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Violence in self-determination conflicts: Exploring the zone of exception in international law

1 Introduction

It would be a false presupposition to abstractly separate philosophical and practical considerations of the problem of political violence. Not only because the former can be used to legitimize actual violence, but also because of the role violence plays in political practice – together with its legal underpinning – is a vital source of reflection for theory. The present chapter delves into international law and international relations to enrich theoretical understanding of how a particular type of political violence – applied in self-determination conflicts. As I will demonstrate, self-determination conflicts are ruled by a particular type of the state of exception to international law. It not only allows violence, but assumes it as part and parcel of its machinery. It is violence neither excluded nor contained within the law, but preserved in a zone of withdrawal from the law. Such an account greatly complicates the usual understandings of violence as either abolished or monopolized by the law.

Philosophical pedigree of these explorations is to be found among key thinkers of the state of exception (and the element of violence that it contains): Carl Schmitt (1888–1985) and Giorgio Agamben. I will also make references to Thomas Hobbes's (1588–1679) and Walter Benjamin's (1892–1940) accounts of political violence to demonstrate in which respect the state of exception paradigm can enrich it.

The chapter is organized as follows. First, I discuss three main traditions of thinking about the relationship between violence and the law. Then I move to a theoretical account of the state of exception. With these considerations in mind I turn to the doctrine of international law to demonstrate how the right of peoples to self-determination is a unique form of the state of exception specific to international law. Finally, I explore the zone of exceptional violence at the heart of international law in order to draw conclusions on how the relationship between violence and the law can be reconsidered.

2 Law and violence: Three accounts

There seem to be at least three traditions of thinking about the relationship between the law and violence. The first one, which we may be tempted to label as the most traditional or intuitive – even if only due to the strength of the intrinsic ideology of the legal – assumes that the law pacifies, curbs and regulates violence. Whenever there is violence, there is no law proper; law appears in order to put an end to violence understood as extra-legal affliction.¹ This tradition is firmly rooted in a Hobbesian vision of the *natural right to use violence* which ceases when transferred to the sovereign and re-emerges if the sovereign's power fades:

[T]he obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished. The sovereignty is the soul of the Commonwealth; which, once departed from the body, the members do no more receive their motion from it. The end of obedience is protection; which, wheresoever a man seeth it, either in his own or in another's sword, nature applieth his obedience to it, and his endeavour to maintain it.²

What separates the law and violence in this vision is the social contract. After it is concluded, natural violence gives way to the sovereign-based law which, in a general sense, still uses violence, but in a legitimate (or rather self-legitimized) way that is no longer natural. Therefore, the law is the eclipse of proper violence.

The second vision strives to identify violence within the law. Walter Benjamin stands perhaps for its most eminent theoretician: for him, the law is a system of a systemic, self-substantiated violence that attempts to get rid of this name. Whenever the law applies violence, it seems to do so in the name of justice and reason, just as if violence did not exist within it. Benjamin begins with criticizing the two sides of the same coin on which the previous theory is built. In natural law, ends are just and means contingent; positive law legitimizes means and channels violence into the force of the law by declaring them legal or illegal.³ From the perspective of this vicious circle it is impossible to grasp the relationship between violence and justice of the entire construct. According to Benjamin, it can however be seen in confrontation with the type of violence that this system

1 See Christoph Menke, *Law and Violence: Christoph Menke in Dialogue* (Manchester: Manchester University Press, 2018), 3.

2 Thomas Hobbes, *Leviathan: The Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civill* (London: Andrew Crooke, 1651), 136.

3 Walter Benjamin, "The Critique of Violence" in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz (New York: Schocken, 1986), 279.

fears the most: the one used in and by class struggle.⁴ The law fears the type of violence which has in itself a law-making potential (embodied by “great criminals,” as Benjamin claims).⁵ It is so because the thetic moment of such violence – through which a violent act establishes a whole normative system that it begins to underpin – lays bare that the law itself is based on a similar gesture. Those who are violent by creating a new law and denying the existing one put themselves in a sovereign position that the law assaults ferociously. What they reveal is the law-preserving violence at the foundations of the legal system – in fact, the highest form of violence:

[F]or if violence, violence crowned by fate, is the origin of law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence. In agreement with this is the fact that the death penalty in primitive legal systems is imposed even for such crimes as offenses against property, to which it seems quite out of “proportion.” Its purpose is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself.⁶

As Karl Marx (1818–1883) repeated after Benjamin Constant (1767–1830), “rien n’est plus terrible que la logique dans l’absurdité” (nothing is more terrible than the logic in the absurd).⁷ The law epitomizes such a logic: by elevating violence to the rank of the legal it does not eclipse, justify or rationalize it, but only elaborates it into a system of camouflaged absurdity.

The third theory does not understand the law and violence as antinomies; neither does it focus on the thetic moment in which violence establishes the law. It rather focuses on how the law withdraws itself – in order to be applicable – and, by that, creates a zone of violence. This paradigm, rooted in Schmitt’s and Agamben’s conceptualizations of the exception, treats seemingly extra-legal violence as part and parcel of the legal apparatus. What is striking in this conceptualization is the way in which it approaches pure violence, not veiled by the concepts of legitimacy, justice or legality, as a pre-conceived aspect of the law. This violence is neither within the law proper, nor at its foundations: it appears whenever the law commands its boundaries. Although neither Schmitt nor Agamben focuses explicitly on the relationship between the law and violence, the paradigm of exception that they elaborate allows a more nuanced theorization of it.

⁴ Benjamin, “Critique of Violence,” 281.

⁵ Benjamin, “Critique of Violence,” 283–284.

⁶ Benjamin, “Critique of Violence,” 286.

⁷ Karl Marx, “Debates on the Law on Thefts of Wood,” Marxists.org, accessed September 25, 2022, <http://hiaw.org/defcon6/works/1842/10/25.html>.

In this chapter I extrapolate Schmitt's and Agamben's theorization of the exception in order to use the third theory for explanation of the zone of inherent violence at the heart of international law. As I will claim, people's right to self-determination (henceforth, RSD) in its most fundamental, external form – involving state-creation – represents a state of exception peculiar to international law. This zone is created by withdrawal of international law from deciding between the two sides – the secessionists and the existing government – and thus open a field of factual fight. Unless the government has the good will to grant secession (which historically happens extremely rarely), this open conflict involves a high level of violence, often a fully-fledged civil war with possible atrocities, bloodshed and ethnic cleansing. During this conflict, international law is present only in a very reduced form through some norms of international humanitarian law. Only after the conflict is decided through applying violence does international law return to the scene to add legal value to what has happened. Through the mechanism of state recognition, it allows existing states to decide on the status of the newly created entity. As a result, the RSD involves a specific state of exception⁸ in which international law deliberately opens a space for violence only to return to the scene later in order to give it a proper legal sense. Throughout this chapter, we return to the recognition that the relation between violence and international law in this field is the one of *exclusion*: international law deliberately creates a zone in which violence is allowed to play its role.

3 Violence and the exception

The relationship between violence and its third theory is conditioned by its firm embedding in the Hegelian paradigm. Both Schmitt and Agamben operate within

⁸ The bibliography for the state of exception is particularly rich. Key works on Schmitt's and Agamben's line of interpreting it are: Jacques Derrida, "Force of Law: The Mystical Foundation of Authority," in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell and Michel Rosenfeld (New York: Routledge, 1992), 3–67; Gian Giacomo Fusco, *Form of Life: Agamben and the Destitution of Rules* (Edinburgh: Edinburgh University Press, 2022); Cosmin Cercel, Gian Giacomo Fusco, and Simon Lavis, eds., *States of Exception: Law, History, Theory* (Abingdon and New York: Routledge, 2021); Daniel McLaughlin, ed., *Agamben and Radical Politics* (Edinburgh: Edinburgh University Press, 2016); William Watkin, *Agamben and Indifference: A Critical Overview* (London: Rowman & Littlefield, 2014); Jens Meierhenrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016); John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (2004): 216; Mark Neocleous, "The Problem With Normality: Taking Exception to 'Permanent Emergency'," *Alternatives* 31, no. 2 (2006): 207.

the boundaries outlined by G. W. F. Hegel (1770–1831): just as in his thought every totality is dependent on the negative determination that underpins it,⁹ so in Schmitt's and Agamben's approaches the law is an unstable totality which is upheld by the exception. Through this exception the law maintains its relationship to the political as its base. It is through these Hegelian roots that Schmitt and Agamben build a paradigm which enables grasping pure violence *within* the law.

Their approaches obviously differ. Famously, Schmitt understands the sovereign as the subject “who decides on the exception.”¹⁰ In other words, sovereignty – the key political concept – is understandable only through the concept of exception. Its meaning is to be sought not in what is central and normalized, but in margins and unique circumstances. Therefore sovereignty should be understood as involving Hegelian rather than Aristotelian logic:

[C]ontrary to imprecise terminology that is found in popular literature, a borderline concept is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a borderline case and not with routine.¹¹

Sovereignty is thus dependent on the exceptional supplement that organizes it. The paradoxical relationship between sovereignty and the exception is replayed in another: the one between the general rule and the act of its application. Contrary to positivist understanding of applying the rule through syllogism, the rule is not easily applied to the case, but linked with it through the category of *decision*:

[T]he assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical foundation. The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm.¹²

It is this link between the couples sovereignty/exception and rule/application that Agamben addresses in his *Homo sacer* series in order to theorize the state of exception.¹³ His theory is based on two crucial elements: identifying the state of ex-

9 G. W. F. Hegel, *The Science of Logic*, trans. George di Giovanni (Cambridge: Cambridge University Press, 2010), 132–133.

10 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA, and London: MIT Press, 1985), 5.

11 Schmitt, *Political Theology*, 5.

12 Schmitt, *Political Theology*, 5–6.

13 Giorgio Agamben, *Homo sacer: Il potere sovrano e la nuda vita* (Torino: Einaudi, 1995); *Stato di Eccezione. Homo sacer II, 1* (Torino: Bollati Boringhieri, 2003); *Il regno e la gloria: Per una genealogia teologica dell'economia e del governo. Homo sacer II, 2* (Torino: Bollati Boringhieri, 2009); *Stasis: La guerra civile come paradigma politico. Homo sacer II, 2* (Torino: Bollati Boringhieri, 2015); *Il sacramento del linguaggio: Archeologia del giuramento. Homo sacer II, 3* (Bari: Lat-

ception with a Schmittian sovereign's decision of suspending the law¹⁴ and the *Homo sacer*, a device that regulates life by its exclusion from the scope of the law.¹⁵ But at the heart of both these theories is a specific Agambenian understanding of the exception itself. Exception, as portrayed in Agamben's thinking, is nothing but a constitutive part of the law which inevitably emerges from the law's linguistic stratum:

[T]he exception is a kind of exclusion. What is excluded from the general rule is an individual case. But the most proper characteristic of the exception is that what is excluded in it is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension. The rule applies to the exception in no longer applying, in withdrawing from it. The state of exception is thus not the chaos that precedes order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological root, taken outside (*ex-capere*), and not simply excluded.¹⁶

Thus construed, exception is a crossing between generality and individuality. It is, however, not built upon the model of proportionality and commensurability between the two, but on their inherent interlinked discrepancy which emerges in *suspension* of the rule. The individual appears in the space of withdrawal of generality. What actually links them is the exception – a proper singularity within the law:

[T]he situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right, but instead *institutes a paradoxical threshold of indistinction between the two* [emphasis mine]. It is not a fact, since it is only created through the suspension of the rule [. . .] [T]he sovereign exception is the fundamental localization (*Ortung*), which does not limit itself to distinguishing what is inside from what is outside but instead *traces a threshold (the state of exception) between the two, on the basis of which outside and inside, the normal situation and chaos, enter into those complex topological relations that make the validity of the juridical order possible*.¹⁷

erza, 2008); *Opus Dei: Archeologia dell'ufficio. Homo sacer II*, 5 (Torino: Bollati Boringhieri, 2012); *Quel che resta di Auschwitz: L'archivio e il testimone. Homo sacer. III* (Torino: Bollati Boringhieri, 1998); *Altissima povertà: Regole monastiche e forma di vita. Homo sacer IV*, 1 (Vicenza: Neri Pozza, 2011); *L'uso dei corpi. Homo sacer IV*, 2 (Vicenza: Neri Pozza, 2014).

¹⁴ Schmitt, *Political Theology*, 5–7; Giorgio Agamben, *Homo sacer*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998), 15–19; *State of Exception (Homo sacer II*, 1), trans. Kevin Attell (Chicago, IL: University of Chicago Press, 2005), 1–2.

¹⁵ Agamben, *Homo sacer*, 71–103.

¹⁶ Agamben, *Homo sacer*, 17–18.

¹⁷ Agamben, *Homo sacer*, 18–19. [emphasis added]

In this respect lies the crucial discrepancy between Schmitt and Agamben. The former theorizes the link between generality and exceptionality through the concept of decision which, in turn, represents the intervention of the political into the legal. It is mostly limited to the most general relationship between the entire legal system and its exception. In Agamben, however, this relationship is extended to all interactions between general rules and acts of its application. Moreover, instead of focusing on decision as a link, Agamben proposes a much more conceptual solution. The decision is rather an agent that operates within a special zone. This zone is characterized – and constructed – by the *threshold of indistinction*.

The move from Schmitt to Agamben is therefore defined by gradual evacuation of personal agency from the field of exceptionality. In Schmitt, the sovereign and its decision are still largely modeled on the constitutional devices of the state of exception, in which a concrete head of state takes the exceptional decision. In Agamben, it is a space that opens up through the work of language itself. Exceptionality, marked by the threshold of indistinction, appears wherever the relationship between the general rule and the particular application is at stake.

Thus construed, exception is first and foremost a particular *space*, in which some binary oppositions are not solved, but effectively suspended, as they conflate one with another. Therefore, it makes no sense to ask whether, for example, the state of exception belongs to the category of the law or of the fact: both categories lose their independent meaning once they enter the area of exception. It may be claimed that these oppositions owe their existence to having a particular foothold in the state of exception, even if the latter usually appears as an abnormality or borderline condition. As we will see, it is precisely this space that – when transplanted into international law – contains violence mandated by the law itself. Yet before we move to this, let us summarize the role of the state of exception in Agambenian thinking.

First of all, Agamben's theory assumes the existence of a special device, the state of exception, at the heart of the legal system. Just as in Schmitt, it is formulated with the system of domestic law in mind: hence the close link between the sovereign and the state of exception. The latter may have a concrete legal form, but it can be presumed in the legal order only implicitly. In either case, it remains an inevitable part of legality – one which can remain inconspicuous in "normal" times, but ready to flare up and poison the entire legal system under specific circumstances.¹⁸ As I attempt to demonstrate, the focus on domestic law is not neces-

18 See Giorgio Agamben, "Il messia e il sovrano: Il problema della legge in W. Benjamin" in *La potenza del pensiero: Saggi e conferenze* (Vicenza: Neri Pozza, 2012), 270–271.

sary in this theory: it may be understood as part and parcel of the state of exception as pertaining to every form of the law, including international law.

Second, the state of exception is just a particular incarnation of a broader, theoretical concept of exception. The exception finds itself in a peculiar relation to the rule: seemingly it is outside of its scope, but it actively relates to it. Its inert component can be found in each act of applying the law, namely in the hiatus between the generality of a rule and the specific decision that comes from the outside to concretize and materialize it. Between the rule and its application – or, to use more general terms, between the law and the facts – there is an irremovable abyss: in Agamben's theory law is never applied as such, but rather undergoes a forced process in which it is externally linked with "facts." Therefore, the distinction between law and facts becomes undecidable: while the law just opens a virtual level of application, it is the real act of applying it that inextricably binds the rule with the fact. What we recognize as application of a norm is an *après coup* act, only retroactively dissolvable into norms and facts.

Third, the state of exception is a device through which the law attempts to regulate a particular domain by withdrawing from it. Just as the ancient Roman *Homo sacer* was banned from the law and could have been freely killed, no longer enjoying legal protection,¹⁹ so is the state of exception a particular form of legal regulation of what cannot be legally regulated. In the state of exception *proprio sensu* the law attempts to regulate its own suspension, creating and struggling to control an allegedly alegal space. An empty legal space being circumscribed by the law which first posited it and later withdrew from it is one of the strongest and most refined forms of exercising power through the law. The state of exception would be a way in which the law uses exceptionality in order to reclaim the foreign territory and attempt to regulate matters that are outside of its scope because it left them so.

4 The right of peoples to self-determination as a zone of exception in international law

If the state of exception indeed conditions every form of legality, where can it be found in international law? As I claim in this chapter, this role is played precisely by the right of peoples to self-determination.

First, the RSD in its external version – understood as exercising the RSD by state-creation – is a mechanism through which international law regulates its own

¹⁹ Agamben, *Homo sacer*, 71–86.

suspension. According to the majority of voices in the doctrine, state-creation through secession is a domain of a certain non-legality, often identified as factuality.²⁰ Yet this factuality is not extra-legal: it is created and maintained by international law as such. Given that states are primary subjects of international law and its main creators, the very act of state-creation belongs to the foundational zone of international law. This law does not regulate this zone, but rather carves out its boundaries and allows the thus produced factuality to operate.

The RSD is a right that covers this abyssal zone. In the current state of international law, the division of land into state territories and the division of humankind into these territories' respective populations remains formally a status quo which cannot be modified otherwise than through trade-offs between sovereign states. Major United Nations (UN) principles – equality of states, their territorial integrity and prohibition of unlawful use of force – seal off this construction against underground subversive movements. And yet there is a right²¹ that makes it possible to temporarily suspend this ossified division and create a new entity without authorization from the sovereign on whose territory it is established.

20 Ernest Duga Titanji, "The Right of Indigenous Peoples to Self-Determination Versus Secession: One Coin, Two Faces?," *African Human Rights Law Journal* 9, no. 1 (2009): 70; Christian Pippin, "The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: An Exercise in the Art of Silence," *Europäisches Journal für Minderheitenfragen* 3, no. 3–4 (2010): 162; Christian Schaller, "Die Sezession des Kosovo und der völkerrechtliche Status der internationalen Präsenz," *Archiv des Völkerrechts* 46, no. 2 (2008): 134. See also Clifton van der Linden, "Secession: Final Frontier for International Law or Site of Realpolitik Revival," *Journal of International Law and International Relations* 5, no. 2 (2009): 4–5; K. William Watson, "When in the Course of Human Events: Kosovo's Independence and the Law of Secession," *Tulane Journal of International and Comparative Law* 17, no. 1 (2008): 274; Antonello Tancredi, "A Normative 'Due Process' in the Creation of States Through Secession," in *Secession: International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge: Cambridge University Press, 2006), 171–172; Alain Pellet, "Quel avenir pour le droit des peuples à disposer d'eux-mêmes," in *El derecho internacional en un mundo en transformación: Liber amicorum al Eduardo Jiménez de Aréchaga*, ed. Manuel Rama-Montaldo (Montevideo: Fundación de Cultura Universitaria 1994), 264; David Raič, *Statehood and the Law of Self-Determination* (Leiden: Kluwer, 2002), 3; Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), 210–211; Theodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (Paris: La documentation française, 1999), 72. Nonetheless, there are also scholars arguing for unlawfulness of secession which is not execution of RSD: Marc Weller, "Why the Legal Rules on Self-Determination Do Not Resolve Self-Determination Disputes," in *Settling Self-determination Disputes: Complex Power-sharing in Theory and Practice*, ed. Marc Weller and Barbara Metzger (Boston, MA, and Leiden: Nijhoff, 2008), 23; Marcelo G. Kohen, "Introduction," in Kohen, *Secession*, 4

21 See Paul H. Brietzke, "Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict," *Wisconsin International Law Journal* 14, no. 1 (1995): 85–96.

The RSD in its external form functions therefore analogously to the state of exception in domestic law: it allows its firm principles of state-centered international law to be suspended²² in order for a new state to arise. The invoked extra-legal necessity concerns the act of an assumed agent, not yet legal, but entering the law: the people. This particular form of the state of exception is a gun pointed at the head of existing states, because – at least on the declaratory level – the same international law which protects their independence and territorial integrity may suspend itself. Once external self-determination is successfully executed, the state of exception is terminated. A new state arises which becomes a beneficiary of the re-established order: its boundaries are inviolable and it is formally equal with all other states.

Second, the Agambenian paradoxes apply to the applicability of the RSD. It is not an ordinary right that is exercised,²³ but rather a shadow-like entitlement guaranteed by particular acts of international and by customary law (uncodified norms corresponding to states' practice and recognized by states as binding). Its application, as the next section shows, relies on open conflict that is only later regulated by the institution of state recognition. If successful, such an act can be deemed an application of the RSD. Nonetheless, it happens only in *futur antérieur*: it will have been applied when the secessionists' victory has been recognized – at least partly – by sovereign states.²⁴ Yet before this act there is no practical applicability, let alone enforceability of the RSD. This right rather covers the zone of exception than is an entitlement that can be invoked.

Third, the RSD as the state of exception in international law is a device through which this law creates its outside – a subject – by withdrawing from its place.²⁵ The subject of the RSD, the people, is an artifact that will have existed when it exercises this right. Yet exercising the RSD is just engaging in a factual fight; if this succeeds, the right will have been exercised. If the secessionists fail,

22 See Duncan French, introduction to *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, ed. Duncan French (Cambridge: Cambridge University Press, 2013), 1.

23 Cf. Urs Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung: Selbstbestimmung, Konfliktmanagement, Anerkennung und Staatennachfolge in der neueren Völkerrechtspraxis* (Berlin: Springer, 2010), 968.

24 See Fernando R. Tesón, "Introduction: The Conundrum of Self-Determination," in *The Theory of Self-Determination*, ed. Fernando R. Tesón (Cambridge: Cambridge University Press, 2016), 8. Nonetheless, instead of speaking of "antilaw" it is more adequate to recognize its metalegal character as the state of exception.

25 Nathaniel Berman, "Sovereignty in Abeyance: Self-Determination and International Law," *Wisconsin International Law Journal* 7, no. 1 (1988): 68.

they also fail in the attempt to constitute themselves as the subject capable of practicing the RSD.²⁶

Therefore, paradoxically, the existence of the subject of the RSD accompanies the shadow status of this right. The RSD does not await its subjects as one of the entitlements that they can easily invoke and enforce. They need to enter the law through open conflict, which almost necessarily involves violence. Success is sealed with a retroactive ascription of this right; a failure means it has never existed. Accordingly, the RSD is not attributable to a subject defined by any broadly recognized criteria (although they are formulated in the doctrine²⁷). It only exists when it is already won. The path of a people to the law – and self-constitution as a state within its normative order – goes through necessary violence which the law creates as its antechamber.

The subject of the RSD does not exist before it is successfully won. As evidenced in the International Court of Justice's (ICJ) argumentation in the *Kosovo* case,²⁸ the act of exercising the external RSD does not involve the transformation of the same subject of this right. It is rather a genuinely original act that gives birth to a new entity – a state – and its respective subject of the RSD, the people. In this sense, the emergence of a state in execution of the RSD is more like *creatio ex nihilo* which wipes the slate clean, creates a new administration and cuts it from the past, which becomes retroactively established.²⁹ Consequently, there is no correspondence between the people before this act and the people-nation after it. This gap is variously covered up by legal scholarship: usually by invoking “politics” or “facts” that reputedly have nothing to do with law.³⁰

²⁶ Musgrave, *Self-Determination*, 195–200.

²⁷ This does not mean, however, that the characterization of the RSD as *lex imperfecta* is adequate. Cf. Brietzke, “Self-Determination,” 85.

²⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010], ICJ Rep 403. See also Helen Quane, “Self-Determination and Minority Protection After Kosovo,” in *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights*, ed. James Summers (Leiden: Nijhoff, 2011), 211–212.

²⁹ Berman, “Sovereignty in Abeyance,” 74.

³⁰ James Crawford claimed that classic international law did not envisage the RSD because “it aspired to something which classical international law precisely did not try to achieve, that is to constitute or reconstitute states. Classical international law left that to power politics, and therefore, almost by definition, it left the question of self-determination to power politics as well. *Sauve qui peut*. Self-determine *qui peut*.” James Crawford, “The Right of Self-Determination in International Law: Its Development and Future,” in *Peoples' Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2001), 12.

To sum up, the RSD represents an exceptional zone of international law. Its paradoxical nature and practical ineffectiveness pushes international law into the condition of permanent structural hypocrisy: it promises something that cannot be delivered just by claiming a right.³¹ The RSD covers the abyss of what appears as the mere sphere of facts, but indeed is a space emerging from a withdrawal of the law. There are, of course, norms regulating recognition of a new state, or obligations of other states vis-à-vis a new entity (including non-recognition³²), but the very state-creation is a self-eclipse of international law.³³ This eclipse is based on the creation of a zone of factuality that not only allows for, but almost mandates exercise of violence. As a consequence, the RSD should be seen in the light of the third theory of the relationship between violence and the law. It assumes violence as a necessary path to entering the law, gaining a right and self-constituting as a subject of this right.

5 Inside the exceptional zone

In order to better substantiate this link between the law and violence we need to delve into the complexity of how the RSD is practically invoked and fought for. What we first need to distinguish analytically is the position of secessionists and the government at various stages of executing the RSD. The first stage is when the secessionists oppose the government in the name of the RSD and engage in a political or military struggle. If the secessionists gain effective control over some territory that they claim, the second stage ensues. The new statal entity comes into existence – provided it has territory, population and effective government. What matters at the second stage is no longer the struggle (albeit this may continue with varying intensity), but the role of state recognition by existing sovereign states as a means of governing the state of exception. Here, I am interested primarily in the first stage. The second, although necessary in order to understand the RSD fully, is lesser relevant to the relationship between the law and violence.

31 See Jean-François Guilhaudis, *Le droit des peuples à disposer d'eux-mêmes* (Grenoble: Presses Universitaires de Grenoble, 1976), 9–10.

32 Saxer, *Die internationale Steuerung*, 975–976; Sam Blay, “Self-Determination: A Reassessment in the Post-Communist Era,” *Denver Journal of International Law and Politics* 22, no. 2–3 (1994): 294; Nina Caspersen, “Collective Non-Recognition of States Recognition,” in *Routledge Handbook of State Recognition*, ed. Gezim Visoka, John Doyle, and Edward Newman (London and New York: Routledge, 2020), 232–239.

33 Berman, “Sovereignty in Abeyance,” 58.

The first stage is in many respects akin to the state of nature. As noticed by Jean-François Guilhaudis, the RSD remains “a principle of fight, a principle of combat.”³⁴ In domestic law norms reduce the use of violence either to the legal one, exercised by state organs, or to few remnants of natural violence in defense of necessity. In international law the use of force between states is generally prohibited apart from exceptions defined in Chapter VII of the UN Charter. Nonetheless, the RSD opens a breach in this system. Currently no norm of international law forbids resorting to force either by the secessionists³⁵ or the government acting against secessionists who do not invoke the RSD in a clear decolonization context—provided it does not cross the line of severe human rights violations and remains proportionate.³⁶ As a result, an exceptional zone opens up at the heart of international law.

It needs to be noted that the position of the government and of the secessionists is not symmetrical. First, the secessionists always hold a more uneasy position as those who contest an existing legal order and aim to found a new one. The government is ensconced in the legality of its own regime which it is deemed to rightly defend. Second, a significant difference exists between self-determination struggles in the main decolonization period and the ones that do not ensue due to decolonization. Under the corpus of UN decolonization law some preference seems to have been given to the secessionists. UN clearly referred to the possibility of the use of force by secessionists (as Michla Pomerance observed, thus reviving the doctrine of just war³⁷); they could also request foreign aid, but not foreign intervention.³⁸ Art. 1 (4) of Protocol I to the 1949 Geneva Conventions extended the scope of application of international armed conflicts under international humanitarian law (henceforth:

³⁴ Guilhaudis, *Le droit des peuples*, 219.

³⁵ Gérard Cahin, “Secession: le retour: Sur quelques tendances récentes de la pratique internationale,” in *La France, l’Europe et le Monde: Mélanges en l’honneur de Jean Charpentier*, ed. Ivan Boev (Paris: Pedone, 2008), 43; M. Rafiqul Islam, “Use of Force in Self-Determination Claims,” *Indian Journal of International Law* 25, no. 3–4 (1985): 437.

³⁶ Anne-Marie Slaughter Burley, “Nationalism Versus Internationalism: Another Look,” *New York University Journal of International Law and Politics* 26, no. 3 (1994): 94; Agata Kleczkowska, “The Use of Force in Case of Secession,” in *The Use of Force in International Relations: Issues of International and European Law – L’usage de la force dans les relations internationales: aspects de droit international et de droit européen*, ed. Anne-Sophie Millet-Devalle (Napoli: Editoriale Scientifica, 2018), 17; Sean Shun Ming Yau, “The Legality of the Use of Force for Self-Determination,” *The Palestine Yearbook of International Law* 21, no. 1 (2020): 49–71; Islam, “Use of Force,” 432.

³⁷ Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United States* (Leiden: Nijhoff, 1982), 48.

³⁸ The Friendly Relations Declaration states as follows: “Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against,

IHL) to the three configurations of legitimate self-determination conflicts in the corpus of UN RSD law (colonial domination, alien occupation and resistance to racist regimes in the exercise of their right of self-determination).³⁹ In turn, the use of force by the government against legitimate decolonization claims was prohibited.⁴⁰ As noticed by Subrata Roy Chowdhury, “a State not possessed of a representative government or a State guilty of violating with impunity human rights, cannot claim immunity by relying on the principle of non-intervention.”⁴¹ Aiding such a state was equally prohibited by international law.⁴² Both state and individual responsibility for thwarting self-determination claims (pertaining to the three cases recognized under UN law) has been claimed to exist.⁴³

and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.” UN GA Resolution 2625 (1970) A/RES/2625(XV). See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 153; Marcelo G. Kohen, “Self-Determination,” in *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law*, ed. Jorge E. Viñuales (Cambridge: Cambridge University Press, 2020), 147–149; Ming Yau, “The Legality of the Use of Force,” 49–55; Alexis Heraclides, “Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis,” *Journal of International Affairs* 45, no. 2 (1992): 402; Ved P. Nanda, “Self-Determination Under International Law: Validity of Claims to Secede,” *Case Western Reserve Journal of International Law* 13, no. 2 (1981): 270; Malcolm Shaw, “The International Status of National Liberation Movements,” *The Liverpool Law Review* 5, no. 1 (1983): 27–29; Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN 1980, E/CN.4/Sub.2/405/Rev.1, 14–15. Cf. Islam, “Use of Force,” 441–445; Pomerance, *Self-Determination*, 46–61; Weller, “Why the Legal Rules,” 29–30.

39 Matthias Vanhullebusch, “Fighting for Self-Determination: On Equality of Peoples and Belligerents,” *Asian Yearbook of Human Rights and Humanitarian Law* 1 (2017): 140–141; Cassese, *Self-Determination*, 201; Jean Salmon, “Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?,” in *Modern Law of Self-Determination*, ed. Christian Tomuschat (Dordrecht: Nijhoff, 1993), 256.

40 Cassese, *Self-Determination*, 154; Ming Yau, “Legality of the Use of Force,” 61; Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, E/CN.4/Sub.2/404/Rev. 1 (1981), 26–30; Malcolm N. Shaw, “Self-Determination and the Use of Force,” in *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, ed. Nazila Ghanea and Alexandra Xanthaki (Leiden and Boston: Nijhoff, 2005), 44–45; Antonello Tancredi, “Secession and Use of Force,” in *Self-Determination and Secession in International Law*, ed. Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (Oxford: Oxford University Press, 2014), 80; Giancarlo Guarino, *Autodeterminazione dei popoli e diritto internazionale* (Napoli: Jovene, 1984), 323–331.

41 Subrata Roy Chowdhury, “The Status and Norms of Self-Determination in Contemporary International Law,” *Netherlands International Law Review* 24, no. 1–2 (1977): 84.

42 Cassese, *Self-Determination*, 199–200.

43 Cassese, *Self-Determination*, 180–188; Gros Espiell, *The Right to Self-Determination*, 65.

Yet after decolonization quashing an insurrection (within boundaries of proportionate actions and with respect of IHL such as common Article 3 to the Geneva Conventions or Protocol II, if applicable⁴⁴) without much doubt⁴⁵ remains a domestic issue of the state.⁴⁶ International law does not prohibit secessionists from using violence either, provided it is used within humanitarian limits.⁴⁷ As a consequence, international law creates – through its withdrawal – a seemingly extra-legal zone (even if created by the law itself) in which the emergence of a new state becomes the matter of conflict.⁴⁸ Acts of international humanitarian law either condone the zone of withdrawal (through Art. 1 (2) and Art. 3 of Protocol II to the Geneva Conventions) or, at best, create a barrier around the conflict.⁴⁹

Within the conflict, the secessionists' goal is reaching effectiveness: "[a] new state cannot therefore be born of a secession unless it manages to escape from the legal order of its predecessor state by imposing and maintaining exclusively its own authority over its territory,"⁵⁰ as noted by Theodore Christakis. Needless to say, the declaration of independence must be issued by the same government or governing group that effectively controls the territory,⁵¹ otherwise it will be an *actus non existens*.⁵² The claim to exercise external self-determination might compensate for lack of effective government (especially in the context of decoloniza-

44 Vanhullebusch, "Fighting for Self-Determination," 140.

45 Nonetheless, there have been some attempts to limit the leeway of both state and secessionists through international law norms. See Tancredi, "Secession and Use of Force," 70–94.

46 Michael Bothe, "Kosovo – So What – The Holding of the International Court of Justice Is Not the Last Word on Kosovo's Independence," *German Law Journal* 11, no. 7–8 (2010): 837; Marc Weller, "Why the Legal Rules," 31; Georg Nolte, "Secession and External Intervention," in Kohen, *Secession*, 66–73; Peter Hilpold, "Das Kosovo-Problem – ein Testfall für das Völkerrecht," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 68 (2008): 797; Christakis, *Le droit à l'autodétermination*, 254–255; Antonello Tancredi, *La secessione nel diritto internazionale* (Padova: CEDAM, 2001), 60–63. Cf. Milena Sterio, "On the Right to External Self-Determination: Selfistans, Secession, and the Great Powers' Rule," *Minnesota Journal of International Law* 19, no. 1 (2010): 146.

47 Jing Lu, *On State Secession from International Law Perspectives* (Cham: Springer, 2018), 160–161; Christian Tomuschat, "Secession and Self-Determination," in Kohen, *Secession*, 43–44.

48 Cassese, *Self-Determination*, 153. See also Marc Weller, *Escaping the Self-Determination Trap* (Leiden and Boston: Nijhoff, 2008), 17. On the possibility of UN intervention into such conflicts see Nolte, "Secession," 83–93.

49 See Vanhullebusch, "Fighting for Self-Determination," 150–152.

50 Theodore Christakis, "Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 75, no. 1 (2015): 92.

51 Jure Vidmar, "Unilateral Declarations of Independence in International Law," in *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, ed. Duncan French (Cambridge: Cambridge University Press, 2013), 66.

52 Vidmar, "Unilateral Declarations," 64–65.

tion), but only temporarily.⁵³ When lasting effectiveness is reached,⁵⁴ the first stage is finished and the newly created entity is subjected to the gaze of the Big Other (to use a Lacanian term) of the international community which, through the institution of recognition, re-inscribes the new state into the world system.

Remarkably, third states are now shielded from intervention by norms of international law. Whereas it gives secessionists an indirect freedom to act, based on a lack of prohibition of secession (and thus leaving them in the “neutrality” zone),⁵⁵ international law in a clear way prohibits states to undertake interventions in domestic affairs of another state or to violate their territorial integrity – both directly (by using armed forces) or indirectly (by funding mercenaries).⁵⁶ The situation was not so clear during decolonization, when third-party help was generally believed to be acceptable, although not by a direct use of force.⁵⁷ Still, historical examples were scarce and hardly generalizable. The most conspicuous one was the help of India in the secession of East Pakistan, although secession in this case was not from the properly colonial state (even if Pakistan inherited the dominant position of the United Kingdom) and India used military force.⁵⁸ The acceptance of foreign aid for secessionists was more a tool to put pressure on the non-aligned countries in the UN General Assembly than a concrete legal right. After decolonization, however, prohibition on the use of force to intervene in self-determination conflicts became almost complete,⁵⁹ only with few isolated voices arguing that intervention on the side of secessionists might be legal if the host state previously received foreign aid.⁶⁰ The doctrine of humanitarian intervention, once claimed to overrule prohibitions stemming from Art. 2 (4) UN Charter,⁶¹

⁵³ Raič, *Statehood*, 100–109.

⁵⁴ Christakis, “Self-Determination,” 95; Christakis, *Le droit à l'autodétermination*, 258.

⁵⁵ Shaw, “Self-Determination,” 44. On the suspended status of secessionists see Olivier Corten, “Are There Gaps in the International Law of Secession?,” in Kohen, *Secession*, 236.

⁵⁶ Kleczkowska, “The Use of Force,” 7–9; Musgrave, *Self-Determination*, 192–193.

⁵⁷ Weller, “Why the Legal Rules,” 29–30; Ioana Cismas, “Secession in Theory and Practice: The Case of Kosovo and Beyond,” *Goettingen Journal of International Law* 2, no. 2 (2010): 551–552.

⁵⁸ Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial ‘National’ Identity* (Leiden and Boston, MA: Nijhoff, 2000), 152–153.

⁵⁹ Weller, “Why the Legal Rules,” 29–30.

⁶⁰ Shaw, “Self-Determination,” 50–51.

⁶¹ Andrew K. Coleman, *Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice* (London and New York: Routledge, 2013), 109; Michael W. Doyle, “UN Intervention and National Sovereignty,” in *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World*, ed. Wolfgang Danspeckgruber (Boulder, CO: Lynne Rienner, 2002), 67–86; Juan Carlos de las Cuevas, “Exceptional Measures Call for Exceptional Times: The Permissibility Under International Law of Humanitarian Intervention to Protect a People’s Right

seems no longer supported.⁶² Despite arguments referring to the need for human rights protection in the context of self-determination (especially in cases of most abject human rights violations such as genocide),⁶³ international law still does not seem to have accepted the exception of humanitarian intervention to the rule guaranteeing territorial integrity. As a consequence, active involvement of third states in secession is prohibited. The only support they might give to secessionists must be peaceful and non-military.⁶⁴ This has significantly reinforced existing states and forced any future secessionists to rely on themselves rather than on foreign intervention.

To sum up, international law – especially after decolonization – produces an exceptional zone within which open conflict between the secessionists and the government is a pre-defined way of exercising the RSD. There is no court or arbitration mechanism that would assess self-determination claims. Even though such proposals were made,⁶⁵ they are to no avail in the current state of international law. What international norms do is to carve out the zone in which other states are prohibited from intervening and allow the two sides of the conflict to clash through violence.

6 Conclusions

The role played by the right of peoples to self-determination in international law after decolonization demonstrates that violence is to be found not only outside the law or at its foundations, in the law-establishing act, but also within zones

to Self-Determination,” *Houston Journal of International Law* 37, no. 2 (2015): 495–542; Vanhullebusch, “Fighting for Self-Determination,” 140–141.

62 Leonard Binder, “The Moral Foundation of International Intervention and the Limits of National Self-Determination,” *Nationalism and Ethnic Politics* 2, no. 3 (1996): 329–336; Coleman, *Resolving Claims*, 110; Doyle, “UN Intervention,” 74–75; Rodney Pails, “Self-Determination, the Use of Force and International Law: An Analytical Framework,” *University of Tasmania Law Review* 20, no. 1 (2001): 96; de las Cuevas, “Exceptional Measures,” 511; Peter Hilpold, “Self-Determination and Autonomy: Between Secession and Internal Self-Determination,” in *Autonomy and Self-Determination: Between Legal Assertions and Utopian Aspirations*, ed. Peter Hilpold (Cheltenham and Northampton, MA: Edward Elgar, 2018), 42.

63 de las Cuevas, “Exceptional Measures,” 542.

64 Kleczkowska, “The Use of Force,” 12. Cf. Chowdhury, “The Status and Norms,” 83.

65 Richard Falk and Andrew Strauss, “On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty,” *Stanford Journal of International Law* 36, no. 2 (2000): 191–218; Olivier P. Richmond, “States of Sovereignty, Sovereign States, and Ethnic Claims for International Status,” *Review of International Studies* 28, no. 2 (2002): 399–400.

created by the law itself. What is so striking about this right that it does not correspond to any concrete entitlement that is invocable or enforceable within international law. It corresponds to a proper abyss: a politico-moral slogan that only when fought with and through violence materializes itself as a right that has been exercised. In this sense, the RSD exists only once exercised and thus covers up the exceptional zone of violence. During the conflict itself, it is nothing but a claim in the name of which the secessionists raise their arms.

Through the RSD international law attempts to cordon off and obfuscate something that it cannot properly grasp: the sphere of factual violence used to create a state through secession. This right is not created by violence, but exercised through its use. In this sense, the RSD neither bans violence nor is established by it: it exists only as a vague principle until violence brings it to the proper status of a right. Unlike typical rights, the RSD does not construct a simple tri-partite syllogism: (1) general norm, (2) factual situation and (3) concretization of a general norm. The form this right has before application is incommensurate with what it is transformed into after this act. Violence mediates between the principle and the right, allowing the latter to constitute itself retroactively as a seemingly exercisable norm.

In pragmatic terms, the violence that is required in order to apply the RSD is an efficient deferent from invoking it. The example of Catalonia demonstrates how difficult it is to start off a new legality: what is required is a fight for self-constitution. Whoever shuns violence in such a conflict will lose. The RSD is not a typical entitlement granted by a legal order to its subject: it contains within itself a violent struggle for self-constitution and recognition. Consequently, it is nothing but a firewall of violence barring entrance into international law and the global community of states. What it preserves is the violence of the struggle for self-constitution as a legal subject. International law is entered through violence.⁶⁶

⁶⁶ This chapter was prepared within the framework of the research project 'The Right of Nations to Self-Determination: A Critical Appraisal of the State of the Art in Times of Populism' (reg. no. 2019/33/B/HS5/02827) financed by the National Science Centre, Poland.