Revisiting self-determination in light of recent changes, the cases of Catalonia and Kurdistan

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Abstract

Self-determination of peoples was long associated with decolonization, and perceived as a legal ground for claiming independence against oppression and illegal occupation. However, its main orientation has currently shifted from promoting decolonization to fostering secession.

The detractors of external self-determination find it irreconcilable with the principles of sovereignty and territorial integrity that require the consent of the mother country, as declarations of independence might alter the sovereign territory of the state and its delimited borders. International law remains unclear regarding the implementation of the right to external self-determination and whether it should cover secession.

In the absence of clear interpretative measures, states can refer to their constitutional law. The right to self-determination requires indeed the reference to international and national norms for a case by case assessment. Hence, this paper will analyze the current state of the right to self-determination to suggest some criteria for remedial secession.

These criteria will be applied in light of recent changes and events focusing on the current implementation of self-determination in the cases of Catalonia and Kurdistan, to conclude that the latter do not appear to be entitled to secede.

Keywords: self-determination, secession, Catalonia, Kurdistan, decolonization, declaration of independence.

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I. Introduction

"If independence is the decisive criterion of statehood, self-determination is a principle concerned with the right to be a state".[(1)] This creates an entitlement for certain groups to be independent or at least autonomous from a specified state. Such right belongs to "cohesive national groups"[(2)], and allows them to choose "a form of political organization and their relation to other groups."[(3)]

This raises many questions concerning the identification of such groups, in addition to their boundaries and limits in exercising the right to self-determination. The latter was even described as one of the concepts that "may not necessarily be legal principles as such but rather purely political or moral expressions."[(4)] They were considered though as "extremely persuasive within the international political order," but "would not necessarily be juridically effective".[(5)]

This can be true when self-determination is given very wide interpretation and implementation. In its stricto sensu, and as provided by the United Nations Charter,[(6)] the principle exists in the international legal order and entails binding obligations.[(7)] But to have such an effect, the right to self-determination must be clearly identified and its legal requirements well defined.

The United Nations practice shows that the right to self-determination was conceived to regulate decolonization.[(8)] The latter happened within a few years after the adoption of the United Nations Charter leading to self-government and promoting for independence.[(9)] This is the traditional vocation of self-determination and probably its raison d'être. As mentioned in several

(1) James Crawford, Brownlies' Principles of Public International Law, 8th edition, 2012, p.141.
(2) Ian Brownlie, Principles of Public International Law, seventh edition, 2008, p.580.
(3) Ibid.
(4) Malcolm N. Shaw, International Law, eighth edition, Cambridge, 2017, p.387.
(5) Ibid. Sir Ian Brownlie believes that until "recently the majority of Western jurists assumed or asserted that the principle [of self-determination] had no legal content, being an ill-defined concept of policy and morality." (Brownlie, op.cit., note 2).
(6) The United Nations Charter provides, in its article 1(2) that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".
(7) Brownlie, op.cit., note 2: "Since 1945 developments in the United Nations have changed the position, and Western jurists generally admit that self-determination is a legal principle." Cf. the division of opinion in the South West Africa cases (Preliminary objections), 1966, p.6.
(8) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) (1971) para. 52, Western Sahara (Advisory Opinion) (1975) paras 54–59.
(9) On this topic, cf. Antonio Cassese, International Law, second edition, 2005, p.328 and chapters XI and XII of the United Nations Charter.

international instruments, it can be perceived as an international law rule to be considered in light of texts and state practice related to the process of decolonization.[10] Nevertheless, gradually, the right to self-determination shifted from the context of decolonization towards the right to social and political participation and eventually to the controversial right to secession. This certainly draws the line between internal and external self-determination, but also between traditional and modern self-determination that can be described based on the current state of international law in theory and practice.

The implementation of self-determination in contemporary situations is not conceptually well-established. Many questions need to be answered concerning mainly the terms and conditions of the principle and whether a legal definition can be found and applied. The objective is not to track the development of the right to self-determination or to provide an exhaustive explanation of the concept, but to provide some legal tools to highlight the new criteria for its implementation, especially in the context of recent case studies.

The outcome is to provide some updates on the current interpretation of self-determination for practical purposes. Therefore, the theoretical development of the right to self-determination is the first focal point of the current study. The corresponding legal analytical outcome is highly interesting and practically useful as it will shed light on the implementation of the right to self-determination. This will be applied in the present paper respectively on the situation in Catalonia and in Kurdistan.

II. The evolving interpretation of the right to self-determination in the international legal order

The right to self-determination has constantly evolved to go beyond its traditional borders. The extension of its scope and beneficiaries was linked to its transition from the colonial to the post-colonial era (A), leading to the controversies regarding its invocation as a legal basis for secession (B).

A. From the colonial to the post-colonial era

The right to self-determination based on the Charter of the United Nations and its subsequent practice is undeniably a legally binding principle that forms an

(10) Such instruments are basically the United Nations charter, the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by General Assembly resolution 1514 (XV) of 14 December 1960, the International covenants on Human Rights and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations was adopted by the General Assembly on 24 October 1970 (resolution 26/25 (XXV). Cf. Malcolm N. Shaw, op.cit., note 4, p.388.

integral part of public international law.[11] However, as previously mentioned, such practice shows that it was tightly linked to the context of decolonization.[12] For example, the Declaration on the Granting of Independence to Colonial Countries and Peoples considered self-determination as "a part of the obligations stemming from the Charter… in the form of an authoritative interpretation of the Charter"[13].

The Declaration applied the right to self-determination to "bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned".[14] The inextricable link with self-determination accelerated decolonization and made possible the independence of non-self-governing entities such as Namibia and Western Sahara. It was invoked in the negotiations to settle other disputes as in Algeria or Vietnam.

Such cases and other numerous similar cases highlight the importance of this principle in the international judicial and political systems. In the first few decades after the establishment of the United Nations, most of these cases were related to decolonization. Things started to change gradually and the right to self-determination extended in two different ways:

1. Extension of the scope of the right to self-determination

The scope of protection provided by the right to self-determination has extended to cover different sets of entitlements. It is traditionally described as the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[15] This includes mainly the right to decide the form of state, "(a) the right to exist demographically and territorially as a people; (b) the right to territorial integrity; (c) the right to

(11) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, op.cit., note 8, paras 52-53, Western Sahara (Advisory Opinion), op.cit., note 8, paras 54-72; Case Concerning East Timor (Portugal v. Australia), ICJ, judgment of 30 June 1995, para 29; Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion), ICJ, 2004, paras 88, 118. Cf. Martin Dixon, Robert McCorquodale, Sarah Williams, Cases & Materials on International Law, sixth edition, 2016, p.229, 234.

(12) Supra, note 10.

(13) Ian Brownlie, op.cit., note 2, p.581. Cf. Malcolm N. Shaw, op.cit., note 4, p.200.

(14) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, op.cit., note 10, para 1: "The principle of equal rights and self-determination of peoples, (b).

(15) Declaration on the Granting of Independence to Colonial Countries and Peoples, op.cit., note 10, para 2; the International Covenant on Civil and Political Rights, article 1, the International Covenant on Economic, Social and Cultural Rights, article 1; General Comment 12, Human Rights Committee (A/39/40), 1994, pp. 142-143.

permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development".[16]

The entitlements derived from the right to self-determination usually differ upon the external and internal aspects of that right.[17] External self-determination or full self-determination "signifies that a group of people seeks to separate from the mother state in order to self-govern"[18]. "Internal self-determination is premised on the beliefs that individuals should have cultural, social, political, linguistic, and religious rights and that these rights need to be respected by the mother state".[19]

Internal self-determination was suggested to regulate cases outside the scope of decolonization considering its ties with the origins of the right to self-determination.[20] However, it was never expressly stated in the United Nations Charter, in the Friendly Relations Declaration or in any other instrument referring to self-determination that it is solely linked to decolonization. It was applied to the latter but it does not exclusively regulate such context.

As a legally binding concept, its existence is no more controversial. However, its scope and implementation terms are highly contested, especially outside the situations of decolonization.[21] The controversies around the circumstantial application of self-determination is linked in current situations to the inquiry on the holders of the right to self-determination that would lead to the identification of some deriving rights stemming from the basic distinction between internal and external self-determination. This inquiry shows that the sphere of people as holders of the right has extended considering the current state of the evolving concept of self-determination.

Article 1 of both international covenants refers in its third paragraph to non-self-governing and trust territories but not in a way to limit self-determination to these contexts. First, this article is not only applicable to the relations between states and their own people.[22] Second, according to its

(16) Catriona Drew, The East Timor Story: International Law on Trial, European Journal of International Law volume 12, (2001), p.663.
(17) Matthew Saul, The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right? Human Rights Law Review, 2011, p.614.
(18) Nora Y.S. Ali, For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination, Cornell International Law Journal, 2014, p.432.
(19) Ibid., p.6.
(20) The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right? op.cit., note 17, p.615.
(21) Ibid., pp.610-612; James Crawford, op.cit., note 1, p.142.
(22) General Comment 12, op.cit., note 15; Cf. Cases & Materials on International Law, op.cit., note 11, p.228.

travaux préparatoires and the discussions, the right to self-determination is a universal right that concerns all countries and territories regardless of their status, whether independent, trust territories, non-autonomous or under the dependence of another state.

This covers in the same time external and internal self-determination. The inclusive approach prevails over the limitation of the right to non-self-governing people, especially to people in colonies or trust territories. The reference to non-self-governing and trust territories in the third paragraph aims to provide reinforced obligations for the states administering such territories.(23)

2. Extension of the holders of the right to self-determination

The association of self-determination with decolonization in light of the Charter and the following practice of the United Nations led to the application of the latter to "the inhabitants of non-independent territories"(24), such as non-self-governing people including national liberation movements and people in trust territories.(25) This initial categorization of people was extended to include the category of "entities sui generis"(26) referring to those "which maintain some sort of existence on the international legal plane in spite of their anomalous character"(27). Indeed, the traditional concept of people has shifted over the years with the further detachment between self-determination and decolonization.

Indigenous people were given the right to self-determination, minorities as well, in addition to some groups that could be considered as entities sui generis following the above-mentioned definition.(28) Moreover, the right to self-determination should be understood within the scope of human rights since it was recognized by both covenants. This provides further protection to this principle and increases the categories of its possible holders.(29) In some instances, in recent cases, the right to self-determination was recognized to some people even without providing any additional analysis of the components or special features of a group for their qualification as holders of the right to

(23) Le Pacte international relatif aux droits civils et politiques, Commentaire article par article, under the supervision of Emmanuel Decaux, 2011, p.94.
(24) Cf. Malcolm N. Shaw, op.cit., note 4, p.388.
(25) United Nations Charter, chapter XI, XII; Antonio Cassese, op.cit., note 9, p.328.
(26) James Crawford, op.cit., note 1, p.123.
(27) Ibid.
(28) Cf. above, note 26.
(29) On the links with human rights, cf. Cases & Materials on International Law, op.cit., note 11, p.229.

self-determination.[30]

This is surely among the consequences of the growing separation between self-determination and decolonization. However, there is still a need for the identification of definite basic requirements to qualify groups as peoples. Some characteristics were provided by the UNESCO in 1990, such as the common features shared by the members of the group including, inter alia, language, religion, culture, in addition to the condition of a certain size and to the will to be identified as a group, and to have some institutions or other means to express the common characteristics of the group.[31]

A “two-part” test was also suggested to assess a group of individuals to differentiate between minority groups and the concept of people as holders of the right to self-determination. It has an objective component focusing on the shared characteristics, and a subjective component taking into consideration the self-perception of such groups, i.e., “a shared sense of values”, “a common goal”, and the extent to which the group “can form a viable political entity.”[32]

As a result, the basic requirement of any group wishing to be considered as “people” in the context of the right to self-determination is that the group should share at least some common values or characteristics; it should be a “cohesive national”[33] group.

More often the question is not about who is considered as people, but about the rights that they are entitled to, for example the right to participate in a referendum. The answer is provided on a case by case basis, and is not fully delivered by international law. It relies as well on the national constitutional law, in compliance with the international obligations of the concerned state and in light of the features of the relevant group. Difference must be made for instance between indigenous groups, minority groups, people under alien subjugation, national liberation movements or other entities sui generis. Each would be subjected to a specific legal regime leading to identified rights deriving from the right to self-determination.

(30) Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, op.cit., note 11.
(31) Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, 1990.
(32) For Better or For Worse? The Forced Marriage of and Self-Determination, op.cit., note 18, p.431.
(33) Ian Brownlie, op.cit., note 2, p.580.

B. Towards a right to secession?

As showed above, the scope of the right to self-determination is not clearly defined. This legal gap should not be interpreted in any way that would limit the exercise of that right. Article 1 of the international covenants did not specify the practical modalities or conditions to exercise it. The purpose is to avoid any limitation to the forms of expression in this regard and not to restrain any potentialities in the future. This was interpreted as an evidence of a very general and open formulation that should be kept despite the lack of criteria which guide the implementation of self-determination in concrete situations.(34) Accordingly, self-determination should be interpreted broadly without being limited to a specified context, to a restrained set of entitlements or solely to the implementation on the internal level. Does this mean that self-determination can be extended to cover cases of secession?

This ambiguous question is far from being settled. Controversies arise from the conflict between self-determination and the concepts of territorial integrity(35) and uti possedetis(36) both deriving from the principle of sovereignty.(37)The Friendly Relations Declaration does not allow any interpretation of self-determination in a way that would affect the territorial integrity "or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."(38) This statement has two consequences in terms of the right to self-determination:

First, territorial integrity is indeed an obstacle to the application of external self-determination, including situations of secession, since the latter would affect the territorial unity of the state. This goes against the territorial integrity especially if applied in conjunction with the principle of uti possedetis which prevents any change to colonial frontiers.(39)

(34) Pacte, commentaire, p.93.
(35) United Nations Charter, article 2 paragraph 4.
(36) Frontier Dispute Case (Burkina Faso/Republic of Mali) (1986), para 25 states: "The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples."
(37) United Nations Charter, article 2 paragraph 1.
(38) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, op.cit., note 10, Principle V.
(39) Frontier Dispute Case, op.cit., note 37 + The essential requirement of stability in order to survive,

Second, a contrario, in case of non-compliance with the provided principles, territorial integrity and political unity of the concerned state are no longer an obstacle to the full exercise of the right to self-determination. This seems as a possible way to reconcile self-determination with state sovereignty and its corollaries territorial integrity and uti possedetis.

The selected approach can solve the conflict between legal principles that are all found in the same legal instrument, the United Nations Charter. Even if these principles are higher than any other principles outside the Charter[40], it is hard to establish any hierarchy between them. This is true knowing that the jus cogens character of self-determination is not well-established and that the resulting erga omnes obligations were all recognized in times of colonization or occupation.[41] Therefore, and because "of the basic attitude of most States towards territorial integrity and national sovereignty, the UN has been or is willing to foster internal self-determination in sovereign States only where it was to bring down governments practicing an apartheid policy"[42]. Can this policy and other legal violations justify external self-determination and allow secession?

For Malcolm Shaw, there "is no international law of secession held by groups within independent states. Similarly, there is no international law duty upon such groups not to secede."[43] However, he continues to state that only in case of egregious violations of international law, secession can be allowed.[44] The same was provided by other legal scholars who believe that secession is allowed in very exceptional circumstances, when it is justified by the breaches of the basic principles of international law, such as human rights violations including the breaches of the right of people to internal self-determination.[45]

to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

(40) United Charter, article 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

(41) Case Concerning East Timor, op.cit., note 11, Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, op.cit., note 11. For a complete study of the possible "scenarios" for the potential jus cogens character of the right to self-determination and its resulting erga omnes obligations, cf. The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right? op.cit., note 17, pp.609-644.

(42) Antonio Cassese, op.cit., note 9, p.329.

(43) Malcolm N. Shaw, op.cit., note 4, p.389.

(44) Ibid.

(45) Evan M. Brewer, To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion, Vanderbilt Journal of Transnational =

In any event, one cannot deny the growth of the current will to widen the boundaries of self-determination. Some evidence is reflected for example in the recent developments of previous cases that arose in the colonization era and that are not necessarily related to secession, such as the case of Western Sahara.

Western Sahara still does not have its own state even though the ICJ held that neither Morocco nor the Mauritanian entity had any sovereign rights over the territory of Western Sahara at the time of colonization, although some legal ties did exist.(46) Some updates are worth mentioning in this regard. The Court of Justice of the European Union has ruled that a long-standing fisheries agreement between Morocco and the EU does not apply to the waters off the coast of Western Sahara.(47)

The ruling issued by the European Court of Justice (ECJ) on February 27 is the second court's decision in less than a week to go against Morocco, following one by the South African High Court over a disputed cargo of Western Saharan phosphate.(48) These developments surely reflect the new tendency towards the expansion of self-determination which is favorable to any potential admission of secession. Other developments support the same extensive position, but while addressing more directly the situations of external self-determination even in case of secession.

In the Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, the ICJ found that it was not necessary to resolve the questions on secession in the present case. It further highlighted the evolution of the right to self-determination and stated the following:

"Whether, outside the context of non-self-governing territories and peoples

Law, January 2012, p.252; Steven R. Fisher, Towards «Never Again»: Searching for a Right to Remedial Secession under Extant International Law, Buffalo Human Rights Law Review, p. 280-281; Glen Anderson, A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession? Vanderbilt Journal of Transnational Law, November 2016, p.1253-1254; Andres Saenz de Santa, Gregorio Garzon Clariana, Araceli Mangas Martin, Xavier Pons Rafols, Antonio Remiro Brotons and Rafael Arenas Garcia, Statement on the Lack of Foundation in International Law of the Referendum of Independence in Catalonia, REDI, volume 70, 2018, p.297-298.

(46) Western Sahara (Advisory Opinion), op.cit., note 8.

(47) Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs, Case C-266/16, Court of Justice of the European Union, Grand Chamber, 27 February 2018.

(48) The Sahrawi Arab Democratic Republic and the Polisario Front v. NM Shipping SA and al., Case No. 1487/2017, High Court of South Africa, 23 February 2018.

subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question”.[49]

The Court concluded that general “international law contains no applicable prohibition of declarations of independence”. The “declaration of independence of 17 February 2008 did not violate general international law”.[50] By reaching this conclusion, the Court seemed to admit the possibility of secession. However, it did not wish to discuss and determine its exact terms and conditions. The latter were identified by the Supreme Court of Quebec that accepted the possibility of applying the principle of self-determination to secession if the following conditions are met: the fulfillment of the characteristics of “peoples” within the meaning of self-determination; the people should be in the situation of occupation or “subject to alien subjugation, domination or exploitation”[51] or “denied any meaningful exercise of their right to self-determination”[52]. Otherwise, if these conditions are not met, “peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of selfdetermination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states”.[53]

Some scholars added further requirements such as the lack of other effective remedies in national or international law [54] that can be maintained as a valid basis for the concept of remedial secession, which is the only form of secession to be allowed outside the context of colonization or occupation. Others suggested some theories like great powers and earned sovereignty[55] or provided a complete model for applying remedial secession to current or

(49) Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, (Advisory Opinion), ICJ, 22 July 2010, para 82.

(50) Ibid., para 83.

(51) Reference Re Secession of Quebec, 2 SCR 217, Canadian Supreme Court, 20 August 1998, (3) Question 2.

(52) Ibid.

(53) Ibid.

(54) Christopher J. Borgen, Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition, AJIL insights, Volume 12, Issue 2, 29 February 2008.

(55) For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination, op.cit., note 18, p.434-437, 440-442.

emerging situations.[56] Another convincing condition provides that secession cannot be lawful when it infringes some fundamental norms of international law, such as the prohibition of the use of force like in the case of Northern Cyprus.[57]

Consequently, based on the requirements provided by case-law and legal doctrine, secession is applied in the following terms:

- Secession is lawful for groups that constitute a "people" within the meaning of the law of self-determination.
- Secession is prohibited under international law if it occurs through the breach of another fundamental norm of international law, such as the prohibition on the use of force.
- Secession is authorized only when the concerned "people" are "governed unequally or subjected to systematic oppression or egregious violations"[58] of their basic rights, and when they are "denied the internal exercise of their right to self-determination".[59]
- Secession is allowed only when there are no other effective remedies in national or international law.
- It is a matter for the relevant domestic law in the absence of egregious violations of international law.

These terms will be followed to assess whether Catalonia and Kurdistan are entitled for external self-determination as per the applicable rules of remedial secession.

(56) To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion, op.cit., note 46, p.279: "The proposed, remedial right to secession permits secession only where necessary to realize a people's right to self-determination without infringing that of others. Under this right, an entity could exercise the right to self-determination externally where it (1) constitutes a "people" within the meaning of the law of self-determination, (2) is governed unequally or subjected to systematic oppression or egregious violations of human or humanitarian rights, (3) is denied the internal exercise of its right to self-determination, (4) freely chooses to exercise this right externally, and (5) respects jus cogens norms and the rights of other minorities within its general territory and has the capacity to ensure such respect in the future. The remedial right would vest only when all conditions are met."

(57) Milena Sterio, Self-Determination and Secession under International Law: The Cases of Kurdistan and Catalonia, AJIL Insights, Volume 22, Issue 1, 5 January 2018.

(58) To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion, op.cit., note 57.

(59) Ibid.

III. The evolving implementation of the right to self-determination in the case of Catalonia

The suggested legal requirements solve the conflict between self-determination and territorial integrity only when they overlap with the specific elements of the case. Indeed, "the key to reconciling the right to territorial sovereignty and self-determination is through an ad hoc, fact-intensive analysis".[(60)] In the situation of Catalonia, the conditions of remedial secession must be met to declare the legality of its independence. A look at the relevant general background and the chronological order of events preceding the declaration of independence would reflect some useful elements that are significant for the current assessment. Therefore, such assessment shall begin with a brief overview of the constitutional settlement of Catalonia.

Then, the above-mentioned four criteria of secession will be respectively assessed to demonstrate that Catalans qualify as "people" within the meaning of self-determination, that they did not breach any fundamental norms when declaring their independence, that they were not oppressed by Spain, that they had other effective remedies to solve their disputes with Spain, and that national laws do not grant them the right to secession.

A. Overview of the constitutional settlement of Catalonia

A system of devolution was established in Catalonia starting from 1980 with the first elections of the new regional parliament.[(61)] The latter gained more powers with the increase of autonomous powers granted to Catalonia. In fact, after Franco's death, a democratic evolution has started [(62)] with the adoption of a new Constitution in 1978 recognizing the existence of different national communities.[(63)] The autonomous status increased with the adoption of relevant statutes covering all Spain including Catalonia, and higher degrees of decentralization were reached due to the adoption of more extensive autonomy arrangements.[(64)]

(60) For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination, op.cit., note 18, p.444.
(61) Catalonia profile-timeline, BBC News, 14 May 2018, www.bbc.com/news/world-europe-20345073, last accessed 24 July 2018.
(62) Oriol Oleart, From Legal Compilations to Legal Codes: A Catalan Legal History Approach (18th-20th Centuries), International Journal of Legal Information, 2014, p.20-21.
(63) Catalonia profile-timeline, op.cit., note 62.
(64) Jorge Martinez Paoletti, Rights and Duties of Minorities in a Context of Post-Colonial Self-Determination: Basques and Catalans in Contemporary Spain, Buffalo Human Rights Law Review, Issue 15, 2009, pp.159- 181; Marta Garcia Barcia, Catalonia: The New European State? ILSA Journal of International & Comparative Law, Volume 20, Issue 3, p.159-160.

The 2006 Statute conferred more powers to Catalonia and described it as a "nation". However, Spain's Constitutional Court restrained the interpretation and implementation of many provisions of the Statute including the qualification of Catalonia as a "nation".[65] Between 2009 and 2011, Catalans held many informal votes of independence. In 2010 and 2012, regional elections took place; they were won by supporters of independence, respectively the center-right nationalists and the left-wing republican party. Many pro-independence moves followed, until October 2017 where the independence referendum was held, leading to the declaration of independence by the Catalan government.[66]

B. Identification of Catalans as people within the meaning of self-determination

In the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ held that as "regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue."[67] Therefore, according to the Court, it is not always mandatory to determine a group of people's shared aspects to determine whether they should be considered "people" as holders of the right to self-determination when the outcome of the assessment is clear or when the other party already admits such qualification, like the case of Palestinians for example.[68]

In any event, even if the identification of Catalans as people is not controversial, one should highlight that they share common characteristics, such as a common language, a distinct history and a separate identity. The Catalonian people enjoyed approximately 700 years of independence before their gradual incorporation into the new Spanish State. The remains of the Catalonian kingdom lasted till the eighteenth century. Afterwards, Catalonia enjoyed great autonomy until the civil war where Catalan people were suppressed by Gen Franco. They restored much of their autonomy after the war under the

(65) Cf. Oriol Oleart, From Legal Compilations to Legal Codes: A Catalan Legal History Approach (18th-20th Centuries), op.cit., note 63, pp.1-21; Josep Ma. Reniu, Could Catalonia Become Independent? International Journal of Legal Information, Volume 42, Issue 1, Spring 2014, pp.67-75; Jorge Martinez Paoletti, Rights and Duties of Minorities in a Context of Post-Colonial Self-Determination: Basques and Catalans in Contemporary Spain, op.cit., note 65, pp.399-421.

(66) Catalonia profile-timeline, op.cit., note 62.

(67) Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, op.cit., note 11, para.118.

(68) In this situation, the Court relied on the fact that the existence of Palestinian people was "recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister." (Ibid.)

1978 constitution and flourished as part of the new Spanish state and were granted an increased autonomous status as described above.[69]

Therefore, Catalans are considered as people considering their common characteristics and the great autonomy granted to them by the Spanish Constitution and by the 2006 Statute. Nevertheless, such qualification is only the first step towards the enjoyment of the right to self-determination. It was even said that the classification "as a "people" does not demonstrate the right to exercise secession; rather, it triggers the right to internal self-determination."[70] Hence, other elements remain to be identified to satisfy the criteria of secession.

C. No breaches of fundamental norms by Catalonian people

Catalans attempted to obtain independence through constitutional means on many occasions. A vote for independence was first initiated in 2014 but it was outlawed by the Constitutional Court. Consequently, an unofficial vote was arranged. Other attempts for greater autonomy followed in 2015 when separatists won the regional elections, but they were faced with stronger powers granted to the Spanish Constitutional Court. On the first of October 2017, Catalan authorities unilaterally arranged a referendum despite a suspension order from the Constitutional Court. Over 90 percent of voters said yes for Catalonia to become an independent republic according to the organizers.[71]

This clearly shows that Catalans did not use force or take any measure that is inconsistent with the fundamental rules of public international law. Rather, they followed peaceful means to seek secession. Moreover, pursuant to the Kosovo advisory opinion, declarations of independence are not illegal.[72] Therefore, Catalonia complied with the basic international legal rules, even though as an entity, it does not have any obligations under international law until independence, if it is eventually attained.[73]

(69) Cf. above, notes 62-66.

(70) For Better or For Worse? The Forced Marriage of Sovereignty and Self-Determination, op.cit., note 18, p.431.

(71) Sabrina Ragone, The Catalan Referendum on Independence: A Constitutional Conundrum, AJIL insights, Issue 16, Volume 21, December 20, 2017.

(72) Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, op.cit., note 50, para 83.

(73) This is pursuant to the rules of attribution in international law. Cf. Responsibility of States for Internationally Wrongful Acts, International Law Commission, adopted by the United Nations General Assembly, Fifty-sixth session, Resolution 56/83, Annex, 12 December 2001, articles 4, 10.

D. Lack of breaches of the basic rights of Catalans

The modern history of Spain reveals the tension between Catalonia and Spain. The reasons are mainly economic resulting from the crisis that led to health and education cutbacks among others, increase of taxes and some flaws in the wealth distribution system in Spain.(74) This tension cannot amount to a breach of the Catalans' basic rights. The same can be said about the measures that limited the autonomy of Catalonia. As mentioned before, it was considered as a "nation" and granted autonomous powers to preserve its identity.(75) However, things changed and Spain took restraining measures following the 2017 referendum.

As a reaction to the declaration of independence, Spain invoked article 155 of the Constitution allowing it to take all measures necessary to compel the autonomous community to fulfil its obligations and protect the general interest of the State. Accordingly, Spain removed the president of Catalonia and his government from office and dissolved the parliament. New elections took place in December 2017. The initial claims of Catalans were financial and fiscal, however, lack of dialogue and tensions transformed those demands into identity claims that need to be discussed for a political solution.(76) In any event, this conflict does not amount to a concrete breach of the basic rights of Catalans that would allow them to seek secession. The threshold is very high in this regard knowing that there should be a meaningful denial of their rights,(77) which is not the case even when it comes to Spain's reaction to the referendum.

E. Availability of other effective remedies

The financial and identity claims of Catalans might be valid, but they do not allow them to seek secession, knowing that other remedies are still possible. Spain often uses negotiations and judicial remedies before the Constitutional Court. The latter has played a fundamental role in settling disputes with autonomous communities.(78) However, its recent limitative position towards the 2006 statute, could be controversial and would raise the concerns of Catalans. Nevertheless, judicial remedies are not fully exhausted, neither are negotiations.

(74) Catalonia: The New European State? op.cit., note 65, p.401.
(75) Cf. above, notes 62-66.
(76) The Catalan Referendum on Independence: A Constitutional Conundrum, op.cit., note 72.
(77) Cf. above, note 53.
(78) Rights and Duties of Minorities in a Context of Post-Colonial Self-Determination: Basques and Catalans in Contemporary Spain, op.cit., note 65, p.162-163.

F. Lack of national legal basis for secession in Catalonia

Considering the lack of violations of international law by Spain, domestic laws apply. Preliminary part section 2 of the Spanish Constitution states:

"The constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."

This clearly shows that secession is not allowed in Spanish Constitutional law since it would certainly affect the unity of the State. Moreover, the capacity to hold referenda is regulated by Article 92 of the Constitution which provides that they must be called by the King on a proposal by the President of the government after previous authorization by the Congress with regards to "political decisions of special importance" provided that it involves "all citizens".(79) Obviously, these conditions were not met in Catalonia; therefore, national law does not authorize Catalonia's declaration of independence.

Accordingly, and pursuant to the listed requirements, the following observations can be made:

- Catalans constitute "people"; they have the right to self-determination.
- They are not currently colonized.
- Catalans have the right to internal self-determination.
- They do not have the right for external self-determination in international law since they are not subjected to oppression or subjugation.
- Catalans' right to self-determination is respected by Spain despite the recent limitations that happened after the referendum.
- Based on Spain's international and national laws, Catalans have the right to internal self-determination.
- Catalans have not been oppressed by Spain and have enjoyed meaningful internal self-determination rights.
- If Spain does not respect Catalan autonomy in the future, or if the internal self-determination is limited by Spain, one can start to talk about external self-determination.
- For the time being, international law does not seem to authorize Catalans to secede.

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(79) Spanish Constitution, passed by the Cortes Generales in plenary meetings of the congress of deputies and the senate held on October 31, 1978, article 92; cf. Catalonia: The New European State? op.cit, note 65, p.405-407.

- The issue of proposed Catalan independence should be governed by domestic law and political means.

IV. The evolving implementation of the right to self-determination in the case of Kurdistan

Catalonia and Kurdistan are different on so many levels, starting from the geographical location and features, to the historical and political backgrounds and the social and economic characteristics. Yet, they share some common elements that would lead to quite similar conclusions concerning their right to self-determination. The Kurdish community was also repressed and granted autonomy in different intervals in the past.

However, the repressive anti-Kurds measures were not limited to general restraints of some basic rights including cultural alienation and political oppression. Such measures amounted to the forced displacement of Kurds, the burn of number of their villages and even to the targeted killing of civilians using chemical weapons, under the rule of Saddam Hussein.(80)

One should highlight that the presence of Kurdistan in the Middle East rendered their history and their human situation worse than other oppressed groups. "It is in this region where some of the most egregious crimes against the dignity of an ethnic people have been committed."(81) Even though this aspect of the Kurdish history must be highlighted and taken into consideration, it is not sufficient to authorize Kurds to secede. The same above-mentioned requirements should be met in the current situation of Kurdistan following a brief overview of the constitutional settlements of Kurdistan following some relevant background information.

A. General background information about Kurdistan

25 to 35 million Kurds are currently present in Turkey, Syria, Iraq, Iran and Armenia. They live mostly in mountain regions and form a "distinctive community" with regards to race, culture and language, as non-Arabs, since they are indigenous groups coming mainly from Mesopotamia. Kurds are predominantly Sunni Muslims;(82) they are "the largest ethnonational group

(80) Iraqi Kurdistan profile, BBC news, 25 April 2018, www.bbc.com/news/world-middle-east-28147623, accessed 13 June 2018; Craig Douglas Albert, Dignity Takings and Dignity Restoration No Place to Call Home: The Iraqi Kurds Under the Ba'ath, Saddam Hussein, And Isis, Chicago-Kent Law Review, Volume 92, Issue 3, 2018, p.817.

(81) Dignity Takings and Dignity Restoration No Place to Call Home: The Iraqi Kurds Under the Ba›ath, Saddam Hussein, And Isis, previous note.

(82) Who are the Kurds? BBC news, 31 October 2017, www.bbc.com/news/world-middle-east-29702440, accessed 25 July 2018.

without their own state".[83] In the beginning of the 20th century, Kurds started to dream of such state, Kurdistan. The 1920 Treaty of Sevres recognized the status of Kurds in the region by providing for a Kurdish state. However, they were never given a concrete geographical entity, especially when the Treaty of Lausanne setting the boundaries of modern Turkey, did not mention a Kurdish state.[84] In Northern Iraq, Kurds have greater autonomy[85] and are closer to fulfilling their wish of having their own state. They are estimated to be more than 6 million people, which is between 17% and 20% of the population in the country.[86] Yet, they are very vulnerable because of the instability in Iraq and in the region in general,[87] which affects their expectation of complete recognition.

B. The identification of Kurds as "people"

Kurds are "people" within the meaning of self-determination. They surely share common language, history, religion and traditions. Their legal qualification is no longer an issue since the 2005 Iraqi Constitution considered Kurdistan as an autonomous region in the north of the country, among the Regions and Governorates in Iraq declared as a federalist State.[88] The Constitution recognized the Kurdistan Regional Government as well and all the laws it passed since 1992.

C. No breaches of fundamental norms by the Kurds

Just like Catalans, when Kurds declared their independence in Iraq, they did not use force or breach any fundamental legal norms.[89] However, in the past, the Kurds of Iraq launched a series of rebellions in the past against British colonial rule and subsequent Iraqi rule. All these rebellions were brutally oppressed especially under Saddam Hussein with massive killings and massacres of Kurds using chemical weapons.[90] Moreover, Kurds have their own armed forces called "Peshmerga" that were involved in many armed conflicts, such as recently against ISIS. This is a main difference with Catalonia where the struggle for independence took mostly the form of a political movement.

Catalan nationalists endeavored to obtain greater autonomy within the existing

(83) Iraqi Kurdistan profile, op.cit., note 81.
(84) Who are the Kurds? op.cit., note 83.
(85) Cf. below, notes 86-88.
(86) Iraqi Kurdistan profile, op.cit., note 81.
(87) Cf. below, paragraphs C and D.
(88) Constitution of the Republic of Iraq, 15 October 2005, article 113.
(89) The legal basis applied for Catalonia is relevant in this context, see above notes 67-68.
(90) Iraqi Kurdistan profile, op.cit., note 81.

legal and political framework, especially starting from the nineteenth century.[91] Kurds did not always do the same in the past; nevertheless, the context in Iraq is so much different, considering that Kurdistan is situated in a boiling region where political and armed tensions are always existent.

Furthermore, the oppression of Kurds mainly in the Ba'ath regime cannot be compared to the oppression of Catalans. And the use of force by the Peshmerga armed forces allowed Kurdish leaders to "consolidate their hold on the north after Iraqi forces withdrew, and provided the basis for the 2005 constitutional settlement.[92] In any event, focus should be on the current struggle for independence where Kurds did not use force to secede. It was based on an independence referendum for Iraqi Kurdistan held on 25 September 2017.

D. Lack of current breaches of the basic rights of Kurds by the Iraqi government

One must be very careful when addressing the rights of Kurds. Their history shows that they were often repressed by many sides in different times. As previously stated, they were the victims of brutal repressive measures taken by Saddam Hussein. Moreover, they suffered like other communities in Iraq from the violence of ISIS, mainly in 2014, when the unity of Iraq was under threat. At that stage, the tumultuous situation in Iraq was beneficial for secession since the central authority was no longer capable of protecting the existing communities.

But this lack of protection does not only apply to Kurds in Iraq but to other components of the Iraqi population. Some would say that this could be a legal basis for the independence of Kurds by considering the intentional non-protection of Kurds against ISIS' incursion as a "dignity taking".[93]

However, this remains very controversial knowing that it has to be proven, when such incursion, followed by a change of leadership in the Iraqi government led to improved relations with Iraqi Kurdistan. The two sides agreed to work together against the common enemy of ISIS, and plans for an independence referendum were postponed until 2017 when the vote took place,[94] and this is when the attempt for secession must be assessed.

(91) Catalonia: The New European State? op.cit., note 65, p.400-401.
(92) Iraqi Kurdistan profile, op.cit., note 81.
(93) Dignity Takings and Dignity Restoration No Place to Call Home: The Iraqi Kurds Under the Ba'ath, Saddam Hussein, And Isis, op.cit., note 81, p.833.
(94) Iraqi Kurdistan profile, op.cit., note 81.

Accordingly, it is not possible to assert that the current government of Iraq breached the basic rights of Kurds. Tensions between the Kurds and the Iraqi government do not reach the threshold of oppression despite the military clash that occurred in 2012 leading to the killing of one person. The conditions set above require a very high standard of occupation or dominion, or the violations of the basic rights reaching the level of apartheid or preventing the enjoyment of the right to internal self-determination.[95] This does not apply to the current situation of Kurds in Iraq, and thus does not allow them to secede or to achieve "earned sovereignty" as suggested by some authors.[96]

E. Availability of other effective remedies

After the referendum, the Iraqi government took several measures restraining Kurdistan's autonomy, such as recapturing territory held by the Kurds outside their autonomous region, taking control of important oilfields and imposing an air blockade that lasted for six months.[97] A considerable source of initial tensions between the parties was article 112 of the Iraqi Constitution about the management of oil and gas extractions, which provides that such management should be under the responsibility of the federal government together with the "producing governorates and regional governments" for the "present fields" and for setting related policies.[98]

However, the exact modalities for sharing powers was not identified, since Iraq never adopted a national law on oil and gas. This gap led to further tensions between the concerned parties in addition to the general economic problems faced by the Kurds in Iraq. These issues could be solved through negotiations as alternative means to secession. Indeed, those negotiations were successful since an agreement was reached in March 2018 "capping months of back-room negotiations aimed at alleviating the political fallout and the Kurds' economic hardships and ultimately at bringing Iraq's Kurdish region back into the fold."[99] Therefore, remedies other than secession are still available in the present case.

(95) Cf. above, notes 52, 59.
(96) Cf. Mathew Packard, Earning independence in Iraqi Kurdistan, Temple International and Comparative Law Journal, Issue 27, Spring 2013, p.190-205; Philip S. Hadji, The Case for Kurdish Statehood in Iraq, Case Western Reserve Journal of International Law, Volume 41, Issue 2, 2009, p.527-536.
(97) Iraqi Kurdistan profile, op.cit., note 81.
(98) Constitution of the Republic of Iraq, op.cit., note 89, article 112.
(99) Margaret Coker, After Months of Acrimony, Baghdad Strikes Deal With Kurds, the New York Times, 22 March 2018, accessed 13 June 2018.

F. Lack of national legal basis for secession in Kurdistan

Considering the lack of violations of international law by the government of Iraq when the referendum took place, domestic laws apply. In fact, as mentioned above, Kurdistan is recognized by the Iraqi Constitution as an autonomous region. However, article 1 states that the "Republic of Iraq is a single, independent federal state with full sovereignty (…) This Constitution is the guarantor of its unity". This provision seems to prevent any acts of secession because this would certainly affect this unity.

Moreover, the Constitution allows regional referenda for many purposes such as in the case of a constitutional change that would the powers of the regions to the advantage of the federal government. Nevertheless, there is a sort of referendum to be held in Kirkuk and other "disputed regions" of Iraq specified by article 140 which states:

"The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007."(100)

This provision does not explicitly allow independence or secession after that deadline. It does not authorize the regions to conduct such a referendum. This should only be used after the "normalization" and "census" in the relevant regions. If article 140 is read together with other articles of the Constitution such as article 1, "the free will of the citizens" should not be interpreted as allowing secession.

Accordingly, and pursuant to the listed requirements, the following observations can be made:

- Considering the historical background and the common shared features, Kurds constitute people and qualify as holders of the right to self-determination.
- They were denied internal self-determination under the Saddam Hussein regime where they were "governed unequally (…) [and] subjected to systematic oppression (…) [and] egregious violations"(101)) of their

(100) Constitution of the Republic of Iraq, op.cit., note 89, article 140.
(101) Cf. above, note 57.

basic rights.

- During that period, they would be fully entitled to secession.
- The same cannot be said about the current situation of Kurds in Iraq.
- The standard for remedial secession is very high. There should be major breaches amounting to apartheid or denial of their basic rights deriving from internal self-determination.(102)
- In the absence of the main requirements provided by international law, and clear national laws allowing secession in Iraq, external self-determination through remedial secession is not applicable today.(103)
- If Iraq does not allow in the future the people of Kurdistan to continue to effectively exercise their internal self-determination rights, Kurds will be entitled to external self-determination through secession.

V. Conclusion

In sum, it is not possible to confirm at this final stage of the study that secession is legal in the current state of public international law. The possible terms suggested in this paper are only some basic criteria that could regulate remedial secession, but they still have to be tested in practice. Remedial secession is indeed far from being established in international law. The controversies arise from legal uncertainties and remaining gaps concerning the theoretical and practical aspects of external self-determination through secession.

In the case of Catalonia, secession cannot be accepted because the applicable standards are far being reached. Kurdistan is different since Kurds' claims for independence can be validated by their severe oppression in the past. However, the present situation does not show any signs of oppression or will to prevent them from their right to internal self-determination. Thus, "Whatever positive entitlement to secession that they may once have had, that right has lapsed in the intervening years. Kurdistan is thus, like Catalonia" is in the zone "in which international law has to say the least. It is through politics, not law, that these matters can only be resolved."

In any event, the debate is still ongoing and there is still a need for scholarly and judicial efforts to further highlight the matter. Remedial secession is still not well-founded, even though some terms and conditions were suggested in this study. The latter revealed that current challenges only undermine legal

(102) Ibid.

(103) Self-Determination and Secession under International Law: The Cases of Kurdistan and Catalonia, AJIL Insights, op.cit., note 58.

guarantees when such guarantees are not clearly identified by the law. In the present paper, these guarantees were collective rights deriving from self-determination, which would not be affected if all relevant gaps were properly filled.

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