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RELEVANCE OF THE REMEDIAL SECESSION THEORY FOR INDONESIA'S TERRITORIAL INTEGRITY

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Abstract

This article aims to analyze the remedial secession theory in international law relevant to the current international armed conflict between Russia and Ukraine waged by Russia's recognition of Donetsk and Luhansk independence. It might have legal as well as political impacts on the territorial integrity of a sovereign State such as Indonesia where human rights violations in Papua have become problematic. The analysis in this paper is mainly constructed using the paradigm of customary international law as the primary source of international law to find out the relevance of the remedial secession theory in terms of its area, scope, and institutionalization. It provides a framework of analysis on how the state provides elements of legitimate expectation and authority: justification and legitimacy over unclear and/or public discourse on the application of remedial secession theory. This article reveals that remedial secession theory has been practiced under the legal notion of the right of self-determination beyond the decolonization context with certain cumulative requirements, such as the factual existence of gross violations of human rights, last resort, and recognition from the mother country and/or other countries. Secondly, it has relevance for the territorial integrity of a sovereign country since it supports changing the paradigm of international law from state sovereignty to sovereignty as responsibility. In this regard, the sovereign state is under an international obligation to respect and protect its own nationals since gross human rights violations committed by the state have been accepted as threats to international peace and security.

Keywords:*remedial secession, international law and gross violations of human rights*

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I. INTRODUCTION

On 8 April 2022, the Directorate of Law, Politics and Security of the Indonesian Ministry of Foreign Affairs hosted a focus group discussion entitled "The Ukraine Conflict and Indonesian Interests to Safeguard its Territorial Integrity: the Case Study of Donetsk and Luhansk".[1] One of its aims was to critically examine whether remedial secession by Donetsk and Luhansk from

[1] Focus Group Discussion of Experts and Practitioners, "Konflik di Ukraina dan Kepentingan Indonesia dalam Menjaga Keutuhan Wilayah: Studi Kasus Donbask and Luhansk [Ukraine Conflict and Indonesia Interest in Teritorrial Integrity]," Directorate of Law Political and Security Treaty, The Ministry of Foreign Affairs of The Republic of Indonesia, Jakarta, 7-9 April 2022.

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Ukraine and the existence of the international armed conflict between Ukraine and Russia had potential impacts on Indonesia's territorial integrity as a sovereign state in today's changing discourse.[2] In his presentation, Hikmahanto Juwana argued that there was no correlation between the said conflict and Indonesia's territorial integrity over Papua since there was an absence of acts of oppression, the inexistence of two major warring parties over Papua, and only factual police measures to restore law and orders there.[3] However, the enactment of the remedial secession theory when Russia recognized the two breakaway provinces: Donetsk and Luhansk, stimulated the prudential care of the mother state to its own populations. Following its recognition, Russia launched a "special military operation" on 24 February 2022. It aims to protect those territories with the legal justification that Ukraine committed genocide against Donetsk and Luhansk populations, resulting in legal proceedings before the International Court of Justice (ICJ), as well as the International Criminal Court (ICC).[4] It had lasted for more than a year escalating in tremendous ways, amounting to possibly World War III.[5] In this situation, this military operation

[2] Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), 6-9 and 12; Shirley V. Scott, "International Law as an Ideology: Theorizing the Relationship Between International Law and International Relations," *European Journal of International Law* 5, (1994): 311. Gerry J. Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rules of Power," *European Journal of International Law* 11, no. 2, (2000): 456; R. P. Barston, *The Changing Nature of Diplomacy: Modern Diplomacy* (New York: Routledge, 2019), 3; and Francis G. Jacobs, *The Sovereignty of Law* (Cambridge: Cambridge University Press, 2007), 4-5.

[3] Hikmahanto Juwana, "Teori Remedial Succession Dalam Hukum Internasional," Presented Paper in Focused Group Discussion of Experts and Practitioners "Konflik di Ukraina dan Kepentingan Indonesia dalam Menjaga Keutuhan Wilayah: Studi Kasus Donbask and Luhansk," Directorate of Law Political and Security Treaty, the Ministry of Foreign Affairs, Jakarta, 7-9 April 2022.

[4] Ved P. Nanda, "Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights," *Denver Journal of International Law and Policy* 26, (1998): 389. Allegations of Genocide Under The Convention on The Prevention And Punishment of The Crime Of Genocide (Ukraine v. Russian Federation), Order, IC, 2022, para. 81. Document from the Russian Federation Setting Out Its Position regarding the Alleged "Lack of Jurisdiction: of the Court in the Case, 7 March 2022. See also ICC, "Situation in Ukraine: Jurisdiction in The General Situation," Press Release, accessed 20 March 2023, https://www.icc-cpi.int/ukraine, as comparison. See also ICC, "ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar," Press Release, 14 November 2019, accessed 20 March 2023, https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-situation-bangladesh/myanmar, and ICC, "Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Aleksevyevna Lyvova-Belova," Press Release, accessed 28 April 2023, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[5] Dietrich Schindler and J. Toman, *The Law of Armed Conflicts: A Collection of Convention, Resolutions and Other Documents*, Third Edition (Oxford: Oxford University Press, 1988), 231. Robert Farley, "5 Ways Russia's War on Ukraine Could Spark World War III," Insider, ac-

has revealed past predictions that Eastern Europe is very prone to international armed conflicts, predicted by Tunander, Baev, Einagel, and Friedmann due to its geopolitics sparks.[6] Factually, this current event enlightens state practice on the relevance of the remedial secession theory that gross human rights violations invoke secession by minority or oppressed groups to establish their own identity of statehood from its mother state without its consent.[7] Consequently, it raises public awareness, stereotyping, or even unilateral use of force deployed by other countries justified by its own national interests and human rights issues as a form of State recognition.[8] To this extent, Indonesia has also been under international public scrutiny over human rights issues in Nanggroe Aceh Darussalam and in Papua Provinces.[9]

The case of Donetsk and Luhansk might have served as an example of remedial succession even though the separatist movements were carried out by unlawful and violent means, especially with military support from Russia.[10] In addition, the governments of Donetsk and Luhansk are still not recognized by most countries and the international community, especially because international law officially acknowledges and defends Ukraine's sovereignty and integrity in terms of territory.[11] It is difficult to say exactly

cessed 31 March 2023, https://www.businessinsider.com/ways-russia-war-in-ukraine-could-spark-world-war-iii-2022-3. Brett Stephen, "This is How War World III Begins," *New York Times*, 15 March 2022, accessed on 31 March 2023, https://www.nytimes.com/2022/03/15/opinion/russia-ukraine-world-war-iii.html.

[6] Ola Tunander, Pavel K. Baev & Victoria Ingrid Einagel, eds., *Geopolitics in Post-Wall Europe* (London: Sage Publisher, 1997), 17-18. Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens and Sons, 1964) 60-63.

[7] Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack) of Practice," *St. Anthony's International Review* 6, No. 1, (2010): 38.

[8] Father Robert Araujo, "Sovereignty, Human Rights and Self-Determination", *Fordham International Law Journal* 24, Issue 5, (2000), 1477; and James Crawford, *The Creation of States in International Law*, Second Edition (Oxford: Oxford University Press, 2006), 375-376.

[9] Beth Simmons and Richard E. Steinberg, *International Law and International Relations* (Cambridge: Cambridge University Press, 2007), 259-260. Robert W. Hafner, "The Swords against The Crescent: Religion and Violence in Muslim Southeast Asia," in *Religion and Conflict in South and Southeast Asia, Disrupting Violence*, Linell A. Cady and Sheldon W. Simmons, eds. (London: Routledge, 2007), 33.

[10] Holly Ellyatt, "Battle for Donbas: 3 Reasons Why Russia is Shifting Its War Machine to East Ukraine?" *CNBC*, 19 April 2022, accessed 15 May 2023, https://www.cnbc.com/2022/04/19/why-does-russia-want-the-donbas-region-so-much.html. Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law on War*, (Cambridge: Cambridge University Press: 2021), 7.

[11] Roman Szporluk, *Russia, Ukraine and the Breakup of the Soviet Union* (Stanford: Hoover Press, 2022), 5. Paul Kubicek, *The History of Ukraine* (Connecticut: Greenwood Press, 2008), 4. Yuriy Syheda and Joung Ho Park, "Ukraine's Revolution of Dignity: The Dynamics of Euromaidan," *Journal of Euroasian Studies 7*, (2016): 87-88.

where international law generally stands on this as well, as there have not been any official ICJ judgements that we can refer to answer the question of what exactly are the criteria of remedial secession outside the context of, for example, colonialism. There have been other cases similar to the case of the Crimean Peninsula, in which it was discovered that Russian troops had invaded key areas of Crimea in 2014, a direct violation of the legal principle of territorial integrity. Russia justifies this action to the United Nations Security Council (UNSC) as an act of self-defense, as they allegedly discovered a genuine threat towards the lives and interests of the Russian people. On 18 March 2014, an agreement was signed in which 95.5 percent of the voters opted for Crimea to join Russia.[12] However, after this entire ordeal, we also see that there are even more reports of human rights conditions only worsening after the Russian intervention. From this case, we see that not even the ICJ has a clear idea of the specifics and more importantly, the practice of remedial secession. More often than not, it is usually abused in practice. This clearly points out to us that the main issue here is the lack of a central authoritative figure that can determine how we use the remedial secession theory if we can even use it at all, with legal justification as a last resort.

The easternmost territories of Ukraine, Donetsk and Luhansk, are the two regions bordering Russia. On 22 February 2022, Russian Federation President, Vladimir Putin, announced the acknowledgement of Donetsk and Luhansk.[13] It was also known that Donetsk and Luhansk had declared their independence from Ukraine in 2014, and separatist movements began to take shape in these areas. Separatist organizations took control of Donetsk and Luhansk after protests and marches against the new pro-Western government in Kiev.[14] Although many different and complex factors influence the separatist movements in Donetsk and Luhansk, the region's ties to Russia play a significant role. Both areas have large ethnic Russian populations as well as close economic and cultural ties to Russia. Numerous locals believe that closer ties with Russia would better serve their interests and that the Ukrainian government does not adequately represent them despite the

[12] "Official Result: 97 Percent of Crimea Voters Back Joining Russia," *CBS News*, 17 March 2014, accessed on 14 May 2023, https://www.cbsnews.com/news/official-results-97-of-crimea-voters-back-joining-russia/.

[13] "Ukraine: Putin Announces Donetsk and Luhansk Recognition," *BBC News*, 21 February, accessed 12 May 2023, https://www.bbc.com/news/av/world-europe-60470900. "Ukraine Conflict: US Warns Russia of Consequences it Invades Ukraine," *BBC News*, 19 February 2022, accessed 12 May 2023, https://www.bbc.com/news/av/world-60445560.

[14] "Ukraine Separatist Declare Independence," *Aljazeera*, 12 May 2014, accessed 14 May 2023, https://www.aljazeera.com/news/2014/5/12/ukraine-separatists-declare-independence.

UN's strong respect for Ukraine's sovereignty and territorial integrity.[15] The Ukrainian government responded by launching a military effort to reclaim the territories, which grew into a full-fledged battle.[16] Although Russia denies these accusations, it has been claimed that Russia has given the separatists military assistance, including equipment, personnel, and training.[17] Numerous civilians have been killed and displaced as a result of the conflict in Donetsk and Luhansk, creating a humanitarian crisis in the area.[18] As a result of Western countries' economic sanctions against Russia over its suspected involvement in the conflict, the conflict has also strained ties between Russia, Ukraine, and the rest of the world.[19]

On the other hand, numerous practices, such as those manifested by the UNSC in Kosovo, highlights the legitimacy of the theory as clearly observed in its resolutions on self-governance of Kosovo, forced displacement of the ethnic Albanian, good governance, and interim administration in Kosovo.[20] Furthermore, Russia seems to be consistent in ways of its representation, invoking the remedial secession theory from Chechnya, Abkhazia, South Ossetia, Donetsk, and Luhansk.[21] Legitimacy invokes the relevance of the remedial secession theory since participation among subjects of international law has increased, which might have impacted the territorial integrity of a sovereign state in its international relations. The aforementioned practices have been driven to establish a new State and/or to become a part of another State as a dynamic process of international needs by the international community.[22]

[15] "Secretary-General Says Russian Federation's Recognition of 'Independent' Donetsk, Luhansk Violate Ukraine Sovereignty, Territorial Integrity," United Nations, Press Release, 23 February 2022, accessed 10 May 2023, https://press.un.org/en/2022/sgsm21153.doc.htm.

[16] "Ukraine War: Ukrainian Fightback Gains Ground West Kiev," *BBC News*, 23 March 2022, accessed 12 May 2023, https://www.bbc.com/news/world-europe-60847188.

[17] Thomas Kingsley, Joe Sommerlad, "Why Did Russia Invade Ukraine?" *Independent*, 13 July 2023, accessed 15 July 2023, https://www.independent.co.uk/news/world/europe/russia-invade-ukraine-why-b2335363.html.

[18] Diana Roy, "How Bad Is Ukraine's Humanitarian Crisis Year Later?" Council on Foreign Relations, 8 June 2023, accessed 15 July 2023, https://www.cfr.org/in-brief/ukraine-humanitarian-crisis-refugees-aid.

[19] "Ukrainian Conflict: What We Know About the Invasion?" *BBC News*, 24 February 2022, accessed 7 May 2023, https://www.bbc.com/news/world-europe-60504334.

[20] UNSC Resolution 1160, (1998), 31 March 1998, S/RES/1160 (1998) and 1199, (1998), 23 September 1998; UNSC Resolution 1244 (1999), 10 June 1999, S/RES/1244 (1999). Marc Weller, "The Vienna Negotiations on the Final Status of Kosovo," *International Affairs* 84, No.4 (2008): 659-660.

[21] Marc Weller, *Escaping the Self Determination Trap* (London: Martinus Nijhoff, 2008), 67-68.

[22] Stanislav Chernichenko and Vladimir S. Kotliar, "On Going Global Legal Debate on Self Determination and Secession: Main Trends," in *Secession and International Law: Conflict Avoidance and Regional Appraisal*, Julie Dahlitz, ed. (New York: United Nations and TM.

This dynamic process is mainly determined by the effectiveness of the government in controlling its own populations or maintaining law and order by authority being disrupted by another instance in the age of globalization and deep integration.[23]

Accordingly, this paper is aimed to address the aforementioned legal discourses and tries to examine their relevance to the current situation in Indonesia, particularly in Papua. Section II will critically examine the area, scope, orientation, and institutionalization of State succession based upon secession where the remedial secession theory is outlined. Section III will focus on the remedial secession theory and its relevance in invoking gross violations of human rights as a threat to international peace and security. It will be then outlined as the foundation for State recognition by means of secession. Section IV discusses the relevance of the remedial secession theory viewed from customary international law. Elements of state practice to sustain its *opinio juris*[24] based upon the current example of Russia recognition over two breakaway provinces will be emphasized to determine whether it is merely an instant custom with certain persistent objectors on that matter. This section will mainly examine *opinio jurist* and state practices as twofold elements of customary international law and whether the remedial secession theory has been operational to gain its legal certainty, purposiveness, and justice in international law.[25] Section V will elaborate possible relevance of the remedial secession theory for safeguarding Indonesian territorial integrity over the Papua issues. In the end, section VI will provide conclusions as well as attainable recommendations for better understanding and proportional assessments on the matter, especially for the government of Indonesia in conducting its current and future international diplomacy.

Asser Institute, 2003), 75-76.

[23] Marcello G. Kohen, *Secession in International Law Perspectives* (Cambridge University Press, 2006), 475. Anne Orford, "The Subject of Globalization: Economics, Identity and Human Rights," in *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 2000, 146-148. Krysti Justine Guest, "Exploitation under Erasure: Economic, Social and Cultural Rights Engage Economic Globalization," *Adelaide Law Review* 19, no. 73, (1997): 78-79. and Robert Howse, "Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization," *Michigan Law Review* 98, no. (2000): 2329.

[24] Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *American Journal of International Law* 95, (2000): 757. See also Anglo Norwegian Fisheries case (United Kingdom v Norway), ICJ Reports 1951; Rights of Passage over Indian Territory case (Portugal v India), ICJ Reports 1960; North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark : FRG v. The Netherlands), ICJ Reports 1969, 3; and Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) (Merits), ICJ Reports 1986, 14.

[25] Kohen, *Secession in International Law Perspectives*, 86-87.

II. STATE SUCCESSION BY MEANS OF SECESSION

Changing legal personality as subject to international law is essential in determining the nature of State succession by means of secession when a territory's status changes, such as when a state dissolves, a part of a state becomes independent, or two or more states merge to form a new state.[26] The new state takes on the rights and obligations of the previous state in terms of international relations, including treaties, agreements, and other commitments made by the previous state.[27] The rule of State succession was practiced from ancient times and has shaped and developed into modern conceptions, even though it has various definitions, ambiguities, and confusions in international law, especially by means of secession.[28] In this article, State succession is understood "as a transfer process of rights, obligations, and property from a previously well-established prior State to the new one fulfilling legal character as the subject of international law without consent from the former" to contextualize the relevance of the remedial secession theory.[29] Thus, it is in a narrow sense which also recognizes State succession by approval from the mother state. Consequently, both have similar legal and political consequences for the creation of statehood. These changes in rights, obligations, and properties also impact the status of overseas assets, monetary reserves, and museum artifacts, participation in treaties, membership into international organizations, and debts as a factual requirement to facilitate the ability to enter international relations by means of federations, mergers, dissolutions,

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[26] Andrea Bianchi, "Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law," *German Yearbook of International Law* 47, (2004): 343. Jan Pronk, "Development as a Conflict, and Conflict as a Principle Matter of Development in Law," The Inaugural Speech for the Geoffstede Lecture, Rijks University of Groningen, 8 February 2008. J. Watson, "A Realistic Jurisprudence of International Law," *Yearbook of the World Affairs*, (1980), 274-275.

[27] Tai-Heng Cheng, *State Succession and Commercial Obligations* (Leiden: BRILL Nijhoff, 2006), 441.

[28] Andrew Conteh, "State Succession in International Law", in *International Law and Development of Global South*, Emeka Duruigbo, Remigius Chibueze, and Sunday Gozie Ogbodo, eds. (London: Palgrave Macmillan, 2023), 155-156. James Crawford, *The Creation of States*, 40-41. Lee C. Buchheit, *Succession, The Legitimacy of Self Determination* (New Heavens: Yale University Press, 1978), 13-19. Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 1997), 301-302.

[29] Vienna Convention on the Succession of States in Respect of Treaties, opened for signature 23 August 1978, 1946 UNTS 3 (entered into force 6 November 1996), art. 2 (1) (b) 1488. Vienna Convention on Succession of State in Respect of State Properties, Archives and Debts, opened for signature 8 April 1983, 22 ILM 306 (not yet in force), art. 2 (1) (a). See also D.P. O'Connell, *State Succession in Municipal Law and in International Law* (Cambridge: Cambridge University Press, 1967), 486-487.

and secessions.[30] More simply, the term "state succession" involves the process of devolving and determining rights and obligations between the successor state and predecessor state or third state due to different approval schemes and recognition.[31]

The area, scope, and institutionalization of state succession by means of secession may depend on certain situations, cause and result analysis, and its institutionalization at domestic and international levels.[32] This dynamic stipulation has paved the way for the continuous redefinition of political sovereignty and territorial integrity due to decolonization process,[33] dismemberment of an existing state, secession, annexation, and merger.[34] Analyzed cases, problems, challenges, and opportunities on the consequences of their legal and political aspects are demanding to cope with.[35] However, the question of state succession does not infringe on normal rights and duties of States under international law and is subject to basic principles of international law as enshrined by Article 2 (1) - (5) of the United Nations Charter, such as sovereign equality, peaceful settlement of disputes, good faith, respect of human rights and refrain to use of force.[36]

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[30] Montevideo Convention on Rights and Duties of States, opened for signature 26 December 1933, entered into force 26 December 1934, art. 1. Malcolm N. Shaw, *International Law*, Ninth Editions (Cambridge: Cambridge University Press, 2021), 2305-2306.

[31] Kohen, *Secession in International Law Perspectives*, 14-15.

[32] C. Haverland, "Secession", in *Encyclopedia of Public International Law*, *Volume 4*, R. Bernhardt, ed. (Amsterdam: North-Holland Publishing Company, 2000), 354-355. C. Drew, "The East Timor Story: International Law on Trial," *European Journal of International Law* 12, (2001): 651-652. J. Samuel Barkin, *International Organisation: Theories and Institutions* (New York: Palgrave Macmillan, 2006), 17.

[33] Josiah Brownell, *The Struggles for Self-Determination: The Denial of Reactionary Statehood in Africa* (Cambridge: Cambridge University Press, 2022), 284-285. Costas Lautides, "Self-Determination and Decolonialization," in *The Routledge Handbook of Self-Determination and Secession*, Ryan D. Griffith, ed. (London: Routledge Taylor and Francis, 2023), 60-61.

[34] Diego Muro, "The Cause of Secession," in *The Routledge Handbook of Self-Determination and Secession*, Ryan D. Griffith, ed. (London: Routledge Taylor and Francis, 2023), 133-134. Valmaine Toki, *Indigenous Court, Self Determination and Criminal Justice*, (New York: Routledge, 2018), 136.

[35] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition (New York: Routledge, 1997), 165. Shaw, *International Law*, 236.

[36] Shaw, *International Law*, 746. Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2004), 52-55. Marcello G. Kohen and Patrick Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Texts and Commentary* (Cambridge: Cambridge University Press, 2019), 35-36. Douglas M. Johnston, "Functionalism in the Theory of International Law," *Canadian Yearbook of International Law* 26, (1988): 6-9. International Law Commission, 1999, *Draft Article on Nationality of Natural Persons in Relation to the Succession of States*, ILC Second Reading in 1999, ILC Report, UN Doc. A/54/10/1999, Chapter IV, Annexed to the UNGA 55/153, 12 December 2000 (1999), Yearbook ILC, 13.

Up to the present, state succession has become an increasingly important issue in international law and relations on sovereignty and territorial integration issues on the global claim of rights of self-determination.[37] It is in line with the German Federal Supreme Court deliberation in the Espionage Prosecution Case that the problem of state succession is urged as a difficult area of international law due to its ambiguity, lacunae, and conflicting norms.[38] Factually, after the Second World War, new states emerged, exercising their rights of self-determination in a very rapid manner.[39] For example, in Europe, Germany reunified, and Spain struggled with Catalan. On the other hand, the Soviet Union, Yugoslavia, and Czechoslovakia broke away, and in South East Asia, the Republic of Democratic Timor Leste (RDTL) gained its independence in 2002.[40] These changes affected more legal as well as political relationships than the earlier decolonization process making dynamic and far-reaching sparks on statehood the primary subject of international law.[41] As a matter of fact, the aforementioned States became new legal and political entities for global diplomacy and deep regional integration.[42] Although the

[37] Michael Humphrey, "Reentering Histories of Past Imperial Violence: Kenya, Indonesia, and the Reach of Transitional Justice," in *Decolonialization, Self Determination, and the Rise of Global Human Rights Politics*, A. Dirk Mozes, Marco Duranti, Roland Burke, eds. (Cambridge: Cambridge University Press, 2020), 262. Allen Buchannan, "Rawl's Law of People: Rules for a Vanished Westphalian World, *Ethics* 115, (2004): 35-65. Stephen Krasner, *Sovereignty: Organized Hypocrisy* (New Jersey: Princeton University Press, 1999), 20. John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept," *American Journal of International Law* 97, (2003), 786-787. Michael Reismann, "Sovereignty and Human Rights in Contemporary International law," *American Journal of International Law* 84, (1990): 876, 879.

[38] "Espionage Prosecution Case," *International Law Report* 94, (1994): 70.

[39] Jamie Trinidad, *Self Determination in Disrupted Colonial Territories* (London: Cambridge University Press, 2018), 2. Aleksandar Pavkovic and Peter Radan, *Creating New State: Theory and Practice of State Succession*, (London: Routledge, 2008), 6 and 241.

[40] Peter Radan, *The Break Up of Yugoslavia and International Law*, (New York: Routledge, 2002), 8-9. Marciano da Silva, "Preparing for ASEAN Membership: Opportunities, Challenges and Recommendation" Timor-Leste Ministry of Foreign Affairs and Cooperation, in *Paper presented at Joint Consultative Meeting 'ASEAN 2030: Joining ASEAN, Growing Together, Sharing Prosperity,* 30 May 2011.

[41] Patrick Dumberry, *State Succession to International Responsibility* (Boston: Martinus Nijhoff Publisher, 2007), 8 and 168. Rohit Ambast and Vinay Tyagi, "Ambassadors of Europe: An Insight into the Evolution of the European Union and International Diplomatic Law," *Studia Diplomatica* 61, no. 4, (2008): 181. Amitav Archarya, "Do Norms and Identity Matter? Community and Power in South East Asia's Regional Order," *The Pacific Review* 18, No. (2005): 95. Oona A Hatheway, "Testing Conventional Wisdom," *European Journal on International Law* 14, no. 1 (2003): 197.

[42] Wade Jacoby, *The Enlargement of the European Union and NATO: Ordering from the Menu in Central Europe*, (London: Cambridge University Press, 2004), 1-5. Gearoid Tuathail, Simon Dalby, and Paul Routledge, *The Geopolitics Reader*, Second Edition (New York: Routledge, 2007), 263. Hans Morgenthau, *Politics Among Nations: Struggle for Power and Peace*,

concept of State succession by means of secession is subject to international law, it is an area of special attention, inconsistency, and scrutiny since it is always related to overlapping territories and available resources.[43] In line with these challenges, the Arbitration Commission established by the Conference on Yugoslavia calls upon practitioners as well as academia to objectively manifest and prudently take into account relevant general principles and conventions to avoid potential risks and lack of authority on this matter.[44]

However, in Western and South Asia, the pathway to reach statehood by means of the secession of Palestine and the crisis between Bangladesh (former East Pakistan) and Pakistan (former West Pakistan) for sharing of the assets of former unified Pakistan is an unresolved one amounting to conflict escalation.[45] In fact, about 42 years have elapsed since the independence of Bangladesh, yet the claim of Bangladesh for sharing the assets was not satisfied as per international law and international human rights law, though Bangladesh has a strong legal footing in support of its claim and Bangladesh still retains it right to have its share from Pakistan.[46] Pursuant to the aforementioned examples, parties to that conflict rely on the notion of self-determination rights since they merely rely on rights of self-determination as the rights of all peoples to freely determine, without external interference, their political status and to participate in active and meaningful participation.[47] Jurisprudence from the ICJ is always referred to when it decided that self-determination is a fundamental human

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Seventh Edition (Boston: McGraw Hill Education, 2005), 4-6. Paul F. Diehl, *The Politics of Global Governance, International Organizations in An Interdependent World* (Boulder: Lynne Rienner Publishers, 2005), 9-11.

[43] Cara Nine, *Sharing Territories: Overlapping Self Determination and Resource Rights* (Oxford: Oxford University Press, 2022), 172. Andrzej Jakubowski, *State Succession and Cultural Property*, (Oxford University Press, 2015), 10; A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colorado: Westview Press, 1991), 174-175; and Allen Buchanan, “The International Institutional Dimension of Succession,” in *Theories of Secession*, P.B. Lehning, eds., (London, New York: 1988), 227.

[44] Interlocutory Decision (Opinion Number 8, 9 and 10), 1993, *International Law Commission Report*, 92, 194-199. Kohen, *Secession in International Law Perspectives*, 23-25.

[45] Leila Farsakh, *Rethinking Statehood in Palestine: Self Determination Beyond Partition* (California: University of California Press, 2021), 295. Mark Dummett, “Bangladesh War: The Article That Changed History,” *BBC*, 16 December 2011, accessed 25 April 2023, https://www.bbc.com/news/world-asia-16207201. Asia Foundation, *The State of Conflict and Violence in Asia 2021: Identity-Based Conflict and Extremism: Bangladesh* (San Francisco: The Asia Foundation, 2021), 65-66.

[46] Sian Herbert, *Helpdesk Report – K4D: Conflict Analysis of Bangladesh*, 2019, 3-4.

[47] United Nations General Assembly ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ [UNGA Res 1514 (XV)] (14 December 1960).

right[48] and construes a legal concept.[49] Therefore, States are obliged to respect and promote the rights of self-determination,[50] and thus self-determination is able to be recognized as a general principle of international law due to its wide recognition to sustain state succession by means of secession.[51]

Consequently, self-determination rights are not only limited to laws and policies, but they act as a form of *jus cogens* imposing an *erga omnes* character.[52] Therefore, looking at the laws and policies, programs, actions, and gross violations of human rights enacted and perpetrated by the mother state to its own nationals reach thresholds for invoking rights of self-determination by means of secession[53] guaranteed and recognized in many international binding legal instruments on human rights.[54] For example, the United Nations Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Vienna Declaration and Programme of Action endorse the existence of this right.[55] The UN Charter promotes and highlights the principle of equal

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[48] Juan Francisco Escudero Espinosa, "Towards a Definition of the Right to Self-Determination," Essay *In Self-Determination and Humanitarian Secession in International Law of a Globalized World Kosovo v. Crimea*, (Cham, Switzerland: Springer International Publishing, 2017), 26; and United Nations General Assembly 'The right of peoples and nations to self-determination' UNGA Res 637(VII)A (16 December 1952) 7th Session UN DOC A/2309.

[49] Case Concerning East Timor (Portugal v. Australia) Merits, Judgment, ICJ Reports 1995 4 at 102, para 29.

[50] United Nations General Assembly 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations' [UNGA Res 2625 (XXV)] (24 October 1970).

[51] Reference Re Secession of Quebec [1998] 2 SCR 217, 278 para 114.

[52] Enrico Milano, "The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question." *Quarterly International Law*, (2014): 43; and Andrew D Mitchell, "Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: Nulyarimma v Thompson", *Melbourne University Law Review* 24, (2000): 19.

[53] Lawson, *"Out of Control, State Responsibility and Human Rights: Will the ILC's Definitions of the Act of State Meet the Challenges of the 21st Century?,* in *The Role of Nations State in the 21st Century, Human Rights, International Organizations and Foreign Policies, Essay in Honor of Peter Baehr*, Castermans, Van Hoof and Smith, eds., (Cambridge: MA, 1999), 91.

[54] Gerry J. Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rules of Power", *The European Journal of International Law* 11, no. 2 (2000), 456.

[55] Jay Winter and Antoine Prost, *Rene Cassin and Human Rights, From the Great War to Universal Declaration of Human Rights,* (Cambridge University Press, 2013), 221-225; and Reiner Arnold, *Universalism of Human Rights*, (Dodrecht: Springer, 2103), 1-12; Jan Klabbers, *An Introduction to International Institutional Law*, (Cambridge, 2002), 1-4; and Christopher Joyner, *The United Nations and International Law*, (Cambridge University Press, 1997), 9-11.

rights and self-determination of peoples[56] and of international economic and social cooperation. Furthermore, a specific territory or people possess the entitlement to choose their own system of governance without being influenced by the preferences of the mother states.[57] Additionally, member states are obliged to promote all people who are not able to exercise or are deprived of their right to exercise self-determination to be able to in accordance with the provisions written in the UN Charter as an international responsibility to protect.[58]

III. GROSS VIOLATIONS OF HUMAN RIGHTS AND STATE SUCCESSION BY MEAN OF SECESSION

Gross human rights violations as a basis for State succession by means of secession could be properly examined first in relation to the group's internal self-determination.[59] It refers to the right of people to choose their political status within a state or to exercise a right of meaningful socio, economic and political participation.[60] In this regard, the right to self-determination is inextricably linked to the principle of territorial integrity as the manifestation of state sovereignty as a responsibility to respect and protect human rights within its jurisdiction and territory.[61] There exists a 'safeguard clause' affirmed by the United Nations World Conference on Human Rights, which states that,

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56 Article 1 (2) of the United Nations, Charter of the United Nations (opened for signature 26 June 1945).

57 Crawford, *The Creation of States*, 114.

58 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Note by the Secretariat', UN Doc. HRI/GEN/Rev.1, 29 July 1994, 107, 13, para. 6.

59 Leila Sadat Waxler, "Committee Report on Jurisdiction, Definition of Crimes and Complementarity", *Denver Journal International Law and Policy* 25, (1997): 226; Shabtai Rosenne, *Yearbook of International Humanitarian Law*, (1999), 134-135; and Herman von Hebel and Darryl Robinson, "Crimes Within the Court", the *International Criminal Court, the Making of the Rome Statute*, (1999), 92-94.

60 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. (New York: Oxford University Press, 2013), 160; and Charles R. Beitz, *The Idea of Human Rights*, (London: Oxford University Press, 2012), 10 and 73; and Phillips Allot, "The Concept of International Law," *European Journal of International Law* 10, (1999): 31-50.

61 Diane Orenlichter, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, (1999): 2537-2542. Michael Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?" *Texas International Law Journal* 31, (1996): 1-4; and Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law," *International Review of the Red Cross* 81, no. 835 (1999): 531.

> *"A state whose government represents the people of its territory without distinction of any kinds, ... complies with the principle of self-determination and is entitled to the protection of its territorial integrity.[62] Consequently, denial of a group's internal rights to self-determination might result in the exercise of their external self-determination where a population of an existing State wishes to break away from the aforementioned state[63], most notably through secession from the parent State without approval.[64] This external right to self-determination may be exercised when the group is "collectively denied its civil and political rights."*

It is subjected to egregious abuses, including a systematic form of discrimination or illegal consolidation of territory, as was held in the cases concerning the Aaland Islands and the Quebec Cases.[65] However, it is important to note that such a right may only be claimed if the group's right to autonomy within the parent State has been "totally frustrated internally".[66]

The adoption of international legally binding agreements supports the right to self-determination, protecting people's rights to self-determination due to the commission of gross violations of human rights.[67] As revealed by the cases concerning the Aaland Island, East Timor, the Palestinian Wall Advisory, Reference Re Quebec, and Kosovo, it arguably concludes that self-determination by means of secession can be raised when there is a widespread and consistent denial of rights.[68] In the Aaland Island case, it is in support of

[62] James Crawford, *The Creation of States*, 119; and J.L. Holzgrefe and Robert O. Keohane*, Humanitarian Intervention, Ethical, Legal and Political Dilemmas*, (Cambridge: Cambridge University Press, 2003), 15-20.

[63] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights*, 158.

[64] Ishita Chakrabarty, "Self-Determination: What Lessons from Kashmir?" *Indiana International & Comparative Law Review* 31, no.1 (2021): 45.

[65] *Ibid*. Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 9. Hans Kelsen*, Principles of International Law*, Second Edition (1966), 180. Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Oxford: Oxford University Press, 1992), 140-141. J. Pritchard, "The International Military Tribunal for the Far East and its Contemporary Resonances," *Military Law Review* 149, no. 25 (1995), 33.

[66] Case Concerning the Right of the Quebec Government to Unilateral Secession. 2001. ICJ Rep. 6, 126-138.

[67] Rashwe Shrinkhal, "Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal," *Alternative: An International Journal of Indigenous Peoples* 17, No. 1 (2021), 71–82; The Asia Pacific Center for R2P, *The Responsibility to Protect in Southeast Asia*, (2009), 6; B. Cheng, "Custom: the Future of General State Practice in Divided World" in *The Structure and Process of International Law: Essay in Legal Philosophy, Doctrine and Theory*, R. Macdonald dan D. Johnston, eds. (Dordrecht: Martinus Nijhoff Publisher, 1983), 513.

[68] Christian Walter, "Postscript," in *Self-Determination and Secession in International Law*, edited by Antje von Ungern-Stenberg and Kavus Abushov (Oxford: Oxford University Press),

secession being allowed in cases where there are human rights violations.[69] The Aaland Island case states that non-colonial people may secede "when the group is collectively denied civil and political rights to egregious abuses.[70] In the East Timor Case, abuses of Indonesia's power led to a referendum voting to its independence facilitated by the United Nations Security Council in a sequence of the Yugoslavia and Rwanda tragedies.[71] Thus, State succession by means of secession is legally considered to be an *erga omnes*.[72] Studies regarding the Quebec case state that self-determination is considered a general principle of international law.[73] Furthermore, rights to autonomy and internal self-determination have to be respected by the mother state; otherwise, they would access the right to external self-determination through secession.[74] Secession can also be raised when people suffer from massive and widespread violations of human rights in terms of intended discrimination in terms of the creation and implementation of law, policy, program, action, and funds.[75] As

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[69] Oliver De Schutter, *The International Human Rights Law* (Cambridge: Cambridge University Press, 2010), 276. Phillips Allot, "The Concept of International Law," *European Journal of International Law* 10, (1999): 31.

[70] Michael P. Scharf, "Earned Sovereignty: Judicial Underpinnings," *Denver Journal of International Law and Policy* 31, no. 3 (2003): 381. P.L. Billon, "The Political Ecology of War: Natural Resources and Armed Conflicts," *Political Geography* 20, no. 5 (2001): 565.

[71] Nora Y.S. Ali, "For Better or for Worse: The Forced Marriage of Sovereignty and Self-Determination," *Cornell International Law Journal* 47, no. 2 (2014): 437. Fredrik Sjöholm, "Timor-Leste's Precarious Route to Development," East Asia Forum, accessed 20 February 2021, https://www.eastasiaforum.org/2020/09/19/timor-lestes-precarious-route-to-development/. Florêncio Miranda Ximenes, "Timor-Leste Petroleum Fund Grows to $18.99 Billion," Tatoli, accessed 20 February 2021, http://www.tatoli.tl/en/2021/02/08/timor-leste-petroleum-fund-for-the-last-trimester-of-2020-grows-to-18-99. "East Asia and Pacific Economic Update: Timor-Leste," World Bank, accessed 25 May 2017, http://pubdocs.worldbank.org/en/688771478677147187/Econ-Update-Main-Report-English.pdf, and The Report of the Panel for United Nations Peace Operation (the Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August 2000; *Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebenica,* UN Doc. A/54/549 (15 November 1999), para. 490; and *Report of the Independent Inquiry into the Action of the United Nations during the 1994 Genocide in Rwanda,* UN Doc. S/1999/1257 (16 December 1999), para. 50-51.

[72] Espinosa, "Towards a Definition of the Right to Self-Determination," 28. Theodore Meron, "International Criminalization of Internal Atrocities," *American Journal of International Law* 89, (1995): 555; and Jack L. Goldsmith and Eric Posner, "Understanding the Resemblance between Modern and Traditional Customary International Law," *Virginia Journal of International Law* 40, (2000): 639.

[73] Kenneth Ng'ang'a Njri, "The Principle of Self-Determination: A Delicate Balance between Unilateral Secession and Territorial Integrity of States," *SSRN Electronic Journal*, (2020): 9.

[74] Milena Sterio, "Self-Determination and Secession under International Law: Nagorno-Karabakh," *German Yearbook of International Law* 59, (2016): 102.

[75] Thomas Burri, "Secession in the CIS: Causes, Consequences, and Emerging Principles," in *Self-Determination and Secession in International Law*, Christian Walter, Antje von Ungern-

a result, discrimination may lead to demands for external self-determination[76] which is recognized by the ICJ as a legal entitlement that overrides a state's territorial integrity in non-self-governing areas, which may involve either the formation of a new state or the recognition of the right to self-governance within an existing state.[77] Grave breaches of international humanitarian law as regulated by the Geneva Conventions 1949 by the mother state towards the separating state may also give rise to the separating state's autonomous character.[78]

Rapid issues on global security determine approaches taken by the UNSC to respond to gross violations of human rights caused by armed conflict, whether international or civil,[79] tyrannical and brutal governments,[80] uncontrolled violence,[81] help to implement peace agreements[82], and

Sternberg, and Kavus Abushov, eds. (Oxford: Oxford University Press, 2004), 145.

[76] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, 403 (Separate Opinion of Judge Abdulqawi A. Yusuf) 618, 624 para. 16.

[77] Request for Advisory Opinion Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.

[78] The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31; the Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85; the Convention Relative to the Protection to the Prisoner of War, opened for signature 12 August 1949, 75 UNTS 135; and the Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287; Marco Sassoli and Antoine Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC vol. II, (2006), 11; and Hans-Joachim Heintze, "Convergence Between Human Rights Law and International Humanitarian Law and the Consequences for the Implementation", in *International Law and Humanitarian Assistance, A Crosscut Through Legal Issues Pertaining to Humanitarianism*, Hans-Joachim Heintze and Andrej Zwitter, eds. (Dodrecht: Springer, 2011), 83.

[79] Such as in Bosnia Herzegovina, United Nations Protection Force (UNPROFOR), S/Res/758, 8 June 1992, S/Res/761, 29 June 1992, and S/Res/770, (13 August 1992), and in Sierra Leone, United Nations Mission in Sierra Leone, S/Res/1270, 22 October 1999.

[80] Such as in Rwanda, United Nations Assistance Mission for Rwanda (UNAMIR), S/Res/918 (17 May 1994), and in Haiti, United Nations Mission in Haiti (UNMIH), S/Res/975 (30 January 1995).

[81] Such as in Somalia, The Unified Task Mission for Somalia (UNITAF), S/Res/794 (3 December 1992); the United Nations Operation in Somalia (UNOSOM), S/Res/814 (26 March 1993), and in Albania, the Italian Multinational Protection Force (MPF), S/Res/1101, (12 March 1997).

[82] Such as in Kosovo, United Nations Mission in Kosovo (UNMIK), S/Res/1199 (23 September 1998), and in East Timor, Australian Multinational Force (INTERFET), S/Res/1264 (15 September 1999), United Nations Transitional Administration in East Timor (UNTAET), S/Res/1272 (12 October 1999.

pandemic situations such as the COVID-19 pandemic.[83] Therefore, political backgrounds in the creation of a mandate for international intervention highlights these multifaceted dimensions of global security dealing with certain factual situations on the grounds that may lead to State succession by means of secession.[84] A number of legal frameworks have established guidelines for what constitutes and defines a gross violation of human rights for the UN operations led by the UNSC, bringing individual accountability for international justice and ending impunity.[85] These transgressions involve apparent disregard for the fundamental rights to human dignity, safety, and freedom, and they frequently result in serious harm being inflicted on a large number of people.[86] Despite the fact that the term gross violations of human rights appear to be a general term for all human rights violations, it actually falls into four major categories developed from practices and international treaties as follows: (1) genocide; (2) Crimes against humanity; (3) war crimes, and (4) Crimes against humanity, such as ethnic cleansing.[87]

[83] "Covid-19 Response," United Nations, accessed 6 September 2022, https://www.un.org/en/coronavirus/UN-response.

[84] Theodore Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94. no. 239 (2000), 244-245, and 256-259.

[85] United Nations, *Concluding Report 1997-2002*, *Challenges of Peace Operation: Into the 21st Century*, New York, 261. Yasushi Akasi, "The Use of Force in a United Nations Peace-keeping Operation: Lessons Learnt from the Safe Area Mandate," *Fordham International Journal* 19, 1995: 1. Michael J. Kelly, Timothy McCormack, Paul Mulgelthon, et. al., "Legal Aspect of Australia's Involvement in the International Force for East Timor," *International Review of the Red Cross* 841, (2001). Steven Ratner and Jason Abraham, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Second Edition (Oxford, 2001), 3-9. Kristen Hessler, "State Sovereignty as an Obstacle to International Criminal Law" in *International Criminal Law and Philosophy*, Larry May dan Zachary Hoskins, eds. (Cambridge: Cambridge University Press, 2010), 39-57; and Hannah Arendt, *The Origins of Totalitarianism*, (New York: the World Publishing Company, 1958), 297; and Onora O'Neil, "Agents of Justice," *Metaphilosophy* 32, no. 1/2 (2001): 198. Antonio Cassese, Paola Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court*, Volume 1 (Oxford: Oxford University Press, 2002), 667-668.

[86] Hilde Hey, *Gross Human Rights Violations: A Search for Causes: A study of Guatemala and Costa Rica*, (Boston: Martinus Nijhoff Publisher, 2021), 21. Louis Doswald-Beck and Sylvian Vite, "International Humanitarian Law and Human Rights Law," *International Review of the Red Cross* 293 (1993): 98. Teraya Koji, "Emerging Hierarchy in Human Rights and Beyond: From the Perspective of Non-Derogable Rights," *European Journal of International Law* 12, no. 5 (2001): 925.

[87] "United Nations Office on Genocide Prevention and the Responsibility to Protect." United Nations, accessed 10 May 202, https://www.un.org/en/genocideprevention/genocide.shtml. Nuremberg Charter, Charter of International Military Tribunal, 82 UNTS 279, (entered into force 8 August 1945), art. 6 (c). Article II.1 (c) of the Allied Control Law No.10 Punishment of Person Guilty of War Crimes, Crimes Against Peace and Humanity, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946 (CCL 10); Article 5 (c) of the Tokyo Charter of the International Military Tribunal for the Far East, Proclaimed at Tokyo,

As a result, remedial secession has been practiced and received worldwide legal and political entitlement and/or remedies as separation of a territory from an existing state with the intention of resolving significant injustices or grievances experienced by the seceding territory due to the existence of gross violations of human rights.[88] Consequently, self-determination is closely linked to statehood and self-governance, and while the UN upholds the territorial integrity of states, it also acknowledges the right of people and nations to make demands for independence and statehood as a dynamic process as well as a test of ability to exercise effective control of the existing statehood.[89] Substantially, remedial secession refers to the continuation of a state's existence despite changes to its territorial boundaries, government system, or legal system. It is based on the understanding that a State maintains its legal identity, regardless of any alterations to its physical or political structure, empowered by other states' recognition in search of comprehensive security, universal justice, and ends of impunity.[90]

IV. REMEDIAL SECESSION AND CUSTOMARY OF INTERNATIONAL LAW

Remedial secession is a theory in international law that addresses the transfer of sovereignty over a territory from one state to another as a result of

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19 January 1946, TIAS 1589 (entered into force with respect to United States 26 April 1946); Article 5 of the International Criminal Tribunal for Former Yugoslavia: SC Res 827 (May 25,1993), UN Doc S/25704 (May 3, 1993), 3 ILM 1159; Article 3 of the International Criminal Tribunal for Rwanda: SC Res 955 (November 8, 1994), UN Doc S/1994/1405, Article 20 of the Draft Statute for an International Criminal Court 1994, Report of the International Law Commission, 46th Session, UNGAOR, 49th Session, Supp. No. UN Doc A/49/10 (1994).

[88] Bennedotto Conforti,"National Court and the International Law of Human Rights," in *Enforcing International Human Rights in Domestic Court*, Bennedotto Conforti and Francesco Francioni, eds. (Cambridge: Cambridge University Press, 1997), 3. Jo Stingen, *The Relationship Between the International Criminal Court and National Jurisdictions, The Principle of Complementarity* (Leiden: Martinus Nijhoff Publishers, 2008), 6-8. John T. Holmes, "The Principle of Complementarity," in *The International Criminal Court: The Making of the Rome Statute, Issues Negotiations Results*, R.S. Lee, ed. (The Hague, Boston: Kluwer Law International, 1999), 41.

[89] Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff Publisher, 2005), 85 and Andrew Guzman, *How International Law Works, A Rational Choice Theory* (Oxford: Oxford University Press, 2008), 22.

[90] Benjamin Miller, "The Concept of Security," *Journal of Strategic Studies* 24, no.2 (2001): 19-22. Daniel Yergin, *The New Map, Energy, Climate and the Clash of the Nations* (New York: Penguin Press, 2020), 423; Ilias Bantekas and Susan Nash, *International Criminal Law*, Third Edition (London: Cavendish, 2003), 3-5. Timothy L.H. MacCormack and Gerry J. Simpson, eds., *The Law of War Crimes: National and International Approaches*, (Kluwer International Law, 1997), 187.

the first sovereign's violation of the inhabitants' rights.[91] This viewpoint holds that the international community has the power to step in and cede control of a territory to a government that is better able or more willing to uphold the basic rights of its citizens, given that the situation for such citizens has become so terrible that this method is needed.[92] In order to assess whether or not remedial secession can be considered as customary international law, two elements must be assessed in a prompt manner: the fulfilment of state practice and *opinio juris* elements to avoid instant custom and persistent objector.[93] These elements are substantially outlined by Article 38(1) (b) of the Statute of the ICJ as a reference to decide and give advisory opinions.[94] State practice is an objective element alluding to the actual behavior of States (State practice), whereas *opinio jurist* can be understood as a subjective, psychological element regarding the belief of States that such behavior, either by action or omission, is a legal obligation (*opinio juris sive necessitates*).[95] However, in recent times, public verbal statements are also considered to be a form of practice.[96] Judicial opinions and the reports of authoritative legal bodies have demonstrated that evidence of what a State does can also be derived from verbal acts directed to

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[91] Alicia Levine, "Political Accommodation and the Prevention of Secessionist Violence," in *The International Dimensions of Internal Conflict*, Michael E. Brown, eds. (Cambridge: the MIT Press, 1996), 311-340.

[92] David Cortright and George A. Lopez, *Sanctions and the Search for Security: Challenges to UN Action* (Boulder: Lynne Rienner Publishers, 2002), 11-12.

[93] Shaw, *International Law*, 517-518. E. Bello, *African Customary Humanitarian Law* (Cambridge: Cambridge University Press, 1980), 65. Dixon and Robert McCorquodale, *Cases and Materials on International Law*, Second Edition (Cambridge: Cambridge University Press, 1991), 26; Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2001), 21-28. Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law* 95, (2000): 757; and Cases such as Anglo Norwegian Fisheries case (United Kingdom v Norway), ICJ Reports 1951; Rights of Passage over Indian Territory case (Portugal v India), ICJ Reports 1960; North Sea Continental Shelf case (FRG v Denmark: FRG v The Netherlands) (1969), ICJ Reports 3; and Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) (Merits) (1986), ICJ Reports 14.

[94] Jorg Kommerhofer, *Uncertainty in International Law A Kelsenian Perspective* (Leiden: Routledge Press, 2011), 192;

[95] Ian Brownlie, *Principles of Public International Law,* Seventh Edition (Oxford: Oxford University Press, 2008), 6; P. Malanczuk, *Akehurst's Modern Introduction to International Law,* Seventh Edition (London/New York: Routledge, 1997), 44.

[96] Lawrance M. Friedman, *The Legal System: A Social Science Perspective*, (New York: Russel Sage Foundation, 1975), 5-6; L.M Friedman, *Sistem Hukum Perspektif Ilmu Sosial* [*Legal System from Social Science Perspective*] (Bandung: Nusa Media, 2009), 12-13; J.W. Harris, *Legal Philosophies*, (London: Butterwoths, 1980), 111. Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence): Termasuk Interprestasi Undang-Undang (Legisprudence)* [*Explaining Legal Theory and Judicialprudence*] (Jakarta: Kencana, 2009), 204.

statements or official releases on remedial secession.[97]

Regarding the state practice of remedial secessions, two main sources can be analyzed. First, instances of self-determination occurred in the past, such as the creation of East Pakistan (Bangladesh) and Kosovo. In 1971, the independent state of Bangladesh was formed following an armed conflict between East Pakistan combatants and Pakistani forces, resulting in the secession of East Pakistan.[98] While this case may serve as a precedent that supports the view that remedial secession is a legal entitlement of oppressed peoples, a different interpretation is also likely.[99] It is possible that "the withdrawal of the Pakistani Army after the ceasefire …merely produced a fait accompli, which in the circumstances other States had no alternative but to accept."[100] Thus, the formation of Bangladesh is not a clear precedent in support of the remedial secession theory. In truth, Bangladesh became universally recognized only following Pakistan's recognition of its independence. This indicates that the international community did not consider secession as an entitlement.[101] The formation of Kosovo, on the other hand, while being a form of self-determination, did not prove that remedial secessions may be a form of customary international law. The Ahtisaari Report suggests that the rationale of the Kosovo declaration was not based on the application of the remedial secession theory.[102] Thus, while a few instances of remedial secessions can be said to have occurred, this is highly debatable.[103] Second considerations direct to opinions of states regarding such remedial secessions

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[97] Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, (Cambridge: Cambridge University Press, 1992), 209. Leslie C. Green, *The Contemporary Law of Armed Conflict*, Third Edition (Manchester: Manchester University Press, 2008), 18. Chris af Jochnick, Roger Normand, "The Legitimation of Violence: A Critical History of the Law of War, *Harvard International Law Journal* 35, No. 49, (1994): 62-63. Adam Roberts and Richard Guelff,, *Documents on the Law of War* (Oxford: Oxford University Press, 2000), 59.

[98] Crawford, *The Creation of States*, 141-142.

[99] Geir Ulftein, Thilo Marauhn and Adreas Zimmerman, *Making Treaties Work: Human Rights, Environment and Arms Control*, (Cambridge University Press, 2007), 3-5. John D. Ciorciari, "Institutionalizing Human Rights in Southeast Asia," *Paper for the International Conference on Issues and Trends in Southeast Asia*, Center for Southeast Asian Studies, (University of Michigan, 2010).

[100] Crawford, *The Creation of States*, 393.

[101] Andrea Birdsall, *The International Politics of Judicial Intervention, Creating a More Just Order* (New York: Routledge, 2009), 54. P. Forsyhte, *Human Rights In International Relations* (Cambridge: Cambridge University Press, 2000); T.M., Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1992); and Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005).

[102] Vidmar, "Remedial Secession in International Law," 37.

[103] Joseph Raz, *The Concept of Legal Systems, An Introduction to A Legal System*, (Oxford: Clarendon Press, 1997), 93-94.

as their belief as the basis of legal entitlement of remedial secession. Several States, such as Germany, made submissions that the right to secession for people does not exist automatically.[104] This stance was taken by states such as the United States, Vietnam, and France.[105] In regards to the second element of customary international law, *opinio juris*, substantial manifestations of remedial secession do not exist. The submissions of States before the ICJ on Kosovo have shown that States have different opinions and contrary beliefs.[106]

Many scholars consider the remedial secession theory to be rather weak, lacking proper theoretical foundations and state practice as well. It is still somewhat questionable whether or not remedial secession has enough support to even be considered an entitlement for states under international law.[107] However, we see that in this case, Russia has invoked the remedial secession doctrine as a means of justification for invading Ukraine's territory and forcibly changing the status of said territory to however they see fit. It is uncertain whether the international community would support remedial succession in this case.[108] Despite their repeated calls for an end to the fighting and a diplomatic solution, the separatist governments in Donetsk and Luhansk are not recognized by the United Nations. A large number of countries continue to recognize Ukraine's total sovereignty over its territory and have condemned Russian military participation, and only Syria, Nicaragua, Venezuela, and Putin have all joined in recognizing Donetsk and Luhansk.[109] Remedial secession is only permitted with the governing state's consent.[110] This consent may be given prior to the declaration of independence or following a first unilateral declaration, through the constitution of the governing state or in another manner. In any instance, the requirement of parent-state consent prevents the assertion of a right to secession as such under international law.

The aforementioned theory affirms state succession in international law, especially resulting from the conjoint application of international human rights law and international humanitarian law on armed conflict[111], even though it

[104] Simone van den Driest, "Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?" Doctoral Thesis, Tilburg University, 2013, 6-10.

[105] *Ibid*.

[106] *Ibid*.

[107] Vidmar, "Remedial Secession in International Law," 38.

[108] "Secretary-General Says Russian Federation's Recognition of "Independent" UNSG Release, Donestk, Luhansk Violate Ukraine Sovereignty, Territorial Integrity", SG/SM/21153, accessed 10 May 2023, https://press.un.org/en/2022/sgsm21153.doc.htm.

[109] Mansur Mirovalev, "Donetsk and Luhansk: What You Should Know about the 'Republics'," *Al Jazeera*, 22 February 2022, accessed 15 May 2023, https://www.aljazeera.com/news/2022/2/22/what-are-donetsk-and-luhansk-ukraines-separatist-statelets.

[110] Vidmar, "Remedial Secession in International Law," 38.

[111] George H. Aldrich, "The Law of War on Land," *American Journal of International Law* 94,

lacks practices caused by the denial of rights of self-determination. When a mother State commits gross violations of human rights to its own individuals or group of individuals based on political affiliations, race, origins, belief, sex, and/or religion, it can respond to the aspiration of capabilities and freedom of the respected entities.[112] This theory is debatable in terms of its rationales, objectives, and operation, both in international law and international relations, since it is covered by well-established norms and principles in international law, such as sovereignty, territorial integrity, and non-interference of domestic affairs.[113] It also justifies the right of self-determination beyond the decolonialization context, and it also entitles responsibility to protect into action once there are gross violations of human rights, denying state sovereignty as responsibility.[114]

It is most likely accepted as state practice as long as it fulfils three consecutive requirements, namely relations, legitimate motives, and factual injuries to sustain its legal rationales, legal tools for its interpretation, and its legal reasons.[115] It also provides legitimate expectations as well as a legal entitlement on how the mother state bears international responsibility to take care of its own nationals and exercise sovereignty as a responsibility.[116] Viewed from the international law discourse, the remedial secession theory also points

no. 42, (2000): 54. George H. Aldrich, "Compliance with International Humanitarian Law," *International Review of the Red Cross* 282, (1991): 294. Timothy LH McCormack, "From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law," *Melbourne University Law Review* 21, (1997): 642.

[112] Ayesah Uy Abubakar, *Peace Building and Sustainable Human Development, the Pursuit of the Bangsamoro Right to Self-Determination* (Switzerland: Springer Nature, 2019), 1-2. Weller, *Escaping the Self Determination Trap*, 59.

[113] United Nations Charter, 1945, 1 UNTS 16 (entered into force 24 October 1945), art. 2.

[114] Maya Abdullah, "The Right to Self Determination in International Law: Scrutinizing the Colonial Aspects of the Rights to Self Determination," Student Essay, University of Gooterborg, 2006, 4-6. Jorg Fisch, *The Right of Self-Determination of Peoples* (London: Cambridge University Press, 2015), 9. Ilias Bantekas and Susan Nash, *International Criminal Law*, Third Edition, (London: Cavendish, 2003), 3-5. Timothy LH MacCormack and Gerry J Simpson, eds., *The Law of War Crimes: National and International Approaches* (New York: Kluwer International Law, 1997), 187.

[115] Thomas W. Simon, "Remedial Secession: What the Law Should Have Done: from Katanga to Kosovo", *Georgia Journal of International and Comparative Law,* 40, no.1. (2011): 110-111. Ian Brownlie, *Principles of Public International Law*, Fourth Edition (Oxford: Oxford University Press, 1990), 3. G.M. Danilenko*, Law Making in the International Community* (Martinus Nijhoff Publisher, 1993), 79, and 98. D'Amato, "Thrashing Customary International Law," *American Journal of International Law* 81, (1987): 101.

[116] Vithit Muntarbhorn, *Challenges of International Law in Asian Region: An Introduction* (Switzerland: Springer, 2021), 27-28. Julian Hermida, "A Proposal Toward Redefining the Model of Application of International Law in the Domestic Arena", *Singapore Journal of International and Comparative Law* 7, (2003), 489-510.

to its own imminent legal questions. In particular, possible legal gaps (norm vs. reality), legal ambiguity, overlapping legal authority, legal loopholes, and possible conflict of norms, especially on its area, scope, and institutionalization relating to humanitarian intervention vs. non-interference principle, territorial integrity vs. sovereignty, and recognition vs. peaceful settlement of the dispute, and use of force always mount to unclear motivations, full of risks and lack of resources.[117]

A summary of the remedial secession theory, whether or not it is fulfilling the elements of customary international law since the remedial secession does not succeed, is still arguable, leading to possible instant custom and its persistent objector.[118] Analyses of pertinent judicial decisions, state practice, and *opinio juris* are prudently carried out, revealing findings as follows. First, it has been determined that, according to the most recent interaction of international law, there is no remedial right to separate. To begin, the international community appears to have a general reluctance to tolerate acts of unlawful secession. Although in the instance of Kosovo, which received widespread backing from the legal profession, a large number of states have refused to recognize it, proven by the fact that Kosovo has not yet been accepted into the United Nations.[119] Secondly, the international community has never once acknowledged a legal entity's right to a corrective secession. This was the case in every single case that was investigated. It would appear that regardless of the circumstances of Bangladesh, Croatia, and Kosovo, which could be deemed remedial by their very essence, the selections of governments to acknowledge them were decided on political and factual considerations and not on an acceptance of legal claim to remedial secession. To conclude, it is still missing some points to call the remedial secession a customary international law. Prior to the Court's imprecise interpretation having any further repercussions on the international legal system, there is an immediate and critical need for it to clarify this matter. The most effective

[117] Amitav Archarya, "Do Norms and Identity Matter? Community and Power in South East Asia's Regional Order," *The Pacific Review* 18, no. 1 (2005): 95. Oona A Hathaway, "Testing Conventional Wisdom," 197.

[118] Bin Cheng, *Studies in International Space Law* (Oxford: Oxford University Press, 1997), 125. Diego German-Meija, "Some Considerations Regarding "Instant Customary of International Law, Fifty Years Later," *Indian Journal of International Law* 55, (2015): 85-87; and Bin Cheng, "Custom: the Future of General State Practice in Divided World," in *The Structure and Process of International Law: Essay in Legal Philosophy, Doctrine and Theory*, R. Macdonald dan D. Johnston, eds. (Dordrecht: Martinus Nijhoff Publisher, 1983), 513.

[119] Christian Reus-Smith, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relation* (Princeton: Princeton University Press, 1999), 21. Hans Morgenthau, *Politics Among Nations: Struggle for Power and Peace*, Seventh Edition (New York: McGraw Hill Education, 2005), 5-6.

remedy for the problem of secession is to put one's attention on fostering democracy and protecting human rights across the board, in all states, for all populations, and in all areas. It will assist in providing the internal self-determination that people need as well as the consistency that is necessary for the development of the international legal system.[120]

V. RELEVANCE OF THE REMEDIAL SECESSION THEORY TO INDONESIA'S TERRITORIAL INTEGRITY

Territorial integrity is recognized as the general principle of international law as recognition of the unification of and sovereignty within a state, in which the enforcement of such a concept would strengthen not only the domestic unity of a state but also the international recognition of the state's unity as the primary subject of international law.[121] Indonesia, in its response to Papua's attempt at self-determination, uses the principle of territorial integrity to reason with the lack of acceptance from the Indonesian government to recognize the self-determination of Papua, claiming the matter lacks merit in light of this concept as common issues faced by Southeast Asian countries.[122] The Indonesian government perceives Papua's attempt to self-determination as a form of separatist movement although the archives to the Indonesian independence pertain to the answers proving Trevor Findley's prediction that this cause of internal conflict will last and haunt the Indonesian Government.[123] Therefore, the escalation of conflicts due to human rights violations might increase, affecting neighboring states, such as Papua New Guinea, which has a defense agreement with Australia.[124] Consequently, proper management of

[120] Rokas Levinskas, "Whether There Is a Right to Remedial Secession under International Law?" *Teisės apžvalga/Law Review* 20, no. 2 (2019): 44. Christian Reus-Smith, *The Moral Purpose of the State: Culture, Social identity, and Institutional Rationality in International Relations* (Princeton: Princeton University Press, 1999), 19-21.

[121] L. Oppenheim, *International Law: A Treatise, Disputes, War, and Neutrality*, H. Lauter-pacht, ed. (London: Longeman, 1952),154. Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002), 1-4. Christopher Joyner, *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997), 9-11.

[122] Trevor Findley, "Turning the Corner in Southeast Asia," in *The International Dimensions of Internal Conflict*, Michael E. Brown, ed. (Cambridge: The MIT Press, 1996), 173. Linda Y.C Lim and Pang Eng Fong, "The Southeast Asian Economies: Resilient Growth and Expanding Linkages," *Southeast Asian Affairs*, (1994), 28.

[123] *Ibid.*, 181. Human Rights Watch, "Indonesia: Human Rights and Pro-Independence Actions in Irian Jaya," *A Human Rights Watch Short Report* 10, no. 8, (1998).

[124] *Ibid.*, 200. John Saltford, *United Nations Involvement with the Act of Self-Determination in West Irian (Indonesian West New Guinea) 1968 to 1969* (London: Routledge Curzon, 2003),7-9.

the said issues invoked by the Russian attitude toward its recognition over two breakaway provinces of Luhansk and Donetsk on remedial secession needs to be prudently taken into account by the Indonesian government for safeguarding its national interests, resilience, and political, social, economic and social aspects in Papua.[125]

During the process of Indonesian independence, the Netherlands promised to exclude Papua from the regions of Indonesia as the Papuan region attempted diplomacy for their independence. However, the Dutch included within their 1956 Constitution that Papua was included within Indonesia's regions, thus during the contemplative measures of the 1962 New York Agreement, it was decided and concluded further by Law 12/1969 that West Irian–which is now recognized as Papua–as to be a part of Indonesia.[126] This context devalues Papua's claim that the 1945 Indonesian Constitution states that all citizens of the state have the right to independence, as in a sense, Papua has obtained independence through Indonesia's independence as well as the realization of the Indonesian foreign policy security interests.[127] Papua began its attempts at self-determination in the 1960s and has been further pursued with Indonesia's exploitation of people and resources from the Papuan region, thus enforcing the attempts of the Papuan Independence Organisation.[128] The people of Papua then attempted a juridical review upon the UU 12/1969, and it was rejected by the Indonesian Constitutional Court as a final and binding decision. The Constitutional Court Decision of 35/PUU-XVII/2019 could not be appealed. The reasoning behind this was firstly the international law principle of territorial integrity, and furthermore, the Court deemed that they did not have authority to examine the legitimacy of the UN's actions as per their involvement to the 1962 New York Agreement. Therefore, Papua's claims to self-determination which may not result in secession highly relates to Indonesia's implementation of territorial integrity, notwithstanding allegations of human rights violations that Indonesia had perpetrated to maintain Papua's region as part of the country, with historical context to how Papua gained independence post colonization. In an attempt to respond to the tension in Papua, special autonomous status

[125] Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*, London and New York: Routledge, 2001), 16-17.

[126] United Nations General Assembly Official Records, 1969, 24th Session, 1813th Plenary Meeting, Wednesday, 19 November 1969, 3.

[127] Leonard Sebastian, "Domestic Security Priorities, "Balances of Interests" and Indonesia's Management of Regional Order," in *Order and Security in Southeast Asia, Essays in Memory of Michael Leifer*, Joseph Chinyong Liow and Ralf Emmers, eds. (New York: Routledge, 2006), 178.

[128] *Ibid.*

was granted to certain provinces in Indonesia including Papua.[129]

There is evidence of human rights violations in Papua since there have been human rights court proceedings on this matter, such as the Abepura case.[130] In addition, there are reports of discrimination and violations of the rights of indigenous Papuans, including the right to their traditional lands and resources. Limited access and availability of natural resources enjoyed by Papuan people have been voiced out to prove discrimination as the root of extensive human rights violations.[131] Indonesia's territorial integrity claim to Papua is based on several factors, including historical, legal, and geopolitical considerations. First, Papua has been part of Indonesia since independence from the Netherlands in 1949. The Netherlands recognized Indonesia's sovereignty over Papua as part of a sovereignty transfer agreement known as the Roundtable Conference (RTC). The RTC confirmed recognition of the Republic of Indonesia's sovereignty over the entire territory of the former Dutch East Indies, including West Papua.[132] Moreover, Papua was legally and politically integrated into Indonesia as a result of a historical process that began during the colonial period and culminated in the 1960s.[133] Indonesia claims that it has a legal basis for claiming Papua based on the principles of international law, particularly the *uti possidetis juris* principle. The international community recognizes Papua as an integral part of Indonesia.[134] Finally, Papua is strategically located in Southeast Asia, giving it access to essential sea routes and abundant natural resources. Therefore, Papua is an important component of Indonesia's territorial integrity, particularly in terms of security and economic considerations".[135]

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[129] Damos Dumoli Agusman, "The Dynamic Development on Indonesia's Attitude Toward International Law," *Indonesian Journal of International Law* 13, no. 1 (2015): 24.

[130] "Putusan HAM Abepura Bisa Picu Internasionalisasi Papua [Court Decision on Abepura Case internationalized Papua Issue]," *Detik News*, 9 September 2005, accessed 19 May 2023, https://news.detik.com/berita/d-438738/putusan-ham-abepura-bisa-picu-internasionalisasi-papua.

[131] Ministry of Finance of The Republic of Indonesia, "A guide to understanding the Freeport divestment deal – Business," available at accessed 19 May 2023, https://www.djkn.kemenkeu.go.id/berita_media/baca/12664/A-guide-to-understanding-the-Freeport-divestment-deal-Business.html.

[132] Bilveer Singh, "The role of the United Nations in the West Papua conflict," *Journal of Southeast Asian Studies* 43, no.1 (2012): 135.

[133] Budi Hernawan, "The History of Papua and West Papua in Brief," *Journal of Pacific History* 50, no. 4 (2015), 475.

[134] Marc Weller, "Settling Self-determination Conflicts: Recent Developments," *European Journal International Law* 20 (2009): 246.

[135] Ali Munhanif, "The Dynamics of Papua's Development and the Role of Local Wisdom," *Journal of Political Science* 2, no.1 (2017): 14.

Politically, Indonesia has kept up control over West Papua for more than five decades and has contributed intensely to improvement and framework. In expansion, Indonesia's claim to West Papua has been upheld by numerous nations, counting the United States, Australia, and the United Kingdom, which have recognized Indonesia's sway over the region. Besides, Indonesia claims that various international treaties and agreements support its sway over West Papua. Human rights are the foundation for developing an accountable government. There is a clear causal relationship between impunity and violations of human rights in Papua. The UN's highest human rights body has failed to pressure Indonesia to hold credible and effective trials of severe crimes, including crimes against humanity, by adopting resolutions condemning these human rights violations. Recognize the serious human rights situation in Indonesia and urge the government of Indonesia to take immediate action to prevent it.[136] It also calls on the Indonesian government to end impunity by bringing alleged perpetrators of human rights abuses to justice and ensuring that all trials comply with international standards of fairness. The Indonesian government has carried out prohibited acts to exterminate the West Papuans, in violation of the Convention on the Prevention and Punishment of Genocide and prohibitions of customary international law. This evidence suggests that the Indonesian government committed illegal acts aimed at exterminating the population of West Papua.

To maintain territorial integrity against Papuans at international fora, Indonesia must engage in communications and negotiations with other states to maintain the territorial integrity of the international community.[137] Negotiation is the art of persuading, inviting, and inspiring bodies to work together to reach an agreement. A form of social contact, a way of communicating through formal discussion shall be continuously sent and delivered.[138] To raise the standard of living for its population, the Indonesian government might finance initiatives for development in Papua, which has been taken by means enlargement and capacity building while massive infrastructure development has been carried out. This can aid in resolving some of the root problems that may be causing social conflicts there.[139] Geopolitically, Papua New Guinea,

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[136] Gopal Siwakoti, George W. Shepherd, and Ved P. Nanda, "Human Rights and Third World Development," *Human Rights Quarterly* 14, no. 4 (1992): 664.

[137] Marcel Massé, "The Intercultural Dialogue: Cornerstone Development," *International Journal of Intercultural Relations* 5, no. 3 (1981): 203–214.

[138] Michele J. Gelfand and Jeanne M. Brett eds., *The Handbook of Negotiation and Culture* (Stanford University Press, 2004), 31.

[139] R.J. Mary, "Mutual Respect, Friendship and Cooperations? The Papua New Guinea-Indonesia Border and Its Effect on Relations Between Papua New Guinea and Indonesia," in *State and Society in Papua New Guinea: The First Twenty-Five Years* (Canberra: ANU Press,

as the neighboring country, will struggle to enter the ASEAN market with its competitive products due to tariff settings in member states that impact to the Indonesian economic policies, programs and actions in Papua.[140] Full membership and preferential tariffs for the Papua products could pave the way for them to expand their exports to ASEAN markets accordingly. Thus, it could also benefit from the ASEAN mechanism that awards large industrial projects to member states. Papua currently has a limited domestic market access, which limits the establishment of large-scale industrial projects. With a larger ASEAN market secured and projected, it is more likely to build one or two large industrial projects that are more economically viable. For example, in the G20, the subject of Papua and human rights violations are rarely tackled in the G20 environment since it is primarily concerned with economic and financial matters.[141] However, this forum can be used to mirror Indonesian government solemn commitments to empower and take active, free and meaningful participation in the development process.

VI. COMPARISON OF INDONESIA AND UKRAINE SITUATION BASED ON THE REMEDIAL SUCCESSION THEORY: SHOULD INDONESIA WORRY?

One of the main backgrounds of this research is due to the concern of the Ministry of Foreign Affairs on the situation in Ukraine and whether Indonesia should be concerned with their territorial integrity, specifically Papua. Although Hikmahanto Juwana has stated that it should not be a concern to Indonesia, a more in depth analysis should be provided, this section aims to analyze whether Indonesia should truly be confident that the Remedial Succession Theory cannot be utilized in the case of Indonesia.

An important factor that needs to be considered by the government of Indonesia is the possibility of human rights violations as a justification to the Remedial Succession Theory. It must not be denied that the situation in Papua has taken the attention of the media and the international community within the past few years. According to UN human rights experts in 2022, the OHCHR expresses their concerns over the human rights situation in Papua

2004), 289.

[140] Floranesia Lantang and Edwin M.B Tambunan, "The Internationalization of 'West Papua' Issue and Its Impact on Indonesia's Policy to the South Pacific Region," *Journal of ASEAN Studies* 8, no. 1 (2020): 41.

[141] Imam Mujahidin Fahmid, Harun Harun, Peter Graham, David Carter, et.al, "New Development: IPSAS Adoption, from G20 Countries to Village Governments in Developing Countries," *Public Money & Management* 40, no. 2 (2019): 160–63.

and West Papua Province particularly cases of child killings, disappearances, torture and mass displacement of people.[142] Additionally, the 2022 Report by Amnesty also reported numerous human rights cases including arrest of political activists, attack on protesters, and even unlawful killings.[143] One of the cases that is still ongoing is the Paniai case.

The Paniai case needs to be highlighted as the case concerns gross human rights violations that was allegedly conducted by a member of Indonesia's Military Armed Force, Isak Sattu, under Makassar District Court.[144] The case dates back to December 2014 when Yulianus Yeimo, who was 14 years old, was beaten by a member of Indonesia's Military Armed Force. The following day, an amount of 1,000 people protested and were responded to by open fire by the security forces.[145] Indonesia's National Commission on Human Rights stated that the mass shooting constituted gross human rights violations, which opened up an investigation.[146] According to the decision on 8 December 2022, the court ruled out that Isak Sattu was not criminally responsible for crimes against humanity. The most recent update of the situation is that the case is currently brought up to appeal to the Supreme Court and has not yet begun.[147] The decision of the district court to release Isak Sattu is deemed a setback to Indonesia's law enforcement system, particularly human rights.

But how does this compare to the situation in Ukraine particularly Donetsk and Luhansk? Indeed, the cases among the situation in Papua and the situation in Donetsk and Luhansk are two different sides of the coin with different backgrounds, actors, and cases. It shall be argued, however, that Indonesia should indeed worry if they do not handle the gross human rights violations appropriately. The situation of Donetsk and Luhansk utilized the

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[142] United Nations Human Rights, "Indonesia: UN Experts Sound Alarm on Serious Papua Abuses, Call for Urgent Aid", accessed 10 August 2023, https://www.ohchr.org/en/press-releases/2022/03/indonesia-un-experts-sound-alarm-serious-papua-abuses-call-urgent-aid.

[143] Amnesty, "Indonesia 2022", accessed 10 August 2023, https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/indonesia/report-indonesia/.

[144] Supreme Court, Prosecutor v. Mayor Inf. Purn. Isak Sattu, Court Decision of Makassar District Court Number 1/Pid.Sus-HAM/2022/PN Mks, 8 December 2022.

[145] Ibid.

[146] "Komnas HAM: TNI dan Polri Halangi Pengusutan Kasus Paniai [Human Rights National Committee: TNI and Polri Dissuade Paniai Case]," *CNN Indonesia*, 18 February 2020, accessed 10 August 2022, https://www.cnnindonesia.com/nasional/20200217185446-12-475479/komnas-ham-tni-dan-polri-halangi-pengusutan-kasus-paniai.

[147] "Kasasi sudah Masuk MA, Paniai belum Inkrah [The cassation has been submitted to the Supreme Court, Paniai has not yet stepped in]," *Media Indonesia*, 1 April 2023, accessed 10 August 2023, https://epaper.mediaindonesia.com/detail/kasasi-sudah-masuk-ma-paniai-belum-inkrah.

Remedial Succession Theory and as consequence succeeded from Ukraine. As mentioned in the previous section before, there is no doubt that Papua is part of Indonesia's rightful territory. However, alleged gross human rights violations that have occurred have become a concern not only internally within the country but rather also the international community including the United Nations and NGOs. If Indonesia does not take robust and appropriate measures to handle the situation in Papua, it is feared that one day Indonesia shall face the consequences of their own actions.

VII. CONCLUSION

The existence of the remedial secession theory in institutionalizing the right to self-determination due to gross violations of human rights is still a work in progress, and in the same time, it leads to a provoking question "where it will end" in international law discourses. Public scrutiny is always needed in order to test elements of last resort character and its proportionality. Furthermore, sovereignty as responsibility gains its momentum as legitimate reasons, prompts authority and resources to maintain the state's national interests, resilience, and fixes positions on its ideology, politic, defense, security, social, economic, and culture as its own identity of statehood. The scope and implementation of this right really depend on specific contexts, such as on the conditions of indigenous peoples and minority groups and the conjoining element of other state recognition. However, attempts to institutionalize the right to self-determination and the recognition of this right as the foundation of international law mark a significant advance in the advancement and protection of human rights worldwide as the State obligation as responsibility toward the international community. In general, the remedial secession theory reminds States to always manage and establish the right to self-determination in international law indicating the rising relevance of this idea in advancing human rights, democracy, and the rule of law globally.

Most importantly, it is crucial for us to realize that the weaknesses in the right to self-determination justified by remedial secession does not necessarily contradict the principle itself but it illustrates difficulties of putting it into effect such as how to manage order and stability in the Papua issue on allegation of human rights violations in international fora. Arguably, it can start with how the right to self-determination can jeopardize a state's territorial integrity, particularly when a group seeks autonomy from a pre-existing established state. This can lead to catastrophic domino effects to not just the state that this new entity split from, but also states surrounding its territory which is particularly the case when external forces support the rise of secessionist movements

such as what is currently happening with the separatist forces in Donetsk and Luhansk in the ongoing Ukrainian war. Even though this conflict does not give rise to direct effects on Indonesia's territorial integrity over Papua issue, in practice, the right to self-determination and other State recognition due to its own interests may prove challenging to be defined and contextualized within Indonesia's interests as a sovereign State without uncertain ends. Consequently, prompt and prudential creation as well as implementation of law, policy, program, action and funds internally and externally by the Indonesian Government to its own nationals based on non-discrimination, active, free and meaningful participation should be guaranteed in order to maintain public understandings, reducing risks and lack of availability of resources. At least, we should be aware to a fact that remedial secession's inherent vagueness and unhelpfulness of terms such as "nationhood" and "sovereignty" in attempting to resolve legal and political conflicts make difficult implementation of well-establishing norms in international law and lead to internal disputes or instability.

To wrap things out on a large scale, the Indonesian government has continuously taken a number of activities to protect and hold Papua's territorial integrity in international venues such as the United Nations, ASEAN, and the G20, avoiding allegations of internationalization of human rights violations as the basis for invoking the right of self-determination on remedial secession. The steps taken include discussions and agreements with international organizations to explain its position, monitoring and reporting on human rights violations committed by independent international organizations, strengthening relations with other countries in support of Papua's territorial integrity, investing in development programs to improve the standard of living of Papua's citizens, and promotion of the region's cultural diversity. The Indonesian government intends to implement these measures in order to demonstrate its commitment to protecting Papua's territorial integrity and responding to all allegations of human rights issues, as well as to promote economic growth, regional stability, and cultural diversity in the relationship between Indonesia and Papua. Finally, through those various mechanisms, Indonesia would consistently maintain territorial integrity over Papua, not letting the case of East Timor happen to this archipelago country again after getting numerous international interventions and pressure for the accused breach of territorial integrity and human rights violations.

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