Secession and self-determination – Remedial Right Only Theory scrutinised
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Abstract
This paper analyses to what extent a 'remedial right' to secession, as suggested by Allen Buchanan's Remedial Right Only Theory, would be suitable for regulating secession of sub-state entities on an international platform. In doing so it will be argued that a number of problems would have to be addressed and ambiguities removed for a 'remedial right' to be realisable: firstly, the entity which should be the bearer of such a right will be identified, while arguing in line with a number of scholars advocating the limitation of the right to nations. Secondly, although agreeing with Buchanan on the limitation of justified secession to exceptional circumstances, the paper will scrutinise the criteria on which legitimate secession could be based by arguing that a restriction of these to the experience of injustices, as suggested by Buchanan, is too narrow and ambiguous. Finally, while finding that an international regulation of secession would rely on strong institutions, it will be argued that the potential for reforming contemporary international bodies to fulfil this task seems limited.

Keywords: secession, self-determination, remedial right, Kosovo’s Declaration of Independence, International Court of Justice.
Introduction

“Recognizing the unilateral declaration of Kosovo’s independence from Serbia legitimizes [...] the act of unilateral secession by a provincial or other non-state actor. It transforms the right to self-determination into an avowed right to independence” (Jeremić, 2008: 1). This assertion by Serbia’s Minister of Foreign Affairs addresses the core of the problem represented by Kosovo’s declaration of independence from Serbia. It reflects the issue whether, under certain circumstances, a sub-state entity can achieve statehood by means of unilateral secession without the consent of the encompassing state (Muharremi, 2008: 414). While international legal instruments and state practice remain ambiguous regarding the question whether, in exceptional instances, minority groups should be entitled to a right to unilaterally secede, in scholarly literature accounts arguing for such a right have been put forward, the most known of which is Allen Buchanan's Remedial Right Only Theory. This paper will attempt to analyse to what extent a ‘remedial right’ to secession, as suggested by Remedial Right Only Theory, would be suitable as a means to regulate secessionist struggles on an international basis.

As Buchanan points out, there are two ways of deliberating over the issue of secession, the first being moral reasoning about the conditions for an entity to have a right to secede, disregarding institutional requirements, and, secondly, reasoning about the legitimate criteria for secession within the framework of international institutions and “a morally defensible system of international law” (Buchanan, 1997: 32). Envisioning reform and amelioration of the responses of international institutions to secessionist struggles, Buchanan (2003: 214-215; 1997: 32) emphasises that the second strand of reasoning is the more significant one to be answered. Most contemporary violent conflicts take place within states rather than between them, and in many of these cases self-determination crises are at the heart of the conflict (Babbit, 2006: 185). In 2011 in 52 conflicts the quest to secede was a root cause of tensions, while in 73 percent of conflicts with secessionist background violence escalated (Heidelberg Institute for International Conflict Research, 2011: 2-5). As secessionist struggles usually have an international dimension, calling for coordinated international responses, an institutional approach to theories of secession, according to Buchanan (1997: 32-33), seems more convincing. In line with Buchanan's suggestion, this paper will focus on institutional reasoning about Remedial Right Only Theory, with the aim of analysing its suitability for regulating secession on an international platform.
In order to do so, the general scope of secession in contemporary international law will be discussed, followed by a brief review of the main scholarly debate on theories of secession in the first chapter. A second chapter will then scrutinise which entity should be the bearer of a ‘remedial right’ to secession while contrasting Buchanan's suggestion that all ‘cultural groups’ should enjoy such a right with accounts arguing for a limitation of the right to nations. Subsequently, the third chapter will then analyse to what extent ‘past injustices’, the legitimate reasons for secession proposed by Remedial Right Only Theory, are suitable for assessing sub-state entities' claims to independence. A fourth chapter will then briefly discuss the institutionalisation of a ‘remedial right’ to secession. It will be maintained that, while a ‘remedial right’ to secession, in constituting a morally defensible approach, is a first step towards finding an international response to secession, a number of ambiguities would have to be clarified and problems addressed in order for it to be feasible. The most important of these are, firstly, an exact definition of the entity entitled to make a claim to secession, secondly, a precise establishing of the legitimate reasons for secession, while taking into account the complex nature of secessionist struggles, and, thirdly, the installation of effective international instruments for the assessment of claims to secession and the enforcement of a ‘remedial right’.

Background

instruments, the practical implications of the concept of self-determination for national and ethnic minorities remain ambiguous, since the international covenants referring to the principle give no explanation as to its precise meaning and whether it implies a right to secession (Freeman, 1999: 355; Muharremi, 2008: 414-415; Musgrave, 1997). Musgrave (1997) thus suggests that state practice might be the best source for an analysis of the scope of self-determination in international law.

Generally, international practice has established the right to self-determination to be achieved principally through so called 'internal self-determination', by means of autonomy arrangements enabling a minority to attain a certain degree of political, social, cultural etc. independence within the framework of an existing state. To what extent the notion of self-determination implies a right to 'external self-determination', and thus enables minorities to secede in order to become independent or associate with a new state, however, remains controversial. Generally it is held in international legal literature that the right to self-determination does not imply a right to secede, except in cases of decolonialisation. Former colonies are considered to have a legitimate claim to break away from the imperial power and to establish an independent state (Kemoklidze, 2009: 123-124; Muharremi, 2008: 416). However, contemporary international law does not authorise secession of minorities living within the borders of another state. Concerning minorities' striving for independence outside the colonial context the principle of self-determination is generally considered not to imply a right to unilateral secession (Muharremi, 2008: 416-417; Musgrave, 1997).

However, there are a number of scholars who argue for an established right to secession in international law. By approaching the issue of secession from a moral point of view, different theories, arguing either for or against an established right to secession, have been put forward. In an attempt to identify morally legitimate reasons for secession, these theories aim at clearly separating justifiable from unjustified claims to secession (Pavkovic, 2000: 486-489). Three main strands of theory have been developed, addressing the conditions under which unilateral secession might be legitimate: ‘choice’ theories, ‘remedial right’ theories, and ‘national self-determination’ or ‘ascriptive’ theories (Dietrich, 2010: 127; Moore, 2003: 4-5). Generally, these conceptualisations of a right to secession have been classified into two categories being, firstly, primary right theories based on individual rights, which comprise ‘remedial right’ and ‘choice’ theories and, secondly, accounts based on collective rights,
namely those of nations, which are expressed in ‘national self-determination’ theories of secession.

Thus, ‘choice’ theories offer a voluntaristic justification for secession by maintaining that any group of individuals, located on a defined territory, has the right to secede and form a new state if this is the expressed desire of the majority of the entity’s members (Dietrich, 2010: 127; Pavkovic, 2000: 486-487). Different conditions are defined by varying accounts of this theory for establishing an entity’s right to independence (Buchanan, 1997: 38-39). While the most permissive ‘choice’ theories solely attach the will of the majority as the requirement for secession, most versions of this theory identify certain additional criteria which have to be fulfilled for secession to be justifiable. As, for instance, Beran (1984) suggests, an entity must afford the necessary resources to successfully build a new state and guarantee the protection of minority rights within the newly created state.

Focusing on a different notion, ‘national self-determination’ theories draw their conditions for secession from ‘national self-determination’ theory, suggesting that independence is justified by the importance of national identity (Moore, 2003: 7-8). Contrary to ‘choice’ theories, these accounts identify as the main criterion for justified secession not the will of the majority, but that the entity wishing to secede can be classified as a nation (Dietrich, 2010: 127). This, however, as will be elaborated further in the following chapter, emerges as rather challenging, since the nation is a very elusive concept.

This paper, however, will mainly focus on the third strand of theory, ‘remedial right’ theory, and in particular Buchanan’s Remedial Right Only Theory. These theories understand secession as a right to resistance and defence against injustices committed against a group by the encompassing state (Buchanan, 2003: 217-221; Moore, 2003: 5-6; Norman, 2003: 41). Advocates of ‘remedial right’ theories consider a right to secede as “analogous to the right to revolution as understood in the mainstream of liberal political theory: as a remedy of last resort for persistent and grave injustices” (Buchanan, 2003: 217). Thus, according to ‘remedial right’ theories, secession is conceived as a right similar to Locke’s theory of revolution, suggesting that if a government breaches the terms under which a people has given authority to it, then “by this breach of trust they forfeit the power the people had put into their hands” (Locke, 1889: 307). This gives the people a “right to resume their original liberty, and by the establishment of a new legislative to provide for their own safety and security, which is the end for which they are in society” (Locke, 1889: 307). Contrary to
Locke’s account, however, a ‘remedial right’ to secession does not concern the state as a whole, but is focused on a sub-state region by granting this entity the right to secede if severe injustices have been committed against the people inhabiting it. In addition, reflecting the conception of the right to secession as being a means of last resort, secession is justified if, and only if, the encompassing state fails to ensure basic human rights and the secured survival of a group (Moore, 2003: 5-6). Thus, the only acceptable condition for secession within the framework of ‘remedial right’ theories is to protect the existence of a minority against grave injustices. While different ‘remedial right’ theories put forward various types of injustices as legitimate reason for secession, this paper will focus on Buchanan’s account which suggests to restrict legitimate secession to three kinds of injustices: “large-scale and persistent violations of basic individual human rights”, “unjust taking of a legitimate state’s territory”, and the “violation of intrastate autonomy agreements” (Buchanan, 2003: 219-220).

Of the three theories concerning secession, this paper will analyse the suitability of ‘remedial right’ theories for regulating secessionist struggles on an international level. While the focus will be placed upon Buchanan’s Remedial Right Only Theory, this account will be contrasted with other ‘remedial right’ theories, as well as aspects of ‘national self-determination’ and ‘choice’ theories at places. In order to analyse the scope of Remedial Right Only Theory for addressing independence struggles, the following chapter will endeavour to establish which entity should be the bearer of a ‘remedial right’ to secession, while the fourth chapter will scrutinise to what extent Buchanan’s suggestion to tie legitimate secession to the experience of injustices is useful for assessing claims to independence. A final chapter will then briefly examine if a remedial right as envisioned by Buchanan could be institutionalised by contemporary international bodies.

**The entity entitled to a ‘remedial right’ to secession**

Having analysed the general scope of secession in international law, the paper will now turn to a detailed analysis of Remedial Right Only Theory as a means to regulate secessionist struggles. Prior to an assessment of past injustices as the only legitimate basis for secession, as proposed in Buchanan’s Remedial Right Only Theory, it seems necessary to clearly establish which entity should be entitled to make a claim to secession within the framework of such a right. While international legal instruments ambiguously refer to the group entitled to self-determination as a ‘people’, scholarly literature exhibits a lack of consensus as to
whether a ‘remedial right’ to secession should be limited to the nation or extended to a wider range of ‘cultural groups’ as Buchanan (1996, 2003) suggests. Furthermore, disagreement about the conceptualisation of both the ‘nation’ and ‘cultural groups’ have marked the debate. Both points of controversy will be addressed in this chapter. After pointing out a lack of guidance on the group concerned under a ‘remedial right’ to secession in international instruments, the first part of the chapter will examine Buchanan’s suggestion of an ascription of a ‘remedial right’ to secede to all ‘cultural groups’. A second part will then, after a brief debate of definitions of the term ‘nation’, turn to dissenting scholarly accounts arguing for a limitation of the group entitled to secession to a nation, while maintaining that these are more convincing. It will be concluded that, while the nation emerges as the most suitable unit concerned under a ‘remedial right’ to secession, the validity of such entitlements should indeed be limited to exceptional circumstances. Whether past injustices, as suggested in Buchanan’s Remedial Right Only Theory, are suitable criteria for assessing such claims will be addressed in the fourth chapter.

Definitions by international instruments
While international legal instruments such as the United Nations Charter or the ‘Friendly Relations Declaration’ refer to self-determination as a right of ‘people’, for instance by establishing that friendly relations between states should be based upon “respect for the principle of equal rights and self-determination of peoples” (United Nations, 2012), it has been ambiguous precisely which groups the term ‘people’ had been envisaged to comprise (Musgrave, 1998; United Nations, 2012; United Nations General Assembly, 1970). As Pavkociv and Radan (2007) point out, generally United Nations practice has established the term ‘people’ to refer to colonial populations, underpinning the process of decolonisation in ascribing a right to independence to former colonial entities. Thus, as international legal documents lack guidance on the entity entitled to a right to secession outside the colonial context, contemporary scholarly debate has centered on a more comprehensive definition of the group concerned.

Within a wider framework of a theory of self-determination, current scholarly debate is divided on the question to which entity a right to self-determination in general, and a right to secession in particular, should be ascribed. Inter alia Seymour (2007: 4-7) and Nielsen (2003:103) argue that all nations have a general primary right to some form of ‘internal self-
determination', “understood as the ability for a people to develop itself within the encompassing state and to determine its own political status within the state” (Seymour, 2007: 4), and in special circumstances, a right to 'external self-determination', thus the right to their own state. Buchanan (2003: 235-241, 212-213), on the other hand, neglects this notion in suggesting that no group in particular has a primary right to internal self-determination, but all cultural groups should be entitled to secession on the basis of a ‘remedial right’. The following paragraphs are going to scrutinise these accounts by contrasting a right to self-determination and secession limited to nations with a ‘remedial right’ to secession for all cultural groups.

A ‘remedial right’ to secession for all ‘cultural groups’

By suggesting that nations are just one among a variety of groups having the right to an attempt at secession, Buchanan (2003: 235-241, 1996: 283) distances himself from most other scholars who argue that such a right is a privilege of nations. Pointing out the lack of a “coherent conceptual and institutional” framework for the regulation of internal self-determination, and the difficulty of determining the circumstances in which such a right should be accorded, Buchanan (2003: 212, 1997: 44) argues against a general right to self-determination. In his view, such a right is misleading, since a great variety of sub-state entities exists which aspire to differing forms of autonomy. Addressing all these groups with a uniform right to self-determination would neglect the diversity of quests for autonomy. Thus, Buchanan suggests instead the establishment of a remedial right to secede for all ‘cultural groups’ and to “uncouple secession from other forms of autonomy” (Buchanan, 2003: 212).

Buchanan (2003: 213, 1996: 283) further argues that the establishment of such a right requires the separation of a right to secede from nationality. By placing emphasis on the equality of nations to all other ‘cultural groups’, Buchanan suggests that nations do not enjoy any rights other than those granted to all ‘cultural groups’. Hence, all ‘cultural groups’ should equally be entitled to make a claim to secession under a ‘remedial right’. The precise nature of the entities which Buchanan refers to with the term ‘cultural groups’ remains ambiguous. While Buchanan (1996: 294) _inter alia_ refers to religious, political-ideological, or ethnic affiliations, Seymour (2012) points out that in arguing for equal rights for all groups, Buchanan’s account comprises an infinite variety of entities.

Buchanan (1996: 293-299) justifies his rationale for equal rights for all cultural groups, as
opposed to a right to self-determination only for nations, with the need to protect cultural
groups on the one hand, and with the moral obligation to respect individual prioritisations of
group allegiances, at the top of which is not always the nation, on the other. Thus, firstly, as
cultural groups may have a moral value for individuals, which has been acquired
instrumentally, for instance through the use of a certain language as a tool for
communication, cultural groups should be entitled to collective rights and protection.
Secondly, Buchanan (1996: 293-299) emphasises that, since the prioritisation of group
affiliations varies individually, ascribing to nations the place at the top of the hierarchy of
identities would impose a certain order of group allegiances on individuals. In this 'equal
respect objection' Buchanan argues that such a deliberate ordering of group allegiances would
infringe the principle of equality and respect of individual self-definition. Ascribing a right to
self-determination to nations would constitute “a public expression of the conviction that
allegiances and identities have a single, true rank order of value, with nationality reposing at
the summit. So to confer a special right to self-government on those groups that happen to be
nations is to devalue all other allegiances and identifications” (Buchanan, 1996: 293).
Buchanan, thus, rejects the notion that affiliations to a distinct nation are essential for an
individual's self-definition and identity by underlining persons’ multiple identifications, the
hierarchical order of which varies from individual to individual. While some perceive
themselves primarily as adherents of a certain religion, others would describe themselves as
advocates of a political-ideological conviction. Moreover, Buchanan contends that in
pluralistic societies groups evolve over time, emerging and attracting varying numbers of
members over a shorter or lesser period, while some vanish after a while and others persist
(Buchanan, 196: 293). As Nielsen (2003: 123-127) adds, this complex system of group
affiliations is further complicated since most individuals are not consciously aware of their
group preferences and change them according to the context they are in. Hence, while, for
instance, during communal elections one’s identity as citizen of a certain village might
prevail, at religious festivals one might identify predominantly as adherent of a certain
religion. Thus, according to Buchanan (1996: 293-299), a general right to self-determination
for nations would neglect the complexity of human identities and affiliations with various
groups. In his view, this can only be respected if all ‘cultural groups’ are entitled to make a
claim to secession within the framework of a ‘remedial right’.

Buchanan’s account, however, exhibits a number of shortcomings, which have been
addressed by scholars suggesting a limitation of the entity concerned under an international regulation of self-determination and secession to the nation (Miller, 2003; Nielsen, 2003; Philpott, 2003; Seymour, 2007). These criticisms are based on the conceptualisation of the ‘nation’, its relevance for secessionist struggles, and the requirements for a group to attain an independent state. Studies suggesting a limitation of the entity entitled to the right to self-determination in general, and a right to secession in particular, identified three essential criteria for statehood which only nations fulfil, as opposed to all other ‘cultural groups’. These criteria include the existence of a shared overarching culture, the attachment to a certain territory, and the striving for political autonomy. The following paragraphs are going to scrutinise Buchanan’s theory according to these criteria after a brief discussion of the concept of the nation.

**A ‘remedial right’ to secession for nations**

The main criticism of Buchanan’s account made by scholars of the field suggests that nations exhibit a number of characteristics which are essential for the formation of a state and, thus, secession, which other ‘cultural groups’ do not possess (Margalit and Raz, 1990; Miller, 2003; Nielsen, 2003; Seymour, 2007). Although the nation is a rather elusive concept and has never clearly been defined, the majority of deliberations about the role of the nation in secessionist struggles refer to elements of the nation which are found in three different approaches to defining the term: the ethnic, cultural and civic conception of the nation. Thus, while acknowledging the great variety of concepts of the nation, this paper will focus on these three ideal-types, as they are most relevant for the understanding of the special position of nations in secessionist struggles.

The ethnic definition of the term 'nation' emphasises the ethnic origins of modern nations. As Anthony D. Smith, a principal proponent of this view, holds “the most modern of nations are defined and located by their root in ancient ethnic past” (Smith, 1986: 214). Emphasis is placed upon a common ancestry or belief in such common roots. Resulting from a collective history and ethnic origin, nations have collective characteristics such as a shared language, territory or religion (Smith, 1968).

On a different note, the civic conceptualisation of the nation is based upon a sense of community and a sentiment of belonging which connects the members of a nation (Pavkovic and Radan, 2007: 15-17). As Ernest Renan suggests, a nation is held together by voluntary consent and a will to share one’s destiny. “[A] nation is a grand solidarity constituted by the
sentiment of sacrifices which one has made and those that one is disposed to make again. […] The existence of a nation is like an everyday plebiscite” (Renan, 1994: 17). In this approach a nation is based upon the sentiment of belonging to a certain group, rather than the group's objective criteria which differentiate it from other nations.

In contrast, the cultural definition bases the existence of nations on a common encompassing culture shared by its members, which Gellner defines as “a system of ideas and signs and associations and ways of behaving and communicating” (Gellner, 2006: 6). Objective criteria of such a common culture are for instance a shared language, religion, or common customs (Pavkovic and Radan, 2007: 15-17). In this definition the origin of a common culture must not necessarily rest on common ethnic roots. It has not clearly been established how this common culture, which creates a feeling of community and a reference for self-definition, has emerged. While in a primordial approach the origin of nations is attributed to people living on the territory which is regarded as their homeland, this view has been challenged by a number of scholars, classified as ‘modernists’, who link the formation of modern nations to the emergence of modernity and the changing requirements of industrialised modern societies (Pavkovic and Radan, 2007: 15-17). For instance, Benedict Anderson (1994) links the origin of modern nations to the replacement of Latin by vernacular languages. As Anderson suggests “print capitalism”, the spread of written texts in different languages, enables people to identify with each other as members of a single language community. On a different note, Hobsbawm (1992) attaches the development of European Nations partly to “conscious and deliberate ideological engineering” of states in the nineteenth century (Hobsbawm, 1992: 82).

These theories are ideal types, singling out essential elements for the understanding and conceptualisation of nations (Gellner, 2006). Each of the characteristics of the nation emphasised in the theories, however, is reflected in the most important arguments made supporting the limitation of groups entitled to make a claim to secession to nations. These characteristics, which differentiate nations from other ‘cultural groups’, are, firstly, the existence of a shared overarching culture, secondly, an attachment to a certain territory and, thirdly, the striving for autonomy as a voluntary political community. Although, as Margalit and Raz point out, “[i]t is far from clear that people or nation rather than tribes, ethnic groups, linguistic, religious or geographical groups are the relevant reference group” (Margalit and Raz, 1990: 445), most attempts at identifying the entity in scholarly literature point to the nation.
Thus, firstly, as pointed out in the cultural definition of the nation, nations differ from all other ‘cultural groups’ as they possess a shared, overarching culture. As Seymour (2007: 5-6) and Nielsen (2003: 104-106), as well as Margalit and Raz (1990: 443-444) point out, contrary to all other ‘cultural groups’, nations provide the context for most of an individual’s various group affiliations and identities. Hence, while a person can have identities which are detached from one’s nationality, most forms of self-definition are perceived through the lens of one’s national identity. For instance, a person’s conceptualisation of adhering to a religion or of supporting a certain political-ideological mindset is determined by the language this person speaks and the way he or she perceives the world, characteristics which are affected by nationality. Nationality “is in modern societies the integrating structure for our other identities” and “provides the context of choice for these things” (Nielsen, 2003: 124-125). Hence, as Nielsen argues, in their virtue of being ‘encompassing cultures’ which affect all other cultural affiliations of an individual, nations are essential for the flourishing of their members and should be protected. Contrary to Buchanan's rationale, however, this does not imply that national identity is the most important of an individual’s allegiances. As Seymour (2007: 6) argues, nations are special because they are a platform for cultural diversity, even though individual preferences for group belongings vary greatly. "Nations are the ultimate sources of cultural diversity without feeling a particular attachment to the nation" (Seymore, 2007: 6).

In addition, Nielsen emphasises that the existence of such a shared, overarching culture entails “social structures” and “interdependent institutions”, such as education or redistributive mechanisms like welfare systems, which no other cultural groups exhibits, giving nations an adequate framework to successfully exercise the functions of a state (Nielsen, 2003: 110). Thus, according to Nielsen and Seymour, nations are entitled to special rights and a right to self-determination, as they provide the context for all other identities.

The second important aspect in considering whether a unit should be entitled to a ‘remedial right’ to secession is its claim to a certain territory. Buchanan points out that “[a] state in the context of issues of secession is understood as a territorially based primary political unit.” (Buchanan, 2003: 209). Also Margalit and Raz argue that secessionist claims require “determinations whether a certain territory shall be self-governing or not” (Margalit and Raz, 1990: 443). A precondition for an entity to secede would, thus, be the attachment to a fixed territory. Furthermore, the group would have to demonstrate that its claim to the particular area supersedes that of the existing state. As Miller (2003: 67-69) argues, in order to void a
state's entitlement to a part of its territory, the secessionist claim to it has to be very strong, as the territory has potentially belonged to the state for a long time. Establishing whether a secessionist claim to territory is valid implies a comprehensive analysis of the attachment of a group to the territory it occupies. In this connection, as has been emphasised by the ethnic concept of the nation, nations are distinct from all other ‘cultural groups’ as they are historically attached to a certain territory (Nielsen, 2003: 105). While nations exhibit this relation to a territory, other ‘cultural groups’ usually are not attached to a certain territory or spread over several unrelated areas of the world. For instance, political-ideological groups, or religious groups stretch across several states, cultures and nations, while for instance ethnic immigrant groups do not have a historical attachment to the territory they live on (Nielsen, 2003: 105-106). As Miller (2003) and Nielsen (2003) argue, most nations on the contrary, have the ability to establish a strong claim to a territory, based on their historical roots. Generally, authority over a region is carried by government institutions, while legitimacy for this and the claim to the territory is derived from the members of the people inhabiting it. According to Miller this claim is established precisely by nations as they develop an attachment to this geographical area and shape it through “custom and practice” as well as “deliberate political processes” (Miller, 2003: 68). Thus, for instance, a territory gains significance for a nation through the installation of public utilities, such as roads, schools or universities, but also through cultural institutions, such as museums or monuments. “These activities give them [the nation] an attachment to the land that cannot be matched by any rival claimants” (Miller, 2003: 68).

Finally, nations are distinct from other cultural groups, as they constitute a voluntary political community, striving for some form of self-government (Miller, 2003: 62-78; Nielsen, 2003: 104-106). In line with the civic definition of a nation, Nielsen (2003: 104-106) as well as Margalit and Raz (2003: 445) point out, that there must be a sentiment of belonging to the nation amongst its members and a resulting desire for political autonomy and a certain degree of self-government. “So nations are inherently political and inherently cultural. The nationalism of a nation will give force to both those aspirations. And these features will mark them off from other groups” (Nielsen, 2003: 105). Similarly, Philpott (2003: 79-85) emphasises that as nations possess a shared identity, expressed amongst others in shared ethnic, linguistic or cultural traits, national groups believe in a common political fate and members feel a desire to participate in the political shaping of it. According to Philpott, this
striving to create something novel, “a realized good”, the good of self-determination as a nation, is reflected most entities’ wish to secede (Philpott, 2003: 82).

**Theory and Practice**

Thus, by virtue of these characteristics nations seem the most suitable entity entitled to make a claim to secession within the framework of a ‘remedial right’.

Yet as these characterisations of the nation reflect ideal types, they cannot equally be found in all secessionist struggles. In this connection, Pavkovic and Radan (2007) point out that, despite their variety, most secessionist struggles in the past decades have been conducted by nations and national identities have played a central role in their striving for independence. This is evident in numerous past self-determination crises, such as secessions from the former Soviet Union by inter alia Estonia, Latvia and Lithuania in 1990/1991, or the declarations of independence of former federal units of the Socialist Federal Republic of Yugoslavia (SFRY), such as Slovenia and Croatia in 1991. The great majority of groups which have striven for independence in the past exhibited the previously named criteria of a nation, hence a shared culture, a sense of community, the striving for political autonomy, and an attachment to the territory which they wished to withdraw from the encompassing state (Moore, 2003: 5-6; Pavkovic and Radan, 2007).

Despite the nation seeming most qualified for special rights concerning secession in theory, and the focus of most past secessionist struggles on national identity, however, ascribing a right to self-determination or even secession to all groups which would qualify as nations, as suggested by some scholars within the framework of ‘national self-determination’ theories, implies a number of problems. Firstly, as Gellner (1986) points out, too great a number of groups would qualify as a nation, leading to numerous demands for independence and causing great instability. This objection towards ascribing a special right to secession to nations is strengthened considering the great number of independence struggles marked by violence (Babbit, 2006: 185; Buchanan, 2003: 229). Furthermore, each independence struggle is likely to imply issues such as disputes over territory or economic resources, and minority protection and respect of human rights in the new state. In addition, as Miller points out, “[t]erritories occupied by homogenous nations are very much the exception in today’s world” (Miller, 2003: 66). Most geographical areas are inhabited by a mix of minority groups of various nationalities, such as the Turkish or Italian immigrants in Germany; “regionally
gathered minorities”, groups who perceive themselves as a nation and strive for a certain degree of autonomy, such as the Kurds; territories with “intermingled populations” who are rooted in various nations, such as the Rumanian and Hungarian population of Transylvania; and areas where parts of the inhabitants have a “dual identity”, such as the Catalans in Spain. (Gottlieb, 1994; Miller, 2003: 66).

Furthermore, considering the variety of different conceptualisations of the nation, the establishment of clear criteria for identifying a group as a nation and, thus, as eligible for a ‘remedial right’ to secession, seems necessary. This, however, could prove difficult as the nation is a rather elusive concept. For instance, contemporary scholarly opinion on the qualification of the Kosovo Albanians as a nation is divided. Thus, Dietrich (2010: 127) clearly identifies the Kosovo Albanians as a nation by referring to their cultural distinctiveness from the Serbian population, such as the Albanian language or religious affiliations to Islam, as well as their sense of community and desire for self government. Seymour (2012, 2007: 11), on the contrary, contests this view by arguing that the Kosovo Albanians share their nationality with neighbouring Albania and, thus, constitute an Albanian national minority in Serbia, as opposed to being an independent minority nation of Kosovo Albanians. This illustrates the difficulty of establishing which groups would qualify for a ‘remedial right’ to secession by their virtue of being a nation, and the need to define clear criteria for assessing claims to secession which, however, could prove difficult considering the various different conceptualisations of the nation.

As Norman (2003: 35-36) points out, an acknowledgement of these numerous challenges faced when granting nations special rights to secession, underpins the conclusion that a right to secession should be given only in certain, exceptional circumstances. Hence, while this paper argues in favour of a limitation of the entity entitled to a ‘remedial right’ to nations, instances in which an entity is given such a right should indeed be rather limited. To what extent the criteria for assessing an entity’s claim to secession put forward by Buchanan’s Remedial Right Only Theory, based on the experience of injustices, are suitable to establish whether a group should be granted a ‘remedial right’ to secede, will be scrutinised in the following chapter.

Criteria for secession within the framework of a ‘remedial right’

‘Remedial right’ theories strictly limit justified reasons for secession to the experience of past
injustices, excluding criteria put forward by other concepts, such as majority decisions, as suggested by ‘choice’ theories, or secession on the basis of nationality, as envisioned by ‘national self-determination’ theories. Hence, a ‘remedial right’ to secession serves the purpose of averting grave injustices and protecting the existence of minority groups only. Various types of wrongs have been suggested as criteria for justified secession by different scholars, the most common of which are violation of fundamental human rights and systematic discrimination, unjust and forceful annexation of territory and, as some scholars add, the violation of internal autonomy arrangements (Buchanan, 2003: 218; Dietrich, 2010: 128; Moore, 2003: 5-6). Depending on the kind of injustices a theory suggests as basis for legitimate secession, different versions of a ‘remedial right’ can be more permissive or restrictive.

The following paragraphs will analyse the criteria for legitimate unilateral secession put forward by Buchanan, by scrutinising their suitability as basis for an institutionalised ‘remedial right’ to secession in a theoretical manner, as well as by referring to examples of secessionist struggles. In a first part, Buchanan’s justification for these three criteria and their advantages for assessing claims to secession will be examined. Subsequently, these justifications will then be scrutinised regarding their shortcomings as framework for regulating secessionist crises. In doing so, it will be maintained that the criteria, as suggested by Buchanan, are too vaguely defined, and fail to reflect the diversity and complexity of secessionist struggles on the one hand, and the reality of state practice, which to date seems largely limited to inter-state relations and is marked by the prevalence of the principle of territorial integrity, on the other.

**Buchanan’s three criteria for legitimate unilateral secession**

The most recent account of Buchanan’s theory (2003: 218-222) restricts legitimate secession to three cases, being, firstly “large-scale and persistent violations of basic individual human rights”, secondly, “unjust taking of a legitimate state’s territory”, and thirdly, “a state's persistent violation of an intrastate autonomy agreement” (Buchanan, 2003: 219-220). Buchanan argues that these three criteria are more suitable for assessing claims to secession than others, such as nationality or plebiscites, as suggested by ‘national self-determination’ and ‘choice’ theories.

Hence, Buchanan (2003: 229) argues that, understood as a remedy against severe and
continuing injustices, a ‘remedial right’ to secession is more restrictive than ‘national self-determination’ or ‘choice’ theories, which grant the right on the more permissive basis of nationality or majority decisions. As secession frequently provokes violent conflict and political instability, Buchanan emphasises that unilateral secessions legitimated by an internationally endorsed right should be confined to exceptional circumstances. Thus, opposed to ‘national self-determination’ or ‘choice’ theories, ‘remedial right’ theories reduce the risk of violent conflict by limiting justified unilateral secession to instances in which a state’s severe discrimination against a minority threatens this group’s existence.

Secondly, by defining the first of his legitimate criteria for secession, the violation of human rights, as a means of last resort to protect the existence of a group, Buchanan (2003: 217-219, 229) justifies this criterion as a right to self-defence. According to Buchanan, individuals inhabiting a certain territory have a right to defend themselves against the violation of their most basic human rights which overrides the state’s sovereignty over the territory and, thus, enables the group of victims to withdraw the region from it. “When the only alternative to continuing to suffer […] injustices is secession, the right of the victims to defend themselves voids the state's claim to the territory and this makes it morally permissible for them to join together to secede” (Buchanan, 2003: 219). Hence, on the basis of the experience of injustices, a group can establish a strong claim to the territory they inhabit, fulfilling an essential criteria for justified secession, while state legitimacy in areas inhabited by citizens feeling represented by the state is upheld.

Thirdly, in Buchanan’s view (2003: 229), a ‘remedial right’ to secession would serve to reduce discriminative and unjust policies of states since repressive policies towards a minority could lead to qualification for unilateral secession of this group. Thus, an internationally accepted ‘remedial right’ to secession would, according to Buchanan, create incentives for governments to implement fair, participatory policies towards minorities as a means to protect the state’s territorial integrity.

Regarding the second criteria, the unjust annexation of a group’s territory, Buchanan points out that initially the legitimacy of unilateral secession on this basis is justified as “[t]he secessionists are simply taking back what was lawfully theirs, rectifying the injustice of the wrongful taking of what international law recognized as their territory” (Buchanan, 2003: 220). Birch (1984: 599) adds as precondition that the people living in the annexed region have continuously demonstrated their refusal to endorse or give consent to the union.
According to Birch, this does not necessarily have to take the form of active protest, but a continuing rejection of the region’s incorporation into the state must be visible. An example of entities which would have qualified for secession under this criterion are the three Baltic Republics Estonia, Latvia and Lithuania. The three states, which gained independence after a conscientious secession from the Union of Soviet Socialist Republics (USSR) in 1990/1991, had originally not been part of the USSR but were illegally annexed by Soviet Russia in 1940. As Pavkovic and Radan (2007: 132-135) illustrate, the three republics were integrated into the USSR after fraud elections had brought Soviet backed governments in power, which then requested to join the USSR, allegedly acting in accordance with the will of the respective population. Also Birch’s additional criteria of demonstration of refusal to join the union would have been met by the three republics. Thus, the Soviet regime had been challenged by large, popularly supported movements in all three republics when Soviet troops reoccupied the territory after German rule over the region ended in 1944 (Hiden and Salmon, 1991). Against the backdrop of Soviet liberalisation under glasnost protests gained new strength and manifestations against the occupation were regularly organised from 1987 (Hiden and Salmon, 1991; Pavkovic and Radan, 2007: 132-135).

Also regarding this second criterion, Buchanan points out a number of benefits. In his opinion, basing the regulation of secessionist conflicts on this condition would serve to deter illegal occupation of territory “and would to that extent reinforce the existing international legal restrictions on the aggressive use of force by states” (Buchanan, 2003: 220). Also the right to self-government would be reinforced, as the unjust occupation of a state constitutes a violation if this right. A ‘remedial right’ to secession in the case of unjust annexation of territory would, thus, acknowledge a state’s right to reclaim its territory and reinstall self-government (Buchanan, 2003: 220).

The third criterion Buchanan suggests are “serious and persisting violations of intrastate autonomy agreements by the state, as determined by a suitable international monitoring inquiry” (Buchanan, 2003: 221). Buchanan (2003: 221-222) has observed this issue for instance in South Sudan and Kosovo, areas in which the state has rescinded a minority group’s autonomous status, which fuelled the groups struggle for independence and in turn let

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1 The three states gained independence after World War I, but were allocated to the ‘soviet sphere of influence’ in a confidential paragraph of the ‘Molotov-Ribbentrop Pact’, leading to Soviet occupation of the territories in 1941 (Pavkovic and Radan, 2007).
to violent suppression of these aspirations by the encompassing state. Thus, the rescinding of the region’s federal status by Serbia in 1989 has led to a decade of repression of the region, giving rise to secessionist aspirations which eventually resulted in violent conflict in 1998/9. As will be discussed in further detail later in this chapter, increased fighting between the Kosovo Albanian ‘Kosovo Liberation Army’ (KLA) and Serbian military triggered a NATO intervention (1999) and Serbian retaliation which was marked by large scale human rights violations (CIA, 2012c; Malcom, 1998; Weller, 2009). Similarly, in South Sudan violations of the ‘Addis Ababa Peace Agreement’, which ended the First Sudanese Civil War (1955-1972) by granting autonomy to the region\(^2\), amongst other reasons led to the outbreak of the Second Sudanese Civil War (1983-2005) (Christopher, 2011: 127-128; Johnson, 2003). By pointing out the ill-coordinated manner in which the international community responds to such conflicts, only intervening after the breakdown of an autonomy agreement has led to severe conflict, Buchanan (2003: 221-222) suggests that a right to secession, based on violation of internationally monitored autonomy agreements, could enhance international responses to such crises. In this connection, Buchanan links the introduction of a ‘remedial right’ to secession to the establishment and supervision of intrastate autonomy agreements with support of the international community. In addition, an international body would have to be commissioned with the task of adjudicating disputes over breaches of autonomy arrangements (Buchanan, 2003: 221-222). As will crystallise in the following analysis, however, the delegation of such competences to international bodies is still in early stages.

Yet although Buchanan’s rationale for tying legitimate unilateral secession to the three above named criteria seems morally compelling and initially justified, if subject to greater scrutiny, these criteria exhibit a lack of clarity on the one hand, and a number of problems regarding the implementation of a ‘remedial right’, on the other. The following paragraphs are, hence, going to critically engage with Buchanan’s three criteria for legitimate secession by examining to what extent they would be suitable as a basis for regulating secessionist struggles. It will be found that, firstly, Buchanan’s criteria, strictly linked to the experience of injustices, are too limited as they fail to address the diversity of causes for secessionist

\(^2\) Under the Addis Ababa agreement South Sudan achieved autonomy through a regional government entitled to impose taxes and to request that the southern region be exempt from national policies it considered disadvantageous to the region. The regional government, however, had only limited competences in the areas of economy and security (Johnson, 2003).
claims. Secondly, there are a number of ambiguities inherent in basing legitimate secession on the experience of injustices and, thirdly, Buchanan’s criteria rely on strong international institutions, the establishment of which seems unlikely in the near future.

**Buchanan’s three criteria scrutinised**

**The underlying causes of secession**

Hence, as a number of scholars have pointed out, assessing the legitimacy of secessionist claims by referring to past human rights violations fails to address the underlying causes of most secessionist struggles (Moore, 2003: 5-6; Pavkovic and Radan, 2007; Philpott, 2003: 79-83). A ‘remedial right’ to secession, as argued by Moore (2003) and Pavkovic and Radan (2007), remains wanting since in most secessionist struggles injustices do occur, but are not the root cause of conflict. The significance of culture and especially national identity seems to be insufficiently accounted for in a ‘remedial right’ approach. As Moore emphasises, “[j]ustice may be a good criterion for assessing government; but it does not seem to be the primary factor in understanding the quest to secede” (Moore, 2003: 6). In this connection, Philpott (2003: 82-84) adds that for most secessionist groups independence constitutes a means to realise the good of self-government, strongly related to a common identity, rather than just the wish to break away from an existing state to avert injustices. A group may have grievances in addition to their quest for self-government “which may morally enhance their appeal for self government”, but “self-government intrinsically desired [...] is an element in the alloy of motivations behind virtually every self-determination claim. In some cases, it is quite explicitly the central motivation” (Philpott, 2003: 82). This also reflects and further underpins the limitation of the entity entitled to a ‘remedial right’ to secession to the nation, as has been argued in the previous chapter. Furthermore, for a group to build a functioning state, certain characteristics, such as the attachment to a territory, striving for political autonomy, and the sentiment of community, seem essential. Basing a right to secession solely on the experience of injustices, discarding the above criteria, entails the risk that newly created states lack essential features of a functioning state.

Buchanan (2003: 230-231), however, objects to these criticisms by, firstly, arguing that, since national minorities are the most common target of human rights violations in secessionist struggles, in many cases Remedial Right Only Theory will ascribe the right to secede to national groups. Secondly, Buchanan points out that his theory only concerns unilateral
secession, the most extreme form of self-determination. Beyond independent statehood, however, various self-determination arrangements with varying degree of autonomy can be established within the state, taking into consideration national sentiments.

The complex reasons for secessionist crises and problems resulting from basing secession exclusively on shared grievances are *inter alia* evident in South Sudan’s struggle for self-government. South Sudan achieved independence in July 2011 with consent of the Republic of Sudan. Yet the newly created state’s history had been marked by two periods of civil war between southern Sudan and the northern government in Khartoum between 1955 and 1972 and again between 1983 and 2005 (CIA 2012b; Christopher, 2011: 127-128). Recent analyses have established the principle causes of civil war in Sudan to be: firstly, the exploitation of Sudan’s peripheries by the central government, a practice dating back to pre-colonial years which, mainly through slavery and slave raiding, left peripheral regions economically and political marginalised. When Sudan was an Anglo-Egyptian condominium (1899-1955) these regional inequalities were increased by an economic system which disadvantaged the economic development of the south, and hence gave rise to demands for enhanced participation in government and support for economic development of southern Sudan after independence in 1956 (Johnson, 2003). On a different note, ethnic, linguistic and religious tensions were at the heart of the conflict, as British colonisers administered the southern regions of Sudan differently from the north, facilitating the spread of Christian religion and English language while in the north Islam was the prevailing religion and Arabic the dominant language (Christopher, 2011: 127; Johnson, 2003). Thus, one reason for the secessionist struggle was that “at independence in 1956, the country was essentially divided on the basis of ethnicity, language and religion” (Christopher, 2011: 127). This divide was further reflected in the outbreak of the Second Sudanese Civil War (1983-2005) which was, as Christopher (2011: 127-128) argues, strongly linked to the introduction of Shari’ah law throughout the country, reflecting the development of a nationalist movement in northern Sudan based on Arabic culture and adherence to Islam, disregarding Sudan’s cultural and ethnic diversity. The conflict was, furthermore, fuelled by the discovery of natural and mineral resources, especially oil, in Southern Sudan. Increasing foreign investments encouraged the central government to occupy resource rich areas in the south, a practice which was marked by severe human rights violations.

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3 Under the governments of Nimeiri (1969 – 1985) and Sadiq al Mahdi (1986 – 1989) the government armed
especially the Cold War, further prolonged the civil war, especially as it let to distribution of high numbers of weapons in the conflict\(^4\) (Johnson, 2003).

Thus, while South Sudan’s struggle for independence has been marked by severe human rights violations, and while the government in Khartoum can clearly be established as the principal reason for these injustices, a reduction of South Sudan’s aspiration for independence to these two factors seems reductionist as it fails to acknowledge the variety of dynamics behind the secessionist crises.

On the other hand, South Sudan’s independence also illustrates the importance of community for building a new state. As Jok Madut (2011) points out, with an estimated sixty-seven cultural and linguistic groups in South Sudan, which historically constitute the primary source of identity rather than a ‘Southern Sudanese nation’, the newly founded state seems to be primarily based on a geographical region, rather than a national community. Having been united through common opposition to the government in Khartoum and a shared struggle for independence from it, “South Sudan’s independence carries the question of whether the historical experiences that have long united the old south will endure in the new south, enabling the young country to become a unified political, cultural, and social entity - in short, a nation” (Jok Madut, 2011: 9, 10). Taking into consideration South Sudan’s history, marked by internal political conflicts along ethnic lines, concerns have been voiced that tensions might increase over the distribution of state resources, threatening the fragile sentiment of community. Signs of this have already been evident in numerous quarrels between ethnic communities since 2005\(^5\) (Jok Madut, 2011; United Nations, 2011). In addition, many South Sudanese have voiced concerns that national cohesion could be impeded through the “exclusion from the national platform, especially exclusion along ethnic lines” (Jok Madut, militia and encouraged them to attack Southern villages with the aim of expelling the population to render oil extraction possible. The attacked communities of mostly ‘Nuer’ and ‘Dinka’ ethnic origin experienced severe human rights violations such as looting and burning of their possessions, and during the attacks individuals were frequently injured or killed. Following, the land was occupied by government troops and residents prevented from returning (Human Rights Watch, 2003).

\(^4\) Since 1972 Sudan established close relations to the US, which regarded it as an ally against Libya and communist Ethiopia, ensuring economic and military assistance (Johnson, 2003).

\(^5\) An estimated thousand people have been killed in ethnic clashes in South Sudan in 2011 alone. Conflict sparked notably between the ‘Lou Nuer’ and ‘Murle’ communities in the state of ‘Jonglei’ (United Nations, 2011).
Thus, as becomes evident from the example of South Sudan, basing a right to secession solely on the shared experience of injustices entails the risk of disregarding other root causes of secessions and of allowing entities to secede which lack essential preconditions for building a functioning state. This underpins the conclusion that, should a ‘remedial right’ to secede be incorporated into international law, a careful examination of all underlying causes for secession, as well as a sentiment of community as basis for a new state, seem essential.

**Defining injustices**

Secondly, a number of ambiguities inherent in Buchanan’s three criteria for justified secession seem to require clarification should a ‘remedial right’ to secession be institutionalised. Hence, Buchanan’s first criterion, the “large scale and persistent violation of basic individual human rights” (Buchanan, 2003: 219), exhibits a vagueness regarding the nature of human rights violations which would qualify a group for legitimate unilateral secession. The specification that human rights violations must be ‘large scale’ and ‘persistent’ in order to build a legitimate claim to unilateral secession, touches upon Buchanan’s justification for the right as a means of last resort to protect a group’s existence (Buchanan, 2003: 219-220; 1991: 65). This is understood as opposed to a mere right to “self-preservation” (Buchanan, 1991: 65), thus to preserve a group's particularities, such as a distinct culture, which according to Buchanan would not suffice as justification for secession. The right to self-defence “here implies an effort to protect against a lethal threat, a deadly attack by an aggressor” (Buchanan, 1991: 65). Furthermore, as Buchanan (1991: 64-66) and Birch (1984: 599) specify, human rights violations threatening a group's existence only constitute a justified basis for secession if the aggressor can clearly be established as being the encompassing state. This could result either from a bias of representative processes against the region or ignorance of the results of fair representation by the executive (Birch, 1984: 599-600). Hence, if a group would for instance be threatened by starvation there would have to be clear evidence that this threat results from the central governing authority and its policies as opposed to other reasons such as droughts etc.

However, even considering this more narrow definition, should a ‘remedial right’ to secession be included into the international legal system it remains unclear precisely which injustices could be regarded as threatening the existence of a group, and how these can be ascribed to
actions and policies of the central government. While Buchanan (2003: 219-222) suggests the establishment of an authority to assess whether human rights violations against a group would justify claims to secession, clear guidelines as to which kind of human right violations would qualify an entity for secession would have to be established as basis for the institution to evaluate claims to secession. Furthermore, as will be examined in further detail at the end of this paper, the creation of such an authority is still in early stages.

Identifying victims and perpetrators

A further problem inherent in an international regulation of secession based on the experience of injustices is the difficulty of clearly identifying victims and perpetrators in secessionist struggles. As Dietrich (2010: 128) points out, the distinction between the group of offenders and the group of victims, which a ‘remedial right’ necessitates, is not clear-cut. Should claims to secession be assessed by referring to injustices, however, these categories would have to be clearly defined. In arguing for a ‘remedial right’ to secession as a means of ‘self-defence’, Buchanan (1991: 64-66) emphasises that this right is not unlimited, putting forward two restrictions which reflect its character as a right to self-defence. Firstly, only the minimal amount of force should be used to avert a threat and, secondly, the attack which leads to self-defence should not be provoked by previous actions of the victim. In the reality of many secessionist struggles, however, these groups are virtually impossible to distinguish, as they are marked by violent conflict in which both the encompassing state and the secessionist group are involved.

As Dietrich (2010: 128) points out, this is evident, for instance, in the Kosovo conflict in which acts of violence have been committed by both the Serbian military as well as Kosovo Albanian guerilla. The Albanian population of the Kosovo, which unilaterally declared its independence in 2008, suffered from severe human rights violations under the regime of Slobodan Milosevic, since conflicts between the KLA and the Serbian police escalated in 1998/1999. While violence started with occasional offensives against Kosovo Albanian villages suspected of hosting rebels, in which members of the KLA as well as civilians were frequently expelled or killed, the conflict escalated during a NATO air bombing campaign between March and June 1999 (Dietrich, 2010: 128; Human Rights Watch, 2010; Kuperman, 2008: 65-66). A large scale attack on the Kosovo Albanian population by Serbian forces
during these months led to the forced expulsion of an estimated 850,000 Kosovo Albanians (Human Rights Watch, 2010). Furthermore, evidence suggests that severe human rights violations, including crimes such as torture, rape and executions have occurred during the attack (Human Rights Watch, 2010; Weller, 2009). While the Kosovo Albanians would probably have qualified for secession under a ‘remedial right’ on the basis of these atrocities, Dietrich (2010: 128) points out that, through Buchanan’s definition of the ‘remedial right’ as a means to self-defence, the Kosovo Albanian’s justified claim for secession could be considered debatable as both parties to the conflict have committed injustices. Thus, while Kosovo Albanians had protested peacefully against the rescinding of their autonomous status in 1989 until the late 1990s, the KLA increasingly engaged in violent attacks against Serbian police and civilians from 1997 (Dietrich, 2010: 128; Human Rights Watch, 2010; Weller, 2009). Moreover, after the withdrawal of Serbian and Yugoslav forces from Kosovo, as a result of the NATO air campaign in June 1999, Kosovo’s Serb and Roma minorities were attacked by returning members of the KLA and ethnic Albanians, leaving an estimated 150,000 Kosovo Serbs and Roma displaced and 1,000 killed or unaccounted for (Human Rights Watch, 2010). Hence, while the atrocities committed against Kosovo Albanians between 1998 and 1999 could be classified as “severe and large scale” and, thus, as qualifying the group for unilateral secession under a ‘remedial right’, the activities of the KLA could equally be considered to be conflicting with the right to self-defence which stipulates that only minimal force should be used to avert a threat (Dietrich, 2010: 128; Hannum, 2011: 157). Meanwhile, however, it could also be argued that, since the Serbian government had initially started the aggressions, the Kosovo Albanian population’s claim to independence would remain justified. As becomes evident from this example, clearly identifying victims and perpetrators in most violent secessionist struggles constitutes a difficult, if not impossible task, which could render the regulation of secessionist crises within the framework of a ‘remedial right’ complicated.

A means to self-defence

A further problem of Buchanan’s first legitimate criteria for secession is the incompatibility of the definition of the right as a means of self-defence and injustices which lie in the past, and have already been remedied, as justified reason for secession (Dietrich, 2010: 128-129). As Buchanan (1991: 64-67) points out, under Remedial Right Only Theory, secession only
constitutes a measure of last resort to avert an immediate existential threat to a group, which raises the question whether secession would still be justified if the injustices have already been averted by other means. For instance, in Kosovo a decade lies between the unjust treatment of the Albanian population and Kosovo’s 2008 declaration of independence (Dietrich, 2010: 128-129; Pavkovic and Radan, 2007: 152-153). The NATO air bombing campaign against Serbia in 1999 which forced the Serbian military to leave Kosovo, and the placing of the territory under UN administration through Security Council Resolution 1244 in 1999 have ended the most grave human rights abuses against Kosovo Albanians. Thus, the commitment of severe injustices against Kosovo Albanians date back to the period before the civil administration of the United Nations had been established in 1999 (Dietrich, 2010: 128-129; Human Rights Watch, 2010; Weller, 2009). According to Dietrich, however, “if the remedial right to secession is meant to be a right to self-defence, the distance of time cannot be ignored. An action can only count as an instance of self-defence if it is performed in direct response to an aggression” (Dietrich, 2010: 128). Kosovo’s declaration of independence in 2008, however, cannot be considered an immediate reaction to human rights violations by the Serbian state, which would invalidate Kosovo’s secession within the framework of a ‘remedial right’ understood as a right to self-defence (Dietrich, 2010: 128-129; Hannum, 2011: 156-158). In this connection, Buchanan argues that, should injustices have been alleviated by, for instance, a change of regime, then the sub-state entity seeking independence and the encompassing state should attempt to establish an autonomy arrangement within the encompassing state as “it is no longer true that their only remedy for injustices is secession” (Buchanan, 2003: 222). Thus, as the creation of a new state should only be permitted if injustices cannot be alleviated in less drastic ways, if the Kosovo Albanian population is no longer threatened by human rights violations today, Kosovo’s secession would seem unjustified under a ‘remedial right’ (Dietrich, 2010: 128-129; Hannum, 2011: 156-158). This, again, indicates that a ‘remedial right’ fails to adequately address the complexity of self-determination struggles, here especially concerning the question whether injustices which have already been remedied by other means still qualify a group for secession and where the line between justified and illegitimate claims to secession should be drawn on this basis.

Unjust annexation of territory scrutinised

Also Buchanan’s initially straightforward second criterion, the “unjust taking of a legitimate state’s territory” (Buchanan, 2003: 219), exhibits a number of ambiguities, when subject to
close scrutiny. Thus, the reclaiming of illegally occupied territory as legitimate reason for secession becomes controversial if the sovereignty of a territory had been contested at the time of annexation. For instance, while secession of the three Baltic republics Lithuania, Latvia and Estonia seems justified under a ‘remedial right’, in other cases, especially secessionist crises resulting from borders drawn in the course of decolonisation, the status of territories is less clear. Such ambiguities are inter alia evident in the Sahrawi people of *Rio de Oro and Saguia el-Hamra’s* (Western Sahara), quest for independence. Western Sahara has been fighting for independence from Morocco since the Spanish colony had been decolonised in 1976. The territory’s sovereignty, however, is to date controversial as claims to it are made by Morocco and the ‘*Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro*’ (Polisario) representing the native Sahrawi population (CIA, 2012; Economist, 2007; Rousselier, 2005: 313; Shelley, 2004). Western Sahara had been placed under a joint Moroccan and Mauritanian administration after Spain withdrew from the colony in the ‘Tripartite Agreement’ (1975). Yet in 1979 Mauritania abandoned its administrated territory in the south due to increased attacks by ‘Polisario’, leading to Moroccan occupation of the entire territory (Cassese, 1998; Hodges, 1983; Rousselier, 2005: 317). Although the annexation of Western Sahara by Morocco is generally condemned by the international community, the sovereignty of the territory remains ambiguous as Morocco and Mauritania, but also the native Sahrawi people claim historical ties to the territory, and to date Morocco refuses to allow any referenda on the territory including the option of independence (Lewis, 2011; Rousselier, 2005; Shelley, 2004).

In such cases, Buchanan suggests that the adoption of an international law regulating secession would have to be accompanied by an "authoritative procedure for adjudicating disputes about whether the territory taken belonged to a legitimate state" (Buchanan, 2003: 221). To date, however, the success of international institutions, like the International Court of Justice (ICJ), in addressing such disputes appears limited. This is inter alia evident in the dispute over Western Sahara’s sovereignty. On the question whether Western Sahara had “at the time of the colonization by Spain [been] a territory belonging to no one (terra nullius)” and on demands for clarification of “legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity” (ICJ, 1975a: 3) the ICJ issued an advisory opinion in 1976. In this legal procedure the court unanimously concluded that legal ties between the territory of Western Sahara and Morocco as well as Mauritania did exist, in form of
allegiances between the Moroccan sultan and tribes inhabiting the territory of Western Sahara, and in form of land rights with Mauritania. The Court, however, further concluded that these ties did not imply rights to sovereignty over the territory for either state and, thus, do not limit the Sahrawi people’s right to self-determination (Cassese, 1998; ICJ, 1975b). While, in the Court’s judgement the right to self-determination of the Sahrawi people has been sustained, it could not solve the dispute over Western Sahara’s sovereignty. As Rousselier points out, “[i]n diplomatic and political circles, it was widely felt that the ICJ advisory opinion, […] although a mastery of compromise granting assents while simultaneously eschewing consent, stemmed as much from international law as political sensitivity” (Rousselier, 2005: 315).

Also Buchanan’s third criterion for justified unilateral secession, the “violation of intrastate autonomy agreements” (Buchanan, 2003: 221), envisions the establishment of strong international institutions, here with competences to monitor autonomy agreements and adjudicate disputes over their violation (Buchanan, 2003: 221-222). Yet while to date the scope of international bodies in addressing secessionist crises seems limited, as will be argued in the following paragraphs, the establishment of institutions with such extensive competences seems unlikely also in the foreseeable future.

Institutionalisation

The implementation of a ‘remedial right’ to secession relies on the establishment of strong international institutions, able to oversee the exercise of the right. As has been argued in the previous chapters, a ‘remedial right’ requires international institutions to fulfil the following functions: identify the entity entitled to such a right, assess whether human rights violations have occurred in a secessionist conflict and whether these qualify the secessionist group for independence, identify the group of victims and offenders, monitor autonomy agreements, and adjudicate conflicts over annexed territory.

An institution capable of fulfilling these functions does not exist to date. However, suggestions have been made by scholars advocating a ‘remedial right’ for the reformation of existing institutions to implement the right. While Buchanan (2003: 222) proposes the expansion of an institution such as the ‘United Nations Special Committee on Decolonisation’ to perform this function, Seymour (2012) suggests that a future version of

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6 The ‘United Nations Special Committee on Decolonisation’ (also named ‘C-24’) is commissioned with the
the ICJ could be commissioned with the task. The functioning of international institutions, especially of the ICJ today, however, suggests that the establishment of international bodies with competences required for the implementation of a ‘remedial right’ is unlikely. A number of scholars have pointed out that to date secession outside the colonial context lies in the field of domestic law and politics rather than international law (Christakis, 2011: 84-86; Corten; 2011: 88-89; Hannum, 2011: 158). As Corten emphasises “[t]raditionally, international law remains neutral in regard to secession: it neither prohibits nor authorizes it.” (Corten, 2011: 88).

As has been argued by Christakis (2011) as well as Corten (2011) and Hannum (2011), the improbability of an alteration of current international law to incorporate secession of sub-state entities outside the colonial context is evident in the 2010 ICJ Advisory Opinion on Kosovo’s declaration of independence (2008). The Advisory Opinion constitutes a watershed as, for the first time, the ICJ assessed the legality of a unilateral declaration of independence outside the colonial context (Christakis, 2011: 73-74). Upon the question if “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law” (ICJ, 2010: 5), the Court has concluded in its advisory opinion in 2010 that Kosovo’s declaration of independence does not contradict current international law. This judgement, however, does not seem to support a ‘remedial right’ to secession but to reaffirm the restriction of secession outside the colonial context to domestic law (Corten, 2011: 88-89). Thus, the scope of the judgement seems limited. Firstly, as advisory opinions are not legally binding, it does not entail any consequences for either Kosovo or Serbia (ICJ, 2012; Vidmar, 2011: 358). Secondly, the Court’s ruling that Kosovo’s declaration of independence is in accordance with international law, does not seem to imply a positive right to statehood for Kosovo (Christakis, 2011: 75; Vidmar, 2011: 358). As the Court emphasises in paragraph 51 of its Advisory Opinion the question posed to it “does not ask about the legal consequences of that declaration [Kosovo’s declaration of independence]”, but solely requested “the Court’s opinion on whether or not the declaration of independence is in accordance with international law” (ICJ, 2010: 19). Thus, while Kosovo’s declaration of independence does not seem to contradict international law, no right to statehood can be deduced from this assertion, as international law does not concern

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task of monitoring the implementation of General Assembly Resolution 1514 (1960), the ‘Declaration on the Granting of Independence of Colonial Countries and Peoples’ (United Nations, 2012b; Johnson, 1967).
secession outside the colonial context (Corten, 2011: 93; Tricot and Sander, 2011).
As Corten (2011: 91-93) and Wilde (2011a: 303; 2011b: 152) argue, the Court reaffirmed that secession outside the colonial context is beyond its jurisdiction by emphasising that the principle of territorial integrity, which international law is concerned with, only applies to relations between states and not between a state and a sub-state entity and, thus, excludes secession. The Court has emphasised this in paragraph 80 of the Advisory Opinion by arguing that “the scope of the principle of territorial integrity is confined to sphere of relations between states” (ICJ, 2010: 30), referring *inter alia* to the Charter of the United Nations, Article 2.4 which stipulates that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State” (United Nations, 2012a). Thus, this part of the Advisory Opinion interprets international law in a traditional manner, emphasising that the principle of territorial integrity does not apply to secession and, thus, excludes secession outside the colonial context from its jurisdiction (Christakis, 2011: 84-86; Corten, 2011: 88).

Concerning a ‘remedial right’ to secession, the court has emphasised in paragraph 83 of its Advisory Opinion that “[d]ebates regarding the extent of the right to self-determination and the existence of any right of ‘remedial secession’” are “beyond the scope of the question posed by the General Assembly” (ICJ, 2010: 31). As Corten (2011: 91-93) points out, however, in its reaffirmation of the principle of territorial integrity as being limited to the relations between states, the Court implicitly challenged the notion of a ‘remedial right’.

From the debate on a ‘remedial right’ to secession which this Advisory Opinion has given rise to, it is also evident that most states are reluctant to endorse such a right. Thus, while according to Christakis (2011: 78) and Corten (2011: 91-93) only a few states, including the Netherlands, Switzerland, and Slovenia, clearly voiced support for a ‘remedial right’ to secession; the majority of states, amongst which Argentina, Brazil, China, and Serbia rejected the notion of a ‘remedial right’.

Thus, as becomes evident from the example of the ICJ Advisory Opinion on Kosovo’s declaration of independence, secession outside the colonial context seems to be firmly entrenched in the domestic sphere. A ‘remedial right’ to secession, as envisioned by Remedial Right Only Theory, however, would rely on strong international institutions, with jurisdiction to adjudicate disputes over secession. Yet considering the functioning of international bodies today, the establishment of institutions with such extensive competences seems unlikely to be
achieved in the foreseeable future.

Conclusion
Considering the number of contemporary conflicts with secessionist background, 52 in 2011, more than one third of which were violent (Heidelberg Institute for International Conflict Research, 2011: 2-5), the development of more effective responses of the international community to these conflicts seems an issue more pressing than ever. As Buchanan emphasises by pointing out that “secession crises tend to have international consequences that call for international responses” (Buchanan, 1997: 33), theories of secession should envision the reformation of international institutions rather than make deliberations which disregard institutional requirements.

In line with Buchanan’s rationale, this paper has engaged in institutional reasoning about a ‘remedial right’ to secession and, thus, has analysed the issue taking into consideration its institutionalisation. This paper, however, has argued that Buchanan’s Remedial Right Only Theory exhibits a number of ambiguities and shortcomings which would have to be addressed, should a ‘remedial right’ to secession be institutionalised.

Hence, firstly, the entity which should be the bearer of a ‘remedial right’ to secede would have to be identified. Contrary to Buchanan’s suggestion to ascribe a remedial right to secession to all ‘cultural groups’, this paper has argued in line with scholars suggesting a limitation of the entity entitled to a remedial right to nations. The singling out of nations as entity entitled to a ‘remedial right’ is based on a number of characteristics unique to nations, distinguishing them from other cultural groups in particular with regard to their ability to build a functioning state. These characteristics, which are reflected in the ethnic, cultural and civic conceptualisation of the nation, are the attachment to a certain territory, the existence of a shared, overarching culture, and the striving for self-government as a voluntary political community.

Yet granting a right to independence to a group solely by its virtue of being a nation would most likely give rise to a great number of quests for secession. Many independence struggles are marked by violence and imply disputes over partition of territory and economic resources on the one hand, and questions such as minority protection in the new state on the other. This underpins the conclusion that, as suggested by Remedial Right Only Theory, legitimate secession should be limited to exceptional circumstances.
Buchanan’s three criteria for justified unilateral secession, which strictly tie legitimate secession to the experience of injustices, although initially morally compelling, exhibit a number of ambiguities which would have to clarified should a ‘remedial right’ be introduced on this basis. Firstly, the criteria seem too narrow since linking justified secession solely to the experience of past injustices fails to address other frequent root causes of secessionist struggles. Secondly, the criteria exhibit a number of ambiguities concerning the precise nature of human right violations which would qualify a group for secession under a ‘remedial right’. Also, distinguishing between victims and perpetrators, which a ‘remedial right’ necessitates, seems difficult in most secessionist crises. A further problem is the incompatibility of a right to secession - understood as a means to self defence - and injustices which lie in the past, and have already been remedied, as basis for justified secession. Should a ‘remedial right’ be institutionalised on an international platform these issues seem to require clarification.

Furthermore, Buchanan’s three criteria for justified secession rely on the establishment of strong international institutions, most importantly for assessing claims to secession on the basis of human right violations and for adjudicating conflicts over annexed territory and the violation of autonomy agreements. The success of international bodies in addressing secessionist crises has, however, been limited to date, and it seems unlikely that international institutions will acquire extensive competences regarding secession outside the colonial context in the foreseeable future.

Thus, as crystallises from the analysis carried out in this paper, the regulation of secession on an international platform - although initially morally compelling as a means to reduce the number of violent conflicts with secessionist background - should be limited to exceptional circumstances and formulated with care, taking into consideration the complexity of secessionist struggles. While a ‘remedial right’ seems to be a first step towards a more proactive international approach to secessionist crises, it seems that a number of problems inherent in the right as suggested by Remedial Right Only Theory would have to be addressed for it to be realisable. Thus, while the ambiguities discussed in this paper seem to require clarification, it has also been highlighted that basing justified secession solely on the experience of injustices entails the risk that other root causes for secession remain unaddressed and that the seceding group lacks a required sense of community. Tying the regulation of secession not only to the experience of injustices but also to a feeling of
togetherness and the expressed wish for self-government, as envisioned by ‘national self-determination’ and ‘choice’ theories, thus seems to be essential in the establishment of a comprehensive right to secession.

Considering the prevalence of the doctrine of territorial integrity and non-interference into states' domestic affairs in contemporary international relations, however, states’ reluctance to delegate competences regarding secession to international bodies remains a major obstacle to an international response to secessionist crises. Hence, the institutionalisation of a ‘remedial right’ to secession, transforming “the right to self-determination into an avowed right to independence” (Jeremić, 2008: 1) in exceptional circumstances, seems to be unlikely in the near future. A number of problems inherent in the right itself, but especially the reluctance of the international community to increase cooperation regarding secessionist crises crystallise as main hurdles to the institutionalisation of a ‘remedial right’.

References


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