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A Reassessment of the Principle of Self-Determination in the Current International Legal Framework

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Abstract: *During the colonial context, self-determination has been regarded as a means for colonial people to achieve independence from their foreign oppressors. However, in recent decades, international law has linked the principle of self-determination to concepts such as democracy and good governance and has reaffirmed the need to respect the principles of sovereignty and territorial integrity of States. Consequently, there has been a complete disassociating between self-determination and secession. This article addresses this shift in the paradigm of self-determination, arguing that in the post-colonial context, self-determination should be exercised solely under its internal dimension, as a right of peoples to have a representative government and to participate freely in the decision-making process of their State. It also explores the possible emergence of a remedial right to secession as an answer to the breach of the fundamental rights the people by their State.*

Key-words: *internal self-determination, remedial secession, territorial integrity*

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1. Introduction

Article 1 (2) of the Charter of the United Nations recognizes self-determination as one of the purposes of the United Nations,[1] while the International Court of Justice (ICJ) held that it represents "*one of the essential principles of contemporary international law*".[2] However, despite its central role within the international legal framework, the exercise of self-determination has been a controversial issue, so much so that, even today, international consensus exists only regarding the rules governing colonial self-determination,[3] its application generally being considered only in relation to non-self-governing territories and peoples subjected to foreign domination or occupation.[4]

The wording of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, as well as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations clearly reflects a colonial view upon the principle. Self-determination is seen as the means to achieving the UN's goal to "*bring a speedy end to colonialism*",[5] following "*the passionate yearning for freedom in all dependent peoples*".[6] In this context, the peoples of colonial or non-self-governing territories have been identified as the holders of the right to self-determination, entitled to regain their freedom from the colonial rulers and constitute themselves as independent sovereign States.[7] For this reason, during the decolonization process, the right to self-determination came to mean almost exclusively secession. But the understanding of the principle cannot be confined to such a limited approach, since self-determination is a concept encapsulating a greater ideal than solely attaining independence: the freedom of a people to choose the form of political, economic, social, and cultural destiny they desire.[8]

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[1] Article 1 (2) of the Charter of the United Nations, 24 October 1945.
[2] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102.
[3] Catriona Drew, "The East Timor Story: International Law on Trial", *European Journal of International Law*, vol. 12, no. 4, 2001, p. 658.
[4] Peter Hilpold, "Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant", *European Papers*, vol. 2, 2017, no. 3, pp. 907-921.
[5] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV)
[6] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV)
[7] Aureliu Cristescu, "The Right to Self-determination, Historical and Current Development on the Basis of United Nations Instruments", E/CN.4/Sub.2/404/Rev.1, 1981, para. 173.
[8] Kalana Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective", *Asian Journal of International Law*, Volume 3, Issue 02, July 2013, pp 305 – 339.

With the end of the Cold War, there has been a shift in the paradigm of self-determination: if during colonial times, secession was not only accepted, but seen as the only option, the international community does no longer regard violent internal conflicts as one of its acceptable expressions, but rather as an undesirable form of domestic conflict resolution.[1] Thus, for a considerable period of time there was substantial resistance to the suggestion that self-determination might have any application outside the colonial context. This denial had been justified by fears of a further fragmentation of the international community based on people's ethnic or religious claims to secede or join their country of ethnicity.[2]

States have argued that a separating action justified through self-determination would be incompatible with other fundamental principles of international law such as territorial integrity and sovereignty.[3] However, since it is one of the fundamental principles of international law and, thus, its application cannot be ruled out, it has been suggested that outside the colonial context, self-determination should be regarded as primarily a constitutional process by which the people of a State determine their future, without external intervention.[4] In this light, the international law provisions regulating the exercise of self-determination, which were developed almost exclusively in the context and with regard to the decolonization process, are no longer relevant, leaving a normative gap when it comes to post-colonial self-determination. This situation has determined scholars to affirm that self-determination is one of the most unsettled norms of international law.[5]

In the context of normative indeterminacy, this article aims to address the content of the right to self-determination in the current international framework, focusing on the internal dimension of the principle, as a rule in exercising post-colonial self-determination. Additionally, the possible emergence of a right to remedial secession will be briefly regarded.

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[1] Marcelo G. Kohen, *Secession. International Law Perspectives*, Cambridge University Press, 2006, p. 84.

[2] Julie Dahlitz, *Secession and international law: conflict avoidance: regional appraisals*, New York: United Nations, 2003, p. 27-28.

[3] Simone F. van den Driest, "Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law", *Netherlands International Law Review*, vol. 62, 2005, pages 329–363. See also Carmen Achimescu, Ioana Oltean, Viorel Chiricioiu, "Challenges to Black Sea Governance. Regional Disputes, Global consequences? " *Romanian Journal of International Law*, http://rrdi.ro/no-26-july-december-2021/

[4] James Crawford, *The Creation of States in International Law*, Oxford University Press, 2006, p. 415.

[5] Deborah Z. Cass, "Rethinking Self-Determination: A Critical Analysis of Current International Law Theories", *Syracuse Journal of International Law and Commerce*, vol. 18, no. 1, 1992, Art. 4.

2. The content of self-determination beyond colonialism

Self-determination is a concept with numerous layers of meaning,[1] thus addressing the internal-external dichotomy of the principle is not a novelty for international law. The dual character of self-determination has been regarded from the early days of its development, in the context of the 1949 Roundtable Conference negotiations concerning the formation of the independent state of Indonesia, when it was pointed out that internal self-determination was "*the right of populations to determine, by democratic procedure, the status which their respective territories shall occupy within the federal structure of the Republic of the United States of Indonesia*" [2]. In opposition, external self-determination was regarded as the right of a population to separate the territory it occupies from the federal State. A similar approach has been presented by the Netherlands following the debates on General Assembly Resolution 637(VII) in 1952. It highlighted that "*self-determination was a complex of ideas rather than a single concept. Thus, the principle of internal self-determination, or self-determination on the national level, should be distinguished from that of external self-determination, or self-determination on the international level. The former was the right of a nation, already constituted as a State, to choose its form of government and to determine the policy it meant to pursue. The latter was the right of a group which considered itself a nation to form a State of its own*."[3]

Therefore, even before the completion of the decolonization process, the distinction between the two dimensions of the principle of self-determination was already defined: the "international" (external) self-determination gives a people the right to attain independence by separation from their former State, while "domestic" (internal) self-determination entitles the whole population of a sovereign State to manifest their will within the borders of that State by choosing their own form of government and participating in the decision-making process. Furthermore, there is a clear difference between the two dimensions regarding the scope of the right. External self-determination is the right of a group of people identified as a different nation than the one of the parent-State, whilst the holder of the right to internal self-determination is the entire population of a sovereign State.

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[1] Marc Weller, "Settling Self-determination Conflicts: Recent Developments", *The European Journal of International Law*, vol. 20, no. 1, 2009, p. 111 – 165.

[2] Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven, London, 1978, p. 14-15, as cited in Kalana Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective", *Asian Journal of International Law*, Volume 3, no. 2/2013, pp 305-339.

[3] Netherlands, 7 GAOR (1952) 3rd Committee., 447th mtg., (A/C.3/SR.447) para. 4. as cited in J. Summers, *Peoples and International Law*, 2nd Edition, Martinus Nijhoff Publishers, 2014, at 347.

The 1975 Helsinki Final Act has been regarded as one of the most explicit norms recognizing internal self-determination, Principle VIII providing that "*all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status*".[1] The reference to a people "always"[2] having the right to determine "their internal and external political status" is more extensive than the wording used by other provisions concerning the matter. Therefore, aside from the three options enlisted in General Assembly resolution 1541(XV), Principle VIII recognizes a fourth, domestic, possibility of exercising self-determination[3] – the right of peoples of sovereign States to choose for themselves their own form of government.[4] In addition, the reaffirmation of the principle of self-determination at the 1991 summit meeting of the Conference on Security and Cooperation in Europe, outlining the need for self-determination to be understood in conformity with the principle of territorial integrity,[5] suggests that a preference for an internal-oriented interpretation exists.

However, these provisions do not establish a clear description of how internal self-determination should be exercised, leaving to the academia the task to fill in the blanks. Antonio Cassese, one of the leading proponents of the idea of post-colonial internal self-determination, characterized internal self-determination as the ongoing right "*to authentic self-government*", meaning the right of the entire population of a sovereign State to elect its representative and democratic government.[6] He highlighted the fact that internal self-determination stands at the very core of the Helsinki doctrine and is one of the principles upon which a pluralistic democratic society must be based.[7] The link between internal self-determination and democratic values is also mentioned by the UN Committee on the Elimination of Racial Discrimination. In its General Recommendation 21, the Committee stated that

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[1] Principle VIII (Equal Rights and Self-Determination of Peoples), Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975.

[2] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Hamangiu, Bucharest, 2018, p. 77

[3] The other three options correspond to the exercise of external self-determination and are established in General Assembly Resolution 1541 (XV). Principle VI of Res. 1541 provides that colonial self-determination can be achieved through emergence as a sovereign state, free association with an independent state or integration with an independent state. UN General Assembly, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, 15 December 1960, A/RES/1541.

[4] James Crawford, *Op. cit.*, p. 126.

[5] Hurst Hannum, "Rethinking self-determination", *Virginia Journal of International Law*, vol. 34, no. 1/1993.

[6] Ibidem, p. 101.

[7] Antonio Cassese, *Self-determination of Peoples; A Legal Reappraisal* (Hersh Lauterpacht Memorial Lectures), Cambridge University Press, Cambridge, 1995, p. 293-294.

internal self-determination represents *"the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level."*[1]

It can be observed that when talking about the exercise of internal self-determination, free participation of the population in the decisions of the State is frequently mentioned, internal self-determination being indissolubly associated with notions of democracy and good governance. Furthermore, these notions have been regarded as values of the post-colonial world order, making them intrinsically linked to today's society.[2] Democracy has been defined as including voting and respect for election results, but also requiring the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment.[3] In this light, the *sine qua non* and essence of the internal dimension of self-determination appears to be the entitlement of all peoples to participate in periodic free elections in which they can choose between a plurality of possibilities.[4] However, having a heavily political connotation, internal self-determination is a broad concept, susceptible to different meanings and therefore leaving States a large discretionary power.

3. Internal self-determination – a rule of the current international framework

The exercise of the principle of self-determination has been controversial mostly because of its overlap with other fundamental principles of international law such as sovereignty and territorial integrity. Throughout the colonial period, all relevant international instruments have recognized the priority of external self-determination, in order for non-self-governing territories to achieve independence. However, the denial of any right to secede outside the colonial context shows that in the current framework territorial integrity is a significant limitation of self-determination.[5] In this context, the dynamics between the two principles needs to be considered.

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[1] General recommendation 21 (48) adopted at 1147th meeting on 8 March 1996: Committee on the Elimination of Racial Discrimination, 48th session, 26 February-15 March 1996, CERD/48/Misc.7/Rev.3.
[2] Julie Dahlitz, *Op. cit.*, p. 29-30.
[3] Amartaya Sen, "Democracy As a Universal Value", *Journal of Democracy*, vol. 10, no. 3, Johns Hopkins University Press, July 1999, p. 9-10.
[4] Julie Dahlitz, *Op. cit.*, p. 29-30.
[5] James Crawford, *Op. cit.*, p. 390.

Perhaps one of the most insightful provisions regarding the "apparent paradox",[1] as Martti Koskenniemi calls he clash between self-determination and territorial integrity, has been the "safeguard clause" of the 1970 Friendly Relations Declaration.[2] According to its provisions, there are two conclusions to be drawn about the exercise of self-determination:

1. The people of a sovereign State exercise self-determination through their participation in the government of the State on a basis of equality;[3]
2. A sovereign State's territorial integrity is protected under international law as long as the government of that State respects the peoples' principles of equality and self-determination within its borders

From a different perspective, the "safeguard clause" suggests that as long as the government of the State is representative for the whole population, that State is in compliance with the principle of self-determination and, consequently, its territorial integrity is protected. In more exact words, when a State grants equal access to the political decision-making process and political institutions to all the people within that State and does not deny access to government on discriminatory grounds, then that State respects the principle of self-determination.[4] The internal exercise of self-determination represents the solution for the "apparent paradox". As Martti Koskenniemi observed, Principle VIII of the Helsinki Final Act plays therefore a dual role: on one hand it implies that self-determination should not be taken to mean secession; on the other hand, that the principle of territorial integrity should not be seen as legitimising oppressive domestic practices.[5]

The fact that self-determination should be regraded with consideration of the principle of territorial integrity in the current framework has also been outlined by the Supreme Court of Canada in its case regarding the secession of Quebec. It held that self-determination had evolved in respect of the

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[1] Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", *International and Comparative Law Quarterly*, vol. 43, 1994, p. 256.

[2] The provision goes as follows: "*Nothing in the foregoing paragraphs shall be construed as authorizing 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.",* UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV)

[3] James Crawford, *Op. cit.*, p. 118-119.

[4] Antonio Cassese, *Op. cit.*, p. 112.

[5] Martti Koskenniemi, *Op. cit.*, p. 256.

principle of territorial integrity and therefore, its exercise should normally be realized within the borders of the State and through its government. Furthermore, the exercise of the right cannot threat the unity or stability of an existing State. [1] While addressing the scope of the principle of self-determination, the Court held that "*the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state*." [2] Similar to what the "safeguard clause" indirectly implies, the emergence of a right to external self-determination is suggested, but only as an exception "*in the most extreme of cases and under carefully defined circumstances*".[3] Accordingly, it appears that outside the colonial context, where express provisions authorized the exercise of external self-determination, international law only accepts its internal dimension. This conclusion was also drawn by the Venice Commission, which underlined the dissociation of secession from the principle of self-determination, concluding that self-determination is primarily construed as internal, with respect to the principle of territorial integrity.[4] Nevertheless, the "safeguard clause" in the Friendly Relations Declaration leaves open a possibility for peoples to defend their rights in extreme cases of States not conducting themselves in compliance with the rules of international law.

4. The concept of remedial secession

As mentioned above, international law rejects secession as an expression of self-determination outside the colonial context.[5] Nevertheless, the "safeguard clause" seems to indirectly imply that a right to "remedial secession" might emerge in exceptional circumstances. These circumstances have been identified by the Supreme Court of Canada to mean, on one side, situations where a people is subject to alien subjugation, domination or exploitation. On the other side, and more relevant to internal self-determination, the Court held that "*when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.*"[6]

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[1] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 127.
[2] Ibidem, par. 126.
[3] Ibidem.
[4] Venice Commission, *Report on Self-determination and secession in constitutional law*, CDL-INF(2000)002-e, 2000.
[5] James Crawford, *Op. cit.*, p. 415-416.
[6] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 131

A similar view has been expressed in the European Court of Human Rights' case *Loizidou v. Turkey* by Judge Wildhaber. In their concurring opinion, Judge Wildhaber, joined by Judge Ryssal acknowledged the possibility of the crystallisation of a remedial right to secession, as an instrument in re-establishing the respect for international standards of human rights and democracy. They suggested that *"[i]n recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way*." [1]

Thus, common characteristics for the emergence of a right to remedial secession can be observed: the context of prior complete denial of internal self-determination and a discriminatory conduct of the State which determined gross violations of fundamental human rights. Only in this situation could a right to remedial secession theoretically arise and even then, only as a a last resort, after the people have exhausted all peaceful means of securing the respect of their rights while respecting the integrity of the State.[2] However, these developments have, at most, a character of *de lege ferenda*, no remedial right to secession being recognized by the international law.[3]

Even so, the idea of a right to remedial secession has been present in the written statements of the States who took part in the proceedings before the International Court of Justice in the *Kosovo* case. Among the States who recognized the right to remedial secession, one of the most comprehensive outlooks of the concept was given by Germany. In its written statement before the Court, Germany emphasised that if a right to secession would not exist outside the colonial context, it would render the internal right to self-determination meaningless in practice. Without an instrument to which a certain group could resort, there would be no remedy for any eventual breaches of internal self-determination and for violations of fundamental rights and freedoms. However, it also recognized the importance of territorial integrity, stressing the idea that a remedial right to secession would not endanger international stability as it would only be applicable under circumstances where the situation inside a State has deteriorated to a point

[1] *Loizidou v. Turkey*, 40/1993/435/514, Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal, Council of Europe: European Court of Human Rights, 23 February 1995.
[2] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, Recueil des cours, Vol. 357, Hague Academy of International Law, p. 146-147.
[3] James Crawford, *Op. cit.*, p. 121.

where it might be considered to endanger international peace and stability itself.[1]

A similar argument has been submitted by the Netherlands who advocated for the exercise of remedial secession under two cumulative conditions: a substantive condition of a serious breach of an obligation to respect the right to internal self-determination or the obligation to refrain from any actions that would deprive a people of their right, followed by a procedural condition that all other possible remedies of the situation have been exhausted.[2] Other States supporting the existence of a right to remedial secession in international law were Slovenia, who argued that self-determination should have priority over territorial integrity,[3] Poland,[4] Finland, who stated that Kosovo's actions were a consequence of the denial of internal self-determination and in accordance with international law [5] and Ireland, who emphasised that when a territory is misgoverned by the State, secession is permitted.[6]

Nevertheless, most of the States have either vehemently opposed any possibility of such a right emerging in international law or did not refer to it altogether. For example, China denied any exercise of external self-determination outside the colonial context,[7] while France, the UK and the USA did not approach the issue. In fact, the only permanent member of the Security Council of the United Nations which recognized the possibility of such a right is Russia, who stated that the possibility of remedial secession only exists in "*truly extreme circumstances such as an outright attack by the parent State, threatening the very existence of the people in question*".[8]

Therefore, although the *Kosovo* case has been considered in doctrine the coming of age for remedial secession as a component of the law of secession,[9] the practice of States has been heterogenous and had determined no change

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[1] Written Statement by the Republic of Germany, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 32-36.
[2] Written Statement by Netherlands, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 7-9.
[3] Written Statement by Slovenia, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 3.
[4] Written Statement by Poland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 25-26.
[5] Written Statement by Finland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 4-7.
[6] Written Statement by Ireland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 8-9.
[7] Written Statement by the Republic of China, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*.
[8] Written Statement by the Russian Federation, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 31-32.
[9] John Dugard, *Op. cit.*, p. 149.

in the application of self-determination in the current international framework. Additionally, the International Court of Justice declined to make any finding on this subject, stating that there are differences regarding whether international law provides for such a right and in what circumstances.[1] In this light, internal self-determination remains applicable in the post-colonial era, while the developments on the matter of remedial secession show, at most, a trend for the future of the international law.

5. Conclusions

Self-determination is still applicable and has not exhausted its role in international law. However, outside the colonial context, the right is applicable inside the boundaries of the existing States and claims to external self-determination cannot be accepted from ethnically or racially distinct groups. International law only recognizes external self-determination for peoples of non-self-governing territories and peoples under alien subjugation, domination, or exploitation.[2]

The content of the principle of self-determination has been associated with notions of equality, democracy, and good governance. It has come to mean the right of peoples within States to freely participate in the decision-making process and to elect their governmental representatives. Thus, it appears that self-determination is currently considered a core right to be fulfilled at the domestic level, as well as the core obligation imposed on governmental authorities to ensure the exercise of democratic rights, the participation in electoral processes which freely determine the political status of the nation-state and the protection of the fundamental rights of their peoples.[3]

Therefore, it seems that by limiting the right to self-determination to its internal dimension, international law has reached a harmony between the conflicting principles of self-determination and territorial integrity. Nevertheless, the principle of self-determination is a complex concept which remains susceptible to many different meanings, so much so that future developments of the international law might determine a reconsideration of the external dimension of self-determination, as a means to overcome the

[1] *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 438, par. 82.
[2] Separate Opinion of Judge Yusuf, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, par. 8-11.
[3] Jakob R. Avgustin, *The United Nations: Friend of Foe of Self-Determination?*, E-International Relations Publishing, Bristol, 2020, p. 53.

discriminatory actions of a State and violations of the fundamental rights of its people.

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Loizidou v. Turkey, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995;

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