Remedial Secession and Justice-Based Legitimacy: Assessing the Cases of South Sudan and Nagorno-Karabakh

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Abstract

The existing world is characterized with a wide range of secessionist movements attempting to establish independent states. Meanwhile, trying to prevent the supposed destabilization of the existing international relations, the international community has shown a relatively clear reluctance to start a legal international precedence of recognizing secessionist claims. And here I question the established double standards and selective approach of the international community towards recognition of secessions and build an argument that morally justified secessions should gain international recognition of their legitimacy.

Building the argument on remedial theories, the following cases have been studied as a test for these theories: South Sudan and Nagorno-Karabakh. Through the study of the aforementioned cases we come to the conclusion that the establishment of a major international justice cannot be undervalued by the existing stance of the legal framework. Thus, in order to reestablish the importance of international justice and fill the gap between legal system and morally justified legitimacy a shift is necessary from the current interpretation of the right to self-determination to a legal incorporation of the right to remedial secession. The institutionalization of the discussed remedial right theories in their limited scope of application should lead to a reevaluation of the global justice, peace and security as the major aims of the current international community.

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Introduction

The existing world is characterized with a wide range of secessionist movements[1] attempting to establish independent states. Constituting a worldwide phenomenon these movements advance their claims on various bases ranging from the argument of common language and history, common cultural values to nationalist arguments, from economic reasons to mere political conditions, from historical reasoning to claims against current injustices. What is common for most of the secessionist movements is their claim for legitimate right to self-determination.

While the right to self-determination has evolved to being interpreted mainly as a right to wide autonomy and self-governance within the existing states, the claims of secessionist units of this right raise a number of questions. Is there a legally recognized right to secession? Does the right to self-determination include a right to secession? If not, what is the interconnection of these concepts? These matters have been largely discussed throughout the last decades from various perspectives.[2] Nevertheless, there is no real consensus about the raised issues, and thus the legitimization of secessionist claims becomes a matter of interpretation.[3] Trying to prevent the supposed destabilization of the existing international relations, the international community has shown a relatively clear reluctance to start a legal international precedence of recognizing secessionist claims. But here a question arises, whether historical, social and legal justice is to be undervalued in comparison with security

[1] E.g. Kosovo, Nagorno Karabakh, South Ossetia, Abkhazia, Republika Srpska, Transnistria, Basque Country, Chechnya, Catalonia, Quebec, etc

[2] For comprehensive analysis of the international law system and secession within it, see Aleksandar Pavkovic and Peter Radan, eds., *The Ashgate Research Companion to Secession*, (Burlington, VT: Ashgate, 2011); James Crawford, *The Creation of States in International Law*, (Oxford University Press, 2006); Julie Dahlitz, ed., *Secession and International Law: Conflict Avoidance□: Regional Appraisals*, (The Hague: T.M.C. Asser Press, 2003); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, (Cambridge University Press, 1995); For the interconnection of Self-determination and Secession, see, e.g., Stephen Macedo and Allen Buchanan, eds., *Secession and Self-Determination*, (New York University Press, 2003)

[3] Various interpretations exist as of viewing the right to self-determination conferred to the colonial peoples, or rather to all the peoples. And these interpretations impact how secession is being positioned with regard to international law. For more details, see Chapter 2 of this thesis

and stability issues. Thus I question the established double standards and selective approach of the international community towards recognition of secessions and build an argument that morally justified secessions should gain international recognition of their legitimacy which can best be done through legal incorporation of a limited right to secession.

As the focus of my research is designed to be the implementation of external self-determination, especially justified in the form of remedial secession, it is important to engage in the normative theories existing in the literature to better understand the legal, political and social justifications for this kind of secession. While a range of theories exist justifying secessions, such as choice; remedial and communitarian theories,[4] my argument is largely based on remedial/justice theories. In general, choice and communitarian theories justify the right of secession as a collective right of individuals to choose their own political status within their territory (communitarian theory requiring common cultural, ethnic, linguistic and historical heritage).[5] The reason of this choice of remedial theory is that the latter provides a more straightforward account of legitimization of secessionist claims through its limited scope of application. The remedialist theory is more connected to the legal approaches and justifies secession as a remedy for the state failure to observe internationally required human rights and secure the internal self-determination of the unit in question.[6] While choice theories base their arguments merely on the expression of the will of the seceding unit,[7] and communitarian theories advance their arguments on the basis of self-identification of the seceding unit, remedial theories base their respective assumptions on certain conditions

[4] For general accounts of these theories, see Aleksandar Pavkovic and Peter Radan, *Creating New States: Theory and Practice of Secession*, (Aldershot: Ashgate c2007), 199-219; Pavkovic and Radan *Ashgate Research*, 399-426; Percy B. Lehning, ed., *Theories of Secession*, (London: Routledge,1998), 32-60, 151-182, 227-253

[5] Simon Caney, "National Self-determination and National Secession: Individualist and communitarian approaches", in Lehning, 152

[6] See, e.g., Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, (Oxford University Press, 2004), 351; Anthony H. Birch, "Another Liberal Theory of Secession", *Political Studies 32, no. 4* (December 1984): 599

[7] Harry Beran, "A Liberal Theory of Secession", *Political Studies, Vol. 32, Issue 1*, (Mar, 1984): 30

(gross injustices, human rights violations, threat to physical integrity). Thus the moral justification provided by the remedial theories has more leverage in terms of further institutionalization and incorporation in the international legal system.

To show the relevance of remedial theories and their importance in the existing international relations, the following cases have been studied as a test for remedial right theories: South Sudan and Nagorno-Karabakh. The cases chosen preserve their relevance not only because of temporal factors (establishment of independence occurred after the end of the Cold War in both cases) but also because of their possible fundamental nature in the changes evidenced in the sphere. The remedial secession as recognition of the right of self-determination is going to be discussed for both cases, and given the fact that it is not that common nowadays, it is important to understand the future perspectives of the right of self-determination with current trends and in the perspective of non-colonial self-determination.

For the purposes of finding the causal links of recognition and justification of external self-determinations, explanatory case-study approach is used. With the chosen cases I carried out a test for the remedialist theory. As the external self-determination of South Sudan was justified on the basis of remedy for the violation of fundamental human rights and discrimination,[8] it provides for the necessary factors for the remedialisit theory. Applying least-likely case study I made generalizations of the theory for Nagorno-Karabakh. In terms of the observed independent variables for both of the cases, there are many similarities such as in both cases unilateral declarations of independence happened in the Post-Cold war era; both constitute recursive secessions; both went in line with ethnic conflicts within former administration of the states they seceded from. Given certain arguments in favor of the fact

[8] Some dynamics of discriminatory policies against the South are presented in Laila B. Lokosang, *South Sudan: The Case for Independence and Learning from Mistakes*, (Xlibris Corporation, 2010); Francis M. Deng, ed., *New Sudan In the Making?: Essays on a Nation in Painful Search of Itself*, (Trenton: The Red Sea Press, Inc., 2010)

that South Sudan was a legitimate subject for the decolonizational right to self-determination to apply, we could account for the major difference of the studied cases to be the application of colonial and non-colonial frameworks. Nevertheless, the secession of South Sudan eventually gained legitimacy as a remedy against former injustices and human rights violations, thus relatively invalidating the relevance of decolonization framework. Hereby the two cases fall under the framework of non-colonial secessions. There is also another major factor influencing the existing state of affairs – the geostrategic interests of the major actors involved in the process, which is shortly discussed as conditioning the differing outcomes of the cases in terms of justification and non-justifications of secessions.

The aim of this research is not to make a full comparative case analysis, but rather show through the selected cases the similar application of the theory which will support the argument of having the right to remedial secession institutionalized. Nevertheless, as far as these cases have never been compared[9], the current degree of comparison adds a certain value to this thesis. Additionally, the study of the selected cases contributes to the existing literature on adding up arguments for the need of incorporation of the right to remedial secession in the international legal system. Furthermore, as South Sudan achieved its recognized independence in 2011, there is not much work done in academically engaging with South Sudan`s recognized independence as a successful remedial secession.[10] The existing literature dating before the independence of South Sudan still incorporates doubts about South Sudan`s legitimate claims and even considers the attempt of secession a failed one.[11]

[9] Both cases have been analysed mainly as single case-studies. For South Sudan see, e.g., supra note 8; Lam Akol, *Southern Sudan: Colonialism, Resistance and Autonomy*, (Trenton: The Red Sea Press, Inc., 2007); Solomon A. Dersso. "International Law and the Self-Determination of South Sudan." *Institute for Security Studies no. 231* (February 23, 2012); for Nagorno-Karabakh, see, e.g. Shahen Avakian, *Nagorno-Karabagh. Legal Aspects*, Third Edition, (Yerevan: 2010); Aleksander Manasyan, *Karabakh Conflict: Key terms and Chronology*, [In Russian], (Yerevan: 2005); William R. Slomanson, "Nagorno Karabakh: An Alternative Legal Approach to its Quest for Legitimacy", *Miskolc Journal of International Law*, *Volume 9. No.1*, (2012)

[10] For recent legal account of South Sudanese secession, see, e.g., Dersso

[11] See, e.g., Crawford, *Creation of States*, 403

Nevertheless, the remedial secession discourse in terms of its fundamental factors has become a mainstream for the South Sudanese case, unlike that of Nagorno-Karabakh. The main arguments presented in the existing academic literature and sources focus on the dichotomy of the right to self-determination and the principle of territorial integrity, or on the conflict-based arguments, additionally, the legal analysis is limited in terms of concentrating on the domestic legislation during the USSR period and debated constitutional right to secession.[12] While the existing gross human rights violations and discriminatory policies are mentioned in the historical context and do not advance to the discourse of remedial secession.[13] Thus, the current research significantly adds up to the arguments of remedial secession applied to Nagorno-Karabakh.

As the cases constitute unilateral secessions, and justifications of remedial secessions are based mainly on the legitimate claims of secessionist units, the approach of the challenged states is not extensively studied, which may constitute a limitation for the thesis. Additional limitations are related to the case studies, in general. This particularly concerns the case of Nagorno-Karabakh, which is presupposed to be presented in a relatively biased and subjective way in various approaches of respectively Armenian and Azerbaijani sources.

For the purposes of this research, the thesis is divided into three main chapters. The First Chapter deals with the general conceptualization of the key terms and their relevance within the chosen theoretical framework. Through the arguments of a range of representatives of remedial right theories, a comprehensive theoretical framework is built which is later applied through practical cases. This Chapter also critically engages in the lacking points of the theoretical framework as it stands in this thesis.

[12] See, e.g., Heiko Kruger, *The Nagorno-Karabakh Conflict: A Legal Analysis*. (Springer, 2010); Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia, and South Ossetia: A Legal Appraisal*, (Martinus Nijhoff Publishers, 2001); Manasyan, *Karabakh Conflict*; Avakian, *Nagorno-Karabagh*

[13] Only limited number of researchers have incorporated the justification of the case as remedial secession in their works. See, e.g., Slomanson, "Nagorno Karabakh"; and Ara Papian, *Hayrenatirutyun(Reclaiming the Homeland): Legal Bases for the Armenian Claims and Related Issues*, [in Armenian], (Yerevan, 2012)

The Second Chapter is aimed at depicting the existing international legal system incorporating the right to self-determination, and showing where secession stands in this complex. For this purpose a short overview of the right to self-determination is given with its various interpretations in the relevant international covenants and declarations. On this basis the second part of the chapter builds the interconnection of the right to self-determination and secession and provides for a comprehensive basis for further application on the practical cases.

The analysis of the selected cases of South Sudan and Nagorno-Karabakh is carried out in the Third Chapter. The aim of the latter is to account for the practical application of remedial theory, which will allow us to make generalizations about similar cases. This research shows that the strongest argument for Nagorno-Karabakh's self-determination is the fact that the state of Azerbaijan, in all aspects, not only failed to provide any framework for Nagorno-Karabakh's free and democratic development, but also, at a state level, planned and systematically pursued a policy of ethnic cleansing, thus imposing a threat to the physical integrity of Nagorno-Karabakh Armenians and hampering the social and economic development of Nagorno-Karabakh. Thus, Nagorno-Karabakh, which at the current state of being non-recognized, was taken as a least-likely case and has been shown to fall under the scope of the remedial right theory. This allows us to claim that moral justification of the secessions as a remedy against gross injustices, aka justice-based legitimacy of secessions can become a basis for general criteria for international legitimization through the incorporation of the discussed right to remedial secession into the legal system. This will also undermine the concerns over double standards of the international community and help create a set of criteria for legitimization of secessions bearing in mind the progress of international relations within the recent decades and its non-static nature.

Chapter 1.

Conceptualization of Secession: Theoretical Framework of Remedial Secession

The existing world being full of secessionist claims and claims for independence has shown certain degree of sensitivity towards the issues of secession and self-determination. Throughout the last century the attempts of the international community to regulate these claims within the framework of international legal norms has brought to the establishment of currently ambiguous right to self-determination and several principles dealing with territorial integrity and national sovereignty of states. In parallel, several theories developed which attempted to justify the claims for secession on various bases. And for the purposes of this thesis which is aimed at moral justification of secessions, we need to establish the framework of the key concepts and theoretical arguments. The following chapter is going to deal with secession and related concepts, and will also put these concepts in the general framework of normative theories of remedial secession. The related issue of the right to self-determination, though, is discussed in the Second Chapter.

1.1. Conceptualization of the Key Terms

For the proper understanding of the issue under discussion, it is important to see how the core concepts of the debate are defined and how they are interrelated. Secession and self-determination being presented and discussed in multidisciplinary contexts (political, social, philosophical, legal and economic) and being of specific sensitivity in political terms have been defined in quite various ways taking into account these sensitivities. This is why it is difficult to account for an unequivocally accepted definition of these concepts. Nevertheless, without certain understanding and definition of these concepts it is hard to judge the claimed right to self-determination and secession in general, to understand the underlying reasons of

granting this right to certain entities and not to others, to understand the differences in justification of the implementation of this right.

The simple genealogical definition of the word "secession" would be "going apart" (based on the Latin roots of the verb "secede" with "se" meaning "apart" and "cedere" meaning "to go").[14] The same logic of "going apart" is encountered in defining secession as "the creation of a new state upon territory previously forming part of, or being a colonial entity of, an existing state".[15] Among the existing theories explanatory theories of secession deal with the nature of this concept and its main characteristics. Thus, for example, John Wood who is one of the major specialists to offer a comprehensive theoretical framework for studying secession offers the following definition as of secession being "an instance of political disintegration wherein political actors in one or more subsystems withdraw their loyalties, expectations, and political activities from a jurisdictional centre and focus them on a centre of their own"[16] thus presenting secession mainly as withdrawal from central political authority. From the same perspective, secession is usually presented as not exactly the withdrawal of a territory and its population from an existing state but the withdrawal of power and institutions of the host state and their transfer to the institutions of the new state.[17] It is also common to view secession as a process which has as its outcome the creation of a new state.[18]

Depending on which kind of lens secession is being judged through definitions differ. Non-justification or more specifically non-acceptance of the general legality of the claims to secession stresses the presence of violence in the definition as incorporated in James

[14] Pavkovic and Radan, *Creating New States*, 5
[15]Peter Radan, "Secession: A Word in Search of a Meaning" in *On the Way to Statehood: Secession and Globalisation* ed. Aleksandar Pavkovic and Peter Radan, (Aldershot: Ashgate, 2008), 18
[16] John R. Wood, "Secession: A Comparative Analytical Framework", *Canadian Journal of Political Science, Vol. 14, No. 1* (Mar., 1981): 111
[17] Pavkovic and Radan, *Creating new States*, 8
[18] Marcelo Kohen, G., ed., *Secession: International Law Perspectives*, (Cambridge University Press, 2006),14

Crawford`s definition of secession as meaning "the creation of a state by the use or threat of force without the consent of the former sovereign".[19] This kind of negative view of the concept is also conditioned by the general opposition of major states to secessionist claims and the violence associated with these claims. Nevertheless, these views fail to take into account that not all claims include violence (e.g. Quebec, Catalonia, etc.) and that just causes can become basis for secessionist claims thus legitimizing them.

Drawing upon certain components of the aforementioned definitions I will view secession as the separation of a territory previously forming part of an existing state with establishment of a new independent state or any other viable political status, and withdrawal of the political authority from the challenged state with the establishment of new state powers. In this definition the "any other political status" refers to either integration within or association with another independent state. The term viable is to specify the conditions under which "any other political status" will be plausible and legitimate. Thus, if integration or association is chosen as a proclaimed political status of a seceding entity, then the state to which it wishes to associate with or integrate within should have its consent directly or indirectly made clear with explicit announcements and declarations or definite state actions.

In the framework of this research it is also necessary to define the following types or categories of secession. We will refer to colonial secession as that where "a colonial entity becomes a new state".[20] Unilateral secession will refer to cases, as Radan makes it clear, where in the presence of the lack of consent of the existing state the seceding unit becomes a new state, while the challenged state continues to exist.[21] One of the founders of the moral theory of secession as of laying grounds for the international law reforms, Allen Buchanan, referring to the unilateral right to secede, presents it as a right "of a group to form its own

[19] Crawford, *Creation of States*, 375
[20] Radan, 30
[21] Ibid., 30-31

independent territorial political unit and seek recognition as a legitimate state in a portion of the territory of an existing state absent consent or constitutional authorization".[22] And cases where despite the initial resistance or lack of it the challenged state consents to the creation of a new independent state as a result of secessionist claims are commonly known as "devolutionary secessions".[23]

Meanwhile the cases we are going to discuss (South Sudan and Nagorno-Karabakh) involve certain common characteristics one of which is that they can both be classified as "recursive secessions".[24] This term is to be understood as a successful secession and creation of an independent state resulting in new attempts of secession from that exact state. And as Pavkovic and Radan put it: "When an attempt of secession triggers or influences attempts at secession from the seceding territory, we shall call 'recursive secessions".[25]

A certain interconnectedness of concepts also exists in this discussion. The connection of secession and ethnic conflicts is important as ethnic conflicts are usually presented as an integral part and sometimes the fundamental cause of the secession process. This is the case discussed in this research, namely with Nagorno-Karabakh and South Sudan. This connection in general can be simply presented like this: the success of secession and even the attempt of secession can lead to a resolution to the existing ethnic conflict becoming a very efficient tool of conflict resolution. Meanwhile, the mere existence of secessionist claims can become a basis for new conflicts. This more skeptical view is accounted by Siroky, who believes that secession does not put an end to ethnic conflicts, but provides for their reordering, and

[22] Buchanan, *Justice, Legitimacy*, 338
[23] Radan, *Secession*, 32
[24] Recursive secessions usually trigger the concept of "domino theory of secession", which, as described by Beran, claims that "an initial successful secession is likely to lead to a series of secessions resulting in unviable political entities". See Beran, 29
[25] Pavkovic and Radan, *Creating new states*, 129

consequently new forms of violence.[26] The same view is defended by Donald Horowitz, who believes that secession does not end the existing ethnic conflicts because it does not necessarily lead to the creation of homogenous successor states as would have been expected.[27] The factor of ethnic conflicts is relevant to the cases under consideration nevertheless the conflicts do not present the primary focus of the current research. It is sufficient to understand the importance of ethnic conflicts as a ground for a degree of legitimization of secessions in terms of viewing ethnic conflicts as the results of the lack of any other peaceful means to resolve the claims of seceding units. This is how the recognition of established statehood as a result of secession can be seen as an effective way of conflict resolution, which is not going to be discussed in the coming chapters, but can otherwise become a focus of further research.

It is also important to make a distinction between "secession" and "ethnic conflict", which becomes even more relevant in light of the fact that in the cases to be examined ethnic conflict was one of the elements of the process of secession. Not to go deep in the variation of the terms which is not the objective of this research, it is enough to underline the core elements of not using the terms interchangeably. First of all, not all secessions involve violence, thus not all secessions go in line with certain conflict, be it ethnic or not. Besides, it is accepted that secessions not necessarily include ethnic groups or promote ethnic claims. Furthermore, ethnic conflict is a broad category and secession is to be only a part of it, as wisely mentioned by Pavkovic and Radan,[28] making the overlaps of these terms only a matter of certain conditions and not an overarching rule.

[26] David S. Siroky, "Secession and Survival: Nations, States and Violent Conflict", (PhD. Diss., Duke University, 2009), 5
[27] Donald L. Horowitz, "A Right to Secede?" in Macedo and Buchanan, 50
[28] Keiichi Kubo, "Secession and Ethnic Conflict" in *The Ashgate Research* ed. Pavkovic and Radan, 211

1.2. Theories of Remedial Secession

The phenomena discussed in the thesis, namely secession and external self-determination, have a long history[29], throughout which they were subjects of debates and discussions. Nevertheless, the existing political and moral assessments of justification of secessionist claims are relatively new. One of the first attempts is believed to have been undertaken by Harry Beran in his article "The Liberal Theory of Secession" in 1984. Hereby secession was put in the liberal normative theoretical framework, though the accent was put not on the justifiability of secession, as the author argues, but on the permissibility of secession.[30] Thus, the desirability of secession was placed above its justifiability.[31] The effective conditions for the secession to be permitted, as discussed in the article, are territorial consolidation and concentration of the seceding group and the moral and practical possibility of secession.

Though Beran does not focus on the justification of secessions and territorial claims as part of secession, this task has been carried out through the lens of a range of theories. Some of these theories[32] were inclined to see no justification at the beginning when they accounted for only individualist claims. Nevertheless, the tendency changed direction towards justification with the shift to a collectivist account of territorial rights. The inclusion of moral values is indispensable for this justification as well. And as Cara Nine states, "If, as in the case of legitimate secession, persons are denied basic liberties because their political groups

[29] A clear example of secession dates back to 1776 when the US declared its independence from the British rule. Besides, separation of territories from existing states has been witnessed afterwards, but gained major outspread in the aftermath of the First World War
[30] Beran, 23
[31] Ibid., 28
[32] Such as property theories. See Frank Dietrich, "Changing Borders by Secession: Normative Assessment of Territorial Claims", in *The Ashgate Research* ed. Pavkovic and Radan, 82-85

do not have access to territorial rights, then there is a reason for limiting the territorial rights of existing states in order for the disenfranchised group to claim territorial rights".[33]

Additionally, the sensitivity of secessionist claims for international and local politics is conditioned by the fact that they entail major territorial claims towards the challenged state, such as the claims for external self-determination. As Lea Brilmayer states, "Secessionist claims involve, first and foremost, disputed claims of territory".[34] This contradicts the notion of self-determination in its internal aspect which is mainly understood in the framework of democratic norms and values and thus entails the granting of more autonomy and more self-governance rights within the host state. In line with these sensitive approaches, we see the reluctance of the major states and general international community in justifying and recognizing the majority of secessions. And in this concern several theories exist which undertake to justify the right to secession through various factors.

From within the existing theories which are categorized as of choice/democratic theories; justice/remedial theories and communitarian/national theories,[35] the current research will focus on remedial theories as justifying secessionist claims. While a short overview of choice and communitarian theories shows that they account for the right to secession largely based on the factors around the holders of the right. For choice theorists it is of primary importance to justify secessions based on the ability and will of the seceding unit to secede. Thus the people usually express their will of enhancing their common welfare through secession, and given they show their ability to provide better conditions for the self-determining group than the current state, their secession is justified.[36] Thus, choice theories

[33] Cara Nine, "A Lockean Theory of Territory", *Political Studies: Vol. 56*,(2008): 158
[34] Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", (Faculty Scholarship Series, Paper 2434, Yale Law School, 1991), 178
[35] Pavkovic and Radan, ed., *The Ashgate Research*, 381
[36] This has to go in line with the existing state`s ability and will to provide welfare for the remaining part after secession, see, Christopher Heath Wellman, *A Theory of Secession*. (Cambridge University Press, 2005), 36

base their arguments on political legitimacy[37] and freedom of association[38] to provide a primary right to secede.

Conferring moral value to the groups as having moral and political importance, communitarian (or otherwise called nationalist) theorists argue for the right of groups to be self-governed.[39] Thus the self-identification of individuals with a certain group (more precisely with a nation) entitles this group a right to secession if it is accompanied with the group`s will to secede. Thus these theories mainly account for national self-determination.[40] Choice and communitarian theories provide for a primary right to secession while accounting for only too general conditions as allowing secession. This is why they lack the plausibility at this state of international relations and at this state of international law to offer law-transcending accounts for moral justifiability of secessions. Remedial right theories are more straightforward in their accounts for secession and are limited in their scope of application which creates a basis for further incorporation in the international legal system. Additionally, choice and communitarian theories are more inclined to result in further fragmentation of the existing world through accounting for a general and primary right to secession. Thus, they are also faced with the problem of overlapping claims for secession on the same territory. All these problems of these theories partly justify the choice of remedial right theories as a focus for the current study. Unlike choice and communitarian theories which suggest the legitimization of the secession based on certain criteria of the entities holding this right to secession, remedial right theories base their justification on the conditions which prescribe these entities the right to secession: these conditions being in general grave injustices or violations of international legal norms and fundamental human rights. And unlike legal

[37] David D. Speetzen and Christopher Heath Wellman, "Choice Theories of Secession", in *The Ashgate Research* ed. Pavkovic and Radan, 414
[38] David Gauthier. "Breaking up: An Essay on Secession." *Canadian Journal of Philosophy 24, no. 3* (September 1, 1994): 360
[39] Caney, 151
[40] Ibid., 152

approaches, remedial right theories do not intend to judge the legality of the secessions under discussion, but rather constitute more "law-transcending"[41] approaches aimed at using moral and normative estimations with a view to having these assumptions underlying further legal judgments.

What is common to all the proponents of the remedial theory is that all acknowledge the justification and legitimization of secession as a remedy for a certain breach of rights or injustice, in general. Nevertheless, what constitutes this "injustice" brings a degree of variation among several remedial theorists. For some it is the non-ability to provide the right to internal self-determination or just the breach of this right,[42] for others it is not necessarily a breach of the right to internal self-determination but grave harm, such as threat to security of the people concerned.[43] The factors causing injustice and becoming a basis for legitimate claims for secession have been categorized by Wayne Norman as follows: for the territorially integrated seceding group to be 1) "victim of systematic discrimination or exploitation" which will continue as long as the group stays within the existing state; 2) "illegally incorporated into the state within recent-enough memory"; 3) the holder of a valid claim to the contested territory; 4) the victim having its culture imperiled and with the only solution to this being its own sovereignty and independence; 5) subject of its "constitutional rights grossly or systematically ignored by the central government or the supreme court".[44] But taking these factors as given will not be effective as there are many points lacking. First of all, the timing of systematic discrimination is not provided, as well as "recent-enough memory". How many years would fall within these categories is not clear. Additionally, what

[41] Reinold Schmücker, "Remedial Theories of Secession", in *The Ashgate Research Companion*, ed. Pavkovic and Radan, 399
[42] See, e.g. Michel Seymour, "Internal Self-Determination and Secession" in *The Ashgate Research Companion* ed. Pavkovic and Radan, 395
[43] See, e.g. Schmücker, 404
[44] Wayne Norman, "The Ethics of Secession as the Regulation of Secessionist Politics" in *National Self-Determination and Secession* ed. Margaret Moore, (Oxford University Press, 1998), 41

constitutes ignorance of the constitutional rights, are these rights to be understood as individual or group rights?

Another factor causing lack of consensus among these theorists are the differing positions on who is entitled to the right to remedial secession. One of the most sensitive issues where there is no consensus is the definition of "peoples", aka holders of the right to self-determination and secession. Problems arose in the process of trying to identify the "self", whose choice was supposed to be definitive of the claims put forward against the existing state. Some put forward the common historical legacy,[45] others shared culture,[46] but still when it comes to state whether a certain entity is entitled to the right of self-determination prescribed to peoples, no consensus is reached on whether this entity constitutes a "people" or not. And as in the cases to be discussed, the debates progressed to the level of claims on whether the right to external self-determination is justified and legitimate or not, we can presume that the categorization of the entities claiming these rights as "peoples" is already accepted as a given fact. Furthermore, in these cases we do not encounter the problem of territory or spatial concerns, as these people under discussion are territorially consolidated. Despite the fact that territorial disputes still exist in both of the cases, it is sufficient for the current research to have the contested peoples be concentrated in a certain territory and not dispersed within the challenged states.

Thus claims for secession are basically justified on the basis of various justice theories. Without casting any doubt on the fact that peoples have the right to self-determination (based on the UN Charter and other UN Declarations and Resolutions to be discussed in the coming Chapters), the just cause theories assert that in line with this primary right of self-determination (also referred to as internal self-determination), these peoples also have a

[45] See, e.g. Seymour, 389-390
[46] Peter Radan, "The Break-up of Yugoslavia and International Law", *Routledge Studies in International Law 2.* (London: Routledge, 2002),12

"remedial right to secession"[47] in the form of external self-determination. The claims of self-determination can take the form of appeal for enhanced cultural and political rights, certain degree of autonomy or confederral arrangements, as well as an appeal for total independence. Thus, the distinction between internal and external self-determinations goes in line with different claims promoted by secessionist groups. Here, and in general, internal self-determination refers to the claim for the right of the peoples concerned to autonomous political status and enhanced democratic rule and participation in state governance, as well as the right to determine their own social, economic and cultural development within the host state. While external self-determination refers to the claims of these peoples to the right to establish their own independent state or associate themselves with an already existing independent state as another alternative.

Remedial right theories make a distinction between general and special right to secede. The remedial right theories justify the right to secession and external self-determination only under certain circumstances, thus making this right a non-primary one. Theorists argue that the special right to secede can be plausible in the following three cases: 1) this right is granted by the host state; 2) this right is incorporated in the Constitution of the host state; 3) this right is presumed to exist following the original agreements based on which the existing state was established. Adding to these the factor of remedy, remedial right theorists restate that there is no general right to secede which does not constitute a remedy to committed injustices.[48]

These theories account for a general remedial right to secede only if the groups under discussion "have suffered certain kinds of injustices and for which secession is the most

[47] Seymour, 385
[48] Allen Buchanan, "Theories of Secession", *Philosophy and Public Affairs. Column 26, Issue 1*,(January 1997): 36

appropriate remedy".[49] In terms of general right to secession, Buchanan mentions two types of injustices as sufficient basis for the claims to unilateral secession. One of them is the already mentioned injustice in the form of threat to the physical integrity of the people concerned, and the other is more of a "historical injustice" allowing legitimate secession if the contested territory claimed by the seceding people constituted a sovereign territory previously, and was unjustly and forcefully taken by the host state.[50] With these conditions, Buchanan argues that remedial right theories are not even contradictory to the principle of territorial integrity which is commonly put forward to invalidate the claims of secession. According to him, the morally legitimate interpretation of this principle acknowledges that it applies only to legitimate states which are short of 1) threatening the lives of a significant part of their population through ethnic or religious prosecution; and 2) depriving this part of the population of their basic economic and political rights. Thus, so far as the conditions underlying the unilateral legitimate right to secession are in compliance with the factors making states illegitimate, the remedial right theories are consistent with the strongly entrenched international legal principle of territorial integrity.[51]

Through this interpretation the right to secession is linked to the notion of sovereignty of the challenged state, and non-compliance with the accepted norms (including the right of peoples to (internal) self-determination) and responsibilities brought under sovereignty, the state is perceived to lose its right to sovereignty and making secession of a certain people from it legitimate and justified. Lea Brilmayer also restates in her analysis that secession theories necessarily rest upon a "theory of legitimate sovereignty over territory".[52] This view is also stated by Norman, in particular mentioning that just-cause theories rest upon the presumptions that "'states exercise legitimate authority over a territory as long as they treat

[49] Norman, 41
[50] Buchanan, "Theories of Secession", 37
[51] Ibid., 50
[52] Brilmayer, 199

citizens and groups within that territory justly".[53] In this way the provision and protection of the right to self-determination within already existing sovereign states is categorized on the same line with the factors legitimizing unilateral secession: constituting colonies; suffering military oppression; and being a subject of unjust annexation of their territories.

Linking morality to the existing legal order results in justice-based legitimate claims for secession. In this concern the notion of justice, and even more precisely, injustice, has to be defined. The international community and the existing scholarship lack a consensus on this matter: a certain threshold has not been clearly defined so as to understand where injustice ends and justice begins. Thus, various accounts for injustice exist in the scholarship. As Allen Buchanan states, injustice in the state`s claim for territory is the forceful annexation of the territory and violations of human rights during the governance of this territory. And consequently, "a secession which is sought as a remedy against state injustice cannot be considered to be an unlawful annexation",[54] given the secessionists meet the same criteria for justice. Forceful, and in certain accounts, unlawful annexation of the territory is not described as that acquired with mere use of force or just without taking into consideration the will of the population inhabiting the concerned territory. The notion of territorial injustice has the same vague nature in Lea Brilmayer`s analysis, where she links the territorial justification of secessionist claims with the fact that the contested territory belonged to the secessionist group and "only came under the domination of the existing state of some unjustifiable historical event".[55] And one of the arguments in this matter dealing with a situation constituting historical unjustifiable event is the wrongdoing committed by a third party. The same problem is encountered in relation to human rights violations as well, where the exact threshold of "grave" violations is not specified in itself.

[53] Norman, 42
[54] Dietrich, 85
[55] Brilmayer, 189

Not only remedial right theories link the justified and legitimate right to unilaterally secede from an existing state and form a new independent state or otherwise associate with another state with the presence of grave injustices in the host state, but also make this legitimization be seen as a last resort in terms of the absence of another method or measure to remedy these injustices. And as mentioned before, these injustices refer to the fact that the "state`s authorities tolerate, support or commit grave violations of human rights, particularly those threatening the physical integrity of the state`s population or a part of it".[56] The theory of remedial secession not only prescribes the right to secede as a last resort, but also makes a moral obligation on the challenged states to refrain from militarily suppressing this kind of secession.[57] Thus the right to secede implies not only the fact that the right-holder has the permission to create its own independent state, but also that the state from which secession is being implemented, should not unlawfully interfere in the attempt of establishing this new state.[58]

Buchanan also makes a distinction between the right to attempt to create an independent state and the right to a legitimate statehood and recognition as such. And here he specifically states that if the claim to independent statehood constitutes a last resort for the grave injustices committed by the host state, then the entity seceding from this state has to be recognized by the international community as having the "claim-right to repudiate the authority of the state and to attempt to establish its own independent political unit".[59] But as this does not constitute a legal obligation to recognize the legitimacy of the state established as a result of secession, then what is it to be done after this state is established? The theory holds no sufficient account on the aftermath of the establishment of a new state in terms of a response of the international community in the form of recognition or non-, leaving it to the

[56] Schmücker, 404
[57] Buchanan, *Justice, Legitimacy*, 331
[58] Ibid., 334
[59] Ibid., 335

political decisions of the respective states. The theory only accounts for the obligation of the states not to interfere in the attempts of the secessionist entity to gain recognition for its statehood. Thus, the issue of recognition is being transferred to another level, where specific conditions of legitimate statehood are being considered, including first of all the capability and practical steps of the new state to comply with the fundamental human rights and provide equal access to these rights within their state without any kind of discrimination. This is claimed to be necessitated by the notion of justice in the international system through which first of all entities gain the right to attempt to overthrow the unjust political order, and separately the right to gain recognition for their newly established state.

Chapter 2.

Right to Self-Determination and Secession: International Legal Framework

During the last century the international community witnessed three major waves of new independences and establishment of new statehoods. These waves had their impact on the development of the concept of self-determination which shifted its presence in the system of international law from being merely a principle to becoming a legal norm. The Wilsonian principle of self-determination lay foundations for the newly established nation-states after the end of the First World War and collapse of the existing major empires (Ottoman, Austro-Hungarian, Russian). The end of the Second World War was signified with the establishment of the UN – new world order with its specific legal and moral norms. The result was the reevaluation of the colonialism and eventual declaration on granting independence to the colonial territories. And thus the incorporation of the right to self-determination gained its meaning and implementation framework only in the colonial context. Furthermore, the end of the Cold war brought the unprecedented amount of new statehoods. The collapse of the Soviet Union, Yugoslavia and Czechoslovakia was the starting point of the existence of more than 20 new states. This resulted in a certain degree of uncertainty about the nature of the right of self-determination. Consequently, the ongoing debates haven`t come to a unique conclusion on what the right to self-determination entails in the light of the changes that the international system has undergone.

The fact that self-determination has not gained a specific context of implementation and still raises concerns over its current nature makes it most important for the current research to understand where the modern international law stands in this concern. Consequently we`ll see how the right to self-determination and the presumed right to secession are interrelated. This,

in its turn will bring us to the ongoing claims of incorporating the right to secession into the existing complex of international legal norms and values.

2.1. Self-Determination

The principle of self-determination[60] as it is understood now was first incorporated in the UN Charter (in particular Articles 1 and 55). Though the UN Charter included provisions referring to the self-determination of non-self-governing and trust territories entailing binding international obligations, its general nature was too vague and complex as to be understood in terms of specific rights and obligations. It was thought to underpin the establishment of peace and security in the world, thus it was thought to be a flexible clause.[61] Nevertheless, it is generally due to the colonial context that the principle of self-determination achieved majorly clear meaning and transformed into right to self-determination. This was essentially and primarily incorporated in the 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples referring to the "right of all peoples to self-determination".

Nowadays, it is commonly accepted among specialists of international law and international relations that the right to self-determination is "difficult to grasp" and it constitutes "lex lata, lex obscura".[62] Lex lata is a law which is established or laid down. There is no doubt in the international legal system that the right to self-determination has become an established legal norm and principle. The right to self-determination constitutes a peremptory legal norm of the current international law system and is non-derogable.[63] The nature of this

[60] Starting to shape as a legal principle already in the Declaration of Independence of the United States of America of 4 July 1776, the concept of self-determination took a more concrete shape in the San Francisco Conference of 1945

[61] Daniel Thürer and Thomas Burri. "Self-Determination" in Max Planck Encyclopedia of International Law, (online version, 2012), 2 http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e873&recno=5& (accessed: 29 May, 2013)

[62] James Crawford, "The Rights of Self-Determination in International Law: Its Development and Future" in *People`s Rights* ed. Philip Alston, (Oxford University Press, 2001), 26

[63] Cassese, 133

right as being bound on everyone has been enshrined in the ICJ report on the East Timor case: right of peoples to self-determination "as right erga omnes and essential principle of contemporary international law".[64] But it is commonly accepted opinion that this right is also lex obscura. Certain uncertainties exist in connection to the core notion of the right to self-determination and its implementation. Its meaning outside of the relatively well-established context of colonial peoples is obscure and uncertain, making this right lex obscura.

The right to self-determination has never been interpreted unequivocally. Even though now there is a relative consensus on the fact that in the post-Second World War period the right was closely attached to the process of decolonization, this consensus was lacking in that exact period among specialists of international law and political actors. In the aftermath of World War II the right to self-determination was incorporated in the Charter of the UN referring the need for this right to the establishment of "peaceful and friendly relations among nations".[65] The right to self-determination also referred to the equal rights of peoples (Article 1 and 55) without specifying peoples under colonial rule or alien subjugation. Only in the Chapters XI and XII reference was made to non-self governing territories. The practice of self-determination based on the Chapters XI-XIII of the UN Charter resulted in the emergence of the right to self-determination as a "legal foundation of the law of decolonization".[66] Nevertheless, it is argued that even in this sense secession or external self-determination in terms of creating independence was not primarily implied or even while mentioned in Article 76 was not the only proper choice for the peoples under concern.[67] It was not until 1960 Declaration on Granting Independence to Colonial territories that this right was explicitly provided for in the international law system. In this context the right

[64] East Timor (Portugal v. Australia), Judgment, ICJ Reports p. 90 (30 June 1995), 4, http://www.icj-cij.org/docket/files/84/6949.pdf (accessed: 28 May, 2013)
[65] Charter of the United Nations, Article 55
[66] Thurer, 4
[67] Judge Rosalyn Higgins, "Secession and Self-Determination" in Dahlitz, 23-24

clearly implied the right of the colonial peoples to determine their future in the form of complete independence.[68]

Within the years of Cold War, The General Assembly showed certain sensitivity in dealing with claims to self-determination in the form of secession beyond the colonial context. Outside the colonial context the classical notions of sovereignty and non-intervention have always been put forward as countervailing factors to self-determination. Not a long time afterwards, in 1966 the language of the right to self-determination already shifted its focus from applying to only colonial territories to all the peoples. The two Human rights treaties adopted by the UN incorporated the right to self-determination as of having the following definition: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[69] This also made possible the shift from the right as a basis for decolonization to the right in a general framework of human rights linking it to "the notions of democracy and good governance".[70] The discourse of self-determination shifted from constituting a mere political principle (as stated in the UN Charter) to becoming an explicit legal right. Additionally, the Declaration on Friendly Relations was adopted, which provides for the modes of the implementation of the right to self-determination as follows: "free association or integration with an independent State or the emergence into any other political status freely determined by people".[71]

And as in the beginning of granting the right to self-determination to colonial peoples, in the aftermath of post-colonial right to self-determination there is a major resistance and

[68] See, UN, Declaration on the Granting of Independence to Colonial Countries and Peoples. Provision 4. General Assembly resolution 1514 (XV), 14 December 1960
[69] International Covenant on Civil and Political Rights, 19 December 1966; International Covenant on Economic, Social, and Cultural Rights. 16 December 1966, Common Article 1(1)
[70] Higgins, 30
[71] UN, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24 October 1970

confusion especially about the holders of the right and the implementation scope. Though the careful analysis of the texts of aforementioned covenants and declarations leads to the conclusion about general nature of the right to self-determination, the general practice during Cold War was its implementation in the colonial context. During the Cold War period Bangladesh was the exclusive case of having implemented the right to external self-determination outside the scope of colonial context.[72]

The post-Cold War era started with the major break-ups of Yugoslavia, USSR, Czechoslovakia and Ethiopia resulting in the independence of more than 20 new states. Though these are implementation of the right to self-determination, they did not set a precedent as of the discussed right to include the right to secession. These break-ups were subjectively presented in the framework of dissolutions with the consent of the constituent state-parties.[73] After praising self-determination as somehow a synonym to decolonization[74], the collapse of the Soviet Union and partition of Yugoslavia and Czechoslovakia was signified with the urge for new reconceptualization of the right to self-determination. The right of all peoples to self-determination is not wholly and clearly accepted in the international community, though no state "claims to be denying self-determination".[75] But still, the nature of this right outside the colonial context continues to be debatable and brings to differentiated approaches towards distinct claims of self-determination.

2.2. Right to Secession?

How are secession and self-determination related? One of the first things is to understand what the position of secession is with regards the system of international law which has already incorporated the right to self-determination. So, is there any existent right

[72] Crawford,*Creation of States,* 391
[73] Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: the accomodation of conflicting rights*, (Philadelphia: University of Pennsylvania Press, c 1996), 497
[74] Garry J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", *Stanford Journal of International Law, No. 32*, (1996): 259
[75] Hannum, 46

to secession, and if no, is there any international legal rule that prohibits secession? One additional factor is whether the right to secession is included in the right of self-determination, though the existing state practice allows us to assume that this engagement of the right to secession has not been yet established as a legal principle and norm.[76]

Speaking about the legality of unilateral secession, James Crawford presents it as only a "legally neutral act the consequences of which are, or may be regulated internationally".[77] And though he argues for the non-existence of any right to secession, he also clarifies that secession is not prohibited on the basis of any international legal norm either. He builds his claim on two notions: first arguing for this kind of prohibitory law to be present in the system of international law would mean acceptance of the international status of secessionist entity (in terms of having obligation to act in accordance to the international law); secondly, the main arguments for the illegality of secession are based on the incompatibility with internal law, not international.[78] As John Dugard rightly mentions the UN also does not view secession as unlawful so far as it "[rewards] successful secessionist States with membership in the United Nations",[79] though the lack of any legal norm on secession imposes limitations on its application. Other political theorists and legal experts promote the idea of a necessary right to secession, which will not bear a general character but rather be justified and limited in its scope.[80]

International double standards continue to condition the modern practice of the recognition of the right to self-determination, in particular concerning unilateral secession. The generally accepted view is to give preference to internal self-determination over external self-determination partly agreeing that the latter can be exercised in extreme cases and under

[76] Hannum, 49
[77] Crawford, *The Creation of States*, 390
[78] Ibid., 389
[79] John Dugard, "A Legal Basis For Secession – Relevant Principles and Rules", in Dahlitz, 91
[80] Peter Radan, "International Law and the Right of Unilateral Secession" in *The Ashgate Research* ed. Pavkovic and Radan, 322

meticulously defined circumstances, and on case-by-case basis. Nevertheless, international actors try to refrain from recognizing these external self-determinations, thus they have not provided accepted threshold to view human rights violations as extremely grave and possible as a basis for external self-determination. Given the inclination towards recognizing the internal aspect of the right to self-determination, the latter is presented as grasping right to "democratic governance" or the "right to be taken seriously in internal affairs".[81] Where external self-determination gains "legality" to be invoked (as embodied in secession) are the cases of colonial domination, alien subjugation; and as a last resort in case of internal unavailability to meaningfully exercise the right to self-determination under the rule of the existing state.[82] In this last case the Canadian Supreme Court ruled while discussing the case of Quebec "secession" that it is not clearly established in the international practice that the latter proposition constitutes an established international standard.

The external dimension is thought to be advocated in exceptional cases such as mass and grave violations of the rights of peoples.[83] This is commonly known as "safeguard clause", the interpretation of which leads to the legal acceptance of the notion of "remedial secession" in terms of last resort.[84] While the Declaration on Friendly Relations presupposes the legitimate claims of external self-determination as last resort only in cases of discrimination as to race, creed or color, this limitation is waived in the UN GA Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, Article 1, which specifies the same "safeguard clause" only based on non-discrimination of any kind.[85] This implied

[81] Thurer, 8
[82] Crawford, *The right of Self-Determination*, 61
[83] This clause is to be found in UN Friendly Relations Declaration, Principle 5. Declaration does not authorize "any action which would dismember … independent States conducting themselves in compliance with the principle of … self-determination of peoples … and thus possessed of a government representing the whole people … without distinction as to race, creed or colour"
[84] Kohen, 10
[85] UN, Declaration on The Occasion of the Fiftieth Anniversary of the United Nations, A/RES/50/6, 9 November 1995. (This declaration, though, has not the same legal value as the Friendly Relations Declaration)

right to secession is seen as "the most radical form of external self-determination".[86] This form of self-determination was further put on the same line as the right to implement self-determination in cases of colonial or alien subjugation, or foreign military occupation,[87] and consequently constituted a unilateral secession.

Since 1945 the practice of unilateral secession of non-colonial territories was opposed by the international community on the basis of territorial integrity of the predecessor state. Thus, the consent of the country from which an entity desires to secede has become a major component of granting legitimacy to the secessionist claims. Nevertheless, the establishment of more than 20 new states after the end of the Cold war presented a challenge in this sense and raised debates about differentiation of secession and dissolution. Though these two terms are distinguished in the two Vienna Conventions on State Succession[88] (which make distinction between succession of states as a result of separation of parts of the state with/without the predecessor state continuing its existence), the international community found hard time in presenting the new independences as results of secession or dissolution. Eventually, the events were described as breakups and dissolutions with the predecessor state ceasing to exist, though unilateral secessions or attempts to secede started the process of the breakup.[89] Even if in this sense the two terms overlap, a major distinguishing point is as follows: in case of dissolution lack of consent of any of the entities becoming states is not a limitation to the legitimacy and legality of the new statehood; while in cases of unilateral secession the consent of existing state is important. Nevertheless, in the latter case the

[86] Cassese, 119-120
[87] Reference re Secession of Quebec, Canadian Supreme Court Judgement, 20 Aug., 1998
[88] "Vienna Convention on Succession of States in Respect of Treaties", 23 August 1978, Articles 34, 35; "Vienna Convention on Succession of States in Respect of State Property, Archives and Debts", 8 April 1983, Articles 17 and 18
[89] With the exception of Russia, which was recognized as the successor state of the USSR and embodied its legal personality, see Crawford, *Creation of States,* 395

requirement of this consent can be waived if the seceding entity firmly establishes effective control which is beyond the hope of any recall from the existing state.[90]

The consent of the existing state is not the only concern with regards to the current approach towards the external self-determination and secession. The principle of self-determination incorporated in the UN Charter referred to the purposes of the UN as to establish and maintain peace and security in the world. And relatively the same purposes are promoted as a basis for rejecting the "external" aspect of the right to self-determination in terms of secession as it will supposedly "destroy order and stability within States and inaugurate anarchy in international life".[91] The major worries about international order arose again with the collapse of the USSR and Yugoslavia, and the resulting crises in Bosnia-Herzegovina, Croatia, Nagorno-Karabakh, etc., showed, as Michael Freeman states, to "the so-called "international community" to be confused not only about the justice of state boundaries and the right to self-determination but also about how to secure the stability which is the principal objective".[92]

The conclusion might be as Chernichenko and Kotliar mention, "Secession is by no means an obligatory stage of a process of realization of the right to self-determination".[93] It is obvious that there is no explicit right to secession (neither in general from, nor in limited) in the existing system of international law. Secession which is sometimes supposed to be a problem of domestic and internal politics and justice of the existing state, is nevertheless dealt on the international level, as the consequences of the secessionist process are of international character and in the successful cases they establish new subjects of international law, aka states. But the problem is there is no legal international mechanism of dealing with

[90] Crawford, *Creation of States*, 391
[91] League of Nations, Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921), 4
[92] Michael Freeman, "The Priority of function over structure: A new approach to secession" in Lehning, 13
[93] Stanislav V. Chernichenko and Vladimir S. Kotliar, "Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends" in Dahlitz,78

issues of secession, more precisely deciding which secessions are legitimate and justified, and which not. And as Broarke states, "the only real alternative to a compulsory law of secession lies in the political actions undertaken by other states".[94] And he continues his argument that these actions are not entirely regulated by the compulsory legal norms, but rather by moral normatives, which brings us to two important things. First, we see the necessity of the moral justifications of secessionist claims, as discussed in the first chapter in terms of remedial secession, which might eventually become a basis for new compulsory international legal norm. Second, it becomes obvious that state actions and their respective strategic interests and policies are definitive in deciding which secession claim is legitimate and justified. Additionally, this raises the issue of recognition as a constitutive or declarative part of statehood establishment. Thus, various state interests in various cases of secessions result in differentiated approach and granting of recognition only to a number of secessionist units.[95]

Additionally, putting pressure on the governments and providing for the (remedial) right to secession incorporated in the system of international law will be more in line with the provision of peace and security in the world. As the political leaders usually act with short time horizons in their mind, it won`t be easy to guarantee the protection of human and minority rights within the state in a long-term perspective. While having the remedial right incorporated will have a long-term pressure and impact on the governments to act in a good will and observe the protection of minority rights and just government. The legal theory of secession itself adds up for the arguments for remedial secession and its legitimacy through its notion of sovereignty and legitimate state. It defines existing states as inherently illegitimate if they continually violate minority and in general fundamental human rights thus

[94] Paul Groarke, *Dividing the State: Legitimacy, Secession and the Doctrine of Oppression,* (Ashgate Publishing, Ltd., 2004), 77
[95] E.g. recognition of South Sudan, partial de-jure recognition of Kosovo

losing the benefits of sovereignty recognized by the international community.[96] In this sense the arguments for humanitarian intervention or R2P can be definitive as well. As one of the proponents of this idea Fernando Teson mentions, a "government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well".[97] And as the notion of sovereignty is currently undergoing a major change in due course of development of R2P, there seems to be more incentive and justification for the simultaneous change in the international system of legal norms and values towards remedial secession.

[96] Groarke, 74
[97] Fernando Tesón, Humanitarian Intervention: An Inquiry into Law and Morality, *The American Journal of International Law, Vol. 83, No. 2* (Apr., 1989): 406

Chapter 3.

Assessing the Cases of South Sudan and Nagorno-Karabakh

Having in mind that international community and major global powers have differentiated approaches towards various cases of self-determination and secession, it becomes urgent to understand the underlying reasons for this. First of them, as we already saw, is the fact that the international legal system lacks any special mechanism to deal with this issue or any specific right to secession. And to see how various factors affect this differentiated approach we need not only apply the theory of remedial secession to the cases of South Sudan and Nagorno-Karabakh, but also see how various international legal norms were put forward throughout the process of secession as underlying the legitimacy of these approaches. Though the secession process de facto begins with the launch of campaign against the existing state and formally with the proclamation of independence, every secessionist movement has a special background behind the formal secession process, which is to be reviewed to have a comprehensive understanding of the issue. Additionally, historical aspect of any issue, especially those involving ethnic conflicts is one of the most contradictory parts of the process of resolution. History is very often misrepresented and misinterpreted by the conflicting parties making reliance on it very dubious, and the establishment of a common basis of truth very difficult. Nevertheless, without encompassing short historical overview we won`t be able to account for certain factors fundamental for the analysis of not only the remedial secession theory, but also the international legal aspect of secession.

On 9 July, 2011 the international community witnessed a recognized change of territorial status quo in the African continent: South Sudan gained its independence from Sudan and formed a separate state. This had a major impact on the existing reality in terms of

the principle of uti possidetis agreed upon during the process of decolonization. The principle accounts for the commitment of African states to "scrupulously respecting and upholding the colonial borders inherited at independence".[98] The principle was formally incorporated in the OAU resolutions adopted by the heads of state and government held in Cairo, UAR from 17 to 21 July 1964. Thereby Member States of the Organization for African Unity solemnly declared their respect for existing borders at the time of "their achievement of national independence".[99] The legitimization of the Southern Sudanese people constituted a case of remedial secession in terms of the systematic discrimination suffered by them.[100] And though not only the international legal system, but also regional complex of African law still linked the implementation of the right to self-determination to the decolonization, the independence of South Sudan gained not only wide justification, but also international recognition (being recognized by all the Permanent Members of the UN Security Council and other major states, such as Germany, India, Brazil, Turkey, etc.).[101]

The South Sudan claims for independence and their right to self-determination were formally launched with the independence of Sudan from the Anglo-Egyptian colonial rule in 1956. The measures undertaken by the Sudanese government meant to Arabisation of the South resulted in the first phase of the South`s claim for self-determination – first civil war of 1955-1972. The signing of Addis Ababa Agreement put an end to the Civil war and granted self-governing status to the South which was further incorporated in the Sudanese Constitution in 1973. A new wave of dissatisfaction started in 1983 when the South was subjected to a lowered status change and new administrative division of the region into three weak administrative parts. The launched civil war gained even more vigorous nature and

[98] Dersso, 1
[99] OAU Resolution on Border Disputes among. African States, OAU document AHG/Res. 16(I), 1964
[100] Angela M. Lloyd, "The Southern Sudan: A Compelling Case for Secession,." *Columbia Journal of Transnational Law* 32 (1994–1995): 419
[101] See, Sudan Tribune "Factbox: South Sudan Receives International Recognition", Plural News and Views on Sudan, July 10, 2011, http://www.sudantribune.com/FACTBOX-South-Sudan-receives,39486 (accessed: 29 May, 2013)

continued till 1994. The continued discriminatory policies of the North and the vigorous fight against these policies and for self-determination of the South resulted in the common understanding that a new peace agreement is needed to bring stability. The Declaration of Principles of 1994 eventually brought to the long-lasting negotiations, the results of which were concluded in the 2005 Comprehensive Peace Agreement. The Declaration stated the right of Southern Sudanese people to self-determination provided a majority vote decides there to be independent from the North. Being continually deprived of their right to self-determination the South brought its fight against this injustice to a successful end by having the Peace Agreement be based on the principle and right to self-determination agreed upon.[102] Thus, the continual violations of human rights and the inability of the Sudanese central government to provide governance based on equal rights and participation resulted in the vote of the Southern Sudanese in January 2011 to form their separate independent state. Thereby the right to self-determination was implemented as a remedial secession against the discriminatory policies and human rights violations of the existing state, aka Sudan.

On 2 September 1991 the local councils of Nagorno-Karabakh declared the independence of Nagorno-Karabakh. The next envisaged step was the organization and implementation of a referendum, which was consequently carried out on 10 December 1991. 82,2 % of the total population having the right to vote took part in the referendum,[103] and the overwhelming majority of participants – 99 percent, voted for the independence of Nagorno-Karabakh.[104] The results were incorporated in a respective Report on the Results adopted by the international independent observers on 10 December 1991. And though the implementation of the right to self-determination and the right to form a separate independent

[102] Dersso, 7
[103] 132.328 citizens were included in the voters` list. For further details, see "Report on the Results of the Referndum on the Independence of the Nagorno-Karabakh Republic", Source: Ministry of Foreign Affairs of the Nagorno-Karabakh Republic, at http://www.nkr.am/en/referendum/42/ (accessed: 29 May, 2013)
[104] Avakian, 20

state was carried out in compliance with the rule of law of the USSR,[105] the Republic of Nagorno-Karabakh (NKR) has not yet gained any recognition either from the part of Azerbaijan, or any other state.

Despite the fact that Nagorno-Karabakh has been an autonomous region in the pre-Soviet period, as well as during the Soviet times under the rule of Azerbaijan SSR, it did not get an equal treatment by the Azerbaijan government. The policies of not only ethnic cleansing carried out on different levels and with various degrees throughout the Soviet period, but also policies of economically and socially weakening Nagorno-Karabakh[106] were one of the fundamental reasons for the secession and are one of the most fundamental justifications for it as well. Nevertheless, the claims of the Nagorno-Karabakh authorities for the recognition of the independence did not have a due attention by the international community.

Hereby we encounter the following situation. Though the international community is supposed to follow the same principles and norms, including international legal regulations, towards similar situations and cases of self-determination, it has established double standards with dealing with various cases. The justification and recognition of the South Sudanese independence and non-recognition of that of Nagorno-Karabakh raises serious questions. The political and geo-strategic interests[107] become mixed with the justice and legal approaches, and the result is the justification and recognition of certain independences (South Sudan) and no justification and rejection of others (Nagorno-Karabakh).

To see how the remedial secession theory applies to the cases, we have to discuss the composing parts of the theory separately. More precisely the theory accounts for various

[105] See USSR, Law on Secession, April 3, 1990. at http://www.nkrusa.org/nk_conflict/ussr_law.shtml (accessed: 30 May, 2013)
[106] Avakian, 21
[107] As of "securing strategic spheres of influences and natural resources in the Caucasus region and in burgeoning Azerbaijan in particular", stated by Kruger, XII

bases as legitimate justifications for the remedial secession against injustices carried out by the existing state. These bases, duly presented in the first chapter, are to be discussed here: historical injustice; grave violations of basic human rights; and discriminatory policies and unavailability of equal participation in the governance.

3.1. Historical Injustice

As previously mentioned, the secessions can be justified on a territorial basis having in mind the historical wrongdoing of a third state. We may presume that these wrongdoings constitute the transfer of the contested territory to the control and authority of a state (in most cases the existing state, from which the entity seeks to secede) without taking the will and choice of the people of this territory into account. The practice of territorial self-determination is an inclusive part of secession because no people lives in a "vacuum" and exercising the right to independence the seceding unit separates from a certain kind of territorial framework[108], usually another existing independent state. The inalienable nature of territorial claims for the secession, the "territoriality thesis"[109] as Buchanan puts it, makes the necessity of territorial justification of claims relevant for debates over legitimacy. The "historical grievance" aspect of this thesis as presented by Buchanan accounts for the most compelling justification for secession. The argument goes in line with the presupposed hypothesis that secession is just a means to regain, reappropriate what was unjustifiably and illegitimately taken from the legitimate owners.[110] To use Buchanan`s terminology, this will lay foundations for the "rectificatory justice" as an important justification of secession. In these terms both of the cases of South Sudan and Nagorno-Karabakh would be explained by this kind of injustice.

[108] Onyeonoro S. Kamanu, "Secession and the Right of Self-Determination: An O.A.U. Dilemma", *The Journal of Modern African Studies, Vol. 12, No. 3* (Sep., 1974): 360
[109] Allen Buchanan, "Self-Determination and the Right to Secede", *Journal of International Affairs,* 45, (1992): 353
[110] Ibid.

In 1953 an agreement was signed between England and Egypt attaching the territory of South Sudan to Northern Sudan and establishing the independence of a united Sudan as a follow-up of decolonization process. The Southern Sudanese representatives were not invited to participate in the negotiations, thus the talks took into consideration only the interests of the British and Egyptian governments and could not in reality appease the Southern Sudanese people. Formally the people of South Sudan were convinced to give their approval of the negotiated and agreed terms only after the Anglo-Egyptian pact was concluded. As the consent was given, the case may seem not to account for a historical grievance or injustice. But this is only the first and superficial sight of the problem. The consent of South Sudan was gained only through promises of greater autonomy within united Sudan or diversified federal system.[111] The fact that South Sudan, even being included in the united Sudanese independent state, was not administered or governed actually as part of Northern Sudan, but as a separate territorial entity,[112] adds up to the territorial justification of South Sudanese people. Nevertheless, the consequences of promises not kept by Northern Sudanese authorities did not take a long time to result in civil strives and eventually bring to a long-lasting First civil war in Sudan.

And as the control over territory or inhabitance in a certain territory is to be understood through the lens of history, we encounter a problem of retrospective: how far in history we may go to justify the legitimacy of secessionist claims as connected with territory? The fact that no specific clause was introduced with the adoption of the Declaration on Granting Independence to Colonial Peoples about the retrospective effect of the legal norms can be a proof that this effect was not presupposed or assumed to be effective of the decolonization process. Nevertheless, there is no legal proof to encounter for the acceptance or denial of this

[111] Lloyd, 441
[112] Ibid.

clause, which makes it very difficult to make reliant assumptions on the legitimacy of the claims based on the historical injustices dated several years ago before the Declaration.

The situation is much more complex in terms of temporal factors with regard to the territorial justice claims of Nagorno-Karabakh. If South Sudanese territorial justification went in parallel with the start and development of decolonization process and after the modern international legal system based on the UN complex was established, the claims of Nagorno-Karabakh in terms of historical injustice and wrongdoing of third state date back to the period after the end of the First World War.

Nagorno-Karabakh`s status as an independent political unit was a recognized fact already in the 1918 while the Assemblies of Armenians of Karabakh were implementing the legislative and executive powers in the territory of Karabakh. The independent status of Nagorno-Karabakh was officially first declared by these Assemblies during its first Convention on 22 July 1918. Very soon Democratic Republic of Azerbaijan presented territorial claims[113] over Nagorno-Karabakh attempting to attach it to its territorial jurisdiction. Restating its state of not-being under control of any state (previously recognized by the British Command) Nagorno-Karabakh rejected Azerbaijani military claims over its territory in the consecutive Conventions until an Agreement was reached with Azerbaijani Government. This provisional agreement left the resolution of the status to the consideration of the Paris Peace Conference while provisionally placing Nagorno-Karabakh "within the boundaries of the Azerbaijan Republic"[114] with extended cultural autonomy.[115] The agreement was also a decent proof of the independent status of Nagorno-Karabakh in terms

[113] Azerbaijanis based their claims on their supposedly recognized entitlement to Nagorno-Karabakh by the British. See Melita Kuburas, "Ethnic Conflict in Nagorno-Karabakh", *Review of European and Russian Affairs 6(1),* (2011): 48

[114] Agreement of the representatives of the Seventh Assembly of Karabagh Armenians with Governor-General Sultanov, accepting provisional Azerbaijani rule, 1919 August 15 (can be found in *The Karabagh File: Documents and Facts on The Region of Mountainous Karabagh 1918-1988* ed. Gerard J. Libaridian, (The Zoryan Institute for Contemporary Armenian Research and Documentation, Inc. Cambridge, 1988), 22)

[115] Libaridian, 7

of being concluded on equal terms between the signatories, aka Republic of Azerbaijan and Nagorno-Karabakh. And since the military attempts of Azerbaijan continued in a breach of the Agreement concluded, Nagorno-Karabakh authorities found it legitimate to declare on 23 April 1920 their new status as of being inalienable part of the Republic of Armenia.[116]

Throughout the Sovietization period not only the Soviet powers and the authorities of the Republic of Armenia, but also Sovietized Azerbaijani governing entities (Azerbaijani Revolutionary Committee) were recognizing the status of Nagorno-Karabakh as proclaimed by the wish of the people of Nagorno-Karabakh[117] – the unit not being put under the permanent full governance of (Soviet) Azerbaijan.[118] The same approach was adopted on July 4, 1921 when the issue was being discussed on the insistence of Azerbaijan SSR in the Caucasian Beaureau of the Central Committee of the Russian Communist Party-Bolsheviks. Nevertheless, the strategy changed within a night and already on 5 July, 1921 it was decided to maintain the wide autonomous status of Nagorno-Karabakh and put it within the Azerbaijan SSR as if derived from the "necessity of establishing peace between Muslims and Armenians […]".[119] Several factors make the arguments for the historically unjustifiable acts of third states, including the current challenged state – Azerbaijan, significantly supportive of the claims for legitimate remedial secession. First of all the will of the people of the contested region – Nagorno-Karabakh was not taken into account. Secondly, the decision was carried out by third countries shaping the fate of Nagorno-Karabakh people. Thirdly, even the voting proceedings were not observed and the resulting decision was made without getting the

[116] The decision was carried out by the Ninth Assembly of Armenians of Karabakh which hold the legislative and executive powers in Nagorno-Karabakh, see Avakian, 10

[117] The wish is clearly expressed in several documents, e.g. Memorandum of representatives of the Fourth Assembly of Armenians of Karabagh to Commander of Allied Forces in Transcaucasia 1919 February 24 (can be found in Libaridian, 14-15)

[118] See Agreement between Soviet Russian and the Republic of Armenia, 1920, August 10; Declaration Regarding the Establishment of the Soviet Power in Armenia proclaimed by the Azerbaidjani Revolutionary Committee 1920 December 2 in Avakian, (Annex 5, 45); Announcements of Armenian-Azerbaijani agreement on disputed territories 1921 June 12 to be found in Libaridian, 35

[119] Manasyan, 112

majority vote.[120] And finally, this heinous decision was adopted by a political party without any constitutional power.[121] Nevertheless, the decision was not only carried out and Nagorno-Karabakh was attached to the Azerbaijan SSR, it was also altered later by the Azerbaijan government with establishing the autonomous region on 7 June, 1923 on a part of the territory annexed by Azerbaijan[122] and with transferring the center of the autonomous region from Shushi (as provided by the decision) to Khankendi.[123] All the aforementioned facts and details of how Nagorno-Karabakh was put under the governance of Azerbaijan constitute sufficient basis to claim that this annexation was "forcible and unlawful".[124] This was also stated in 1977 November 23 Session Protocol of the Presidium of the Council of Ministers of the USSR: "As a result of a number of historic circumstances, Nagorno-Karabakh was artificially annexed to Azerbaijan […]".[125]

3.2. Violations of Human Rights and Discriminatory Policies

As remedial right theorists constantly argue, one of the major bases on which the secessionist claims acquire legitimacy, is besides illegal and unjustifiable incorporation into the existing state the discriminatory policies and human rights violations against the seceding people carried out or encouraged by the central government of the challenged state. Though a specific threshold does not exist as to understand which violations would become a legitimate basis for secession and a certain international institution does not exist to judge the cases of secessions, nevertheless this factor constitutes a serious challenge for the existing state and a comprehensive basis for secession. The cases where the claim becomes more undisputable is when the central government of the challenged state constantly and intentionally creates

[120] The decision was imposed by the Moscow authorities without any voting procedure. See Manasyan, 46
[121] See Avakian, 13-14
[122] Manasyan, 113
[123] Avakian, 14
[124] MIAK: United Liberal National Party, "Nagorno Karabakh: The Truth and Facts", 15 June 2011, http://www.miak.am/en/home/show_best/139/ (accessed 30 May, 2013)
[125] See "An Extract from the Session Protocol of the Presidium of the Council of Ministers of the USSR of November 23, 1977", Annex 6 in Avakian, 47

direct or indirect obstacles through discriminatory policies for the seceding people to implement their recognized right to internal self-determination, to preserve their cultural values and identity. Thus, the state gives a reason to the seceding people to see the solution in the separation from the existing state which denies them their right to self-determination. More weighty argument for the secession becomes the same discriminatory policies of the state when these policies pose a threat to physical integrity of the seceding people. This kind of policies may take a form of ethnic cleansings or even genocidal acts. Thus, to judge whether secessionist claims can be explained and justified by the remedial secession theories, it is important to understand the underlying factors of these secessions in terms of being based on grave discriminatory policies of challenged states.

Throughout the period of condominium governance of Sudan the British and Egyptian rulers applied separate tactics towards the North and the South of Sudan. This resulted in not only relatively separate paths of growth of the two parts of Sudan, but also to different identifications and different ethnically and nationally consolidated people resident in the two parts. Consequently when Sudan was united, the central government situated in the North continued the already established political orientation and thus started to apply arabization policies[126] so as to have a united identity in the country. Nevertheless, in reality this meant a serious disregard for the values and cultural identity of the South Sudanese people and eventually brought to even more discrimination against them. The undertaken arabization was a threat for the South in terms of "cultural extinction and political domination".[127] It would also undermine Southern Sudanese full participation in the new government because of the prevalence of English in the South.[128] Even the change of the central governments was not promising alteration of the existing policies towards the South. The consecutive governments

[126] Lloyd, 443
[127] Francis Mading Deng. "Dynamics of Identification a Basis for National Integration in the Sudan", *Africa Today 20, no. 3* (January 1, 1973): 21
[128] Lloyd, 443

of Sudan were implementing assimilation policies and disregarding the economic development of the South. The accent was only put on the growth of the North and extension of the Northern culture and values over the South. Thus, South Sudan was indeed subject to grave violations of its human rights and rights to participate in the governance.[129]

Additionally, certain remedial rights theorists also require all the peaceful or internal measures for the problem resolution to be exhausted so as to see the resulting choice of seceding from the existing country as justified and legitimate. This was the case for South Sudan. The authorities and governing parties of the latter have shown their desire throughout the years of independence of a united Sudan to concede their demands for independence if provided with wide autonomy and opportunities of their identity and culture preservation within the country. Firstly, when agreeing in1953 to be united with Northern Sudan when the independence of Sudan was on the agenda within the framework of decolonization in 1956. Secondly, when South Sudan gave up its claims for independence in 1972 Addis Ababa Agreement.[130] The clause of self-government was incorporated in the 1973 Constitution and became a "pivotal event in the Southern Sudanese fight for autonomy".[131]

While the Southern Sudanese claim for secession was legitimized on the basis of being deprived by the central government of Sudan of full participation in the governance and implementation of their right to internal self-determination, the claim of Nagorno-Karabakh, besides having the same grounds for secession, also could be legitimized on the basis of having the physical integrity of the people threatened. Despite serious concerns of the Nagorno-Karabakh people in this matter, it was not taken as a sufficient ground for recognizing the legitimacy of the secessionist claims of Nagorno-Karabakh.

[129] Deng, *New Sudan*, 73-77
[130] The respective provinces, as the Agreement states, "shall constitute a self-governing Region within the Democratic Republic of the Sudan and be known as the Southern Region". See The Addis Ababa Agreement on the Problem of South Sudan, Article 4, http://madingaweil.com/addis-ababa-peace-agreement-1972.htm (accessed: 30 May, 2013)
[131] Lloyd, 446

After being subjected to the Azerbaijani SSR in 1921, the people of Nagorno-Karabakh suffered systemic human rights violations by the central government. Throughout the Soviet times many Armenian schools and churches were closed, cultural heritage of Karabakh Armenians was being destroyed, the connections with the cultural "centre" of Armenians, aka the Armenian SSR were being kept at minimum, at least for Karabakh Armenians. These policies contributed to the image of contrasting state practice with regards to its internal law. The law of the Azerbaijan SSR on "Nagorno-Karabakh Autonomous Oblast" provided for equality for all the citizens, free use of their language, as well as development of the Oblast in parallel with the entire country.[132] Besides, the policies of the Azerbaijani SSR were aimed at eviction of Armenians from Karabakh. These policies were accompanied with those aimed at populating more Azeris in the region of Nagorno-Karabakh. Results can be shown in simple statistical numbers: while in 1923 Armenians constituted 94,4 per-cent of the entire population of Nagorno-Karabakh and Azerbaijanis constituted 3 per-cent, in 1989 Armenians constituted 76,9 per-cent and Azerbaijanis 21,5 per-cent.[133]

Additionally, Azerbaijani government policies were aimed at hampering economic and social growth of Nagorno-Karabakh.[134] The discriminatory policies initiated by the Azerbaijani government were depicted with the notions of Azerbaijani "national chauvinism".[135] The aggravating situation and the growing hatred was a basis for many requests[136] to the high authorities of the USSR and the Azerbaijani central government, which eventually remained unresponded or ignored.

[132] Law of the Azerbaijan SSR "On the Nagorny Karabakh Autonomous Oblast", 16 June 1981, http://www.un.int/azerbaijan/the_nagor.php (accessed: 30 May, 2013)
[133] Avakian, 21
[134] This is not commonly agreed. The economic underdevelopment of Nagorno-Karabakh is sometimes presented as a result of the economic situation in the entire USSR and not a result of discriminatory policies of Baku. See Kruger, 17
[135] Libaridian, 46
[136] See "An appeal by residents of Mountainous Karabagh to the People and Government of Armenia, Central Committee of the Party and Public Authorities", *Asbarez*, (19 September 1967) in Libaridian, 48; Raymond H.

In the modern stage of the events unfolded in the region the will of the Nagorno-Karabakh people of altering their status and becoming independent of the Azerbaijani rule has been established through peaceful marches and demonstrations starting already in 1987. This was the direct result of the hopes that people gained after the launch of Gorbachev`s policy of Perestroika in the Soviet Union.[137] Not a long time after the will of the people was incorporated in the decision of the special session of the Regional Council of the NKAO on 20 February 1988 to "appeal to the Supreme Councils of the Azerbaijani and Armenian Soviet Socialist Republics to transfer Nagorno-Karabakh from the Azerbaijani SSR to the Armenian SSR".[138] After the people of Nagorno-Karabakh made clear their will of being united with the Armenian SSR in 1988, Azerbaijani government responded with initiating massacres and ethnic cleansings throughout the country. Armenian pogroms were implemented in Baku, Kirovabad, Shemakh, Shamkhor in 1988, a major massacre of Armenians took place in Baku in 1990,[139] and systemic deportations of Armenians during this period. Starting on February 27 1988 and lasting three days Armenians of the city of Sumgait were subjected to killings. With the proclamations, such as "Armenians, out of Azerbaijani lands! Death to the Armenians!"[140] several groups of Azerbaijanis started to kill Armenians and loot their homes: 32 Armenians were killed, about 400 injured and 18000 Armenians became refugees.[141] Though these acts are not unequivocally presented as organized crimes focused against Armenians,[142] it is attempted to show that these acts were really organized. The fact that they carried out their attacks having the exact addresses of Armenians speak of

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Anderson, "Armenians Ask Moscow for Help, Charging Azerbaijan With Bias", *the New York Times* (11 December 1977) in Libaridian, 51; "Petition signed by over 75000 Armenians from Mountainous Karabagh and Soviet Armenia to General Secretary Gorbachev", *Droshak*, (Athens, October 13-14, 1987), in Libaridian, 86-88

[137] Potier, 5

[138] Tatul Hakobyan, *Karabakh Diary, Green and Black - Neither War nor Peace*, (Antelias, Lebanon 2010), 375-376

[139] Ibid., 63

[140] Ibid., 36

[141] Against Xenophobia and Violence NGO *The Sumgait Syndrome. Anatomy of Racism in Azerbaijan*, (Yerevan, 2012), 13

[142] These acts were even described as mere "acts of hooliganism" by the Moscow central television program Vremya. See Hakobyan, 37

the organized nature and ethnic orientation of the Sumgait massacres.[143] The Sumgait massacres also resulted in European Parliament Resolution[144] which condemned the violence against Armenians taking into account the historically arbitrary decision of annexing Nagorno-Karabakh to Azerbaijani SSR and the massacres carried out by the latter against Armenians. The aforementioned evidence of the human rights violations and discriminatory policies that the Nagorno-Karabakh people was subjected to makes their claim for secession legitimate on the ground of remedy to the suffered injustices.

3.3. Need For Legal Incorporation

As we have seen, the secessionist demands of South Sudan and Nagorno-Karabakh show equally valid bases for being justified as remedial secessions. The underlying factors of the remedial secession theories, particularly the historical territorial injustice in a recent-enough memory and grave violations of human rights and the right to equal participation in the governance, especially of the issues of local interest, as well as hampering of the decent development of seceding units within the existing state, are encountered in both cases. And though this would presuppose the formal justification of both cases, the reality is different: South Sudan is an internationally recognized state, while Nagorno-Karabakh is only a de-facto state without any single act of state recognition. And as argued in the Second chapter, secession is not provided in international law in the form a specific right, and only is sometimes claimed to be included in the right to self-determination (external), it would be plausible to look for the factors influencing the existing reality of (non-)recognition of the discussed cases in the international law itself.

[143] The connection of these Azerbaijani groups with the government has not been proven, nevertheless the government itself did not undertake respective measures to prevent the killings or put an end to them in a quick manner. The relative inaction of the government supports the argument that Azerbaijani authorities encouraged these acts of hatred.

[144] European Parliament Resolution on the Situation in Soviet Armenia. Joint resolution replacing Docs. B2-538 and 587/88, July 1988. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1991:106:0102:0163:EN:PDF#page=19 (accessed: 29 May, 2013)

Second Chapter provided for several arguments against the right to self-determination that are usually put forward, usually on behalf of the challenged states. The most commonly presented argument is the principle of territorial integrity (in line with state sovereignty) provided in international covenants. The Declaration on Friendly Relations made a first attempt to solve the issue of controversy of the two principles. In the safeguard clause the Declaration indirectly provided for the prevalence of territorial integrity over (external) self-determination by stating the inviolability of territorial integrity unless the States fail to act in compliance with the principle of equal rights and self-determination as described in the previous provisions of the Declaration. This gives enough reason for the challenged states to claim for their right to protect territorial integrity and keep their state sovereignty over the contested territory. Protecting territorial integrity and unity of the country was one of the major claims of the central government of Sudan against Southern secessionist inclinations. This is one of the major claims on behalf of Azerbaijan to restore its territorial integrity, which becomes obvious with the claims Azerbaijani side sets for discussing the status of Nagorno-Karabakh.[145]

Additionally, another argument against the implementation of external self-determination in the form of unilateral secession is the lack of the consent of the challenged state. The international community, showing sensitivity in the matters of secession, has been inclined to requiring consent of the existing state as an inclusive part of the legitimacy of secessions. This consent can be provided with a specific law incorporated in the domestic legal system of the existing state, otherwise the consent can be given with a special declaration of conclusion of an agreement with the seceding unit. This is what happened in

[145] The Azerbaijani main conditions are as follows: to return the seven districts adjacent to Nagorno-Karabakh now out of Azerbaijani jurisdiction; and to reestablish Nagorno-Karabakh as subject to the jurisdiction and legislation of Azerbaijan. See Dina Malysheva, "The conflict in Nagorno-Karabakh: its impact on security in the Caspian region", in *The Security of The Caspian Sea Region* ed. Gennady Chufrin, (Oxford University Press, 2001), 260

the case of South Sudan: its right to external self-determination and to establish an independent state was provided in the Comprehensive Peace Agreement of 2005, which became the basis of justification and recognition of South Sudanese independence. This somehow may seem to contradict to the meaning of unilateral secession, as the latter provides for the lack of consent of the existing state. Nevertheless, this is a required condition only at the beginning of the secession process. This is conditioned by the following causal argumentation. The legitimate claims for secession should be eventually recognized by the international community making a pressure on the existing state to do the same. Thus the circle of secession should end with the agreement between challenged state and seceding entity. This process expected to form a natural cycle, cannot discredit the secession as not being unilateral. Thus, even though South Sudan gained its independence on the basis of an agreement with Sudan, it still constituted a case of unilateral secession. And as both South Sudan and Nagorno-Karabakh constituted cases of unilateral secession and are justified by the remedial secession theories, the (lack of the) consent of the challenged state can be seen as the factor conditioning the (non-) recognition of the secessions. But as the international actors – regional or global powers, regional and international organizations can influence the decision of the challenged state we come to the third and most plausible factor influencing the differing results of two discussed secessions – the factor of regional and international actors and their interests.

It was due to the mediating efforts of the UN and the African Union that the long-lasting civil war came to its end with the Comprehensive Peace Agreement of 2005.[146] And being concerned with the regional stability and peace, these organizations did their best to put an end to the ethnic conflict and violence in Sudan. While in case of Nagorno-Karabakh the events unfolded in a way that the OSCE undertook the main mediating powers. OSCE Minsk

[146] United Nations Mission in Sudan, "The Background to Sudan`s Comprehensive Peace Agreement": http://unmis.unmissions.org/Default.aspx?tabid=515 (accessed: 29 May, 2013)

Group which is the main facilitator of negotiations over the Nagorno-Karabakh conflict has not achieved significant results in terms of seeing a progress over the talks on the status of Nagorno-Karabakh. The conflicting parties continue to stick to their strongly established positions and sometimes do not seem willing to get a consensus. Meanwhile the international actors also have their relevant interests here, especially in terms of energy resources and the region being on the crossroads of important networks.[147] The idea that Nagorno-Karabakh conflict raised so many disputable issues and lack of consensus because of the conflicting interests of not only the conflicting parties but other international and regional actors as well has become a mainstream.[148] This conflict has been described to be "a crossroads" with all the conflicting interests forming a "complex pattern".[149] The study of these interests is not a priority of this research, and it is sufficient to state that these conflicting and converging interests of the parties involved in the negotiations, aka Azerbaijan and Armenia, and the other actors directly or indirectly involved in the region, gain more prevalence in the process of (non-)justification of the Nagorno-Karabakh secession through the existing gap of the international law of not providing any specific legal norm on secession.

The obscure nature of the right to self-determination and various interpretations of it as of inclusive or non-inclusive the right to secession becomes a basis for the existing states and international actors to be selective in granting recognition to the seceding units. And to overcome this dichotomy of moral legitimacy of secession and no-recognition argued through the non-existing right to secession, there is a need to incorporate the right to secession in the legal system. For the supporters of the moral right of secession this right is "inherently institutional",[150] thus its legitimacy and institutionalization cannot be separated. And as

[147] See, e.g. Malysheva, 257
[148] See, e.g. Kuburas, 52
[149] Malysheva, 257
[150] Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice*, (Oxford University Press, 2009): 54

Buchanan states, "one cannot first determine a pure, non-institutional right to secede and then, as a separate task determine whether institutionalizing it makes sense".[151] And thus Buchanan progresses the idea of institutionalizing the right to secede – not a general right, but the special right to remedial secession as a last resort to the injustices, as being more straightforward and implying more weighty justification for legitimacy. And thereby the deficiency of the international legal system, as of providing very little guidance for how to respond to the cases of secession, would be improved with reforming the system of international law. As it is supposed to regulate international relations which are not static and have evolved from the period of decolonization to a more liberal world, the legal system should also express this shift by moving from mostly decolonizational right to self-determination to morally justified and justice-based right to remedial secession. This will fill the gap between morally justified legitimacy and legal system. As far as secession is of international concern, mere justification by the morality-based and justice-based remedial right theories is not enough for the legitimately seceding units to find their legitimate place in the system of international relations. Thus, these theories are to be institutionalized in the international legal system through which the system will not only serve its primary aim of maintaining peace and security, but also will provide more leverage for international justice.

[151] Buchanan, *Justice, Legitimacy*, 27

Conclusion

The aim of this thesis has been to engage in the existing theoretical and legal debates on the justification and legitimization of the claims for secession in South Sudan and Nagorno-Karabakh and through the practical application of the theory of remedial secession to show its relevance for legal incorporation. In order to accomplish this purpose it was necessary to understand how the discussed phenomena, aka secession and self-determination fit in the current theoretical framework and international legal system. Furthermore, the evident variation of approaches towards different secessions necessitated the practical application of the chosen theory, aka remedial right theory, on the selected cases of South Sudan and Nagorno-Karabakh in order to show the problem of the gap of the international legal system in terms of justifications of secession.

Through the first chapter the importance and relevance of the moral justification of secessionist claims was set out. Having in mind the sensitivity that the international community has shown throughout its history towards secessions and claims for independence and the reluctance in recognizing the majority of secessions, it was established that moral justifications of these claims can gain a strong leverage and have a huge impact in the building of current international relations. From among the existing normative theories remedial right theories were chosen to be studied because of their straightforwardness and limited scope of application, which would make their incorporation more plausible. Additionally, the main underlying conditions of the remedial right theory were put forward, as of being grave violations of fundamental human rights and the right to internal self-determination, as well as historical wrongdoing of a third country and current discriminatory policies of the challenged states against the seceding people. And eventually, making a distinction between general remedial right and a special one, the secession was viewed as a last-resort remedy against the initiated injustices. Thus the scope of the right to remedial

secession was limited to certain conditions: its revocation against specific types of injustices (human rights violations, historical injustice and grave discriminatory policies) and only as a last resort.

Additionally, as the current international practice makes it clear that internationally non-recognized states cannot become a full member of the international community, it became important to see how the international legal system regulates the issues of secession. And the lack of a specific legal norm on secession brought us to the debates on the interconnectedness of secession and self-determination and possible inclusiveness of secession in the right to self-determination. The study of this issue brought to the conclusion that no general right to secession is incorporated in the existing international legal system. It was shown that even the right to self-determination (the external aspect of which is closely connected to secession in terms of including the establishment of an independent state) has an ambiguous nature and thus raises different interpretations about its scope of application. This contributed to the argument that a serious gap exists in the existing legal system in terms of secession, more precisely on the morally justified remedial right to secession, allowing for double standards of recognition to exist.

Furthermore, the third chapter of the thesis shows the practical application of the remedial right theory. Through two different cases which had several similar characters, especially in terms of satisfying the conditions laid down by the theory, it was shown that the theory of remedial secession can be applied beyond the currently justified and recognized secessions. Thus the case of Nagorno-Karabakh was an important factor to restate the gap of standards on legal justifications of secessions and the major influence of various geostrategic interests in this concern.

The study of the aforementioned phenomena brought us to the conclusion that the establishment of a major international justice cannot be undervalued by the existing stance of the legal framework. Thus, in order to reestablish the importance of international justice and fill the gap between legal system and morally justified legitimacy a shift is necessary from the current interpretation of the right to self-determination to a legal incorporation of the right to remedial secession. The institutionalization of the discussed remedial right theories in their limited scope of application should lead to a reevaluation of the global justice, peace and security as the major aims of the current international community.

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