

# THE SECESSION-REMEDY EPISODES. MASSIVE AND GRAVE VIOLATIONS AGAINST THE HUMAN RIGHTS OF MINORITIES AND PEOPLES

*Los episodios de secesión-remedio. Violaciones graves y sistemáticas de los Derechos Humanos de minorías y pueblos*

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## **Abstract**

This Paper intends to give an overview of the development in the concept of self-determination made by United Nations after World War II, from the last period of colonialism, codifying the right to self-determination and considering the Peoples who suffered from it as subjects of this right, until the appearance of secessionist

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episodes and the restricted reformulation on the following decades; then, the assumption of the *theory of secession-remedy* will be scrutinized as the last step in the evolution of self-determination in response to episodes of grave violations of human rights and restrictions of self-government faculties.

### ***Keywords***

Self-determination, Colonial domination, territorial integrity, secession-remedy, national minorities, United Nations.

### ***Resumen***

El presente *paper* lleva a cabo una visión general del desarrollo del concepto de autodeterminación efectuado por las Naciones Unidas tras la Segunda Guerra Mundial, desde el período del colonialismo, codificando el derecho de autodeterminación y considerando a los pueblos que lo padecieron como sujetos del mismo, hasta la aparición de episodios secesionistas y la reformulación restringida formulada en las décadas siguientes; posteriormente, será analizada la teoría del remedio de secesión como el último estadio en el proceso evolutivo de la autodeterminación en respuesta a episodios de violaciones graves y sistemáticas de derechos humanos y restricciones de las facultades de autogobierno.

### ***Palabras clave***

Autodeterminación, dominación colonial, integridad territorial, secesión-remedio, minorías nacionales, Naciones Unidas.

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**SUMMARY:** I. INTRODUCTION. 1. *The principle of self-determination of Peoples within the United Nations Organization after World War II.* 1.1. The positivation of the right to self-determination of Peoples during the decolonization period. Colonial territories as the subjects of the right. 1.2. The new and ambiguous evolution of the right to self-determination and the secessionist cases. The codification of the principle of territorial integrity. II. THE SECESSION-REMEDY EPISODES. THE LAST STAGE OF ITS EVOLUTION. III. CONCLUSIONS. *REFERENCES.*

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## I. INTRODUCTION

The imprecise delimitation of self-determination in International Law and its ambiguous and, to a certain extent, confusing content is partly due to its evolutionary nature. As a matter of fact, the principle of self-determination of Peoples has been one of the most relevant principles in International Law<sup>2</sup> in the last two centuries and represents not only a simply legal concept, but also a significant axiom in so many situations and in a vast range of circumstances along history, even trespassing the borders of Law where its evolution process began. However, it was in the 20<sup>th</sup> century, throughout its legal codification, when the most remarkable and significant period of its evolution took place, gaining this principle a great relevance in our current world.

As a consequence of the evolutive character of self-determination, it is particularly difficult to approach its features in order to clarify them properly. This is also the main reason why there has been such an intense doctrinal debate in the last couple of decades discussing about the specific content and the subjects of the right to self-determination of Peoples, as well as a persistent misunderstanding of the conditions of exercise thereof by the International Community<sup>3</sup>. Thus, as is widely known, this principle has suffered many restrictions and willing deformations by the sovereign States themselves who have not always duly respected the applicable regulation of this confused expression established in International Law along the last century<sup>4</sup>, giving priority instead to their own political judgment whenever this principle should be implemented.

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<sup>2</sup> Gómez Robledo, A. (1982): *El ius cogens internacional: (estudio histórico-crítico)*, México: Universidad Autónoma de México, p. 40-41.

<sup>3</sup> Ofuately-Kodjoe, W. (1977): *The principle of Self-Determination in International Law*, New York, Nellen Publishing Company, Preface.

<sup>4</sup> Héraud G., Preface in Obieta Chalbaud, J.A. (1980): *El Derecho de autodeterminación de los pueblos. Un estudio interdisciplinar de los DD.HH.*, Universidad de Deusto, Bilbao.

## 1. *The principle of self-determination of Peoples within the United Nations Organization after World War II*

As a matter of fact, the codification of the principle of self-determination of Peoples in International Law is a pretty recent event, since the creation of political entities and States was considered as a *de facto* issue that could only being resolved by the use of power, not being subdued by any kind of regulation. Upon one part from the parent State achieved the real independence the rest of the countries were free from that moment on to recognize it or not as a new sovereign State. However, after Second World War, in a post-war period once again, the concept «self-determination» regained ascendancy in international relations, no longer being regarded as a political measure and acquiring legal status<sup>5</sup>. Along the 20<sup>th</sup> century, the self-determination experimented a gradual process of evolution to become an undeniable peremptory norm in the positive international law, which stemmed from the legal codification of the right to self-determination of Peoples by the United Nations and its later development in the aftermath of the armed dispute<sup>6</sup>, surrounded by ambiguity and some confusion within the International Community.

What is of particular interest here is to understand properly how this principle was applied by the United Nations and the disparate approaches made to its Resolutions depending on the territory who claims its exercise. As a starting point, United Nations distinguished between two separate situations, colonialism and secessionism. Applicable international regulations in both cases were utterly different, especially the assumption of Peoples as subjects entitled or not to the right of self-determination in each case<sup>7</sup>. In reality, this legal principle had in practice serious political consequences that led to

<sup>5</sup> In this respect, during Second World War, the President Franklin Roosevelt of the United States and the British Prime Minister, Winston Churchill, signed the Atlantic Charter in 14 August 1941, which make reference to the principle of self-determination and have an evident similarity with the Fourty Points of Wilson proclaimed in the First World War. This joint declaration is defined in the own document as a “certain common principles (...) on which they based their hopes for a better future for the world”. The present document acknowledged among these principles the following two:

“(...) Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them (...)” (*Treaties and Alliances of the World: An International Survey Covering Treaties in Force and Communities of States*, Bristol, Keesing’s Publications, 1974).

<sup>6</sup> Gómez Robledo, A., 1982, p. 83.

<sup>7</sup> González Represa, G. (2017): “La constitucionalidad de un referéndum independentista catalán”, in *Diario LA LEY*, nº8902, Editorial Wolters Kluwers, p. 6-7.

United Nations to adopt two contrasting currents of legal doctrinal thinking on its confusing practice: on the one hand, supporting for the fully colonial independence in which the political aspect prevailed over the legal one; on the other hand, the new perspective adopted in the International Covenants, by means of which the trend was reversed and the legal aspect took priority.

### 1.1. The positivation of the right to self-determination of Peoples during the decolonization period. Colonial territories as the subjects of the right

The decolonization process began in the 18<sup>th</sup> and 19<sup>th</sup> century with the emancipations of the United States from the British Empire and, subsequently, the Latin America colonies from the Spanish and the Portuguese Empires, in which nationalist movements were greatly influenced by the triumph of the Enlightenment doctrine and the independence of the United States<sup>8</sup>. These political processes in America epitomized somehow the ideal of self-determination of Peoples that had not yet been enshrined by then<sup>9</sup>. The decolonization was irrepressible and grew across Asia, Africa and Oceania, especially on the occasion of the end of the Second World War. As a consequence of this lamentable armed conflict and the cruelty reached during that time, the necessity of a large number of political changes in the world was evinced, being opened doubtless a new period in history with a large-scale decolonization process that was extended until the end of sixties in the three said continents, after which few territories remained under the colonial rule<sup>10</sup>.

There had previously been several mentions to the self-determination as a right from a colonial perspective. Among the most relevant, the United States Declaration of Independence must be highlighted as the former allusion to the right to self-determination from a colonial understanding, stressing that the Thirteen Colonies at war had to be free, independent States<sup>11</sup>. Vladimir

<sup>8</sup> In this sense, the Fifth President of the United States of America, James Monroe, proclaimed in a Message to Congress on December 2, 1823, that:

“The American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subject for future colonization by any European Power (...) We would not view any interposition for the purpose of oppressing (the former colonies in the Americas) or controlling in any other manner their destiny by any European Power (...)” (*Treaties and Alliances of the World: An International Survey Covering Treaties in Force and Communities of States*, Bristol, 1974, p. 151).

<sup>9</sup> Gómez Robledo, A., 1982, p. 87.

<sup>10</sup> “The wind of change is blowing through this continent”, UK Prime Minister Harold Macmillan to the Parliament of South Africa, on 3 February 1960.

<sup>11</sup> “The Representatives of the United States of America, in General Congress, Assembled, (...) do, in the Name, and by the Authority of the good People of these Colonies,

Lenin also made express reference to the colonial issues in his manuscripts, urging oppressed nations to achieve their political independence from oppressive nations in colonial circumstances via referendum<sup>12</sup>. Soon after, the President of the United Nations during World War I, Woodrow Wilson, alluded to the pressing readjustment of the colonial claims in the Fifth Point among his proposals in 1918 in pursuit of preventing the situations of subjugation from extending even more<sup>13</sup>.

No sooner had the World War II come to an end than the European Empires, especially the United Kingdom, France, Portugal and Netherlands, saw themselves forced to contemplate how the colonial territories under their control repeatedly claimed their self-government and their right to set in motion a new independent State. As is widely known, any intention to deny or prevent these strong feelings of freedom from these Peoples triggered in turn new bloody conflicts between the Great European Empires and the oppressed communities angling for ending with the exterior domination. Nonetheless, on other occasions, the leading European Powers were especially interested in enabling the emancipation of their colonies, which entailed a considerable amount of expenses, facilitating that the processes took place peacefully.

Some reasons can be given as an explanation to pinpoint why this new decolonization process occurred. The thrilled attempts at becoming independent were in some measure due to the spreading of nationalist movements across the indigenous minorities of the colonies and the weakness of their parent States at that point of time because of the wars, which inspired to these entities who suffered their oppression to change the situation in which they had lived for so long. In addition to the foregoing, the position of the two world superpowers, the United States and the Soviet Union, which respectively had an evident colonial past and rejected the oppressed nations, was clearly in favor of the currency of this trend, which constituted a crucial boost.

Therefore, the necessity and the extreme urgency of finishing with the colonial imperialism and their related unfair situations around the world were

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solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved” (Conclusion paragraph of the United States Declaration of Independence signed in 1776 by the Second Continental Congress).

<sup>12</sup> Sanz de Hoyos, C. (2017): *El derecho de autodeterminación. Constitución y normas internacionales*, Pamplona, Aranzadi, p. 25; 63-68.

<sup>13</sup> “A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined”.

revealed. In order to achieve that, the United Nations adopted the Woodrow Wilson's understanding of the principle of self-determination that the President had endorsed some decades before as a benchmark for its codification<sup>14</sup>. It is remarkable the significant role the United Nations played in the decolonization process by means of its codification in favor of Peoples on a legal document, its Foundational Charter<sup>15</sup>, historically considered as the first allusion to the self-determination of Peoples in International Law, and its later development on its Resolutions, maybe the legal source which have supplied it most practical duress, which is the essential question to be addressed now<sup>16</sup>.

Upon establishing the *Principle* of self-determination of Peoples as a rule for the Relations among States, its facet as a collective Human Right<sup>17</sup>, the so-called *Right* to self-determination of Peoples, gained great relevance as well, being applied in the aftermath of the war in favor of the colonial territories to reach their independence. This fact is due not only to its codification on the UN Charter, but also in some of its Resolutions which were of great importance during the decolonization process, such as the United Nations General Assembly Resolution 1514, of 14 December 1960, titled «Declaration on the Granting of Independence to Colonial Countries and Peoples», and Resolution 2625, of 24 October 1970, titled «The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States»<sup>18</sup>.

The mentioned Resolutions of the United Nations reflected the pressing need to end urgently with colonialism and any kind of alien subjugation in order to attain world peace as justification to implement the said principle, as the Charter also did in 1945. The persistent and ardent desire of the colonial territories was clearly unstoppable and pointed towards the emergency of embracing these aspirations and drawing a period of constant and evident denials of fundamental human rights to a close. For this reason, the United

<sup>14</sup> Sanz de Hoyos, C., 2017, *cit. op.*, 65-71.

<sup>15</sup> The Charter of the United Nations is the foundational treaty of this organization and it was signed in San Francisco, United States, on 26 June 1945. It entered into force on 24 October of that same year.

<sup>16</sup> Casanovas y la Rosa, O.: *Unidad y pluralismo en Derecho Internacional Público*, II Cursos Euromediterráneos Bancaja de Derecho Internacional, 1998, and Gómez Robledo, A., 1982, p. 83-84.

<sup>17</sup> The International Court of Justice's Advisory Opinion related to Sahara Occidental, of 16 October 1975, recognized the collective facet of the self-determination right and Peoples as its titular subjects.

<sup>18</sup> Recalling Resolution 1966 (XVIII), of 16 December 1963, titled «Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations».

Nations was fully conscious that any delay in the application of its Resolutions could continue to occasion new conflicts and disputes across the globe. For the purpose of promoting their correct implementation and the lasting and perpetual maintenance of international peace and cooperation among States, the General Assembly went a step further and even founded in 1961 a Special Committee on Decolonization that examined their effective application and was enabled to make suggestions and recommendations to contribute to the success of the process<sup>19</sup>.

Thus, there is no doubt that the positivation and application of the principle of self-determination and its subsequent right was a fundamental step in the development of friendly relations among States<sup>20</sup>. Much evidence of this has been provided by the wording of the Charter itself, in Article 1, paragraph 2<sup>21</sup> and in Article 55<sup>22</sup>, both with almost identical content, and by the United Nations' persistent practice, whose contribution helped to give rise to an appropriate atmosphere for international peace and stability, becoming gradually a basic legal principle in International Law. Moreover, the application of the principle of self-determination during the decolonization process, with the colonies as subjects of the right, was not only promoted by the United Nations, but also by the countries that had achieved independence in the post-war period and now were pressuring the winners of World War II to also release their colonial territories<sup>23</sup>.

<sup>19</sup> The Special Committee of Decolonization was established by the United Nations General Assembly Resolution 1654, of 27 November 1961, titled «The situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples», paragraph 3.

<sup>20</sup> Gómez Robledo, A., 1982, p. 40-41.

<sup>21</sup> “The Purposes of the United Nations are: (...) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of Peoples (...)”.

<sup>22</sup> “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of Peoples, the United Nations shall promote (...)”.

<sup>23</sup> In this respect, the Bandung Conference, held in Indonesia in 1955, shows the aspiration of the new independent States in Asia and Africa to put an end to colonialism, their former regime. The highly attended Conference adopted resolutions on various issues, including human rights and self-determination of Peoples and nations, proclaiming in this regard the Declaration on Problems of Dependent Peoples the following:

“The Conference declared its full support of the principle of self-determination of peoples and nations as set forth in the Charter of the United Nations and took note of the United Nations resolutions on the rights of peoples and nations to self-determination, which is a pre-requisite of the full enjoyment of all fundamental Human Rights (...) The Conference is agreed: a) in declaring that colonialism in all its manifestations is an evil which should speedily be brought to an end; b) in af-

In sum, a situation of oppression takes place as long as a group of citizens of a political community are marginalized by the parent State representing a deprivation of human rights of these entities and retarding their cultural, social and economic progress<sup>24</sup>. As a consequence, the United Nations assumed that any sort of alien domination, subjugation or submission a People could suffer from other country endangered the maintenance of international peace, security and justice, some of the main purposes of this organization in accordance with the Charter. Further, those situations even posed a risk to some of their main principles, such as the principle of sovereign equality of States<sup>25</sup>, the democratic basis whereby the equal rights and obligations will be guaranteed to all the States in search for fostering friendly and prosperous relations among States deprived of hierarchies.

Nonetheless, the codification of the principle of self-determination did not entail its effective application and observance by the States, which would only fulfil their duties as to this respect when they were compelled to do it. Indeed, a large number of colonies that had gained their independence during this period did not attained a real sovereignty in their territories, since the great economic power of the former colonial empires was still exerted over them. This new kind of domination was named as *neo-colonialism*. In addition, the frontiers of the newly created States were established by the foregoing colonial powers irrespective of the existence of Peoples, ethnic groups and tribes, causing arbitrary separations and unions between all of them, which has constituted the seed of countless conflicts in the last decades and that remain present nowadays. Accordingly, the application of this right could not be left to the judgement of a said State, which may not be interested in it and may endeavour to impose its own discretion.

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firming that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation; (c) in declaring its support of the cause of freedom and independence for all such peoples”.

(Martín de la Escalera, C. (1955): «La conferencia de Bandung, sus conclusiones y su posible alcance», in *Revista de Política Internacional*, n. 22, CEPC, Madrid, p. 93-103; and *Treaties and Alliances of the World: An International Survey Covering Treaties in Force and Communities of States*, 1974, p. 208-209).

<sup>24</sup> United Nations General Assembly Resolution 1541, of 15 December 1960, titled «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».

<sup>25</sup> The theoretical equality of sovereigns is stated in Resolution 2625, by means of which a group of principles is coded in order to promote a more effective application in the International Community.

## 1.2. The new and ambiguous evolution of the right to self-determination and the secessionist cases. The codification of the principle of territorial integrity

As far as secessionism and other cases are concerned, it must be pointed out that Considerations of UN Resolutions differ greatly whenever the right to self-determination is intended to be exercised within an extra colonial context. The reason for this is very simple: The International Community bore in mind that the unlimited increase of independent processes meant a serious threat to the stability and strengthening of the newly independent States formed over the decolonization period. It was inevitable to cast doubt on the benefits of a world made up of microstates, which were probably incompetents to survive by themselves. Because of that, and in contrast to the custom carried out during the colonial emancipation, once the decolonization process around the world was concluded, the United Nations adopted, so to speak, a more cautious position refusing the assumption of self-determination of Peoples as an absolute and unrestricted right of any claimer community.

The United Nations' Resolutions recognized simultaneously the self-determination as a legal principle that grants a Right to the Peoples and at the same time established in some of their provisions the limits imposed to its exercise on the grounds of some political considerations. In this respect, as some of its Resolutions have pointed out, the UN regarded that whenever a People determines its own political condition breaking pre-existing territorial unity is inconsistent with the fundamental purposes and principles embodied in the Charter<sup>26</sup>. An evident reason can be given as an explanation: as is widely known, UN endeavours towards the maintenance of international peace and security after decolonization process were focused on controlling the continued secessionist ambitions in many countries, which could endanger their equilibrium and hinder the ideal progress of the International Community.

Nonetheless, the contradictions that both statements entail also added more ambiguity and confusion around this principle in the aftermath of the armed-conflict since the duality of political and legal elements in this principle was still evident in the Resolutions' wordings and especially in the subsequent practice of the United Nations. The problem probably derives from the fact that the regulation of the principle of self-determination in the Charter was concise and vague, enabling its abusive application based on

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<sup>26</sup> Apart from the mentioned United Nations' Resolutions, this organization also codified this principle in the Helsinki Final Act of the Conference on Security and Co-operation in Europe, signed in 1975. Even so, this legal text compels to refrain from assumptions that can be a threat to the territorial integrity of a State.

opportunistic interpretations; on account of this, the Nations United judged extremely necessary to diminish the scope of this right in order to prevent its exercise in those cases which could be considered secessionisms. With regards to this objective, Resolution 2625 was adopted for the purpose of clarifying the new limits imposed to the right, which were conceived to support the continuation of the political organizations born of the decolonization process<sup>27</sup>.

The mentioned Resolution stresses the substantially different treatment of these episodes and the colonial ones to which the exercise of self-determination right had been granted. Therefore, this document underlines that its ownership can never mean a kind of *a secession right* within an extra colonial context and, consequently, it must be just regarded as a concession in favor of oppressed colonial Peoples. The overall Resolutions' treatment lead to the conclusion that the exercise of the right to self-determination should be refused whenever the certain claiming group forms part of a sovereign, constitutional and democratic State, whose domestic law represents properly the entire People of its territory without any kind of discrimination, as well as respects the distinguishing elements of every single community and permits the exercise of its self-government. In such cases, there is no reason pursuant to International Law to deem these Peoples as entitled to the right to self-determination. As a result, secession of one part from a pre-existing State is definitely rejected by UN legal system<sup>28</sup>.

The legal mean to restrain the secessionist ambitions and the absolute application of this right implied the codification of the principle of territorial integrity of the newly independent States<sup>29</sup>, in such a manner that it involved that the right to self-determination of Peoples could not be exercised as long as it supposed a serious threat or lessen the political unity of a State that met the requirements indicated in the paragraph above. Indeed, in accordance with the Resolution 50/6, of 9 November 1995, titled «Declaration on the occasion of the Fiftieth Anniversary of the United Nations», the exercise of

<sup>27</sup> In this respect, it is noteworthy the ex-Secretary-General's assumption, U Thant, about secessionism on June 1970, warning that United Nations had never acquiesced this event to take place in a member State and would never do it (Conférence de presse du SG, ONU. Chronique mensuelle, 7 [1970], n. 2, p. 29).

<sup>28</sup> Muñoz Machado, S.: *Informe sobre España, Repensar el Estado o destruirlo*, CRITICA, Barcelona, 2012, p. 235.

<sup>29</sup> A former precedent of the principle of territorial integrity can be figured out in the treaties of the Peace of Westphalia signed on 1648, which attempted to establish a new political system for the central European States after the Thirty Years' War. By means of this series of treaties, the strengthening of the integrity of the States parties of the Peace and their consideration as sovereign States were assumed as some of the fundamental purposes in the new political period of peaceful coexistence.

the right to self-determination shall not encompass «authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States». Thus, the incompatibility between secessionist movements and the codification of this principle thereupon was clearly evinced, becoming one of the most transcendental principles in International Law and prevailing over the exercise of the right to self-determination.

Without limiting the foregoing, the priority implementation of the principle of territorial integrity has an evident statutory exception, in compliance with some UN Resolutions. As Resolution 2625 reveals, the self-determination of Peoples must not be construed as a permission to break the inviolability of the territory of an independent State, but only provided that the State complies fully with the requirements mentioned some paragraphs above. Therefore, it should be noted contrariwise that if the State in question does not achieve those conditions satisfactorily, the principle of territorial integrity will not perform as a limit to the exercise of self-determination. The evolution of this hypothesis as a new stage of the right to self-determination of Peoples will be studied in the following section.

## II. THE SECESSION-REMEDY EPISODES. THE LAST STAGE OF ITS EVOLUTION

A State may secure its territorial integrity and prevent unilateral secessions, on condition that it carries out an effective development of the self-government of the Peoples that are part of it<sup>30</sup>, that is, the entire population settled in its territory is represented equally regardless of the race or ethnicity and without any discrimination. However, a State compounded of several Peoples who endure continuous restrictions to their self-government and representation faculties, as well as massive and grave violations against their Human Rights, will not be able to allege the principle of territorial integrity against the groups that suffer these situations; consequently, these groups could be granted the exercise of their right to self-determination, even when it involves the partial or total disruption of the territorial unity of a pre-existing State.

As far as these new circumstances in which the right to self-determination has been granted in the last decades are concerned, it is often argued that this episode must be assumed as the last stage in the evolution process of this right. This hypothesis, entitled by the scientific literature as the *theory of*

<sup>30</sup> As it has been described by the Supreme Court of Canada's interpretation developed in the Reference Re Secession of Quebec, of 1998 (Chacón Piqueras, C. and Ruiz Robledo, A. (1999): "El dictamen sobre la secesión de Quebec: un comentario" Revista Teoría y Realidad Constitucional, n. 3, Madrid, p. 275 ff).

*secession-remedy*<sup>31</sup>, the *Just secession principle* and the *Just cause*<sup>32</sup> or the *theory of violation of rights*<sup>33</sup>, must warrant the creation of a new independent State by any group that suffers from any of the mentioned infringements on its right to self-determination. In other words, according to the trend adopted by most of the scientific literature at the end of 20<sup>th</sup> century, any act that brings about a group a deprivation of its self-governing faculties or even its human rights will justify the exercise of the right to self-determination in order to separate from the parent State, not only as a last resort to reach a solution to curb this tyranny, but also as a compensation for the damage this group has endured.

Therefore, three arguments can be given as an explanation of the exercise of this right in the present assumption: first of all, a flagrant, grave and persistent violation against the fundamental or human rights of a community; a deficient representation of this community in the State institutions, as well as whenever this representation takes place with serious and systematic discriminations against a collective by the central government based on race, creed or belonging to an ethnic group<sup>34</sup>; and lastly, continuous restrictions or even exclusions to their self-government faculties. That is to say, whenever a collective has not received an equal treatment compared to the other groups within the same political organization will be rightfully permitted to create a new State for the purpose of fully exercise its right to self-determination.

Notwithstanding, then the real problem will be to determinate how grave this treatment must be to account for the exercise of this right and the consequent creation of a new State, as the unique and more convenient solution for the situation. It seems to be peacefully admitted that independence of an unjustly treated People that has suffered this experience will be justified always provided that this process is a necessary, proportional and useful tool to bring to an end to violation of rights. Thus, in the rest of cases in which less drastic measures could equally resolve these infringements the right to self-determination will not be granting to make possible the creation of a new and sovereignty State.

It is noteworthy to mention that this new stage of the right to self-determination has been recently claimed in the secessionist process in Catalonia,

<sup>31</sup> Martínez Jiménez, A. (2016): *Derecho de autodeterminación de los pueblos en el Siglo XXI*, Aranzadi, Madrid, p. 20-22.

<sup>32</sup> Norman W. (2006): *Negotiating Nationalism. Nation-building, Federalism, and Secession in the Multinational State*, Oxford New York, Oxford University Press, p. 183.

<sup>33</sup> Buchanan, A. (2004): *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law*, Oxford-New York, Oxford University Press, p. 369-371.

<sup>34</sup> Petrosino, D. (1996): "Democrazie di fine secolo. L'epoca delle secessioni?", in De Fiore, C. and Petrosino, D.: *Secessione*, Roma, Citoyens, p. 28.

in which some political parties have defended occasionally its application on the grounds that this region may have experienced oppression and, consequently, constitutes a secession-remedy case<sup>35</sup>. Without assessing the Catalan case, it should be noted that this secessionist attempt has invoked the exercise of the right to self-determination quoting the impact of the three arguments mentioned above as a justification of the exercise of this right; namely, a grave and persistent violation of human rights, a deficient representation or discriminations against a collective in the State institutions and restrictions to the self-government faculties. In addition to the foregoing, it should be noted that claiming the right to self-determination as a remedy will mean putting the constitutional character of the parent State in doubt, as long as this kind of widespread violations cannot ensue in an organization equipped with mechanisms of prevention and reaction against serious violations of fundamental rights.

What is of particular interest here is that, by virtue of the Resolutions adopted by the United Nations, this theory requires for the exercise of self-determination that a collective has suffered heftly and grave crimes, genocides or persecutions, in short, cases of an evident discrimination against a group. Nonetheless, doctrinal opinions dissent from this way of reasoning because of the differing interpretation of the extent of the term «discrimination». According to some authors, any claim built simply on the basis of an insufficient identity or political recognition of a group or a fairer tax treatment in favor of a region should not be compared to the secession-remedy cases and will be considered an excessive invocation of this theory<sup>36</sup>. On the contrary, others argue that an undue tax pressure or also an excessive participation in the distribution of wealth and resources should also be regarded as a case of discrimination and, consequently, result in entitling the affected communities with the right to self-determination<sup>37</sup>.

As it has been described some paragraphs above, the exercise of the right to self-determination and the subsequent disruption of the territorial unity of a State in some cases will be considered the most convenient remedy on the condition that it constitutes a necessary, proportional and useful option to end the infringements to the self-governing faculties and human rights of a community. Nevertheless, with respect to this point of disagreement, it must be assumed that all the circumstances mentioned as cases of discrimination may find many other solutions within the domestic law of a constitutional and

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<sup>35</sup> Keating, M. (1996): *Naciones contra el Estado. El nacionalismo de Cataluña, Québec y Escocia*, Barcelona, Ariel, 143-196.

<sup>36</sup> Tajadura Tejada, J.: “Los procesos secesionistas y el Derecho europeo”, *Revista Teoría y Realidad Constitucional*, n. 37, Madrid, 2016, p. 351.

<sup>37</sup> Petrosino, D., 1996, p. 28.

democratic State. Accordingly, deeming the secession-remedy as the unique and a proportional alternative to these situations turns out a very questionable assertion. For this reason, the *Just secession principle* will not be the suitable argument to claim the exercise of the right to self-determination in this last assumption because of its deficient justification, so the concrete group must find another legal alternative in order to set in motion an independent State.

As far as the unilateral secession declarations are concerned, it is a matter of fact that its exercise is not comprehended in favor of a fraction of State neither under International Law, nor under European Union law nor under the domestic law of any constitutional State. Nevertheless, the viability of a unilateral secession in the secession-remedy cases should be admitted under UN law in the exercise of the right to self-determination by a People, as well as in the colonial contexts and in any kind of oppressed communities for any reason, prevailing over the territorial integrity of the parent State. The recent international practice has clearly demonstrated this current whereby a People that has suffered a secession-remedy episode is legitimized to exercise the right to self-determination through a unilateral secession declaration. This possibility, however, must be rejected in the rest of the circumstances, and cannot be accepted when is solely found on the majority will of the citizens in favor of the independence of their territory, as most recent studies express<sup>38</sup>.

### III. CONCLUSIONS

During and after the two World Wars, the creation of new independent States was accepted on account of the codification of the principle of self-determination of Peoples in International Law. The implementation of this principle was crucial after the fall of the European Empires and during the decolonization process in order to reshape the new frontiers in the International Community. In comparison to these episodes in which this principle was applied, the claims of self-determination of entities established in constitutional and democratic States, in which the legal system enables their self-government and foster their progress and their cultural singularities, are not justified under International Law. Thus, if the concrete entity does not represent an oppressed collective, the self-determination regulation enshrined in International Law cannot be applied. In these cases, any attempt at creating a new independent State must be analysed under the domestic law of the concrete State and the fundamental principles of its legal order.

<sup>38</sup> See in this regard Gutiérrez Espada, C. and Bermejo García, R. (2014): “El derecho de libre determinación de los pueblos no coloniales a la luz del Derecho Internacional”, in Solozabal, J.J. (Ed.): *La autodeterminación a debate*, Editorial Pablo Iglesias, Madrid, 2014, p. 93-108.

Unilateral declarations of independence are not acknowledged by the International Law, neither by Community Law, nor by any domestic law of a constitutional State. The recent international practice legitimizes these declarations exclusively in those cases in which a State violates human rights or the right to self-determination in its aspect internal, that is, the assumptions of secession-remedy. However, to claim in a constitutional State and member of the European Union the theory of secession-remedy as justification to attempt the independence, will turn to be an incoherent argument.

The lack of sufficient identity recognition or a fairer treatment tax in favor of certain regions, does not constitute an enabling episode to recognize this concrete exercise of the right to self-determination. In order to invoke the theory of secession-remedy it is necessary that a collective has suffered serious crimes, genocides and persecutions, choosing to become independent from the parent State as the last possible solution. The status of member state of the European Union forces us to completely reject the existence of episodes of oppression or marginalization of a collective within any European State, so the secession-remedy will not be the proper way to attempt secession in the European Union.

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# THE SECESSION-REMEDY EPISODES. MASSIVE AND GRAVE VIOLATIONS AGAINST THE HUMAN RIGHTS OF MINORITIES AND PEOPLES

*Los episodios de secesión-remedio. Violaciones graves y sistemáticas de los Derechos Humanos de minorías y pueblos*

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