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## **A Look at the Evolution of the Right to Self-determination in International Law**

**Abstract:** The article takes stock of the historical development of the notion of the right of a people to self-determination in international law. It provides a coherent review of the main international treaties, customary rules, and legal rulings that shaped the evolution of the term over the course of the twentieth century. In doing so, it focuses on the main historical and political events, which had an impact on that process as well as the preconditions that have to be met in order for a people to have the legal capacity to execute the right to self-determination. Three main processes, which it focuses on are: decolonization, the establishment of a number of new countries following the dissolution of the Soviet Union, and the recent developments following ICJ's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. It also delineates the subject of the legal definition of a "people" as opposed to a "minority", describes the legal tension between the right to self-determination and the principle of territorial continuity in international law, and discusses potential further development of the term.

**Key words:** self-determination, minorities, territorial continuity, International Court of Justice, Kosovo, secession

### **Introduction**

The right of a people to self-determination is a fundamental principle of the modern international law system. At its core is the notion that every people has a right

to freely choose its political status<sup>1</sup>. It is enshrined in the Article 1 of the Charter of the United Nations, which states:

“The Purposes of the United Nations are:

(...) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”<sup>2</sup>.

However, despite its prominent character, the exact boundaries of the term have never been conclusively defined in a document qualifying as a source of international law. Instead, the scope of the right to self-determination has been evolving shaped to a large extent by State practice and, after 1945, jurisprudence of the International Court of Justice. In this article I aim to present how the scope of applicability of the term has changed after World War II in response to the geopolitical context. By tracking these shifts, we are able to anticipate the potential future evolution of applicability of the term.

## 1. Evolution of the term self-determination in the modern history

The UN Charter, being the foundation of the modern system of international law, was signed in 1945. It was at this time that the right to self-determination, previously on the borderline between being a political postulate and an actual legal premise, definitively shifted toward the latter.<sup>3</sup>Historically, the principle was acknowledged by the Western international community already in the year 1648 in the Treaty of Westphalia, which ended the Thirty Years' War and granted international legal status to a mosaic of small German States making up Holy Roman Empire. The Treaty formally established the principle of sovereign equality as the defining feature, by which every State, regardless how big or small, has an equal legal status in international law<sup>4</sup>. This formula ushered in a new model of international relations, remaining the foundation of the international legal system until today, in which the right to self-determination is a gateway for a people to assume statehood, and thus become a subject of the international law<sup>5</sup>.

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1 R. Augestad Knudsen, Moments of self-determination: the concept of 'self-determination' and the idea of freedom in 20th- and 21st century international discourse. PhD thesis, The London School of Economics and Political Science, London 2013, p. 9.

2 Charter of the United Nations, 1 UNTS XVI, United Nations, 1945, Art. 1(2).

3 J. Tyranowski, Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym, Warszawa – Poznań 1990, p. 190; M. Perkowski, Samostanowienie narodów w prawie międzynarodowym, Warszawa 2001, pp. 18–20.

4 G. Simpson, Great Powers and Outlaw State: Unequal Sovereigns in the International Legal Order, Cambridge, Cambridge University Press, 2004, p. 35.

5 L. Gross, The Peace of Westphalia, 1648–1948, The American Journal of International Law, vol. 42, no. 1, 1948, pp. 20–41.

Whereas the existence of the principle is acknowledged at this point by all main actors of international law, its extent and limitations are being hotly contested. Following the establishment of the UN, the right to self-determination became one of the themes picked up by anti-colonial movements<sup>6</sup>. In 1960, “Year of Africa,”<sup>7</sup> the UN General Assembly passed Declaration on the Granting of Independence to Colonial Countries and Peoples, in which it asserted:

“All peoples have the right of self-determination (...)”<sup>8</sup>.

This unconditional universal framing was repeated in a number of other international declarations and treaties, most notably in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States from 1965<sup>9</sup>, International Covenant on Civil and Political Rights and International Covenant on Civil International Covenant on Economic, Social and Cultural Rights from 1966<sup>10</sup>, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations from 1970. The last one of them stated:

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people”<sup>11</sup>.

According to the document, not only is self-determination a universal right of all peoples. It is also the duty of every State to promote the realization of this right on the international stage. This bold language reflected the struggle on behalf of newly recognized States to bring an end to Western colonialism.

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6 L. Antonowicz, *Rzecz o państwach i prawie międzynarodowym*, Lublin 2012, s. 90.

7 S. Gurjar, 1960 and African Independence: Revisiting the ‘Year of Africa’, *Indian Council of World Affairs*, 7 February 2020.

8 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN GA, Res. December 14 1960, 1514 (XV), p. 2.

9 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UN GA, Res. 21 December 1965, A/RES/36/103, UN Doc. A/36/51, section II, point f).

10 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN GA, Res. 16 December 1966, A/RES/2200, Art. 1.

11 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN GA, Res. 24 October 1970, A/RES/2625(XXV), UN Doc. A/5217, Art. 1.

During this period, when the political majority at the UN General Assembly was pressing for a wide applicability of the term, the International Court of Justice (the ICJ) served as a hedging influence. Since its rulings are an essential element of the body of international law, it had an ability to concretize the scope of the term “right to self-determination” in a case-based manner. In 1966, the ICJ refused to recognize Liberia’s and Ethiopia’s direct legal interest in facilitating the exercise of right of self-determination by Namibians in a case filed against South Africa<sup>12</sup>, rendering their direct involvement there unlawful. The International Court of Justice further hedged the applicability of the right to self-determination in its Advisory Opinion on Western Sahara from 1975 in a seemingly neutral statement:

“(…) the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned”<sup>13</sup>.

The Court deducted the requirement of a free and genuine expression of willingness to exercise the right of self-determination from the fragment of UN General Resolution 1514 adduced above. In the Court’s interpretation, it meant a prohibition of external interference aimed at inducing the creation of a new state. This more guarded understanding of term was accepted by the international community, especially by Western countries. This can be seen in subsequent political statements such as the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki later in the same year (1975) which stated:

“All peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference”<sup>14</sup>.

This short statement incorporated ICJ’s interpretation that a proclamation of independence cannot be induced by external interference, and that it must be preceded by a free expression of the wish of the people concerned. This understanding of the term formulated a basis for denying certain *de facto regimes* international recognition as States due to the way in which they were established. This was in line with the prevailing State practice, for instance regarding the State of Manchukuo, created via Japanese invasion in 1931, which was denied recognition by the League of Nations<sup>15</sup>. The year 1975, when this approach was reinforced in the context of the right to self-determination, was also when the UN was grappling with the Turkish invasion of Northern Cyprus and the subsequent illegal declaration of independence<sup>16</sup>, which might have influenced the line of reasoning. It also signaled that unfettered right to

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12 Judgment of the ICJ on case South West Africa, Second Phase, 1966, p. 6.

13 Advisory Opinion of the ICJ on case Western Sahara, 1975, p. 55.

14 The Final Act of the Conference on Security and Cooperation in Europe Helsinki, 1 August 1975, section VIII: Equal rights and self-determination of peoples.

15 The League of Nations, The National Archives of the UK Government, Section Credibility and end of the League, November 2020; See also: J. Frowein, De Facto Regime, Max Planck Encyclopedias of International Law, March 2013.

16 UN Security Council, Res. 550, 11 May 1984, Art. 2.

self-determination can be a destabilizing factor. The logic of external interference deeming a declaration of independence null and void retains much relevance. For instance, the argument was used in the Opinion of the Legal Advisory Committee to the Minister of Foreign Affairs of Poland when describing the situation in Russian-occupied Ukrainian province of Crimea<sup>17</sup>.

The anti and post-colonial context dominated debates on the right to self-determination through the 1980s. By 1991 that process was essentially complete. A watershed moment for further evolution of the term took place during the aftermath of the fall of the Soviet Union. Its collapse created a momentum for new types of independence movements around the globe, many of them of non-post-colonial origin. This new context engendered a wave of jurisprudence on behalf of the ICJ.

This time round, the Court assumed a much bolder position in terms of expanding the applicability of the term compared to its earlier stance. For example, in the Judgement on the Case Concerning East Timor in 1995, the ICJ asserted that right of self-determination enjoys an *erga omnes* position (binding for all) within the framework of international law:

“In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court”<sup>18</sup>.

The emphasis on the *erga omnes* character rather than on hedging prerequisites moved the Court toward the position of universal applicability of the term. Nine years later, in 2004, in its Advisory Opinion on Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, the ICJ once again stated that the right to self-determination has the *erga omnes* character:

“The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination”<sup>19</sup>.

It is worth mentioning that, according to the ICJ’s judgement from 1964 on Barcelona Traction, Light and Power Company Limited, *erga omnes* rights are a concern of all States, and, therefore, all States have a legal interest in protecting them<sup>20</sup>.

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17 Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland, The incorporation of Crimea into Russian Federation in light of international law, 14. 12. 2014, p. 7.

18 Case Concerning East Timor (Portugal v Australia), Judgment, 1995, the ICJ Rep. 90, p. 102.

19 Advisory Opinion of the ICJ on the case of Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, 2004, p. 155.

20 Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), Judgement, 1964, the ICJ, p. 33.

Confirming the *erga omnes* character of the right to self-determination bore important legal consequences, since it eliminated ambiguity on that aspect that might have been stemming from the above-mentioned Court's judgment on Namibia from 1966. The *erga omnes* character of the right to self-determination has been since repeated in publications of *Institut de Droit International*<sup>21</sup>. Importantly, the ICJ stopped short of declaring the right to self-determination as *ius cogens* – a peremptory norm from which no derogation is permitted. It follows then that the actualization of the right to self-determination is a concern of all the States (*erga omnes*), but there might exist circumstances that could render it invalid in specific cases.

The high point of ICJ's espousal of a universal interpretation of the term might have happened in 2010 when its Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo strengthened the right to self-determination by proclaiming that:

“State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence”<sup>22</sup>.

While, “no prohibition of declarations of independence” does not equate stating that all of them will end up being effective, it can be read as an encouragement of sorts. The ruling was invoked by the Crimean authorities in the region's declaration of independence in 2014<sup>23</sup> and by the Russian Federation during the speedy annexation that followed only five days later<sup>24</sup>. Those events led to critique of the ICJ taking the interpretation of the term as enabling secessionist movements<sup>25</sup>.

## 2. Criteria for being considered a people

A key aspect regarding the applicability of the right to self-determination is deciding what criteria a group of people has to meet in order to be considered “a people” and hence be eligible to exercise it. The initial anti-colonial context in the period following formation of the UN led to a specific interpretation in that regard, as people inhabiting non-self-governing territories were declaring independence within

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21 Resolution 2005/1 - Obligations *erga omnes* in International Law, Institut de Droit International, 2005, Art. 3.

22 Advisory Opinion of the ICJ on the case of accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2010, p. 79.

23 Ch. Walter and A. von Ungern-Sternberg and K. Abushov, *Self-Determination and Secession in International Law*, Oxford University Press, 2014, p. 297.

24 Address by President of the Russian Federation, Presidential Executive Office, 18 March 2014.

25 G. Matteo Vaccaro-Incisa, *Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law*, 15 *Santa Clara Journal of International Law*, p.132; R. Caplan and S. Wolff, *Some Implications of the Advisory Opinion for Resolution of the Serbia-Kosovo Conflict*, *The Law and Politics of The Kosovo Advisory Opinion*, p. 320.

colonial borders defined by European metropolises<sup>26</sup>. This formula lost its relevance toward the end of the twentieth century. Tensions around the status of Turks in Cyprus, Serbians in Bosnia and Russians in post-Soviet republics, to list a few cases, underscore the importance of establishing who can actually invoke the right to self-determination with all the consequences of it.

The legal definition of a *people* is vague and distributed across a number of sources of international law. It is a surprising state of affairs, regarding how crucial it is for determining, whether a certain collection of individuals is actually entitled to exercise one of the most fundamental rights in the system of international law. The ambiguous nature of a “people” has caused many disputes on eligibility of various aspiring communities aiming to establish a new State, especially after the 1960 when the narrow post-colonial definition began to lose its relevance.

International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty agreed-upon by UN General Assembly in December 1966 is one of early legal sources from that time, which dealt with the complexities of the definition of a “people” (its “twin” Covenant on Economic, Social and Cultural Rights also addresses the subject). Since its inception 50 years ago, it has grown in importance, having been signed so far by a total of 117 parties and thus serves as one of the pillars of the international law framework. The Covenant introduced a division between the terms “people” and “minority”. Article 1 of the ICCPR opens the Covenant by reinforcing the universal character of the people’s right to self-determination:

“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”<sup>27</sup>.

Later in the Covenant, article 27 addresses the subject of “minorities”, defining their rights in a much more limited way:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”<sup>28</sup>.

The distinction between a “people” and a “minority” is crucial. If a certain group of people is labelled as a minority but not as a people, its members are entitled to practice their collective culture and pursue individual protections of their identity-related rights. However, attaining the status as a subject of international law is

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26 J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa – Poznań 1990, p. 109.

27 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN GA, Res. 16 December 1966, A/RES/2200, Art. 1.

28 *Ibidem*, Art. 27.

beyond that scope. It means that if a group is categorized as a minority rather than as a people, it does not have a right to self-determination. This argument is strengthened by the *Travaux Préparatoires* of the ICCPR where such a conclusion is explicitly stated<sup>29</sup>. One example of a minority which failed to be acknowledged as a people is the Mikmaq tribe in Canada. Mikmaq are the aboriginal inhabitants of Nova Scotia and Quebec. In 1980, some of the tribe's members unsuccessfully sought to be recognized as a people by the UN Human Rights Committee in light of the Article 1 of the ICCPR. The Committee is in charge of overseeing the implementation of rights enshrined in the ICCPR among Covenant's State Parties<sup>30</sup>. The tribespeople were hoping that the UN HRC would recognize a number of rights relating to the legal status of Mikmaq culture and their political self-determination. The Committee refused to proceed with the case, citing inadmissibility of Mikmaq's claim due to the difference between a *people* and a *minority*, and they were included in the latter category<sup>31</sup>.

The Conference on Security and Co-Operation in Europe Final Act, signed in Helsinki in 1975 a political declaration of USA, Canada and European States, further addressed the topic of *minorities*, confirming their cultural and human rights:

“The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere”<sup>32</sup>.

The omission of political self-determination in that statement and its focus on personal rights within national legal frameworks, rather than collective ones can be perceived as a reinforcement of the distinction laid out in the ICCPR.

The issue grew even more pressing in the 1990s due to fragmentation of both the Soviet Union and Federal Republic of Yugoslavia. In 1990, recognizing this situation, the United Nations Educational, Scientific and Cultural Organization (UNESCO) organized a high-profile conference on the subject, gathering the best experts in the field. In the official conclusion of the event we read:

“The definition of ‘peoples’ is uncertain and the notion of peoples’ rights could lead to dangerous proliferation of claims, undermining settled borders, national sovereignty and international peace and security. (...)during the meeting the

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29 M. Aukerman, Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context, “Human Rights Quarterly”, Vol. 22, 2000, p. 1035.

30 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN GA, Res. 16 December 1966, A/RES/2200, Art. 40,41.

31 Communication of Human Rights Committee on The Mikmaq tribal society v Canada, UN Doc. A/39/40, No. 78/1980.

32 Conference On Security And Co-Operation In Europe Final Act, Conference On Security And Co-Operation In Europe, Helsinki August 1<sup>st</sup> 1975, p. VII.

following characteristics were amongst those mentioned as inherent in a description (but not a definition) of a 'people'(...):

1. a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life;
2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;
3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
4. the group must have institutions or other means of expressing its common characteristics and will for identity.

It is possible that, for different purposes of international law, different groups may be a 'people'. A key to understanding the meaning of 'people' in the context of the rights of peoples may be the clarification of the function protected by particular rights(...)”<sup>33</sup>.

While the statement is not a source of international law and does not deliver an exhaustive definition, it provides a list of criteria, which a group can be tested against. It also introduced, in the last part of the statement, an argument that classification as a “people” depends on the circumstances of each case. Additionally, distinguishing between claims and desirable objectives might mean that self-determination translates to different outcomes in various contexts, sometimes taking on a form of creating a new State but sometimes meaning autonomy within a federation or yet something else.

This framing, in which both the term “self-determination” and “a people” are relative and can be expressed in diverse ways, received recognition among an array of international law scholars. For instance, M. Perkowski and L. Antonowicz discussed various ways in which a people can express its right to self-determination, where establishing a new State is only one of many options<sup>34</sup>. Regarding the relative nature of the definition of “a people,” Władysław Czapliński, in his publication from 1998 on self-determination in Central and Eastern Europe, claimed that a ‘people’ should possess an objective and a subjective element in addition to living on

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33 International meeting of experts on further study of the concept of the rights of peoples, UNESCO, SHS- 89/CONF. 602/7, Paris, 22 February 1990, p. 22, 23.

34 M. Perkowski, *Samostanowienie narodów w prawie międzynarodowym*, Warszawa 2001, pp. 92–105; L. Antonowicz, *O zmianach mapy politycznej świata w XX w. (kilka uwag ze stanowiska prawa międzynarodowego)*, *Studia Iuridica Lublinensia* 19, Lublin 2013, p. 47.

a certain, defined piece of territory. The objective element can include such features as: a separate language, customs, history and culture. The subjective element is the people's collective desire to preserve their distinctive character and pursue political sovereignty, expressed in political discourse and majority opinions among members of the community. According to Professor Czapliński the definition of a "people" also entails that if a given people already has a sovereign State, the right to self-determination is consummated<sup>35</sup>. The last part is a critically important perspective gaining legal and scholarly momentum as presented in the paragraphs below. It also represents a hedging approach to the subject to self-determination since it potentially limits the number of new States that could potentially be established.

In the early 1990s, the Arbitration Commission of the Peace Conference on Yugoslavia, known widely as the Badinter Commission after its chairman Robert Badinter, further developed the definition of a people as part of its effort to stabilize the legal situation in the Western Balkans after the Yugoslavian war. The Commission's work developed a framework to apply the right to self-determination in a context different than decolonization, effectively re-conceptualizing the term for the post-Cold-War era. The establishment of the Commission was agreed on by representatives of the Council of Ministers of the European Economic Community and the Socialist Federal Republic of Yugoslavia during a meeting in Brussels on August 27, 1991. It was granted the task of defining new viable international borders, based on internal Yugoslavian borders and the situation on the ground. Although its conclusions are not a source of international law, they are often cited as a crucial point of reference regarding the right of self-determination<sup>36</sup>. In its final opinion the Badinter Commission stated:

"Norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics vis-à-vis the minorities on their territory. The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international convention as well as national and international guarantees"<sup>37</sup>.

It is important that the Badinter Commission referred to the Serbian population groups in Croatia and Bosnia-Herzegovina as minorities rather than a people. Since Serbians, as a people in general, already have their own Serbian-identity-based

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35 W. Czapliński, *Zmiany terytorialne w Europie Środkowo-Wschodniej i ich skutki międzynarodowoprawne*, Warsaw 1998, p. 51.

36 J. Vidmar, *Explaining The Legal Effects Of Recognition*, *The International and Comparative Law Quarterly* 61(2), p. 370; C. Navari, *Territoriality, self-determination and Crimea after Badinter*, *International Affairs (Royal Institute of International Affairs 1944-)* 90(6), p. 1299; M. Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, *20 Michigan Journal of International Law* 31(1998), p. 31.

37 Appendix: *Opinions of the Arbitration Committee of the Peace Conference on Yugoslavia*, Council of Ministers of the European Economic Community, 11 January 1992, Opinion No. 2.

sovereign State (back then known as the Socialist Federal Republic of Yugoslavia, now simply as Republic of Serbia), their right to self-determination had been successfully *consummated*. Members of Serbian minorities in surrounding countries, identifying with their compatriots in Serbia, had no right to create yet another State. The logic goes that their collective right of self-determination as a whole *people* ends when one State is successfully created. What Serbian communities in other countries are entitled to in this situation are cultural and human rights reserved for *minorities*, without a possibility of a secession.

### **3. The right to self-determination and the principle of territorial continuity**

Another important aspect of the right to self-determination is the tension between it and the principle of territorial continuity of existing States. To analyse that tension, let us first take a closer look at the requirement a people has to fulfil to establish a new country. A State is created when a people manages to establish a territorial organization, which meets the criteria for statehood laid out in Article 1 of the Montevideo Convention on the Rights and Duties of States. The Convention was developed at the forum of the Seventh International Conference of American States and signed on December 26 1933. It serves as a restatement of globally acknowledged customary international law. This means that norms included in it are applicable not just among the signatories but across the whole system of international law. This is reflected for example in the fact that the Badinter Commission invoked the Convention as a source of law in its First Opinion on the conflict in West Balkans<sup>38</sup>. The government of Switzerland was also citing the Convention as a source of international law<sup>39</sup>. Article 1 of the Convention lays out four requirements for State:

1. Permanent population;
2. Defined territory;
3. A government;
4. Capacity to enter into relations with the other States<sup>40</sup>. (This last requirement is sometimes perceived as a consequence of the previous three).

Besides the requirements listed in the Article 1, the Montevideo Convention says that the existence of a State is a matter of effective control. This was further

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38 Appendix: Opinions of the Arbitration Committee of the Peace Conference on Yugoslavia, Council of Ministers of the European Economic Community, 29 November 1991, Opinion No. 1.

39 Recognition of States and Governments, Switzerland's Ministry of Foreign Affairs, DFA, Directorate of International Law, 2005.

40 Montevideo Convention on the Rights and Duties of States, Seventh International Conference of American States, December 26 1933, Art. 1.

acknowledged by the doctrine, among others by M. Shaw and J. Crawford<sup>41</sup>. This seemingly neutral list of prerequisites created a tension between the right of self-determination of a people on a land already recognized by the international community as part of another State and inviolability of territorial continuity of existing States – another recognized principle of international law. At the textual level, if the list of requirements has been met, a new State becomes reality.

The principle of territorial integrity pertains to interactions between existing States while the right to self-determination can be invoked an entity different than a State – “a people”<sup>42</sup>. For this reason, it might appear that the right to self-determination can overcome the principle of territorial continuity. This state of legal uncertainty prompted the ICJ in 2010 to attempt to reconcile the tension in its Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo:

“During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for[:]  
[1.] the peoples of non-self-governing territories and  
[2.] peoples subject to [2.1] alien subjugation, [2.2] domination and [2.3] exploitation. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”<sup>43</sup>.

(Square brackets added by the author.)

The ruling takes stock of various paths a people can take to actualize its right to self-determination by establishing a new state. Importantly, the number of these paths is limited, implying that creating a new state is not available in a situation not included among the enumerated categories.

The first viable path listed by the Court – proclamation of independence by non-self-governing territories – has been practically exhausted at this point, with essentially no relevant territories of that kind left following the process of decolonization. As noted by L. Antonowicz, the international community has a collective duty to facilitate actualization of the right to self-determination by non-

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41 M. Shaw, *International Law*, Cambridge 2008, p. 202.; J. Crawford, *The Creation of States in International Law*, New York 2007, p. 97.

42 J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa – Poznań 1990, p. 243; P. Łaski, *Dezintegracja Związku Radzieckiego i Jugosławii w świetle prawa międzynarodowego*, “*Annales Universitatis Mariae Curie-Skłodowska*” 1992, p. 63.

43 Advisory Opinion of the ICJ on the case of accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2010, p. 79.

-self-governing territories<sup>44</sup>. It has delivered on this duty for the most part. Since the establishment of the UN, around 100 non-self-governing territories became sovereign States<sup>45</sup>. 17 territories still listed by the United Nations as “non-self-governing territories” are Gibraltar, Western Sahara, and 15 small islands, mostly, in the Caribbean and the Pacific Ocean<sup>46</sup>.

The second path – *peoples subject to alien subjugation, domination and exploitation*– is much more controversial. The theory states that a *people* is entitled to secede from a State to create another one, in case the previous one is committing massive atrocities against humanity. This view received recognition in the doctrine<sup>47</sup>. In case of Kosovo War, 8,692 Kosovar civilians and 3,631 insurgents were killed or went missing due to actions taken by the Serbian army. 90% of the Kosovo population was displaced<sup>48</sup>. These atrocities were deemed sufficient to make the Kosovar independence bid viable in the system of international law.

This theory was buttressed by various States around the world. Take Canada. Its Supreme Court, in its landmark ruling espoused by the government, declared that Quebecers, even if they were to be seen as a *people*, would not be allowed to create a State due to lack of atrocities committed against them<sup>49</sup>.

While Canada’s internal organ’s ruling is not a source of international law, it remains an indication of State practice, which can become a building block of customary legal rules if other conditions are met, too. While Canada’s Supreme Court rejected the independence bid, it validated a possibility of one, in case a government commits a sufficient number of atrocities. However, determining the necessary threshold of such atrocities proves difficult as not enough customary cases have accrued for its clear delineation. The one available case of Kosovo provides an important point of reference but a question remains open whether a smaller number of atrocities would be deemed sufficient, too.

## Conclusion

The scope of the applicability of the term “right to self-determination” has been evolving since the establishment of The United Nations depending on the geopolitical situation. The initial anti-colonial context created momentum at the UN

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44 L. Antonowicz, Zagadnienie podmiotowości prawa międzynarodowego, „Annales UMCS” 1998, Vol. XLV, p. 12.

45 L. Antonowicz, Rzecz o państwach i prawie międzynarodowym, Lublin 2012, s. 90.

46 List of Non-Self-Governing Territories by Region, United Nations, November 2020.

47 See F. Kirgis Jr., The Degrees of Self-determination in the United Nations Era, „American Journal or International Law” 1994, pp. 306–308; M. Perkowski, Samostanowienie narodów w prawie międzynarodowym, Warszawa 2001, p. 103

48 Kosovo Memory Book, 1998–2000.

49 Reference re Secession of Quebec 2 SCR 217, Supreme Court of Canada, 1998, p. 154.

General Assembly toward a universal and unconditional interpretation of the term. At the time, the ICJ served as a hedging influence, strengthening legal prohibition of creating States via external interference or intervention.

As the post-colonial drive lost its relevance and the collapse of the Soviet Union ushered in a slew of new countries, the focus shifted to the subject of the definition of “a people” vs. “a minority” and prerequisites necessary for the right to self-determination to supersede territorial continuity of an existing country. During this period, which spanned the 1990s and the 2000s, the ICJ proved to be in favor of an expanded version of the definition, which found a conclusion in its 2010 Advisory Opinion on the case of Kosovo.

The 2010s bore witness to a number of controversial cases of breakaway regions, including Catalonia, Scotland, Iraqi Kurdistan, and Crimea. The last one led to an effective secession and subsequent annexation by Russia. This dynamics drew the international community’s attention to the risks that the right to self-determination might pose to the stability of the international system. This new political context, combined with the relative rise of the clout of China in the UN system, might lead to a shift of the pendulum once again towards a narrower and more guarded interpretation of the right to self-determination.

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