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The relevance of remedial secession in the post-Soviet "frozen conflicts"

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ABSTRACT

The article introduces a set of remedial conditions that might justify unilateral secession under international public law and examines whether remedial secession might be applied in the post-Soviet "frozen conflicts": South Ossetia, Abkhazia, Nagorno-Karabakh, Transdniestria and Crimea. The article concludes that the remedial right to secession has no relevance in the "frozen conflicts" in post-Soviet region and neither of the entities cannot justify their independence on remedial secession. However, all the cases confirm the existence of the right and its conditions. Moreover, the situations of the "frozen conflicts" in the post-Soviet region add clarity to the procedural criterion for the exercise of the negotiations. Negotiations in good faith are possible merely if the conflicting parties are not influenced by the third states, which violate international law. The cases of South Ossetia, Abkhazia, Nagorno-Karabakh, Transdniestria and Crimea reveal that the right to remedial secession simply is not relevant in the cases which are related to the unlawful use of force or other egregious violations of the norms of international law. Remedial secession cannot be exercised in the cases, created in serious breach of international law norms.

1. Introduction

The secession attempts of Kosovo, South Ossetia[1] and Abkhazia in 2008 put the questions of state sovereignty and self-determination at the top of the international agenda and triggered debates among academics on the applicability of the right to self-determination, including the right to secession (Tancredi, 2008; Müllerson, 2009; Slomanson, 2009; Borgen, 2009–2010). Self-determination and secession constitute the core issues of international public law (hereinafter referred to as 'international law'). Peoples and groups in many parts of the world assert the right to self-determination and even secession, which conflicts with the respective states' sovereignty and territorial integrity (Walter and Ungern-Sternberg, 2014, p. 1). All the above-mentioned cases – Kosovo, South Ossetia and Abkhazia – represent a possible clash of self-determination and territorial integrity. Yet, it is argued that the right of states to territorial integrity might not be absolute and unqualified, as "the development of international human rights law has in many respects limited the concept of state

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[1] The official Georgian name of South Ossetia is Tskhinvali.
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sovereignty" (Vidmar, 2010, p. 38). This value-oriented approach introduces the idea of the remedial secession – a set of conditions that might justify the secession of a subgroup from its parent state as a "remedy of last resort".

The doctrine of remedial secession was invoked by many states that recognised Kosovo (Bolton, 2013, p. 109). Similarly, the Russian Federation adopted the language of remedial secession to justify its recognition of South Ossetia and Abkhazia after the end of the RussiaGeorgia war.[2] To date, South Ossetia and Abkhazia *de jure* remain a part of Georgia, though Georgia does not have any effective control over these self-proclaimed republics. South Ossetia, Abkhazia, as well as Transdniestria in Moldova[3] and Nagorno-Karabakh in Azerbaijan[4] are considered as "frozen conflicts" in the post-Soviet region.

From the perspective of political science, the conflicts are labelled as "frozen conflicts" which signifies that although the military hostilities have stopped, the solutions to the roots of these conflicts have not been found (Walter, 2014, p. 295). The term "frozen conflict" means a stalemate, which may occur due to military, political, economic or other factors (Walter, 2014, p. 295). From the perspective of international law, "frozen conflicts" indicate competing sovereignty claims over a particular territory and a possible clash of different international law norms, in which a subgroup refers to the right of self-determination of peoples, whereas the parent state urges on respect for the territorial integrity of states. Therefore, as in the cases of South Ossetia and Abkhazia, Transdniestria and Nagorno-Karabakh also claim that they are not only entitled to self-determination, but to secession, and they base their claim on charges of discrimination and massive human rights violations committed by their parent states (Walter and Ungern-Sternberg, 2014, p. 2), which form the basis of the right to remedial secession.

The legal aspects of self-determination and secession have been propelled to new heights in international politics by the 2014 Ukrainian crisis (Walter, 2014, p. 295). On March 16th of 2014, a referendum was held, in which Crimea voted in favour of joining the Russian Federation (Crimea exit poll: About 93% back Russia union, 2014;). The international community underscored the referendum as having no validity and violating the sovereignty and territorial integrity of Ukraine.[5] Despite the international condemnation and warnings (Crimea crisis: foreign leaders condemn 'Russia's destabilising actions' as 93% vote in referendum for secession, 2014; Ukraine crisis: 'Illegal' Crimean referendum condemned, 2014; The Brussels G7 Summit Declaration, 2014, p. 8), the Russian Federation recognised the independence of Crimea (Декларация о независимости Автономной Республики Крым и г.Севастополя, 2014) and, following the results of the referendum, a treaty of the accession of Crimea to the Russian Federation was signed (President Putin signs treaty to bring Crimea into Russia, 2014). While justifying its actions, Russia, as well as in the cases of South Ossetia and Abkhazia, referred to self-determination and Kosovo's example.

The Crimean crisis, considered as a new "frozen conflict" in the post-Soviet region ("A Strong NATO in a Changed World" Speech by NATO Secretary General Andres Fogh Rasmussen at the "Brussels Forum", 2014), heightened concerns about the unresolved conflicts, as they are all potentially explosive and dangerous. The illegal referendum and the subsequent annexation of Crimea by the Russian Federation also revealed the importance of the proper understanding and application of the right to self-determination, including remedial secession. If misapplied or distorted, self-determination might threaten international peace and security, and lead to the fragmentation of states. In this regard, H. F. E. Whitlam aptly noted that "[i]deas might be used as weapons… as a weapon 'self-determination' should be handled with care" (Summers, 2007, p. 9). Therefore, this article introduces a set of remedial conditions that might justify unilateral secession. A particular amount of attention is paid to the Kosovo case, which is referred to as a precedent for the secessionist claims. The article also examines whether remedial secession might be applied in the post-Soviet "frozen conflicts". The applicability of the remedial right to secession in the mentioned conflicts might also reveal or rebut the existence of the right, as well as its conditions.

2. The right to remedial secession and its conditions

State and judicial practice supports the existence of the right to remedial secession and reveals a set of conditions that have to be met prior the exercise of the right. Remedial secession was supported by some of the judicial bodies (Katangese Peoples' Congress v. Zaire, 1994; Loizidou v. Turkey, 1996). Perhaps the most prominent and cited judicial decision, which dealt with the unilateral secession of a part of the population, was adopted by the Supreme Court of Canada.[6] The Canadian Supreme Court was asked to issue a decision whether Quebec had the right to secede from Canada and if so, under what circumstances. In its decision, adopted in 1998, the Court summarised its findings, indicating that international law "at best" generates the right to external self-

[2] An armed conflict took place in August 2008 between Georgia on one side, and the Russian Federation and the separatist South and Abkhazia on the other. The conflict is also known as the Russia-Georgia, the 2008 South Ossetia war, the Five-Day war and the August war.

[3] The latter is also known as Transnistria and Trans-Dniestr. After the proclamation of independence, Transdniestria purported to create Pridnestrovian Moldovian Republic (also known as Pridnestrovie).

[4] In Russian, "Nagorno" means "mountainous", whereas the word "Karabakh" is a Turkish-Persian fusion, most often translated as "black garden". Armenians name the region "Artsakh", while Azerbaijanis refer to it as "Yukhari Karabakh" ("Upper Karabakh"). The region is also sometimes spelled as Nagorno-Karabagh, Nagorny-Karabakh or Nagorny-Karabgh. The authors have chosen the spelling "Nagorno-Karabakh", because it is used by the Organisation for Security and Co-operation in Europe and in the international documents related to Nagorno-Karabahk. The choice does not endorse any position.

[5] General Assembly Resolution 68/262 supported the sovereignty and territorial integrity of Ukraine and underscored the referendum as having no validity (GA Resolution 68/262, 2014).

[6] Some academics, while discussing remedial secession, merely refer to the decision of the Supreme Court of Canada. For instance, Vidmar, 2010, p. 39; The Lecture 'Remedial Secession in South Caucasus' by Professor W. Slomanson, 2012.

determination *inter alia* in situations where a definable group is denied meaningful access to the government to pursue their political, economic, social and cultural development (Reference re Secession of Quebec, 1998, § 126). In such a case, "< … > the people in question are entitled to a right to external self-determination because they have been denied the ability to internally exert their right to self-determination" (§ 138). At the same time, the Supreme Court of Canada observed that it is not clear whether the proposition of the right to remedial secession reflects "an established international standard" (§ 135), though it did not examine this question in detail, because the Quebecers were not the beneficiaries of the right. The Court concluded that the population of Quebec was entitled to meaningful internal self-determination, as Canada was a "sovereign and independent state conducting itself in compliance with the principle of equal rights and the self-determination of peoples and thus possessed of a government representing all the people belonging to the territory without distinction" (§ 136, § 154). In other words, the Supreme Court of Canada applied the typical *a contrario* reasoning of the safeguard clause and acknowledged the right to secession, conditioned on non-respect of internal self-determination.

The most recent judicial opinion is on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010) ('Advisory Opinion' or 'Advisory Opinion on Kosovo'). The Court was asked to render an opinion on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in Accordance with International law (§ 1, p. 5). The ICJ confined itself to examining whether the Declaration of Independence was *prohibited* either under general international law or under the Security Council Resolution 1244 (1999) (§ 49–56, p. 19–21). It concluded that Kosovo's Declaration of Independence did not violate international law, because international law contained no applicable prohibition of declarations of independence (§ 84, p. 32).

Given the manner in which the Court interpreted the question of the General Assembly, the Court did not analyse the scope and content of contemporary self-determination, including remedial secession. It considered that the question of whether Kosovo had the right to declare its independence by virtue of the right to self-determination and the existence of the right to remedial secession were beyond the scope of the case (§ 82–83, p. 31). In regard to the right to remedial secession, the ICJ simply noted that "radically different views" were expressed on whether "< … > the international law confers upon part of the population of an existing State a right to separate from that State < … > " (§ 82, p. 31). In addition, it observed that "[s]imilar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances" (§ 82, p. 31). The Court was highly criticised for the missed opportunity to shed more light on the right to self-determination not only by academics (Cerone, 2010; Mills, 2011; Burri, 2010; Hannum, 2011), but also by the judges of the ICJ.[7] The authors agree with the expressed criticism, though at the same time, find that the Advisory Opinion is important for several reasons.

Firstly, it is clear that the Court neither closed the doors for remedial secession nor denied the existence of remedial secession as, for instance, *de lege ferenda* or, as a regional customary rule. On the contrary, it might be argued that the remedial secession theory was indirectly supported by the ICJ. It maintained that the scope of the principle of territorial integrity was confined to the sphere of relations between states (§ 80, p. 30), which implies that the ICJ excluded territorial integrity as an obstacle prohibiting the right to secession of a subgroup (Laurinavičiūtė, 2014, p. 179). Secondly, the Court reaffirmed that secession *per se* is not illegal, though the illegality of unilateral declarations (those aimed at seceding) stems not from the unilateral character of these declarations, but from the fact "< … > that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)" (§ 81, p. 38). In other words, the general principle of law *ex injuria non oritur jus*, applicable in international law, allows drawing the conclusion that even effective territorial situations, created in breach of *jus cogens*[8], will not be recognised as having legal effect.[9] Therefore, the ICJ confirmed that the legal basis in the process of the creation of states is of great importance.

Thirdly, the judges of the ICJ, A. A. Canado Trindade and A. A. Yusuf, accepted the right to external self-determination in a case when a group is subjected to systematic repression, crimes against humanity, persecution, discrimination or tyranny by its parent state (Separate Opinion of Judge Yusuf, § 7–9, p. 3; Separate Opinion of Judge A. A. Canado Trindade, § 173–176, p. 53). Moreover, the written and oral positions of the states, submitted during the proceedings at the ICJ, are indicative of the *opinio juris* of the states towards remedial secession. Of the 43 states, 17 states recognised or did not rule out the existence of the right to remedial secession.[10]

[7] For instance, the judge A. A. Yusuf stated that "[t]he Court had a unique opportunity to assess < … > the legal conditions to be met for such a right of self-determination [the right to remedial secession] to materialize and give legitimacy to a claim for separation." Separate Opinion of Judge Yusuf, 2010, § 17, p. 5.

[8] Article 40 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts states that (it) stipulates the existence of the so-called peremptory norms of general international law which are also known as *jus cogens* norms. According to the Commentary on Article 41 by the International Law Commission on Articles on Responsibility of States for Internationally Wrongful Acts, for instance, self-determination and the prohibition of the threat or use of force may be considered as *jus cogens* norms. Draft Articles on Responsibility *of States for Internationally Wrongful Acts with commentaries,* 2001, p. 112–116.

[9] For instance, the effective territorial regime of Southern Rhodesia was condemned as illegal and created in breach of self-determination. See GA Resolution 2024 (XX), 1965; SC Resolution 216, 1965; SC Resolution 217, 1965; SC Resolution 277, 1970.

[10] Germany, Estonia, Albania, Ireland, Netherlands, Poland, Slovenia, Switzerland, Finland, Denmark, the Maldives, Croatia, the Russian Federation, Romania, Estonia, Belarus, and the Hashemite Kingdom of Jordan. It should be observed that not all the states used the terms "remedial secession" or "the right to remedial secession", though they either referred to the Paragraph 7 of the Principle V of the Friendly Relations Declaration, either relied on the conditions of the right to remedial secession or employed arguments resembling remedial secession. The Russian Federation, Romania and Belarus expressed doubts about whether the right to remedial secession was firmly established in international law.

As for the conditions of the right to remedial secession, there was a consensus among the above-mentioned states that subgroups within a state do not have an automatic right to unilateral secession even in cases of serious oppression. Instead, according to the states, several conditions of must be satisfied prior to the exercise of the right to remedial secession. There was an agreement on the need for severe, long-lasting refusal of internal self-determination and/or systematic, severe and massive human rights violations[11], as well as the absence of any viable remedy or feasible alternative to solve the conflict (procedural condition). In other words, the right to secession must be an *ultima ratio*.[12] All these conditions are well evident in the Kosovo case which, according to the authors, might be considered as "< ... >a *cause celebre* of the use of the principle of self-determination in state-creation" (Economides, 2013, p. 824).

Before examining the above-mentioned conditions, it should be emphasised that a prior condition of the right to remedial secession is that a subgroup must qualify as peoples for the purposes of the right to self-determination. The term "subgroup" refers to a certain group of individuals, though not every group of individuals qualify as "peoples". There should exist "< ... > a collectivity as a distinct entity with certain group characteristics, which are non-reducible to the characteristics of the composing individuals. Reformulated with regard to the issue of group identity, this amounts to saying that the identity of the community has to go beyond the merely aggregated identities of the individual members" (Raič, 2002, p. 260). In other words, a mere community or association of people cannot be regarded as the holders of self-determination.

The distinctiveness of a subgroup refers to the composition of both objective and subjective criteria (Raič, 2002, p. 263). As to the objective criteria, the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples ('UNESCO International Meeting of Experts') suggested that an entity should possess some or all of the following common features: common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, and common economic life. Moreover, the group must be of a certain number which need not be large (e.g., the people of micro-states), and must also be more than a mere association of individuals within a state (UNESCO International Meeting of Experts on Further Study of the Rights of Peoples, 1990, Final Report and Recommendations, 1990, p. 7–8). A similar approach towards the characteristics was taken by the International Commission of Jurists, while analysing whether East Pakistanis might qualify as "peoples" (International Commission of Jurists, 1972).

Kosovo Albanians, a territorially concentrated minority group within Serbia, seemed to have met both the objective and the subjective criteria of "peoples". As to the objective criteria, Kosovo Albanians differed from Serbians and other groups within Serbia. They possessed a common historical tradition, racial and ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinity, territorial connection, and common economic life. The criterion of the territorial connection is often considered as a *sine qua non* condition for "peoplehood", as it forms the background for the establishment and development of the clear identity of a subgroup. This criterion implies that a group of people must constitute a clear majority within a particular territory (Murswiek, 1993, p. 23; Raič, 2002, p. 262).[13] Kosovo Albanians constitute 90% of the population of Kosovo.

As to the subjective criteria, the UNESCO International Meeting of Experts has stated that an entity "< … > *as a whole must have the will* to be identified as a people or *to be conscious of being* a people < ... >" (emphasis added) (UNESCO International Meeting of Experts on Further Study of the Rights of Peoples, 1990, Final Report and Recommendations, 1990, p. 8). The terms a people and a minority might sometimes overlap. As a minority usually has its own "kin" state, the collective individuality means an identity by which it can be distinguished from those living in a "kin" state. Many minorities usually "< … > cannot (apart from the geographical factor) and, indeed, do not wish to be distinguished from their kith and kin residing in the kin state" (Raič, 2002, p. 269).

An overlap between a people and a minority might well be exemplified by Kosovo Albanians. On one hand, Kosovo Albanians share ethnic and other similarities with the majority of the population of Albania and constituted a minority within Serbia. On the other hand, they constitute a numerical majority in Kosovo and have a well-established connection with the territory. Moreover, throughout the years they have developed an identity which can be distinguished from Albanian Albanians, therefore, it is submitted that they were a minority and a people at the same time (The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, 1998; Elsie, 2008; Ryngaert and Griffioen, 2009, p. 577; Laurinavičiūtė, 2014, p. 143–148).

However, it should be highlighted that even if a subgroup qualifies as peoples for the purposes of the right to self-determination, it does not *per se* signify the entitlement to remedial secession. A minority group or a subgroup is primarily

[11] See Written Statement of Germany, p. 35; Written Statement of Estonia, § 2.1.1., p. 6–9; Written Statement of Denmark, § 2.7, p. 12; Written Statement of Finland, § 10, 12, p. 5, 7; Written Statement of Albania, § 75, 79, 86–92, p. 40, 42, 44–48; Written Statement of Ireland § 32, p. 10, § 33 iii, p 11; Written Statement of the Netherlands, § 3.9–3.13, p. 9–11; Written Statement of Switzerland, § 81–86, p. 21–23; Written Statement of Poland, § 6.5, 6.10–6.12 p. 25–27; Written Statement of Maldives, p.1; Written Statement of Slovenia p. 2/3; Croatia, see CR 2009/29 of 7 December 2009, § 13, p. 53, §43, p. 58, § 56–61, p. 61–62; the Hashemite Kingdom of Jordan, see CR 2009/31 of 9 December 2009, § 10, p. 29, § 24, p. 33, 38, p. 37; Written Statement of Romania, § 134, p. 39; Belarus, see CR 2009/27 of 3 December 2009; Written Statement of the Russian Federation, § 88, p. 31–32.

[12] Written Statement of Estonia, § 2.1.2., p. 9–10; Written Statement of Poland, § 6.7, p. 10; Written Statement of Germany, p. 35; Written Statement of Albania, § 93–96; p. 48–50; Written Statement of Switzerland, § 87–96, p. 23–26; Written Statement of the Netherlands, § 3.14, p. 11–12; Written Statement of Ireland, § 33 v., p. 11; for the position of the Hashemite Kingdom of Jordan, see CR 2009/31 of 9 December 2009, § 38, p. 37; Written Statement of Finland, § 12, p. 7; Written Statement of Maldives, p. 1; Written Statement of Romania, § 139, p. 40–41; Written Statement of the Russian Federation, § 88, p. 31–32.

[13] However, it is difficult to give an indication of what constitutes a clear majority. Some assert that as the risk of creating a large minority in the newly established State must be brought to a minimum, a majority of at least 80% would be required (see, for instance, Ryngaert, and Griffioen, 2009, p. 577).

entitled to exercise self-determination internally within the framework of a state. The right to remedial secession applies to a subgroup only when other conditions for the remedial secession are satisfied.

As to the second condition of the remedial secession, a subgroup must be subjected to a serious violation or denial of internal self-determination that might be followed or be in combination with widespread, gross and persistent human rights violations. Kosovo Albanians seem to have met the second condition, as they were denied internal self-determination after the abolishment of autonomy in 1989 and were subjected to a decade of disproportionate mass violence.[14] The escalation of the violence in Kosovo turned into a humanitarian catastrophe and ended up with the NATO military campaign.[15]

The criterion is also evident in the case of Bangladesh (East Pakistan). The events during the 1970's in Bangladesh evolved into " < … > acts of repression and even possibly genocide, and caused ten million Bengalis to seek refuge in India" (Crawford, 2006, p. 141). According to the various sources, over one million Bengalis were killed and some ten million East Pakistani refugees fled to India (International Commission of Jurists, 1972). On 17 April 1971, East Pakistan proclaimed its independence " < … > in due fulfilment of the right to self-determination of people of Bangladesh < … > " (Bangladesh Proclamation of Independence, 1971, 10 April 1971). The fact that the population of Bangladesh was subjected to an extreme amount of violence played a significant role in the international community's recognition of the legitimacy of the claim to secession of Bangladesh (Raič, 2002, p. 341). In this regard, the cases of Kosovo and Bangladesh indicate that the claim for secession does not arise in every case of oppression or discrimination, as the oppression must cross a certain threshold. From the perspective of human rights law, it may sound very cynical, though the right to secession arises merely " < … > if a given human community suffers unbearable persecution < … > " (Tomuschat, 1993, p. 1), thereby threatening the extermination of such a community. This criterion is extremely important, as mass violence might be considered as an act conferring a certain status to the victimised group.

Furthermore, all effective, available and realistic remedies for the settlement of the conflict must be exhausted and the secession must be an *ultimum remedium*. In this sense, the example of Croatia is worth mentioning. For the first time, Croatia declared its independence from the Soviet Federal Republic of Yugoslavia on 25 June 1991, which was reasserted on 8 October 1991. It seems tenable to share the opinion that Croatia's declaration of independence of 25 June 1991 seemed to be illegal, because there were still other alternatives instead of secession and Croatia participated in the negotiations that led to the Brioni-Accord (Raič, 2002, p. 361–362). Only upon the failure of the negotiations, was secession used as a remedy of last resort.

This condition for remedial secession was also fulfilled by the Kosovo case, as after the establishment of an international administration in Kosovo in 1999, Kosovo participated in the negotiation process on the future status for Kosovo. The independence was declared only when the negotiation process officially ended without results.[16] The case of Kosovo reveals the importance of the conduct of the parties during the negotiation process – the procedural criterion for the exercise of the negotiations. The lack of good faith from the Serbian side was one of the factors that made successful negotiations impossible and subsequently led to the unilateral secession of Kosovo.[17] The conduct of the parties had influence on the support of the international community for the claim to independence.[18] This procedural criterion was also emphasised by the Supreme Court of Canada in its decision *Reference re Secession of Quebec* (§ 151, § 153).

3. The right to remedial secession and the "frozen conflicts"

South Ossetia, Abkhazia, Nagorno-Karabakh, Transdniestria and Crimea are unsuccessful and widely unrecognised secessions. Despite the attempts of the Russian Federation to justify the independence of South Ossetia, Abkhazia and Crimea, employing the arguments of remedial secession and relying on "the Kosovo precedent created by our western partners" (Address by President of the Russian Federation, 2014), such arguments did not convince the international community. The independence of South Ossetia, Abkhazia and Crimea gained little support.[19] States condemned the

[14] The violations and their scale that took place in Kosovo are well documented not only by the UN bodies and non-governmental organisations, but also by the laws of Serbia/Yugoslavia legalising discriminations towards ethnic Albanians. See, for instance, resolutions of the General Assembly of the UN: UN Doc. A/Res/47/147, 1993, UN Doc. A/Res/49/204, 1994, UN Doc. A/Res/50/190, 1995, UN Doc. A/Res/52/139, 1997; reports of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia: UN Doc. E/CN.4/1992/S-1/9, 1992, UN Doc. E/CN.4/1995/57, 1995, UN Doc. E/CN.4/1996/107, 1996; the report of the Human Rights Watch: *Humanitarian Law Violations in Kosovo, Human Rights Watch*, 1998. See the list of the legislation in the Report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, UN Doc. E/CN.4/1993/50, 1993, § 156–159.

[15] The NATO's military campaign was justified on the necessity of averting "a massive humanitarian catastrophe". See, for instance, *The Situation in and Around Kosovo, Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO headquarters,* Brussels, on 12th April 1999.

[16] The Special Envoy of the UN Secretary-General, who led the negotiation process, stated that " < … > the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse". See Report of the Special Envoy of the Secretary-General on Kosovo's future status, 2007, § 3. A similar conclusion was reached by the so-called Troika, comprising of the EU, the Russian Federation and the United States. See Report of the European Union/United States/Russian Federation Troika on Kosovo, 2007, § 11, § 13.

[17] See more in, for instance, Laurinavičiatė (2014), p. 173–174.

[18] During the UN GA 22nd plenary meeting, the representative of the UK maintained that "Serbia complains about the unilateral declaration of Kosovo in February 2008. But it was Serbia that, in a unilateral move of its own, *rendered successful negotiations impossible.* < … > " (emphasis added). See UN Doc. A/63/PV.22, 2008.

[19] To date, Abkhazia and South Ossetia is recognised by the Russian Federation, Nicaragua, Venezuela and the Pacific Island of Nauru. Crimea as a part of the Russian Federation is recognised by Afghanistan, Venezuela, Cuba, Nicaragua, North Korea, Syria and Russia.

involvement of the Russian Federation and refereed to "a unilateral attempt to redraw the borders of a neighbouring country through the use of force" (UN Doc. S/PV.5969, 2008, p. 12; UN Doc. A/68/PV.80, 2014, p. 12).[20]

Russia asserts that South Ossetia and Abkhazia "have more grounds for recognition than Kosovo, both historically and legally" (UN Doc. S/PV.5969, 2008, p. 17). Similarly, Transdniestria argues that its claim to self-determination is "both legally and historically" in a better position than Kosovo (Bowring, 2014, p. 157). The latter unrecognised breakaway region also has similarities with South Ossetia, Abkhazia and Crimea, because of the involvement of the Russian Federation. Although the Russian Federation did not recognise Transdniestria, the European Court of Human Rights ('ECHR') in Ilaşcu and others v. Moldova and Russia (2004, § 392) maintained that the entity was "set up in 1991–92 with the support of the Russian Federation" and "remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation".

Karabakh Armenians also refer to the right to self-determination of peoples and reject Azerbaijan – its parent state – claims for the respect of the territorial integrity (UN Doc. E/CN.4/2005/G/23, 2005; Declaration on State Independence of the Nagorno Karabakh Republic, 1992). In the conflict of Nagorno-Karabakh, as well as in other "frozen conflicts", the military involvement of a third party is evident. Armenia does not recognise Nagorno-Karabakh, though provided external direct and indirect military support to the breakaway entity.[21] Armenia and the Nagorno-Karabakh Republic supported Crimea's choice of joining the Russian Federation and referred to it as a form "of realisation of self-determination" (Armenia backs Crimea's right to self-determination, 2014; Karabakh Foreign Ministry Issues Statement on Crimea, 2014).

To ascertain whether self-determination in the form of remedial secession might be applied in the post-Soviet "frozen conflicts", it is necessary to examine whether the conditions of remedial secession existed in South Ossetia, Abkhazia, Transdniestria, Nagorno-Karabakh and Crimea.

The first question to discuss is whether the populations of the "frozen conflicts" might be considered as "peoples". In Nagorno-Karabakh, Transdniestria and Crimea, minority groups that have their own "kin" states claim the right to self-determination. Minorities do not have the right to self-determination, unless they have an identity by which they can be distinguished from those living within its own "kin" state. There is no sufficient evidence that Karabakh Armenians in Nagorno-Karabakh[22], Russians and Ukrainians in Transdniestria[23] and Russians in Crimea[24] have a collective individuality, therefore, they cannot qualify as "peoples".

As regards the Abkhazian people, they might possibly qualify as "peoples", but they constitute a numerical minority in Abkhazia[25], whereas people that claim for self-determination have to constitute a majority in a particular territory. One might argue that the number of inhabitants is not the main obstacle for the recognition of Abkhazia's right to remedial secession (Dugard and Raič, 2006, p. 118), though it is hard to accept that the will of the minority may overrule the will of the majority of the population.

The Ossetinian people seem to constitute a numerical majority (Regions and Territories: South Ossetia) in South Ossetia and have their own distinct identity, which might theoretically qualify them as "peoples". However, one of the main obstacles to qualify all the groups in the "frozen conflicts" as the holders of the right to self-determination is the influence of a third party on these self-purported states. Presently, it is especially difficult to identify the groups claiming independence and/or their genuine will. Russia significantly supports the "state" building process in South Ossetia and Abkhazia[26], and Russia has been actively engaged in granting Russian citizenship to Abkhazian and Ossetian people (International Crisis Group, 2006; p. 9 – 10). Furthermore, Russian military forces have been present in Abkhazia and South Ossetia, which, according to the Russian Federation, are merely peacekeeping forces (International Crisis Group, 2006, p. 7 – 8). Due to the military presence of the Russian Federation, Abkhazia and South Ossetia are overwhelmingly dependent on Russian financial aid for their economy (International Crisis Group, 2013, p. 4–5).[27]

The referendum in Crimea can neither be regarded as an exercise of self-determination of the people, as it was held under the military presence of the Russian Federation (Report on the Human Rights Situation in Ukraine by the High

[20] The statement of the United Kingdom in response to Russia's intervention in Georgia and the subsequent recognition of South Ossetia and Abkhazia. See UN Doc. S/PV.5969, 2008, p. 12. Similarly, Iceland condemned Russia's involvement in Ukraine, maintaining that "[t]he use of military force to redraw national boundaries is unacceptable and will have serious consequences for Russia's international standing." See UN Doc. A/68/PV.80, 2014, p. 12.

[21] In its resolutions, for instance in resolution 853 (1993), the UN Security Council called upon the states "to refrain from supplying any weapons and munitions". In its resolution 884 (1993), the UN Security Council called upon the government of Armenia "to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic with resolutions 822 (1993), 853 (1993) and 874 (1993), and to ensure that the forces involved are not provided with the means to extend their military campaign further".

[22] Since the beginning of the 1920s, Nagorno-Karabakhhas been populated largely by ethnic Armenians. The Armenian population constituted 94% of the whole population 1921 and 75% in 1988. See in, for instance, Chaliand (1994), p. 11 and De Waal (2003), p. 8, 10.

[23] According to a census carried out by Transdniestria's authorities in 2004, the population of Transdniestria is 555,347, of which Moldavians comprise 31.9% (177,000), Russians 30.4% (168,000), Ukrainians 28.8% (160,000) and others (mainly Bulgarians, Poles, Gagauz, Jews and Germans) 8.9%. See World Directory of Minorities and Indigenous Peoples – Transnistria (unrecognised state: Overview), 2007.

[24] According to census data, in 2001 the population of Crimea was 1,916,000, of which Russians comprise 58.5% (1,180,400), Ukrainians 24.4% (492,200) and Crimean Tartars 12.1% (243,400). See in Sasse, 2007, p. 275.

[25] In 1992, Abkhazia was populated by Georgians 45%, Abkhaz 18% and Russians 16%. See *Население Абхазии*.

[26] Professor D. Žalimas states that the main administration of Abkhazia and South Ossetia is composed of the former security and military officers of Russia (Žalimas, 2008). Professor D. Žalimas is the head of the Constitutional Court of Lithuania and the director of the International and European Law Institute of Vilnius University (Lithuania).

[27] For the role of the Russian Federation in South Ossetia and Abkhazia also see, for instance, Žalimas, 2008.

Commissioner for Human Rights, 2014, p. 4, 7, 21). A similar situation exists in Transdniestria, which was set up with the help of Russia and "survives by virtue of the military, economic, financial and political support given to it by the Russian Federation" (Ilaşcu and others v. Moldova and Russia, 2004, § 392).

As to Nagorno-Karabakh, Armenia participated in the events in Nagorno-Karabakh since the beginning of the conflict and actively participated in the preparation of the plans to transfer Nagorno-Karabakh from the Azerbaijan SSR to the Armenia SSR (De Waal, 2003, p. 15 – 22, p. 20 – 24). Armenia and Nagorno-Karabakh are also "heavily integrated financially and military" (Ajemian, 2011, p. 376–377; Cheterian, 2012, p. 714) and the self-proclaimed entity is mostly dependent on the support from Armenia. Furthermore, one can hardly talk about the self-determination of peoples in South Ossetia, Abkhazia and Nagorno-Karabakh, as the territories were ethnically cleansed, thereby creating mono-ethnic territories.

Even if one admits that the groups in the "frozen conflicts" qualify as "peoples"[28], it should be emphasised that "peoplehood" does not *per se* signify the right to unilateral secession. Therefore, it is necessary to examine whether the second condition for remedial secession was met in the "frozen conflicts". It seems hard to accept that there was a serious denial of internal self-determination, followed by widespread, systematic and mass human rights violations towards South Ossetians, Abkhaz people, Russians and Ukrainians in Transdniestria, and Russians in Crimea. As to South Ossetia and Abkhazia, it would be difficult to deny that Georgia made human rights violations, particularly during the 1992–1993 conflict and an armed conflict in 2008, though it is documented that during the fighting in the period of 1992–1993, as well as during an armed conflict in 2008, both sides committed atrocities.[29] Moreover, the condition for the remedial right to secession may only exist *after* mass violence towards the claimants of the right. In the cases of South Ossetia and Abkhazia, both conflicts might be regarded as a result of secessionist attempts, but not as the reason to secede. Prior to the conflicts, there was no evidence of such an amount of violations towards the Abkhazians and Ossetians that it would have threatened the extermination of these groups.[30] On the contrary, ethnic Georgians were subjected to mass and disproportionate violence and expelled from their homes.[31]

The Russian Federation, while recognising the results of the referendum in Crimea and signing the treaty of the accession of Crimea to the Federation *inter alia* mentioned widespread and systematic human rights violations towards the Russian speaking population in Ukraine (Address by President of the Russian Federation, 2014), thereby invoking the remedial secession arguments. On the contrary, as to the assertions of Russia, the Ukrainian government neither seriously denied the internal self-determination of the people of Crimea nor there were widespread, systematic and gross human rights violations towards the Russian population in Crimea (Report on the Human Rights Situation in Ukraine by the High Commissioner for Human Rights, 15 April 2014, 2014). The decision of the Parliament of Ukraine to abolish the 2012 Language Act that extended the scope of the use of the regional languages, including Russian, cannot amount to such a level of oppression that it could justify secession (p. 3, 16). Moreover, the former acting president of Ukraine vetoed the decision and it did not come into force.

As to Nagorno-Karabakh, there was no systematic or serious denial of the internal right to self-determination. The autonomy was abolished merely after the proclamation of the independence of Nagorno-Karabakh.[32] One can hardly deny that Azerbaijanis committed violent attacks on Karabakh Armenians[33], though it is unlikely that the oppression towards this group threatened the extermination of the Nagorno-Karabakh population and crossed the required threshold to justify unilateral secession. The degree of violence hardly reached the atrocities committed towards the Kosovo Albanians, where the oppression threatened the very existence of the people.

The third question to discuss is whether all effective, available and realistic remedies for the settlement of the "frozen conflicts" have been exhausted. In the opinion of the authors, the question has to be answered in the negative. The third condition of the remedial secession in the cases of South Ossetia and Abkhazia was unfulfilled, due to the consistent rejection of Georgia's proposals for political and territorial autonomy.[34] The absence of the third condition is also evident in the case of Crimea. Therefore, it seems tenable to argue that the attempts by Russia to set up a legal case for the remedial secession of Abkhazia, South Ossetia and Crimea have been met with failure, particularly given the fact that " < … > it is unlikely that the threshold of "extreme persecution" was genuinely reached" (Tancredi, 2008, p. 53). The independence of Abkhazia and South Ossetia represents the creation of puppet states through the violation of international legal norms[35]

[28] For instance, Pieters argues that the population of Crimea might qualify as "peoples". Pieters, 2014. B. Bowring writes about the distinct identity of the inhabitants of Transdniestria. Bowring, 2014, p. 170 – 171.

[29] See, for instance, Human Rights Arms Project. *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict*, Human Rights Arms Project, 1995, p. 1; IIFFMCG Report, Volume II, p. 76–77.

[30] This approach is also supported, for instance, by Prof. Tancredi, J. Dugard and D. Raič. Tancredi, 2008, p. 53; Dugard and Raič, 2006, p. 118.

[31] See, for instance, OSCE Istanbul Declaration, 1999, § 17; European Parliament Resolution on the Situation in Abkhazia of 1990; SC Resolution 869, 1994, § 12; SC Resolution 1036, 1996, § 7.

[32] On 2 September 1992, Nagorno-Karabakh proclaimed an independent Republic of Nagorno-Karabakh. On 26 November 1991, Azerbaijan abolished the autonomous status of Nagorno-Karabakh.

[33] For instance, "Operation Ring" is among well documented Azerbaijani attacks on Karabakh Armenians. Human Rights Watch described an operation as an "unprecedented degree of violence and a systematic violation of human rights." See *Azerbaijan. Seven Years of Conflict in Nagorno-Karabakh*, 1994, p. 5.

[34] It is worth mentioning that during the 59th session of the UN General Assembly, the former president of Georgia, M. Saakashvili, talking about Abkhazia and South Ossetia, ensured that Georgia is ready for " < … > a global solution with global guarantees that would lead to the establishment of the fullest and broadest form of autonomy – one that protects culture and language and guarantees self-governance, fiscal control and meaningful representation and power sharing at the national government level". UN Doc. A/59/PV.4, 2004, p. 14.

[35] According to Prof. A. Tancredi, " < … > by extending Russian citizenship to the inhabitants of the two breakaway provinces, Russia aimed to undermine the personal (and indirectly, territorial) basis of Georgia. By threatening the personality of another State, Russia has at least violated the duty

rather than legitimate claims for independence that were not recognised by the international community.[36] Crimea is just a mere example of illegal annexation by Russia.

It is worth noting that Russia and Crimea justify Crimea's independence relying on the ruling of the International Court of Justice ('ICJ') that international law contains no prohibition on unilateral declarations (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, § 81). However, both of them do forget to mention that the ICJ also emphasised that the illegality of unilateral declarations stems not from their unilateral character, but from the fact that they were related to the unlawful use of force or other egregious violations of the norms of international law, in particular those of a peremptory character (*jus cogens*) (§ 81).

From the perspective of the ICJ ruling, the independence of South Ossetia, Abkhazia and Crimea was illegal, as it was connected to the use of force and breach of the obligation not to intervene in the domestic affairs of another state. It allows drawing the conclusion that the right to remedial secession cannot emanate from the use of force or other serious violations of international law norms. If these violations are present, even effective territorial situations cannot be recognised as having any legal effect. Similarly, Professor H. Hannum notes that "[m]ilitary force can establish control over a particular territory, but it cannot create international legitimacy" (Hannum, 1998, p. 14).[37] Therefore, the Advisory Opinion on Kosovo rebuts the propositions of the Russian Federation and Crimea and reveals the illegality of the independence of Crimea.

In the cases of Nagorno-Karabakh and Trandniestria, no negotiations took place prior to the proclamation of independence, as it was in the case of Kosovo. In the present negotiation process, Nagorno-Karabakh and Armenia reject the proposals of autonomy (International Crisis Group, 2009, p. 6; Ochoa, 2014). The fact that the conflict has remained unresolved for more than twenty years signifies that the Minsk Group, the main mediator of the conflict, failed in acting as a successful negotiator. In this sense, the participation of the Russian Federation, as a co-chair of the Minsk Group, raises serious doubts, because Russian military forces have remained a strong presence in Armenia (De Waal, 2003, p. 261; International Crisis Group, 2013, p. 4). Russia not only has strong interest in the South Caucasus, but also supplies arms to both parties of the conflict (International Crisis Group, 2013, p. 2, 4, 9). Russia's policy in the region is often described as *divide et impera* (The Nagorno-Karabakh Crisis: A Blueprint for Resolution, 2000, p. 11). In this regard, the international community should revise its negotiating strategy regarding Nagorno-Karabakh, particularly in mind of the fact that the policy of the Russian Federation towards the conflict of Nagorno-Karabakh, as well as in Abkhazia, South Ossetia and Crimea, is based on strategic geo-political interests, rather than good faith and the proper application of international law norms.

Transdniestria represents another conflict which has remained unresolved for more than twenty years. In the negotiations over Transdniestria, Russia also played a pivotal role. Formally, the Russian Federation has always maintained that Transdniestria should have a special status within Moldova (Bowring, 2014, p. 171), though facts deny this formal proposition. As previously mentioned, the breakaway entity survives merely by virtue of the various kinds of support given by Russia. Moreover, in 2013, Russia threatened that Moldova would lose Transdniestria if it continued moving towards the European Union (Ivan, 2014, p. 1).[38] Transdniestria, as well as Nagorno-Karabakh, demonstrates that *bona fide* negotiations between conflicting parties are simply not possible if the mediator has strong influence on the parties or does not respect international law. In this sense, the situations of the "frozen conflicts" in the post-Soviet region add clarity to the procedural criterion for the exercise of the negotiations. Negotiations in good faith are only possible if the conflicting parties are not influenced by third states, which violates international law, including the principles of non-intervention in the internal affairs of states and the prohibition of the use or threat of force.

Therefore, as regards the situation over the "frozen conflicts", the international community must demonstrate that it will not allow further escalation of the situation in the region and the trampling of international law norms (Ivan, 2014, p. 4). Otherwise, the international community might face other irresistible misapplications of international law norms turned into "just" facts.

4. Conclusions

1. The remedial right to secession has no relevance in the "frozen conflicts" of the post-Soviet region. South Ossetia, Abkhazia, Nagorno-Karabakh, Transdniestria and Crimea cannot justify their independence on remedial secession. None of the cases mentioned met the required conditions and their claim to independence was not recognised by the international community.
2. The cases of South Ossetia, Abkhazia, Nagorno-Karabakh, Transdniestria and Crimea reveal that the right to remedial secession is simply not relevant in cases which are related to the unlawful use of force or other egregious violations of the

(*footnote continued*)
not to intervene in matters within the domestic jurisdiction of another State, in accordance with the UN Charter and the 1970 Friendly Relations Declaration." Tancredi, 2006, p. 52.

[36] In the opinion of the authors, Chechnya and Tibet are two well-known examples of unrecognised legitimate claims for independence.

[37] The professor referred to the Turkish Republic of Northern Cyprus, Israel's annexation of East Jerusalem and other cases as examples.

[38] The author also indicates that Russia has also imposed an embargo on Moldovan wine, but not Transdnistrian wine.

norms of international law, in particular *jus cogens* norms. *Ex injuria jus non oritur* might be considered as a *sine qua non* of a precondition for remedial secession.

Negotiations in good faith are only possible if the conflicting parties are not influenced by third states, which violates international law, and while the mediation of the international community or third states is often necessary in the negotiation process, the participation of states "violators" might be regarded as a decisive obstacle preventing *bona fide* negotiations.

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