller, Vienna, 1988) pp. 72ss. D. Blumenwitz, *Minderheiten- und Volksgruppenrecht* (Kulturstiftung der deutschen Vertriebenen, Bonn, 1992) p. 32 writes the following (translation by this author): “The interpretation of the term ‘people’ which can be found in the UN Charter as well as in some Resolutions by the UN General Assembly has

the German speaking area that international law could not fulfil. International lawyers described a world as it should be according to their perceptions and ignored thereby that reality on the ground had taken a different direction.

There can be no doubt that ethnic groups in Europe cannot refer to the “colonial right to self-determination” in their fight for autonomous statehood, while this fact was ignored by many German writers of this time. Nonetheless, also this branch of self-determination discussion has advanced and further strengthened the importance and the reach of the general concept of self-determination.

In this context, the Western Sahara case and East Timor case should assume special prominence. Both cases introduced a particular note of complexity into international law practice as they concerned former colonies (Morocco and Indonesia) now independent that tried to impede the exercise of the right to self-determination to other colonies. In both cases the self-determination movement gained some support by the UN. With regard to the former situation it can be noted that the United Nations have been addressing this case as an issue of colonialism. In its Opinion of 16 October 1975, the ICJ confirmed the applicability of Res. 1514 (XV) of 14 December 1960 on this territory and the ensuing obligation to grant the right to self-determination. In 1995 the ICJ stated that the East Timor had a right to self-determination<sup>32</sup> and that this right had an *erga-omnes* character.<sup>33</sup>

While initially the rejection by the ICJ of its jurisdiction had met with widespread disappointment on a longer run this statement should be of considerable importance for undermining Indonesia's authority over this territory. Eventually, independence was achieved in 2002. The ICJ, recurring to its earlier jurisprudence, confirmed the importance of the right to self-determination in its “Wall Opinion” of 2003 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine*).<sup>34</sup>

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been subject to an extensive interpretation over time. In the meantime it can be taken as granted that the right to self-determination pertains also to ethnic groups”.

32 See *Case concerning East Timor (Portugal v. Australia)*, 10 June 1995, ICJ, para. 37.

33 *Ibid.*, para. 29: “In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and the United Nations practice, has an *erga omnes* character, is irreproachable”.

34 In particular, the ICJ confirmed again the *erga omnes* character of the right to self-determination and the ensuing obligation not to recognize situations resulting from a violation of this right: “As for the consequences for other States, the ICJ observed that certain obligations violated by Israel were obligations *erga omnes*, namely the right of the Palestinian people to self-determination and certain obligations under international

Again was this the case in the Kosovo Opinion<sup>35</sup> of 2010?<sup>36</sup> On the whole it can therefore be stated that the rudimentary rules on self-determination set by UN law over time and strengthened considerably, by the way of international practice and a consolidated *opinio juris*, have evolved to a right proper. The colonial branch of this development has operated as an important catalyst which, for a long time, monopolized also the pertinent discussion. Fears, however, that thereby a particularist right with a clearly limited field of application would form out, have turned out to be unjustified.<sup>37</sup> This colonial right to self-determination has neither acted as a barrier to the formation of a general right to self-determination. In the meantime, such a general right has surely come into being even though its exact contours are still in many ways unclear.

#### 4.2 *Self-determination in the Postcolonial Practice*

The self-determination processes on the Balkans and in Central and Eastern Europe in the 1990s have unfolded outside the UN anticolonial practice. In this processes, elements of state dismemberment and self-determination were closely interwoven. These were two sides of the same coin and it should remain open which element should be the decisive one.

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humanitarian law". The ICJ was: "of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention". Vgl. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory opinion*, ICJ 2004, Rz 200.

35 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ 2010.

36 *Ibid.*, para. 79.

37 Thus, Michla Pomerance, a renowned expert in this field has stated the following in her detailed analysis of the relevant UN practice: "[T]he 'New UN Law [of Self-determination] exploits the democratic penumbra and respectability of 'self-determination' while scorning the essence of the democratic credo". Pomerance, *supra* note 31, p. 75. As to the period examined by Michla Pomerance, going until the end of 1970s, this analysis can be seen as fully fitting.



This had become very clear in the course of the Yugoslav dismemberment process where claims for self-determination of single territories and more fundamental unravelling processes concerning the state as a whole were mutually reinforcing. It was interesting to see how the broad majority of the state community first tried to oppose both tendencies,<sup>38</sup> while in aftermath, when it became apparent that this dissolution process was irreversible, it was attempted to at least administrate and somewhat steer these events, so to avoid an uncoordinated drifting apart of the single regions and an ensuing further deterioration of the humanitarian situation in these territories and of the security situation in this region as a whole. As is well known, an important instrument to this end was the institution of an expert commission, the so-called Badinter Commission.<sup>39</sup> In its first opinion of 29 November 1991 this Commission left no doubt as to the fact that the state of Yugoslavia was now to be considered as defunct<sup>40</sup> and that, as a consequence, the results of this irrevocable dissolution process have to be examined from an international law perspective.<sup>41</sup>

The most delicate challenge was now to be found in the need to find criteria for the territorial delimitation of the new states that have formed out as a consequence of the dissolution process. In fact, in a multinational state formed of nations which see themselves as cultural nations in the meaning used by Herder and which evidence very strong ties to historical myths this may be a task which is extremely hard to fulfil, in particular if the wide-spread intermingling of the various ethnic groups is taken into regard. To overcome this problem the Badinter Commission referred to the *uti possidetis* principle that was developed for the drawing of borders in the 19<sup>th</sup> century in Latin America and that should finally become of paramount importance in occasion of the decolonization process in Africa in the 20<sup>th</sup> century.<sup>42</sup>

38 As is well known, when the then Foreign Minister Hans-Jürgen Genscher pressed ahead with the recognition of Croatia in 1991 (formally the recognition had taken place on 23 December 1991), this met with harsh criticism with some critics accusing Germany (albeit unjustly) for being responsible for the definite unravelling of Yugoslavia. See *Der Spiegel*, 26/1995, pp. 38–41.

39 The Badinter Commission was a commission of arbitration established by the EC Council of 27 August 1991 with the purpose to legally advice the Commission on Yugoslavia.

40 “[T]he Socialist Federal Republic of Yugoslavia is in the process of dissolution”.

41 *Ibid.* “[I]t is incumbent upon the Republic of Yugoslavia to settle such problems of state succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities”.

42 With regard to the *uti-possidetis-Prinzip* see G. Nesi, ‘*Uti possidetis hors du contexte de la décolonisation: Le cas de l’Europe*’, in XLIV *AFDI* 1998, pp. 1–23; G. Abi-Saab,

This approach was radically new in the sense that even outside the colonial context internal administrative boundaries of a federal state became relevant for international law. The *uti possidetis* principle as such does not grant any right to self-determination. It can, however, be helpful for the implementation of this right in practice as it may be of decisive importance for determining who constitutes the “people”, the “self”. In Latin America, where the *uti possidetis* principle was developed, this question was of no greater relevance as the drawing of the borders was the starting point for the development of a different national identity of the various newly-born states. Somewhat more surprising was the success story of this principle in Africa as the different African tribes evidenced a clearly discernible cultural and historical identity. However, the newly created political and historic realities should evidence a totally unexpected and rapidly unfolding identity-forming power that would swiftly overlap historic tribal identities to a considerable extent.<sup>43</sup>

Different was the situation in former Yugoslavia. While in a first moment the application of the *uti possidetis* principle should lead to the creation of independent republics whose territory more or less coincided with that of the former sub-state republics within Yugoslavia the original national identities remained alive. Now it was tried to create ethnically homogeneous nations by brutal repression, by ethnic cleansing and genocide.<sup>44</sup> In two cases the state community tried to oppose these primordial forces. This was, first of all, the case in Bosnia where it was possible, by the use of enormous military and financial means, to ensure the survival of the republic as a multinational and multireligious entity.<sup>45</sup> Furthermore, this happened with regard to Kosovo

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‘Le principe de l’uti possidetis – Son rôle et ses limites dans le contentieux territorial International’, in M.G. Kohen (eds.), *FS Lucius Caflish* (Brill, Leiden, 2007) pp. 657–671 and S. Lalonde, ‘Uti possidetis: Its Colonial Past Revisited’, *Revue Belge de Droit International* (2001) pp. 23–99.

43 Of course, this was no definite impediment to further tribal conflicts but at the outset and in view of the nearly total lack of a historic tradition of these newly created states a conflictuality of a far greater dimension was to be feared.

44 See *Case concerning application of the Convention of the Crime of Genocide*, ICJ 2007.

45 Whether this would be possible also on the longer run is, however, open to debate. Up to this date, no common “Bosnian identity”, no common “Bosnian self” can be discerned. On the short run, the approach chosen by the state community did surely make sense: Inter-ethnic hostilities have come to an end and a stand was taken that dissolution processes based on ethnic conflict could not unfold indefinitely. See St. Oeter, “International territorial administration” als neue Form der internationalisierten Zwangsverwaltung’, in F. Frommelt (ed.), *Zwangsadministration* (Duncker & Humblot, Berlin, 2014) pp. 309–330

where the State Community even demonstrated a preparedness, in special circumstances, to abandon the *uti possidetis* principle.

The essential elements of Kosovo conflict can be briefly summarized as follows.<sup>46</sup> Kosovo, predominantly inhabited by Albanians, was declared an “autonomous province” by Tito in 1974. Although the autonomous competences of this province resembled very much that of an “autonomous republic” the formal legal status was clearly of a lower rank. This was surely no coincidence as Tito tried hard to forestall any secessionist tendencies. As subsequent events evidenced the consequences of this choice were extremely far-reaching: When the Badinter Commission had to implement the *uti possidetis* principle it referred only to republics and not to provinces. Only former (sub-national) republics should be recognized a right to independence. Milosevic first restricted the Kosovar autonomy and afterwards abolished it completely. In the second half of the 1990s repression by the Serb-dominated government in Belgrade was on the rise and led eventually to ethnic cleansing and crimes against humanity.<sup>47</sup> After intense mediation attempts by the state community had brought no result and human rights violations had become rampant, NATO intervened on 24 March 1999. On 10 June 1999, the defeated Serb troops left Kosovo. At the same time the UN Security Council passed Rs. 1244/1999 which provided for the establishment of an international civil and security presence in Kosovo. The final status of Kosovo was left open and made dependent upon a political agreement. It was thereby made clear that no unilateral solution should be possible.

A political consensus to this end was, however, not attainable at the international law level. Thus Kosovars took their destiny in their own hand. and on 17 February 2008 declared the independence of Kosovo.

This act met with harsh resistance by Serbia and her allies (in particular Russia). Some countries rushed forward to recognize Kosovo, others followed more hesitatingly, still others temporized. At Serbia’s instigation a majority was found in the UN GA to seize the ICJ with the question whether Kosovo’s declaration was in conformity with international law. In its Opinion of 22 July 2010, the ICJ stated that international law does not prohibit declarations of

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and J. Malik, ‘The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing Through Democracy’, 36 *Stan. J. Intl.* (2000) pp. 303–355.

46 For more detail see P. Hilpold, ‘Das Kosovo-Problem – ein Testfall für das Völkerrecht’, 68 *ZaöRV* (2008) pp. 779–801; as well as, P. Hilpold, ‘The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Re-Requisites’, in: P. Hilpold (ed.), *Kosovo and International Law* (Martinus Nijhoff, Leiden, 2012) pp. 1–29.

47 See in this sense *Prosecutor v. Milan Milutinovic*, 26 February 2009, ICTY.

independence and this Court could neither find a conflict of the independence declaration of 2008 with Res. 1244/1999 as the Kosovar politicians issuing this declaration, according to the ICJ, had acted as private persons and not as deputies to the Provisional Kosovar Assembly.

The ICJ took notice of the fact that there was an ongoing discussion in international law theory and practice about a “remedial right of secession” but the ICJ did not find it necessary to take position in this regard. Nonetheless, there can be no doubt that the overall attitude by the ICJ as to this concept was highly critical.<sup>48</sup> By the expression “radically different views were expressed”, this Court made clear that no uniform *opino iuris* was given in this regard and therefore it was not possible to identify a corresponding customary law provision.

At this point, the relationship between NATO military operations of 1999 and Kosovo's act of self-determination of 2008 has to be addressed.

NATO intervention of 1999 is – in a strictly legal consideration – an act of humanitarian intervention that finds no legal basis in international law or, to say it more clearly, that is, as a matter of rule, strictly forbidden by international law.<sup>49</sup> Nonetheless, the international community has *de facto* ignored this violation; no sanctions were applied. There can be no doubt that NATO intervention was a factual precondition for Kosovo's independence. Nonetheless, to draw a direct line between the events of 24 March 1999 and those of 17 February 2008 and to see here an expression of a right to remedial self-determination would hardly be legally plausible. Even among those states which expressed themselves eventually (*de facto*) in favour of the existence of such a right, the vast majority rejected such a qualification for the present case. Essentially, the ICJ followed this line when it qualified this situation as a sequence of factual events in a *sui generis* context and nowhere gives the impression to recognize a remedial right to secession.

But the ICJ neither subscribes to the different extreme: While Judge Koroma has expressed the conviction that secession was prohibited as international law protects the territorial integrity of states the Kosovo Opinion clearly bears out that the ICJ does not support this position.

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48 See para. 82ss. of the Opinion.

49 See P. Hilpold, ‘Humanitarian Intervention: Is There a Need for a Legal Reappraisal?’, 12(3) *EJIL* (2001) pp. 437–467.

## 5 The Remedial Right to Self-determination

The notion that in extreme cases of oppression and discrimination a minority or a people should exceptionally be awarded a right to secession seems to find growing support. The advocates of this proposition are able to bring forward elements that refer far back to history<sup>50</sup> and at least to the *Aland* case if only the more recent history is taken into regard. In that case, however, the jurists asked by the League of Nations to assess the self-determination claims by the Alanders only very vaguely referred to remedial secession and this happened surely not in terms of a right as rather as a political possibility.<sup>51</sup> A more suitable legal basis for a remedial right to secession could perhaps be found in Principle V para. 7 of the Friendly-Relations-Declaration of 1970. Although this Declaration is not legally binding as such it is to be seen as an authoritative interpretation of UN law and as a basis for determining the further direction of the development of UN law.

The relevant provision goes 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.

To deduce from this provision a general right to secession would, however, overstretch its meaning as the clause “without distinction as to race, creed or colour” clearly refers to the colonial context.<sup>52</sup>

50 As to the historic development of the remedial right to secession see P. Hilpold, ‘Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens’, 63(1) *ZÖR* (2008) pp. 117–141.

51 For a more extensive examination of this case see P. Hilpold, ‘Secession in International Law: Does the Kosovo Opinion Require a Re-Assessment of this Concept?’, in P. Hilpold (ed.), *Kosovo and International Law* (Martinus Nijhoff, Leiden, 2012) pp. 47–78.

52 See Ch. Gusy, ‘Selbstbestimmung im Wandel’, *Archiv des Völkerrechts* (1992) pp. 385–410 (394); as well as A. Cassese, *Self-determination of Peoples* (CUP, Cambridge, 1995) p. 61. According to Patrick Thornberry ‘Self-Determination, Minorities, Human Rights: A Review of International Instruments’, 38 *ICLQ* (1989) pp. 867, 877) this clause appears to address racial issues, thereby limiting its application “only [to] Pariah states like South Africa, which oppresses its majority on racial grounds”. According to G.H. Fox, who refers

It had been pointed out<sup>53</sup> that the United States had tried to find an alternative formulation according to which the presence of a representative government should explicitly be seen as a manifestation of self-determination. This (broader) formulation did not, however, find a majority.

Interestingly enough, however, exactly this broader formulation was adopted by the Vienna Declaration on Human Rights of 1993. Therein, at first sight, a profound change of attitude could be seen:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

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 peoples 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 Charter 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.<sup>54</sup>

According to this provision a government is required that should be representative in relation to the entirety of the population and no reference is made to the colonial issue. Nonetheless, neither from this provision a right to secession

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to this remark by Professor Thornberry ("Self-determination in the post-cold war era: A new internal focus?", *16 Michigan Journal of International Law* (1995) pp. 734–781, at 740) "the United States offered an alternative text which directly equated representative government with fulfilment of self-determination", but this (broader) proposal was rejected (*ibid.*).

53 *Ibid.*

54 *See Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights* in Vienna on 25 June 1993, para. 2.

can be deduced. It is true that here representativity is required as a general rule. In default of such representativity no automatic right to secession follows. We are rather confronted here with unclear formulations, imprecise promises and hidden threats. This is surely not a *lex perfecta* describing the conditions for its application and the respective legal consequences.

Also some judicial pronouncements have been referred to as a justification for a purported right to self-determination but the cases made do not convince. An often-cited judgment is that of the Canadian Supreme Court in “Reference re Secession of Quebec”,<sup>55</sup> which, however, recognizes a right to self-determination only for the cases of colonial dependence or alien subjugation, domination or exploitation which are generally uncontested. The existence of a more extensive, general remedial right to secession is portrayed by this Court only as a possibility and no definite answer is given in this regard.<sup>56</sup> This decision has inspired also the Russian Constitutional Court which in its decision of 31 July 1993 regarding a possible secession by Chechnya has come to a similar conclusion.<sup>57</sup>

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55 See *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), p. 1342ss.

56 The Canadian Supreme Court came to the following result: “In summary, the international right to self-determination only generates, at best, a right to external self-determination in situations of former colonies, where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all these situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to external self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of people or “peoples”, nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada”. Two experts (James Crawford and Luzius Wildhaber) have presented specific studies on this subject to this Court. The Court has essentially sided with Professor Crawford. Luzius Wildhaber, on the other hand, accepted a remedial right to secession. See for more details P. Hilpold, ‘Self-Determination in the 21st Century – Modern Perspectives for an Old Concept’, 36 *Israel Yearbook of Human Rights* (2006) pp. 247–288 as well as P. Hilpold, ‘Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens’, 63:1 *Zeitschrift für öffentliches Recht* (March 2008) pp. 117–141, at p. 134.

57 See A. Tancredi, ‘A normative “due process” in the creation of States through secession’, in M. Kohen (ed.), *Secession – International Law Perspectives* (CUP, Cambridge, 2006) pp. 171–207 (181), referring to T. Beknazar, ‘Übergesetzliches Staatsnotrecht in Rußland: Staatsnotstand und Staatsnotstandsbefugnisse der Exekutive. Zum Tschetschenien-Urteil des russischen Verfassungsgerichts v. 31. Juli 1995’, 37 *ZaöRV* (1997) pp. 161 ss. (180).

Similar conclusions can be found in the *Catanga* case (Democratic Republic of Congo) decided by the African Commission of Human and Peoples' Rights:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participation in government as guaranteed by Article 13 (1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>58</sup>

Here, the Commission only states that in the present case for a remedial right to secession being attributed even the most basic factual elements are lacking. The question whether such a right exists at all, is not specifically addressed.

It has also to be mentioned that in its statement in the Kosovo proceeding, the Finnish government has tried hard to justify Kosovo's declaration of independence by reference to a remedial right to secession. This document portrays in detail the massive discrimination that happened in Kosovo, how Serb authority over this territory came to an end by NATO intervention as well as the exceptional situation that followed to this crisis. According to the Finnish government in the *Kosovo* case, the remedial right to secession applied on the basis of the findings of the League of Nations in the *Aland* case.

The Finnish government merits approval when it emphasizes the extraordinary character resulting from the Kosovo crisis. In an ex-post perspective this situation can surely be described as a case of self-determination. On the other hand, it should not be overlooked that the ICJ did not qualify the *Kosovo* case this way and that the State Community, in its great majority, tried adamantly to rule out such a qualification. It simply took note of a situation that had come about on the factual level. It was the special nature of the Kosovo case that was key to exclude its qualification as a case of self-determination. If a situation is "sui generis" it can hardly qualify as expression of a legal concept which by its very nature should find general application. The attempt was to open the door for a very specific case of self-determination that could not and should not be impeded but to close the door immediately afterwards. It is, however, doubtful whether this "*sui generis* approach" still finds general recognition as soon as the situation is settled and the mist of the immediate conflict surrounding this situation disappears. It then becomes all too evident that this qualification was dictated by political considerations.

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58 *Katangese Peoples' Congress v. Zaire*, October 1995, Case 75/92, p. 1.



A special aspect that still merits examination regards the question whether quests for self-determination can be supported by force, i.e. whether the right to self-determination constitutes an (additional) exception to the prohibition of the use of force and whether it should therefore offer also a justification for an “intervention by invitation”. Recently, this question has gained particular prominence in the context of the Russian intervention in Crimea, a discussion that has provided very clear results:<sup>59</sup> A right to self-determination – be it of an external or an internal nature – never provides a justification for a military intervention. It is therefore not possible to re-introduce by this way, through the backdoor, a right to humanitarian intervention<sup>60</sup> and neither does the existence of an secession conflict abolish the prohibition of intervention.

### 5.1 “Internal Self-determination”

On the whole – and pending a more detailed examination towards the end of this piece – it can be stated that no remedial right to self-determination, understood as a right of a minority or an ethnic group to secede from a state in case of serious human rights abuses that jeopardize the very existence of a people, can be found in international law.

Ever broader recognition finds, however, the right to “internal self-determination”. For many, outside the colonial context the right to “internal self-determination” is even to be seen as the most important form of self-determination. As a consequence, how to define this concept becomes of paramount importance. Generally, internal self-determination is understood as the systematic involvement of all groups in the national democratic process, thereby allowing for the preservation of their cultural identity and their development on an equal footing with the majority population. As a consequence, democracy must not be equalled with the application of the majority principle.

59 See P. Hilpold, ‘Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History’, 14 *Chinese Journal of International Law* (2015) pp. 237–270 (251); J. Kranz, ‘Imperialism, the Highest Stage of Sovereign Democracy: Some Remarks on the Annexation of Crimea by Russia’, 52 *AVR* (2014) pp. 205–221; and A. Tancredi, ‘Crisi in Crimea, referendum ed autodeterminazione dei popoli’, 8 *Diritti umani e diritto internazionale* (2/2014) pp. 480–490.

60 See also the Independent International Fact-Finding Mission on the Conflict in Georgia: “Military force is never admissible as a means to carry out a claim to self-determination, including internal self-determination. There is no support in state practice for their right to use force to attain self-determination outside the context of decolonization or illegal occupation [...] This also means that a secessionist party cannot validly invite a foreign state to use force against the army of the metropolitan state”. ([www.rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf](http://www.rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf), 14 July 2015).

Care has rather to be taken that minorities are not systematically overruled by the majority. While the strict application of the majority principles would lead to a situation where minorities never have their saying, in a genuine democracy respecting the principle of internal self-determination precautions have to be taken that the interests of minorities are taken into regard the same way as it is the case for the majority. The democratic process must not degenerate to an “all or nothing”-mechanism but it is rather the case that the interests of the single member of the minority must have the same weight as that of an individual pertaining to the majority. To achieve this end, in practice it will regularly be necessary to introduce preference rules for minorities, so-called “positive measures” (“positive discrimination”). Such a balancing of interests should lead to a consociational democracy.

There are various provisions in international law, in particular in the field of human rights law, from which a right to internal self-determination can be deduced. This is the case for the freedom of expression (Article 21 CCPR), the freedom of assembly (Article 22 CCPR), the right “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors” (Article 25b) CCPR) and generally the right “to take part in the conduct of public affairs, directly or through freely chosen representatives” (Article 25a) CCPR).

Although many uncertainties are still given, ever more elements are forming out according to which a “right to democratic governance” is coming into being.<sup>61</sup> In such democracies based on international law the protection of minorities – which finds additional guarantee in an ever-growing number of specific international provisions – will be of fundamental importance.

Will the internal right to self-determination, as it is often said, transmute to a right to secession in case that minorities are denied their right to effective participation? There is no convincing evidence for the existence of such a mechanism as it has been demonstrated in the context of the discussion about the so-called right to remedial secession.

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61 As is well known the fundamental contribution in this regard has been written by Th. Franck, *Fairness in International Law and Institutions* (OUP, Oxford, 1995). See also G.H. Fox and B. Roth (eds.), *Democratic Governance and International Law* (CUP, Cambridge, 2000).

## 6 Autonomy

Autonomy is both an alternative to self-determination as well as an expression of it.<sup>62</sup> From an etymological perspective both concepts should be more or less identical as the term “autonomy” is formed by the Greek terms “auto” and “nomos”, meaning together again “self-determination”. And in fact, in practice there is a close relationship between “autonomy” and one specific form of self-determination, namely internal self-determination. Conceding to a minority the right to deliberate about issues that are of immediate relevance for the conservation of their identity is tantamount to creating a framework system guaranteeing the systematic participation of these groups in pivotal societal decision processes. It is true that autonomy systems often have a larger reach but at the same time it is also true that the concession of specific minority and group rights regularly stands at the centre of such sets of rules. Autonomy has even been called the “queen of minority protection instruments”.<sup>63</sup>

Of course, there is not the one and only conception of autonomy; autonomy systems may rather present itself in many different fashions. In a certain sense, each autonomous order is unique. Typical for most autonomous orders is their territorial entrenchment. If the autonomy issue is addressed, usually a territorial autonomy, finding application on a certain part of the national territory, is meant.<sup>64</sup> On a first *rapprochement* to this issue one could say that

62 For many authors autonomy is the most genuine expression of (internal) self-determination. See L. Hannikainen, ‘Self-Determination and Autonomy in International Law’, in M. Suksi, *Autonomy: Applications and Implications* (Kluwer, The Hague, 1998) pp. 79–95; H.-J. Heintze, ‘Autonomie’, in K. Ipsen (ed.), *Völkerrecht* (C.H. Beck, Munich, 2014) pp. 369ss.; H.-J. Heintze, ‘Selbstbestimmungsrecht der Völker als Herausforderung des souveränitätsorientierten Völkerrechts’, in P. Hilpold (ed.), *Autonomie und Selbstbestimmung* (Nomos et al., Baden-Baden et al., 2016) pp. 50–67; A. Cassese, *Self-determination of Peoples* (Cambridge University Press, Cambridge, 1995) pp. 348ss.; and W. Danspeckgruber, ‘Self-Governance Plus Regional Integration – A Possible Solution to Self-Determination Claims’, in M. Weller and S. Wolff (eds.), *Autonomy, Self-Governance and Conflict Resolution* (Routledge, London, 2005) pp. 26–48.

63 See M. Brems, *Die politische Integration ethnischer Minderheiten* (Peter Lang, Frankfurt a.M., 1997) p. 142, referring to Ch. Pan. See also M. Suksi, ‘Autonomy and Conflict Resolution’, in H.-J. Heintze and P. Thielbörger (eds.), *From Cold War to Cyber War* (Springer, Heidelberg, 2016) pp. 21–42.

64 As is well-known, alongside the concept of territorial autonomy there is also the concept of personal autonomy conceived for situations in which the members of a minority live scattered over the territory and intermingled with the majority population. This concept had considerable relevance in the Ottoman Empire (in the ambit of the so-called Millet system) while presently it is pre-eminently of academic relevance.

an autonomous order is located, as to its function, between a mere minority protection system and the implementation of self-determination with ensuing territorial changes. In fact, minority rights are focused on the protection of individual rights, even though, as a consequence, they may protect the minority as a whole and evidence therefore also a collective dimension (this is the case, for example, with topographic naming and the right to political representation). The territorial aspect has here the role of a logical pre-condition for the application of the right and is not in itself subject of the regulation. In an autonomy system, instead, the territory acquires the role of a constitutive element of the whole protective mechanism without putting into question the basic sovereign rights of the territorial state. Dynamic elements can be found in an autonomous system only insofar as certain protective measures are adapted to changing needs by the minority and its members. With regard to the sovereign prerogatives of the nation state autonomy rules are, instead, of a static nature. It can even be said that a specific characteristic of these systems lies exactly in the fact that they do not challenge the sovereign power of the state. Therefore, autonomous systems regularly display characteristics of a compromise which necessarily is fraught with doubts and imperfections. The often-cited saying according to which autonomy is granted reluctantly and accepted ungratefully appears to be very much to the point. Once an agreement on autonomy is achieved, this compromise may at any time be questioned again: The central government may be tempted to interpret the autonomy provisions restrictively and to retreat concessions made once it feels to get the upper hand in the struggle with the autonomous region(s). However, also the opposite may happen: The minority may see the autonomy as a basis for further requests that should finally lead to secession, to independent statehood.

Lately it was suggested that a new concept of autonomy was taking shape that would countervail these secessionist tendencies.<sup>65</sup> Whether such a change of mind has really taken place, is, however, open to debate as substantiated empirical evidence is still lacking. It seems to be more appropriate to see in autonomy an ongoing challenge for all stakeholders that have to be convinced time and again of the inherent value of such a set of norms. At the same time

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65 See S. Wolff and M. Weller, 'Self-determination and autonomy – A conceptual introduction', in *idem* (eds.), *Autonomy, Self-governance and Conflict Resolution* (Routledge, London, 2008) pp. 1–25 (2): "In response, autonomy was re-discovered as a potential remedy of self-determination claims. It was now no longer seen as the secessionists' stepping stone towards independence, but instead, in a 180-degree reversal of the previous position, autonomy was now considered as a possible tool in accommodating separatist movements without endangering the continued territorial integrity of an existing state".

they have also to be persuaded that any extreme alternative to existing autonomy attributing more power and competence to a group (or the central state) could come at a high price.<sup>66</sup>

If autonomies are sometimes viewed at with scepticism this can be attributed to the fact that for a long time no immediate basis was given in international law for this concept<sup>67</sup> and it was difficult to find a commonly agreed definition for this instrument.<sup>68</sup> In the meantime, much has changed in this regard. In this context, special attention has to be given to the Lund Recommendations on the Effective Participation of National Minorities in Public Life of 1999<sup>69</sup> that highlight the importance of territorial arrangements for the realization of effective participation of minorities.<sup>70</sup> A vast literature on autonomy issues underscores the pivotal importance of autonomy arrangements as a minority rights protection instrument.<sup>71</sup> A special field in which such arrangements

66 A list of requirements, a successful autonomy model has to fulfil, can be found in R. Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* (United States Institute of Peace Press, Washington, DC, 1996) p. 199ss. There, particular emphasis is given to the need to involve all stakeholders (and in particular also the kin state of the minority) in the process of forming and developing autonomy. This process has to take place step by step in a dynamic and democratic way.

67 So H.J. Steiner, 'Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities', 66 *Note Dame Law Review* (1991) pp. 1539–1560 (1547). Contra: G. Gilbert, 'Autonomy and Minority Groups: A Right in International Law', 35 *Cornell International Law Journal* (2002) pp. 302–353.

68 As to the various attempts to define autonomy see Lapidoth, *supra* note 66, 1997, p. 29ss.

69 See OSCE High Commissioner on National Minorities 1999.

70 See in particular para. 20 of the "Lund Recommendations":

Appropriate local, regional, or autonomous administrations that correspond to the specific historical and territorial circumstances of national minorities may undertake a number of functions in order to respond more effectively to the concerns of these minorities:

- Functions over which such administrations have successfully assumed primary or significant authority include education, culture, use of minority language, environment, local planning, natural resources, economic development, local policy functions, and housing, health, and other social services.
- Functions shared by central and regional authorities include taxation, administration of justice, tourism, and transport.

71 See, i.a., H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania, Philadelphia, 1996); M. Suksi (ed.), *Autonomy: Applications and Implications* (Kluwer, The Hague, 1998). Special Issue on Forms of Autonomy, 15 *International Journal on Minority and Group Rights* (2008) pp. 143–432; and L. Hannikainen, 'Cultural Autonomy – and Some Related Aspects of Territorial Autonomy', in D. Thürer and Z. Kedzia (eds.), *Managing Diversity* (Schulthess, Zürich, 2009) pp. 193–205

have found most useful application was that of the protection of indigenous peoples and much more could still be done in this area after arrangements of this kind have found international recognition and support by the United Nations Declaration on the Rights of Indigenous Peoples of 2007.<sup>72</sup> At the same time, however, this Declaration leaves no doubt that a right to autonomy will never constitute a basis for secessionist claims by indigenous peoples.<sup>73</sup>

On a whole, it can be stated that within the large array of minority protection instruments available autonomy has proven to be a very successful one.<sup>74</sup> Its usefulness has been demonstrated in a myriad of cases and it continues to do so. Exactly because this instrument has so successfully stood the test of the practice the fears often voiced in the past according to which the concession of autonomy could set in motion secessionist processes constituting a first step towards independence have lost their urgency and in conflict situations more and more preparedness is to be noted to directly refer to autonomy as

72 See *United Nations Declaration on the Rights of Indigenous Peoples*, 4 Annex, UNGA Res. 61/295, 13 September 2007, 61 UN GAOR (vol. 111), Supp. No. 49, p. 15, UN Doc. A/61/49: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. While in the years before it was prevalently disputed that a right to autonomy should make part of indigenous rights (see, in particular, the Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc. OEA/Ser.L/V/II.62, doc. 26 (1984), pp. 81–82) this can now no longer be contested. See also J.A. Hofbauer, *Sovereignty in the Exercise of the Right to Self-Determination* (Brill/Martinus Nijhoff, Leiden, 2016) p. 166s.; and F. Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’, 42 *Texas International Law Journal* (2006) pp. 186–187.

73 See Article 46 para. 46 of the Declaration: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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”. On the particularities of autonomy rules for indigenous peoples see also G. Alfredsson, ‘Indigenous Peoples and Autonomy’, in Ch. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, The Hague, 1993) pp. 41–54.

74 See only the example of the South Tyrol autonomy. See P. Hilpold, *Modernes Minderheitenrecht Eine rechtsvergleichende Untersu chungdes Minderheitenrechtes in Österreich und Italien unter besonderer Berücksichtigung völkerrechtlicher Aspekte* (Manz Verlag, Vienna, 2001).

a problem solution instrument,<sup>75</sup> exactly to counter-act further secessionist tendencies.<sup>76</sup>

As the Scottish referendum of 18 September 2014 has revealed a highly developed legal order should not fear a discussion about a possible secession of parts of its territory even without international or constitutional obligations being given to permit it.

## 7 Conclusions

The considerations above have demonstrated that the modern concept of self-determination, as it has been given life by Woodrow Wilson in 1918, is ambiguous and contradictory. Exactly for the situation for which it had been created, the post-war peace-settlement after WW I, it has miserably failed. Nonetheless, a process had been set in motion that continues to be operative up to these days. Coadjuvated by the creation of a broad system of human rights the concept self-determination has continuously strengthened the position of the person, both as an individual as members of a group.

The roots of this concept that are to be found in the Wilsonian (not to say the US-American) conceptions of individualism, democracy and fairness continue to re-appear in this process despite the many situations of backlash and disappointment. The various steps in this process might not always satisfy the high expectations usually associated with the idea of self-determination. This is in particular the case with regard to decolonization where the needs and interests of the oppressed peoples were often neglected (as happened with regard to the Ibos in Biafra/Nigeria or the Saharuis in Western Sahara).

If an attempt is made to examine the present self-determination claims in Europe it has to be acknowledged that in international law no right to secession for single territories, groups or minorities is given. Nonetheless, in international law practice a plethora of elements can be discerned that operate in favour of secession movements. Thus, for example, it can be noticed that

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75 See the widely-cited report by Asbjorn Eide on "Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities", E/CN.4/Sub.2/1993/34. With regard to indigenous peoples the UN Declaration on the Rights of Indigenous Peoples of 2007 now explicitly refers to the right to self-determination (Article 3; this provision grants in substance, however, only a right to "internal self-determination") as well as to the right to autonomy (Article 4).

76 See M. Weller, *Towards a General Comment on Self-determination and Autonomy*, 2/AC.5/2005/WP.5, 25 May 2005.

governments are now more prepared than in the past to negotiate with centrifugal forces. Behind this attitude the conviction can be discerned that legitimate sovereignty has to have a contractualistic nature and be based on a consensus oriented government. At the same time, history is becoming ever more important. Questions like: are there historic titles and if yes, what is their foundation, how intense are the demands for self-determination, is historic injustice still present and how strongly is it felt acquire particular relevance.<sup>77</sup> Numerous elements come into play when answers are looked for with regard to these questions. Often, economic elements are decisive in this regard.<sup>78</sup> Recent studies demonstrate that the previous concession of autonomy is often even decisive for the subsequent successful assertion of self-determination claims.<sup>79</sup> These studies are mostly characterized by a highly critical undertone against secessionist attempts. It may be open to debate whether the causalities asserted in these studies are really an empirical fact. Thus, it may be correct that resource rich territories are particularly tempted to fight for independence. On the other hand, the wealth of resources may previously have been decisive why this territory has been occupied in the first place. It may also be true that territories endowed with autonomy may fare rather prominently among those territories which advance claims for secession. It should not be neglected, however, that the respective autonomy has been granted exactly because this territory evidences considerable differences from the rest of the territory as to the linguistic, ethnic and cultural composition of its population. This autonomy can also be seen as a compensation for (external) self-determination denied.

Irrespective of the fact, how these factors are politically gauged and how far back in history we want to go to measure the causalities mentioned it can be assumed that these elements are highly sensitive for the self-determination issue.

On a whole it can be said that autonomy can contribute to a considerable measure to countervail situations of wide-spread discrimination and to realize a consociational democracy that should permit accommodations of persons

77 As to this point see extensively L. Brilmayer, 'Secession and Self-Determination: A Territorial interpretation', 16 *Yale Journal of International Law* (1991) pp. 177–202 (1995s.).

78 See P. Collier and A. Hoeffler, 'The Political Economy of Secession', in: H. Hannum and E.F. Babbitt (eds.), *Negotiating Self-Determination* (Lexington, Oxford, 2006) pp. 37–59 (52 s.): "[S]ecessionist movements should not in general be seen as cries for social justice. Those few secessionist movements that are able to scale-up to being organizations with a serious political or military capability are likely to occur in rich regions and contain an element of resource grab".

79 See E. Jene, 'National Self-Determination – A Deadly Mobilizing Divide', in H. Hannum and E.F. Babbitt (eds.), *Negotiating Self-Determination* (Lexington, Oxford, 2006) pp. 7–36.



and groups with different languages, religions, culture and ethnical affiliations. If such measures offer important help to preserve these different identities in a peaceful environment but at the same time pave the way for more extensive self-determination requests this may be a price to be paid for a successful consociational democracy.<sup>80</sup> A living, functioning democracy should not fear a discussion on self-determination that takes places within established political procedures and availing itself of recognized instruments. In a democracy in which the people is the sovereign also a discussion about territorial changes must be allowed. Care has to be taken, however, that this discussion is not conducive to new forms of nationalism and that the political procedures, permitting exactly this discussion, are not destroyed or altered in their structure so to inhibit a similar discussion in the future. With other words: In a democratic order it should always be possible to discuss about changes in the political and territorial framework but the choices taken as a consequence shall not be irreversible and no new situations of discrimination shall thereby be created. Such a strategy could make part of a long-term management of self-determination claims.<sup>81</sup>

It can be noted that in Europe the discussion about self-determination has gained enormous breath and the distinction between “external self-determination” and “internal self-determination” has created broad space for introducing a plethora of new modes through which this right can be exercised. The strengthening of the democratic principle has added further to the relevance of this discussion. The many self-determination movements all over Europe have therefore to be taken seriously if international law does not grant any right to secession outside the exceptional cases treated above. The strengthening of the “internal self-determination” grants larger participatory rights to minorities and groups and at the same time a discussion about vanishing borders between external and internal self-determination is no longer a taboo.

And if we consider all these factors it is fair to say that the quest for self-determination which shows up these days in many places all over Europe is of a rather strong nature and it is highly probable that these demands will sooner or later be crowned with success. Therefore, it can be assumed that what

80 On the concept of “consociational democracy” see A. Lijphart, *Democracy in Plural Societies* (Yale University Press, New Haven et al., 1977); as well as A. Lijphart, ‘Self-Determination versus Pre-Determination of Ethnic Minorities in Power Sharing Systems’, in W. Kymlicka et al. (eds.), *The Rights of Cultural Minorities* (OUP, Oxford, 1995) pp. 275–287.

81 On this subject see also K. Gallagher Cunningham, *Inside the Politics of Self-Determination* (OUP, Oxford, 2014).

presently appears as illusionary and utopian can become a hard fact in reality in the next future.<sup>82</sup>

We are confronted here with a strange contradiction. Although the reference to a remedial right to secession is unconvincing, although peoples outside the colonial context do not have any right to their own state, and although historical myths on which many self-determinations are based usually do not withstand closer scrutiny, the belief in the contrary can create new realities. At the end, whether a historical myth is true is all but irrelevant.<sup>83</sup> What really matters is not whether a group can prove historically and objectively to constitute an independent nation but rather whether this group truly believes in these myths and whether it has built up sufficient identificatory elements that furnish somewhat convincing arguments to justify the claim for an autonomous identity. If one day specific conditions materialize that permit the realization of a secession claim, utopia can become reality. At the same time, there should be greater preparedness to discuss and eventually also to accept territorial modifications based on a freely expressed will by the concerned populations. They are surely no panacea for the solution of problems in the day-to-day interaction of different groups and it should also be clear that modifications of this kind will create new social, political and economic costs that have to be carefully pondered before starting such a project. Nonetheless, it becomes clear that what was radically excluded in the past and not even suitable for discussion now can be faced far more openly. And the consequences of this development may be different than supposed: If the discussion about territorial changes loses its conspirative glare it may be the case that at the end of this process the decision is taken to leave the territorial situation as it is, perhaps with the exception of some minor changes and improvement. Such an outcome would again constitute a "*plebiscite de tous le jours*" in the sense of Ernest Renans for the preservation of the democratic system within the existing territorial borders combined with an ongoing struggle, also taking place on a day-to-day basis, for permanently optimizing the given arrangements.

82 See A. Fischer, *Sezession im Völkerrecht. Faktisches Phänomen oder reale Utopie* (Peter Lang, Frankfurt a.M., 2017).

83 This has already been impressively demonstrated by Benedict Anderson in relation to the formation of nations. See B. Anderson, *Imagined Communities* (Verso, London, 1996). Also for David Miller "identities are partly mythical in nature". See D. Miller, 'In Defence of Nationality', 10:1 *Journal of Applied Philosophy* (1993) pp. 1–16. Similarly, Ernest Gellner sustains that nations are the result of a self-determination process. See E. Gellner, *Nations and Nationalism* (Cornell University Press, Ithica, NY, 2006).