THE RIGHT TO SELF-DETERMINATION OF PEOPLES: FROM CLASSICAL CONCEPTION TO MODERN SELF-DETERMINATION

O PRINCÍPIO DA AUTODETERMINAÇÃO DOS POVOS: DA CONCEPÇÃO CLÁSSICA À AUTODETERMINAÇÃO MODERNA

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Abstract: In recent times, international practice has provided new cases of decolonization, but also of mutually agreed secessions with a previous independence referendum, as well as violent ruptures. Although the unilateral secessions are not well received by the international community, they are not only possible, but they have been favored by the ICJ's Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. This paper analyzes new cases involving the right to self-determination, to later try to identify new holders of the right to self-determination in the light of modern international practice. It focuses on the "**wide self-determination**" approach, the so-called "**modern self-determination**", whose holders are not "peoples under colonial rule, foreign domination and alien subjugation".

Keywords: Autonomy, Democracy, Independence, Self-Determination, Secession, Statehood.

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Resumo: Nos últimos tempos, a prática internacional forneceu novos casos de descolonização, mas também de secessão mutuamente acordada, com um devido referendo de independência, além de rupturas violentas. Embora as secessões unilaterais não sejam bem recebidas pela comunidade internacional, elas não são apenas possíveis, mas foram favorecidas pela Opinião Consultiva do CIJ sobre a legalidade da declaração de independência realizada pelas Instituições Provisionais de Auto-Governo de Kosovo. Este artigo analisa novos casos envolvendo o direito à autodeterminação, para posteriormente tentar identificar novos detentores do princípio da autodeterminação à luz da prática internacional moderna. Ele se concentra na concepção ampla do princípio, a chamada "autodeterminação moderna", cujos detentores não são povos sob dominação colonial ou estrangeira.

Palavras-chave: Autonomia, Democracia, Independência, Autodeterminação, Secessão, *Statehood*.

Summary: I. Introduction. II. The classical conception. III. Wide Self-determination. IV. Conclusions. V. Bibliography

"*What then is freedom? The power to live as one wishes.*"
-CICERO: *DE RE PVBLICA*

I. Introduction

In Taiwan, the results of the latest general elections held in January seemed to have discarded the possibilities of reunification in favor of a peaceful separation from China. The reelected president, Tsai Ing-wen, declared, while delivering her victory speech in Taipei: "We must work to keep our country safe and defend our sovereignty" (The Guardian, 2020). President Tsai Ing-wen also warned: "Peace means that China must abandon threats of force against Taiwan" (BBC, January 2020).

Last year, for more than 22 weeks, protests were held in defense of autonomy in Hong Kong[3], which later became known as the "water revolution". After the start of the protests held in Hong Kong, the reelected Taiwanese president rejected the application of the principle "one country, two systems" *vis-à-vis* Taiwan (Fong, 2019). This principle actually rules the relations between China and Hong Kong, contained in the "Basic Law"[4] of the latter (Reuters, October 2019). An important statistic is that 57% of Taiwanese population would support the protests in Hong Kong, while only 19% would not support them (Rigger, 2019).

It is important to highlight that both, Taiwan and Hong Kong, are member economies of the Asia-Pacific Economic Cooperation (APEC). Taiwan participates under the name "Chinese Taipei" while Hong Kong entered the APEC as a British colony but currently is considered a Special Administrative Region of the People's Republic of China. Additionally, Taiwan is a member of the World Health Organization (WHO) as a separate customs territory. Taiwan's current success on dealing with Covid-19 supports its recent participation at WHO forums without China's approval (Reuters, February 2020). After closing its missions in the Solomon

[3] The Nanking Treaty, signed in August 29, 1842, ceded Hong Kong to the United Kingdom in perpetuity. The period was modified by the Sino–British Joint Declaration, signed in December 19, 1984.

[4] The Fundamental Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law or Fundamental Law) entered into force on July 1, 1997.

Islands and Kiribati last year, Taiwan is recognized by 14 United Nations member states[5]. In March 2020, President Donald Trump signed into law an act that requires increased support from the United States for Taiwan in recognition of its dispute with China (Reuters, March 2020).

On the other hand, last year in Europe, on October 14, protests broke out in Catalonia after the nine Catalan independence leaders were sentenced to between 9 and 13 years in prison by the Spanish Supreme Court. The Spanish Government issued a statement about "widespread violence in the protests of Catalonia". The ultimate goal of protests was to achieve the right to self-determination of Catalonia. For that reason, the plenary session of the Parliament of Catalonia voted on November 12, 2019 a motion in which it expressed "its willingness to exercise the right to self-determination and to respect the will of Catalan people" (El País, November 2019).

The Spanish government has shown open to negotiating a "fiscal pact" (The Guardian, 2017). Nevertheless, previous international reports show that an "agreed secession" would be more convenient for the Catalan people (Plickert, 2017). Although the Government of Catalonia presented a so called "Europe Plan" on November 2019, which objective was to assert Catalonia's presence and influence in Europe, there are reports that raise the possibility of joining European Free Trade Association (EFTA) as a second option (Generalitat de Catalunya, 2019).

On February 25, 2019, the International Court of Justice (ICJ) delivered its Advisory Opinion on "Legal Consequences of the separation of the Chagos Archipelago from Mauritius", in which the ICJ considered that "the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968" (ICJ, February 2019, §174). The ICJ reminded that: "Since respect for the right to self-determination is an obligation *erga omnes*[6], all States have a legal interest in protecting that right" (ICJ, February 2019, §180). The Court finally concluded that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible" (ICJ, February 2019, §183.4).

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5 This is despite the fact that in 1942, Taiwan ("Republic of China") was among the first countries to sign the United Nations Declaration.

6 That the Court has now reverted back to the language of *erga omnes* (instead of *jus cogens*), but done so in a way that downplays the legal consequences of the UK's breach of the principle of self-determination, makes the Court's case law look incoherent (Lusa, 2019, pp. 256-257).

The aforementioned Advisory Opinion is important *vis-à-vis* similar processes of decolonization. Despite on November 4, 2018, the 56,7% of the neo-Caledonian population refused to become an independent territory of France, New Caledonia prepares now to hold a second independence referendum on September 6 this year. The Matignon Agreements[7], signed in June 1988, admit the possibility of holding up three referenda if independence is rejected in the first two. These agreements were approved by 70% of neocaledonian population. The Matignon Agreements were signed following the violence of the 1980s, which culminated in the taking of hostages and the assault on the Ouvéa cave in May 1988, which caused 25 dead (Le Parisien, November 2019).

In the event of independence, the proposed name for the new country would be "Kanaky Nouvelle Caledonie" due to its autochthonous –and majority– ethnic group: the Kanaks. France would continue to provide services to the territory[8] for a limited time. Then, it will pass a law that will mark the end of New Caledonia's membership of the "*République Française*" (Press TV, 2018).

As a consequence of Brexit, support for Irish reunification appears stronger than ever with four in every five Irish people in favor of the idea of a united Ireland. Indeed, only 20 per cent of Irish people are opposed to the idea (The Times, 2020). As if that were not enough, Brexit revives the independence movement and the possibility of a new referendum in Scotland. In the referendum held in 2016, the Scottish population voted clearly in favor of the permanence in the European Union. The Scottish Nationalist Party (SNP) since then has managed to channel part of the discontent caused by Brexit into the last years (El País, December 2019).

In 2017, more than 92% of the voters in the Iraqi Kurdistan referendum supported independence; however, the president was forced to resign on November 2017 after losing control of large disputed territories of Erbil, the capital of the Kurdish Autonomous Region (El País, October 2017). Subsequently, the Supreme Court of Iraq declared the referendum unconstitutional (BBC,

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7 The Nouméa Accord of 1998, the second accord following the Matignon Agreements, has implemented a decolonization process in different stages.

8 Article 73 of French Constitution, since the 2003 amendment, counts French Polynesia and New Caledonia as "Overseas countries" ("*Pays d'outre-mer*", POM). French Polynesia is nevertheless an "overseas collectivity" ("*collectivité d'outre-mer*"), while New Caledonia has a provisional status of "specific collectivity" ("*collectivité spécifique*") until its independence or its maintenance are decided. Eventually, these two regions ("*Pays d'outre-mer au sein de la République*") could gain their independence.

November 2017). As for the rest of Kurdistan, at the end of 2019 Russia and Turkey agreed to create a buffer zone along the border between Turkey and Syria "free" of Kurdish fighters. (El País, October 2019).

Hence, it is important to reexamine the right to self-determination of peoples and to distinguish between the restricted and the wide conceptions of self-determination. Therefore, this paper will focus on the "**wide self-determination**" approach, the so-called "**modern self-determination**", whose holders are not "peoples under colonial rule, foreign domination and alien subjugation" (UNGA, 1974). It analyzes new cases arising from international practice to later try to identify new holders on the right to self-determination.

II. The classical conception

The ICJ established the principle of self-determination in the Advisory Opinion on the "Western Sahara" of 1975, in the context of decolonization (ICJ, October 1975, §70). In this first case, the ICJ stated that the freely expressed will of the peoples concerned is the prerequisite to self-determination (ICJ October 1975, §55-59).

In 1971, in the Advisory Opinion on the "Legal Consequences of the Continued Presence of South Africa in Namibia" ("Namibia exception"), this principle was mentioned in the context of foreign occupation but attributing little importance to it (ICJ, June 1971, §52-53). Similarly, in its Advisory Opinion on "Legal Consequences of Building a Wall in the Occupied Palestinian Territory" of 2004, the ICJ determined that the right to self-determination of the Palestinian people had been violated (ICJ, July 2004, §184), the right of self-determination also played a secondary role.

It should be noted that in the matter related to East Timor (ICJ, June 1995), the right to self-determination of peoples was considered as an opposable *erga omnes* obligation in a context of colonization or occupation given that the territory was occupied by Indonesia after its independence –decolonization– of Portugal.

On the other hand, the "Declaration on the granting of independence to colonial countries and peoples", approved by United Nations General Assembly (UNGA) Resolution 1514 (XV) on December 14, 1960 stated that: "Believing that the liberation process it is irresistible and irreversible and that, in order to avoid serious crises, it is necessary to put an end to colonialism and all the segregation and discrimination practices that accompany it […]" (UNGA, 1960). Subsequently, the UNGA would adopt the "Declaration of the United Nations on the Elimination of All Forms of Racial Discrimination" through Resolution 1904 (XVIII) of November 20, 1963, which reaffirmed in its fourth considering the following:

> "*Considering that the United Nations has condemned colonialism and all the segregation and discrimination practices that accompany it, and that the Declaration on the granting of independence to colonial countries and peoples proclaims among other things the need to end colonialism quickly and unconditionally [...]*" (UNGA, 1963).

Additionally, UNGA Resolution 2131 (XX) of December 21, 1965, approved the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty", which invoked all States to "contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestation" (UNGA, 1965). Those principles were mentioned in several UNGA Resolutions (*e.g.*, 1970, 1973, etc.).

Between those resolutions, UNGA Resolution 36/103 of December 9, 1981 approves the "Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States", whose third part (2.III.c) recognizes:

> "*The right and duty of States to fully support the right to self-determination, freedom and independence of peoples subject to* ***colonial domination***, ***foreign occupation*** *or* ***racist regimes***, *as well as their right to wage a political and armed struggle with this purpose, in accordance with the purposes and principles of the Charter*" (UNGA, 1981).[9]

[9] Section 4 states: "Nothing contained in this Declaration shall in any way undermine the right to self-determination, freedom and independence of peoples subject to colonial domination, foreign occupation or racist regimes, nor their right to seek and receive support in accordance with the purposes and principles of the Charter".

Consequently, it is possible to state that the ICJ began to build the right to self-determination of peoples until it became a rule of customary international law[10], and subsequently an imperative norm of general international law (*jus cogens*), in relation with three classic cases: (**i**) peoples under colonial domination; (**ii**) peoples subject to foreign occupation; and, (**iii**) racist regimes. In other words, the ICJ has already recognized the right to self-determination for three situations:

(**i**) Colonial peoples seeking independence from a metropolis (*e.g*., Advisory Opinion on "Western Sahara" or, more recently, Advisory Opinion on "Legal Consequences of the separation of the Chagos Archipelago from Mauritius");

(ii) Peoples seeking to expel foreign invading troops (*e.g*., Advisory Opinion on "Legal Consequences of the construction of a wall in the occupied Palestinian territory");

(**iii**) Peoples seeking to overthrow a racist regime within their borders (*e.g*., SWAPO against the former South African racist regime).

The right to self-determination became an imperative norm of international law on November 29, 1991, when the Arbitration Commission of the Conference for Peace on Yugoslavia, in its Opinion No 1, qualified it as a structural principle of international law, considering it a faithful reflection of the category of imperative norms (*jus cogens*).[11]

Since the ICJ issued the Advisory Opinion on "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo", in which cited (ICJ, July 2010, §55-56) the Opinion ("*Avis*") of the Supreme Court of Canada on the Secession Question in Quebec (Supreme Court of Canada, 1998, §155), a strong controversy has arisen about how to interpret both pronouncements, as well as their scope. Both

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10 For the crystallization of Self-determination as a rule of customary international law, see UN Documents A/RES/1514 (XV), A/RES/2625 (XXV), A/RES/231 (LXX), A/RES/142 (LXX), A/RES/2065 (XX). On *opinio juris*, see ICJ Advisory Opinion on the "Case Concerning the Military and Paramilitary Activities in and Against Nicaragua", June 27, 1986; and, ICJ Advisory Opinion on the "Legality of the threat or use of nuclear weapons", July 8, 1996.

11 Article 53 of the Vienna Convention on the Law of Treaties of 1969, in *Revue générale de droit international public* (Editions A. Pedone: Paris, 1992), p. 265. Additionally, it should be noted that in "East Timor", the right to self-determination of the peoples was considered as an *erga omnes* norm (ICJ, 1995, p. 90).

pronouncements differ in their means: while the Advisory Opinion on Kosovo would legitimize a non-negotiated or unilateral independence, the Opinion on Quebec only raises the possibility of an "agreed secession". However, in both of them, the uncertainty lies in the possibility of legitimizing new holders of the right to self-determination. As Martinez Cruz explained:

> "Catalonia and Crimea are very recent examples, but many scholars disagree that these peoples have such a right. Let us call the conception of the right whose holders are only colonized peoples restricted self-determination, and the conception of the right whose holders are both colonized and non-colonized peoples wide self-determination. Whatever view taken on this, it is not possible to deny today that wide self-determination is a powerful argument that seems to back and foster claims of growing minorities that seek recognition, autonomy or even secession. Perhaps, it will eventually prevail over restricted self-determination." (Martinez, 2018).

Frequently, the ICJ is criticized for having missed, when issuing the Advisory Opinion on the compliance with international law of the unilateral declaration of independence relating to Kosovo of July 22, 2010, a unique opportunity to address the issues of "**remedial secession**" (Mueller, 2012) and "**modern self-determination**" (Burri, 2010). However, in relation to "remedial secession", it is legitimate to infer that the ICJ would not have treated it for the reason that it probably considered that the situation in Kosovo –in 2008– did not merit it or because simply it could be dangerous to take such a big step.

The ICJ simply confirmed that there is no rule of international law that prohibits an entity from declaring its independence, however, it remained silent regarding the consequences of such a declaration, especially if "**effecting independence**" could violate international law or not. Since the pronouncement is strictly limited to the question of legality or conformity of the unilateral declaration of independence with general international law, it would be very difficult to interpret it in the sense that Kosovo would have a right to secession (McKenna, 2010).

Indeed, the situation in Kosovo in 2008 would not have justified a "**remedial secession**", unlike, for example, the situation of prolonged civil war, extreme humanitarian crisis and serious human rights violations in South Sudan prior to the Agreement General of Peace of 2005, where a "**remedial secession**" would have been fully justified[12] in the hypothetical case of not having the

[12] "In cases like Sudan, where the government has engaged in a consistent policy of ethnic war, remedial criteria would conclude that the South has the moral right to secede" (Day, 2012, p. 30).

formal consent of the central government of Sudan for the holding of a binding referendum of independence, in which the secessionist option was supported by an overwhelming majority of the population. Unlike the case of Kosovo, South Sudan is a State created with the approval of the predecessor State. The mechanism for secession was rooted in the 2005 General Peace Agreement and in the constitutional agreement that was signed after it. Therefore, South Sudan is an example of constitutionally exercise the right to independence (Vidmar, 2012); and, consequently, one of the new cases of "agreed secession". Similarly, the independence referendum held in Montenegro on Sunday 21 May 2006, which led to the proclamation of independence of Montenegro and Serbia in June 2006, was exercised in accordance with the 2003 constitutional charter of the State Union of Serbia and Montenegro.

Additionally, Resolution 1244 of the United Nations Security Council (UNSC) had already provided Kosovo with a satisfactory autonomous regime. Similarly, the situation of serious human rights violations suffered mainly between 1996 and 1999 –the year in which the North Atlantic Treaty Organization (NATO) intervenes– had already been overcome. Likewise, the Serbian political regime had undergone profound changes since 1999, so it would have been legitimate to expect a better behavior of its authorities regarding the Kosovar people (Jiménez, 2011).[13]

The ICJ determined that the unilateral declaration of independence of Kosovo was in accordance with general international law but it did not rule on the secession of Kosovo from Serbian territory. In effect, the ICJ specified the legal effects of the unilateral declaration of independence promulgated in Kosovo, thus avoiding demonstrating a "remedial" effect but leaving the door open to future cases of secession of peoples not subject to "foreign occupation and colonial domination".

Additionally, it is necessary to take into account that, Kosovo did not comply with the state requirement regarding the need to exclusively control the territory[14], required by international

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13 See, allegations of Argentina (§83-86), Romania (§132-159), Cyprus (§140-148), Iran (§4.1-4.2); Russia (§19-22 and 55-59) and China (§24-26).

14 In this regard, it should be noted that in principle the stated requirement was not considered, but only those of population and territory (Tribunaux Arbitrales Mixtes, 1930, p. 344). These criteria were adopted in the first

law, given that not even the MINUK ("*Mission d'administration intérimaire des Nations Unies au Kosovo*") controlled northern Kosovo in 2008, which is why certain States claimed that the recognition of Kosovo would have been "premature" (Corten, 2011, pp. 721-760), although the Advisory Opinion analyze seemed to implicitly deny the illegality of such recognition (Vidmar, 2011).

It is necessary to understand the Advisory Opinion on Kosovo in a literal way, in what corresponds to what is expressly expressed and omitted. Otherwise, "***de facto* secessions**" with little international recognition, like those of Abkhazia and South Ossetia, could be validated, taking into account the acts of ethnic cleansing that occurred prior to Russian intervention in Georgian territory (Pechalova, 2017). It is what is called a chain reaction when applying theoretical concepts that –according to certain authors favorable to the Russian cause– could even be considered as an emerging international practice (Kapustin, 2015), in a clear effort to justify the annexation of Crimea as a case of "**remedial secession**"[15].

As Judge Koroma noted in his dissenting opinion of the Advisory Opinion on Kosovo, the claim that international law neither allows nor prohibits unilateral declarations of independence only makes sense if it is done in a general way, not in a specific case, in which depending on circumstances it could be contrary to international law.[16]

In this regard, the Advisory Opinion on Kosovo explained, based on the allegations made by several participating States, that the United Nations Security Council (UNSC) had condemned certain unilateral declarations of independence (Southern Rhodesia, Northern Cyprus and the Republika Srpska), noting that in all these cases the UNSC had ruled in respect of each specific

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Arbitration Commission of the International Conference on Yugoslavia on Section (b) of its Pronouncement: "*the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority*" (Badinter Arbitration Commission, 1991).

15 In this regard, it is important to note the following: "In the absence of Security Council resolution to liberate Crimea, and in the absence of numerically overwhelming population, who wants to be liberated in Crimea, a paradox is created in which the principles of title to the territory is opposed by the principle of self-determination." (Ahmet, 2016, p. 278).

16 See, Dissenting opinion of Judge Koroma, §20. For his part, Judge Bennouna, in his dissenting opinion, criticized that the ICJ focus on the unilateral declaration of independence in abstract, without inquiring about the particular context in which the consulted act was adopted, that is, without worrying about the background of such adoption nor who were its authors.

situation that existed at the time of its promulgation and, therefore, its illegality did not derive from their unilateral character, but from the fact that they were or would have been accompanied by an illegal use of force or other serious violations of imperative norms of international law (*jus cogens*) (ICJ, 2010, §81).

However, that seems to be the reasoning of the ICJ –according to Judge Simma[17] himself (ICJ, 2010)– in relation to a specific act. Indeed, according to the ICJ it is not necessary to demonstrate a permissive norm as long as there is no prohibition ("residual freedom theory"[18]). This would be just a consequence of having limited itself to ruling on the unilateral declaration of independence as an isolated act and not on the possibility of secession, which was after all what really was at stake (Peters, 2011; Weller, 2017). However, as Muharremi suggests:

> "*To summarize, according to the ICJ, there is no norm of international law which prohibits an entity to declare independence, which is different of effecting independence*" […] "*Therefore, since there is no rule of international law, which prohibits a declaration of independence, one could argue that there is also no norm of international law, which prohibits secessions*" (Muharremi, 2010, p. 880).

Indeed, for some authors, the ICJ has not denied the existence of the right of secession, so it could be considered as an emerging right which has been the target of strong international opposition. However, that the fact of having been invoked by various States participating in the Advisory Opinion on Kosovo of July 22, 2010 has led to its strengthening (Cirkovic, 2010).

Hence, according to this ICJ ruling, a unilateral declaration of independence would not be *a priori* opposite to international law (Cirkovic, 2010), provided that other circumstances that could lead to their illegality (e.g., serious violations of human rights or international humanitarian law)

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17 According to Judge Simma, when examining only the existence of a rule of international law prohibiting unilateral declarations of independence, the ICJ once again accepted the principle of the "Lotus" case (prepared by the Permanent Court more than 80 years earlier) and returned to the positivism of the 19th century, thus adopting an anachronistic and highly consensualist view of international law (belief in the completeness of substantive international law), so that reasoning would be obsolete. However, as Muharremi illustrates, such a principle had already been confirmed by the ICJ on previous cases in 1986 and 1996: "The Lotus-Presumption was confirmed in subsequent ICJ case-law, e.g. the Nicaragua Judgment, and the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, and was applied in relations between states. In the present opinion, the ICJ applies the Lotus-Presumption to an entity declaring its independence, which may or may not yet be a state." (Muharremi, 2010, p. 876).

18 It should be noted that, although Judge Simma agrees with the ICJ in most of his arguments, he questions the limited nature of his analysis, considering that both prohibitive norms and permissive norms of general international law should have been subject to further full treatment.

did not concur. Similarly, international law would remain neutral in regard of the act of secession. As Muharremi notices: "Therefore, since there is no rule of international law, which prohibits a declaration of independence, one could argue that there is also no norm of international law, which prohibits secessions" (Muharremi, 2010, p. 880). For other scholars, the Advisory Opinion on Kosovo can be read both ways: "either secession is outside international law in the sense that international law is simply neutral *vis-a-vis* secession, or international law allows secession" (Peters, 2011).

In its Advisory Opinion on Kosovo, dated July 22, 2010, the ICJ would have avoided ruling on the legal effects of the unilateral declaration of independence of Kosovo on February 17, 2008. In effect, the ICJ merely admitted its legality under general international law, stating –in application of the **Lotus principle**– that it does not contain any prohibitions applicable to unilateral declarations of independence. Therefore, it would be possible to state that the Kosovar people –regardless of whether or not they had the right to self-determination– would not have committed any illegal act in international law by declaring their independence (Verhelst, 2018).

Despite Serbia's assertion that Kosovo's unilateral declaration of independence ignored the principle of territorial integrity, the ICJ stated that the scope of the principle of territorial integrity of States is limited to the sphere of relations between States (ICJ, 2010, §80). Therefore, it would not be applicable to intra-State relations and could not be applied to the specific case of the unilateral declaration of independence of Kosovo[19]. As Crawford explains:

> "*The principle of 'territorial integrity' does not provide a permanent guarantee of present territorial divisions, nor does it preclude the granting of independence to part of its territory, even where such a grant is contrary to the wishes of the majority of the people of the State as a whole*" (Crawford, 1977, pp. 341-345).

As previously mentioned, the ICJ did not rule on the legal consequences of the unilateral declaration of independence, which was really important. Consequently, it is possible to distinguish, as Muharremi does, between "**declaring**" and "**effecting**" **independence**

[19] Restrictive understandings of the principle of self-determination are usually based on Articles 1.2 and 2.4 of the Charter of the United Nations, of June 26, 1945; Articles 2 and 6 of General Assembly Resolution 1514 of December 4, 1960; Article 1.1 of the International Covenant on Civil and Political Rights, December 16, 1966; General Assembly Resolution 2625, October 24, 1970; Articles II , IV and VIII of the Helsinki Final Act, August 1, 1975; and, General Assembly Resolution 50/6, November 9, 1995.

(Muharremi, 2010, p. 873). In fact, for the ICJ, a unilateral declaration of independence is just as a simple **declaration of intention**[20]. This would explain the current situation of Kosovo before the international community. Kosovo has not been recognized by Serbia, Russia and five European Union member states, while the United States and more than 100 other countries have already recognized it. For that reason, the United States government is trying to reach a settlement between both parties, convincing Serbia to extend recognition to Kosovo in exchange for concessions by Pristina, which may include a land swap (Bechev, 2020).

Indeed, the ICJ avoided addressing the issue regarding the legal effects of a unilateral declaration of independence, recalling that the act of declaring independence does not necessarily result in the creation of a new State. Statehood depends on other considerations. The traditional requirements established in the Montevideo Convention on the Rights and Duties of States of December 26, 1933 are: (**1**) A permanent population; (**2**) A defined territory; (**3**) Government; and, (**4**) Capacity to enter into relations with the other States.

In addition to the above criteria, it is currently considered that, in order that a new entity could be considered a State, it must comply with the standards of respect for human rights and the principle of self-determination[21]. In particular, it is worth mentioning, in relation to the secession process, that while a violation of an imperative norm (*jus cogens*) of international law is illegal; in relation to the creation of States, there is an obligation not to recognize such illegal acts in international law, under customary international law and in accordance with the general principles of law, which would have been confirmed by coding the Draft Articles on State Responsibility.[22]

Consequently, the Resolutions of the UNSC and the UNGA are –from a jurisprudential perspective– declaratory in the sense that they confirm the duty of the States not to recognize such situations. In practical terms, these resolutions are essential, because they involve a

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20 La Cour internationale de justice a dit qu'une déclaration unilatérale ne viole pas le droit international, car c'est une simple déclaration d'intention" (Kohen, 2017).

21 This would have been confirmed by the promulgation in December 16, 1991, of the Guidelines on the recognition of new states in Eastern Europe and the Soviet Union (Dugard and Raic, 2006, p. 96).

22 Articles 40 and 41 of Chapter III (A/56/83). Article 41(2), "Draft Articles on the Responsibility of States for Internationally Wrongful Acts", 53° session, G.A.O.R. 50° session, Suplement No 10 (A/56/10), pp. 286–289.

collective determination of illegality and nullity[23]. In accordance with this doctrine, the United Nations would have led States not to recognize emerging entities created on the basis of acts of aggression (e.g., the Turkish Republic of Northern Cyprus), of systematic racial discrimination and denial of human rights (e.g., the Bantustan States of South Africa) or contrary to the principle of self-determination of peoples (e.g., Katanga and Southern Rhodesia) (Dugard and Raic, 2006, p, 101).

There are two theories about the recognition of a State: the constitutive theory and declarative theory (Caplan, 2005). The declaratory theory was adopted in Badinter Commission's opinions (*e.g.*, Opinion No 11) and confirmed in consecutive pronouncements. The first one considers recognition as a necessary act before the recognized entity which can enjoy an international personality, while the second one considers it as a political act that recognizes a pre-existing state of facts (Vidmar, 2010, pp. 361-362). However, the constitutive perspective would have a great deficiency: it does not provide any response to the scenario in which an emerging entity receives recognition from some States but not from others, which would mean that the new entity has and does not have –at the same time– an international personality (Vidmar, 2015; Lauterpacht, 1947). Due to this problem or contradiction, the majority doctrine believes that recognition should have declarative effect (Harris, 2010).

Therefore, it should be remembered that initially only the **population** and **territory** requirements subject to a Government were considered, as can be seen in the award issued in the *Deutsche Continental Gas – Gesellschaft v. Polish State* (*Tribunaux Arbitrales Mixtes*, 2010). Such criteria were reiterated in other arbitral tribunals, such as in the Arbitration Commission of the International Conference on Yugoslavia (Badinter Arbitration Commission, 1991). Additionally, it is worth to mention Andrés Bello: "A nation or State is a society of men whose objective is the conservation and happiness of the associates; which is governed by positive laws emanating from it, and owns a portion of territory" (Bello, 1832).

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[23] This idea would have its origin in the doctrine of non-recognition, which was founded on the principle *ex injuria jus non oritur*, according to which unlawful acts cannot create law.

It should be noted that in the 19th century the recognition of a State was crucial for its admission to "civilized society" because international law was conceived as the governing law among "civilized nations"[24], regardless of how each State is constituted (Crawford, 1977, pp. 93-182). European peoples have historically denied sovereignty to non-European peoples and therefore the need for recognition (Anghie, 2015, pp. 71-99). Therefore, treaties were signed between non-European and European states without equality because this latter did not belong to the family of civilized nations (Becker, 2010).

For this reason, Anghie places great emphasis on the concept of sovereignty because it used to be important to differentiate European and non-European states that had just become independent (Anghie, 2015, p. 74). In this sense, Jhon Westlake boasts this:

> "*When people of European race come into contact with American or African tribes, the first need is a government under whose protection those can carry out the complex way of life to which they are accustomed in their homes, which can prevent that way of life be disturbed by the confrontation between different European powers for supremacy on the same floor, and that can bring the security of the natives and their well-being, at least to the extent that they enjoyed it before the arrival of strangers. Can the natives provide that government? Or can Europeans look for themselves? In the answer to this question lies, for international law, the difference between civilization and the desire to have it*" (Westlake, 1897, p. 141).

Nowadays, it is considered that recognition by other States is not properly constitutive of a State, but declarative in nature and effect (Crawford, 1977, pp. 138-139). However, a State may exist despite negative reactions, including radical opposition from third States. In practice, widespread recognition seems to be particularly valuable from the perspective of those entities that claim to meet the criteria of statehood (Almqvist, 2009). Consequently, the majority of supporters of declarative theory are forced to recognize at least some recognition of pre-existing states as a precondition for access to statehood (Crawford, 1977, p. 74).

In relation to the recognition of a State by a small number of countries, it should be recalled, as James Crawford explains, that: "Even individual acts of recognition may contribute towards the

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[24] Vásquez de Menchaca said that the Law of People has universal institutions but that is determined by the practice of "civilized nations", thus affecting the other non-civilized nations (Vasquez de Menchaca, 1985). It is possible to see the legacy of this ancient conception in Article 38 1 (c) of the Statute of the ICJ.

consolidation of status; in Charpentier's terms, recognition may render the new situation opposable to the recognizing State" (Crawford, 1977, p. 27).

In this regard, it is important to specify that, in the case of entities that do not qualify as a State for breaching any of the traditional criteria of statehood, recognition may be constitutive of a legal obligation for the acquiescent State. In any case, as explained above, the act of recognition would be in principle declarative, although it may be of great importance in certain cases. (Crawford, 1977, pp. 27-28).

The recognition by third States could be decisive, since, as the Supreme Court of Canada stated concerning the secession of Quebec, the definitive success of a unilateral secession would depend on the recognition of the international community (Supreme Court of Canada, 1998, §155). However, it also might not be, because a community that claims to be sovereign but cannot exercise this right or attribute in practice is not a proper State (Bull, 1977).

Notwithstanding referred to the recognition, it is essential to appreciate that political considerations influence the decision to grant it and may encourage a State to recognize an entity emerging prematurely or to refuse to grant recognition. The political nature of recognition would have favored the acceptance of the "**declarative theory**"[25] (Badinter Arbitration Commission, 1991), according to which an entity that meets the requirements of statehood becomes a State regardless of recognition (Nolte, 2006).[26]

Declarative theory might be adequate in the case of a State that has been recognized by some States but not by others; however, it is difficult to maintain that an entity that has received recognition by none or very few States, such as the cases of the Turkish Republic of Northern Cyprus or the Bantustan States of South Africa (Transkei, Bophuthatswana, Venda or Ciskei), could claim to be a State, because it cannot demonstrate its capacity to establish relations with

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25 The declarative doctrine would have its origin on the Opinions of the Arbitration Commission of the conference on Yugoslavia (Badinter Arbitration Commission), who stated that: "*the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory*". Opinion 1 in ILR 92, p. 162.

26 "The Badinter Committee was thus correct to assert that 'in its present state of development, international law does not make clear all the consequences which flow from this principle'" (Pellet, 1992, p. 179).

other States and, therefore, from a functional approach –traditional criteria– cannot be described as a State (Dugard and Raic, 2006, p. 98).

In relation to the Kosovar case, it is commonly asserted that the most convenient thing for the ICJ would have been to apply the so-called "safeguard clause" contained in UNGA Resolution 2625 (XXV) (UNGA, 1970, Resolution 2625), due to the context of serious violations –systematic and massive– Human rights and discrimination against the Albanian population prior to Resolution 1244 of the UNSC could have justified the applicability of this clause (UNSC, 1999). If the Advisory Opinion on Kosovo had been based on the application of the "safeguard clause", the ICJ would not have needed to insist on the exceptional nature of the case, since the said clause is *per se* an exception to the norm.

In any case, it is possible to recognize an additional cause of exercise to self-determination, whose grounds can be found in the United Nations resolutions and which has been subject of a vast doctrinal development, the so called "**remedial secession**". Indeed, some scholars claim that the Advisory Opinion on Kosovo implies an implicit acceptance of this exceptional cause for exercising the right to self-determination (Valderrama, 2013; Hillestad, 2010).

Meller explains the permissive attitude of the ICJ by virtue of the need not to contradict the **Lotus principle** and let the principle of effectiveness govern the unilateral declaration of independence of Kosovo and subsequent political acts (Meller, 2012). However, as explained above, the situation of the Kosovar people in 2008 had changed substantially compared to the period of serious humanitarian crisis suffered between 1996 and 1999.

III. Wide Self-determination

Prior to the formation of current International Law, specifically in the 19th century, not every people had the right to self-determination. In fact, a State had to be recognized as a civilized nation in order to enter the "society of nations". For example, the disintegration of the Mughal Empire was not a matter of interest to international law at the time, factually speaking, as this empire was not part of the international system (Alexandrowicz, 2017). However, Westlake

compared the disintegration of the Mughal Empire with the secession of Lunéville (Lorraine) from Germany, in favor of France, in 1795 (Westlake, 1894, p. 194).

However, there were attempts of self-determination in this century. For example, Serbia in its first revolution of 1803 tried to be an independent state supported by the Russian state (Lawrence, 1979). But contrary to expectations, the rebellion was crushed and the Serbs lost autonomy due to Russian neglect for the formation of this new State (Lawrence, 1979).

The Serbian case is not the only one. In 1848, the Hungarians rebelled against the Austrian Empire trying to regain their autonomy. From April to August of that year the Hungarians tried to negotiate with foreign states to be able to be an independent state without the need to go through recognition of the predecessor State (Deme, 1979). However, the revolution was crushed by the Austrian government.

There are currently new parameters. Regarding new approaches, it should be noted that in recent years several States have declared their independence with the consent of the predecessor State, although reluctantly after an initial refusal. These include Slovenia in 1991, East Timor in 2002 and South Sudan in 2011, when the results of an independence referendum were finally accepted by the predecessor state. Similarly, Czechoslovakia separated peacefully in the Czech Republic[27] and Slovakia in 1993 with the agreement of both regions[28].

Although the agreement of the predecessor State supposes the ideal situation in international law; In practice, most secessions do not occur with the consent of the predecessor State. There are many examples of this assertion: Armenia[29], Azerbaijan[30], Belarus[31], Croatia[32], Georgia[33],

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27 In this regard, it should be noted that after an internal debate about its lack of international recognition, the Czech Republic officially changed its name to "Czechia", more than two decades after its independence.

28 Similar separation, although from a personal union in this case, led to the dissolution of the union between Norway and Sweden, known as the United Kingdom of Sweden and Norway, in 1905.

29 Armenia held a referendum on September 21, 1991 without the consent of the Soviet Union and was admitted as a member of the (UN) on March 2, 1992.

30 Azerbaijan held a referendum on December 29, 1991 without the consent of the Soviet Union and was admitted as a member of the UN on March 2, 1992.

31 Belarus declared its independence without the consent of the Soviet Union on December 29, 1991, gained independence on December 26, 1991 and was recognized by all members of the European Union.

32 Croatia held a referendum on May 19, 1991 without the consent of Yugoslavia, declared its independence on June 15, 1991 and was admitted as a member of the UN on May 5, 1992.

Latvia[34], Macedonia[35], Ukraine[36], Turkmenistan[37], Uzbekistan[38], Bosnia and Herzegovina[39], etc. In most cases, a referendum was held previously, or to endorse the secessionist process. In short, among all the tools of participatory democracy, the referendum has proven to be the one that grants the most legitimacy (Saint Clair, 2017).

As Ahmet comments in his Doctoral thesis: "Modern self-determination in non-colonial context was notable in 1989, dissolution of the former Union of Soviet Socialist Republics into independent unitary states." (Ahmet, 2016, p. 34). In this regard, when the Soviet Union collapsed in 1989, the majority of the former Soviet Republics successfully declared their own independent State, which was recognized by the international community. Nevertheless, the right to self-determination was denied to some former Soviet Republics like Aphasia in Georgia, and Chechnya and Dagestan in Russia.

However, beyond trends, the fundamental question arises as to whether the consent of the predecessor State is really essential when a people will declare their independence. The answer apparently should be negative, since arguing otherwise is contradictory in a constitutional democracy, even contrary to international practice. (The Conversation, 2017).

This question is decisive in cases of "***de facto* secession**". Traditionally, there is consensus on the existence of five stable *de facto* States[40]: Abkhazia, Nagorno Karabakh, Northern Cyprus (ECHR, 2001), Somaliland, South Ossetia and Transnitia (López, 2019). Additionally, the Sahrawi Arab

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33 Georgia held a referendum on March 31, 1991 without the consent of the Soviet Union and was admitted as a member of the UN on July 31, 1992.

34 Latvia held a referendum on March 3, 1991 without the consent of the Soviet Union and was admitted as a member of the UN on September 17, 1991.

35 Macedonia held a referendum on September 8, 1991 without the consent of Yugoslavia, declared its independence on November 20, 1991 and was admitted as a member of the UN on April 8, 1993.

36 Ukraine held a referendum on December 1, 1991 without the consent of the Soviet Union and was recognized by all members of the European Union.

37 Turkmenistan held a referendum on October 26, 1991 without the consent of the Soviet Union and was admitted as a member of the UN on March 2, 1992.

38 Uzbekistan held a referendum on December 29, 1991 without the consent of the Soviet Union and was admitted as a member of the UN on March 2, 1992.

39 Bosnia and Herzegovina held a referendum on February 29, 1992 and on March 1, 1992 without the consent of Yugoslavia, declared its independence on March 1, 1992 and was admitted as a member of the UN on May 22, 1992

40 *De facto* State is an entity that manifests the elements of statehood contained in Article 1 of the Montevideo Convention on the Rights and Duties of States; nevertheless, their recognition as States remains partial or limited.

Democratic Republic (partially recognized *de facto* State) government controls about 20–25% of the territory it claims (Liberated Territories or the Free Zone) while Morocco controls the rest of the disputed territory (Southern Provinces).[41]

In regards to Iraqi Kurdistan, a *de facto* autonomous regime emerged during the first gulf war in order to defend the Kurds against Sadam Hussein's attacks by the establishment of a no-fly zone. The Kurdish question became of international concern as the UNSC issued a resolution claiming for their protection against the repression of the Iraqi government (UNSC, 1991). The United States occupation allowed the Kurds of Iraq to freely develop as a *de facto* autonomous region. In 2005, the new Iraqi Constitution recognized the existence of the Kurdish nation and considered it as a self-governed autonomous region.

The Kurdish government had built an important network of international and economic relations. Erbil host consulates of countries from Africa, America, Asia and Europe, including a European Union delegation, a United Nations office and an International Committee of the Red Cross (ICRC) regional office. Iraqui Kurdistan also has diplomatic representations abroad in Australia, Austria, European Union, France, Germany, Iran, Italy, Poland, Russia, Spain, Sweden, Switzerland, the United Kingdom and the United States (KRG – Department of Foreign Relations, 2020). In conclusion, Iraqi Kurdistan could be considered as a partially recognized *de facto* State.

International practice also demonstrates that, however it occurs in the minority of situations, the "agreed secession" always implies an alternative to be taken into account. Peaceful secession is undoubtedly the ideal path, while bloody disintegrations are undesirable for all. As previously

[41] Nevertheless, successful secession depends on the capacity of the autonomous entity to maintain the control over the territory. An example of failure is that of the Brazilian province of Rio Grande, which was explored by the Portuguese in violation of the Treaty of Tordesillas signed in 1494. In 1737, the Portuguese founded the city of Rio Grande and, in 1761, after 24 years, the situation would be regulated with Spain. During the Farroupilha Revolution (September 1835 – March 1845), this region would become independent under the name of *República Rio-grandense* or *República de Piratini*. The government of this historic Republic would proclaim its own constitution in 1843. However, it would lose its independence after being defeated by the forces of the Brazilian Empire in 1845 (Zalla and Menegat, 2011). Another example of failure in "effecting" independence is that of the Republic of Yucatan from Mexico, between 1841-1848. Despite a formal declaration of independence and an innovative Constitution of Yucatán (1841), the Republic of Yucatan cannot succeed. (Pool, 2019).

mentioned, the case of South Sudan is one of the new cases of "agreed secession", despite having fought a bloody civil war.

An older case of "agreed secession", despite the initial bloodshed, is that of India and Pakistan (comprising modern day Pakistan and Bangladesh) *vis-à-vis* the United Kingdom in 1947, achieved after the Indian National Congress reluctantly accepted the creation of Pakistan to appease the Muslim League and conclude the independence negotiations with the United Kingdom.[42]

A more peaceful example is the independence achieved by Suriname over the Netherlands in 1975. Similarly, it is possible to mention the secession of Eritrea with the consent of Ethiopia in 1993, or that of Montenegro with the agreement of Serbia in 2006[43]. In the case of Ethiopia, as in Saint Kitts and Nevis, the right to self-determination is guaranteed in its own Constitution, which has a secession clause. In long-term, this could be the case of Northern Ireland or Scotland if the independence option –from the United Kingdom– wins their next referenda.

In this regard, it is worth mentioning the secession by Bangladesh of Pakistan in 1971, although the latter recognized the independence of the former only after two years of the secession[44]. This case is particularly important because it shows certain tolerance on the part of the international community towards modern self-determination outside the colonial context (Shany, 2015).

In the Opinion concerning the secession of Quebec on August 20, 1998, the Supreme Court of Canada determined its opinion on the basis of four underlying constitutional principles: the federal, the democratic, the constitutional and the rule of law and respect for the rights of minorities; which must be interpreted and applied in symbiosis between them. Indeed, the Supreme Court of Canada stressed that "none of these principles can be defined in abstraction

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42 Parliament of the United Kingdom, Indian Independence Act (1947). The Act took effect in August 15, 1947.

43 In the case of the secession from Serbia by Montenegro, the latter's recognition by Serbia (June 15, 2006), was only days after independence was proclaimed (June 3, 2006).

44 Late recognition, after at least a couple of years of the declaration of independence, has been a common practice since the beginning of the Republican Era. For example, Portugal recognized Brazil's independence only after three years of armed conflict, by signing the Friendship and Alliance Treaty (*Tratado de Amizade e Aliança*) on August 29, 1825.

from the others and none of these principles can prevent or exclude the application of any of the others." (Rocher, 2017, p. 33).

The ruling on the secession of Quebec recognizes four underlying constitutional principles that inspire the text of the Constitution, implying implicit premises. In this way, the Constitution forms a set of legal norms but also a framework of implicit principles (Supreme Court of Canada, 1998, §55). The Supreme Court of Canada, in the absence of an express provision that allows one of its constituent territorial units to carry out a secession through a previously defined process, determined that the Constitution is not an obstacle and that the underlying constitutional principle means that democracy does not It allows political authorities to ignore the will for constitutional modification, having to access the dialogue for this purpose (Supreme Court of Canada, 1998, §42).

Additionally, in the case of the secession of Quebec, the Supreme Court of Canada pointed out that, in a constitutional democracy, the wishes of the majorities must be respected because no majority is more legitimate than another as an expression of democratic opinion (Supreme Court of Canada, 1998, §66), although finally It determined that Quebec could not claim to exercise the right to self-determination through secession (external autonomy), because Quebecers were not prevented from exercising their right to self-determination or autonomy at the internal level (Supreme Court of Canada, 1998, §134-136).

In this way, the Supreme Court of Canada aligned itself with the provisions of the International Committee of Jurists in the Report in the case of the Aland Islands (Finland) of 1920, in which it was determined that the Dutch people would only have the right to secession in the case Finland did not respect its ethnic and cultural autonomy, a situation distant from that of the Dutch case, even then. (League of Nations, 1920).

In regards to the Kurdish people in Iraq, it is claimed that if their right to internal autonomy were not respected, they could legitimately opt for secession; however, if their autonomy would be respected internally, the autonomous relationship would have to be governed by the internal law of Iraq (Sterio, 2017, p.153-154).

According to Stavenhagen, **internal autonomy** would affect not the state's own sovereignty, but "*[...] the form of internal political and economic organization*." Therefore, "*[...] more than secession or political independence, we speak today of various forms of political, territorial and economic autonomy"* (Stavenhagen, 2017). Consequently, in a constitutional democracy there must be a continuous process of discussion –at least in the political and economic spheres– since no one has a monopoly on the truth. Building majorities requires commitment, negotiation and deliberation; therefore, a democratic pluralist system must take into account the inevitable dissenting opinions and try to incorporate them into the legal system. (Supreme Court of Canada, 1998).

The Canadian pronouncement has special relevance in the case of the Catalan people, since the Constitutional Court of Spain expressly cited, in the foundations of its Judgment of March 25, 2014, the August 20, 1998 ruling of the Supreme Court of Canada (Constitutional Court of Spain, 2014). In this way, the Constitutional Court would have opened the door for a "**trans-constitutional**" **dialogue** (Rocher, 2017, p. 44), from which the duty to negotiate in good faith follows (Weller, 2017; Vidmar, 2010). Indeed, in the conclusions of the pronouncement of the Supreme Court of Canada, it is possible to identify the obligation to negotiate in good faith, based on the four underlying constitutional principles mentioned above (Supreme Court of Canada, 1998), which allow interpreting the constitutional text. Among these principles, it is worth mentioning, in addition to the reference to respect for minorities, that of constitutional democracy (Rocher, 2017, p. 44).

The Opinion concerning the secession of Quebec was unquestionably a turning point in the Québec sovereignty process, recognizing Quebec's ability to separate from the rest of Canada whenever three conditions were met (Guénette, 2017, p. 22): (**i**) a clear question, (**ii**) a clear answer; and, (**iii**) prior negotiation (Liñeira and Cetrà, 2015).[45]

[45] In this regard, it should be noted that, both the Catalan and Scottish referenda experience have led Liñeira and Cetrà to establish four useful lessons in future processes: (**i**) the requirement of a popular mandate; (**ii**) a decision made through a referendum; (**iii**) an agreement between State and sub-State entities in order to determine the terms of the consultation; and, (**iv**) the clarity of the question. (Liñeira and Cetrà, 2015).

Additionally, it should be noted that the understanding of the democratic principle exceeds the mere formal framework of the representative and respectful government of the rule of law. That is why the Supreme Court of Canada has extended its definition to three new dimensions: (**i**) Democracy is a permanent state of deliberation, discussion, debate, expression of opinions, commitments and negotiations. (**ii**) Democracy imposes the need to take dissident voices into account and respond to them in the laws. (**iii**) The right to propose constitutional modifications translates into the obligation to engage in a debate to take the democratic expression of a desire for change in modifications and can be expressed by one or several provinces.

The open attitude to negotiate and dialogue with the secessionist entity, on the part of Canada, although it is not a consequence of any obligation of public international law, shows instead what to expect from a constitutional democracy (Vidmar, 2010). By imposing the obligation to negotiate secession in good faith in response to the expression of a clear majority in favor of it, the Supreme Court of Canada established fundamental principles that constitute parameters that must be respected in a constitutional democracy (Guénette, 2017, pp. 26-27).

Consequently, it is possible to infer a last hypothesis of exercicing of the right to self-determination, contributed in this case by comparative constitutional law, although repeated –as explained above (ICJ, 1973, §55-56)– by the Advisory Opinion on Kosovo, the one to which people can be prevented from exercising its internal autonomy. It should be recalled that peoples that are not subject to colonial domination neither to foreign occupation only have the right to external self-determination (against the State), if they are denied or impeded of exercising their right to internal self-determination (inside the State).

Therefore, within the framework of a constitutional democracy, before the manifest will of independence of a clear majority of the population of the corresponding entity, there must be a dialogue between the “two legitimate majorities”(Supreme Court of Canada, 1998, §93), which could generate constitutional modifications or even an “agreed secession”. If this democratic dialogue is not possible, the ignored majority could choose to “declare” and “effect” independence, which can ultimately lead to a “*de facto* secession” and, in case of serious human rights violations, to a “remedial secession”. In sum, there would be three possible alternatives of

secession within the broader conception of "**wide self-determination**" (*i.e.*, of peoples under no colonial or foreign domination): (**i**) "**agreed secession**"; (**ii**) "***de facto* secession**"; and, (**iii**) "**remedial secession**".

IV. Conclusions

In order to not contradicting the **Lotus principle**[46] and applying the principle of effectiveness (*ex factis ius oritur*) (Christakis, 2006) to govern the unilateral declaration of independence of Kosovo and subsequent political acts, were probably the reasons that led the ICJ to affirm that as long as there is no norm in international law that prohibits unilateral declarations of independence (Meller, 2012), they would be in accordance with general international law (Verhelst, 2018).

In the same way, it could be affirmed that there is also no norm in international law that prohibits secession (Muharremi, 2010), considering that secession is regulated by national law, not by international law (Corten, 2011, pp. 87-88). In that sense, the traditional approach held that secessionist movements that were not under foreign control would be purely an internal matter. According to this perspective, international law would neither encourage secessionism nor prohibit it (Kohen, 2006, p. 5).

However, the foregoing should not lead us to believing that, while there would be no rule of general international law that prohibits secession, it would be consistent with it, as an approach guided by the "residual freedom theory" would not be without criticism (Bermejo and Gutiérrez, 2010). In this regard, it should be noted that it is currently claimed that international law would increasingly regulate secession[47]; preventing it in certain cases (when it violates fundamental

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[46] According to the "Lotus" principle, a fact is internationally lawful that there is no rule of international law that prohibits it. The principle was established by the Permanent Court of International Justice in 1927 regarding the S.S. Lotus and has been reiterated by the ICJ in subsequent rulings, as in the Advisory Opinion on "Military and paramilitary activities against the Government of Nicaragua" (*Nicaragua v. United States*) or the one on "Legality of the threat or use of weapons nuclear." Through the Advisory Opinion on Kosovo, the ICJ would have extended the aforementioned principle to entities that could be considered as State in *status nascendi* (Muharremi, 2010).

[47] The aforementioned doctrine argues that international law would authorize secession in three cases: (**i**) Of territories incorporated into a State by decision of the UNGA under certain conditions that are breached by that State (e.g., Eritrea); (**ii**) Of entities illegally incorporated or annexed to a State from which they decide to separate (e.g., the Baltic States in 1991); and, (**iii**) Of peoples to whom national domestic legislation recognizes the right to self-determination, in which case the breach of the relevant national norms by the

principles), authorizing it in others (e.g., Eritrea, Baltic States, among others) and allowing it only for the remaining situations (Kohen, 2006, pp. 19-20).

In this regard, Judge Koroma, in his dissenting opinion of the Advisory Opinion on Kosovo, argued that the claim that international law neither allows nor prohibits unilateral declaration of independence would only make sense if it is done in the abstract, not in a specific case, in which, depending on the circumstances, a unilateral declaration of independence may be contrary to international law, as the ICJ itself acknowledged that occurred on previous occasions, like in Southern Rhodesia, Northern Cyprus and Republika Srpska (ICJ, 2010, §81).

Additionally, the ICJ declared, regarding the unilateral declaration of independence of the Kosovar people, that the scope of the principle of territorial integrity of the States is limited only to the sphere of relations between States (Oklopcic, 2011); therefore, it would not be applicable to relations between peoples who aspire to self-determination and their predecessor State. Indeed, renowned scholars in general international law consider that the principle of territorial integrity does not provide a permanent guarantee of current territorial divisions, nor does it exclude the granting of independence to part of its territory, even when such a concession is contrary to the wishes of the majority of people of the State as a whole (Crawford, 1977, pp. 341-345).

Under the Report in the case of the Áland Islands (League of Nations, 1920), as well as the expressed reference to the pronouncement of the Supreme Court of Canada in the Advisory Opinion on Kosovo (ICJ, 2010, §55-56), it is possible to consider a final hypothesis of the right to self-determination, in response to the lack of internal autonomy in a constitutional democracy, with or without the consent of the predecessor State. Some cases may prove the viability of the latter hypothesis, in its unilateral modality, like the independence of Slovenia and Croatia in 1991[48], and its consequent secession from the former Yugoslavia (Weller, 2017).

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central government may open the way to legal secession from the point of view of international law (eg, Ethiopia, Serbia and Montenegro, Saint Kitts and Nevis, and Uzbekistan).

48 In this regard, it should be recalled that, in the late 1980s, the effective annulment of the constitutional autonomy of Kosovo and Vojvodina by Serbia and the establishment of a pro-Serbian government in Montenegro gave Serbia more power in the Yugoslav federal government, which allowed it to surpass Croatia, Slovenia and Macedonia in the federal decision-making process. The above, coupled with the overrepresentation of the Serbs in the federal public administration and in the army, as well as the exploitation of the most prosperous republics of Croatia and Slovenia in order to provide greater well-being to Serbia and

In the case of Catalonia, the impediment by the Spanish central government of exercising its internal autonomy would not have been sufficiently and convincingly evidenced before the international community. Although, previously the attitude of the central government could have been considered as reluctant to discuss the granting of a "*pacto fiscal*" ("fiscal pact")[49], so that in some way the refusal or impediment of exercising the economic aspect of the internal autonomy of the Catalan people (Costa, 2012); this possibility vanishes before the current position of opening to dialogue regarding an hypothetical "fiscal pact" by the Spanish central government (The Guardian, 2017).

Additionally, taking into account the statistical surveys according to cities in relation to the possibility of Catalan secession, it is necessary to take into account the possible internal fragmentation of a hypothetical Republic of Catalonia, because not all cities would support Catalan independence, something similar to what is currently happening with the Republika Srpska *vis-à-vis* Bosnia (Global Security, 2018).

The traditional holders of the right to self-determination under a restricted approach are the following: (**i**) peoples under colonial domination; (**ii**) peoples under foreign occupation; and, (**iii**) peoples subject to racist regimes. As explained above, the pronouncement on the secession of Quebec would have contributed in developing a last hypothesis, whose peaceful modality would depend fundamentally on the respect of certain principles and parameters of a constitutional democracy. However, the unilateral modality would be recognized only under the extreme situation of "**remedial secession**", whose intended application to the Kosovar case is still highly questioned. In fact, this theory could have triggered the "***de facto* secession**" of Abkhazia, South Ossetia and Crimea[50]. Therefore, it is better to be cautious about the applicability or assimilation of the theory of "**remedial secession**" to the Advisory Opinion on Kosovo.

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the other republics, led to demand greater autonomy from Croatia and Slovenia (Dugard and Raic, 2006, pp. 123-124).

49 On the refusal of the Spanish Constitutional Court to grant greater fiscal autonomy to Catalonia, see Judgment of 31/2010 June 28th, 2010. Recurso de inconstitucionalidad No 8045-2006, § 118 y ss.

50 The Crimean region must have been an independent State under the treaty signed between that region and the Ottoman Empire. However, it was fully annexed by Russia in 1783. Despite the independence guaranteed in this treaty, the Russian Empire did not cease to intervene in the internal affairs of Crimea and therefore it could easily be annexed (Sánchez Ramirez, 2016).

The ideal way to exercise the right to self-determination is an agreed and peaceful secession (because it could be agreed after an armed conflict), although it is not very frequent in international practice. This could be the case of Northern Ireland, Scotland and New Caledonia, and it would have been that of Quebec, if the obstruction –by the central government– in exercising its internal autonomy had been proven. However, the Opinion on the secession of Quebec provided principles and parameters that would allow a peaceful exit ("**agreed secession**") in response to the lack of internal autonomy, which should be taken into account by all constitutional democracies. In case of non-respect of pluralism and democratic dialogue, the ignored people could choose to "declare" and "effect" independence, which can ultimately lead to a "***de facto* secession**" and, in case of serious human rights violations, to a "**remedial secession**".

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