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Twenty Years after the NATO Armed Intervention: The Kosovo case and Remedial Secession

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Abstract: The NATO military intervention in Yugoslavia took place twenty years ago, triggering several important consequences not only regarding the Kosovo case but also on the global level. This paper concentrates on the issue of the relevance of the Kosovo Case for the concept of remedial secession. The main argument of the paper is that the Kosovo Case is of the utmost importance for the above concept because it has motivated numerous states to officially accept the existence of remedial secession in international law. Several decades ago, this was hardly imaginable. Even though the Kosovo Case has not motivated states to change the formal sources of international law in this regard, it could change the way international actors behave when they make decisions about secession. Therefore, one of the conclusions of the paper is that, after Kosovo, the genie of remedial secession could not be put back in the bottle.

Keywords: Kosovo, remedial secession, self-determination, international law, *sui generis* thesis, the International Court of Justice, Advisory Opinion on the Declaration of Independence.

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Introduction

The NATO military intervention in Yugoslavia happened twenty years ago. The intervention has triggered important consequences not only regarding the contested legal status of Kosovo but also regarding the nature of the international legal order.²

This paper focuses on the influence of the Kosovo case on the acceptance of the concept of remedial secession in international law. Remedial secession, as it will be explained in greater detail below, is not strongly supported by the formal sources of international law. However, the support of international law scholars for this concept and – as we will see – of some of the states, is increasing.

The main argument of the paper is the following: the Kosovo case is of the utmost importance for the concept of remedial secession because it has motivated numerous states to officially accept the existence of this concept in international law (regardless of the fact that this has not provoked the change of formal sources of international law in this field.). Several decades ago, this was hardly imaginable. After the Kosovo case, it is almost impossible for these states to deny the existence of the concept of remedial secession in international law (they could deny the applicability of the concept to some specific situation, but not its existence). Therefore, after the Kosovo case, the genie of remedial secession could hardly be put back in the bottle, as confirmed by the analysis of some recent case studies used in this paper.

The paper consists of five main sections. After the introduction, the second section focuses on the general concept of remedial secession in international law. The third is dedicated to the relevance of the said concept for the Kosovo case. The fourth deals with the *sui generis* thesis, as many actors insisted that Kosovo should not be analysed as a case of remedial secession but as a *sui generis* case. The final section considers the possibilities of using the Kosovo “precedent” of remedial secession for future cases. Final remarks are provided at the end of the paper.

The concept of (remedial) secession in international law doctrine

Secession is possible without the invocation of the principle of self-determination – it is just “the most dramatic form of assertion of self-determi-

² In the Constitution of the Republic of Serbia, the official name of Kosovo is Kosovo and Metohija.

nation”.³ Since the focus of this paper is on the concept of remedial secession, the relationship between secession and the principle of self-determination is very important and will be assessed at the beginning. This relationship (as viewed by the advocates of the restrictive and progressive approach) can be best illustrated by comparing the positions taken by the Committee of Jurists and the Committee of Rapporteurs in the context of Aaland case⁴ (Table 1):

Table 1: Restrictive and liberal view on the scope of self-determination rule

<p>The restrictive view on the scope of self-determination rule taken by the Committee of Jurists</p>	<p>“Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.”⁵</p>
<p>The progressive view taken by the Committee of Rapporteurs</p>	<p>“The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.”⁶</p>

However, this difference between the two standpoints of the respective Committees is actually oversimplified. Namely, the Committee of Jurists had already opened the door to a more liberal view on the issue of foreign involvement in the event of a manifest and continued abuse of sovereign power:

³ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law*, Oxford University Press, Oxford, 2007, p. 332.

⁴ The comparison was previously made and used by many authors such as: Antonio Cassese, *Self-Determination of Peoples, A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995; Milena Sterio, *The Right to Self-determination Under International Law, “Selfistans”, Secession, and the Rule of Great Powers*, Routledge, New York, 2013.

⁵ “Report of the International Committee of the Jurists Entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question”, *Official Journal of the League of Nations*, Special Supplement No. 3, October 1920, 5.

⁶ “The Aaland Islands Question”, LN. Doc. B7.21/68/106, 1921.

The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising, therefore, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned but comes within the sphere of action of the League of Nations.⁷

On the other hand, the Committee of Rapporteurs did stipulate that the principle of self-determination was “...not, properly speaking, a rule of international law”.⁸

Be that as it may, these two reports triggered the question about the scope of the self-determination principle (whether it includes the right of secession or not, and if the answer to the question is yes, who the right-bearer is), and that dilemma is still open among scholars. The international law is arguably more conservative than political theory regarding the “right to secede”.⁹ Even the strongest advocates of the right to (remedial) secession usually speak about the need to *reform* the international legal order which *should* incorporate this right.¹⁰

The notion of secession is used by international law scholars, both broadly and strictly. The broad concept includes “all cases of separation of States in which the predecessor State continues to exist in a diminished territorial and demographic form”,¹¹ while the more restricted one refers to “the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter”.¹² Since there is no consent of the Republic of Serbia to Kosovo’s independence, the restricted notion of secession will be used in this paper.

One can speak about at least five alternative answers to the question of (il)legality of secession in international law (Table 2):

⁷ “Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question”, *op.cit.*

⁸ “The Aaland Islands Question”, *op.cit.*

⁹ Christopher Heath Wellman, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press, Cambridge, 2005, p. 157.

¹⁰ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law*.

¹¹ See Marcelo G. Kohen, “Introduction” in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, Cambridge, 2006, p. 2.

¹² *Ibid.*, p. 3; See also James Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford, 2006, p. 375. (Secession “...may be defined as the creation of a State by the use or threat of force without the consent of the former sovereign...”).

Table 2: Five alternative answers to the question of (il)legality of secession in international law¹³

Five alternative answers to the question of (il)legality of secession	Main characteristics of the approach
1. All forms of secession outside of the colonial context are prohibited by international law	<ul style="list-style-type: none"> - Respect of the territorial integrity of states is a key principle of international law - It is prohibited to use force to help secessionist movements - It is prohibited to help secessionist movements by any other means - External self-determination exists <i>only</i> in the colonial context
2. All forms of secession are in accordance with international law	<ul style="list-style-type: none"> - The territorial integrity of states has a very limited importance - There is an obligation to help secessionist movements, even by use of force - Mostly noticeable in normative approach and primary rights theory and not international law strictly speaking
3. There is only a remedial right to secession in international law	<ul style="list-style-type: none"> - Secession is allowed only when one part of the population is severely discriminated or a victim of international crimes - The territorial integrity of states is an important principle of international law, but it is not the absolute one and it is created for interstate relations - The international community (or even individual states) has an obligation to help (even by use of force) people who are victims of international crimes
4. International law does not regulate the issue of secession	<ul style="list-style-type: none"> - The classical, positivistic approach - Statehood (and secession) is a matter of fact - International law does not prohibit or allow secession: the territorial integrity of states is granted only in relations between states - A foreign intervention aimed at helping secessionist movements is prohibited - Underlined importance of the principle of effectiveness
5. International law regulates only certain types of secession	<ul style="list-style-type: none"> - International law does not regulate attempts of peaceful secessionist movements - International law regulates only those violent secessionist attempts which can be classified as a threat to peace

¹³ The table is partially based on considerations made in: Marcelo G. Kohen, "Introduction" in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*.

There is no room here for a detailed analysis of each of those alternative answers.¹⁴ This paper argues that no alternative answer is completely satisfying, although most international law scholars assert that secession is neither prohibited, nor allowed by international law (approach no. 4 in Table 2). Firstly, there are some situations in which attempts of secession are prohibited by resolutions of the UN Security Council. Secondly, even if we agree that the sources of international law do not regulate secession per se, human rights law and international humanitarian law do regulate situations which accompany attempts of secession (e.g., demonstrations, armed conflicts, etc.) That actually means that even though international law in most of the cases does not regulate the *outcome* of secession attempt, it regulates the process. Hence, the author of this article finds the fifth answer to the dilemma in reference to (il)legality of secession in international law to be the most satisfying.

In his analysis of the relationship between the principle of self-determination of peoples and the act of secession, Christian Tomuschat, for example, underlines the importance of the notion of 'people'.¹⁵ He then concludes that "...the presumed premise – the existence of an unlimited right of secession for every ethnic group – must be wrong".¹⁶ Apparently, Tomuschat rejects the possibility of the second alternative option from Table 2. On the other hand, in his analyses of *opinio juris* as part of customary international law in this field, Tomuschat finds that "GA Resolution 2625 (XXV) emphasises the principle of national unity, *departing from that proposition in view of instances only where the government of the country concerned does not represent the entire people...*"¹⁷ and adds that "...exceptional circumstances are capable of sustaining a claim for secession – circumstances which may roughly be summarised as a *grave and massive violation of the human rights of a specific group in a discriminatory fashion. This is a situation which Lee Buchheit has called 'remedial secession...'*".¹⁸ This is a confirmation of the third alternative answer presented in Table 2, and a significant part of this paper will be dedicated to the analysis of the concept of remedial secession in international law.

¹⁴ It is important to note that the third alternative answer could be seen as part of the fifth. We decided to keep both because the third alternative answer may be crucial for this article.

¹⁵ Christian Tomuschat, "Secession and self-determination", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, Cambridge, 2006, p. 23.

¹⁶ *Ibid.*, p. 29.

¹⁷ *Ibid.*, p. 35, (emphasis added).

¹⁸ *Ibid.* (emphasis added).

According to Tomuschat's above argumentation, the right to remedial secession is primarily based on the so-called *a contrario* interpretation of the 'safeguard clause' in the part of GA Resolution 2625 (XXV) that deals with the self-determination of people as a general principle of international law.¹⁹ Namely, the Resolution expressly stipulates that:

"Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, 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*".²⁰

A *contrario* interpretation of this clause stipulates that the territorial integrity is guaranteed only to those states whose *governments represent all the people belonging to the territory without distinction as to race, creed, or colour*. If that is not the case, parts of the population severely discriminated (or as we shall see, are victims of serious international crimes) do have the right to secede. Some authors have concluded that the relationship between the principle of territorial integrity and self-determination of people "...should be resolved by embracing a remedial right to secession to ensure that a minority may exercise its right to self-determination where its surrounding state violates its fundamental rights".²¹

One of the most quoted references concerning the remedial right of secession is probably the one from Karl Doehring's contribution to Bruno Simma's UN Charter Commentary.²² After stating arguments for *a contrario* interpretation of the safe clause, Doehring also states that "[i]t seems to be clear that not every kind of

¹⁹ However, see e.g. Antonio Cassese, *Self-determination of Peoples: a Legal Reappraisal*, Cambridge University Press, Cambridge, 1995, pp. 302-312.

²⁰ "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", www.documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement, visited on 30 December 2019, (emphasis added). These words are carefully restated in some other important documents such as the *Vienna Declaration and Programme of Action* adopted on 25 June 1993, www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx, visited on 30 December 2019.

²¹ Evan M. Brewer, "To Break Free from Tyranny and Oppression: Proposing a Model for Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion", *Vanderbilt Journal of Transnational Law*, vol. 45, no.1, 2012, p. 248.

²² Karl Doehring, "Self-Determination", in: Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, vol. I, 2nd edition., Oxford, 2002, para. 29.

discrimination can legitimise a secession...” However, he also adds that “... a right of secession could be... recognised if the minority discriminated against is exposed to actions... which consist in an evident brutal violation of fundamental human rights...”²³ Doehring also mentions one more condition for the application of the remedial right of secession: “[t]he right of secession may be excessive if the expectation still exists that the state authorities are prepared to stop the discrimination or if legal remedies and protection by tribunals are available”.²⁴

On the other hand, a great number of authors reject the existence of the remedial right of secession in international law. Marcelo Kohen, for example, accepts Tomuschat’s approach in which he underlines the importance of the notion of *people* in the self-determination right. However, the difference between these two authors starts with an understanding of who has a right to be called *people*. Kohen concludes that there is “...only one people where there exists a State”.²⁵ For him, there is a logical consequence of this conclusion: minorities are not *people*. He further rejects the existence of the remedial right of secession:

“...the interpretation of the safeguard clause as allowing ‘remedial secession’ would lead, as a consequence of the violation of the internal dimension of self-determination, to the loss of the territory of the State... This is tantamount to saying that when a national, religious or linguistic minority is seriously discriminated against, then it becomes a ‘people’. It seems that the more appropriate way to address the issue of serious violations of human rights, either collective or individual, is rather through the restoration of the respect of such rights”.²⁶

This tension between the concept of *people* and a remedial right on secession is also recognised by other authors. Namely, James Summers speaks about two dimensions of self-determination – inherent and remedial: “A preliminary issue in discussions of the dimensions of self-determination is whether it is held inherently (or primarily), attaching to certain groups simply because they are peoples, or remedially, to provide redress for situations of oppression or discrimination”.²⁷ Summers relates this classification to the perspectives of nationalism and liberalism.²⁸ He first notes that liberalism is supporting the territorial integrity of states, but that:

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Marcelo G. Kohen, “Introduction”, *op. cit.*, p. 9.

²⁶ *Ibid.*, pp. 10-11.

²⁷ James Summers, *Peoples and International Law*, Martinus Nijhoff Publishers, Leiden, 2014, p. 55.

²⁸ *Ibid.*

“[l]iberalism’s support for the territorial integrity also implies a possibility of secession. If a state is unrepresentative and excludes or persecutes part of its population, then that population might legitimately secede to establish a more representative government. This is the idea of remedial independence, perhaps still best expressed in the American Declaration of Independence in 1776. International instruments and courts and other bodies have implied such a right in their support for the territorial integrity, but to what extent is there actual support for such a right itself?”²⁹

After a vigilant analysis of the legal documents and practice in this area, James Summers draws a solid and balanced conclusion: “[r]emedial independence has weak support from formal sources. Nonetheless, it runs to the heart of statehood and reflects liberalism’s deep roots in the state and by extension international law...”³⁰ Some other authors, like Jure Vidmar, confirmed this conclusion by stating that the theoretical foundation of the concept of remedial secession is rather weak.³¹ In addition, Vidmar concluded that the Kosovo case did not support the general use of remedial secession in international law.³²

The situation in which there is increasing support for the concept of remedial secession in the doctrine of international law and weak support in the formal sources of international law has its own consequences. There is no consensus about what the remedial right on secession (if that right exists at all) actually stands for – *who* has the right of remedial secession (who can be subsumed under the notion of *people* and whether only *people* have the right of remedial secession), *when* that subject has the right of remedial secession (discrimination, violation of some basic human rights, or international crimes such as crimes against humanity or genocide), or *what the additional conditions* for its application are (*e.g.*, at which moment we can claim that negotiations about internal self-determination are no longer fruitful).

Therefore, states as primary law-makers in the international legal order (some would even say exclusive law-makers) need to resolve the above-mentioned controversies if they want to have clear normative guidance in this field. That is the reason why one needs to analyse their positions concerning remedial secession very closely. Since their submissions to the adjudicating bodies are among the most

²⁹ *Ibid.*, p. 517.

³⁰ *Ibid.*, p. 521.

³¹ Jure Vidmar, “Remedial Secession in International Law: Theory and (Lack of) Practice”, *St. Antony’s International Review*, Vol. 6, Number 1, 2010, pp. 37-56.

³² *Ibid.* This aspect will be analysed in the next section.

important means of expressing their position on a certain topic, the Advisory Opinion on the Declaration of Independence of Kosovo may be the crucial source for such an analysis.

Use of the concept of remedial secession in the advisory opinion on Kosovo

When it comes to the issues of statehood, self-determination and secession, arguably the most quoted academic source is James Crawford's book *The Creation of States in International Law*.³³ Crawford notes: "[a]t least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State, and that the 'safeguard clauses' in the Friendly Relations Declaration and the Vienna Declaration recognises this, even if indirectly".³⁴ Interestingly enough, Crawford did not explain in detail his argumentation for this standpoint. He just continued to analyse the *Quebec Secession Case* and its relevance for the concept of remedial secession.³⁵ It is, however, interesting to note that Crawford also commented on the recent developments in respect of greater inclusiveness of the term *people* (not limited to the people of the state as a whole), and that he made an argument that "...these developments are still tentative (*de lege ferenda*), and they do not affect the established rules and practices with respect to self-determination and the territorial integrity of states".³⁶

James Crawford was indeed an important figure in the Kosovo case before the ICJ. Not only was he a Counsel and Advocate of the United Kingdom of Great Britain and Northern Ireland before the Court, but his above-mentioned book on the creation of states in international law was also the most quoted source in the written proceedings and oral statements in this case.³⁷

³³ James Crawford, *The Creation of States in International Law*, Oxford University Press, New York, 2006.

³⁴ *Ibid.*, p. 119.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 121.

³⁷ The book *The Creation of States in International Law* was cited more than 50 times by 15 parties in their written proceedings in this case. The most interesting thing is that this book was cited by both supporters and opponents of Kosovo's independence. That was also noted by Crawford himself in the oral submission of the United Kingdom: "during the course of these proceedings, a number of governments have cited my work on secession in support of what you will already have realised are apparently contrasting conclusions". (Footnote omitted), www.icj-cij.org/docket/files/141/15734.pdf, 30/12/2019.

The presence of experts such as James Crawford, Martti Koskenniemi (representative of Finland), Malcolm Shaw and Marcelo Kohen (Counsels and Advocates of Serbia), Sir Michael Wood and Sean Murphy (Counsels of Kosovo or *authors of the declaration*, which was the official name before the ICJ in this case), Jochen Frowein (Legal Advisor of Albania), Jean d'Aspremont (representative of Burundi), Vaughan Lowe and Colin Warbrick (Counsel and Advisor of Cyprus), Ole Spiermann (Advisor of Denmark), Allain Pellé (representative of France) and Niels Blokker (representative of the Netherlands) is an indicator of how important this case was for a number of states. Other signs that reveal the importance of the Kosovo Advisory Opinion are: the number of states involved (the case was second on the list of cases in the Court's history, just behind the *Wall* case), the fact that all permanent members of the Security Council actively participated, etc.³⁸

Unfortunately, the Advisory Opinion on Kosovo did not meet the high expectations of international law doctrine.³⁹ Namely, it did not provide crucial answers regarding the scope of general principles of international law, such as self-determination of peoples or its relationship with other principles such as the territorial integrity of states or prohibition of the use of force in international relations. Nevertheless, the relevance of the Advisory Opinion on Kosovo is based *inter alia* on the fact that it revealed the positions of a number of states in reference to certain important issues such as the concept of remedial secession. It was expected that those states that were claiming the illegality of Kosovo independence would not embrace this concept.⁴⁰ On the other hand, some of the states that were defending the legality of Kosovo independence (or, at least, claiming that the Declaration of Independence did not violate international law) relied on the concept of remedial secession, while others did not (Table 3).

³⁸ This author already dealt with issues such as the relevance of the Kosovo Case and especially the relationship between self-determination of peoples and the territorial integrity of states in statements of states before the ICJ in: Miloš Hrnjaj, "Odnos prava naroda na samoopredeljenje i teritorijalnog integriteta država: podnesci povodom Savetodavnog mišljenja o Kosovu", in: *Srbija u evropskom i regionalnom kontekstu* (ed. Radmila Nakarada, Dragan Živojinović), Belgrade, 2012, pp. 191-212.

³⁹ See e.g. Marko Milanovic, Michael Wood (ed.), *The Law and Politics of the Kosovo Advisory Opinion*, Oxford University Press, Oxford, 2015.

⁴⁰ However, see the important exception of the Russian Federation which accepted the theoretical possibility of remedial secession which was not, according to its opinion, applicable to the Kosovo Case: written proceeding of Russia, pp. 30-32, www.icj-cij.org/docket/files/141/15628.pdf, 30 December 2019.

Table 3: The list of states that used remedial secession as an argument for Kosovo independence⁴¹

States that supported Kosovo independence before the ICJ	
States that were relying on the concept of remedial secession	States that were <i>not</i> relying on the concept of remedial secession
<ol style="list-style-type: none"> 1. Albania 2. Denmark 3. Finland 4. Estonia 5. Germany 6. Latvia 7. Ireland 8. Holland 9. Poland 10. Switzerland 11. United Kingdom 12. Czech Republic 13. Slovenia 14. Maldives 15. Norway⁴² 	<ol style="list-style-type: none"> 1. Sierra Leone 2. Japan 3. France 4. United States of America 5. Austria 6. Luxembourg

It is, however, important to note that there are some more subtle differences between the states. For example, Norway and Maldives did not explicitly refer to the concept of remedial secession, although they did provide arguments that could be recognised as part of the concept. Other states did mention the concept but made no thorough argumentation about its relevance to the Kosovo case or any other case.⁴³

In the end, the Court concluded that the question posed by the UN General Assembly was limited to the question of (il)legality of the Declaration of

⁴¹ Miloš Hrnjaz, "Odnos prava naroda na samoopredeljenje i teritorijalnog integriteta država: podnesci povodom Savetodavnog mišljenja o Kosovu", op. cit., str. 198.

⁴² Majority of authors who cope with this topic name 11 states plus authors of the Declaration. The reason for this difference is that some states did not openly advocate the applicability of the concept of remedial secession, but their arguments relied on it.

⁴³ See e.g. Written Statement of UK, www.icj-cij.org/docket/files/141/15638.pdf, pp. 92-93, 30 December 2019.

Independence as a legal act, and that: “[i]t does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognised it as an independent State”.⁴⁴ Therefore, the Court did not comment in detail on the issue of (remedial) secession. However, it did mention something that could be important for the evaluation of the legal nature of the concept of remedial secession in international law:

“Whether, outside the context of non-self-governing territories and peoples 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. *Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.* The Court considers that it is not necessary to resolve these questions in the present case”.⁴⁵

By emphasising *radically different views* of states regarding the international law of self-determination and especially “remedial secession”, the Court arguably stated that *there was no customary international law governing the remedial right to secede*.⁴⁶ Just as a short reminder, in its jurisprudence, the ICJ underlined the importance of the *general* belief in or acceptance of some rule of behaviour as a condition for the existence of a customary rule:

“Two concepts have crystallised as customary law in recent years arising out of the *general consensus* revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be *generally accepted*”.⁴⁷

⁴⁴ In accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 51.

⁴⁵ *Ibid.*, para. 82, 83, (emphasis added).

⁴⁶ It is interesting to note in this regard that the Court used the name of the concept with quotation marks.

⁴⁷ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, ICJ, Merits, Judgment, [1974] p. 23, www.icj-cij.org/docket/files/55/5977.pdf, 30/12/2019. (emphasis added). See also: *Colombian-Peruvian asylum case*, ICJ, [1950], p. 277 www.icj-cij.org/docket/files/13/1933.pdf, 30 December 2019.

If the condition of general consensus and acceptance is not fulfilled, then there is no international customary rule and, accordingly, no customary rule on remedial secession was established in this case. Probably the best argument for this statement can be found in the famous *dictum* from the *Legality of Use of Nuclear Weapons* case:

“...several of the resolutions under consideration in the present case have been adopted with *substantial numbers of negative votes and abstentions*; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons”.⁴⁸

Radically different positions of states have further implications for the future development of the concept of remedial secession. Namely, those radically different positions illustrate the fact that not only there is no consensus in international law doctrine, as we have already demonstrated, but that there is also no consensus among states. Therefore, advocates of this right in international law doctrine need to take a moderate stand if they want success - more progressive views on this concept hardly have any chance of success among states. Additionally, one must bear in mind a well-known fact that seems to be overlooked more often than not - the content of submissions before adjudicating bodies could reflect the vision of future international (legal) order shared by states as its primary subjects.

The Kosovo Case: Remedial secession or *sui generis*?

As previously noted, the argument of remedial secession was used only by some states before the ICJ.⁴⁹ And even for those states, remedial secession was not used as a primary argument for Kosovo’s statehood (a fact recognised by the ICJ):

“A number of participants in the present proceedings have claimed, although in almost every instance *only as a secondary argument*, that the population of Kosovo has the right to create an independent State... pursuant to what they described as *a right of “remedial secession”* in the face of the situation in Kosovo”.⁵⁰

⁴⁸ *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion, para. 71, www.icj-cij.org/docket/files/95/7495.pdf, 30/12/2019. (emphasis added). *But see* Written statement of United States of America in *Kosovo* case, footnote 211 on page 52 www.icj-cij.org/docket/files/141/15640.pdf, 30 December 2019.

⁴⁹ See Table 3 of this article.

⁵⁰ *Kosovo* case, para. 82. (emphasis added).

Since one of the main arguments of Serbia⁵¹ (both in the political and legal sense) and some other countries such as Cyprus⁵² was that Kosovo could be a dangerous precedent for secessionist movements across the globe, states that have recognised Kosovo did their best to demonstrate that Kosovo was not a precedent – they instead argued that Kosovo was a unique, *sui generis* case.⁵³ It should be stated here that it is not always easy to differentiate between political and legal justifications for the recognition of Kosovo. States usually prefer using political arguments over “technical” legal argumentation when they decide to recognize an entity as a state.⁵⁴ Therefore, it could be argued that the *sui generis* argument in the case of Kosovo was not legal but political. Nevertheless, states which were advocating Kosovo’s independence before the International Court of Justice in the Advisory Opinion on the Declaration of Independence used this argument as a part of their *legal* argumentation.⁵⁵ This paper argues that the used *sui generis* thesis is not supported by the international legal framework and that proponents of the legality of Kosovo’s statehood must rely on some other legal basis (remedial secession being one of the most important among them).

One should, therefore, start with the following question: What does it mean to set a precedent? Perhaps this would be the right place to remind of one basic fact – international law, at least formally speaking, is not a precedent law.⁵⁶ However, as already noted by some eminent scholars, this rule should be viewed in a more nuanced way.⁵⁷ Hence, although international law formally speaking is not a precedent law, adjudicating bodies do their best to have a coherent jurisprudence, as the international rule of law would be jeopardised if similar cases had different

⁵¹ See Written Statement of Serbia, www.icj-cij.org/docket/files/141/15642.pdf, 30 December 2019.

⁵² See Written Statement of Cyprus, www.icj-cij.org/docket/files/141/15609.pdf, 30 December 2019.

⁵³ See, e.g.: James Summers (ed.), *Kosovo: A Precedent*, Brill, Leiden, 2011; Peter Terem, Peter Rosputinský, “Legal and Political Aspects of the Kosovo’s Unilateral Declaration of Independence”, in: *Kosovo: Sui Generis or Precedent in International Relations* (ed. Dušan Proroković), Institute of International Politics and Economics, Belgrade, 2018, pp. 91-118.

⁵⁴ Confirmation of this argument can be found in the Kosovo case too: S. F. van der Driest, *Remedial Secession: A right to external self-determination as a remedy to serious injustices*, Intersentia, 2013, p. 242.

⁵⁵ See, e.g.: Milos Hrnjaz, “Odnos prava naroda na samoopredeljenje i teritorijalnog integriteta država: podnesci povodom Savetodavnog mišljenja o Kosovu”, 2012; S. F. van der Driest, *Remedial Secession: A right to external self-determination as a remedy to serious injustices*, 2013.

⁵⁶ See e.g. article 59 of ICJ Statute (as an illustration of this fact): “The decision of the Court has no binding force except between the parties and in respect of that particular case”.

⁵⁷ Mohamed Shahabuddeen, *The Precedent in the World Court*, Cambridge University Press, Cambridge, 2007.

outcomes. Most of the proponents of the unique case thesis in the case of Kosovo actually wanted to demonstrate that the different legal outcome of the Kosovo case (statehood) is a consequence of the different factual background.

This is the right moment to underline that a *sui generis* case means 'one of a kind'.⁵⁸ There are two different aspects of a *sui generis* thesis: political and legal.⁵⁹ The focus of this paper is on the latter. But what, in the legal sense, makes something *one of a kind*? Normally, general rules are applicable to factual circumstances *similar enough* (not identical but similar enough because identical circumstances are very rare, especially in international relations). However, if we accept the *sui generis* thesis, then there is the following consequence: general rules of international law are not applicable to that case; it falls within a sort of a *grey zone of international law* and, therefore, there is enormous room for political discretion.

Different factual circumstances *per se*, however, should not be sufficient for accepting a *sui generis* thesis. We need to find out what it is that is so different in a concrete case, in a *legal sense*, which makes it *one of a kind*. Some countries insisted on three main characteristics of the Kosovo case that made it *one of a kind*: the specific constitutional position of Kosovo within Yugoslavia, the conflict in Kosovo in 1999, and the international administration of Kosovo based on UNSC Resolution 1244.

Although Kosovo truly held a specific constitutional position in Yugoslavia, that fact was not enough for the Badinter Commission to conclude that it had the right of external self-determination in the process of Yugoslavia's dissolution.⁶⁰ The specific constitutional position of Kosovo could be relevant for the application of the right of remedial secession, but it is hardly relevant for the *sui generis* thesis.

The conflict of Kosovo in 1998 and 1999 has been used as an argument for a *sui generis* thesis because there had been gross violations of human rights and war crimes, especially during the NATO intervention in 1999 in the Federal Republic of Yugoslavia. However, it is difficult to see why this should be a valid argument for a *sui generis* thesis. Namely, revoking humanitarian intervention as the basis for a

⁵⁸ Anne Peters, "Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?", in Marko Milanovic, Michael Wood (ed.), *The Law and Politics of the Kosovo Advisory Opinion*, Oxford University Press, Oxford, 2015, pp. 291-317.

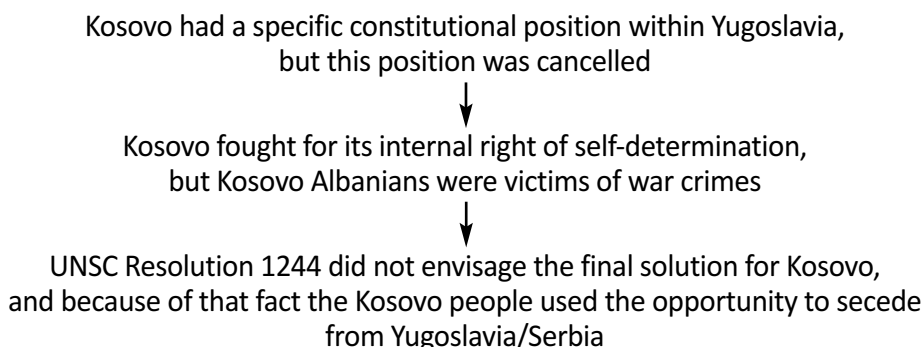
⁵⁹ There is, of course, certain overlapping between the political and legal aspects, and we will explore it below.

⁶⁰ See e.g. Gulara Guliyeva, "Chapter 9 Kosovo's Independence: Re-Examining the Principles Established by the EC Badinter Commission in Light of the ICJ's Advisory Opinion", in: James Summers (ed.), *Kosovo: A Precedent*, Brill, Leiden, 2011, pp. 279-303.

sui generis thesis could not be valid if for no other reason than because this was not the only case in which some international actors claimed that the use of force was justified to stop gross violations of human rights or war crimes and genocide. The other option is to see gross violations and war crimes against Kosovo Albanians as an argument for gaining independence; however, this could also be an argument for remedial secession, and it does not make the situation one of a kind at all.⁶¹

The third argument in favour of the *sui generis* thesis was that it was the international administration of Kosovo, based on UNSC Resolution 1244, that made the Kosovo case *one of a kind*. First of all, it should be noted that the UNSC Resolution was adopted based on Chapter VII of the UN Charter and that it, therefore, represented a *lex specialis* compared to the norms of general international law. However, as the ICJ underlined in the Advisory Opinion on Kosovo, this Resolution was adopted in order to establish an interim legal regime in Kosovo so as to avoid being viewed as authorising Kosovo's secession.⁶² Kosovo certainly is not the only territory under the UN Administration, and it would thus be very difficult to claim that this fact alone makes it a *sui generis* case.

Therefore, these claims, at least when viewed separately, are not convincing arguments for a *sui generis* thesis. Anne Peters notes that the only possible argument for a *sui generis* thesis could be to take all these arguments together.⁶³ This seems fair because it resembles most of the arguments made by states that are proponents of a *sui generis* thesis before the ICJ. The argumentation could be then presented as follows:



⁶¹ For example, In its written submission before the ICJ, Finland mentioned East Timor and Bangladesh as cases in which the concept of remedial secession was used prior to the Kosovo case.

⁶² *Kosovo case*, para. 94-100.

⁶³ Anne Peters, "Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?", *op. cit.*

Notwithstanding the fact that this diagram is factually questionable, even if it is completely factually correct, it is probably not sufficient to sustain the *sui generis* thesis. After all, the diagram itself illustrates the fact that Kosovo is an example of secession. As already stated, it cannot be seen as the final chapter of Yugoslavia's dissolution for a number of reasons. This means that Kosovo is not a *sui generis* case and that general rules of international law need to apply to this case as well, which brings us back to the five alternative answers to the question of (il)legality of secession in international law.⁶⁴

If we exclude two extremist views – that international law prohibits all secessions (after all, the ICJ did pronounce that respect of the territorial integrity of states is applicable only in relations between states) and that all forms of secession are allowed under the rules of international law (this argument is reserved almost exclusively to the field of normative political theory and not international law), we are left with two main positions: that there was a remedial right of secession of the Kosovo people (this position was part of our previous considerations), and the classical positivists' view that international law does not regulate the issue of secession (secession is a question of fact). In the case of Kosovo, we could hardly say that secession is a question of fact. Namely, proponents of this thesis are claiming that a parent state has a right to defend its constitutional order (accordance with the rules of international humanitarian law and human rights law), and Serbia could not do that in 2008 because of the application of UNSC Resolution 1244.⁶⁵ Hence, we can conclude that either Kosovo had a remedial right of secession or that international law prohibits/allows secession of territories under the UN Administration from previous parent states.⁶⁶ Whichever of the two positions that we take, it is applicable also to the Kosovo case.

Of course, there were various other attempts to circumvent this dilemma concerning the legal basis of Kosovo's contested statehood (probably having in mind the relatively weak theoretical foundation of the concept of remedial

⁶⁴ See Table no. 2.

⁶⁵ On the issue of how UNSC Resolution 1244 created a "framework" for Kosovo's secession see: J. Summers, "Kosovo: from Yugoslav Province to Disputed Independence", in J. Summers (ed.), *Kosovo: A Precedent?*, Martinus Nijhoff Publishers 2011, pp. 48-51.

⁶⁶ The ICJ pronounced that the aim of UNSC Resolution 1244 was to establish an interim regime, but the World Court was silent in giving response to the question of whether this means that unilateral attempts to resolve the issue of the status of Kosovo would, therefore, be allowed. Unfortunately, this was probably the only opportunity for us to obtain an authoritative interpretation of this situation, as it is not realistic to expect a UNSC consensus on this issue (at least at this point).

secession). One such proposal was to use the concept of “earned sovereignty” in the Kosovo Case.⁶⁷ This concept is defined “by three core elements: shared sovereignty, institution building, and a determination of final status”.⁶⁸ Determination of final status as the last phase of earned sovereignty is understood as finding acceptable options ranging from substantial autonomy to full independence.⁶⁹ By doing this, some authors are actually chronologically placing the concept of earned sovereignty after the concept of remedial secession (remedial secession was invoked in the Kosovo case in 1998 and 1999, and earned sovereignty after the adoption of UNSC Resolution 1244 and unsuccessful negotiations prior to the promulgation of the Declaration of Independence). However, the concepts of earned and remedial sovereignty both described the political process and reasons why some states decided to recognise Kosovo as an independent state, and not the *legal basis* of the contested Kosovo’s statehood.

Therefore, it is possible to conclude that Kosovo could not be a *sui generis* case in a legal sense and that the *sui generis* thesis could not be the legal basis for Kosovo’s independence. We can even say that the *sui generis* thesis is not legal at all. This thesis could be viewed as a political one, with a strong political argument in its essence: one should recognise Kosovo as an independent state because Kosovo is politically a unique case. Therefore, one should not do the same in any future similar cases. In addition, this practice of recognition of Kosovo should not be seen as part of the process of making a customary law in this field.

Kosovo as a *sui generis* case of remedial secession?

It is fair to say that prophecies made by Serbia and some other countries concerning the possible effects of Kosovo’s Declaration of Independence were not completely fulfilled. There has been no explosion of cases of (remedial) secession in the world. However, some recent examples of secessionist attempts and foreign interventions in support of secessionist movements do show that it is difficult to sustain a *sui generis* thesis in international law and avoid criticism regarding the so-called double standards. The situations in Crimea, Georgia and Kashmir illustrate

⁶⁷ Grace Bolton, Gezim Visoka, “Recognizing Kosovo’s Independence: Remedial Secession or Earned Sovereignty”, South East European Studies at Oxford, Occasional Paper no. 11/10, 2010.

⁶⁸ *Ibid.*, p. 7.

⁶⁹ *Ibid.*

this fact and the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol opens with the following statement:

“We, the members of the parliament of the Autonomous Republic of Crimea and the Sevastopol City Council, with regard to the charter of the United Nations and a whole range of other international documents and taking into consideration *the confirmation of the status of Kosovo by the United Nations International Court of Justice on July, 22, 2010, which says that the unilateral declaration of independence by a part of the country doesn’t violate any international norms...*”⁷⁰

In addition, the President of the Russian Federation used the Kosovo case to justify Russian official policy towards Crimea.⁷¹ Many authors warned that, although there are obvious factual and legal differences between the Crimea and the Kosovo case, it is not easy to avoid double standards, both on the side of Russia and the West.⁷² It should be recalled in this regard that international law provides an opportunity for actors to use international legal arguments to legitimise their behaviour in the international arena. As noted by Ian Klabbbers, all actors use various justifications for their behaviour, and the Kosovo case provided an additional argument for states and non-state actors in the international arena even though, as Klabbbers also noticed, that does not mean that all justifications are equally persuasive.⁷³ Therefore, it is important to see whether the Kosovo case encouraged the use of remedial secession as a justification of political aspirations and acts of state and non-state actors even though remedial secession has weak support in the formal sources of international law.

The case of eventual Kurdish independence is arguably most illustrative. In February 2015, Swedish Minister of Foreign Affairs, Margot Wallström, ruffled some feathers when she stated in the Swedish Parliament that “[w]e as the Social Democratic Party have had a clear policy toward the case of Palestine, and I want Sweden to change its foreign policy toward the Middle East as it is the right time to discuss Kurdish independence.”⁷⁴ She did not, however, provide any details regarding legal grounds for eventual Kurdish independence. Approximately one

⁷⁰ Available at: <https://www.voltairenet.org/article182723.html> (accessed on 30 December 2019), emphasis added.

⁷¹ S. F. van den Driest, “Crimea’s Separation from Ukraine: An Analysis of the Right of Self-Determination and (Remedial) Secession in International Law”, *Netherlands International Law Review*, vol. 62, no. 1, 2015, p. 330.

⁷² See e.g. interview with Bruno Simma in Spiegel: Von Dietmar Hipp, ‘Der Westen ist sheinheilig’, *Der Spiegel*, 7 April, 2014.

⁷³ Jan Klabbbers, *International Law*, Cambridge University Press, Cambridge, 2017, p. 22.

year later, Mr. Hemin Hawrami, Foreign Policy Advisor to the President of the Kurdistan region, delivered remarks on Kurdish independence at the Washington Institute for Near East Policy.⁷⁵ In the course of that meeting, Hawrami explained why he believed the Kurdish people should have their own state:

“Under the Iraqi central government, Kurdistan lost 4,500 villages, was subject to chemical weapons attacks, and experienced the Barzani genocide. Prior to 1991, only one percent of Iraq’s industry was located in Kurdistan, and there was only one university there. Iraqi Kurds originally hoped that post-2003 Iraq would be based on power sharing, federalism and constitutionalism, but federalism has failed. A new formula is needed.”⁷⁶

The President of the Kurdistan region at the time, Masoud Barzani, had no intention of giving up a referendum on the status of Kurdistan. He mentioned self-determination as a legal basis for independence more than once: “... [s]elf-determination is an indisputable right of the people of Kurdistan. Change is ahead. The people of Kurdistan have not been the reason for those changes and massacres; rather, they have always been the victims.”⁷⁷ The fact that Kurdistan officials are talking about alleged genocide, numerous civilian casualties and the use of weapons of mass destruction is not accidental. The purpose of this discourse is to create a resemblance with some earlier attempts at secession such as the one of Kosovo. More precisely, these arguments looked like the arguments made in the context of a remedial right to secede. Of course, these arguments probably would have been used even without the Kosovo case, but this time they sounded more convincing because some states openly supported the legality of remedial secession in world politics.⁷⁸

However, there are more subtle ways by which invoking remedial secession in the case of Kosovo could influence world politics. After Kosovo, secessionist movements know the path to independence. They need to prove not only that there is some form of discrimination in the parent state, but also that there are

⁷⁴ H. Abdulrazaq, ‘Swedish Foreign Minister: It’s time for Kurdish Independence’, *Basnews*, 14 February 2015, www.basnews.com/index.php/en/news/126915, 30 December 2019.

⁷⁵ Hemin Hawrami, *The Future of the Kurdistan Region of Iraq: Mosul, Economic Crises, and Self-determination*, www.washingtoninstitute.org/uploads/Documents/other/Hawrami20160208-transcript.pdf, 30 December 2019.

⁷⁶ *Ibid.*

⁷⁷ Statement of President Masoud Barzani on Self-determination Right, *Hawler Times*, 3 February 2016, hawlertimes.com/2016/02/03/statement-from-president-masoud-barzani-on-self-determination-right, 30 December 2019.

⁷⁸ In the end, the referendum was held in 2017, but Kurdish people in Iraq did not gain independence.

crimes committed against members of the movement (usually some minority). If there are no crimes as of yet, governments should be provoked to commit them. The next step is to gain support from international actors (this is the crucial step that is missing in most cases such as Kurdistan at the moment) for independence based on the argument of remedial secession. Of course, governments are also aware of these possible steps. They will try to prove that they are representing entire populations, without discrimination and in democratic conditions. Additionally, they will try to prove that they did not commit any crimes at all. In less powerful states, governments will also look for international support for their own cause or “fight against terrorism”. But, regardless of who wins those concrete (diplomatic) battles, the concept of remedial secession will remain in the background of the disputes.

Concluding remarks

Numerous states offered two legally relevant explanations for their positions on Kosovo’s statehood: remedial secession and the *sui generis* thesis. This article argued that the *sui generis* thesis should be abandoned for a number of reasons. It should be treated as a political explanation as to why someone decided to recognise Kosovo as an independent state, and not as a legal argument for Kosovo’s statehood in a strict sense. There is nothing sufficiently unique in the case of Kosovo to justify treating it as a *sui generis* case; and even if it is unique today, no one can guarantee that it will remain unique in the future.

Therefore, the only valid legal justification for the position in favour of Kosovo’s statehood is the applicability of the concept of remedial secession. This argument should be taken seriously because it has serious political and legal implications. There is increasing support for the applicability of the remedial secession concept in the doctrine of international law, but there is rather weak support for it in the traditional sources of international law. Hence, the Advisory Opinion on Kosovo was an important opportunity for states to demonstrate their positions regarding the concept of remedial secession. Although states’ submissions before the ICJ, in this case, demonstrated a lack of proof that there was a customary law on the remedial right of secession, there were definitely some states that have endorsed the use of this concept.

It is going to be interesting to see the reactions from states to different secessionist movements in the future. There is no doubt, and the Kurdish example illustrates this very well, that the Kosovo case is going to be used as an example of

how to gain one's own state. On the other hand, the case of Crimea illustrated once more why even liberal states are still cautious about the use of remedial secession concept - there is still much room for its misuse.

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**DVADESET GODINA POSLE ORUŽANE INTERVENCIJE NATO:
SLUČAJ KOSOVA I METOHIIJE I KOREKTIVNA SECESIJA**

Apstrakt: NATO vojna intervencija u Jugoslaviji dogodila se pre dvadeset godina, što je izazvalo nekoliko važnih posledica ne samo po pitanju Kosova i Metohije, već i na globalnom nivou. Ovaj se rad koncentriše na pitanje važnosti slučaja KiM za koncept korektivne secesije. Glavni argument rada je da je slučaj KiM od najvećeg značaja za gore navedeni koncept, jer je motivisao brojne države da zvanično prihvate postojanje korektivne secesije u međunarodnom pravu. Pre nekoliko decenija ovo bi bilo teško zamisliti. Iako slučaj Kosova nije motivisao države da promene formalne izvore međunarodnog prava u tom pogledu, to bi moglo da promeni način ponašanja međunarodnih aktera kada oni donose odluke o secesiji. Prema tome, jedan od zaključaka rada je da, nakon Kosova, duh korektivne secesije ne može biti vraćen u bocu.

Ključne reči: Kosovo i Metohija, korektivna secesija, samoopredeljenje, međunarodno pravo, teza *sui generis*, Međunarodni sud pravde, Savetodavno mišljenje o Deklaraciji o nezavisnosti.