

Emerging Trends in International Law on Secession: Case of Kosovo

Dissertation zur Erlangung des akademischen Grades
doctor rerum politicarum (Dr. rer. pol.)
durch die
Fakultät für Staats- und Sozialwissenschaften der
Universität der Bundeswehr München

vorgelegt von
Jelena Pifat

**ANGABEN IN DEN PFLICHT EXEMPLAREN
DER DISSERTATION**

**UNIVERSITÄT DER BUNDESWEHR MÜNCHEN
Fakultät für Staats- und Sozialwissenschaften**

Thema der Dissertation: **Emerging Trends in International Law on Secession: Case of Kosovo**

Verfasser: **Jelena Pifat**

Promotionsausschuss:

- Vorsitzender: Univ. -Prof. Dr. Kathrin Groh
1. Berichterstatter: Univ. -Prof. Dr. Daniel-Erasmus Khan
2. Berichterstatter: Univ. -Prof. Dr. Stephan Stetter
3. Berichterstatter: Univ. -Prof. Dr. Carlo Masala
4. Berichterstatter: apl. -Prof. Dr. Franz Kohout

Tag der Prüfung: 21. 03. 2013

Mit der Promotion erlangter akademischer Grad: **Doktor der Staats- und Sozialwissenschaften
(Dr. rer. pol.)**

Neubiberg, den 21. 03. 2013

Table of Contents

Acknowledgements	iii
Abbreviations	v
Introduction	1
Part I: International Law on Secession	9
1 Introduction	10
2 Wilsonian concept of self-determination and the Aaland Islands Dispute	14
3 The 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples	25
4 The 1966 International Covenants on Human Rights	27
5 The 1970 Declaration on Friendly Relations	32
6 The Algiers Declaration, the Helsinki Declaration and other relevant documents	40
7 The Advisory Opinion of the Supreme Court of Canada	47
8 What type of norm is self-determination?	56
9 Internal and external dimension of self-determination	60
10 Further remarks on remedial secession in international law	66
11 Who are the ‘people’? Minorities as ‘peoples’ – the return of the Wilsonian concept	73
12 Defining minorities and their protection	78
13 The meaning given to the “self” (what does the term “peoples” mean)	90
14 Question of Statehood	100
15 Sovereignty	106
16 Recognition of states	113
17 <i>Uti possidetis</i>	119
18 New application of <i>uti possidetis</i> – Yugoslavia	125
19 Conclusion	137

Part II: Political Theories on Secession	142
1 Introduction	143
2 Associative (choice) theories	146
3 Ascriptivist (nationalist) theories	160
4 Remedial right theory	182
5 Conclusion	201
Part III: Case of Kosovo	207
1 Introduction	208
2 History	212
3 Humanitarian intervention – NATO’s 1999 Operation Allied Force	233
4 Resolution 1244 and the Kumanovo Agreement	253
5 The UN interim administration	259
6 Independence – the end of the road?	270
7 Is Kosovo an example of remedial secession?	278
8 The ICJ’s Advisory Opinion on Kosovo	291
9 Kosovo – a unique case or a test case?	296
10 Proposal for the solution of the Kosovo problem	301
11 Conclusion	308
<i>Précis</i>	319
<i>Appendix I: Chronology</i>	330
<i>Appendix II: Maps</i>	336
<i>Appendix III: Select Documents</i>	339
<i>Bibliography</i>	348

Acknowledgements

First of all, I am profoundly grateful to my doctoral supervisor Prof. Dr. jur. Daniel-Erasmus Khan for an expert guidance, valuable advice and mentorship. I give my heartfelt thanks to Ass. jur. Donald Riznik for his sincere help and insight. I would also like to thank Christian Driessen for giving me constant support and being a true friend.

Above all, I thank my parents Zvonimir and Gordana and my sister Dragana. They have always provided endless love and encouragement. Finally, I would like to express my deepest gratitude to Vanja for great patience and support at all times. I could not have done it without you.

Jelena Pifat
October 2012

Abbreviations

AAK	Aleanca për Ardhmërinë e Kosovës, Alliance for the Future of Kosovo
AI	Amnesty International
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CSCE	Conference on Security and Cooperation in Europe
EC	European Community
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
FPRY	Federal People's Republic of Yugoslavia
FRY	Federal Republic of Yugoslavia
GA	General Assembly of the United Nations
GAOR	General Assembly Official Records
HRC	Human Rights Committee
HRW	Human Rights Watch
ICG	International Crisis Group
ICJ	International Court of Justice
ICJ Reports	International Court of Justice Reports of Judgements, Advisory Opinions and Orders
ICO	International Civilian Office
ICR	International Civilian Representative
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally displaced person
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
LDK	Lidhja Demokratike e Kosovës, Democratic League of Kosovo
LPK	Lëvizja Popullore e Kosovës, People's Movement of Kosovo

KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KPC	Kosovo Protection Corps
KPS	Kosovo Police Service
KVM	Kosovo Verification Mission
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity
OSCE	Organization for Security and Cooperation in Europe
PDK	Partia Demokratike e Kosovës, Democratic Party of Kosovo
PISG	Provisional Institutions of Self-Government
SAA	Stabilization and Association Agreement
SC	Security Council of the United Nations
SCOR	Security Council Official Records
SCR	Supreme Court Reports
SG	Secretary-General of the United Nations
SFRY	Socialist Federal Republic of Yugoslavia
SRSG	Special Representative of the Secretary-General
UCK	Ushtria Çlirimtare e Kosovës, Kosovo Liberation Army
UDB	Uprava Drzavne Bezbednosti, Yugoslavia's State Security Administration
UDI	Unilateral declaration of independence
UN	United Nations
UN Charter	Charter of the United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOSEK	Office of the Special Envoy of the Secretary-General of the United Nations for the Future Status Process for Kosovo
UNSCR	United Nations Security Council resolution
UNTS	United Nations Treaty Series
USA	United States of America

Introduction

Many modern conflicts are caused by some entity's aspiration to be independent, and its refusal to accept that there may be a solution to the conflict other than separate statehood. Independent statehood is portrayed as irrefutably superior option to forming a part of another state, even if the second option entails a substantial autonomy for the separatist group in question. Because of secessionist aspirations and struggles, it cannot be said that the distribution of earth's surface has come to its historical end. Although the existing states cover every corner of the world, the distribution of territory between them is hardly final. The key problem is that national self-determination is seen as a zero sum game, and the abuse of the self-determination concept by the insurgents around the globe causes fear of the world of two thousand states. Self-determination has Janus-like nature;¹ it is a paradoxical concept, at the same time associated with values of democracy and anarchy and ethno-national chauvinism. Gudmundur Alfredsson makes a humorous, but nonetheless true remark about the contemporary notion of self-determination: "the right of self-determination provides an attractive heading with great popular appeal for very understandable reasons. Self-determination claims are being made by an ever-growing number of groups; it has become like a large umbrella which can give shelter to everybody's claims. Newcomers to the self-determination fan-club even include women's groups although they are hopefully talking about the internal rather than the external aspects."²

The development of international relations in the post-Cold War world was marked by the resurgence of ethnic passions and conflicts, which were followed by demands for self-determination. Historical defeat of socialism and communist ideology in Europe led to an overemphasis of liberal values in the societies caught in the struggles of transition. While the victory of liberalism led to the raising of the individual 'self' on a pedestal, economic and political integration of Europe progresses by building federal supra-national structures which erode the concept of state sovereignty. Parallel to these new forms of integration and interdependency are the processes of retribalization and strengthening of particularistic identities. A shift of emphasis from the external dimension of self-determination to the 'right to democratic governance' proclaimed by scholars coexists with inextinguishable fires of nationalistic

¹ Cassese, Antonio (1995): *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, p. 340

² Alfredsson, Gudmundur (1993): *The Right of Self-Determination and Indigenous Peoples*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, p. 53

resurgence. According to Thomas Franck, since the beginning of the new era after the Cold War, a new political context appears – postmodern tribalism. It is an environment conducive to the break-up of sovereign states. “It promotes the transfer of defined parts of the populations and territories of existing multinational or multicultural states in order to constitute new uninational and unicultural – that is, postmodern tribal – states. It asserts a political, moral, historically-determinist and legal claim to support this agenda. The legal claim it espouses is framed in terms of a well-established existing right, perhaps even a preemptory norm: that of self-determination.”³

Attempts of secession by minority groups represent an important feature of the postmodern world, and expressions like retribalization, fragmentation, postmodern tribalism or balkanization depict the present-day nightmare of politicians, international lawyers and scholars. None of the multicultural structures today is immune to these modern surges of nationalism, which occur with no regard to the democratic or autocratic nature of the system. Violence that is often associated with secessionist movements is probably the most stigmatized aspect of these undertakings, but there is no denying of the fact that as long as groups feel that they are being oppressed, some of them will fight to liberate themselves and gain independence. This shows that self-determination remains one of the most compelling forces and ideas in the international community, which cannot be ignored because of the complexity and controversy of these issues. The main objection to recognizing a right to secession is, of course, that it disrupts and threatens the international order, and can lead to a spiral of conflicts by encouraging other secessionist movements (the anarchy argument). As Will Kymlicka points out, international law should define conditions under which a group has a right to secession, but that is not enough. This problem is not confined to the Third World - even in prosperous liberal states, such as Belgium or Canada, the threat of secession has arisen, and it exists in both democracies and military dictatorships, in both prosperous and impoverished countries. It will remain an ever-present threat unless we learn to accommodate ethnocultural diversity, because minority groups will

³ Franck, Thomas (1993): *Postmodern Tribalism and the Right to Secession*, in Brölmann, Lefeber and Zieck (ed.): *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers, Dordrecht, p. 4

contemplate secession, as long as they feel that their interests cannot be accommodated within existing states.⁴

Since secession is often associated with destabilization, success of secessionist claims tends to depend on the measure of disruption that the international community is ready to endure. While it is theoretically justifiable to focus on secession as it is the most important mode of implementing the right of self-determination, the same notion can be seen as a reason for states to reject the right of self-determination for minorities in their territory. Another factor that may have a great effect on credibility and support for the secessionist claim is the type of government in the state they wish to secede from. If that government is repressive, there are higher chances for support from the international community than if that government is democratic, even if the risk of destabilization is greater. There are other considerations that can discourage the international community from tolerating secession, besides the risks of disrupting national unity and stability of entire regions. The main one is the use of violence and the denial or deterioration of human rights and freedoms, which is often followed by degeneration of democratic institutions. In such cases, allegations of human rights violations and terrorism become political tools and viable solutions to the conflict are harder to find. Thus Hurst Hannum states that “indiscriminate repression by government security forces and politically motivated killings by opponents may discourage moderate or interim solutions which might otherwise be possible in the middle stages of an increasingly violent conflict”.⁵

It is safe to say that the past two decades were the age of secession. Many ethnic groups have claimed the right to secede, and their independence results in the disruption of the unity of a state which they no longer regard as their sovereign. It is increasingly difficult to enumerate all of the new secessionist movements that emerged since the end of the Cold War, besides the lingering ones like Cyprus or Tibet. During the Cold War the superpowers insisted on the stability of boundaries, but since 1991, several multinational states have disintegrated, and as the case of Balkan shows, that process is yet to be finished. In the 1990s secessionist movements gained

⁴ Kymlicka, Will (1998): *Is Federalism a Viable Alternative to Secession?*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, p. 111-112

⁵ Hannum, Hurst (1990): *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, p. 12

thrust not only in unstable regions of Eastern Europe and in the Third World, but also in politically stable countries like Canada or Spain. It is the dark side of self-determination that is often accused of being able to destroy and dehumanize, to create “fresh complexities and oppositions, new minorities, and has the potential to produce new forms of illiberalism: fanatical fundamentalisms, purities of “race” and tribe leading at worst to genocidal policies of so-called ethnic cleansing – a practice which violates the most fundamental principles of international human rights.”⁶

The words of Friedrich Engels about the fate of minority cultures under the heavy boot of the predominant nationalist ideology are still current: “there is no country in Europe which does not have in some corner or other one or several fragments of peoples, the remnants of a former population that was suppressed and held in bondage by the nation which later became the main vehicle of historical development. These relicts of nations, mercilessly trampled down by the passage of history, as Hegel expressed it, this ethnic trash always became fanatical standard bearers of counterrevolution and remain so until their complete extirpation or loss of their national character, just as their whole existence in general is itself a protest against a great historical revolution.”⁷ Resurgence of nationalism and ethnocentrism in many countries today proves that fundamentally little has changed in this aspect since the 19th century. Rights of minorities and indigenous peoples, as well as self-determination of peoples seem to be stuck on the agenda of international community exactly for this reason. On the one hand, it is a fact that too many ethnic and minority groups suffer from discrimination and oppression, but on the other hand, it is questionable whether independent statehood can solve all their problems. Most secessionist conflicts are fueled by nationalism, and ethnicity is a central notion in these struggles where usually ‘one nation - one state’ represents the basic mantra of the separatists. The disruptive effects of nationalism and tribalism seriously endanger multinational states, and popular versions of self-determination that often stem from political philosophy can, and often do, enhance this disruption.

⁶ Thornberry, Patrick (1993): *The Democratic or Internal Aspect of Self-Determination with Some Remarks to Federalism*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, p. 104

⁷ Engels, Friedrich (1849): *Hungary and Panslavism*, reprinted in full in Marx and Engels: *The Russian Menace to Europe*, as quoted in Peter Leuprecht (2001): *Minority Rights Revisited: New Glimpses of an Old Issue*, in Alston, Philip (ed.): *People’s Rights*, Oxford University Press, Oxford, p. 112-113

Many authors maintain the traditional view that secession is a political event, outside the realm of law.⁸ Courts do not regulate this question; it is a state of interregnum decided by political forces. If successful, secession means that the transfer of sovereign power to a new political authority has occurred. Although territorial integrity remains one of the fundamental values of the international system and although secession is considered principally as political event where power plays an important role, we are witnessing a gradual extension of international legal regulation to that area. It is a necessity, since it is clear that changes in international arena are so overwhelming that the existing legal order has questionable capacity to deal with the new developments. “The development of concepts like self-determination, *ius cogens* and *erga omnes* obligations at the end of the 1960s and the 1970s certainly represents a substantial limitation on the operation of the principle of the effectiveness, and that may be why it is difficult to find many subsequent references to it.”⁹ Simply, cluster of *jus cogens* norms and the fact that it creates obligations *erga omnes* proves that there are certain values that are above every state and its sovereignty. Political right to secede is no longer completely independent of legal regulation. There is a steady evolution of standards for the recognition and legitimacy of newborn states which also erode state sovereignty (in the United Nations declarations and resolutions, international conventions and programs of action, as well as in the opinions of judges at international legal bodies such as the International Court of Justice and in the vast amount of literature by scholars and international lawyers).

This study is organized in the following way. As the title says, the main task is to examine emerging trends concerning secession in international law. Accordingly, this matter should be analyzed not only from the perspective of international law *de lege lata*, but also from the perspective of the contemporary political theories of secession, which tend to offer *de lege ferenda* approach to the subject matter. In that respect, this study will focus on the case of

⁸ Duursma claims that a right to secession as such does not exist, but secession is inherent in the right of self-determination: “contrary to what some distinguished writers have maintained, international State practice does accept a right of secession. Secession is inherent in the right of self-determination. It is not prohibited by international law to seek secession if one constitutes a people and/or fraction of a people and if in addition one inhabits a certain territory delimited by international and/or internal administrative borders. The latter condition is reflected by the principle of *uti possidetis juris*.” Duursma, Jorri (1996): *Fragmentation and the International Relations of Micro-States*, Cambridge University Press, Cambridge, p. 99-100

⁹ Milano, Enrico (2006): *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, Martinus Nijhoff Publishers, Leiden, p. 25

Kosovo, as potential landmark case in this area of law. This concluding part should also elucidate potential consequences which independent statehood of Kosovo might have for international relations. Key issues that demand inquiry, organized by aforementioned aspects of the core problem are as follows:

1. Legal framework – self-determination

Legal regime on secession can be analyzed only in a broader context of law on self-determination, so it is necessary in the first part of the study to put forward the key features of the present state and developments in that field. This requires a historical overview of the law on self-determination since World War II via analysis of the relevant legal instruments in which the principle and rules on self-determination are stipulated. After that we need to, following Antonio Cassese's lead, pinpoint the emerging trends and new incentives in the law on self-determination. The most important of them, for the case we are set to analyze, is the link between internal and external self-determination with the focus on cases of extreme oppression where secession can emerge as remedial right, and potential developments in the area of self-determination of minorities.

2. Political theories on secession

The second part is focused on the theoretical approach to secession, primarily Allen Buchanan's theory as the most relevant in the field. The greatest advantage of remedial right theory, in comparison to the other two main theories - plebiscitary and national self-determination, is that it is more compatible with the aforementioned emerging trends in international law on secession. Thus, the latter theories should be only outlined for the needs of comparison and analysis of the case study. Besides trying to assess the legitimacy of disputed cases of secession according to these theories, another particularly sensitive question deserves attention – the treatment of the problem of “orphans of secession” or trapped minorities in these theories.

3. History and assessment of the case of Kosovo

The last part of the study concentrates on this case of secession which already affects the reality of international relations and promises to affect international law as well. Events in

this region should not be analyzed only because they are contemporary, but also because they caused interesting debates and profound divisions among scholars. Here we can try to determine possible phases of secession, preconditions, most relevant factors, *differentia specifica* of the case, and most importantly, whether international legal principles and rules played any part in the political process. The final part of the study is projected to be the synthesis of previous parts, with the task to pinpoint new trends and incentives in international relations aroused by this case of secession and partially anticipated in international law and political theories. We will examine the role of the concept of remedial secession in this case, then challenge the 'unique case' thesis, and in conclusion the main consequences of the Kosovo episode, including its effects on the situation in South Ossetia and Abkhazia, are investigated from the international relations perspective in order to determine whether the pessimistic vision of endless fragmentation, conflicts and microstates is coming to life or we are witnessing a new drive toward positive changes in international law and international relations that show greater respect for freedom and wishes of underprivileged minorities.

This subject is not only timely, as it is focused on contemporary and intricate problems that the international system has to confront, but also has relevance to theoretical currents. This is why main theoretical debates in the field and alternatives to the approach chosen here are presented and tested, besides offering some fresh ideas and analysis of new events that have the advantages, but also the faults that an ongoing conflict generates. This is an interdisciplinary study embedded in the broader framework of liberal institutionalism that draws on empirical and theoretical investigations in the aforementioned fields of social scientific research. Core findings derive from the case studies analysis, analysis of theoretical findings and official documents. There are also certain inherent limitations to the study of recent events, such as the lack of important official documents that can shed further light on circumstances, but many of them will probably not be available to the public in the near future – if at all.

Part I

International Law on Secession

The contemporary has no perspective; everything is in the foreground and seems the same size. Little matters loom big, and great matters are sometimes missed because their outlines cannot be seen.

Barbara Tuchman, *Practicing History* (1981)

1 *Introduction*

‘Self-determination’ and ‘secession’ are among the most frequently (ab)used and among the most controversial terms in international law and international relations during the last few decades. Despite the frequency of usage and great importance of these issues, not to mention considerable literature dealing with these matters, a general confusion about the meaning and definition of these concepts still exists. However, this study is not an attempt to clarify and define these concepts, but an endeavor to pinpoint the most relevant historical points and documents for the modern notion of self-determination in international law, as well as the emerging trends in the field, especially regarding the particular case study of Kosovo.

Proliferation of movements for independence and emergence of new states after the Cold War ended has created a new interest and fresh perspectives in the law on self-determination, mainly concerning the right to secession. However, in Eastern and Southern Europe nationalist fervor continues to linger, and reasons for the upsurge and durability of secessionist sentiments could

still contribute to significant destabilization. Cass Sunstein detects five basic categories of reasons why a sub-unit of a country might want to secede – infringement of civil liberties, economic self-interest, economic exploitation, the injustice of original acquisition and claims of cultural and ethnic integrity.¹⁰ All of these reasons have played a prominent role in Eastern and Southern Europe. Perhaps another reason for this resurgence of nationalism during the last two decades can be found – they had all been authoritarian societies, and after democratization and transition, ethnic minorities got freedoms and rights which enabled them to express themselves.

States, as the primary subjects of international law, construct the international order with the purpose of regulating relations between themselves and other subjects of international law. Karen Knop criticizes limited possibilities of participation and representational practices of groups that are likely to claim self-determination. “While self-determination thus involves speaking about and to nations, peoples and minorities, it has rarely involved speaking with them...Hence, although people may have a right of self-determination, they have in fact been largely excluded from participation in the interpretation and development of the right.”¹¹ On the other hand, the importance of states is confirmed by ethnic groups’ striving for independent statehood. This obsession with territory leads these groups to believe that once they possess an exclusive authority over a territory, era of conflicts will come to an end, and that prevents them from seeking a compromise, a solution within the existing state structures. Even if they do achieve independent statehood, it often turns out that functioning of the new state is burdened with many problems, and that most difficulties and troubles do not magically disappear (as the situation in Kosovo confirms).

Increasing frequency of upheavals within states in which self-determination rhetoric is employed leads to problems involving colloquial usage of the term self-determination and of related notions such as liberation, emancipation, or freedom from oppression and provides for an emotional discharge prone to manipulation. The concepts of self-determination and secession proved to be very vital and relevant, despite advice from some scholars that they should be

¹⁰ Sunstein, Cass (1994): *Approaching Democracy: A New Legal Order for Eastern Europe – Constitutionalism and Secession*, in Brown, Chris (ed.): *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London and New York, p. 26-27

¹¹ Knop, Karen (2002): *Diversity and Self-Determination in International Law*, Cambridge University Press, Cambridge, p. 8

discarded because of the controversies and contradictions that surround these terms.¹² Ethnic groups around the world are demanding separation from their mother states, and in the struggle for statehood, they often invoke the right to self-determination of peoples. Precisely these ethnic groups and minorities are central to the discussion concerning subjects of self-determination. Although these groups claim that they are entitled to secede, by being a ‘people’ and forming a majority on a territory they wish to separate from the mother state, until recently the international community has unequivocally rejected rights to external self-determination for these groups and has supported the territorial integrity of the existing states. However, many states digressed from this practice when they decided to recognize Kosovo’s statehood, after its unilateral declaration of independence on the 17th of February 2008. For this reason, the Kosovo case makes these issues even timelier, as it has enduring characteristics that allow pursuing of questions about self-determination in law, philosophy and politics.

Self-determination came to denote different things in the post-colonial world, and these different meanings need to be examined.¹³ However, the description of the entire progress of the idea of self-determination in the course of time is not the goal of this study. Historical perspective presented in the following chapters has one main objective – to track the process that led to modern claims of self-determination. The reason to start with a brief history of the concept is

¹² For example, Jack Donnelly writes: “what is one to conclude? Is there an internationally recognized collective human right of peoples to self-determination? It’s hard to say. Maybe. Sort of. Not exactly. Therefore, I propose to set this right aside.” Donnelly, Jack (1993): *Third Generation Rights*, in Brölmann, Lefeber and Zieck (ed.): *Peoples and Minorities in International Law*, p. 133

¹³ Halperin and Scheffer, for instance, distinguish among several types of claims and categories for self-determination. First is anti-colonial self-determination that is considered a largely historical phenomenon, although the potential for such claims may still exist. Second is sub-state self-determination as the attempt of a group to break off or to achieve a greater degree of political or cultural autonomy within the existing state. Third is trans-state self-determination that involves concentrated grouping of a people in more than one existing state, such as the Kurds or Armenians in Nagorno-Karabakh and is often called an irredentist claim. Fourth is the self-determination of dispersed peoples where peoples are intermixed throughout the same territory, and that distinguishes these claims from claims involving a geographically concentrated people, so the possible response here is to develop representative and democratic government. The next category is indigenous self-determination that can apply to claims of groups with distinct ethnicity and long historical continuity and may pose a special challenge since they can be geographically concentrated, dispersed throughout an area or cut across international boundaries. In any case, handling them requires greater sensitivity to political culture and traditions. The last category is representative self-determination which refers to a situation when the population of an existing state seeks to change its political structure in favor of a more representative and democratic structure. This actually describes internal self-determination. The authors conclude that a particular self-determination movement may fit into more than one category. Halperin and Scheffer with Small (1992): *Self-Determination in the New World Order*, Carnegie Endowment of International Peace, Washington, D.C., p. 49-52

twofold. Firstly, there is no better way to present a certain problem in all its complexity. Showing the development of self-determination certainly broadens the perspective and also serves as a way to identify main characteristics of this concept. History enables us to see how the right of self-determination has been generated, and helps us to identify controversial issues and questions still unanswered (or, more often, multiple answers are offered, but none completely satisfactory). Secondly, the intention is not to present the historical perspective in its entirety, but simply to pinpoint and analyze international legal instruments and developments in international law and international community that are important for this specific topic and for the case of secession that will be examined in the last part of this study. It also needs to be noted that the development of the right of self-determination is a complex historical process, and it remains *lex ferenda* in some aspects, while in others it attains the character of *lex lata*.

Of course, the goal of this analysis is not to discuss international law on self-determination in detail. The subject needs to be addressed in such a manner that only relevant legal instruments and scholarly views on the topic are examined, for instance the elements of remedial right to secede in the existing international law. For that reason, the developments regarding self-determination will be analyzed mostly at the level of the United Nations. Also, since most decisions of the ICJ regarding the right of self-determination deal with colonial situations, references to these cases will be very brief, but the analysis of the Supreme Court of Canada's opinion on the secession of Quebec is more extensive. After the main points of historical perspective on self-determination are highlighted, main characteristics of this norm (for instance, its external and internal dimension, what type of norm it is – a rule or a principle, etc.) are examined, and then particular attention is given to remedial right to secession. A very challenging question - who the 'people' entitled to self-determination are - is investigated next, including the issue whether minorities can be considered a 'people' entitled to external self-determination. Final chapters deal with principles of statehood, sovereignty, recognition and *uti possidetis*, which are obviously intrinsically related to self-determination.

Another comment can be added at this point. As Marcelo Kohen notices, existing states continuously evade referring to the concept of secession: "their representatives even carefully avoided the very use of the term 'secession' when involved in codifying the rules of State

succession, preferring to speak about ‘separation of part of a State’.”¹⁴ This avoidance shows that states are not ready to acknowledge that secession is an act governed by international law, and it is congruent with traditional view that the creation of states is a matter of fact, and not of law. Effect of this position is that many scholars perceive the role of international law in this field as not very significant, so they focus more on legal consequences of statehood than on the legal theory on creation of states. This is why this research will also turn to less direct considerations of the main issue which are indicated in legal theory on other, related questions (such as recognition of states or *uti possidetis*), as well as to political theories of secession.

2 *Wilsonian concept of self-determination and the Aaland Islands Dispute*

The US President Woodrow Wilson is often called the father of modern-self-determination. He aimed for equilibrium in Europe after World War I, not only for a way of dismemberment of the Habsburg and the Ottoman empires and the balance-of-power system in Central Europe. Although not considered a legal right, self-determination became one of the guiding principles in the drawing of boundaries of new states in Central and Eastern Europe after World War I. Application of the principle was not general – it did not apply in Africa or Asia, or in the territories of Allies. However, the concept that Wilson was talking about meant primarily that people should be governed by their own consent. In his speeches he has asserted that a people should not be forced under a sovereignty under which it does not want to live. Wilson’s political principle of self-determination centered on self-governance, the right of peoples to choose their own form of government, but with ‘external’ focus on drawing new borders of Europe, to the extent possible, along national lines. Among the most quoted lines concerning self-determination are his words spoken on the 11th of February 1918 to the US Congress: “peoples are not to be handed about from one sovereignty to another by an international conference or an undertaking between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril.”¹⁵ According to Antonio Cassese Wilson propounded four different variants of self-determination

¹⁴ Kohen, Marcelo (2006): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, p. 3

¹⁵ Baker and Dodd (1927): *The Public Papers of Woodrow Wilson*, Vol. 1, Harper Brothers Publishers, New York, p. 180

on the international level. First is the aforementioned right of each people to choose the form of government under which it would live. The second version is related to the restructuring of the states of central Europe, self-determination as a guiding principle when it came to dividing the Ottoman and Austro-Hungarian empires. Third is self-determination as criterion governing territorial changes, which should be made in the interest of the populations concerned. And fourth is the purpose of settling colonial claims, but taking the interests of colonial powers into consideration.¹⁶

Nevertheless, many authors believe that the heart of this concept is a concern for oppressed minorities, and certain parts of Versailles Settlement confirm that. One of the most important elements of the Settlement was that groups that were identified as a 'people' were accorded statehood, and the minority groups that were too small for this gained a system of protection within their states. However, these minority guarantees were not a general right, but were established under specific minority treaties which certain countries such as Greece, Romania, Yugoslavia, Poland and Czechoslovakia concluded with the Allies, or were, under provisions protecting minority rights, included in the peace treaties of some countries, such as Austria, Hungary, Bulgaria and Turkey. The provisions affecting persons belonging to racial, religious or linguistic minorities constituted international obligations, with the Council of the League of Nations as a supervising body. Disputes that arose out of minority clauses could be referred to the Permanent Court of International Justice, although only members of the Council and the League could act on behalf of an individual belonging to a minority, which could not initiate proceedings on his/hers own behalf. The system was not universal, since the minority obligations were limited to a small number of states. As Thomas Musgrave explains: "some alternative had to be found which would prohibit national minorities from seeking union with their respective nation-states, but which would nevertheless affirm that complete cultural development of such groups was still possible. This led to the idea that if the linguistic, cultural and religious attributes of national minorities were adequately protected, their union with their respective nation-state would no longer be necessary."¹⁷ Of course, one of the most serious problems for the Allies was the establishment of territorial boundaries, and they attempted to draw them so that they coincide

¹⁶ Cassese, Antonio, *ibid.*, p. 20-21

¹⁷ Musgrave, Thomas (2000): *Self-Determination and National Minorities*, Oxford University Press, Oxford, p. 38

with nationality. That was not possible to achieve everywhere, so a minority protection system was established as a complementary measure to the principle of self-determination. Minority protection measures in this case were an alternative to self-determination, but although their purpose was the same, these minority rights were only the next best thing. The goal was to set guarantees for a measure of national-cultural autonomy, but only in cases when circumstances indicated that there is a chance that a certain minority will be oppressed.

It is also important to mention plebiscites as a way to solve the problems of the disputed areas. Internationally supervised plebiscites can also be considered as a way of giving effect to the principle of self-determination, by deciding the fate of some of the disputed territories through democratic process. Of course, plebiscites were not generally used, but only when political choices were hard to make or a mixture of national groups existed in a disputed area which represented only a small portion of a state's territory. In most cases, the nationality of a border population was seen as a sufficient indicator of the wishes of that population.¹⁸ That was especially the case if it was probable that the people's wishes will run counter to geopolitical and strategic interests of victors. The mandate system also reflected the idea of self-determination, because it was expected that these territories will be guided by the more developed nations until the assessment is made that they have developed sufficiently. The reason for placing these territories under international supervision is that they were perceived as still not capable of governing themselves, but when they develop sufficiently, they can exercise the right to self-determination. The mandate system of the League of Nations was in this manner related to the right of self-determination, as it has entrusted powers to guide the A-mandated territories to independence, and after World War II this system was replaced by the trusteeship system of the UN.¹⁹

¹⁸ In response to Hungarian protests over the cession of Hungarian territory without plebiscite, the Allies stated in their Cover letter: "as regards the question of plebiscites the Allied Powers considered them needless, when they perceived with certainty that this consultation, if surrounded with complete guarantees of certainty, would not give results substantially different from those at which they had arrived after a minute study of the ethnographic conditions and national aspirations." As quoted in Ofuatey-Kodjoe, Wentworth (1977): *The Principle of Self-Determination in International Law*, Nellen Publishing Company, New York, p. 82

¹⁹ Doehring, Karl (2002): *Self-Determination*, in Simma, Bruno (ed.): *The Charter of the United Nations: A Commentary*, Vol. 1, Oxford University Press, Oxford, p. 51

The system of minority protection devised by the Allies did not apply to Western states, but only to Eastern and Central Europe, and only for the cases where the application of self-determination did not go against geopolitical considerations of the Allies. In this manner, the solution to the problem of minorities consisted primarily of territorial adjustments (some states were dismembered while other were created) and of conduction of plebiscites where possible and necessary in order to determine the desires of the population of disputed areas. In cases where these territorial readjustments did not adequately solve minority problems, treaty guarantees of minority rights were constructed in order to protect minority groups. Rigo Sureda claims that in these cases where full recognition of self-determination was not granted (where statehood was not achieved), a form of partial recognition of self-determination was developed. “This partial recognition involved the use of techniques, such as the plebiscites, minority regimes, mandates, all of which served to give a clearer conception of the ‘self’ (the unit constituting a people) and the rights pertaining to that people than did the somewhat arbitrary and highly political decisions by the Allies on full self-determination.”²⁰ In all of these instances, the Allies believed that they were applying self-determination to oppressed groups, which were non-self-governing. So the term ‘people’ was used to denote minorities, whether they lived in one state or more states, or for a people that is a majority or a minority which lived under foreign domination within the territory that has a special status. Of course, *realpolitik* concerns took priority – support of one of the Great Powers was essential for any group or minority that asked for certain rights or protection. Since territorial delimitation did not always coincide with the principle of national self-determination, another method was used - population exchanges took place, but only in few instances (between Greece and Turkey and Greece and Bulgaria).

Wilson himself wanted the principle of self-determination to be recognized in the Covenant of the League of Nations, but his proposal was dropped before adoption of the Covenant. His draft of the proposal stated: “the Contracting Parties unite in guaranteeing to each other political independence and territorial integrity but it is understood between them that such territorial adjustments, if any, as may in future become necessary by reason of changes in present racial and political relationships, pursuant to the principle of self-determination, and also such

²⁰ Sureda, Rigo (1973): *The Evolution of the Right of Self-Determination: A Study of United Nations Practice*, A.W. Sijthoff International Publishing Company, Leiden, p. 25

territorial adjustments as may in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the people concerned, may be effected if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdictions or boundary.”²¹ This principle, that Wilson perceived to be in service of stability and political balance, was feared by other delegations as a possible source of instability and rebellion. It was no surprise that the proposal was not accepted, and it is even less surprising that the League did not live up to Wilson’s ideas and expectations. However, the principle was obviously influential in the aforementioned series of treaties on protection of minorities and in a number of plebiscites conducted in areas where conflicting territorial claims existed. It should be kept in mind that there were also the limitations originating from numerous secret agreements that the Allies made during the war as well as certain strategic arguments that prevented the application of Wilson’s ideal of democracy. “While the equation of self-government with democracy may have been the philosophical underpinning of Wilsonian principles, the states created in 1919 undertook no specific obligations to ensure a democratic form of government, despite the various minority guarantees that were given.”²²

There were, of course, many problems with this concept of self-determination. It was not consistent or developed, it could not be transferred universally, it only applied to defeated or new states, and the problem of defining the ‘people’ remained. This is why it is easy to relate the situation in the post-Cold War world to situation in the post-World War I world. In the decades after World War II it was more or less clear who possessed the right to self-determination and under which conditions, but modern development of the right to self-determination brings us back to the questions raised in relation to Wilsonian concept. Hannum makes an important remark concerning the importance of strategy in applying the concept of self-determination in that period: “it should be underscored that self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical

²¹ As quoted in Partsch, Karl Josef (1982): *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination*, in Vasak and Alston (ed.): *The International Dimensions of Human Rights*, Greenwood Press, Westport, p. 63

²² Hannum, Hurst (1993): *Rethinking Self-Determination*, Virginia Journal of International Law, Vol. 34, p. 8

and strategic interests of the Great Powers.”²³ Wilson’s concept was too vague and indeterminate, and it seems that he was not aware of the possible consequences it might have on international relations. Lee Buchheit, on the other hand, sees the problem differently: “at the end of the First World War, therefore, the principle of self-government by ‘natural’ political communities was transformed into a norm to which the international community openly subscribed. The lethal weaknesses of the doctrine of national self-determination were its assumptions that ‘nations’ would generally be self-evident entities and that only nations, as history has delimited them, would constitute natural political units having a compelling desire for self-government.”²⁴ Philip Allott describes this period of historical development of self-determination as hegemonic self-determination in a climate of subjectivity that lasted until the end of World War II.²⁵ It is the period when ideas became social forces, and society became a machine for processing ideas, while self-determination became self-conscious. In his understanding, the fate of the empires was determined by a handful of diplomats and politicians in a sad parody of the Congress of Vienna, while Wilson himself was the victim of wishful *a priorism* because he wanted to believe that there is a natural relationship – self-determination equals nationality equals democracy equals stability. Simply, self-determination may not produce nationally homogenous societies, while nationality may be compatible with tyranny and democracy itself can be compatible with structural corruption, the oppression of minorities, lawlessness and it is not inherently stable.²⁶ Another important circumstance was that, at the time, there was no unanimous support in the US administration for the president’s concept, and the other world leaders did not completely accept his ideas, as the Covenant of the League of Nations’ omission of the article on self-determination shows. Well known critic of his plan was Secretary of State Robert Lansing (eventually he had to resign at Wilson’s request), who

²³ Hannum, Hurst (1990): *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, p.28

²⁴ Buchheit, Lee (1978): *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven, p. 5

²⁵ The three stages of historical development of self-determination are:

1. practico-symbolic reciprocal self-determination (800-1789)
2. hegemonic self-determination in a climate of subjectivity (1789-1945)
3. collective self-determination with an aura of constitutionalism (1945-)

He believes that the seemingly hopeless confusion surrounding the category led to the development of what amounts to an international social pathology of self-determination which has terrible effects for whole societies and individual human beings, and that will continue until humanity finds a way to transcend yet again the category of self-determination. Allot, Philip (1993): *Self-Determination – Absolute Right or Social Poetry?*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, p. 181-183

²⁶ *Ibid.*, p. 188-205

summed up the problem with the words: “when the President talks of self-determination what has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability.”²⁷ It turned out that his fear of aggression against small political units was justified. The main consequence was that the ‘self’ in the Wilsonian concept became linked to the principle of ethnicity. As Wentworth Ofuatye-Kodjoe notices, the term was introduced in the form of national self-determination, defined as a right of a nationality to form an independent state, and that produced two important questions. First is whether or not the right of self-determination implied the right to secession. Since the initial definition of the right of self-determination was the right to form a separate state, it also meant the right to secede from the existing states. This is the cause of the great antagonism of many writers for the principle, which, if comprehended in this way, leads to balkanization and international chaos. Second is the meaning of the word nationality, by which he understands the problem of the unit that possess the right. Since these are nationalities, it is necessary to find an explicit formulation of the meaning of that word, and that has proven to be impossible. One common characteristic of nationalities is self-determination on the basis of ethnicity, but it is necessary to differentiate between those nationalities that have a legitimate claim and those that do not.²⁸

²⁷ Lansing, Robert, *Self-Determination*, the Saturday Evening Post, the 9th of April 1921, as quoted in Whelan, Anthony (1994): *Wilsonian Self-Determination and the Versailles Settlement*, International and Comparative Law Quarterly, Vol. 43, p. 108; Another coeval of Wilson’s, Theodore Woolsey, has posed similar questions that were troubling the public back then in his editorial comment: “what is the theory of self-determination founded upon? Upon the doctrine of popular sovereignty. What is its object? To avoid subjecting a people to alien control against its will. What size of unit answers to the description of a people? Such as is otherwise capable of independent existence. Does the multiplication of small political units make for peace and stability? On the contrary, it makes for instability and invites aggression, since defensive power is lacking. Has self-determination worked well in the past? In a few minor cases it may be said to have succeeded; in others it has been the cause and the result of intrigue, or has been inoperative.” Woolsey, Theodore (1919): *Self-Determination*, as quoted in McCorquodale, Robert (2000): *Self-Determination in International Law*, Ashgate, Aldershot, p. 193

²⁸ Ofuatye-Kodjoe, Wentworth, *ibid.*, p. 24-25; He also explains that in these early stages it was possible to differentiate three main theories of nationality and self-determination. First is the *national equality theory*, advocated by the Bolsheviks and some of the nationalities of east and central Europe and of groups such as the Yugoslav Committee. This theory advocated for achieving the sovereign equality of all nationalities, and nation has the right to arrange its life on the basis of autonomy, it has the right to enter into federal relations and even to complete secession. Nationalities that possessed this right were those that were oppressed. *National determinism theory* was advanced by the German government in the interwar period and it postulated the principle one nation: one state, which meant that each state should be ethnically homogeneous. *The plebiscite theory* took completely opposite view that nation is the state, and self-determination is a continuing political consent of the inhabitants to be members of the state. This theory equates self-determination with self-government. *Ibid*, p. 28-32

To see how this principle functioned in practice at the time, relevant parts of the Aaland Islands Dispute need to be underlined.²⁹ The relevance of this case for the modern law on self-determination is unquestionable. It is one of the most analyzed cases among scholars and international lawyers, and not without reason – its main features can be easily linked to contemporary problems of secession. In short, it is a group of about 6,500 islands located in the Baltic Sea between Finland and Sweden with considerable strategic significance. The inhabitants of the islands inherited Swedish language, culture and tradition from the period when they were under Swedish control (1157-1809). They were ceded by Sweden to Russia in 1809, and when Finland proclaimed independence from the Russian Empire in December 1917, the inhabitants of the islands wanted to be returned to Sweden.³⁰ Sweden has tried to convince Finland to hold a plebiscite in the disputed islands, but Finland refused to do so. Finland sent troops to the islands and the dispute was brought before the Council of the League of Nations by the United Kingdom, which feared that the situation can endanger peace in the Baltic. Before the League of Nations was called upon to determinate the status of the islands, Finland had offered autonomy to the islands, but they rejected it, so Finland arrested the Aaland Islands leaders that wanted to be united with Sweden. Sweden favored a solution in accordance with the principle of self-determination, while the inhabitants of the islands opted for a reunion with Sweden and if that is not possible, for independence. The League appointed two commissions to examine the case. International Commission of Jurists was to deliver legal advisory opinion on the Finland's objection to the competence of the Council on domestic jurisdiction grounds, and then a Commission of Rapporteurs was established to prepare a solution to the question.

Finland claimed that this was a matter of domestic jurisdiction, but that claim was rejected since the state of Finland was not fully formed. That was the conclusion of the Commission of Jurists - Finland did not acquire sovereignty over the islands when the Russian empire was disintegrating, and prior to the expression of Aalanders' wishes to reunite with Sweden. In this manner the Commission of Jurists based the Council's competence upon the transitional and uncertain

²⁹ On Aaland Islands case generally see Barros, James (1968): *The Aaland Islands Question: Its Settlement by the League of Nations*, Yale University Press, New Haven

³⁰ A plebiscite was held on the 31st of December 1917 that consisted of collecting signatures authorizing the submission of an appeal to the king and the people of Sweden. More than 7,000 Aaland Islanders (approximately one-third of the population) expressed their wish that the islands be reunited with the Kingdom of Sweden.

character of the political situation.³¹ The Commission also asserted that although self-determination of peoples had played an important part in modern political thought, and had been recognized in some international treaties, the latter “cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations... Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.”³² But this general prohibition was only to protect a nation definitely constituted as a sovereign state, and the jurists did not accept that Finland had achieved this status during the critical period. The Commission of Rapporteurs, in a report issued several months later, came to an opposite conclusion - the islands were incorporated *de jure* in the new Republic of Finland, so it proposed autonomy under Finnish sovereignty. It is important to note that by the time the second commission was asked to investigate, some of the circumstances had changed and Finland had established a much better control over its territory. The rapporteurs declared that the sovereign and independent Finnish state had been born from the moment of its declaration of independence, and that the Aaland Islands had formed its part.

The solution of the Commission of Rapporteurs was eventually adopted by the Council of the League, but the Council demanded guarantees for the preservation of Swedish traditions of the Aaland population. The rapporteurs have also stated that if Finland refused rights to the inhabitants of the islands, they would have the right to hold a plebiscite. This suggests that if a state treats a group in a discriminatory manner, that group has a right to secede. In a report presented to the Council of the League by the Commission of Rapporteurs the next sentences can be read as implying that right: “what reasons would there be for allowing a minority to separate itself from the State to which it is united, if this State gives it the guarantees which it is within its rights in demanding, for the preservation of its social, ethnical or religious character? Such

³¹ Commission of Jurists concluded that “in the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife...It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State...It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.” As quoted in Crawford, James (2006): *The Creation of States in International Law*, Clarendon Press, Oxford, p. 58

³² *Ibid.*

indulgence, apart from every political consideration, would be supremely unjust to the State prepared to make these concessions. The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees of religious, linguistic and social freedoms.”³³ This leads to a conclusion that oppression might allow a minority to secede by way of last resort, in cases of severe misgovernment. Of course, normally, minorities cannot have any right to secession, because that would inaugurate anarchy in international life. However, this conclusion did not apply to the Aaland case, and only if Finland had disrespected their ethnic and cultural autonomy the islanders’ right to separate from Finland would have been triggered. The reference to remedial secession that the Commission of Rapporteurs had made continues to attract attention of legal doctrine. Finally, Aaland Islands autonomy was guaranteed by Finland in the Law of Autonomy of the 7th of May 1920, and reinforced by the recommendation of the Council of the League in 1921. Both Finland and Sweden accepted the recommendation and Finland agreed to guarantee the Aalanders the preservation of their culture, language and local Swedish tradition. This can count as a success for the League - it succeeded in avoiding conflict and ensuring the cultural autonomy for the residents of the islands as well as that the islands remain a neutral territory. Hurst Hannum concludes: “in the search for a means of determining whether a particular secessionist movement is legitimate or illegitimate, one common denominator is the violation of fundamental rights by the state; only where such violations occur can secession be justified. While not confirming or implying a right to secession, even the League of Nations, during its consideration of the Aaland Islands, seemed to suggest that what would now be called human rights were a legitimate concern.”³⁴

The concept of self-determination under the UN system had a different meaning – decolonization. The question of ethnicity or nationality was no longer posed, the new right was formulated in order to free colonial people and allow them to govern themselves. The victors of World War II decided to construct general human rights system, after the collapse of the guarantees provided to the minorities by the League of Nations because of German nationalism.

³³ League of Nations, Report Presented to the Council of the League by the Commission of Rapporteurs, the 16th of April 1921, Council Doc. B7/21/68/106, p. 28

³⁴ Hannum, Hurst, *ibid.*, p. 471

Fear of nationalism and failure to protect vulnerable groups led the Allies to ensure that the 'self' does not become linked to the principle of ethnicity as it was in the Wilsonian concept. It became obvious that "as an agency of destruction the theory of nationalism proved one of the most potent that even modern society has known."³⁵ The UN Charter mentions the right to self-determination only twice,³⁶ and only when it speaks of development of friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples. Even so, the link between self-determination and the equality of groups was made evident, and 'peoples' were denoted as the subjects of self-determination instead of nationalities – no references to ethnicity or culture were made.

Although the UN Charter does very little to develop the content of self-determination, it is important that the principle became a part of a legally binding document for the first time and that it was extended to all colonial territories. "Thus, the legally binding nature of the purposes is undoubtedly clear, since they are expressly described as the object of legal protection. Even if one does not favour this doctrinal position, the subsequent practice of the UN organs and its members confirms the legally binding character of the right of self-determination."³⁷ Legal position of self-determination in the Charter was conservative, but it has consequently gained a different meaning. Rapid changes in the international community have enabled the transformation of this principle into a legal right, although in the following decades it has been directed toward decolonization because of the combination of articles on self-determination and chapters of the UN Charter on non-self-governing and trust territories. The General Assembly has gradually build up its competence to decide whether or not a territory should exercise (or has exercised) self-determination. Although decolonization is a form of secession, because it involves the creation of a new state by withdrawal of territory from the jurisdiction of an existing state, for the purposes of this study the analysis of secession is limited to secession of entities

³⁵ Cobban, Alfred (1969): *The Nation State and National Self-Determination*, Collins, London, p. 36

³⁶ The principle of self-determination is referred to twice. Article 1, paragraph 2 states: "the purposes of United Nations are...2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Article 55 enumerates the objectives the United Nations shall promote "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples." United Nations, Charter of the United Nations, the 26th of June 1945, 1 UNTS XVI

³⁷ Doehring, Karl, *ibid.*, p. 59

from existing states and it does not include decolonization. The explanation for this is twofold – firstly, the era of decolonization is practically over, since there are only few colonial entities left, and secondly, decolonization had a very different standing and treatment in the international community compared to secession (while decolonization was seen as a positive and legitimate goal, one to be supported and championed, secession is seen as a controversial undertaking, a contested and divisive issue toward which the international community has mainly negative stance). Since decolonization is not particularly relevant to this study, focus will be on the legal instruments in the post-World War II period which imply new developments of the right to self-determination. Those are the instruments that played a decisive role in the gradual evolution of customary rules on self-determination, whether they are treaty rules such as the UN Charter and the 1966 International Covenants on Human Rights, or General Assembly resolutions such as the 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples and the 1970 Declaration on Friendly Relations. It should be emphasized that in the case of self-determination the role of UN resolutions was as important as the treaty rules for the transformation of this principle into a legal right. Cassese explains why: “in the case of self-determination – as in similar highly sensitive areas fraught with ideological and political dissension – the first push to the emergence of general standards has been given by the *political will* of the majority of Members States of the UN, which has then coalesced in the form of General Assembly resolutions. Strictly speaking, these resolutions are neither *opinio juris* nor *usus*. Rather they constitute the major factor triggering (a) the taking of a legal stand by many Member states of the UN (which thereby express their legal view on the matter) and (b) the gradual adoption by these States of attitudes consistent with the resolutions.”³⁸

3 *The 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples (General Assembly Resolution 1514)*³⁹

Although this interpretation of the UN Charter focuses on the issues of decolonization,⁴⁰ it needs to be mentioned because of three reasons. Firstly, it was an important step in transformation of a

³⁸ Cassese, Antonio, *ibid.*, p. 69-70

³⁹ General Assembly of the United Nations, Declaration on the Granting of Independence to Colonial Territories and Peoples, the 14th of December 1960, A/RES/1514, 15 UN GAOR Supp. (No. 16)

political principal of self-determination into a rule of customary international law. It sets a 'right' of self-determination for all peoples and interprets that right. The second reason is that the Declaration on the Granting of Independence to Colonial Countries and Peoples included self-determination as a fundamental human right and linked it to the issue of discrimination. It also stated that the process of liberation is 'irresistible and irreversible' and that self-determination of peoples includes a right to their own resources, thereby combining political, economic, social and cultural components. Thirdly, the Declaration stated in paragraph 2 that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Although not limiting this right to a specific people or peoples under a colonial rule, there is no doubt that the spirit of the Declaration calls for self-determination and independence of peoples which have not yet attained independence from a colonial rule, since the preamble explains the main aim of the Declaration - "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." However, paragraph 2 shows that the right of self-determination, as formulated here (self-determination of *all* peoples, not just colonial peoples) is also a general right with universal application. That this wording had been fully meant was confirmed few years later in the International Covenants on Human Rights. The Declaration also states in paragraph 6 that emancipation of a territory must not affect the territorial integrity of the colonial power: "any attempt aimed at particular or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations", and the final paragraph reiterates "the sovereign rights of all peoples and their territorial integrity". This contradiction remains highly visible in all the following documents on self-determination. On the one hand, there is the principle that peoples should have the right freely to determine their own future, and on the other hand, there is the sacrosanct status of stability and order in the international system. Territorial integrity and boundaries are of highest value in this system, so the disruption of state unity was considered unacceptable. There were no direct clashes of these principles during decolonization – simply, entities that were entitled to the right of self-determination and, consequently, independence, were very distant from colonial powers and did not present a threat to their boundaries. Thus it was understood that sometimes a

⁴⁰ That is clear from paragraph 5, where it is demanded: "immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations."

territory must break-away from a government in power in order to practice its right to self-government, but even the developing countries believed that colonial boundaries should not be modified in order to avoid disruption and conflicts.

4 *The 1966 International Covenants on Human Rights*⁴¹

International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights both mention the right to self-determination in Article 1, with exactly the same wording.⁴² The article states that *all* peoples have the right to self-determination and by virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development. This is the most important point - not only colonized peoples, but all peoples have this right and it presents an obligation binding upon the parties to the treaties.⁴³ Such wording implies that the right of self-determination in the Covenants is universal and that the term 'peoples' has a general connotation. This term was a subject of many interpretations, but it is clearly used in its general sense, and there is nothing in the following provisions of the Covenants which contradicts the general interpretation of 'peoples'.

However, not only did it remain unclear which 'peoples' are to have this right conferred upon them, but during the debates in the General Assembly and in the Commission on Human Rights leading up to the final drafting of the Covenants, a certain amount of disagreement over the meaning of both 'peoples' and 'self-determination' existed. The West European states opposed the very inclusion of a right to self-determination on a number of grounds, and the initiative for

⁴¹ General Assembly of the United Nations, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights, the 16th of December 1966, A/RES/21/2200, 999 UNTS 171, 993 UNTS 3

⁴² Article 1 on self-determination is identical in both Covenants: "1.) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2.) All peoples may, for their own ends, freely dispose of their natural wealth and resources, without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3.) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

⁴³ "In addition, these treaty obligations are of great importance for the interpretation of the Charter, since they have been elaborated by organs of the UN and thus can be seen in a certain sense as the implementation of a Charter task." Doehring, Karl, *ibid.*, p. 53

introducing the right to self-determination into the Covenants came from the Soviet Union. One of the arguments has been that it is premature to do so, since self-determination is a principle rather than a right, although the true reason behind these arguments was the protection of colonial interests. The other argument has been that the principle of self-determination is too complex and that terms such as ‘peoples’ should be defined first. On the other side of the debate was the Afro-Asian bloc that has successfully argued that self-determination is the most fundamental of all human rights and a prerequisite for the enjoyment of all other rights. There was also the objection that the 1948 Universal Declaration of Human Rights had made no mention of self-determination. This was enough for some state representatives to question the fundamental character of the right to self-determination. Few delegations (Canadian, Swedish and Dutch) have even argued that the right of self-determination is a collective human right and therefore not appropriate for a covenant on individual rights.⁴⁴ However, the fact that Article 1 on the right of self-determinations stands at the beginning of both human rights Covenants confirms that this right is a pre-condition for the realization of all individual human rights, and even prior to those rights.

Like most authors, Ofuatey-Kodjoe affirms that the incorporation of the right of self-determination into the Covenants established a connection between human rights and group rights. “With the realization that in some cases the deprivation of individual rights is based on the fact of the membership of that individual in a group, it was finally recognized that in such cases there could not be effective protection without admitting the concept of protection for the entire group. Thus, the essential similarity between the status of “oppressed minorities” and colonial peoples was formally recognized.”⁴⁵ It can be stated that this position is now generally accepted. During the debates leading up to the final drafting of the Covenants the proponents of

⁴⁴ Cassese mentions other ‘technical’ arguments that Western countries put forward in opposing the provision on self-determination, such as that it is too vague, that the implementation system could not be applied, that self-determination was a slow and gradual process which would not be furthered by including a provision on the subject in an international treaty, that the UN Charter mentions self-determination so there is no need to make reference to the principle in the Covenant and there were even objections on the procedural plane, with several states contending that the Third Committee of the General Assembly and the Commission on Human Rights did not have jurisdiction over the matter. Western states also stressed the dangers of secession and multiplication of frontiers and other perils for the territorial integrity of sovereign states harboring minorities. In the end, socialist and developing countries won the debate, but these technical objections to the proposed drafts of Article 1 ensured that the rule was properly worded and even contributed to the widening of the scope of Article 1. Cassese, Antonio, *ibid.*, p. 50-52

⁴⁵ Ofuatey-Kodjoe, Wentworth, *ibid.*, p. 170-171

the right have elaborated on the fact that this right is essential for the enjoyment of all human rights and that self-determination is an integral part of the UN Charter and other UN documents. When the Indian Government, in a reservation entered on its ratification of the Covenants, has stated that self-determination is to be understood as a right of peoples under foreign domination and not of sovereign independent states or a section of a people or nation, Federal Republic of Germany issued a formal declaration of protest joined by the Netherlands and France.⁴⁶ The Netherlands stated that “the right of self-determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of Article 1 common to the two Covenants but as well from the most authoritative statements of the law concerned, i.e. the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of the right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.”⁴⁷ There were also different opinions on the scope of the right, but a narrow interpretation prevailed. The question of secession was raised, but quickly dismissed as a separate problem or a misuse of the right of self-determination.⁴⁸ Yugoslavia and the United States have proposed that self-determination should include the right to secede and to establish an independent state, but these amendments were not adopted. The very fact that this issue was heavily debated shows that many states believed that a ‘people’ could mean a national group within the state, but the text of the two Covenants does very little to uncover the meaning of ‘people’ as used by the UN at the time. The opposing states feared for the world peace, while the others did not think it was important to define ‘peoples’ at that point, since it was not

⁴⁶ Tomuschat, Christian (1993): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, p. 2-3

⁴⁷ As quoted in Crawford, James (2001): *The Right of Self-Determination in International Law: Its Development and Future*, in Alston, Philip (ed.): *People’s Rights*, p. 28; In a similar manner, the Federal Republic of Germany objected to the reservation: “the right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign dominations. All peoples, therefore, have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Government cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provision in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants.” France has stated that the Indian reservation is objectionable because it “attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination. The present declaration will not be deemed to be an obstacle to the entry into force of the Covenant between the French Republic and the Republic of India.”

⁴⁸ Simpson, Gerry (1996): *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, in Sellers, Mortimer (ed.): *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples*, Berg Publishers, Oxford, p. 40-41

specified in the UN Charter either, and its signatories understood the meaning of the phrase. Some of the states, the United Kingdom, the US and the Soviet Union among them, have claimed that the right to secession is inherent to the right of self-determination and belongs also to the minorities. Finally it was regarded as unnecessary to define the word 'people'. It is important, however, that the Covenants did not grant the right of self-determination only to populations of existing states, populations living under foreign military occupation and non-self-governing and trust territories, but to all peoples.⁴⁹ It was the first time that an international legal instrument proclaimed self-determination as the right of a whole people to democratic rule, as well as obligation for each contracting state to refrain from interfering with the independence of other states.⁵⁰

There are also opinions that Article 1 concerns a right to internal self-determination as a political, economic and cultural autonomy. Thomas Franck belongs to authors who believe that the internal aspect of self-determination is the important one: "when the Covenant came into force, the right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies) and became a right of everyone. It also, at least for now, stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state."⁵¹ Cassese points out that Article 1 has to be read as encompassing the internal decision-making process by establishing a permanent link between self-determination and civil and political rights. It requires that the people choose their legislators and political leaders freely. "Thus, internal self-determination is best explained as a manifestation of the totality of rights embodied in the Covenant, with particular reference to: freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association (Article 22); the right to vote (Article 25 b); and, more generally, the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25a). Only when individuals are afforded these rights can it be said that the whole

⁴⁹ For detailed discussion on this issue see Duursma, Jorri, *ibid.*, p. 27-35

⁵⁰ Cassese, Antonio, *ibid.*, p. 65-66

⁵¹ Franck, Thomas (1992): *The Emerging Right to Democratic Governance*, American Journal of International Law, Vol. 28, p. 58-59

people enjoys the right of internal self-determination. Consequently, one can claim a breach of Article 1 of the Covenant if a State abuses or gravely disregards the limitations on civil and political rights authorized by the Covenant.”⁵² The very fact that the right of self-determination is proclaimed in an international instrument that deals with human rights implies that the right to internal self-determination is also intended to be incorporated in the Covenants, albeit indirectly. However, the Covenant makes a clear distinction between the right of peoples to self-determination and the rights of persons who are part of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion and to use their own language. Article 27 guarantees these rights to individuals who belong to minority groups.⁵³

States are required under Article 40 to submit periodic reports to the Human Rights Committee, which is a treaty-applying organ, on their implementation of the rights guaranteed under the Covenant. A discussion then follows between the Committee experts and government representatives. Using this dialogue with the state representatives, questions are regularly posed as to how political institutions operate and how the people of the state concerned participate in the governance of their state, thus encouraging the states to achieve a range of relevant human rights within their territories. The very fact that the Committee asks not only about dependent territories of states, but also about the possibilities which the populations of these states have to determine their own political systems shows that states accept the existence of internal self-determination. This Committee was meant to further define the right to self-determination, but the lack of consensus disabled it in fully achieving this goal. Practice of the Committee is still substantial, since through its examinations of state reports it supports the right to democratic governance. It explained the importance of the right to self-determination and its central position in the Covenants: “the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two

⁵² Cassese, Antonio, *ibid.*, p. 53

⁵³ “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

Covenants.”⁵⁴ This comment forwarded by the Committee suggests that self-determination is both interrelated and serves as a precondition for the fulfillment of the range of human rights stipulated in the Covenants. Its special position is suggested by its inclusion in a separate untitled Part I in both Covenants.

The Covenants on Human Rights marked a new phase of legal development of the principle of self-determination, in which there is a repeated reference to self-determination in human rights terms. Words of the UK Representative to the General Assembly’s Third Committee in 1985 best explain the importance of the first article of the Covenants: “it is no accident that the first article of each of the Covenants proclaims the right of self-determination. We should always remember that under the Covenants self-determination is a right of peoples and not of governments. Moreover, it is not only peoples suffering occupation by a foreign power which are deprived of their right to self-determination. We are all aware of appalling violations of many other fundamental rights, perpetrated against peoples by their own countryman. Amin’s atrocities in Uganda and Pol Pot’s in Cambodia are perhaps the most glaring contemporary examples. But they are by no means the only ones. Self-determination is not a single event, but a continuous process.”⁵⁵

5 *The 1970 Declaration on Friendly Relations (General Assembly Resolution 2625)*⁵⁶

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations is one of the most important legal instruments for the development of modern right to self-determination. Gerry Simpson calls it the highest development yet of United Nations law, since it reconfigures the

⁵⁴ United Nations Human Rights Committee, Human Rights Committee General Comment 12 (21), the 13th of March 1984, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 1

⁵⁵ As quoted in Crawford, James (1988): *Self-Determination outside the Colonial Context*, in Macartney, Allan (ed.): *Self-Determination in the Commonwealth*, Aberdeen University Press, Aberdeen, p. 6

⁵⁶ General Assembly of the United Nations, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, the 14th of October 1970, A/RES/2625 (XXV), 25 UN GAOR Supp. (No. 28)

bonds between democratic representation and self-determination.⁵⁷ It addresses, if not ultimately clarifies, the questions which previously analyzed developments raised, such as the meaning of ‘peoples’ and whether the right to self-determination exists outside the context of decolonization. This declaration is “usually discussed from two angles, namely the formulation of an additional implementation method of the right to self-determination and the possible implications of the requirement that the government should represent the entire people of the territory concerned.”⁵⁸

Even though General Assembly resolutions are normally low in the hierarchy of sources of international law, the Declaration can be considered *jus cogens* norm according to Joshua Castellino, because its passage through the General Assembly had a wide consensus. Although these resolutions are not binding, when a General Assembly resolution is passed with such unanimity it reflects ‘international custom’ or ‘state practice’.⁵⁹ Although this instrument is adopted over 40 years ago, it is still widely discussed and it has a lasting influence on the development of international law. The Declaration considers a broad range of questions, such as the duties of states to promote human rights in accordance with the UN Charter, the principle of sovereign equality of states, the duty of states to cooperate, prohibition against intervention in the internal affairs of the state, settling of the international disputes by peaceful means etc. It actually elaborates on the principles embodied in the UN Charter that are, according to the Preamble of the Declaration on Friendly Relations, basic principles of international law. It presents a further study of these principals, an attempt to clarify their legal content as it was derived during the previous decades from the practice of states and international organizations such as the UN. As for the self-determination issue, the Declaration states that *all* peoples have the right freely to determine their future. That means that peoples are free to determine their political status and without external influence. Every state has a duty to promote the realization of the principle of equal rights and self-determination of peoples. States can do that either by not interfering in the

⁵⁷ Simpson, Gerry, *ibid.*, p. 42

⁵⁸ Henrard, Kristin (2000): *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination*, Martinus Nijhoff Publishers, The Hague, p. 288

⁵⁹ Castellino, Joshua (2000): *International Law and Self-Determination*, Martinus Nijhoff Publishers, The Hague, p.

process of self-determination or by helping the UN by collective acting with other UN members to carry out emancipation of peoples.⁶⁰

Since the Declaration speaks of the ‘speedy end of colonialism’, the universality of its scope is sometimes questioned. The document states that ‘subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as denial of fundamental human rights and it is contrary to the Charter of the United Nations.’ Evidently, by referring to alien subjugation, domination and exploitation separately from colonialism, as different types of situations which may give rise to the right of self-determination, it is indicated that these situations may exist outside of colonial context. Before the Declaration and the Covenants, the goal of the principle of self-determination of peoples was the territorial independence of the overseas colonies from metropolitan powers in a way that preserved separate territorial integrity of the colonial unit. It did not apply to groups within the colonial territories – they did not have the right to determine their own political future. However, self-determination is articulated in the Declaration in a manner that transcends colonial circumstances. According to Jorri Duusrma, self-determination is a universally applicable principle. Although it is true that the United Nations have given a good deal of attention to non-self-governing and trust territories, they did not intend to limit the right of self-determination to these peoples. The debate on the term ‘peoples’ in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States showed very different opinions of the state delegates on this matter. Some proposals provided for a right of self-determination of colonial peoples, or peoples under alien subjugation, domination and exploitation. Yet questions were raised whether, besides independent peoples of existing states and colonial peoples, there are other groups that possess the right of self-determination and some states accepted the right of secession from existing states as inherent in the right of self-determination. Other states have expressed views that it is doubtful whether such a right could be

⁶⁰ Paragraphs 1 and 2 state: “By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter...and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.”

codified, but under the US and British drafts a limited right of secession was promoted. Finally, a compromise was reached, embodied in paragraph 2.⁶¹

The Declaration also states options to implement the right of self-determination – the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people. The modes of implementing the right to self-determination were previously declared in a similar fashion in Resolution 1541 adopted unanimously by the General Assembly in 1960 (a day after Resolution 1514), which has asserted for the first time the modes by which a non-self-governing territory under Chapter XI of the UN Charter can achieve a full measure of self-government.⁶² Those are the emergence as a sovereign independent state, the free association with an independent state, or integration with an independent state. The Declaration on Friendly Relations provides further flexibility by listing an additional possibility – any status freely determined by the people. What these modes have in common is the impairment of the territorial integrity of an existing state. However, this additional possibility opens the door for the internal dimension of self-determination – “this Resolution’s recognition of an internal dimension of the right to self-determination can thus be argued to support the grant of a certain right to self-determination to minorities.”⁶³ It is equally important that this provision is addressed not to states, but directly to peoples.

This is the first international legal instrument that implies that the principle of self-determination takes priority over the prohibition of the use of force against the territorial integrity of a state, and that a right of secession would arise if the requirement of a representative government that acts in conformity with internal self-determination is not fulfilled: “every State has the duty to

⁶¹ Duursma, Jorri, *ibid.*, p. 21-25

⁶² General Assembly of the United Nations, Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, the 15th of December 1960, A/RES/1541 (XV), 15 UN GAOR Supp. (No. 16); neither Chapter XI nor XII of the UN Charter explicitly mention self-determination, but indirectly refer to the principle. Article 73 of Chapter XI calls upon the states administering the territories whose people have not yet attained a full measure of self-government (non-self-governing territories) to promote self-government and to “take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.” Article 76 of Chapter XII states the basic objective of the UN trusteeship system – to promote progressive development in the trust territories towards self-government or independence.

⁶³ Henrard, Kristin, *ibid.*, p. 288

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, 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 of the Charter.” This implies that peoples have the right to armed support in fighting for independence and that the principle of self-determination takes priority over the prohibition of the use of force against the territorial integrity of a state. Then one comes to the most important paragraph of the Declaration when self-determination is concerned, the so-called safeguard clause, and this paragraph “seems to recognize, for the first time in an international document of this kind, the legitimacy of secession under certain circumstances.”⁶⁴ “Nothing in the foregoing paragraph shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.”

This paragraph reveals the conflict of two important principles of international law (self-determination and territorial integrity). The safeguard clause deserves particular attention, because it affirms the democratic aspect of self-determination by posing a condition of a representative government on states. It clearly states that territorial integrity is sacred for states that conduct themselves in compliance with the principle of equal rights and self-determination of peoples and possess a government that represents the whole people. So what if a government is not representative? The paragraph implies that when a government does not respect human rights and self-determination and when it does not represent the whole people, territorial integrity is not guaranteed. Thus, peoples within existing states that are treated in a discriminatory fashion by a government that does not properly represent them can claim self-determination without fear that the principle of the territorial integrity will defeat their claim. Remedial secession remains a measure of last resort, and it is now widely accepted among scholars. Discriminatory policies of

⁶⁴ Buchheit, Lee, *ibid.*, p. 92

a government represent a violation of the internal dimension of self-determination. “Only if such a representative government does not exist can the territorial integrity and political unity of a State be disregarded and secession allowed. The obligation of representative government seems to form part of the internal right of self-determination. A representative government is set up as an ideal result of internal self-determination. If this form of internal self-determination is denied, the peoples have the right to external self-determination. This is historically speaking nothing new.”⁶⁵ Karl Doehring notices that this raises questions as to what quality and quantity of discrimination could justify an ethnic minority’s seceding from its state, since not every kind of discrimination can legitimize secession. This right could be recognized if the minority is exposed to actions by the sovereign state power which consist in an evident and brutal violation of fundamental human rights, so that the secession is the only possible defensive reaction to such brutal oppression.⁶⁶

Cassese points out that “since the possibility of impairment of territorial integrity is not totally excluded, it is logically admitted...It can therefore be suggested that the following conditions might warrant secession: when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure. Thus, denial of the basic right of representation does not give rise *per se* to the right of secession. In addition, there must be gross breaches of fundamental human rights, and, what is more, the exclusion of any likelihood for a possible peaceful solution within the existing State structure.”⁶⁷ Those are exceptional circumstances that link external self-determination to internal self-determination. However, opinions differ on the matter of content of the requirement of a representative government. It is mostly related to the respect for individual and group rights of members of various ethnic groups within a state, and the threshold for triggering the external dimension of the right to self-determination is high. Consistent violations

⁶⁵ Duursma, Jorri, *ibid.*, p. 21-25

⁶⁶ Doehring lists examples of the evident and brutal violations of fundamental human rights – killing or unlimited imprisonment without legal protection, destroying family relations, expropriation without any regard for the necessities of life, special prohibitions against following religious professions or using one’s own language and executing all these prohibitions with brutal methods and measures. Doehring, Karl, *ibid.*, p. 58

⁶⁷ Cassese, Antonio, *ibid.*, p. 119-120

of individual and group rights create the conditions in which the oppressed groups may invoke the right of self-determination in order to secede.

There are, of course, different opinions - for example Patrick Thornberry concludes in his commentary on the Declaration on Friendly Relations that “there is some attraction in intimating an ultimate sanction of secession to despotic governments. But as a general ‘right’, it is difficult to see how it can be accepted by States, however nuanced the criteria suggested: international law is not a suicide club for States.”⁶⁸ Another argument used by authors who do not agree with the remedial interpretation of the safeguard clause is that such interpretation is not in conformity with the rest of the Declaration. Kohen, for instance, claims that violations of human rights are usually a doing of a particular government that pursues discriminatory politics. Since this is a temporary situation, a radical and lasting solution such as secession is not appropriate.⁶⁹ The International Commission of Jurists gave its interpretation of the safeguard clause in 1972. In its report the Commission described the Declaration on Friendly Relations as “the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity.” It is a “courageous attempt” to reconcile principles of self-determination and territorial integrity, and although self-determination is a right that can be exercised only once, “it is submitted, however, that this principle is subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive.”⁷⁰ The safeguard clause thereby supports the argument that a ‘people’ is not the entire population of a state, because it does not absolutely guarantee territorial integrity of states. It implicitly envisages the emergence of a new state in certain circumstances, although there are no generally accepted rules which regulate such a process. A right to secede is implied in circumstances of oppression against section of a state’s population, as an *ultimum remedium*.

⁶⁸ Thornberry, Patrick, *ibid.*, p. 118

⁶⁹ Kohen, Marcelo, *ibid.*, p. 11

⁷⁰ Secretariat of the International Commission of Jurists (1972): *The Events in East Pakistan*, as quoted in Buchheit, Lee (1978): *Secession: The Legitimacy of Self-Determination*, p. 95-96

Some authors tend to dwell on the “distinction as to race, creed or colour”, but it is asserted that the right of self-determination is not confined to decolonization, but is a right of all peoples. Narrow interpretation of the safeguard clause is contradictory to the Declaration itself, and leaves it without legal weight. The Declaration emphasizes the necessity for governments to represent the whole people, and implies the applicability of the right of self-determination to all peoples living within existing states. As Otto Kimminich explains, “especially in Europe ‘race and colour’ are of little help to identify the groups entitled to self-determination under specific circumstances. Rather, it is the term ‘ethnic group’ which has to be used here and elsewhere, in order to make UN law and its interpretation by the Declaration on Principles workable. The logic of this law and its interpretation is really quite simple: as long as a multi-ethnic (or poly-ethnic) State respects the collective and individual rights of ethnic groups and their members, these groups can find their protection within the State in accordance with present-day international law. As soon as that State constantly violates these rights, a situation arises in which the suppressed people or ethnic group may invoke its right of self-determination in order to bring about constitutional changes within the State or to find an international solution by seceding.”⁷¹ The safeguard clause also implies that if a state does not conduct itself in compliance with the right of self-determination of peoples, third states are entitled to support a people that wishes to secede. The permissibility of action by third states is linked to the fact that the right of self-determination is violated. “This circumstance is determinative of the legitimacy of the secession attempt and would raise the situation to the level of international concern. This, in turn, would permit third State ‘action’ – including recognition – in support of that attempt. The *travaux préparatoires* with respect to the principle of self-determination in the Friendly Relations Declaration contain support for this argument.”⁷² So only if the attempt to secession is made legitimate and justifiable by the conduct of the parent state, the third state action in support of the right of self-determination can be qualified as lawful. On the other hand, it is the existence of a government that represents all peoples that disclaims all demands to self-determination founded upon nationalist basis. Legitimate claims to self-determination are based on, as the Declaration

⁷¹ Kimminich, Otto (1993): A “Federal” Right of Self-Determination, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, p. 92

⁷² Dugard and Raic (2006): *The Role of Recognition in the Law and Practice of Secession*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, p. 104

implies, denial of human rights and freedoms, so a representative government has no obligations under international law to consider secessionist claims.

In the end, it should not be forgotten that this Declaration was prepared during the time of profound ideological and political divisions between East and West and in the midst of the decolonization process. It was actually a form of a western response to Soviet politics of Peaceful Coexistence. Consensus among states is difficult to achieve even in the post-Cold War world because there are always different positions and interpretations of important provisions, so during the period of Cold War it was a great achievement to produce an instrument that is considered a landmark in the progressive development of international law, after almost a decade of work on the elaboration of the Charter's most important principles. This consensus was achieved only after prolonged and detailed diplomatic negotiations between East and West. The price to pay was a certain vagueness of formulations and inclusion of conflicting principles without an attempt to reconcile and harmonize them, as well as emphasized regard toward preservation of state sovereignty and stability. Nevertheless, the Declaration represents a huge step toward progressive development, codification and clarification of legal principles whose significance only grew in time and came to be considered *jus cogens*.

6 *The 1976 Universal Declaration on the Rights of Peoples (Algiers Declaration),⁷³ the 1975 Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Declaration)⁷⁴ and other relevant documents*

There are declarations and resolutions that did not undergo the classical method of codification and are not a formal source of law within the categories of Article 38(1) of the Statute of the ICJ. Such instruments, however, can have a determining influence on the development of international law as they may represent evidence of general practice and *opinio juris* of states and other subjects of international law. This is a problem of 'soft' law, where the lack of legally

⁷³ Universal Declaration on the Rights of Peoples, the 4th of July 1976, adopted in Algiers by a group of non-governmental actors; see Cassese, Antonio (1995): *Self-Determination of Peoples: A Legal Reappraisal*, p. 296-302; see also http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm, last visited on the 7th of September 2012

⁷⁴ Conference on Security and Co-operation in Europe, Final Act of the Conference on Security and Cooperation in Europe, the 1st of August 1975, 14 ILM 1292

binding force does not prevent these documents from having a direct influence on the practice of states and can lead to the creation of customary law, because if resolutions and declarations with similar content are repeatedly adopted, we can speak of international legal right. An authoritative expression of views in forms of declarations and interpretations both inside and outside of the United Nations that represent official expression of opinion by states have to be given weight as they constitute state practice and reflect *opinio juris* of states. Such norm-creating provisions can be found in instruments that are not technically binding international agreements and they may articulate emerging trends of international law (*lex ferenda*). R.R. Baxter describes this new development, and as it is not possible to elaborate on this issue further, his conclusion satisfies the scope of this study: “what I have said about the instruments to which States subscribe – treaties, declarations, statements of policy, final acts, resolutions of international organizations, and other forms of expression of agreement – will, I hope, have persuaded the reader that it is excessively simplistic to divide written norms into those that are binding and those that are not. Provisions of treaties may create little or no obligations, although inserted in a form of instrument which presumptively creates rights and duties, while, on the other hand, instruments of lesser dignity may influence or control the conduct of States and individuals to a certain degree, even though their norms are not technically binding.”⁷⁵

Universal Declaration on the Rights of Peoples was adopted at a nongovernmental meeting in Algiers and it essentially recognizes the importance and interlocking of human rights, minority participation and self-determination. Even if it was a result of an ad hoc meeting of lawyers, politicians and political scientists, it has certain authority, at least as an expression of public opinion, and the main effect of that fact is that there were no state interests or over-emphasis of territorial integrity to limit the scope of the Declaration. The Declaration deals with group rights divided into six categories: the right to existence, the right to political self-determination, economic rights of peoples, the right to culture, the right to environment and common resources and rights of minorities. If a right to popular participation, earlier expressed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights reflects the ‘internal’ aspect of self-determination, it has only recently become accepted as

⁷⁵ Baxter, R.R. (1980): *International Law in her Infinite Variety*, International and Comparative Law Quarterly, Vol. 29, p. 564-565

having a binding legal value. Meaningful participation in society is of immense importance, and Algiers Declaration clearly states that “every people has the right to have a democratic government representing all the citizens without distinction as to race, sex, belief or colour, and capable of ensuring effective respect for the human rights and fundamental freedoms for all.” This means that if a considerable segment of society is consistently excluded from any real share in political and economic life of that society, other means of ensuring participation must be acquired. The government must be democratic, and able to guarantee human rights and fundamental freedoms. So the Declaration provides that any people whose fundamental rights are seriously disregarded has the right to enforce them, even, in the last resort, by the use of force, while the members of the international community have the right and duty to intervene.⁷⁶ It also provides that, if human rights are consistently denied, a group whose physical survival or survival of its identity is gravely endangered may have a right to secede from a larger political entity. Article 21, positioned in the Section VI titled Rights of Minorities states: “these rights shall be exercised with due respect for the legitimate interests of the community as a whole and cannot authorise impairing the territorial integrity and political unity of State, provided the State acts in accordance with all the principles set forth in this Declaration”.⁷⁷ The Declaration gave rise to the founding of the Leilo Basso International Foundation for the Rights and Liberation of Peoples, under whose auspices a Permanent Peoples’ Tribunal was established. This declaration, together with the Helsinki Final Act analyzed below, indicates the emerging trend of emphasizing the internal dimension of self-determination and the link between fundamental human rights and freedoms and self-determination.

The Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act) adopted on the 1st of August 1975 embodied a Declaration on Principles Guiding Relations between Participating States. The Helsinki Declaration in principle VIII contains provisions

⁷⁶ Article 28 proclaims the rights of peoples “whose fundamental rights are seriously disregarded to enforce them, especially by political or trade union struggle and even, in the last resort, by the use of force.” Article 29 adds that “liberation movements shall have access to international organizations and their combatants are entitled to the protection of the humanitarian law of war.” And Article 30 proclaims “the re-establishment of the fundamental rights of peoples, when they are seriously disregarded, is a duty incumbent upon all members of the international community.”

⁷⁷ The Algiers Declaration also states in Article 5 that “every people has an imprescriptible and unalienable right to self-determination. It shall determine its political status freely and without any foreign interference.” Article 6 continues: “every people has the right to break free from any colonial or foreign domination, whether direct or indirect, and from any racist regime.”

regarding equal rights and self-determination of peoples: “the participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.” This wording implies the unconditional exercise of the right to self-determination - no form of alien subjugation, domination, exploitation or oppression is required. Self-determination applies *always* to *all* peoples. There was certainly no point in mentioning colonial peoples in this context, but at the time there was a number of authoritarian regimes and the peoples concerned were the peoples living in European states, not under colonial or racist regimes. The Helsinki Declaration specifies the internal and external right of self-determination, so this is the first explicit reference to internal self-determination. Also, by stating that all peoples *always* have the right, the right of self-determination is defined as a continuing right, not just a right that is being exercised once, at the time of independence. This means that self-determination has to be understood as a process, not as a one-time right that is exhausted by the achievement of independence. Cassese emphasizes anti-authoritarian and democratic thrust of the principle of self-determination embodied in the Helsinki Declaration: “the wording agreed upon by the thirty-five States embodies the idea that self-determination means the permanent possibility for a people to choose a new social or political regime and to adapt existing social or political structures to meet new demands.”⁷⁸ He further explains the meaning of external self-determination in the Helsinki Final Act: “no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State.”⁷⁹ Presumably, what is meant under this provision is that people need to be consulted via referendum or other similar procedure when

⁷⁸ Cassese, Antonio, *ibid.*, p. 286-287

⁷⁹ *Ibid.*, p. 287

there is a possibility of territorial change. Of course, considering the situation in Europe at the time, the drafters must have had the reunification of Eastern and Western Germany in mind.

The Helsinki Declaration also contains provision for the preservation of territorial integrity of existing states.⁸⁰ The safeguard clause of the Declaration on Friendly Relations is repeated, but with somewhat different implications: “the reference to international rules concerning territorial integrity does not qualify the rights of people to self-determination; it only restricts the actions of States, which are duty-bound neither to support secessionist movements elsewhere nor to take any action likely to impair the territorial integrity of other States. It would follow that, under the Helsinki Declaration, a ‘people’ can claim a right to secede if they consider secession the only means available to implement their right to self-determination (but that which was stressed above must be recalled: ‘peoples’ is not synonymous with ‘minorities’; the latter are not entitled to self-determination and certainly not to secession).”⁸¹ Since the protection of minorities is covered by Principle VII,⁸² it is safe to assume that they are excluded from Principle VIII and that they do not have the right to external self-determination. Martti Koskenniemi notices that “the tension between the two opposite notions is moderated by modifying the substance of the right so that it leads into minority protection rather than secession. Thus, principle VII of the 1975 Helsinki Final Act (including the commitment to the protection of minorities in Europe) plays the dual role of implying, on the one hand, that the self-determination principle (Principle VIII) should not be taken to mean a right of secession (something that would be destructive for the European political order) and, on the other, that the principles of territorial integrity and non-interference (Principles IV and VI) should not be invoked to throw a veil over discriminatory practices against groups of nationals. Subsequent CSCE documents have not essentially modified the triad of self-determination - territorial integrity - minority protection.”⁸³ Although the Helsinki Final Act does not have the status of a legally binding document, it was agreed upon by 35 states

⁸⁰ Principle IV states: “the participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.”

⁸¹ Cassese, Antonio, *ibid.*, p. 289

⁸² “The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.”

⁸³ Koskenniemi, Martti (1994): *National Self-Determination Today: Problems of Legal Theory and Practice*, International and Comparative Law Quarterly, Vol. 43, p. 256

which confirmed the value of internal self-determination, the idea that self-determination represents a permanent possibility for peoples to choose social and political structures that would represent them in an adequate way.

Charter of Paris for a New Europe,⁸⁴ adopted in November 1990 during a meeting of the CSCE, refers to self-determination in a manner that somewhat narrows previous formulations. It reaffirms equal rights of peoples and their right to self-determination in compliance with the UN Charter and other relevant norms of international law, including those relating to territorial integrity of states. However, the paragraph on self-determination is included in the chapter on 'Friendly Relations among Participating States' and not in the chapter on 'Human Dimensions' which embodies the most important commitments of the members of the organization on the implementation of human rights and freedoms. This narrow and restrictive approach probably resulted from the fear of secession in Europe. Then again, Helsinki process is more focused on internal dimensions of self-determination, such as democracy and minority rights. In the Charter of Paris the link between democracy, human rights, political pluralism and the rule of law is highlighted⁸⁵ and the Office for Free Elections was set up, as well as the CSCE High Commission on National Minorities two years later.

Also important are the General Assembly Declaration on the Occasion of the Fiftieth Anniversary of the United Nations⁸⁶ and the Vienna Declaration and Programme of Action from 1993⁸⁷ which was the result of the United Nations World Conference on Human Rights held in Vienna. The Vienna Declaration recognizes "the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-

⁸⁴ Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe, the 21st of November 1990, 30 ILM 193

⁸⁵ "Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person. Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law."

⁸⁶ General Assembly of the United Nations, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, the 24th of October 1995, A/RES/50/6, 49 UN GAOR Supp. (No. 49)

⁸⁷ World Conference on Human Rights, Vienna Declaration and Programme of Action, the 25th of June 1993, UN Doc. A/Conf.157/24, 32 ILM 1661

determination as a violation of human rights and underlines the importance of the effective realization of this right”, and repeats the safeguard clause from the Declaration on Friendly Relations, but in a slightly different manner: “this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.” It is significant that the phrase ‘without distinction as to race, creed or colour’ from the Declaration on Friendly relations is replaced with the phrase ‘without distinction of any kind’ in the Vienna Declaration in order to emphasize that the right of self-determination belongs to all peoples that are being oppressed. As James Crawford concludes: “the question is whether these paragraphs envisage what may be termed ‘remedial secession’ in the case of a State that does not conduct itself in compliance with the principle of equal rights and self-determination of peoples... At least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete people within a State, and that the ‘safeguard clauses’ in the Friendly Relations Declaration and the Vienna Declaration recognize this, even if indirectly.”⁸⁸

The General Assembly adopted in October 1995 the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (the Fiftieth Anniversary Declaration). By Article 1 the UN declared that it would, *inter alia*, “continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.” Article 1 of this Declaration has a very similar wording to the corresponding paragraphs of the Friendly Relations

⁸⁸ Crawford, James, *ibid*, p. 119

Declaration and of the Vienna Declaration and it, similarly to the Vienna Declaration, speaks of representative government ‘without distinction of any kind’, thereby implying that any oppressed group within an unrepresentative or discriminatory state has the right to secede.

7 *The Advisory Opinion of the Supreme Court of Canada*

The question of external self-determination was brought before the Canadian Supreme Court in the *Quebec Secession* case.⁸⁹ This was probably the most important contemporary deliberation of the issue, although before a national court. It was a significant decision because it addressed the circumstances in which secession may be allowed under international law, outside the colonial context. It is an example of great value for this topic because it discusses the collision of claim to self-determination and territorial integrity in the course of legal debate. Especially considering the fact that secession is often associated with violence, this process before the Supreme Court is not only a valuable reference for future disputes regarding matters of secession, but a constructive and advantageous example of insistence on negotiations as a path of resolution of a secessionist dispute. The second largest of ten provinces of Canada is inhabited with French-speaking population.⁹⁰ A nationalist movement that advocates the secession of Quebec from Canada is active in the province from the 1960s, and the Party Québécois was formed in 1968 with independence from Canada as one of its main aims. It held the government of Quebec for much of the time since it was formed. During its mandate it organized a referendum in Quebec (in 1980 and 1995) in order to obtain the legitimacy to negotiate a new status for the province. The goal was to achieve independent statehood for Quebec, which would remain in an economic association with Canada. However, this proposal was defeated, in 1980 referendum with 59.6 per cent of the vote against, as well as in 1995 referendum, when an incredible 94 per cent of

⁸⁹ This ruling comes under the legal framework of a ‘reference’, a procedure by which the federal government refers legal questions to the Supreme Court of Canada to consider, give its opinions and its reasons for the answer. Section 53 of the Supreme Court Act gives the power to the government to refer questions to the Court, notably concerning: the interpretation of the Constitution Act; the constitutionality or interpretation of any federal or provincial legislation; and the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the federal or provincial governments. In practice, references have been treated as binding in the same manner as any other judgment. See Bayefsky, Anne (2000): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague

⁹⁰ Of approximately 7.5 million inhabitants (2005), 6 million are French-speaking (francophones), 650,000 are English-speaking (anglophones), around 68,500 are Amerindians and around 10,000 are Inuit; the latter two groups constitute the Aboriginal peoples of Quebec. The remaining residents are immigrants from non-English and non-French speaking countries.

registered voters in Quebec turned out and those who voted in favour of continued union won by just a few thousand votes.⁹¹ Since this raised considerable concerns in Canada, the federal government, besides recognizing Quebec as distinct society and granting, by law, all provinces, including Quebec, a veto on constitutional matters, asked the Supreme Court of Canada for an advisory opinion on the possibility of unilateral secession of Quebec.⁹² In addition to the federal government, twelve interveners participated on the side of the federalists, including some provinces and territories, women's groups and First Nations' groups. Since Quebec boycotted the proceedings, arguing that the Supreme Court has no jurisdiction over such matters, the Court appointed *amicus curiae* to represent the sovereigntist case. The Attorney General of Canada's two experts were James Crawford and Luzius Wildhaber whilst the four experts of the *amicus curiae* on international law and self-determination were George Abi-Saab, Thomas M. Franck, Allain Pellet and Malcolm N. Shaw. Since their opinions became part of the record for the Court's consideration, the most important conclusions of these well-known experts need to be mentioned, particularly considering their value and weight when discussing the issue of self-determination.

James Crawford's findings are summarized as follows: "in international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a subdivision or territory, whether or not that population constitutes one or more 'peoples' in the ordinary sense of the word. In international law, self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity...In accordance with [the Friendly Relations Declaration] clause, a state whose government represents the whole people on a basis of equality complies

⁹¹ It should be noted that the wording of the question used in the second referendum was vague and unclear: "do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?" (Yes or No).

⁹² The three questions of the *Secession Reference* case were:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

with the principle of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity. The people of such a state exercise the right of self-determination through their equal participation in its system of government.”⁹³ Luzius Wildhaber was asked to comment on Crawford’s report, and he agreed with his conclusions adding that “until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonization. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.”⁹⁴

In the first expert report for the *amicus curiae* George Abi-Saab has maintained that secession is a question of fact rather than law. “The primary fact, as captured and rationalized in the abstract model of the state by international law, is the triptych of population, territory and sovereignty, or rather, a population sovereignly organized (or governed by a sovereign authority), within a given territory. And it is the effectivity of these elements, and above all their integration into an operative whole, which constitutes the ‘primary fact’ and determines its being taken into consideration by international law or, in other words, compels its acknowledgment as a state by international law, regardless of the process that led to this result.”⁹⁵ Self-determination can represent only a factor which facilitates the process of acquiring statehood, but a factor that creates legitimacy for the new state and facilitates rapid recognition by other states. The second report for the *amicus curiae* was prepared by Thomas Franck. In his opinion, international law does not give a right of secession *per se*, but neither prevents it. “It is wrong, however, to say there is no right of secession if by that, one seeks to convey the impression that any secession is prohibited by international law. The way Question 2 of the Reference has been worded appears to invite the Court to adopt this false correlation between the (correct) absence of a right and the

⁹³ Crawford, James (2000): *State Practice and International Law in Relation to Unilateral Secession*, in Bayefsky, Anne (ed.): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague, p. 31-32

⁹⁴ Wildhaber, Luzius (2000): Report [without title], in Bayefsky, Anne, *ibid.*, p. 64

⁹⁵ Abi-Saab, George (2000): *The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law*, in Bayefsky, Anne, *ibid.*, p. 70

(incorrect) existence of a prohibition. International law permits secession and does not in any sense prohibit a people's seceding, provided (see below) this occurs within procedural constraints imposed by international law."⁹⁶ He has explained that the right to secede is in this aspect similar to a right to revolution – such a right is not established in any constitution, yet revolutions do occur, and international law, although it does not recognize such a right, does accept that revolutions are not prohibited and, thus, are permitted. Although international law does not promote secession, it is a well-known means of achieving statehood. “While this is so in general, there may well be exceptional situations in which a minority people may have a *right* to secession tenable in law and politics due to their demonstrable inability to achieve established rights of self-determination guaranteed by law. For example, article 27 of the Covenant on Civil and Political Rights entitles ‘ethnic, religious or linguistic minorities’ to the ‘right...to enjoy their own culture, to profess and practice their own religion, or to use their own language’. When these rights are grossly denied, the international legal and political system may actually intervene to help the oppressed population achieve its legal rights through secession or an enforced change in their governance. Thus, article 1 of the Civil and Political Rights Covenant, in entitling ‘all peoples’ to ‘the right of self-determination’ – although not normally tantamount to a *right* to secession – in special circumstances of oppression, may afford a remedial *right* to secede with the help of the international system.”⁹⁷ In Franck’s conclusion entitled “International Law Permits Secession to be Effected Unilaterally” he agrees with Crawford that it is possible for an entity to achieve statehood through the principle of effectiveness, but maintains that Crawford is “flatly wrong” in stating that “international law has always favoured the territorial integrity of states.” In his opinion international law is neutral; it “maintains neutrality towards the secessionist impulse but recognizes it when it succeeds”.⁹⁸ Alain Pellet’s report is focused on proving that Crawford’s conclusions are not valid, and he does that from the position that favors the principle of effectiveness, stating that the “law bows before the fact.”⁹⁹ He emphasizes that international law does not encourage the secession of non-colonial peoples, but does not forbid it either. Non-colonial peoples have the right to self-determination, but that right does not confer upon them a right to secede if their identity as a distinct group is recognized within their states

⁹⁶ Franck, Thomas (2000): *Opinion Directed at Question 2 of the Reference*, in Bayefsky, Anne, *ibid.*, p. 77

⁹⁷ *Ibid.*, p. 79

⁹⁸ *Ibid.*, p. 82-84

⁹⁹ Pellet, Alain (2000): *Legal Opinion on Certain Questions of International Law Raised by the Reference*, in Bayefsky, Anne, *ibid.*, p. 120

(such is the case of Quebec). But if such peoples claim independence, although they do not have the legal foundation of a right to self-determination, that independence is justified by the principle of effectiveness. Malcolm Shaw takes a similar position, stating that international law does not promote unilateral secession by granting a specific entitlement, but neither negates the result of a successful secession.

The Supreme Court of Canada rendered its advisory opinion on the 20th of August 1998, as a unanimous ruling for each question, with each judge personally signing the ruling. International legal experts assisted the Court with prepared written opinions. The Court first discussed the question whether Quebec could legally secede from Canada under the Constitution of Canada. Even though the Constitution of Canada says nothing on this question, the Court has concluded that an act of secession is inconsistent with current constitutional arrangements and would therefore be illegal.¹⁰⁰ In this manner the Court has rejected the separatist argument that, upon a winning referendum, Quebec would immediately fall outside the scope of Canadian legal order and be governed by international law.¹⁰¹ At the same time, the Court has validated the idea of a referendum on secession, although that referendum would have no direct legal effect. However, unambiguous vote in favor of independence of Quebec confers legitimacy to secessionist initiative which all of the other participants would have to recognize. If there is a majority support for secession, the content and process of negotiations will be for the political actors to settle and the courts would have no supervisory role. The Court has added that under the Constitution, secession requires an amendment to be negotiated.

¹⁰⁰ “Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from Constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian Constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.” Supreme Court of Canada, Reference re Secession of Quebec, 1998, 2 SCR 217, para. 151

¹⁰¹ Dumberry, Patrick (2006): *Lessons Learned from the Québec Secession Reference before the Supreme Court of Canada*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, p. 426

The Court then turned to the question of the right of peoples to self-determination under international law, and its findings are consistent with the prevailing opinion among scholars that Quebec does not meet the criteria set by international law in order to secede. The Court has said that it does not need to decide the 'people' issue in the context of Quebec, because a right of secession only arises in a colonial context or where a people is subject to alien subjugation, domination or exploitation, and possibly where a people is denied any meaningful exercise of its right to self-determination within state of which it forms a part. After having rejected the contention that Quebec has a unilateral right to secede, the Court pronounced the effectivity principle, acknowledging that international law may adapt to recognize a political and/or factual reality. The Court was also required to consider whether a right to unilateral secession exists under international law and concluded that "some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all 'peoples'. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the 'people' issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principle of self-determination in its internal arrangements, is entitled to maintain its territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the 'National Assembly, the legislature or the government of Quebec' do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally. Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such secession would be dependent on recognition by the international community, which is likely to consider the legality and

legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.”¹⁰²

The Canadian government and the Supreme Court discussed the possibility of application of the aforementioned safeguard clause, according to which external self-determination (remedial secession) can arise in extreme cases of oppression and governmental abuse. It is clear that it cannot be said that Quebecers had been oppressed in any way, since Canadian constitutional system enables internal self-determination and represents all peoples that reside within its territory. The main argument is that safeguard clause actually protects from secession those states that act in accordance with it. The Supreme Court has concluded that there is no incompatibility between the maintenance of territorial integrity and the right of self-determination when a government of a state represents without discrimination all the inhabitants of the state. But the Court went on to discuss the issue of remedial secession, elucidating at the same time with utmost clarity the position of external self-determination in modern international law in several paragraphs:

“The right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now undisputed, but is irrelevant to this Reference. The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the *Declaration on Friendly Relations*...A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent ‘the whole people belonging to the territory without distinction of any kind’ adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. Clearly, such a circumstance parallels

¹⁰² Reference re Secession of Quebec, para. 154-155

the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated... Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.”¹⁰³

The Canadian Supreme Court has maintained that a people has a right to internal self-determination first, and that only if that right is not respected by the state, the right to remedial secession may accrue. The Court has concluded that there is no right of secession¹⁰⁴ either under constitutional or international law, but there is a constitutional right to negotiate independence in the event of a clear affirmative answer to a clear referendum question about secession. It linked democratic rights and constitutional obligations, acknowledging that negotiations may follow on the issue of secession. However, the Court did not answer whether or not Quebecers, or the aboriginal peoples residing within its borders are ‘peoples’, or what constitutes a clear question or a clear majority. On the third question (in the event of conflict between domestic and international law on the right of unilateral secession, which would take precedence in Canada), the Court has stated that there is no conflict between domestic and international law to be addressed. The Parliament of Canada adopted an act to clarify the terms of the right to negotiate (An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference - the Clarity Act). This Act provides that the House of Commons shall consider the text of any future referendum question related to secession in order to determine whether the question is clear and to determine other relevant circumstances such as the size of the majority in the referendum and percentage of voter participation. In spite of its requirement that the views of all political parties, other Canadian institutions and aboriginal peoples are taken into account, the Clarity Act allows a majority of federal members of parliament from outside Quebec to decide on whether a referendum held in Quebec is legitimate or not. The Clarity Act was perceived by the government of Quebec as an attempt by the federal government to block any future referendum by giving the federal government a double veto in this process. In the rest of Canada the Clarity Act was interpreted as consistent with the Court’s

¹⁰³ *Ibid.*, para. 132-135

¹⁰⁴ “International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people.” *Ibid.*, para. 112

opinion and as an appropriate response by the federal government. In return, the government of Quebec adopted An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State. This act declares the existence of Quebec people and its right to freely decide its political regime and legal status. It also provides that simple majority is the rule in any future referendum, that the territory of Quebec and its boundaries cannot be altered except with the consent of the National Assembly and that the Government must ensure that the territorial integrity of Quebec is respected. It also states that “no other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Quebec people to determine its own future.”¹⁰⁵ Both acts carry no relevance from the perspective of international law, unlike the opinion of the Court.¹⁰⁶ The Court did, as expected, consider the Quebec secession illegal under international law, but it did much more – it imposed an obligation of negotiations on the federal government in the event of an unambiguous vote in favor of independence of Quebec in referendum. It even decided which formula is appropriate for such a revolutionary change - an amendment to the Canadian Constitution. Allen Buchanan explains how the well-reasoned and lucid ruling of the Supreme Court attempted to do something of great importance – to subject the issue of secession to the rule of law by constitutionalizing the secession process in the absence of an explicit constitutional provision for secession (and in the absence of a moral right to secede). He agrees with the Court’s conclusion that secession must be consensual (negotiated) rather than unilateral, as well as with the Court’s rejection of a unilateral right to secede as justified. However, he identifies two crucial problems that the Court’s ruling leaves unsolved. First is the risk that negotiations will break down (and no alternative mechanisms are discussed), because of disagreement as to what counts as a clear majority or a clear question at any future referendum or any other possible point, such as shape of the boundaries of an independent Quebec or the division of the national debt. In that case, he proposes that mediation by a suitably composed and impartial international body could reduce the risk and facilitate negotiations.

¹⁰⁵ As quoted in Dumbery, Patrick (2006): *Lessons Learned from the Québec Secession Reference before the Supreme Court of Canada*, p. 449

¹⁰⁶ “The jurisdiction of a court that tries an issue like secession emanates from the same legal and moral principles, which extend into the extra-constitutional realm. This is apparent in the decision of the Supreme Court of Canada in the *Secession Reference*. Although the Court traced its ruling to ‘underlying constitutional principles’, the decision steps into the extra-constitutional realm for its authority. This may be inevitable, since a court cannot deal with secession without ruling on matters that fall outside the ordinary legal and political orders.” Groarke, Paul (2004): *Dividing the State: Legitimacy, Secession, and the Doctrine of Oppression*, Ashgate, Aldershot, p. 72-73

Other problem, that also needs to become a matter of international concern, is the status of native peoples, because the process that the Court outlined did not provide an adequate voice for the indigenous people, especially the native peoples of Quebec, as full parties of the negotiations.¹⁰⁷

8 *What type of norm is self-determination?*

After this historical overview of the development of self-determination,¹⁰⁸ few more remarks concerning the nature and characteristics of the norm of self-determination can be made. The review of the relevant international legal documents showed that the right of self-determination has the status of customary law, and many commentators argue that it is a rule of *jus cogens* (the norm of preemptory force from which no derogation is possible). The language on the right of peoples to self-determination in the Namibia Advisory Opinion¹⁰⁹ and in the East Timor Case (Portugal v Australia)¹¹⁰, where the ICJ confirmed that the right of peoples to self-determination is one of the essential principles of contemporary international law that has an *erga omnes* character, points to the conclusion that the ICJ recognized the right of self-determination as *jus cogens*, at least in the cases of non-self-governing peoples and peoples living within existing states. The majority of authors and international lawyers take this position, but there are still those who argue that self-determination is not a right but a principle, or that it is a right applicable only to colonial peoples.¹¹¹ Ofuatey-Kodjoe has stated long time ago that decades of

¹⁰⁷ Buchanan, Allen (2003): *The Québec Secession Issue: Democracy, Minority Rights, and the Rule of Law*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*, New York University Press, New York, p. 238-271

¹⁰⁸ There are alternative ways to describe the historical development of self-determination. For instance, Dov Ronen identified five types of quests for self-determination both in history and political philosophy. First is national self-determination that was characteristic for the 19th century (1830s-1880s); second is class self-determination, advocated by Marxism in the mid-nineteenth century; third is minorities' self-determination brought forward by Wilson after World War I; fourth is racial self-determination proclaimed by colonial peoples from 1945 to the 1960s; and fifth is ethnic self-determination that he attributes to period from the mid-1960s onwards and whose major instances are Bangladesh, Quebec, Biafra, Scotland. Ronen, Dov (1979): *The Quest for Self-Determination*, Yale University Press, New Haven, p. 9-52

¹⁰⁹ The ICJ concluded that developments in international law had left little doubt that "the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned." International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, the 21st of June 1971, ICJ Reports 1971, p. 31

¹¹⁰ International Court of Justice, East Timor (Portugal v Australia), Jurisdiction and Admissibility, Judgment, the 30th of June 1995, ICJ Reports 1995, p. 90

¹¹¹ For instance, Verzijl has claimed that the right to self-determination has "never been recognized as a genuine positive right of 'peoples' of universal and impartial application, and it never will, nor can be so recognized in the

international practice created a strong presumption that the principle of self-determination, as a rule of customary international law, exists and has a scope and content that states accept as legally binding: “any international practice of such long duration always, *ab definitio*, involves an implied core or nexus that represents the part of that practice that states accept as legally binding, for the process of forming rules of customary international law is part of the very flow of international relations.”¹¹² In the Advisory Opinion on Western Sahara the ICJ emphasized the true core of the principle of self-determination – “the need to pay regard to the freely expressed will of peoples.”¹¹³ Thus the Court has clearly stated that the free expression of will of the population is needed, even when self-determination is taking place in colonial context. Kristin Henrard poses another related question – can the right of self-determination be exercised only once, on achieving independence, or it has a more permanent nature? She concludes that the right of self-determination is granted to ‘all peoples’ and is not exhausted as soon as they establish their own state. “On the contrary, the right to self-determination would be an inherently inalienable and thus enduring right. In this way, the emphasis (rather) falls on the internal or ‘democratic’ dimension of the right, although in certain circumstances even secession, the best well-known mode of exercise of the external right to self-determination, would not be excluded.”¹¹⁴ This conclusion is in accordance with international legal instruments, particularly the Helsinki Declaration, which describes self-determination as a process.

Another important question is what type of norm is self-determination – is it a rule or a principle? Dominant view among scholars and international lawyers is that self-determination is both a principle and a right. A study prepared by UN Special Rapporteur Aureliu Cristescu points out the importance of the principle of self-determination which underlines the other fundamental principles of international law. Self-determination is “the most important of the principles of international law concerning friendly relations and cooperation among states”;¹¹⁵

future.” Verzijl, J.H.W. (1968): *International Law in Historical Perspective*, Vol. 1, Kluwer Law International, The Hague, p. 324; however, such statements are regarded as outdated.

¹¹² Ofuatey-Kodjoe, Wentworth, *ibid.*, p. 16

¹¹³ International Court of Justice, Western Sahara, Advisory Opinion, the 16th of October 1975, ICJ Reports 1975, p. 33

¹¹⁴ Henrard, Kristin, *ibid.*, p. 286

¹¹⁵ Cristescu, Aureliu (1981): *The Right to Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments*, United Nations, New York

this principle “entails international legal rights and obligations”¹¹⁶ as a right of a “general and permanent” character.¹¹⁷ Cassese asserts that self-determination consists both of general principles and of particular customary rules. He cleverly avoids opting for a single norm and explains how the principle is above the rule – it can always be used to interpret the rule and it is very useful for the cases not covered by the rules.¹¹⁸ It is evident that this standpoint leaves not only more room for interpretation, but also for evolution of self-determination. Cassese goes beyond *de lege lata* in developing a contextual approach which takes history and politics into consideration. Self-determination is, according to him, a multifaceted but extremely ambiguous concept, since it belongs to an area where state’s interests and views are so conflicting that states cannot agree upon specific standards of behavior and must therefore be content with the loose formulation of very general standards or principles. Principles lend themselves to various and contradictory applications and can be manipulated and used for conflicting purposes, but on the other hand, their normative potential and dynamic force are great, since one can deduce specific rules from them. That makes self-determination an extremely controversial and confused area of international law.¹¹⁹

Crawford’s approach does not differ much on the question of the nature of the norm of self-determination. He claims that self-determination is a political principle, legal principle and legal right at the same time. Although the political principle of self-determination is too vague, it contributes to international legal practice and legal principle of self-determination. He makes a clear distinction between the principle and the right of self-determination – the difference is in the subject. The subjects of the right of self-determination are defined in the UN Charter under Chapter XI (trust and mandates territories and territories treated as non-self-governing). The principle, however, applies to cases where subject of the right does not fall into one of those categories. This is the point where this question becomes a matter of politics as much as law and additional category becomes important. Crawford uses the term *carence de souveraineté*.¹²⁰ It applies to territories with distinct political and geographical characteristics, whose populations

¹¹⁶ *Ibid.*, p 18

¹¹⁷ *Ibid.*, p. 22

¹¹⁸ Cassese, Antonio, p. 132

¹¹⁹ Cassese, Antonio (1996): *The International Court of Justice and the Right of Peoples to Self-Determination*, in Lowe and Fitzmaurice (eds.): *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge University Press, Cambridge, p. 351

¹²⁰ Crawford, James (2006): *The Creation of States in International Law*, p. 126

do not have a share in the governments of states to which these areas belong. Such a territory becomes in effect non-self-governing. This is where another difference between his and Cassese's interpretation lays – to Crawford, legal principle of self-determination comes into play only when nothing else remains, in the cases where there is no applicable rule, or when a rule is too vague and ambiguous. On the other hand, many scholars assign the dominant role to principles, since they are more general and stand higher in the hierarchy of legal norms than rules. Cassese gives another argument which shows that principles are above the rules – while rules are too conservative, specific and precise, and correspond to old, stable international society, principles are more responding to present and changing international society.¹²¹ Those who opt for rules in this rule/principal distinction have an argument in the fact that rules are dispositive, and principles are not. There is another dichotomy associated with this distinction. It is related to participation. Karen Knop sees it as association of rules with disempowerment and principles with empowerment.¹²² Basically, international actors do not have equal access to resources, or equal knowledge and training in legal matters. Searching for customary rules is also coupled with difficulties in determining the state practice, while the interpretation of principles does not depend on that kind of evidence. Knop quotes Virally who says that principles “constitute an idea-force, accessible to all, largely escaping, as a consequence, the control of jurists and dynamically affecting the functioning of the ways of creating law.”¹²³

As Gerry Simpson correctly notices, the potential of self-determination is diminished by two interpretive trends, as well as by its very transformation from political strategy to legal right which led to the weakening of concept's revolutionary and democratic potential. First is conservative and statist definition of the principle that has reached its apogee during the period when it was identified exclusively with decolonization. As this process reached its peak, self-determination came to be a right without purpose, bereft of any potential beneficiaries. The second trend is the misappropriation of the label. Because of its elasticity, legitimacy of self-determination is diminished, as it came to satisfy strategic and political interests and it has thus evolved into a highly manipulative and indiscriminately employed slogan. Its descent into incoherence is caused primarily by its internal opposition contained in the idea of, on the one

¹²¹ Cassese, Antonio (1995): *Self-Determination of Peoples: A Legal Reappraisal*, p. 128-129

¹²² Knop, Karen, *ibid.*, p. 41-44

¹²³ *Ibid.*, p. 43-44

hand, state rights to self-determination and, on the other hand, the rights of minorities within a state to dismember or challenge it in the name of another competing principle of self-determination. This shift from self-determination as an exercisable right to self-determination as a privilege is caused, according to this author, by successful attempts by states to exclude from the principle of self-determination a right of secession, that is one of its natural outcomes.¹²⁴

9 *Internal and external dimension of self-determination*

One of the often made distinctions concerning self-determination is the division between external and internal self-determination. External self-determination basically means gaining independence after the impairment of the territorial integrity of a state, be that through secession or dissolution of a state. Internal self-determination is, in short, a right to democratic governance. It is usually related to self-government and autonomy. It means that a people must not be discriminated against by its government, so it is associated with principles of democracy, non-discrimination and non-domination, as a right of a people to choose its own government and to participate in the decision-making process. For Kristin Henrard “the internal dimension of this right is rather concerned with the state structure and other national legal regulations designed to accommodate in a (more) optimal way the separate identities of the various population groups present in a state.”¹²⁵ This internal dimension of self-determination provides for a diversity of possible implementations which are all dealing with intra-state regulations and structures, so this diversified content of the right to internal self-determination opens more possibilities for minorities.¹²⁶ It represents a right of peoples to determine their internal political status freely, without outside intervention. Patrick Thornberry explains the difference between two dimensions of self-determination very simply – “the external dimension or aspect defines the status of a people in relation to another people, State or Empire, whereas the democratic or internal dimension should concern the relationship between a people and ‘its own’ State or government.”¹²⁷ He also points out that autonomy rather than participation is the essence of the internal dimension of self-determination, but there is no group right to autonomy while

¹²⁴ Simpson, Gerry, *ibid.*, p. 36-37

¹²⁵ Henrard, Kristin, *ibid.*, p. 281

¹²⁶ *Ibid.*, p. 300

¹²⁷ Thornberry, Patrick, *ibid.*, p. 101

participation rights are much better established, and active participation in the life of states may lead to autonomous structures.¹²⁸ There are, of course, different opinions. For instance, Gudmundur Alfredsson asserts that “in establishing the right of self-determination, the instruments adopted by the United Nations do not distinguish between its external and internal forms. This distinction is the later invention of political talking and scholarly writing. Indeed, the argument can be made that the instruments, such as article 1 of the International Covenants on Human Rights, relate only to the external form of self-determination when an entity determines its international status with the resulting options of independence, free association and integration.”¹²⁹

Most scholars argue that right to democratic governance has already emerged in international law (this idea of internal self-determination became widely accepted during the 1980s), so it is important to establish under which conditions the right to external self-determination may arise, or in other words, when does the right to internal-self-determination convert into a right to external self-determination. Cassese asserts that there are several different situations with regard to the self-determination for the populations of sovereign states. First he considers the issue of the right to internal self-determination afforded to the entire population of a sovereign state, the right that exists under treaty law by virtue of Article 1 of the 1966 Covenants, and concludes that recent practice shows that a customary rule on the matter is in the process of formation. The second situation is the issue of the rights of ethnic groups, linguistic minorities, indigenous populations and national peoples living in federated states. The UN has remained mostly silent in response to claims asserting the right of self-determination in these cases, although there seems to be a tendency towards broadening the concept of internal self-determination in such a way as to cover minority groups, as recently many contracting states of the 1966 UN Covenants agreed to discuss, under the heading of self-determination, issues relating to regions or minorities. The third is the issue of rights of racial or religious groups living in states which grossly discriminate against them. Their right to internal self-determination is guaranteed by the 1970 Declaration on Friendly Relations’ saving clause.¹³⁰ It can be added that the right to internal self-determination of all groups living in states which discriminate against them is now guaranteed by the revised

¹²⁸ *Ibid.* p. 134

¹²⁹ Alfredsson, Gudmundur, *ibid.*, p. 50

¹³⁰ Cassese, Antonio, *ibid.*, p. 102-111

saving clause contained in the subsequent documents such as the Helsinki Declaration, the Vienna Declaration and Programme of Action and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, in which the phrase ‘without distinction as to race, creed or colour’ from the Declaration on Friendly Relations is replaced with the phrase ‘without distinction of any kind’.

Cassese concludes that “there is room for believing that a new general rule on internal self-determination is in the process of formation. Under this customary norm, the whole people of every State would have the right freely to choose its rulers, through a democratic and pluralistic process and in particular by means of free and genuine elections. This right would be an ongoing one, that is to say permanent in character: it would by no means be a ‘once and for all’ right.”¹³¹ This conclusion is correct, and customary law is coming to coincide with treaty law, which, as we have seen, contributed to the expansion and evolution of the internal aspect of self-determination (the 1966 UN Covenants, the 1975 Helsinki Final Act and the follow-up process, and the growing emphasis on protection of minorities). Furthermore, state practice confirms this conclusion. State reports submitted under Article 40 of the International Covenant on Civil and Political Rights show that although states still regard the right to external self-determination as a right of the entire population of the state, there is a different development in respect of internal self-determination. Most reports comment on the state of internal self-determination by describing the state’s system of government and its constitution, and sometimes they refer to the state of minority rights.¹³² The Committee on the Elimination of All Forms of Racial Discrimination in its General Recommendation 21¹³³ has pointed out the fact that ethnic or religious groups often refer to the right of self-determination as a basis for an alleged right to secession, so this Recommendation directly addresses this issue. The Committee distinguishes between two aspects of self-determination. Firstly, the ‘internal aspect’ consists of the rights of all peoples to pursue freely their economic, social and cultural development without outside interference, and this is linked with the right of every citizen to take part in the conduct of public

¹³¹ *Ibid.*, p. 311

¹³² See United Nations Human Rights Committee, UN Docs. CCPR/C/32/Add. 19 (1994), CCPR/C/58/Add. 15 (1992), CCPR/C/36/Add. 4 (1998), CCPR/C/68/Add. 1 (1991), CCPR/C/32/Add. 17 (1993) and CCPR/C/62/Add.1 (1991).

¹³³ Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation 21, 48th Session, 1996, UN Doc. CERD/A/51/18, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 209 (2003)

affairs at any level, contained in various human rights instruments. As a consequence, governments are to represent the whole population without distinction as to race, color, descent or national or ethnic origin. Secondly, the ‘external aspect’ of self-determination described by the Committee “implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.”¹³⁴ The Committee then calls upon governments to respect fully the rights of all peoples within a state and in particular to avoid discrimination, suggesting that governments should “consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.” In paragraph 6 the Committee emphasizes that nothing it has said or done “shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or colour. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a state.”¹³⁵

Some authors consider another category – ‘federal’ self-determination, as a form or a step between internal and external self-determination, or as a part of internal dimension of self-determination. A considerable number of solutions for the problem of secession in the literature points to the development of various forms of self-government such as federalism and autonomy. The usual conclusion is that, if a group with grievances and claims to self-determination is in time offered to negotiate some federal arrangement or a high degree of autonomy, these claims will not develop into a full-blown demand for secession. However, although interesting and with the ultimate goal of finding a peaceful solution that bears in mind the stability of the international community, a federal right of self-determination is not some new form of self-determination. If

¹³⁴ *Ibid.*, para. 4

¹³⁵ *Ibid.*, para. 6

the dichotomy internal/external self-determination is considered, as external self-determination equates with independent statehood, federal self-determination can be characterized as a form of internal self-determination. Still, it should be remembered that “it is of no advantage to divide the concept of self-determination and describe different rights of self-determination. One may speak of the external and internal aspect of self-determination, but one should never speak of two different rights. Self-determination of peoples in present-day international law is a right of peoples and ethnic groups against the holder of sovereignty of the territory in which they live.”¹³⁶ Otto Kimminich explains that the federal solution recommends itself in cases where an ethnic group lives in a territory which in size, location, and resources meets the minimum requirements of a federal unit. In these cases federalism can be used to solve the problems of multi-ethnic states, because suppressing ethnic groups in the end only causes troubles for such states. He concludes that there is no federal right of self-determination because federalism is just one form of implementation of this right that may prove to be only a transitional stage in a long process of self-determination.¹³⁷

As for the external self-determination, the right of an ethnic group to secede from a state is one of the most disputed questions among authors. Ofuatey-Kodjoe draws attention to the fact that self-determination cannot be equated with the right to secede because the right of self-determination actually distinguishes between legitimate and illegitimate secessions. “In other words, the international community seems to be saying that an act of secession is valid if it is based on a legitimate claim of the right of self-determination. And the legitimacy of the claim depends on the ability of the group to meet the qualifications of a beneficiary of the right of self-determination, that is, it must be under the subjugation of another community.”¹³⁸ Of course, external self-determination is not limited to secession, as UN Resolution 1514 and the Declaration on Friendly Relations show. Possible implementations of external self-determination are the establishment of a sovereign and independent state, the free association or integration with an independent state, or any status freely determined by the people. The Declaration on Friendly Relations is of special importance when external dimension of self-determination is considered, as it produces arguments that discrimination against ethnic minorities could give rise

¹³⁶ Kimminich, Otto, *ibid.*, p. 90

¹³⁷ *Ibid.*, p. 98-100

¹³⁸ Ofuatey-Kodjoe, Wentworth, *ibid.*, p. 162

to a right of secession.¹³⁹ It should be emphasized that this limited right to secession, due to the principle of territorial integrity, remains characterized as a remedy of last resort, and it is commonplace that, beside this fundamental requirement of severe oppression and discrimination, many authors pose additional conditions for secession (viability and democratic government of the new state, territorial concentration of the population group intent to secede, expression of the popular will via referendum etc.). An attempt to break away from a state is often followed by disorder and violence. Such consequences sometimes cannot be avoided, especially if the state itself provided justification for secession by discriminating against a part of its population. However, considering the gravity of such violence and the probable loss of human lives, possible secession, even when in accordance with international law and morality, has to be considered as the last resort, last step that should not be taken until other remedies are still available.

It is clear that self-determination is a concept with multiple meanings. In a legal sense, there are several layers of meaning of self-determination which correspond to the broad definition used in relevant UN documents (the right of all peoples freely to determine their political, economic and social status). Firstly, as a part of the internal dimension of self-determination, there is the right to some form of democratic governance. It reflects the right of individuals to participate in the political, economic or cultural system of their state. Secondly, self-determination is related to minority rights, and this meaning also corresponds to internal aspect of self-determination. This is the right exercised by members of certain groups – national, ethnic, religious or linguistic minorities, and it protects their existence and identity. Closely related is the right of indigenous peoples to self-determination, again in the internal aspect. It ensures not only the preservation of the cultural identity of indigenous peoples, but also certain land rights, since their culture and existence depend, according to the representatives of these groups, on the historic bond with territories they have occupied for centuries. And thirdly, there is the external dimension of self-determination, which enables an entity to determine its international status. Of course, each category has different legal consequences.

¹³⁹ Doehring, Karl, *ibid.*, p. 57-58

10 *Further remarks on remedial secession in international law*

As a conclusion of this part of the study which highlighted the historical development and the most important characteristics of the norm of self-determination, further elucidation on the so-called remedial secession is presented, as it is the focal point of the thesis. So far we have seen that, according to *opinio juris* and state practice, the concept of self-determination came to denote several things: (1) the right to be free from colonial domination and any form of alien subjugation, domination and exploitation; (2) the right to secede peacefully, on the basis of mutual agreement (Czechoslovakia) or to reunite (Germany); (3) internal self-determination as the right to democratic governance, the rights of ethnic groups to participate in political process and preserve their identities, and the right of limited autonomy, short of secession. The additional category is the right to remedial secession, which still causes debates in legal doctrine – it is denoted as *lex lata* by some authors and as *lex ferenda* by others. As already shown, the concept of remedial secession has a broad support among international lawyers and scholars, but in order to be qualified as a part of customary international law, it needs to have some confirmation in state practice. On the other hand, principles of international law such as self-determination or non-use of force that reflect the most important obligations of states – to protect human rights and fundamental freedoms – must be considered part of customary law. From this perspective, to deny participation to a substate group is a grave violation of human rights, since it is usually associated with other forms of discrimination. It all comes down to Tomuschat's eloquent and accurate conclusion: "in the present context, the relevant question is whether the international community, which for its part has many options to pursue, wishes to remain the only actor entitled to take remedial action by way of countermeasures or open criticism in formalized procedures, as practiced in particular in the fora of the United Nations, or whether it grants a certain space of independent action to the actual victims of oppressive policies. Our conclusion is put forward without any hesitation. Within a context where the individual citizen is no more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for

secession as a measure of last resort after all other methods employed to bring about change have failed.”¹⁴⁰

Remedial secession becomes an option only if the right of internal self-determination cannot be exercised and no remedy other than secession can rectify the situation when an unrepresentative and discriminatory government oppresses a part of state population. Then the right of internal self-determination converts into a right of external self-determination, but until then, the exercise of the right of self-determination is limited by the principle of territorial integrity of states. Lee Buchheit has argued more than 30 years ago that a recognized rule of customary international law accepting what he describes as remedial secession exists: “from the indications now available, therefore, the concept of ‘remedial secession’ seems to occupy a status as the *lex lata*... Remedial secession envisions a scheme by which, corresponding to the varying degrees of oppression inflicted upon a particular group by its governing State, international law recognizes a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the *ultimate remedy*. At a certain point, the severity of a State’s treatment of its minorities becomes a matter of international concern. This concern may be evidenced by an international demand for guarantees of minority rights (which is as far as the League was willing to go) or suggestions of regional autonomy, economic independence and so on; or it may finally involve an international legitimation of a right to secessionist self-determination as a self-help remedy by the aggrieved group (which seems to have been the approach of the General Assembly in its 1970 Declaration).”¹⁴¹ Cassese mentions two sets of exceptional cases where factual conditions hinder internal self-determination. First is a case of an armed conflict breaking out in a multinational state, and one or more groups are fighting for secession so it is too late for a peaceful solution based on internal self-determination (as was the case with Yugoslavia). The second case is when central authorities of a multinational state act irremediably oppressive, persistently violating basic human rights of minorities, so that no peaceful solution can be envisaged since it is improbable that those authorities will grant any autonomy or participatory rights to oppressed minority.¹⁴² According to Robert McCorquodale

¹⁴⁰ Tomuschat, Christian (2006): *Secession and Self-Determination*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, p. 41

¹⁴¹ Buchheit, Lee, *ibid.*, p. 222

¹⁴² Cassese, Antonio, *ibid.*, p. 259-60

secession is justified only when there are no less drastic means to free people from oppression. In that case the territorial integrity as a limitation on the right of self-determination does not apply as in those states in which the government represents the whole population. “So a government of a State which does not represent the whole population on its territory without discrimination – such as Iraq in regard to the Kurds or South Africa in regard to the blacks – cannot succeed in limiting the right of self-determination on the basis that it would infringe that State’s territorial integrity.”¹⁴³ Clearly, in cases when identity, survival and physical existence of a substate group are endangered and government is irremediably oppressive, the right of self-determination overrides the principle of territorial integrity and legitimizes secession as the remedy of last resort.

Dugard and Raic maintain that the Friendly Relations Declaration implicitly acknowledged the existence of a right of unilateral secession for peoples within existing states under certain exceptional circumstances and refer to it as ‘the qualified secession doctrine’.¹⁴⁴ If people’s collective identity, fundamental rights and freedoms are endangered or the right of internal self-determination of the people concerned is denied, with no other remedies available, a right to external self-determination, including unilateral secession, arises. On the other hand, if such circumstances do not exist, the principle of territorial integrity is to be respected and the right of self-determination needs to be exercised within the existing state. This view has received strong support not only in legal literature, but also in judicial decision and opinions. Since Aaland Islands dispute and Quebec Secession case are analyzed in the previous chapters, we should briefly mention the third important example of such judicial decision. This decision has been given by the African Commission on Human and Peoples’ Rights in *Katangese Peoples’ Congress v. Zaire*.¹⁴⁵ The President of Katangese Peoples’ Congress, as the only party representing the people of Katanga, in 1992 requested the Commission to recognize the Katangese Peoples’ Congress as a liberation movement and to recognize the right of Katangese people to secede from Zaire. The Commission stated in its decision: “the Commission is

¹⁴³ McCorquodale, Robert (1994): *Self-Determination: A Human Rights Approach*, International and Comparative Law Quarterly, Vol. 43, p. 880-81

¹⁴⁴ Dugard and Raic, *ibid.*, p. 106

¹⁴⁵ African Commission on Human and Peoples’ Rights, Communication No. 75/92, *Katangese Peoples’ Congress v. Zaire*, 8th Annual Activity Report of the Commission 1994/1995; this Commission is a quasi-judicial body responsible for promoting and protecting human rights throughout the African continent and interpreting the African Charter on Human and Peoples’ Rights.

obligated to uphold the sovereignty and territorial integrity of Zaire, member of the OAU and a party to the African Charter on Human and Peoples' Rights. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire."¹⁴⁶ So the Commission has concluded that Katanga has to implement the right of self-determination internally, but if serious violations of human rights had existed, the Katangese people would have been entitled to external self-determination.

Allen Buchanan shows that the main argument of remedial right theory is actually very similar to the argument against colonization: "the most obvious deficiency of existing international law regarding unilateral secession is the apparent arbitrariness of the restriction to classic decolonization. Presumably what justifies secession by overseas colonies of a metropolitan power is that the colonized are subject to exploitation and unjust domination, not the fact that a body of saltwater separates them and their oppressors. But if this is so, then the narrow scope of the existing legal right of self-determination is inappropriate. The existing right to secession as decolonization appears to be justice-based, yet the idea that serious injustices can justify secession points to a more expansive right."¹⁴⁷ Another illustrative case which should be mentioned is the secession of Bangladesh from Pakistan in 1971, and it showed the potential impact of the safeguard clause of the Friendly Relations Declaration soon after its adoption.¹⁴⁸ The International Commission of Jurists has observed in its 1972 study entitled "The Events in

¹⁴⁶ *Ibid.*, para. 5-6

¹⁴⁷ Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, Oxford University Press, New York, p. 339

¹⁴⁸ In 1971, the Bangladesh secessionist movement was brutally repressed by the Pakistani government in a campaign that included severe human rights violations (500,000 people had died and eight million had fled to India). In response, Indian army invaded East Pakistan, enabling Bengali independence. Another relevant example is the independence of Eritrea. Eritrea was granted autonomy under Ethiopia by the UN General Assembly in 1950, but in 1962 the Ethiopian government abolished Eritrean self-government, inciting a war with the Eritrean People's Liberation Front (EPLF). In 1991 The Ethiopian People's Revolutionary Democratic Front overthrew the Soviet-backed regime of Mengistu Haile Mariam. The new transitional government in Ethiopia agreed that Eritrea, by then effectively controlled by the EPLF, had a right to determine its status in a plebiscite. In 1993 Eritrea achieved independence, representing a case where the revoking of a prior autonomy led to international recognition of secession.

East Pakistan, 1971” that the right to self-determination and the principle of territorial integrity are conflicting principles, and that the safeguard clause gives primacy to the principle of territorial integrity. The Commission then noted: “it is submitted, however, that this principle is subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right to self-determination will revive.”¹⁴⁹ Thus the Commission has concluded that if such circumstances are present, as in the case of Bangladesh, secession as the exercise of a people’s right to self-determination is permissible.

The Friendly Relations Declaration, the Helsinki Declaration, the Vienna Declaration and Programme of Action and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations confirm in safeguard clauses, even if indirectly, that international law allows remedial secession to discrete people within a state in extreme cases of oppression. Crawford points out the link between internal and external self-determination, and concludes that a particular people may be treated by the central government in such a way as to become, in effect, non-self-governing. Gross discrimination against the people of a territory on grounds of their ethnic origin or cultural distinctiveness may define the territory concerned as non-self-governing according to existing criteria and even constitute a case for external self-determination for the people of that territory.¹⁵⁰ Furthermore, in such cases of extreme oppression, the secessionists are entitled to seek external help: “if a government is at the high end of the scale of representative government, the only modes of self-determination that will be given international backing are those with minimal destabilizing effect and achieved by consent of all parties. If a government is extremely unrepresentative and abusive, then much more potentially destabilizing modes of self-determination, including independence, may be recognized as legitimate. In the latter case, the

¹⁴⁹ International Commission of Jurists, *The Events in East Pakistan: A Legal Study*, 1971, *The Review*, 1972, No. 8, p. 46, as quoted in Radan, Peter (2002): *The Break-Up of Yugoslavia and International Law*, Routledge, London and New York, p. 61

¹⁵⁰ Crawford, James (2001): *The Right of Self-Determination in International Law: Its Development and Future*, p. 64-65

secessionist group would be fully entitled to seek and receive external aid, and third-party states and organization would have no duty to refrain from providing support.”¹⁵¹

Nevertheless, a remedial right of secession suggests more question than answers. Some of them are related to the degree of inequality or gravity of human right abuses that would justify an act of remedial secession, and the persistence and longevity of those abuses. Another issue is the matter of measures that need to be exhausted before the claim to secession is put forward, since a consensus exists among theorists and international lawyers that secession can only be a remedy of last resort. There is also the question of necessity of historic ties with the territory whose population wishes to secede, and a related one - whether there is a readily severable part of the state territory that could be a self-sustained unit. Another important consideration is the disruption that secession would cause to international system. What remains clear is that the breach of the internal right of self-determination must be persistent and gross in order to become a matter of international concern.

Several authors believe that Kosovo is an example of remedial secession, or at least has a number of characteristics of remedial secession. This issue will be dealt with in the final part of this study dedicated to the case of Kosovo, but another question then arises. Can this case serve as a confirmation of emerging trends concerning remedial self-determination when members of international community that support the unilateral independence of Kosovo use the ‘unique case’ argumentation? It was mentioned that in order to be qualified as a part of customary international law, the concept of remedial secession needs to have some confirmation in state practice, and so far the only two (successful) cases of secession based on remedial right are Bangladesh and possibly Kosovo, and they show that although the empirical basis is rather thin, it is not completely absent.

Still, one has to keep in mind that states have not accepted secession as a principle of international law, although legal doctrine is satiated with attempts to define general criteria for secession. It is rightly repeated that secession normally creates more problems than it solves, so

¹⁵¹ Scharf, Michael (2003): *Earned Sovereignty: Judicial Underpinnings*, Denver Journal of International Law and Policy, Vol. 33, p. 385

it can never be anything more than a measure of last resort, a *sui generis* solution to a specific problem. That problem always comes down to governments denying human rights, so self-determination represents the right of peoples to stand against oppression and tyranny. This is the exact incitement expressed in the Universal Declaration of Human Rights: “whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”¹⁵² One final remark should be made – a right to remedial secession is not as radical or sweeping as it might seem at first glance, because “remedial secession is geared to protect the present State-centered order; it implies that every State has the ability to neutralize the right of any segment of its population to separate self-determination merely by according a measure of representative government, or protection of human rights. It is therefore basically a conservative principle. What makes remedial secession appear so extraordinary an innovation and so seemingly radical a doctrine is simply that it was adopted by a body of States in which those possessing a truly representative government and adequate protection of human rights constituted a distinct minority.”¹⁵³ And Benedict Kingsbury’s warning concerning remedial self-determination as a tool for freedom of oppression should not be ignored: “the argument from decolonization has been reinforced by practice suggesting that self-determination in the strong form as a right to establish a separate state may be an extraordinary remedy in distinct territories suffering massive human rights violations orchestrated by governing authorities based elsewhere in the state... But the far-reaching argument that self-determination in this strong form of statehood or almost complete autonomy is essential as a general precondition for human rights does not establish which groups or territories are the units of self-determination for purposes of human rights enhancement; nor does it overcome legitimate concerns about the threats to human rights and to human security posed by repeated fragmentation and irredentism. The remedial human rights justification for self-determination, while persuasive in some cases, is most unlikely to become normal rather than exceptional unless the sovereignty and legitimacy of states declines precipitously.”¹⁵⁴ With this we turn to the question which groups or territories are the units of

¹⁵² General Assembly of the United Nations, Universal Declaration of Human Rights, the 10th of December 1948, A/RES/217A (III), 3 UN GAOR (Resolutions, part 1), preambular para. 3

¹⁵³ Buchheit, Lee, *ibid.*, p. 222-223

¹⁵⁴ Kingsbury, Benedict (2000): *Reconstructing Self-Determination: A Relational Approach*, in Aikio and Scheinin (eds.): *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Institute for Human Rights, Abo Akademi University, Turku, p. 23

self-determination – a question equally complex and controversial as the right to remedial secession.

11 *Who are the ‘people’? Minorities as ‘peoples’ – the return of the Wilsonian concept*

In the heart of every movement for independence lies some form of exclusion. Minorities that want to secede usually suffer injustices, which range from discrimination and reduced possibilities of participation to severe violence or even ethnic cleansing. Subsequently, minorities are the best indicator of politics of exclusion. They are a group that is different than the majority, whose interests cannot always be fulfilled, and all societies contain such numerically inferior groups. They are the best markers of the state of human rights in a certain society in general, since they become the first and inevitable targets of oppressive governments, and the position of minority groups and the state of their rights always point to the overall position of peoples and human freedoms in a certain territory. However, violence and abuse do not come only from the side of sovereign state, but often from the secessionist movement itself. Some of these movements turn to violence and terrorism at one point, sometimes only when peaceful resistance and legitimate means gave no result. Usually both sides in a secessionist conflict believe that unilateral action is justified and that their response is supported by law or even above it.

This is why international law and authors that interpret it tend to emphasize the importance of peace in stability in international community. “If every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult to achieve.”¹⁵⁵ The forces of secession are, clearly, in collision with this need for order. On the other hand, the tyranny of the majority and the vulnerability of minorities within sovereign states lead to the development of mechanisms of minority protection in international law and international politics, and the right of internal self-determination is one of them. Although an ethnic group within a state may claim that its interests

¹⁵⁵ United Nations Secretary-General, *An Agenda for Peace*, Report of the Secretary General to the Security Council, the 17th of June 1992, UN Doc. A/47/277-S/24111, para. 17

are best served by independent statehood, secession must remain a last remedy, only to be used when all other political and legal means are proven unsuccessful. This is why minorities seek to be confirmed as ‘peoples’, but they do not possess a right to external self-determination under international law, as they, unlike ‘peoples’, usually lack an attachment to a particular territory. Christian Tomuschat points out that the classification issue is crucial. “According to Article 1 of the two International Covenants on human rights, not every people, but only a people, has the right to self-determination. If every group that qualifies as a people in the ethnic sense were to be considered a people under that provision, the present legal position would be marked by a blatant inconsistency. On the one hand, as shown above, the right of self-determination always includes a right to independent statehood, on the other, however, all relevant international instruments are adamant in rejecting a right of secession except as a remedy of last resort. It is for this reason that for the purposes of self-determination peoples are normally defined in a strictly juridical sense.”¹⁵⁶ The two International Covenants on human rights state that self-determination is an action for *all* peoples. Minority rights issues, however, are covered under Article 27 and fall short of the right to self-determination. Despite recent developments, current international law is seriously disregarding the demands of national, cultural, religious or linguistic minorities. This state stems from the paramount importance of the territorial integrity and international stability for states which are, in the end, the main creators of international law. States are therefore reluctant to deal with the rights of groups, because of fear that such rights might lead to separatist demands which could threaten their territorial integrity, especially if minorities within their borders share identity with populations across those borders. This leads to a situation in which minorities become seriously protected by law only when they are endangered. The claim that self-determination is appropriate for ‘peoples’, not for minorities, turns the focus to the question whether the separatist group constitutes a ‘people’, that needs to be ethnically, linguistically, religiously or racially distinct from the dominant group in the existing state.¹⁵⁷

So far it was shown that the question of ‘peoples’ that have a right to self-determination according to international legal instruments remains unanswered. Better to say, it has multiple answers but none of them seems able to induce consensus among scholars and international

¹⁵⁶ Tomuschat, Christian (1993): *Modern Law of Self-Determination*, p. 15-16

¹⁵⁷ Pomerance, Michla (1982): *Self-Determination in Law and Practice*, Martinus Nijhoff Publishers, The Hague, p.

lawyers, not to mention in the international community. We embark on the analysis of the immensely complex and important matter of subjects of self-determination by starting with the most controversial category – minorities. Kristin Henrard notices that the UN practice is predominantly ambiguous on the question whether ethnic groups within a state are entitled to self-determination and that there are very divergent opinions - “in this regard the following positions can be distinguished: those who make a radical distinction between minorities and peoples, those who do not exclude a possible overlap between both concepts and finally those who take a more central position as they emphasize that the minority should take part in the exercise of the self-determination of the ‘people’ in globo. Overall, there seems to be a growing acceptance that minorities (should) benefit in some way and to some extent from the right to self-determination.”¹⁵⁸ This issue is extremely important, because the right of self-determination is granted to ‘peoples’, but that term is used loosely and the instruments of international law have never defined it. There are, however, developments in international law regarding the scope and content of the right of self-determination that provide for consideration of demands made by ethnic groups. Ofuatey-Kodjoe has warned us more than 35 years ago that narrow and parochial use of the right of self-determination, when the UN Charter and subsequent declarations clearly state that the right of self-determination belongs to all oppressed peoples, is what makes the application of the principle to ethnic minorities impossible. “This represents a serious *lacuna* in the regulation of the relations between the various groups in the multi-ethnic societies and the guarantee of the rights of minorities. In that respect, we are back to settling issues involving self-determination by force of arms, as was the case in both Bangladesh and Biafra. These two cases provide us with a grim warning of what the future may have in store for international peace and security. They are not only examples of the new demands for self-determination that are likely to be advanced by ethnic minorities on a widespread basis, they are also examples of the sheer savagery with which these demands will be fought.”¹⁵⁹ These examples showed that because there are at present no customary international rules regulating the equilibrium between the principles of self-determination of peoples and territorial integrity of states, in practice the solution is sometimes imposed by the use of force. Practice taught seceding peoples that if they manage to keep control over their territories for a sufficient period of time, there is a greater

¹⁵⁸ Henrard, Kristin, *ibid.*, p. 292

¹⁵⁹ Ofuatey-Kodjoe, Wentworth, *ibid.*, p. 187

chance they will eventually be recognized as states. However, while people's rights to self-determination might constitute a threat to the territorial integrity of states, minority rights do not, because the legal instruments and practice of states and international organizations make clear distinction between people's rights and minority rights. The essence of this distinction is that peoples have the right to self-determination which includes its external dimension, while minorities possess only the right to internal self-determination.

After World War I the original Wilsonian interpretation of self-determination has targeted minority groups within states as holders of the right of self-determination. After World War II the situation has changed and peace and order have been proclaimed as the ultimate goals of the international community. The dominant interpretation of 'people' became a territorial one – 'people' was related to an entire population of territorial entity, be that entity a state or a colony. States indeed tend to "tread carefully when formulating law that could compromise their international integrity".¹⁶⁰ In the framework of decolonization, primary definition of 'peoples' were the inhabitants of colonies, but the contexts of self-determination was more complex in the period between the two world wars. Hannum lists five different uses of the term 'peoples' in the 1919-1945 period to which the principle of self-determination applies: a people living entirely within a state ruled by another people (the Irish before 1920); peoples living as minorities in various countries without controlling a state of their own (Poles in Russia before 1919); a people living as a minority group in a state but understanding themselves as forming part of the people of a neighboring state (Hungarians in Romania); a people dispersed throughout many separate states (German people in various European states); and a people who constitute a majority in a territory under foreign domination (colonial regimes).¹⁶¹ However, when the assiduous link between human rights and the right of self-determination is taken into consideration, as well as the fact that one of the first attempts to apply the principle of self-determination was after World War I when it was applied to minorities, it appears that there is no reason to deny the right to self-determination in its internal aspect or in a strictly remedial form to territorially concentrated ethnic groups within a state which have an attachment to a particular territory.

¹⁶⁰ Castellino, Joshua, *ibid.*, p. 47

¹⁶¹ Hannum, Hurst, *ibid.*, p. 35

In the era of decolonization the right of self-determination was primarily applied to entire populations of dependent territories, and this territorial interpretation rendered ethnic identity as irrelevant. Since self-determination extends beyond the colonial context, the matter of applicability of self-determination to subgroups within a state became very important in the post-colonial period. As previously discussed, relevant legal instruments addressing the right of self-determination, such as the Friendly Relations Declaration, the Helsinki Final Act, the Charter of Paris and the Vienna Declarations show that, in addition to the entire population of the state, distinct groups within the state have the right to internal self-determination – the right to participate in the decision-making process of the state. Also, every one of these documents refers to the principle of territorial integrity, stating that the right of self-determination may not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states. This implies that subgroups within states are envisaged as holders of the right of self-determination, because if nations were the only holders of the right, this emphasis on the principle of territorial integrity would be superfluous. In addition, legal instruments that deal with self-determination simultaneously use terms ‘peoples’, ‘nations’ and ‘states’. It follows that subgroups or ethnic groups within states, besides the entire population of the state, have the right of internal self-determination, so the question of group characteristics of this subject of self-determination presents itself. Therefore a good starting point for the analysis of this complex issue is its most divisive category – minorities.

There are authors whose work focuses on the rights of minorities and the importance of self-determination for preservation of their identity. For instance, Karen Knop tries to analyze the relation between interpretations of self-determination and identity and identifies “the activity of interpretation in an international community that historically has marginalized precisely the groups for whom the concept of self-determination has the greatest significance”¹⁶². The problem is that a great deal of controversy related to the meaning and definition of the term ‘minority’ remains unresolved. Further difficulties arise from the fact that governments are relatively free in determining who is a minority. Adding complexity to the issue is the fact that many minorities

¹⁶² Knop, Karen, *ibid.*, p. 50

are divided by international borders, so there are often third-party interests in ensuring and managing the rights of minorities.

12 *Defining minorities and their protection*

Various demands for recognition of identity, equal treatment, forms of autonomy and self-determination being made by minority groups all over the world increasingly attract attention of international community and force it to deal with these issues. Minority protection today has a universal character, primarily as a result of the activity of the UN system. Minorities and protection of their rights was, of course, a subject of bilateral and multilateral agreements between states in past centuries, but that was a protection of particular, clearly identified groups in a specific historical context, not principles that could be applied universally. As already mentioned, after World War I provisions on minorities were a part of the treaties which the Allied Powers concluded with states that had sided with the Central Powers. Guarantees that were provided to minorities during the inter-war period by the League of Nations collapsed due to German expansionism. After World War II, states have learned the lesson from Germany's use of German minorities in the neighboring countries, and were reluctant to establish international law standards especially for minorities, preferring to construct general human rights system instead.¹⁶³ This is why the 1948 Universal Declaration on Human Rights and the 1950 European Convention on Human Rights lack minority rights clauses, and Article 27 of the International Covenant on Civil and Political Rights remains the main general minority rights treaty provision of global application, but with somewhat modest scope.

In the 1990s the situation began to change gradually, as the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and 1998 Council of Europe's Framework Convention for the Protection of National Minorities

¹⁶³ As Hurst Hannum notices "instead of adopting the League of Nations approach of attempting to resolve the territorial-political problems posed by the existence of minority groups within a state (particularly those which had linguistic or ethnic ties to neighboring states) by boundary adjustments which might more accurately reflect a true nation-state, the drafters of the UN Charter seemed to assume 1) that European and other minorities would be satisfied if their individual rights, particularly those of equality and non-discrimination, were respected; and 2) that recognition of the right of self-determination would be adequate to resolve the problem of colonialism." Hannum, Hurst (1988): *Recent Developments in International Protection of Minority Groups*, in Macartney, Allan (ed.): *Self-Determination in the Commonwealth*, p. 37

show.¹⁶⁴ Other relevant documents were adopted at the European level: the Conference on Security and Cooperation in Europe adopted in 1990 the Copenhagen Document which strengthened both the classical human rights and the protection of national minorities, and this political declaration was followed by the creation of the position of High Commissioner on National Minorities in 1992, while the Council of Europe adopted the European Charter for Regional and Minority Languages and the aforementioned Framework Convention for the Protection of National Minorities, both of which entered in force in 1998.¹⁶⁵ However, their scope also remains somewhat modest and many states are reluctant to support such provisions that may encourage minority group demands. Nevertheless, these documents present a radical departure from the previous approach and support the idea that minorities should enjoy the

¹⁶⁴ There are other UN instruments relevant to minorities, even if they do not deal with minorities directly (but pose, for instance, non-discrimination standards from which they can benefit): the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1989 Convention on the Rights of the Child, UNESCO's 1960 Convention against Discrimination in Education, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion of Belief, as well as instruments drawn up by other intergovernmental organizations, such as the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the European Charter for Regional and Minority Languages adopted in 1992 by the Council of Europe, the 1991 CSCE Report of the Geneva Meeting of Experts on National Minorities, the 1958 Convention concerning Discrimination in Respect of Employment and Occupation by the ILO or the ILO 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries.

¹⁶⁵ Hurst Hannum outlines the general content of minority rights contained in the aforementioned legal instruments. He writes that, bearing in mind that specific instruments contain different provisions and that some apply only to a relatively small number of states, minority rights today include the following:

- Protection of one's physical integrity and identity as a member of a minority, including the prohibition of forced assimilation or population transfers that are designed to minimize or interfere with minority cultures. Whether or not an individual is a member of a minority group is up to the individual, and whether or not there is, in fact, a minority within a particular country is a matter of fact that does not depend on formal recognition by the state.
- Non-discrimination and equality of treatment.
- The right to enjoy one's own culture.
- Freedom of religion.
- The right to use one's language in public and in private. This right may extend to the right to use one's language in communicating with governmental administrative authorities if there is need to do so in areas where minorities constitute a substantial proportion of the population. It may also include the right to recognition of minority-language place names and personal names, parallel to use of the majority or official state language.
- The right to establish minority associations and institutions, including schools. Where necessary and feasible, primary school instruction should be in the minority language or, at least, there should be provision for minority children to be taught their mother tongue. The extent to which states are obligated to provide funds for minority education varies from instrument to instrument.
- The right to maintain contacts with other members of the group, including across frontiers.
- The right to effective participation in cultural, economic and political life, including the right to participate in decision making on issues which might be of particular importance to minorities. The form that such participation might take is generally left to the discretion of national authorities.

Hannum, Hurst (2006): *Self-Determination in the Twenty-First Century*, in Hannum and Babbitt (eds.): *Negotiating Self-Determination*, Lexington Books, Oxford, p. 72

greatest possible degree of self-government. Minority rights have been a hard matter for the international law to handle, but the state's treatment of minorities has progressively become a subject of international concern. Their social, political, cultural and religious particularities pose serious questions to the international community. The complexity of the matter is enhanced by the fact that "the existence of diverse minority situations and approaches to the problem has also created the need to employ different minority designations. These include 'ethnic minorities', 'racial minorities', 'religious minorities', 'cultural minorities', 'linguistic minorities', 'national minorities', 'indigenous or aboriginal minorities' and 'sexual minorities'. This is also why we see distinctions drawn between various minority groups, e.g. between 'privileged' and 'underprivileged' minorities, 'national minorities and immigrants', 'static and dynamic minorities' or between minorities that are 'established', 'settled', or 'historical', and those which arrived recently."¹⁶⁶

No comprehensive definition of the term 'minority' has been adopted in international standards. It is clear that this concept remains difficult to define, due to its intricacy and political sensitivity, but there are certain essential elements that appear in most definitions. A distinct authority in this field, Francesco Capotorti, embarked on the problematic issue of defining minority by accepting to prepare a study pursuant to Article 27 of the International Convention for Civil and Political Rights which reads: "in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Thornberry notices several relevant issues concerning this article. First is that self-determination means full rights in the cultural, economic and political spheres. Secondly, the rights of minorities are enumerated and finite, but they do not include political control. Thirdly, minorities do not have collective rights, it is 'persons belonging to such minorities' who are accorded rights. Finally, the opening phrase of the article 'in those States in which... minorities exist' practically invites states to deny that they exist, and many states have

¹⁶⁶ Gayim, Eyassu (2001): *The Concept of Minority in International Law: A Critical Study of the Vital Elements*, University of Lapland Press, Rovaniemi, p. 7-8

responded to the invitation.¹⁶⁷ Even the phrase ‘shall not be denied the right’ seems to exclude obligation on states to promote minority identity.

Definition of the term ‘minority’ was a subject of debate in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Capotorti formulated a definition of a minority, which is probably the most quoted one concerning this question. According to this definition a minority is a group which is “numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”¹⁶⁸ The UN Sub-Commission subsequently asked Jules Deschênes to formulate another definition of a minority (which it did not approve in the end), so his proposal was: “a group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious, or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one

¹⁶⁷ Thornberry, Patrick (1989): *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, International and Comparative Law Quarterly, Vol. 38, p. 880-81; however, the Human Rights Committee has demanded that France addresses minority issues in its periodic report and concluded: “the Committee takes note of the declaration made by France concerning the prohibition, prescribed under article 27 of the Covenant, to deny ethnic, religious or linguistic minorities the right, in community with members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language. The Committee has taken note of the avowed commitment of France to respect and ensure that all individuals enjoy equal rights, regardless of their origin. *The Committee is, however, unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities.* The Committee wishes to recall in this respect that the mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country, and their entitlement to the enjoyment of their culture, the practice of their religion or the use of their language in community with other members of their group.” United Nations Human Rights Committee, Concluding Observations of the Human Rights Committee, the 4th of August 1997, UN Doc. CCPR/C/79/Add.80, para. 24

¹⁶⁸ Capotorti, Francesco (1991): *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York, p. 96; He also wrote that “application of the principles set forth in article 27 of the Covenant cannot, therefore, be made contingent upon a ‘universal’ definition of the term ‘minority’, and it would be clouding the issue to claim the contrary. Moreover, the question has so often been complicated by a desire on the part of some Governments to restrict or refine the definition so that no minority is recognized as existing in their territory, and that consequently no international obligations arise for them in relation to the protection of minorities. If, however, the problem is examined without political prejudice and from a truly universal point of view there can be no gainsaying that the essential elements of the concept of a minority are well known, and that the only point at issue as far as the definition is concerned is whether an indisputable objective ‘core’ can be widened or restricted by means of a few controversial considerations.” *Ibid.*, para. 564

another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.”¹⁶⁹

As Asbjørn Eide points out, these definitions turned out to be too controversial for the Sub-Commission, where considerable difference in opinions existed, so the question of definition was abandoned. He identified the major problems with these definitions – one arises from efforts to have a common definition of minorities that is applicable to very different situations; the second difficulty is related to the problem of defining the beneficiaries of rights before the content of their rights is made clear; and there are also controversies regarding Article 27 over the question whether states have only negative obligations or also positive obligations.¹⁷⁰ Since there is a high degree of resemblance between the two definitions (which confirms that certain essential elements are common to most definitions of a minority),¹⁷¹ only Capotorti’s will be briefly examined. Definition has objective and subjective factors. Objective factors include ethnic, religious or linguistic characteristics different from the majority, numerical inferiority, non-dominant position and the nationality of the state concerned. Subjective element is a sense of solidarity, a collective will to preserve culture, traditions, religion or language. The determining factors that distinguish a minority group from the rest of the population are ethnic, religious or linguistic characteristics - they are necessary and sufficient for one group of people to vary from another group. “These ‘inborn’ or ‘inherited’ characteristics are so ‘natural’ and vital to the person concerned that to expect such a person renounce them would be tantamount to asking him/her abandon his/her identity. It is no wonder, therefore, that these characteristics have been and

¹⁶⁹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Proposal Concerning a Definition of the Term ‘Minority’ Submitted by Mr. Jules Deschênes, the 14th of August 1985, UN Doc. E/CN.4/Sub.2/1985/31, p. 30

¹⁷⁰ Eide, Asbjørn (1993): *In Search of Constructive Alternatives to Secession*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, p. 158

¹⁷¹ The European Commission for Democracy through Law (the Venice Commission), an advisory body of the Council of Europe suggested a definition of the term ‘minority’ that includes ethnic, religious or linguistic and national minorities as a part of a proposal for the European Convention for the Protection of Minorities:

“1. For the purposes of this Convention, the term ‘minority’ shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language.

2. Any group coming within the terms of this definition shall be treated as an ethnic, religious or linguistic minority.

3. To belong to a national minority shall be a matter of individual choice and no disadvantage may arise from the exercise of such choice.” As quoted in Henrard, Kristin, *ibid.*, p. 26-27; She concludes that there is no general agreement on the definition of a minority either at the international or at the European level. Instead, there is a transition toward a more pragmatic approach regarding this definitional issue. *Ibid*, p. 30

continue to be exploited by local political leaders to rally individuals around political objectives, such as the struggle for self-determination.”¹⁷²

Numerical inferiority is an important element of the definition, although cases of reverse minority can exist (for example South Africa), and the Sub-Commission has stated that account should be taken of oppressed majority living under minority regimes, in a sense that it deserves protection as if it were a minority. No numerical threshold was ever determined, but the size of the minority group is related to the width of state obligations towards that group. The exclusion from power is another objective element of the definition. Minorities and majorities are always in a correlation that has a hierarchical structure, so majorities have a dominant position in political, economic, social and cultural domain. Louis Wirth defines a minority “as a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of minority in society implies the existence of a corresponding dominant group enjoying higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of the society.”¹⁷³ It needs to be mentioned that the non-dominant position is not explicitly stated in the UN documents, although it is possible that it is implied, because what is the point of aiming at equality with the majority group if there is no hierarchical relationship. Numerical inferiority is, therefore, related with the non-dominant position. However, it is possible that several minorities exist within a multinational state in which none of these groups represents a convincing majority.¹⁷⁴

Nationality (understood as having citizenship by most authors, including the UN Rapporteurs) is another requirement that separates the members of minorities who are not citizens of the state from minorities in a narrow sense. Law and policies of most countries refer to members of their minorities as nationals or citizens, and the phrase ‘national minority’ is used in many

¹⁷² Gayim, Eyassu, *ibid.*, p. 18

¹⁷³ Wirth, Louis (1970): *Minority Problems*, in Kurokawa, Minako (ed.): *Minority Response: Comparative Views of Reactions to Subordination*, Random House, New York, p. 34

¹⁷⁴ “Non-dominance does not necessarily imply being subordinate or oppressed, which tends to support the view that in a plural society the several ethnic, religious and linguistic groups could all be considered minorities. It is quite possible that none of the population groups in such a society are in a dominant position.” Henrard, Kristin, *ibid.*, p. 36

international and regional treaties and conventions. The reasoning behind this broadly accepted position is that states are responsible for the members of minorities who are their citizens, while aliens have their own governments for protection. Different point of view is that distinctions between aliens and citizens are becoming irrelevant since international human rights law protects human rights on universal basis. For instance, the Human Rights Committee has made it clear that Article 27 of the International Convention for Civil and Political Rights (where the term persons, not citizens was used) protects even migrant workers and tourists.¹⁷⁵ Another objective element, although not directly expressed in the definitions, needs to be mentioned. The so-called time-element is the requirement that a minority group must have a long-term presence in the territory concerned in order to differ from foreigners who enter and remain in a country on a temporary basis (migrant workers, refugees, immigrants, stateless persons, etc.).¹⁷⁶ Although the Human Rights Committee adopted a broader point of view, and although these foreigners often find themselves facing similar challenges as the members of minority groups, they were (normally) exercising a free choice when coming to a foreign country. They are entitled to enjoyment of human rights without discrimination, but not to minority rights. It would not be sustainable to offer them instant minority protection when they arrive to a foreign country, although it is possible for these groups to become a minority in time (but this process usually lasts several generations). Besides the objective, subjective elements of the definition of a minority need to be taken into account.

Self-identification plays an important role in the Capotorti definition, and the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries specifies in Article

¹⁷⁵ “Article 27 confers rights on persons belonging to minorities which ‘exist’ in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers of even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of a State party, they would, also for this purpose, have the general rights for example, to freedom of association, of assembly and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.” United Nations Human Rights Committee, Human Rights Committee General Comment 23 (50), the 6th of April 1994, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 5

¹⁷⁶ Alfredsson, Gudmundur (2005): *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter on International Law*, in Ghanea and Xanthaki (eds.): *Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry*, Martinus Nijhoff Publishers, Leiden, p. 167

1, paragraph 2, that self-identification shall be regarded as a fundamental criterion for determining groups to which the Convention applies.¹⁷⁷ The sense of solidarity, as a subjective element in the definition generates another important feature – it creates an exclusion from the majority group. That may lead to feelings of isolation which can easily be used by secessionist forces. This solidarity is linked to the need to protect a way of life, to preserve culture, traditions, religion and language. Those are specific values and characteristics that differ in a majority group, so the efforts to preserve these values may be perceived as a threat to the corresponding values of the majority group, and that can multiply the feelings of exclusion.

Despite the existence of objective elements, even the very existence of a minority group can come into question if that group has no awareness of its existence and separateness as a group. The right to identity represents a group right and is central to every system of minority protection.¹⁷⁸ Some authors find that the deprivation of identity is almost as grave as the deprivation of physical right to existence, and the preservation of a separate identity is often a critical issue for minority groups. To deprive a minority of its identity is sometimes seen as a necessary part of nation building, and the idea of ‘national unity’ inspires different ways of denying minorities their rights to separate existence and identity, such as assimilation, integration and other forms of identity loss. From the perspective of group rights, the concepts of culture and ethnicity are very closely connected, almost overlapping. The minority can be perceived as the *Other*, and represent a challenge to the dominant majority and its culture. Since the order, peace and the preservation of the existing system represent the highest goals of the international community, minorities can be seen as an inside threat to these goals of sovereign states. This is intensified by the development of the right of self-determination, so if a group asks for a higher degree of autonomy because it fears for the continued existence of its separate identity, the

¹⁷⁷ International Labour Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, the 27th of June 1989, 72 ILO Official Bull. 59

¹⁷⁸ “Non-discrimination would be a necessary but nevertheless insufficient condition for minority protection. Minorities should additionally be granted the right to the protection and promotion of their cultural identity, which would imply some of the following minority rights, each time depending on the specific circumstances: the right to use their own language, including facilities for publication and reasonable access to radio and television; the ability to provide for the education of their children, which might include the establishment of their own schools; maintenance of minority or traditional religions, in the context of a secular state, or retention of various areas of personal jurisdiction over their members in a religious state, and preservation of sufficient political, economic and environmental control so that the minority is not wholly at the mercy of the dominant culture. This enumeration clearly contains certain forms of autonomy, which once more points to a connection between minority protection and the right to internal self-determination.” Henrard, Kristin, *ibid.*, p. 231

possibility that this demand will be transformed into a demand for independent statehood is always feared.¹⁷⁹ Secession and self-determination were also subjects of discussion in the Sub-Commission. It was noticed that if the rights of minorities and equality were respected, the demands for secession would not be manifested strongly.

One of the popular views among authors is the notion that the internal dimension of the right to self-determination is more consistent with minority protection. This view is compatible with a variable concept of a people, which means that a particular group might constitute a people for the purpose of internal, but not external self-determination. Diverse forms of the right to internal self-determination are available to minorities, like decentralization, regionalization, federalism and other kinds of autonomy. This view is accepted by the UN, when it comes to solving problems that involve minorities. For instance, a 1995 Secretary-General Report titled “Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities” underlined the connection between minority protection and internal self-determination by stating: “as a general rule, solutions to minority problems had to be found within the framework of existing States. Legitimate claims by individuals and groups should normally be accommodated within the State constitutional system by creating adequate political arrangements, structures and procedures. Thus, the starting point of a model world order was that there was no generally recognized right of secession, that State borders were not to be altered except with the consent of the parties concerned, and that weight should not be put on external self-determination. Instead, the focus must be on the creation and pragmatic development of flexible forms of internal self-determination which gave all social groups – majorities and minorities, ethnic and other groups – a fair chance of political autonomy

¹⁷⁹ There are, of course, different interpretations as to why there have been such difficulties in defining minorities and minority rights at the international level. For instance, Hurst Hannum identifies four socio-political realities that render this matter troublesome. First is that the concept of ‘minorities’ does not fit easily within the theoretical paradigm of the state, so minority rights may be seen as contradicting the fundamental basis of society. Second is that this concept is also at odds with the theory of nation-state and its one people-one state rhetoric, as it developed in the eighteenth and the nineteenth centuries. Third is the fear on the part of all countries that the recognition of minority rights will encourage fragmentation and undermine national unity. Finally, there is the unpleasant social reality of widespread discrimination and intolerance based on religion and ethnicity, which is found in all regions of the world. Hannum, Hurst (1988): *Recent Developments in International Protection of Minority Groups*, p. 38-39

and other forms of self-realization.”¹⁸⁰ This connection between minority rights and internal self-determination helps to address the minorities’ needs and can possibly prevent a desire to secede. It is commonly asserted that minorities do not possess a right to external self-determination, and the Committee on the Elimination of All Forms of Racial Discrimination in its General Recommendation 21 was clear on the issue of secession. After recognising the right to internal self-determination for minorities, the Committee concluded that “international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paras. 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.”¹⁸¹

Another group, comparable with minorities, which is sometimes denoted as the holder of the right of self-determination, are indigenous peoples. Gudmundur Alfredsson points out that a written proposal from a tribal summit held by the International Organization of Indigenous Resource Development in 1992 in Denver is representative of mainstream indigenous demands: “indigenous people have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with States, in spirit of coexistence, and freely pursue their cultural, spiritual, economic and social development in conditions of freedom and dignity.”¹⁸² The Declaration on the Rights of Indigenous Peoples had been pending since 1994 before it was adopted in 2007 by the UN General Assembly, because the issue of self-determination for indigenous peoples and its formulation were hard to agree upon.¹⁸³ The right of

¹⁸⁰ United Nations Secretary-General, Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Report by Secretary-General, the 14th of June 1995, UN Doc. E/CN.4/Sub.2/1995/33, para. 71

¹⁸¹ Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation 21, para. 6

¹⁸² Alfredsson, Gudmundur (1993): *The Right of Self-Determination and Indigenous Peoples*, p. 42

¹⁸³ Declaration on the Rights of Indigenous Peoples drawn up by the Sub-Commission on the Promotion and Protection of Human Rights was pending since 1994 before the Commission on Human Rights, until it was finally adopted on the 13th of September 2007 by the UN General Assembly, precisely because the issue of self-determination prevented agreement. Representatives of indigenous peoples demanded incorporation of a version of Article 1 of the 1966 Covenants in the UN Draft Declaration, which states expressly that the right of self-determination belongs to indigenous peoples. A number of states opposed, on the grounds that these groups are not peoples, and have no right of self-determination. However, the declaration mentions the right of self-determination for indigenous peoples in Article 4: “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” Article 5 elaborates: “indigenous peoples have the right to

self-determination for indigenous peoples is disputed for the same reasons as the right to self-determination for minority groups. Most authors opine that both groups have only the right to internal self-determination, and this position is in accordance with international law. It should be noted that indigenous peoples and their representatives do not seek external self-determination, but a greater degree of self-government and autonomy.

The International Labour Organization Convention 169 of 1989 made clear that “the use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”¹⁸⁴ This reservation was made in order to disable transformation of indigenous peoples into entities with international legal personalities. So the term ‘peoples’ is used in indigenous context, but with respect to the aforementioned limitation that it does not include political right to self-determination. Through the UN Declaration on the Rights of Indigenous Peoples, rights are assigned to peoples, not persons, and this implies that some of these rights are group rights. These groups rights are of two sorts: rights of self-government, understood as rights to autonomy, not independent statehood, and rights to ‘cultural integrity’, understood to include not only rights against interference with cultural activities, but also rights to positive action by states to help indigenous peoples to preserve and strengthen their cultures.¹⁸⁵ One can easily agree with Patrick Thornberry that “it seems possible that international law will accept the self-definition as peoples of the world’s indigenous peoples more readily than it will accept the claims of minorities at

maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

Obviously, internal self-determination is the only aspect of this right available to indigenous peoples. General Assembly of the United Nations, Declaration on the Rights of Indigenous Peoples, the 13th of September 2007, A/RES/61/295, 61 UN GAOR Supp. (No. 53)

¹⁸⁴ Article 1 of the ILO Convention No. 169

¹⁸⁵ Buchanan distinguishes articles of the UN Declaration on the Rights of Indigenous Peoples which relate to intrastate autonomy and articles that relate to cultural integrity. He explains that there are four distinct and mutually compatible justifications for developing international legal rights to intrastate autonomy for indigenous peoples. These justifications are remedial, so the chief concern is the rectification and prevention of human rights violations. First, the creation of intrastate autonomy regimes for indigenous peoples can be required in order to restore self-government of which these peoples were deprived by colonization. Second, intrastate autonomy can provide a non-paternalistic mechanism for protecting indigenous individuals from violations of their individual human rights and for counteracting the ongoing detrimental effects of past violations of their individual human rights or those of their ancestors. Third, it may be necessary to establish or augment institutions of self-government in order to implement settlements of land claims in cases where lands that were held in common were lost due to treaty violations. Fourth, self-government is a superior alternative to the incorporation of indigenous customary law in the state’s legal system. Buchanan, Allen, *ibid.*, p. 415-421

large.”¹⁸⁶ This implies that for a number of governments indigenous peoples represent a historical and politically accepted group, while a much wider group of ‘minorities’ cannot be paralleled when it comes to their comparable claims to self-determination. Crawford points out that a more useful distinction than categories of groups such as national, ethnic, linguistic, religious minorities or indigenous populations can be drawn. That is a distinction “between the people of the state as a whole, more or less dispersed minorities which are in some way distinctive in terms of ethnicity, language or belief, and ‘concentrated’ minorities forming a distinctive unit in a particular area of the state and constituting a substantial majority in that area. All these groups can, depending on the circumstances, properly claim to be ‘peoples’. But the consequences of the recognition of that claim must also depend on the circumstances, if the rights of others involved are not also to be denied.”¹⁸⁷

A question that now arises is whether and when it is possible for minorities to constitute a people, since ‘all peoples’ have the right to self-determination. Self-determination and minority rights are closely connected; indeed they are ‘two sides of the same coin’.¹⁸⁸ There are many similarities in characteristics of peoples and minorities. Numerical element is not essential for the definition of either people or minority. A more important element for distinguishing minorities and peoples which possess the right to external self-determination under international law is that minorities, unlike ‘peoples’, usually lack an attachment to a particular territory. So far, it was shown that peoples and minorities are distinct legal classifications, although they are rather similar from sociological and anthropological perspective. Minorities are entitled to minority rights, in addition to individual rights, and they are normally not recognized by the international community as ‘peoples’ entitled to external self-determination. This means that they are entitled to internal self-determination which, if effective, precludes external self-determination. We should turn again to the evolution of the concept of self-determination. It should be determined how the concept of self-determination, which was a tool of decolonization, became an instrument in the post-Cold War world for the groups within states which claim the right to democratic governance, autonomy, and even statehood.

¹⁸⁶ Thornberry, Patrick (1993): *The Democratic or Internal Aspect of Self-Determination with Some Remarks to Federalism*, p. 128

¹⁸⁷ Crawford, James, *ibid.*, p. 64

¹⁸⁸ Thornberry, Patrick (1989): *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, p. 867-889

13 *The meaning given to the “self” (what does the term “peoples” mean)*

Self-determination is often characterized as a vague and ambiguous concept, and it is used in different contexts. To repeat probably the most quoted words on self-determination, written by Ivor Jennings more than fifty years ago: “nearly forty years ago, a professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seems reasonable: let the people decide. It is in fact ridiculous, because the people cannot decide until someone decides who are the people.”¹⁸⁹ The term ‘peoples’ is often related to very different social groups: a community of people which live in their own state; ‘people’ of a colonial state; it is often identified with nation; sometimes minorities are denominated as ‘peoples’ etc. There has been little progress since 1955 when the UN Secretary-General concluded that “suggestions were made to the effect that ‘peoples’ should apply to ‘large compact national groups’, to ‘ethnic, religious or linguistic minorities’, to ‘racial units inhabiting well-defined territories’, etc. It was thought, however, that the term ‘peoples’ should be understood in its most general sense and that no definition was necessary. Furthermore, the right of minorities was a separate problem of great complexity.”¹⁹⁰ The UN instruments are clear in separating the rights of peoples and rights of persons belonging to minorities.

When trying to determine whether a certain group represents a people, first we need to distinguish between objective and subjective criteria which define a ‘people’. Objective criteria, despite the name, are arbitrary and somewhat variable. The identification of objective criteria is related to anthropological features of a group, such as race, ethnicity, culture, language, history, religion, traditions (and a common territory according to some views – people should have an attachment to a piece of territory). Subjective criteria, on the other hand, refer to the will and choice of that group to be considered a distinct people, a consciousness of identity and a will to preserve it. This identification is subjective because it is liable to change. The subjective, as well

¹⁸⁹ Jennings, Ivor (1956): *The Approach to Self-Government*, Cambridge University Press, Cambridge, p. 55-56

¹⁹⁰ United Nations Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, 1955, UN Doc. A/2929, as quoted in Gayim, Eyassu, *ibid.*, p. 166

as the objective elements (common features of the group) can change over time. These criteria are interrelated and a 'people' cannot be defined just on objective grounds.¹⁹¹ One of the things which can be stated with certainty is that a 'people' can be described as a mutable concept, possibly carrying different meanings for different rights.¹⁹²

According to relevant legal instruments discussed above, beneficiaries of the right to self-determination are 'peoples'. Those instruments do not define this term, so in most cases practice has relied on territorial entities with certain historical background. When Wentworth Ofuately-Kodjoe gave his definition of the beneficiary of the right of self-determination, he made one important remark - "the beneficiary of the right of self-determination is a self-conscious politically coherent community that is under the political subjugation of another community."¹⁹³ The relevant thing that he noticed is that the teleological dimension of the beneficiary is related to gaining freedom from political domination of another group and gaining control of its own destiny. Although legal documents state that self-determination is a right that belongs to all peoples, it is clear that there is no point in applying this right to a people, group, or community that is in effect self-governing. The right is exercised in situations when a group is oppressed, dominated, subjugated in order to remedy that situation. Claims of certain groups have not been accepted precisely on this ground (Quebec). Another observation should be made – the term 'people' is not to be used (although it often is) as a synonym for a state or nation, otherwise these terms would not have been used in legal documents simultaneously.

¹⁹¹ There will be no attempts to define a 'people' in this study, but according to the UNESCO Experts there are characteristics "inherent in a description (but not a definition) of a people... A group of individual human beings who enjoy some or all of the following common features:

- a) a common historical tradition;
- b) racial or ethnic identity;
- c) cultural homogeneity;
- d) linguistic unity;
- e) religious or ideological affinity;
- f) territorial connection;
- g) common economic life."

This description also makes reference to number and to the consciousness or the will to be a people, and to institutions which express characteristics and identity. Problem is that this description can be easily confused with definitions of minority, due to similarity of characteristics. The UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations, 1990, as quoted in Thornberry, Patrick (1993): *The Democratic or Internal Aspect of Self-Determination with Some Remarks to Federalism*, p. 124-125

¹⁹² *Ibid.*

¹⁹³ Ofuately-Kodjoe, Wentworth, *ibid.*, p. 156

There are, basically, two major conceptions of ‘peoples’, present not only in international law during the last two centuries, but also in modern literature on self-determination. First is the ethnic conception which was dominant until World War II, according to which a ‘people’ is an ethnic group residing on its historical homeland. As maintained by the Wilsonian principle of self-determination, ‘peoples’ entitled to the right of self-determination are ethnic groups and many of these groups gained political independence after the collapse of Ottoman, Austro-Hungarian and German empires. According to this concept, boundaries should be drawn around ethnic groups, so that all members of a group, if possible, belong to the same state. Although the second, civic conception became predominant after World War II due to the activity of the UN, ethnic conception is still influential, both among scholars and in praxis among secessionist movements. International law in the period after World War II insisted that ‘peoples’ entitled to self-determination are not ethnic groups, but ‘peoples’ living under colonial rule, majorities within accepted political units, so this territorial unit practically defined the ‘people’. Clearly, no matter how complex this question may be, one category of ‘peoples’ is beyond debate – colonies. That means that categories of trust territories and non-self-governing territories stipulated in the UN Charter are beneficiaries of this right beyond any doubt. All trust territories as well as almost all non-self-governing territories have achieved self-determinations, and that meant the creation of a vast number of new states (since the exercise of self-determination has most often resulted in independence) in a relatively short period of time. Since colonies exercised their right to self-determination, the debate shifts to the question whether ‘peoples’ can mean more than inhabitants of colonies. A number of respected scholars and international lawyers give a negative answer and associate self-determination with decolonization only. For instance, Hannum states that non-colonial people or minority within a state have not yet acquired the right to independence or self-determination under international law: “although several authors have argued that some form of a ‘right to secession’ *should* be recognized as part of the right to self-determination, constant state practice and the weight of authority require the conclusion that such a right does not yet exist”.¹⁹⁴ He, however, further asserts that the *principle* of self-determination

¹⁹⁴ Hannum, Hurst (1990): *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, p. 49; however, he also writes that there are two instances in which secession, as a form of external self-determination, should be supported by the international community. The first concerns cases of massive repression and discriminatory human rights violations by central authorities, and the second a situation where “reasonable

will continue to be a major political force and that developing concepts of human rights, minority rights and indigenous rights may contribute to its strengthening.

Another category of self-determination that is regarded as non-controversial is foreign domination, since it is mentioned in several declarations and resolutions of the UN, such as the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1970 Declaration on Friendly Relations, the 1993 Vienna Declaration and Programme of Action, etc. It is based on an argument called ‘wrongful taking’ and it is related to the forcible taking of territory or annexation against a sovereign state.¹⁹⁵ Also undisputed is a right to secession which arises from domestic law, from the constitutions of federations. The whole people of a state is another unquestioned unit of self-determination. Some authors claim that international law recognizes additional categories of ‘peoples’. They focus on the wording of Article 1 of the 1966 Covenants on Human Rights, asserting that the right of self-determination belongs to all peoples and includes only a portion of the population of an existing state. Crawford concludes that there are new developments in the field of international law (*de lege ferenda*) in accordance with which the term ‘peoples’ is coming to be seen as more inclusive, and is not limited to the people of the state as a whole.¹⁹⁶

The Supreme Court of Canada has also referred to the bearers of the right of self-determination and confirmed these emerging trends: “international law grants the right to self-determination to ‘peoples’. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of ‘peoples’, the result has been that the precise meaning of the term ‘people’ remains somewhat uncertain. It is clear that ‘a people’ may include only a portion of the population of an existing state. The right to self-determination

demands for local self-government or minority rights have been arbitrarily rejected by a central government.” Hannum, Hurst (1998): *The Specter of Secession, Responding to Claims for Ethnic Self-Determination*, Foreign Affairs, Vol. 77, p. 15

¹⁹⁵ “Interpreted as corrective, the right of self-determination of peoples restores power or territory to a people on the grounds that the taking was wrongful in a deeper sense. The case of the Baltic states has been analyzed as a wrongful taking both in the formal, inter-state sense and in this sense of self-determination.” Knop, Karen, *ibid.*, p. 70

¹⁹⁶ Crawford, James (2006): *The Creation of States in International Law*, p. 121

has developed largely as a human right, and is generally used in documents that simultaneously contain references to ‘nation’ and ‘state’. The juxtaposition of these terms is indicative that the reference to ‘people’ does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect territorial integrity of existing states, and would frustrate its remedial purpose.”¹⁹⁷ Peter Radan notices that the safeguard clause of the Declaration on Friendly Relations stipulates that a state’s territorial integrity is conditional upon it guaranteeing representative government to all of its peoples. If a state’s territorial integrity is not protected by safeguard clause, due to its failure to comply with the obligation of providing representative government, its territorial integrity is justifiably violated by the act of secession of a group within the state. What is critical, given that safeguard clause envisages the right to secede, a people cannot be defined as the entire population of a state: “if secession is, as will be argued, the exercise of the right of ‘a people’ to self-determination, a people cannot at the same time be the entire population of a state as well as a group that secedes from that state. The only logical conclusion is that, because paragraph 7 sanctions secession, and because secession is by a people that necessarily forms only part of the population of a state, it is impossible for the entire population of a state to be a people.”¹⁹⁸

Authors that consider additional categories of ‘peoples’ claim that several different meanings of the term ‘people’ exist - for instance, Doehring believes that there are three different meanings of ‘peoples’ in international law. One of them is, of course, colonial population. Another category is the population of sovereign states that has a right of self-determination in case of a foreign domination. He reserves the third group for ethnic minorities living inside a state territory and justifies this assertion with practice in international law after World War I, as well as with the Declaration on Friendly Relations. One of its most quoted paragraphs permits secession of ethnic minorities in cases of extreme oppression.¹⁹⁹ Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities Aureliu Cristescu, who deals with the development of basic concepts related to self-determination in his study, also endorses the

¹⁹⁷ Reference re Secession of Quebec, para. 123-124

¹⁹⁸ Radan, Peter, *ibid.*, p. 55-56

¹⁹⁹ Doehring, Karl, *ibid.*, p. 55-58

right to remedial secession. In his view self-determination is a fundamental right without which other rights cannot be fully enjoyed, so it is a prerequisite for the exercise of all individual rights and freedoms. He states that self-determination “does not grant an unlimited right of secession to populations living in the territory of an independent sovereign State, and such a right cannot be regarded as a provision of *lex lata*... The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples concerned have the right to regain their freedom and constitute themselves independent Sovereign States.”²⁰⁰ His and similar views postulate that there is no secession in every case of discrimination, but only when fundamental human rights of an ethnic group are severely violated, so that their remaining within an oppressive state is no longer possible.

Besides declarations of international organizations and numerous contributions of various authors that treat the right of external self-determination as remedial for human rights abuses, there are also opinions of judges at international legal bodies that support this view. One of them is the opinion of Judge Wildhaber (1996 judgment by the European Court of Human Rights in *Loizidou v. Turkey*): “until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonization. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.”²⁰¹ Similar opinion was asserted in a report on constructive national arrangements for minorities by Special Rapporteur Asbjørn Eide, where he discussed external dimension of self-determination. Besides the categories he perceives as undisputed (colonized peoples, territories occupied since 1945,

²⁰⁰ Cristescu, Aureliu, *ibid.*, p. 26; Joshua Castellino recommends “remedial right to self-determination where widespread and consistent rights denial occurs – usually in the forms of crimes against humanity or genocide – against a vulnerable group, such as indigenous peoples or minorities. The exercise of the territorial rights associated with self-determination should be part of the international community’s duty to protect against gross human rights violations.” Castellino, Joshua (2008): *Territorial Integrity and the “Right” to Self-Determination: An Examination of the Conceptual Tools*, Brooklyn Journal of International Law, Vol. 33, p. 561-562

²⁰¹ European Court of Human Rights, *Loizidou v. Turkey (Merits)*, No. 40/1993/435/514, the 18th of December 1996, Human Rights Law Journal, Vol. 18, p. 59

peaceful divorce, and republics of federal states formed by voluntary accession with constitutional arrangements that allow separation), he concludes that “beyond these cases, the question of a unilateral right to self-determination is extremely doubtful. It is overridden by the basic principle of territorial integrity, provided, however, that the State conducts itself in accordance with the principle of equal rights and self-determination of peoples and is possessed of a government representing the whole people of the territory without distinction as to race, creed or colour... When the Government does not allow all segments and all peoples to participate, the question of the right to self-determination of the different components becomes more pertinent.”²⁰²

There are slightly different interpretations regarding cases in which the right to secession as a remedy emerges – absence of a representative government, discrimination and violation of human rights and other forms of abuse and inequality of treatment. Severe misgovernment of a territory corresponds with Crawford’s *carence de souveraineté*, although he considers Bangladesh as the only example where a right of secession was recognized on this basis. Thomas Franck interprets this remedial view as a stretched definition of colonialism. When a minority within a sovereign state is persistently denied political and social equality and the opportunity to retain its cultural identity, it is possible for international law to define this as repression that could give rise to a right of decolonization, even if the oppressing state cannot be characterized as ‘imperial’. This is a legal fiction of applying decolonization to a post-imperial state as a neocolonial liberation. How will this right develop is extremely important, because “at stake is nothing less than whether humanity is to assume a preponderantly tribal or cosmopolitan identity, whether the afferent or efferent tendencies, or a new synthesis of both, will be the dominant theme of the new era”.²⁰³ According to Franck, so far we were lucky because most of these modern challenges of secession and postmodern tribalism were resolved by political means, such as conflict resolution, without the procedures of international law. However, such matters cannot be left to political opportunism. International law must have a saying in these matters, although it might be more prudent and fruitful to resolve each case of secessionist

²⁰² United Nations Secretary-General, Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, 2nd progress report prepared by Mr. Asbjorn Eide, the 1st of July 1992, UN Doc. E/CN.4/Sub.2/1992/37, para. 165

²⁰³ Franck, Thomas (1993): *Postmodern Tribalism and the Right to Secession*, p. 15

conflict on an ad hoc basis, so that a complete legal evaluation of all important factors is conducted. This means that in identifying ‘peoples’ that may be entitled to self-determination, international community must not focus on a single criterion. It should be determined how clearly the group’s objective features such as ethnicity, religion, language or culture are exhibited, as well as the subjective dimension embodied in the group’s perception of its distinct identity. Furthermore, it should be established whether the group possesses an attachment to the territory and whether it is subjected to discriminatory practices and abuses by its government. Approach to different self-determination claims cannot be uniform, since the complexity and dilemmas that the post-Cold-War world creates concerning self-determination and secession issues need specific answers – a carefully assessed framework for evaluating validity and legitimacy of these claims.

This discussion can be ended by identifying ‘peoples’ or categories of territory to which the right of self-determination applies, following Crawford’s conclusions. He claims that the principle of self-determination applies in the following cases. Firstly, it applies to mandated, trust and non-self-governing territories and all entities whose right to self-determination is established under international agreements. Secondly, it applies to existing states (excluding those parts of states which are themselves self-determination units) as a continuing right and in this case it takes the form of the rule preventing intervention in the internal affairs of a state. Here the central element is the right of the inhabitants of the state to choose their own form of government. The last possible category of self-determination units, according to Crawford, are entities that are a part of metropolitan state but that have been governed in such a way as to make them in effect non-self-governing territories – subject to *carence de souveraineté* (as examples he lists Bangladesh, Kosovo and perhaps Eritrea).²⁰⁴ This enables us to conclude that besides the aforementioned undisputed units entitled to self-determination, a consensus is emerging that an additional category possesses this right. It is ‘peoples’ that are severely oppressed and discriminated against, and ethnic groups can claim to be a ‘people’ only if they fulfill this criterion. Otherwise, they are entitled to internal self-determination only. The external aspect of this right is unavailable to them under international law unless they are heavily discriminated against, as the opinions of most scholars and international lawyers have confirmed. Although minorities might

²⁰⁴ Crawford, James, *ibid*, p. 126

constitute a separate people and have a legitimate claim which accords them internal self-determination, it is difficult to assert that they have the right to external self-determination. Minorities often use self-determination rhetoric in order to achieve independence, but the states from which they want to secede usually have a different point of view. Kosovo is only the latest example of this trend, as will be shown in the following chapters. In conclusion of these deliberations about the meaning of ‘peoples’, one can hardly contest James Anaya’s opinion: “under a human rights approach, the concept of self-determination is capable of embracing much more nuanced interpretations and applications, particularly in an increasingly interdependent world in which the formal attributes of statehood mean less and less. Self-determination may be understood as a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics. The institutions and degree of autonomy, necessarily, will vary as the circumstances of each case vary. And in determining the required conditions for a claimant group, decisionmakers must weigh in the human rights of others. While not precluded, independent statehood will be justified only in rare circumstances.”²⁰⁵

To summarize – categories of units which are, according to international law on self-determination, ‘peoples’ with a potential right to external self-determination:

1. Mandated and trust territories, and non-self-governing territories
2. Territories where self-determination is based upon the agreement by the parties, or is allowed by the constitution of a state
3. Entities subject to *carance de souveraineté*
4. The entire population of a state
5. Entities that were independent before forcible taking of the territory or annexation and want to reestablish their independence

We have seen that there has been a profound change in self-determination discourse since the World War I Settlements. After the unambiguous definition of ‘peoples’ in the decolonization

²⁰⁵ Anaya, James (1990): *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, Iowa Law Review, Vol. 75, p. 837; However, Thornberry points out that “the self-determination choice has almost inevitably been described in terms of a people *or* an ethnic group possessing the right. These are incompatible oppositional prescriptions. The result is the perception of minorities as rivals in self-determination, as a permanent threat to the people, and their marginalization and suppression in many States.” Thornberry, Patrick, *ibid.*, p. 126

era, this question has been re-opened after the events in the Soviet Union and Yugoslavia. It has become more difficult to show who the 'people' are, and there are ongoing debates among scholars concerning that question, which were summarized in this chapter. One definition of the term 'people' is clearly impossible to construct, so present ambiguity is likely to last. Presumably, such definition should not be generated, even if possible, since different peoples are vested with different series of rights in international law. One of the viable options seems to be determining various types of people who are protected by different instruments of international law. Not much can be added to the balanced conclusion that Ian Brownlie suggested 25 years ago: "it is my opinion that the heterogeneous terminology which has been used over the years – the references to 'nationalities', 'peoples', 'minorities', and 'indigenous populations' – involves essentially the same idea...In fact, there is a sort of synthesis between the question of group rights as a human rights matter and the principle of self-determination. The question of group rights, more especially when it is related to territorial rights and regional autonomy, represents the practical and internal working out of the concept of self-determination."²⁰⁶ Vitality of the principle of self-determination should not be underestimated, and its adaptation to a different international environment after decolonization ended testifies to that verve. Finally, it should be born in mind that an amount of flexibility is needed when dealing with the concept of 'self'. Nations and peoples are a part of the latest stage of development in human history and, accordingly, represent concepts that are amenable to transformation and change.

Another remark could be made regarding the right to self-determination. Formulations of this right in international instruments are made in a very general way, so there are various concepts that explain it and ascribe different meanings to it. That produces methodological difficulties in the analysis of the scope and content of this right. This is particularly the case with international instruments that link self-determination to the principles of territorial integrity of states and non-intervention in internal affairs. Although the international law in general is often characterized as a static system, there are principles such as state sovereignty and territorial integrity that are usually considered conservative, and principles that are flexible, like self-determination. Their

²⁰⁶ Brownlie, Ian (1988): *The Rights of Peoples in Modern International Law*, in Crawford, James (ed.): *The Rights of Peoples*, Clarendon Press, Oxford, p. 4-6

relationship and mutual influences, as well as inevitable conflicts that derive from the confrontation of these principles are examined in the following chapters.

14 *Question of statehood*

If an entity exercises its right to external self-determination and declares independence, it needs to prove that it qualifies as a state under international law and it needs to be recognized as a state by the international community. Creation of a new state in international law, as a result of a successful secession from another state involves complying with certain criteria. Since states are the spine of the international system and possess international legal personality, there are legal criteria which determine whether an entity is a state. Koskenniemi explains the ambiguous relationship of self-determination and statehood. This relationship has two dimensions. Firstly, self-determination acts as a justification of statehood, as a patriotic concept, because all peoples have the right freely to determine their political status, and states have to respect that right. In this manner self-determination can express the political phenomenon of state patriotism and explain why we in general endow acts of foreign states with legal validity even when we do not agree with them, avoiding intervention in other state's political processes. The other side of the coin is the challenge that self-determination provides to formal structures of statehood. This is a revolutionary dimension of self-determination. According to this feature, true self-determination is expressed in the existence of an authentic communal feeling, a togetherness of the relevant group. If, in extreme cases, this may be possible only by leaving the state, then the necessity turns into a right. This is so because "statehood *per se* embodies no particular virtue and that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be overruled or its consequences modified in favour of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined."²⁰⁷ The principle of self-determination supports and challenges statehood at the same time, and that creates difficulties with its application.

The classic definition of a state in international law is given in the 1933 Montevideo Convention on Rights and Duties of States. Article 1 lays down the requirements of statehood in customary

²⁰⁷ Koskenniemi, Martti, *ibid.*, p. 245-49

international law: “the State as a person of international law should possess the following qualifications:

- a) a permanent population
- b) a defined territory
- c) government; and
- d) capacity to enter into relations with other States.’²⁰⁸

These criteria, based on the notion of ‘effectiveness’,²⁰⁹ are undergoing a certain transformation, and the reason for this is that they can be at odds with the emerging additional criteria based on legitimacy. It should be kept in mind that Montevideo requirements were drawn up at a time when the right to self-determination did not exist in international law. The additional requirements, related to standards of human rights, protection of minorities and democratic institutions, do not yet have a status as the *lex lata*. The international community emphasizes these standards as additional requirements for an entity that claims statehood, as Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union show. However, there are proposals of other requirements by various authors, such as a certain degree of civilization, permanence, obedience to international law, or even a government established consistently with the principle of self-determination.²¹⁰

Such new elements of statehood reflect the intention of the international community to strengthen international human rights regime. Thomas Grant analyses four of the more persistently promoted additions to the traditional list of prerequisites of statehood. These are self-

²⁰⁸ Seventh International Conference of American States, Convention on Rights and Duties of States, the 26th of December 1933, International Conferences of American States, First Supplement 1933-1940, Carnegie Endowment of International Peace, Washington, D.C., p. 122

²⁰⁹ The meaning of effectiveness on which the traditional criteria for statehood are based is “the quality of a fact (here the exercise of power or territorial jurisdiction), which – according to international law – makes this fact suitable as a condition for the attribution of full international legal personality.” Raic, David (2002): *Statehood and the Law of Self-Determination*, Martinus Nijhoff Publishers, The Hague, p. 58

²¹⁰ “The traditional description of an independent state, as being a community of people, living together in a defined territory under an organized government not subordinate to any other government, may then need the addition of a new criterion: the self-determination of its people...If there is a systematic denial to a substantial minority, and still more to a majority of people, of a place and say in the government, the criterion of organized government is not met.” Fawcett, J.E.S. (1965): *Security Council Resolutions on Rhodesia*, British Yearbook of International Law, Vol. 41, p. 112

determination, democracy, minority rights and constitutional legitimacy.²¹¹ Raic maintains that “in sum, on the basis of the practice of explicit non-recognition of claims to statehood it must be concluded, that for the emergence of a State in the sense of, and thus under, international law, additional and new criteria for statehood must be met which are not based on effectiveness, and which can be grouped under the broader heading of the obligation to respect fundamental rules of international law (that is, at least *jus cogens*) during the entity’s creation. Violation of these norms obviates statehood of the entity concerned and, if only for reasons of clarity, such an entity will not be called a state.”²¹² Many entities that have proclaimed statehood did not fulfill some of the new or even old conditions, and yet they were recognized by numerous states of the international community. This means that, although the norms for statehood are set out by the Montevideo Convention, the political process of state recognition is decisive for achieving statehood.

The question of statehood causes debate only when a borderline case arises, when an entity that claims statehood does not fulfill all of the traditional criteria. There are various objections to the Montevideo definition. For instance, ‘a permanent population’ excludes non-sedentary parts of populations like nomad groups or gypsies. A defined territory means fixed boundaries, and this is one of the highly contentious issues in international law (for instance, a new state may exist despite claims to its territory), and we will return to it when discussing the *uti possidetis* principle. Many entities that are considered states have a disputed territory and unresolved border issues (for example, Israel’s territory is disputed by its Arab neighbors). A government with the capacity to enter into relations with other states is the final condition for an entity to constitute a

²¹¹ Grant, Thomas (1999): *The Recognition of States: Law and Practice in Debate and Evolution*, Praeger Publishers, Westport, p. 84; He concludes that “self-determination, democracy, and guaranties to minorities – the first three of what I have discussed as addenda to the Montevideo list – all possess fairly evident contacts to international affairs. Self-determination means that distinct national groups have the right either to organize themselves under a state particular to the group or to manage some aspects of their own affairs within another state. To deny such right would call into question the nation state, still arguably a key organizing force in public international law and international relations. Democracy is a less firmly-rooted criterion, but is nonetheless arguable that democracy constitutes such an important principle to the leading state actors today that it deserves some degree of acknowledgment in the law of recognition...The third proposed addendum, minority rights guarantee, serves a certain systemic international interest as well...The first three addenda – self-determination, democracy and minority rights – bear close links to international order. Domestic constitutional text does not.” p. 102-103

²¹² Raic, David, *ibid.*, p. 156

state according to the Montevideo Convention.²¹³ However, in the past entities with collapsed governments have remained states (Afghanistan in the 1990s) and there are numerous small nations that do not possess the capacity to enter into international relations, and are dependent on other states in this aspect and others (such as their national defense – for instance Monaco and Liechtenstein). The fact that the international community undertakes serious efforts to ensure the achievement of effectiveness in recognized entities whose effectiveness is questionable further proves the continued importance and relevance of this criterion. A government with the capacity to enter into relations with other states is also a basis for another important and closely related condition – independence.²¹⁴ It is usually considered as sufficient that a government has the authority and ability to regulate internal activities (effectiveness principle), and that its legal capacity to act as it wishes is not in subordination to the will of other states. The criterion of effectiveness will be more strictly applied if statehood of an entity is opposed, and especially if an entity tries to secede from within the state.

The condition of independence also was not always respected (satellite or puppet states such as Northern Cyprus or Manchukuo, or even states like Romania and Bulgaria during World War II) and on the other hand, there were several entities throughout history that possessed authority (*de facto* control over the territory) but gained no international recognition (Peoples Republic of China until the 1971 UN Resolution). One can also ask what degree of independence is necessary. This term is interrelated with sovereignty, and sometimes even equalized to it. According to Crawford, independence can be divided into formal and actual or real independence, so a new state attempting to secede has to demonstrate both formal and real independence in order to be regarded as definitively created. Formal independence exists where the powers of a government, both in internal and external affairs, are vested in the separate authorities of the State (*l'exclusivité de la compétence*), and actual independence means the

²¹³ According to Raic, the criterion government consists of two related dimensions. Firstly, there should be an institutionalized political, administrative and executive organizational machinery for the purpose of regulating the relations in the community and charged with the task of upholding the rules. Secondly, and based on the concept of effectiveness, the criterion government refers to the existence of *effective* government, which means that the institutionalized political, administrative and executive organizational machinery must actually exercise state authority over the claimed territory and the people residing in that territory. *Ibid.*, p. 62

²¹⁴ Crawford considers government as the exercise of authority with respect to persons and property within the territory of the state, and independence as the exercise of such authority with respect to other states (internal and external sovereignty); Crawford, James, *ibid.*, p. 55

minimum degree of real government power at the disposal of the state authorities (*plénitude de la compétence*). Entity may qualify as a state only when both real and formal independence exist. There are no dilemmas when both formal and actual independence exist, or even when formal independence masks the lack of real independence, but in borderline cases, where a certain lack of formal independence and substantial real independence exist, factors such as recognition and longevity are of particular importance.²¹⁵ An even more problematic criterion is the capacity to enter into relations with other states, especially since this is no longer an exclusive state prerogative. It is not uncommon that a bigger friendly state conducts international relations on behalf of a smaller neighbor (Bhutan and India), and the very existence of supra-national bodies that decide and conduct a portion of politics of its member states is another example (the European Union).

However, an entity may fulfill all conditions for statehood and not be recognized by the international community because its creation violates a preemptory norm of international law. According to the doctrine of non-recognition states are under legal obligation not to recognize entities which have violated one or more fundamental rules of international law when coming into existence (*ex injuria jus non oritur*). “The problem which arises is whether this entity can be considered a State which violates international law, or whether statehood is precluded by definition because of the illegal origin. In the former case, non-recognition would only function as a political sanction without prejudicing statehood. In the latter case, non-recognition denies the statehood, because it regards the legality of origin as a constitutive criterion for statehood.”²¹⁶ Duursma concludes that the creation of a state will only be illegal if it is founded on a breach of international law and made possible by this violation. Three norms of international law have been invoked with respect to the illegality of the creation of states: the prohibition of aggression and acquisition of territory by means of force (for instance, entities which wish to secede but do not have the right of self-determination with force of *jus cogens* cannot claim statehood if the putative state has been founded with the help of armed forces of a third state), the right of self-determination (a new state cannot be created without the consent of the peoples which hold the right of self-determination) and the prohibition of racial discrimination and apartheid (in this

²¹⁵ *Ibid.*, p. 72-88

²¹⁶ Duursma, Jorri, *ibid.*, p. 127

case statehood is excluded because a government based on racial discrimination will in most cases act in contravention of the right to self-determination of the whole population).²¹⁷ It is obvious that in these cases the grounds for the legal obligation of non-recognition are in fact additional criteria of statehood, based on legitimacy and legality, not effectiveness. Also, these are illegal acts under international law that do not affect only the rights of the holder of the violated rights, but also the rights and interests of the entire international community. This is why the theory of recognitional legitimacy has great importance, especially since it is based on the existing international law (Article 41 of the 2001 International Law Commission Articles on State Responsibility²¹⁸ states that when the creation of a state is pursued as a result of a serious breach of preemptory norms, states will have a general duty of non-recognition, with a view of making the illegal state internationally ineffective, so any state that enters into international legal relations with this type of illegal state will commit a wrongful act).

This short sketch of the Montevideo criteria should show how contentious these conditions for statehood are in practice, when borderline cases arise. Their main advantage seems to be that they are, at the moment, the only clear indicator of statehood in international law.²¹⁹ They provide the only generally accepted standard, but the problem arises when this standard needs to be applied to a specific situation, especially when conflicting claims exist. In these situations recognition and state practice related to the status of the entity in question are of particular importance. The ultimate confirmation of statehood in the modern world is the admission to the United Nations Organization as a member state. There is no definition²²⁰ given by this

²¹⁷ *Ibid.*, p. 129-132

²¹⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of Its 53rd Session, 2001, UN Doc. A/56/10, 56 UN GAOR Supp. (No. 10); see Crawford, James (2002): *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge

²¹⁹ Crawford proposes that state independence as a prerequisite for statehood should be focused on. This notion embodies two elements according to him: the existence of an organized community on a particular territory, exclusively or substantially exercised self-governing power, and secondly, the absence of the exercise of another state, and of the right of another state to exercise, self-governing powers over that territory. This would mean that the clearly delimited boundaries do not present a prerequisite for statehood, since they are merely the consequence of territory. Crawford, James, *ibid.* p. 437

²²⁰ Article 4(2) of the UN Charter states that membership in the United Nations is open to "peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." In practice member states often pose additional political criteria in order to block the membership of other states, because Article 4(2) imposes a pre-condition to admission – a decision of the General Assembly upon the recommendation of the Security Council. The ICJ has recognized that statehood is a primary qualification for admission to the UN. According to the Court, an entity should formally meet five

organization of conditions that an entity has to fulfill in order to become a UN member state, but the non-restrictive admission of the newly proclaimed states in the process of decolonization showed great flexibility in this respect. The UN proved that elasticity in the interpretation of traditional criteria is equally important as their respect. In the context of decolonization, the right to self-determination softened the necessary level of fulfillment of the classical criteria of statehood.²²¹ The era of this automatic membership ended with the completion of the process of decolonization, but new candidates for the membership in the UN appeared with the break-up of Yugoslavia, the Soviet Union and Czechoslovakia (new member states emerged with the peaceful ending of the Union of Serbia and Montenegro, which divided into two states – Republic of Serbia and Republic of Montenegro. With the admission of South Sudan on the 14th of July 2011 the number of the UN member states climbed to 193, but there are entities such as Kosovo that struggle to gain international recognition). Having briefly examined the law of statehood, we can conclude that although it may at first appear that the classic criteria are no longer relevant, they still form the basic normative requirement for assessing statehood, and in cases where an entity striving for independence does not fulfill them, it must show that there are further convincing considerations in order for its statehood to be internationally recognized.

15 *Sovereignty*

Another related concept in international law and political theory is sovereignty. Sovereignty is traditionally defined as an absolute political authority in a state or, contemporarily defined, as a set of rights and duties acknowledged in international law as inherent to the state. According to Sureda, the history of self-determination is closely linked with the history of the doctrine of popular sovereignty, but self-determination has since beginning posed a threat to the legitimacy of the established order, and at the same time tried to substitute for it with more equality.²²² Modern authors relate this concept more often to independence than to exclusive power and try to define the objective features of the principle, but this concept is more analyzed in political

conditions: (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so. International Court of Justice, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, the 28th of May 1948, ICJ Reports 1948, p. 62

²²¹ Shaw, Malcolm (1986): *Title to Territory in Africa: International Legal Issues*, Clarendon Press, Oxford, p. 151-162

²²² Sureda, Rigo, *ibid.*, p. 17

theories than in international law. Sovereignty means that no other state or organization has a right to intervene in the internal affairs (domestic jurisdiction) of a state. In the Corfu Channel case, Judge Alvarez noted that “by sovereignty, we understand the whole body of rules and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.”²²³

Sovereignty is not full de facto independence, but a legal right – it confers a right to act independently internally and externally, but not necessarily the capacity to do so. Its primary meaning is independence,²²⁴ but within the limits of international law. Moreover, as Georg Nolte points out, it is recently accepted that sovereignty implies not only rights for states but also responsibilities.²²⁵ Crawford maintains that “in its most common modern usage, sovereignty is the term for the ‘totality of international rights and duties recognized by international law’ as residing in an independent territorial unit – the State.”²²⁶ It seems that the juridical concept of sovereignty has begun to prevail – sovereignty has come to signify an international legal status conferred on a state through recognition by other states. It is now being conceived as a set of rights and duties, and “instead of being perceived as a relationship between the state and a particular territory, sovereignty is rather perceived as a social relationship between states where each recognizes the rights of others.”²²⁷

It is often stated that sovereignty is in a state of transition today, in a state of flux, and that it is challenged and eroded in new ways. States are no longer sovereign in the traditional sense, not only because of the changes in international law (especially concerning international human rights norms), but also in economy, environmental politics and because of demands for democratic institutions. As Tomuschat explains, today exists “general recognition that States are not objectives in and by themselves and that, conversely, their finality is to discharge a task

²²³ International Court of Justice, Corfu Channel Case (UK v. Albania), Separate Opinion of Judge Alvarez, the 9th of April 1949, ICJ Reports 1949, p. 39

²²⁴ In the Island of Palmas case Judge Hubert observed that “sovereignty in the relations between States signifies independence.” Permanent Court of Arbitration, Island of Palmas (United States of America v. The Netherlands), 1928, United Nations Reports of International Arbitral Awards, Vol. 2, p. 829

²²⁵ Nolte, Georg (2006): *Secession and External Intervention*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, p. 70

²²⁶ Crawford, James (2006): *The Creation of States in International Law*, p. 26

²²⁷ Brewin, Christopher (1982): *Sovereignty*, in Mayall, James (ed.): *The Community of States: A Study in International Political Theory*, George Allen and Unwin, London, p. 43

incumbent upon them in the service of their citizens. In other word, States are no more sacrosanct. Their existence is not exempt from challenge, even on a legal plane. Rather, they have a specific *raison d'être*. If they fundamentally fail to live up to their essential commitments they begin to lose their legitimacy and thus even their very existence can be called into question.”²²⁸ Still, states are the most important subjects of international law and they try to preserve the exclusive power of decision-making. This is why occasional propositions that the term sovereignty should be eliminated from vocabulary because it has no substantive meaning in contemporary theory and post-modern world cannot be accepted. Sovereignty is not a static but a relative concept, and although international law needs sovereign states, a modification of that sovereignty is needed in order to improve the collective decision-making process at the level of international community, as sovereign states remain its executive branch. In its basis the formal order of international community continues to be provided by sovereign states. Even secessionist movements which challenge this order do not strike at the principle of sovereignty, because the goal of their struggle is achieving sovereignty, so they direct their attacks on the legitimacy of state authority instead.

A lot is written on the topic of transnational and supra-national organizations' influence on the decline of sovereignty.²²⁹ Rapid transformation of international relations has reduced the ability of states to face diverse economic and security challenges independently. Since states can no longer control their own economy due to progressive economic globalization, they relinquish their sovereignty and join supra-national organization like the European Union, and similarly, since they have lost their ability to defend themselves, faced with diverse security threats (including nuclear weapons and terrorism), they join international security arrangements such as NATO. However, the development of effective international governance is required not only in

²²⁸ Tomuschat, Christian (1993): *Modern Law of Self-Determination*, p. 9

²²⁹ “There is a growing cleavage between *institutional* and *conceptual* foundations of international law. If institutionally it is still founded on the system of States as the most effective organizing frameworks for law and order, conceptionally it is eroded to the point where its main protagonist – the sovereign State – can no longer claim its exclusive status in regulating many economic and social issues. It is allegedly in ‘progressive decline’, giving way to such phenomena as ‘percolated’ and ‘perforated’ ‘national sovereignties’. Moreover, the internationalization of corporate organizations, finance and trade, the globalization of environmental and security problems, the accompanying emergence of ‘new’ ‘minorities’, groups and social movements with both a local and transnational consciousness are pointing the way to new macroscopic trends in the modern world, where the twin processes of integration and fragmentation are effectively eroding the notion of sovereignty, as they underline modern political and international legal discourse.” Skurbaty, Zelim (2000): *As if People Mattered: A Critical Appraisal of ‘Peoples’ and ‘Minorities’ from the International Human Rights Perspective and Beyond*, Martinus Nijhoff Publishers, The Hague, p. 179

order to respond to the problems which can no longer be solved at the national level (economic, ecological, financial problems, terrorism, etc.), but also to respond to situations when sovereign states will not, or cannot perform their functions in a legitimate manner (for example, failed states or misuse of sovereign powers). Beside this political dimension of the weakening of sovereignty, there is also a juridical dimension, which comprises different legal mechanisms that dilute sovereignty. International law produces limits to sovereignty and no one can deny that states had more power in the previous centuries than they do now. Many constraints such as international cooperation, respect of human rights, or respect of decisions made by international organizations are self-imposed. Others, however, are not. The norms of *jus cogens* such as the prohibition of genocide, maritime piracy, slavery, torture, and wars of aggression bind states no matter if they consented to them. Certain customary law limitations such as the freedom of navigation through international waterways differ from limitations that international law poses on states within their own territories, such as diplomatic immunity, prohibition against racial discrimination or protection of states from the acts within one state that can cause damage to other states. Human rights, for instance, do not fall exclusively into domestic jurisdiction. International legal order based on the respect for human rights requires legitimacy from the governments that can no longer be achieved by basing it on the concept of sovereignty in the traditional sense. The UN Secretary-General has stated that the democratic rule, the respect for human rights, and a sustainable development are seen as pivotal for the realization of the concept of human security, and that states have become “widely understood to be instruments at the service of their people, and not vice versa.”²³⁰

Dietrich Murswiek asserts that there is no contradiction between sovereignty and the right of self-determination, or that they exclude each other. “In fact, sovereignty is currently limited in many respects, e.g. by human rights, and one does not consider this as contradictory. Also the right of self-determination could be limited without completely losing its significance.”²³¹ Most scholars stress that the conflict between self-determination of peoples and territorial integrity of states is principally resolved in favor of state sovereignty, with the exception of remedial secession. Only in this case of denial of people’s right to internal self-determination and severe

²³⁰ Annan, Kofi (1999): *Two Concepts of Sovereignty*, The Economist, the 18th of September 1999

²³¹ Murswiek, Dietrich (1993): *The Issue of a Right of Secession – Reconsidered*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, p. 35

violations of the fundamental rights and freedoms of individuals, the victim group is entitled to exercise the right to secession. Conflicting views about the degree in which sovereignty is eroded in the post-Cold War world were clearly expressed in the debates triggered by the Kosovo case. For instance, the Netherlands has pointed out that the interests of threatened populations outweigh traditional concepts of sovereignty and non-intervention: “since 1945, the world has witnessed a gradual shift in that balance, making respect for human rights more and more mandatory and respect for sovereignty less and less stringent. An elaborate body of international human rights law has come to counterbalance the dictates of paragraphs 4 and 7 of Article 2. Today, human rights have come to outrank sovereignty. Increasingly, the prevailing interpretation of the Charter is that it aims to protect individual human beings, not to protect those who abuse them. Today, we regard it as a generally accepted rule of international law that no sovereign state has the right to terrorize its own citizens. Indeed, if the Charter were to be written today, there would be an Article 2(8) saying that nothing contained in the present Charter shall authorize Member States to terrorize their own people.”²³² Of course, these claims were not undisputed. China, for instance, stated: “sovereign equality, mutual respect for State sovereignty and non-interference in the internal affairs of others are the basic principles governing international relations today. In spite of the major changes in the post-cold war international situation, these principles are by no means out of date. Any deviations from or violation of these principles would destroy the universally recognized norms governing international relations and would lead to the rule of hegemonism; if the notion of ‘might is right’ should prevail, a new gun-boat policy would wreak havoc, the sovereignty and independence by virtue of which some small and weak countries protect themselves would be jeopardized and international peace and stability would be seriously endangered.”²³³

The UN Charter confirms that state sovereignty constitutes the foundation of interstate relations in Article 2(1): “the Organization is based on the principle of the sovereign equality of all its Members.” Nevertheless, status quo is not a value per se, and situations may arise when legitimate self-determination claims override the principles of sovereignty and territorial integrity. Legal instruments that affirm self-determination provide strong support for both

²³² General Assembly of the United Nations, Verbatim Records of the Plenary Meetings of the 54th Session, the 24th of September 1999, UN Doc. A/54/PV.13

²³³ General Assembly of the United Nations, Verbatim Records of the Plenary Meetings of the 54th Session, the 22nd of September 1999, UN Doc. A/PV/54/8

principles, as seen above, and it is usually necessary to weigh the right of self-determination against the right of territorial integrity. This is the main paradigm of the self-determination principle that may culminate in secession: territorial integrity is one of the most important principles in international law, but it runs contrary to the essence of self-determination - that oppressed and dominated people within a state have a right to seek statehood. For this reason it is relevant to determine when the right of self-determination has primacy over the territorial integrity of a state. "It should be concluded that State practice has not established an *opinio juris sive necessitates* under which a material justification for secession has been accepted in international law. There is therefore no material customary rule of international law which can decide the balance process between the right of self-determination and the principle of respect for the territorial integrity of a State."²³⁴ People have a right to internal and external self-determination which limits respectively the internal and external aspects of state sovereignty. "The debate over the validity of particular claims to secede is thus framed in terms of the two generally recognized values of self-determination and territorial integrity. The difference between proponents and opponents of particular secessions lies in the relative priority they accord these apparently competing values within specific contexts. The appeal of a secessionist argument lies in the importance of self-determination, the links between that principle and the concept of democratic self-government, and the alleged moral superiority of self-determination over the preservation of territorial boundaries. Ethnic distinctiveness plays an important role in these arguments because the secessionist needs to limit the number of groups entitled to claim a right to secede. Whether or not a positive law right to secede can be established, such arguments have undeniable rhetorical force."²³⁵

There is another view concerning this matter among scholars. Crawford, for instance, observes that seceding groups are not bound by the international law rule of territorial integrity because such groups are not subjects of international law at all, in the way that states are, since a group does not become a subject of international law by expressing its wish to secede. The state is entitled to resist challenges to its territorial integrity, including secession, at least for a significant period of time, because until an advance stage in the process, secession is a matter within the

²³⁴ For detailed discussion see Duursma, Jorri (1996): *Fragmentation and the International Relations of Micro-States*, p. 96

²³⁵ Brilmayer, Lea (1991): *Secession and Self-Determination: A Territorial Interpretation*, Yale Journal of International Law, Vol. 16, p. 183-84

domestic jurisdiction of the affected state. International law favors the territorial integrity of the predecessor state, in all cases short of the irreversible dissolution and fragmentation of a state, and a secessionary entity has no such territorial integrity until it has achieved stable and effective independence.²³⁶ Alain Pellet, on the other hand, considers that the principle of self-determination takes primacy over the principle of territorial integrity: “while the principle of territorial integrity is unquestionably a principle of positive law, it is not compelling because no one would doubt that a state may, in the exercise of its sovereign jurisdiction, allow its territorial integrity to be undermined. Consequently, it must be concluded that this territorial integrity may be undermined not only by virtue of a standard of *jus cogens* – and there is no doubt that the principle of the right of peoples to self-determination is the very type of an imperative standard – but also by a simple mandatory rule, such as a rule that would impose respect for a successful secession.”²³⁷

There are also authors who assert that the principles of self-determination and territorial integrity are not competing, but complementary principles. Lea Brilmayer, for instance, suggests that the plausibility of a separatist claim does not depend primarily on the degree to which the group in question constitutes a distinct people in accordance with relevant international norms, but derives instead from a different source, namely the right to territory that many ethnic groups claim to possess. The fact that the secessionist group constitutes a distinct people does not by itself establish a right to secede – to be persuasive a separatist argument must also present a territorial claim, since secession typically represents a remedy for past injustices. In this aspect, according to her, historical territorial analysis contrasts sharply with the traditional analysis of ethnic differentiation. Even the phrase self-determination frames the separatist question in a misleading way, by focusing on whether the aggrieved group constitutes a distinct people and obscuring the territorial aspects of the dispute.²³⁸ When a separatist group wants to secede, it is claiming a right to a particular piece of land, and it is important whether that group is entitled to that piece of land. Properly understood, the principle of territorial sovereignty accommodates a right of secession perfectly well and provides a better account of secessionist claims than a self-determination principle defined in terms of the rights of peoples. According to her, whatever

²³⁶ Crawford, James (2001): *The Right of Self-Determination in International Law: Its Development and Future*, p. 50-51

²³⁷ Pellet, Alain (2000): *Legal Opinion on Certain Questions of International Law Raised by the Reference*, p. 99

²³⁸ Brilmayer, Lea, *ibid.*, p. 186-187

conflict exists is not between these two principles, but over land. “Self-determination claims can be ranked on a spectrum, depending upon the extent to which inclusion of the claimants’ territory was wrongfully brought about by the current majority group. While it may be difficult to know where on the spectrum to draw the line between normatively valid and normatively invalid claims, a fair amount of agreement would likely emerge about where to place particular cases, and colonialism would probably be at one extreme of the spectrum. Noncolonial situation, such as Bangladesh, need additional arguments to support secessionist claims, such as the existence of widespread human rights abuses.”²³⁹ Territorial claims are usually founded upon historical grievances, and the argument is that the land has properly belonged to the secessionist group, but it came under the dominion of the existing state by way of some unjustifiable historic event, such as improper annexation. Ethnic identity is not irrelevant under this territorialist interpretation, for it explains why historical grievances continue to matter, and how territorial claims survive. Her view is congruent with international law and practice of states, inasmuch as it argues that the ethnic group cannot justifiably claim the remedy of secession unless it can convincingly assert a claim to territory. And precisely that wish to separate and establish a new state on a particular piece of land is what distinguishes separatist from minority claims, which do not always include a historical right to a particular territory. It is not enough for a group to prove that it constitutes a separate people, and not merely a minority group within the state – it also needs a sound historical claim to the territory.

16 *Recognition of states*

Political entities aspiring statehood are highly dependent on recognition by the international community. Recognition of an entity as a state provides for international legal protection and in some cases the very survival of an emerging state. Firstly, the recognition or the consent of the previous sovereign plays a very important role for an emerging state. When the previous sovereign formally consents to the separation, there is little doubt and controversy regarding statehood of a new entity. Even if the government of a new state does not have effective control of all of its territory, the issue of statehood is undisputed, as various decolonization cases demonstrate. Secondly, recognition by third states, although it plays an important role in the

²³⁹ *Ibid.*, p. 197

process of acquisition of statehood, is a political act. When factual criteria of statehood are fulfilled, statehood is not dependent upon recognition. When a state satisfies these criteria, when it exists as a fact, it is a state in the sense of international law, and recognition is just a formal acknowledgment of an already existing fact. The majority of authors today support the declaratory theory according to which statehood is a matter of fact. According to this theory the criteria of statehood have a central position in the process of recognition. Crawford begins his “Creation of States in international law” by quoting Oppenheim who states that “the creation of a new State is...a matter of fact, and not of law.”²⁴⁰

While the declaratory theory is based on objective facts, according to the subjective constitutive theory, recognition is not a mere declarative act, but the rights and duties related to statehood draw from recognition by other states.²⁴¹ Foundations of this doctrine can be found in voluntarist, free-will theories of law. Recognition constitutes the state; it is an additional requirement of statehood. As Grant describes, “recognition, to the declaratist, is a response triggered by certain facts and conditioned by law. When the attributes which international law holds to define a state come to obtain within a community, existing states should declare that fact by according the community recognition. The constitutivist maintains that the state is held to no such duty. A central feature of the declaratory model is that it seems to subject recognition to legal principle, whereas the constitutive model implies recognition to be a mere tool of statecraft... Declaratory doctrine imposes on existing states the duty to identify when new states have arisen. This in turn demands a clear conception of what constitutes a state. Accordingly, the declaratory approach enmeshes recognition with the definition of statehood. Herein arises the substantial complexity of declaratory doctrine.”²⁴²

Crawford notices that neither theory of recognition satisfactorily explains modern practice. Declaratory theory confuses fact with law and by equating them, excludes the possibility that the creation of states might be regulated by rules and fundamental principles of international law. On

²⁴⁰ Crawford, James (2006): *The Creation of States in International Law*, p. 3; he also points out that an entity is not a state because it is recognized, but it is recognized because it is a state. *Ibid.*, p. 93

²⁴¹ Oppenheim describes the constitutive position in the following way: “International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.” Oppenheim, L.F.L (1905): *International Law*, Vol. I, Longmans, Green and Co., London, p. 110

²⁴² Grant, Thomas, *ibid.*, p. 4-5

the other hand, the constitutive theory, although it opens a possibility of identification of subjects of international law, fails to recognize that this identification may be achieved in accordance with general rules and principles of international law, instead of on ad hoc, discretionary basis that diplomatic recognition amounts to.²⁴³ Constitutive theory even seems illogical, in a sense that the legal existence of a state depends on its relations to other states (so, for example, an entity could be recognized by some states but not by others and would thus simultaneously be a state and a non-state). Declaratory theory, according to which recognition is a political act, avoids such logical difficulties. But this theory is also not completely consistent with state practice, which shows that there are cases of contested sovereignty when recognition can practically have a constitutive effect, and in some cases recognition may serve as an important evidence of legal status. As long as recognition remains discretionary, it continues, for both the declaratory and the constitutive positions, to lie outside the orbit of law, and remains vested with a political, rather than a legal character.²⁴⁴

Recent practice regarding this question implies that international recognition has more than just a declaratory effect. These situations, however, do not change the conclusion that the status of a state is principally independent of the recognition of its status as a state. But if the new state is non-recognized by the majority of existing states, evidence is presented it does not comply with the required criteria for statehood, especially with the capacity to enter into international relations. However, the end of the Cold War produced a new situation where additional criteria for recognition were expressed (the European Community's Guidelines on Recognition of New States in Eastern Europe and the Soviet Union), and they made the line between recognition and criteria for statehood extremely thin. Although these criteria have yet to reach the status of a customary norm and although they are not binding for states outside of Europe, they show the evolution of recognition in international law. These new criteria imply fusion of the declaratory and constitutive theory of recognition as well as collective, regional action in their application, forcing individual states to cooperation and coordination. Preconditioning of recognition with acceptance of democratic standards and values is also a mechanism to avoid premature recognition, although in the case of Kosovo such mechanism was not developed and the EU is still struggling to construct cohesive politics on the matter.

²⁴³ Crawford, James, *ibid.*, p. 5

²⁴⁴ Lauterpacht, Hersch (1947): *Recognition in International Law*, Cambridge University Press, Cambridge, p. 76

Nevertheless, there are objective criteria in international law (defined in the Montevideo Convention) that determine the legal personality of a state. Admission to membership in international organizations, particularly the UN is of great importance, today it can even be seen as an additional criterion for statehood. Although the criteria for membership in the UN are not the same as the criteria for statehood, admission to the organization amounts to recognition of statehood, since the UN is only open to states. This membership confirms that the international community recognizes a new state as its member with all the rights and duties that this membership entails. This may be a conclusive evidence of a status of a state, and when the UN, for instance, recognize an entity with a questionable status, such recognition can represent conclusive evidence of that entity's statehood (for instance, Bosnia and Herzegovina and Croatia). Admission to the UN has helped the claims to statehood of several entities, which perhaps would not have been recognized by a number of other states if it had been up to their individual decision and judgment of the degree of fulfillment of traditional criteria for statehood. This is congruent with the view that although the declaratory theory is generally accepted in modern international law, recognition can have a constitutive effect in certain cases, especially when secession is involved.

Similar conclusion was reached by the Canadian Supreme Court in the Quebec Secession reference: "although there is no right, under the Constitution or at international law, to unilateral secession...this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other factors, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition."²⁴⁵ The Court has adopted the declarative theory in general, but has added that the viability of a new entity in the international community, as a practical matter, depends upon recognition by other states. However, in the process of granting or withholding recognition of a new state, the legitimacy of the process of secession needs to be taken into account.²⁴⁶ This legitimacy would include assessment whether a

²⁴⁵ Reference re Secession of Quebec, para. 155

²⁴⁶ "Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived

right to self-determination on the part of the seceding state existed and whether the secession was achieved legally in accordance with the law of the state from which the territorial unit seceded. These statements about legitimacy as a precondition for international recognition are consistent with the emerging trends in international law on secession. Although recognition remains mainly a discretionary political act, the matter of legitimacy is coming to play a role in the process.

Recognition is a discretionary act of states, and they can decide to withhold it from an entity that objectively qualifies as a state, although this can cause many difficulties for the newly formed state. However, if a state is not recognized by a large part of the international community, it can hardly enter into relations with other states, so recognition does play a certain role in the creation of a state. As Doehring notices, “the right of self-determination is of particular importance, because recognition cannot have any constitutive effect if one assumes that the right of self-determination encompasses the right to establish a State... Recognition could only have constitutive effects if the establishment of a State based on the exercise of self-determination is not yet completely achieved, perhaps due to a certain lack of effectual control on the part of the government. Such a lack of full effectiveness could then be compensated for by recognition. However, such recognition should not be proclaimed too early.”²⁴⁷ This leads him to the conclusion that the right of self-determination is only compatible with the declaratory theory. On the one hand, when the seceding unit satisfies the criterion of effectiveness and when legitimacy of the secessionist movement is undisputable, even premature recognitions from the third states can be seen as legitimate. On the other hand, since the end of decolonization, every attempt to redraw boundaries has been seen as an attack on the principle of territorial integrity and state boundaries of an independent and sovereign state. This is why “no longer is the question *when* may States recognize seceding entities, but *whether* they may do so at all.”²⁴⁸ Lauterpacht, for instance, strongly supports the rule against premature recognition because it constitutes an abuse of the power of recognition and considers it an “act of intervention and an international delinquency.”²⁴⁹ Such an intervention in an unclear situation can trigger unpredictable

legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.”

Ibid., para. 103

²⁴⁷ Doehring, Karl, *ibid.*, p. 59

²⁴⁸ Dugard and Raic, *ibid.*, p. 95

²⁴⁹ Lauterpacht, Hersch, *ibid.*, p. 8

consequences and further complicate matters, as the recent example of Kosovo demonstrates. Malcolm Shaw opines that there is a presumption against recognition of non-consensual secession from an existing state for several reasons, but the principle of effectiveness is what counts the most in the end. Firstly, the principle of territorial integrity protects sovereignty of existing states and any disruption of it could destabilize international relations and numerous countries. Secondly, the very careful definition of self-determination adopted outside of the colonial context, insofar as secession is concerned, has in effect reinforced the territorial basis of existing states and turned attention to issues of domestic governance. Thirdly, general policy reasons such as fear of ethnic conflicts that may arise if all ‘peoples’ were recognized as having the right to secede unilaterally and which might entail consequential risks to the maintenance of international peace and security and respect for human rights. In such circumstances, premature recognition would offend the sovereignty of the state concerned. The very fact that only Bangladesh can be put forward as an example of non-consensual secession from an existing state speaks volumes, but in such cases, the presumption may be overturned by the clear establishment of effective control over territory in question over time by the secessionist authorities coupled with the clear acceptance of this situation by those states most obviously affected.²⁵⁰

Bearing in mind the fact that in the post-colonial world the existing boundaries are considered sacrosanct and all states are considered sovereign and equal, territorial changes, especially unilateral secession, are usually disapproved or viewed as a violation of international law. This situation leads to an increasingly important role of the instrument of non-recognition, which becomes as significant as the recognition itself when an attempt of an entity to unilaterally secede occurs. If that act violates a *jus cogens* norm it is considered illegal, as previously mentioned. In that case states have a duty not to recognize such acts, under customary international law. There were several examples when the UN asked their member states not to recognize an entity created on illegal basis such as aggression or racial discrimination (the Turkish Republic of Northern Cyprus or Rhodesia). This implies that the lawfulness of the process of state creation is an important element besides the traditional criteria for statehood. If an entity is created on an illegal basis, and otherwise is effective, that illegitimacy would prevent that entity from being regarded as a state. “Thus, whereas in the framework of decolonisation the

²⁵⁰ Shaw, Malcolm (2003): *The Role of Recognition and Non-Recognition with respect to Secession: Notes on Some Relevant Issues*, in Dahlitz, Julie (ed.): *Secession and International Law*, Asser Press, The Hague, p. 247

principle of self-determination served as a legal basis for statehood, it stems from this second body of practice that preemptory norms could also play a negative role, since their violation would obviate statehood by *prohibiting* secession.”²⁵¹

The question of legitimacy of a secessionist claim and its relation to recognition cannot be avoided. The bond between the law of self-determination and recognition practice in cases of unilateral secession indicates that the recognition of a seceding entity as a state implies also the recognition of validity of the right to external self-determination of the people concerned. It is not only the state which is recognized, but also the right to unilateral secession. This is of great importance, since in most cases of unilateral secession it is the act of recognition of the new state that actually consolidates statehood. In the end there is nothing to add to Robert Jennings’ conclusion: “if the new State...is established with the disputed territory as its sole territory, and its Statehood is recognized, it would seem that another claim to sovereignty over the territory *is* defeated. In short it is only where there is room for doubt or ambiguity in the definition of the new State’s territory that a claim against the territory will survive. A sufficient number of recognitions of the new State clearly implying recognition of its title to the disputed territory would presumably destroy the claim.”²⁵²

17 *Uti possidetis*

Scholars often assert that the most important, but also the most problematic issue related to the concept of self-determination is the definition of the ‘self’. However, this problem is followed by another one, equally difficult – identifying territorial boundaries that belong to a defined ‘self’. The controversial matter of the determination of boundaries is clearly innately connected to the issues of legitimacy and secession. Competing groups may lay claims to the same territory, constructing their claims on different bases, which range from historical facts and grievances, patterns of settlement, to economic and security interests, etc. However, there are no established and confirmed standards in international law which can serve as guidelines in settling competing claims to the same territory. This is why the international community, during the period of

²⁵¹ Tancredi, Antonello (2006): *A Normative ‘Due Process’ in the Creation of States through Secession*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, p. 182

²⁵² Jennings, Robert (1963): *Acquisition of Territory in International Law*, Manchester University Press, Manchester, as quoted in Crawford, James, *ibid.*, p. 666

decolonization, chose the most straightforward and clear-cut solution, the principle of *uti possidetis*. Moreover, this principle continued to play an important role in the post-Cold War world, and the wisdom of this choice and its consequences are analyzed in this chapter. There is, however, another reason to analyze the doctrine of *uti possidetis*. That is its importance for the case study of Kosovo and for the analysis of the possible solution of that conflict. One point needs to be made before embarking on this analysis – it should be kept in mind that boundaries are administrative, artificial creations, and usually a result of power and political decisions, or chances of history. They are not inalterable, so when they are used to control or assimilate an ethnic group, they should be considered as no more than an instrument of oppression.

The doctrine of *uti possidetis* basically provides for stability of boundaries, by stating that when a new state gains independence, it will have the same boundaries that it possessed when it was an administrative unit within a territory of a colonial power. The very wording actually means that the existing state of possession should not be disturbed (*uti possidetis ita possidetis* – as you possess, so may you possess). When becoming independent, a new state practically inherits boundaries and there is no need for their re-drawing. It is a norm whose goal is to preserve de facto situation and it is in its essence deeply conservative. Its main advantages are that it was applied in order to prevent conflicts in the era of decolonization, and furthermore, it is very convenient and presents the simplest solution by consolidating the status quo. It simply forbids the re-definition of boundaries that the colonial power had drawn (unless all sides agree otherwise), treating them as sacrosanct. This was useful in situations when a new state emerged with multiple dangers surrounding it, such as conflicts of sub-state groups with different agendas and neighbors that might be interested in re-negotiating artificial boundaries. The international community saw perfect means in *uti possidetis* to an end of helping the new state to gain control over its territory and maintain integrity. Klabbers and Lefeber argue that the principle of *uti possidetis* is not synonymous with what has been labeled as the intangibility of boundaries. This phrase can serve as legal shorthand only, since no boundary is intangible – they can be changed as a result of agreement among states. *Uti possidetis* actually denotes that the attainment of independence by former colonies cannot in itself be a ground to invalidate boundary

settlements.²⁵³ So the main purpose of the doctrine is order, and as we have seen, the international law norms with a goal to secure order are deeply rooted in the present international system. This was enough to provide for the duration and adaptability of this norm even after the decolonization period, but the question is – should it? “Thus, if the logic of the doctrine of *uti possidetis* is to be followed as in Latin America, it would suggest that ignorant civil officers, typically situated in foreign offices in London and Paris in the middle of the nineteenth and twentieth century have shaped the identities and destinies of African peoples for all time. Lines drawn across a map is all that international law requires to cement identities, despite the fact that these lines were drawn by ignorant colonial rulers, cutting across rivers, lakes and mountains, as well as, more importantly, tribes, cultures and beliefs”.²⁵⁴ Should such norms and such law continue to be applied in the 21st century, especially when new trends in the law of self-determination are considered?

The norm has a long history which needs not to be traced, from Roman law, to the fight for independence in Latin America and decolonization process after World War II. The principle of *uti possidetis* has origins in Roman law²⁵⁵ and it was transformed and incorporated into the corpus of international law in its formative years, when scholars relied heavily on Roman law concepts. In this period it was used as a method of determining the territorial changes which occurred as a result of armed conflict and it was in conjunction with the concept of the *status quo post bellum* – entitlement to territory which had changed hands during the war was determined by the principle whereby each party gained legal right to the territory actually possessed at the time hostilities ceased. With the increased use of treaties to terminate wars after the Peace Treaties of Westphalia of 1648, *uti possidetis* became the principle applied to govern legal rights to property in the absence of specific provisions to the contrary.²⁵⁶ It was employed as a way to deal with the dissolution of the Spanish empire, so it was applied to the emerging states with a single ethnicity in Latin America in the early decades of the nineteenth century. The application of the principle meant that the borders of newly independent states would be the same as those of

²⁵³ Klabbers and Lefeber (1993): *Africa: Lost Between Self-Determination and Uti Possidetis*, in Brölmann, Lefeber and Zieck (ed.): *Peoples and Minorities in International Law*, p. 63

²⁵⁴ Castellino, Joshua (2000): *International Law and Self-Determination*, p. 138

²⁵⁵ In Roman law it was used in disputes over possession between two individuals, in the absence of any established title to land, to confirm the right of the current possessor of immovable property.

²⁵⁶ Radan, Peter, *ibid.*, p. 71

the former Spanish administrative units in order to prevent the boundary disputes concerning the precise location of a boundary line that had divided two colonial units and that post-colonial activities had set up as a new international border. Then the doctrine adapted to the process of decolonization where it was used in a synthesis with self-determination in the post-World War II Africa. As the principle of self-determination enabled decolonization, the question of the appropriate territorial framework arose. Colonially defined territory was taken as a self-determining unit, although changes to the boundaries of colonies could take place by virtue of consent. This has meant that self-determination must occur within the colonial boundaries - the application of *uti possidetis* was securing respect for the territorial boundaries at the moment when independence is achieved. It provided territorial delineation for the process of creation of a new state, and once this new state is established, the principle of *uti possidetis* gives way to the principle of territorial integrity. Not only did this doctrine have a strong support in state practice, in determining boundaries in Africa, it was supported by regional organizations such as the OAU²⁵⁷ and by the ICJ, which was categorical in the defense of the stability of boundaries *versus* the potentially disruptive nature of the principle of self-determination.

In the case of the Frontier Dispute (Burkina Faso v Mali), the Court has declared that *uti possidetis* is a general principle of international law logically connected with the phenomenon of the obtaining of independence, where it occurs, and a rule of general scope for all cases of decolonization, stating that: “at first sight this principle (of *uti possidetis*) conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.”²⁵⁸

²⁵⁷ Resolution 16(1) by the OAU at its 1964 Cairo meeting reaffirmed the principle, by stating that colonial frontiers existing at the moment of decolonization constituted a tangible reality which all member states pledged themselves to respect. Organization of African Unity, Border Disputes Among African States, Resolution 16 (1), First Ordinary Session of the Assembly of Heads of State and Government, the 21st of July 1964, AHG/Res. 16(1)

²⁵⁸ International Court of Justice, Frontier Dispute (Burkina Faso v Mali), Judgment, the 22nd of December 1986, ICJ Reports 1986, p. 567; as to the effect and the meaning of the principle the Court stated: “the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is

The statement is a stretch of the Latin American legal doctrine, where *uti possidetis* was considered a political, pragmatic rule that helped political leaders to achieve peaceful transition to independence, not some general principle. Of course, there were cases during decolonization period when the turning of the administrative boundaries into external frontiers presented not only appropriate but also the only viable solution (for instance, when a self-determining entity has no majority, but consists of many different ethnic groups). However, this statement of the Court is open to criticism, particularly from the aspect that it introduces political argumentation into legal reasoning in order to reconcile two legal principles that are in their nature impossible to reconcile. Still, this norm is considered a principle of customary international law. Cassese maintains that *uti possidetis* at present constitutes a general rule of international law, but explains that “it is plain that this rule, in that it is designed to ‘freeze the territorial title’ and to ‘stop the clock’ at the time of a colonial country becoming independent or at the time of the secession of a region from a unitary State (or a member State from a federated State), is in sharp contrast with that of self-determination. This is because the population living on or around the borders of the newly independent State may wish to choose a different sovereign or even opt for independent status or some sort of autonomy. We are here confronted with an area in which historical and political considerations were regarded by States as of such paramount importance as to make it necessary to set aside the right of peoples to self-determination. In this area, the principle of self-determination, instead of influencing the content of international legal rules, has been ‘trumped’ by other, overriding requirements.”²⁵⁹

As mentioned above, the main purpose of this norm is to provide order, and the main argument in its defense is that any alternative to *uti possidetis* is not feasible. It has also been characterized as logical and rational, since it allows for peaceful and simpler transition to independence. This idea that boundaries are sacrosanct solves one of the most problematic issues concerning self-determination. If the *uti possidetis* norm solves the question of the territory of the emerging state,

achieved. Such territorial boundaries may be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term... International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the ‘photograph’ of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands.” *Ibid.*, p. 568

²⁵⁹ Cassese, Antonio, *ibid.*, p. 192-193

there is no need to confront the Gordian knot of determining who the ‘peoples’ are. Although it is a political decision adopted to avoid conflicts in the decolonization period, it is considered a legal rule by many authors. However, many scholars such as Castellino believe that self-determination is more universally accepted: “the doctrine of *uti possidetis* clearly cannot be considered to be a norm of customary international law on the same level as the norm of self-determination since it fails to gain universal support”.²⁶⁰ He, among other authors, claims that this norm actually endangers long term peace and stability by enforcing statehood and suppressing older identities. Its applicability in the post-colonial context is also questionable.

This principle was, however, the leading one on drawing boundaries in most of Africa and Asia during decolonization. The aim of this doctrine was twofold – to protect the new state from possible irredentist movements in the neighboring countries, and internally, to protect the newly independent countries from possible secessionist movements. Ethnic diversities in many of these countries are great, and although anti-colonial fight enabled cooperation among different ethnic groups, different tribal loyalties produced many conflicts after coalitions made to oppose imperial power broke down. Artificial boundaries that were imposed on many of these states turned out to be, often enough, one of the main reasons for subsequent conflicts. The doctrine’s main purpose was to freeze the inherited colonial boundaries, to photograph the post-colonial territorial situation in order to preserve the status quo, the stability, as the ICJ confirmed in the Frontier Dispute Judgment. It is easy to agree with Karl Marx: “impotence is expressed in this one proposal: maintenance of the status quo. The general conviction, that a certain state of facts, brought about by accident and any whatever circumstances, has stubbornly to be maintained, is a statement of bankruptcy, an admission of the leading powers, that they are incapable to further the sake of progress and civilization.”²⁶¹ When new challenges were posed to the international order by the break-ups of the Soviet Union, Yugoslavia and Czechoslovakia, the doctrine of *uti possidetis* was once again seen as the most viable solution for the newly arisen forces of fragmentation.

²⁶⁰ Castellino, Joshua, *ibid.*, p. 123

²⁶¹ Marx, Karl, as quoted in Grewe, W. G. (1981): *Status Quo*, in Bernhardt, Rudolf (ed.): *Encyclopedia of Public International Law, Installment 1*, Vol. 7, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, p. 440

18 *New application of uti possidetis – Yugoslavia*

The disintegration of Yugoslavia is particularly interesting from this point of view, especially since it is related to secession of Kosovo more than a decade later. In this case, the doctrine of *uti possidetis* meant that the administrative boundaries of the old federal state should be preserved and given international legitimacy. It was the first time that the *uti possidetis* principle has been applied outside the colonial context, where it rested on the consent of the parties involved. A solution based on this principle was imposed on the constituent republics of the SFRY. Was the Badinter Commission wrong in stating that today *uti possidetis* is recognized as a general principal and should be applied as such? It seems rather that the norm exhausted its historical purpose with decolonization, and its application in post-colonial state break-ups seems suspicious, since it failed to produce even a short term order in the case of Yugoslavia.

Throughout the first half of 1991, in the months preceding the Slovenian and Croatian declarations of independence, international organizations such as the UN and the European Community, as well as various governments, have maintained that the principle of unity and territorial integrity should not be undermined and secessionist war was interpreted as a domestic affair.²⁶² In that period the impending collapse of the Soviet Union was the major preoccupation of the international community, and it was widely accepted that under international law Yugoslav republics had no right to external self-determination. In the beginning fears for political stability prevailed, although German and Austrian officials supported the independence of Croatia and Slovenia from the very start. The EC proposed a peace conference, and the Conference on Yugoslavia was established on the 27th of August 1991.²⁶³ The EC also

²⁶² In the letter of the 28th of March 1991 to Yugoslav Prime Minister Ante Markovic, President George Bush has stated that the US will not encourage those who would break any country apart, and on the 21st of June 1991, during a visit to Yugoslavia, the US Secretary of State James Baker has made it clear that the US will not recognize the planned declarations of independence by Slovenia and Croatia. The USSR also supported Yugoslav unity, and the Soviet Foreign Minister Aleksandr Bessmertnykh has remarked that Yugoslavia's territorial integrity is one of the essential preconditions for the stability in Europe. The EC expressed views similar to those of the US. At the meeting of EC Foreign Ministers on the 23rd of June 1991 it was declared that the EC would not recognize any unilateral declaration of independence by either Slovenia or Croatia. On the 19th of June the CSCE, of which Yugoslavia was a member, issued a statement supporting Yugoslavia's territorial integrity. Nevertheless, on the 25th of June 1991 the Croatian Assembly passed a Declaration relating to Croatia's independence, and on the 24th of June 1991 Slovenia issued a formal Declaration on the Sovereignty of the Republic of Slovenia. Detailed description of the international response and the course of the Yugoslav break-up can be found in Radan, Peter, *ibid.*, p. 160-203

²⁶³ The Conference was chaired by Lord Carrington and it began to function in September 1991. It was supplanted in August 1992 by a broader conference involving the UN, besides the EC. The plenum was chaired jointly by the UN

established an Arbitration Commission (also known as the Badinter Commission because it was presided over by Robert Badinter, president of the French Constitutional Court) in order to advise on the legal matters.

This case is also important because the EC's Peace Conference at The Hague in October 1991 spelled out additional requirements for the recognition of independence of state members of Yugoslavia. Besides the classic requirements, other conditions related to minority protection, local autonomy and human right guarantees were produced. This proposal was further specified at the Ministerial Meeting in December²⁶⁴ and then the Arbitration Commission had to decide if these guidelines were fulfilled. Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the following Declaration on Yugoslavia²⁶⁵ have proclaimed the readiness of the member states of the EC to recognize those new states which "have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to

Secretary General Boutros Boutros Ghali and the UK Prime Minister John Major, since the UK was at the time holding the Presidency of the EC, while Lord Carrington had resigned as EC special envoy just before the second conference.

²⁶⁴ "The Community and its member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations. Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighboring States. The commitment to these principles opens way to recognition by the Community and its member States and to the establishment of diplomatic relations." European Community, Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, the 16th of December 1991, 31 ILM 1486-1487

²⁶⁵ In Declaration on Yugoslavia the member states of the EC agreed to recognize all Yugoslav Republics which declared before the 23rd of December that they wished to be recognized as independent states, that they accepted the commitments in the Guidelines and that they accepted the so-called Draft Convention or Carrington Convention prepared during the peace conference on Yugoslavia. European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, the 16th of December 1991, 31 ILM 1485-1486

negotiations.” This way the shift in the policy of the international community towards legitimizing secession was formally confirmed. The Guidelines represent an interesting mixture of the declaratory and constitutive theory on recognition. Democratic institutions such as the approval of the majority of the people concerned as an assessment of legitimacy of the new government are beginning to form a new standard in international law, and are, if not originating from, certainly complementary to self-determination. In other words, by making the external self-determination conditional upon the respect for democracy, the relation between internal and external aspects of self-determination, as well as the link between self-determination and minority rights is confirmed.²⁶⁶ However, it is still a stretch to say that this standard amounts to a rule of customary international law. It is, in its essence, a demonstration that even in cases of apparently unstoppable secession, some sort of institutional framework needs to be produced. This led Dietrich Murswiek to conclude that there is a hesitant change of mind towards affirmation of the right of secession under certain conditions in the international community.²⁶⁷

A new state originating from secession should only be recognized if it has acquired all the classic characteristics of a state in accordance with the principles of international law, otherwise the recognition would be a breach of international law. It is doubtful whether all of the classic and new conditions for statehood were fulfilled when the EC decided to go ahead with recognitions. The recognitions of Croatia and Bosnia and Herzegovina served primarily political goals. In the beginning of 1992, there were still doubts concerning the success of Croatia’s attempt at secession, so diplomatic recognition would not have been in accordance with international law, unless Croatia had been entitled to secede by the right of self-determination. This means that the right of secession was implicitly admitted when many states recognized Croatia.²⁶⁸ Dugard and Raic have asserted that although the formation of the Republic of Croatia is generally viewed as a case of state-creation following the dissolution of federation, it is better categorized as an example of unilateral secession, because in this case, it was the secession of federal republics that led to the dissolution of the SFRY (the creation of the state of Bosnia-Herzegovina may also be seen as an example of unilateral secession). That shows that secession and dissolution are not mutually exclusive and that the right of self-determination was applicable to the crisis in the

²⁶⁶ Cassese, Antonio, *ibid.*, p. 268

²⁶⁷ Murswiek, Dietrich, *ibid.*, p. 30

²⁶⁸ *Ibid.*, p. 30-31

SFRY.²⁶⁹ There are, of course, different opinions. For instance, Andreas Zimmermann claims that “the break-up of the former Yugoslavia can no longer be considered as a chain of separations, but rather as a continuous process leading to a complete dismemberment of the Socialist Federal Republic of Yugoslavia. It is still true however, that even this process of dismemberment did include initial instances of secession by at least Slovenia, Croatia and Bosnia and Herzegovina, which by their cumulative effect later turned into a complete dissolution of the former Yugoslavia.”²⁷⁰ Crawford maintains that this case does not support the view that international law is moving towards greater tolerance of secession. Although he admits that the recognition of Croatia and Bosnia and Herzegovina was, at the time, anything but the recognition of ‘facts’ and that the early stages of the crisis were characterized by attempts on the part of several of the constituent republics to secede, he gives greater relevance to Badinter opinions and the decision to treat Yugoslavia as being in the state of dissolution.²⁷¹

“The use of recognition as a pressure was a tragic mistake which forced the international community to deal with the Balkan conflict in terms of inter-State aggression and self-defence. It was forced to treat the conflict as primarily one of Serbian aggression. This policy – shared initially by the United States – was neither historically nor politically (nor perhaps legally in as much as doubt may be expressed about the legality of Bosnia’s secession after a plebiscite among the Muslim population) correct characterization of the situation and led to an inflexible approach stressing the need to respect the ‘territorial integrity’ of Croatia and Bosnia in a fashion that has made any compromise settlement vulnerable to the charge of rewarding aggression.”²⁷² However, rapid recognition of the Yugoslav republics as independent states by members of the international community represents an enormous leap in post-colonial international practice, since widespread recognition of the secessionist states occurred while they were still engaged in armed struggles. It also showed that internal boundaries can have international significance if that serves current political goals, because national interests were dominant in the original decisions on recognition.

²⁶⁹ Dugard and Raic, *ibid.*, p. 123-130

²⁷⁰ Zimmermann, Andreas (2006): *Secession and the Law of the State Succession*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, p. 211

²⁷¹ Crawford, James (2001): *The Right of Self-Determination in International Law: Its Development and Future*, p. 54-55

²⁷² Koskenniemi, Martti, *ibid.*, p. 268

Opinions of the Arbitration Commission served as the legal basis for recognitions, so a legal precedent in favor of a right to secede was not created. Internal borders of Yugoslavia were not to be changed. It is, however, more than doubtful whether under international law a 'federal' right of self-determination exists, while the secession of autonomous regions is prohibited. There is, admittedly, a sound argument that federal republics have developed state structures so they can easily prove the effectivity of their governments. Inviolability of frontiers was one of the additional requirements for the recognition of the emerging states, and thus it was declared that the borders of sub-units within the federation are not to be modified. That was the opinion of the Arbitration Commission. The Commission delivered ten opinions between December 1991 and July 1992 in response to the questions formulated by the chairman of the peace conference, Lord Carrington, or at the initiative of the EC Council of Ministers. Further five opinions were delivered after it had been reconstituted in January 1993. Opinions Nos. 1-3 are particularly relevant.

Opinion No. 1 of the 29th of November 1991 states that the situation in Yugoslavia involves the dissolution of the federation and emergence of its constituent republics as independent states, although that process is not yet completed.²⁷³ This emphasis on dissolution had important consequences on matters of state succession, boundaries, minority rights and status of autonomous regions - it was not accepted that the groups within the republics had the right to secede. Another important consequence was that the EC was not seen as sanctioning secession when subsequently granting recognition to the republics, but as recognizing new states that emerged from this process of dissolution. It is questionable whether the Commission was right to conclude that the SFRY was in a process of dissolution, because even substantial changes to territory, population and government do not necessarily point to the extinction of a state. As Craven explains "dismemberment... is merely descriptive of a form of extinction following the

²⁷³ EC Conference on Yugoslavia, Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1494; According to Opinion No. 8 of the 4th of July 1992 this process of dissolution is completed, and the SFRY no longer exists: "the Commission finds that the existence of a federal State, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign States with the result that federal authority may no longer be effectively exercised. By the same token, while recognition of a State by other States has only declaratory value, such recognition, along with membership of international organizations, bears witness to these States' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law." EC Conference on Yugoslavia, Opinion No. 8 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1521

disassociation of various territorial units. As such, it can only really be attributed to a situation *ex post facto* once the lack of continuity of the State has been finally determined. If the issue is simply whether or not a State continues to exist, it makes no sense to speak of dismemberment as a process.”²⁷⁴ He uses the word dismemberment as synonymous to dissolution. In Opinion No. 8 the Commission has recognized that at the date of Opinion No. 1, despite the SFRY being in the process of dissolution, it was at that time still a legal international entity.²⁷⁵ On this basis Craven concludes that the Commission should have refrained from offering its view that the SFRY was in the process of dissolution in November 1991.

In Opinion No. 2 of the 11th January 1992²⁷⁶ the Commission answered the question of the Republic of Serbia – Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination? The Arbitration Commission stated that “international law as it currently stands does not spell out all the implications of the right to self-determination. However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise. Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law...The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities.” This means that the members of the Serbian population are minorities and possess minority rights, including the right to recognition of their identity under international law and the right to choose their nationality, while self-determination can be granted to them only if the Republics agree to do so, as a consequence of the application of *uti possidetis*. So external self-determination was denied to Republika Srpska, but the right of

²⁷⁴ Craven, M.C.R. (1995): *The European Community Arbitration Commission on Yugoslavia*, British Year Book of International Law, Vol. 66, p. 369

²⁷⁵ Opinion No. 8 of the Arbitration Commission, p. 1521

²⁷⁶ The Commission ruled that the SFRY had been in the process of dissolution on the basis of three factors. Firstly, there was reference to the plebiscites on independence held in Slovenia, Croatia and Macedonia, and the sovereignty resolution of the Assembly of Bosnia and Herzegovina. Secondly, according to the Commission federal institutions such as the Federal Presidency, the Federal Assembly, the Constitutional Court and the Yugoslav People’s Army had ceased to meet the criteria of participation and representativeness inherent in a federation. Thirdly, federal authorities and the republics had been unable to enforce respect for any of the numerous cease-fires that had been negotiated by the European Community and the UN. EC Conference on Yugoslavia, Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1497

self-determination at the internal level was not. The same principle applied to other territorial units such as the autonomous province of Kosovo.

However, it is not clear why the Croats and Bosnian Muslims came to be considered by the Commission as peoples who could, in the exercise of their right to self-determination, change the borders of the SFRY, while the Serbs of Croatia and Bosnia and Herzegovina were characterized as minorities. The Serbs had the same status under the 1974 constitution, they were, together with the Croats and Bosnian Muslims, recognized as constituent nations, and under the republic constitution of Bosnia and Herzegovina these three nations were proclaimed equal and constituent nations of Bosnia and Herzegovina. Also in Croatia, under the 1974 republic constitution the Serbs and the Croats were equal and constituent nations of that republic. Because the Croats, the Serbs and Bosnian Muslims were constituent nations within the SFRY, one could not discriminate between their rights to self-determination. As Peter Radan explains, if the Croats and Bosnian Muslims of Croatia and Bosnia and Herzegovina in the exercise of the right to self-determination had the right to their own states at the expense of the borders of the SFRY, then logically the Serbs of Croatia and Bosnia and Herzegovina, in the exercise of their right to self-determination, had the same right at the expense of the borders of Croatia and Bosnia and Herzegovina.²⁷⁷ However, the Opinion No. 2 excluded the right of secession for the Serbs of Bosnia and Herzegovina and afforded them minority rights. Ved Nanda submits that the Commission failed to provide guidance on what kind of self-determination rights the Serbs could have in Croatia and Bosnia, thus losing an opportunity to clarify alternatives to secession because it equated the right to self-determination solely to secession and changes in boundaries. “Perhaps the Commission could have recommended a negotiated redrawing of the boundaries of Yugoslavia based upon plebiscites under international supervision. This may have provided peaceable resolution of the dispute and avoided the years of bloody civil war that followed. Since

²⁷⁷ He further concludes that it could be argued that the Serbs of these two republics had no right to self-determination on the basis that these Serbs, as a fraction of a people, cannot have a right to self-determination independent of the rest of that people living elsewhere in the SFRY. The Badinter Commission, in Opinion No. 4 on the International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Members suggests that a fraction of people can exercise the right of self-determination independently of the rest of the people. In this opinion the Commission recommended that the population of Bosnia and Herzegovina had to indicate its will for independence by means of a plebiscite in which that republic’s population would vote. This meant that a fraction of the Serb people, together with fractions of the Croat and Bosnian Muslim people, could exercise the right to self-determination by voting for the independence of Bosnia and Herzegovina. Thus, a fraction of people can exercise the right of self-determination independently of the rest of that people. Radan, Peter , *ibid.*, p. 219-220

this was not a colonial situation, the Commission's invocation of the concept of *uti possidetis juris* was not appropriate.²⁷⁸

In Opinion No. 3²⁷⁹ of the 11th January 1992 the Commission stated that “except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. The Committee recalled the Judgment of the International Court of Justice of 22 December 1986 in the case between Burkina Faso and Mali where it was stated that *uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle. The International Court of Justice in the case between Burkina Faso and Mali (Frontier Dispute, (1986) ICJ Reports 554 at 565) stated: Nevertheless the principle [of *uti possidetis*] is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles.” Legal justification for this opinion of the Commission stems from two international law principles – the principle of territorial status quo and the principle of *uti possidetis*. Respect of the territorial status quo of existing internationally recognized states is unquestionably valid, but the difficulty lies in the fact that the principles of territorial integrity and the inviolability of international borders apply to international states and international borders, not to federal units of states and their internal borders. The second principle is *uti possidetis*. It is interesting to note that the Commission chose to omit the last few words of the final sentence of the ICJ's judgment it quoted. The entire sentence reads: “its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles *provoked by the challenging of frontiers following the withdrawal of the administering power.*”²⁸⁰ In the same judgment that the Commission selectively quoted, the Court actually said: “*uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to

²⁷⁸ Nanda, Ved (2000): *Self-Determination and Secession under International Law*, Denver Journal of International Law and Policy, Vol. 29, p. 314

²⁷⁹ This opinion was a respond to the following question by Lord Carrington: Can the internal boundaries between Croatia and Serbia and between Bosnia and Herzegovina and Serbia be regarded as frontiers in terms of public international law? EC Conference on Yugoslavia, Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1499

²⁸⁰ Frontier Dispute (Burkina Faso v Mali), p. 565

international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.”²⁸¹ Nothing in this decision of the ICJ suggest that the principle of *uti possidetis* applies to cases of dissolution or secession from internationally recognized states – the decision rather indicates that the principle is confined to decolonization. If the Court had meant to refer to the emergence of states worldwide, it would have probably used the term self-determination instead of decolonization. Furthermore, *uti possidetis* does not prevent the emergence of different borders during decolonization. There are cases where states emerged with other than their pre-independence borders or where single colonies were split at independence through various processes. States have also agreed to accept deviations from *uti possidetis*.²⁸² As Suzanne Lalonde argues “in both Latin America and Africa, two separate and distinct processes were at work: first, the identification of the presumptive units of statehood, whether by virtue of the principle of effectiveness or the right of self-determination of colonial peoples; and second, the determination of the boundaries of those entities through the application of various principles including *uti possidetis*. Yet the Badinter Commission in Opinion No. 3 assigns to the *uti possidetis* principle the unprecedented role of selecting which administrative units will be entitled to join the international community of states.”²⁸³

The Commission has further stated that external frontiers should be maintained in accordance with the principles set forth in the UN Charter, General Assembly Resolution 2625, the Helsinki Declaration and Article 11 of the 1978 Vienna Convention on Succession of States. The boundaries of the republics can be modified only by consent. If such consent does not exist, they are protected by international law (*uti possidetis juris*). To extend the *uti possidetis* principle to internal administrative boundaries of a federal unit in such a manner, without federal or Serbian consent, is hardly resting on any legal authority, and it is clearly done in order to avoid the issue

²⁸¹ *Ibid.*, p. 566

²⁸² For examples see Ratner, Steven (1996): *Drawing a Better Line: Uti Possidetis and the Borders of New States*, American Journal of International Law, Vol. 90, p. 599-600

²⁸³ Lalonde, Suzanne (2002): *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, McGill-Queen’s University Press, Montreal, p. 192-193; She concludes that “there appears to be no legal basis for the Arbitration Commission’s characterization of *uti possidetis* as a general principle of international law. Not only did the commission transpose a colonial principle of uncertain status to a radically different situation – the dissolution of a sovereign state – but it also radically transformed the principle. Whereas in the colonial context *uti possidetis* constitutes a delimitation principle, as applied by the Arbitration Commission it serves as an inconsistent rule for the identification of units of statehood. Furthermore, this new version of the *uti possidetis* principle is no longer founded on the consent or contracting-in of the parties involved but has become a binding solution that can be imposed upon unwilling participants.” p. 202-203

of territorial adjustments and compromises that could have been more successful in preventing ethnic cleansing. Hurst Hannum opines that the Commission's equation of the SFRY's internal borders with those drawn by colonial powers has no basis in law,²⁸⁴ and that the commission members "appear to have based their judgments on geopolitical concerns and imaginary principles of international law, rather than on the unique situation in Yugoslavia."²⁸⁵ Peter Radan maintains that to insist that, in cases of secession from a federal state, internal administrative borders should automatically become international borders is to create a new rule of international law.²⁸⁶

Jochen Frowein concludes that "if one reads these very short opinions, which apparently are being considered as binding judgements on points of law, one is surprised about the boldness with which very difficult issues of public international law are being decided in a clear-cut manner without much argument...a lot can be said for the approach made by the Badinter Committee, but one wonders whether lawyers should automatically declare, as legally prescribed, what they consider to be the most appropriate solution in political terms."²⁸⁷ Lord Owen, the former Co-Chairman of the Steering Committee of the International Conference on the Former Yugoslavia, has stated that sticking unyieldingly to internal borders was a 'folly' and that the EC's rejection of a Belgian proposal to redraw borders was incomprehensible, with the consequence that "the refusal to make these borders negotiable greatly hampered the EC's attempt at crisis management in July and August 1991 and subsequently put all peacemaking

²⁸⁴ Hannum, Hurst (2006): *Self-Determination in the Twenty-First Century*, p. 65; He also claims that "this neo-decolonization territorial approach can have troubling consequences if used to legitimize secession for groups possessing a distinct political status while denying the right of secession to territorially based ethnic communities not formally organized into political units. This seems to be the position taken by the Arbitration Commission established by the International Conference on Yugoslavia, which has implied that the right to secede varies according to the degree of autonomy recognized by the central government... Regrettably, this approach will encourage states to resist granting precisely those political and economic rights which might constitute the most realistic and effective response to claims for self-determination. In effect, a state would be penalized if it addressed ethnic or regional concerns by devolving power to autonomous regions. This is directly contrary to the message that should be sent by the international community to states faced with ethnic or regional conflicts." Hannum, Hurst (1993): *Rethinking Self-Determination*, p. 38-39

²⁸⁵ Hannum, Hurst (1993): *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles*, Transnational Law and Contemporary Problems, Vol. 57, p. 69

²⁸⁶ Radan, Peter, *ibid.*, p. 247

²⁸⁷ Frowein, Jochen (1993): *Self-Determination as a Limit to Obligation*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, p. 216-217; Similarly, Marc Weller writes: "overall, the generally very brief opinions of the Commission are likely to attract considerable and probably hostile scholarly interest. They are underpinned by the shallowest legal reasoning and do not appear destined to assist the international community greatly when addressing the potentially dangerous problem of secession in the future." Weller, Marc (1993): *International Law and Chaos*, Cambridge Law Journal, Vol. 52, p. 8

from September 1991 onwards within a straitjacket that greatly inhibited compromises between parties to the dispute.”²⁸⁸ It turned out that the insistence on maintaining internal borders not only prolonged the violence, but also intensified it, opposite to the main argument usually deployed in defense of *uti possidetis* that it minimizes threats to peace and security.

Edward McWhinney believes that the Commission’s reasoning originates from the fact that its members were not experts in international law: “part of the problem inherent in the jump from purely *internal*, regional boundaries within a federal or plural-constitutional state that are sanctioned, as such, under the Municipal, constitutional law of the state concerned, to *external* frontiers of a state sanctioned, as such, under Public International Law, may perhaps be found in the special nature and composition of the Badinter Commission with its five members’ special legal expertise in Municipal, national constitutional law, without obvious claims also to authority in international law.”²⁸⁹ Crawford asserts that the Commission failed to take into account standard criteria for independence based on the principle of effectiveness. He concludes that “the way in which the Yugoslavian situation was handled provides no precedent for the extension of any international legal right to secede in the case of the constituent units of federal States.”²⁹⁰ These and many other authors criticized the confusion rendered by the Arbitration Commission,²⁹¹ but the fact is that this entire process was authorized by the international community by according diplomatic recognition to new states and by their hasty admission to the UN.

It seems that the policy of the international community in the case of Yugoslavia backfired and showed how a transformation of an internal boundary into an external, international one can create many problems. The rigidity of boundaries can seriously compromise the concept of self-determination and the long-term stability. A uniform and rigid solution is unacceptable in

²⁸⁸ Owen, David (1995): *Balkan Odyssey*, Victor Gollancz, London, p. 33

²⁸⁹ McWhinney, Edward (2007): *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law*, Martinus Nijhoff Publishers, Leiden, p. 54

²⁹⁰ Crawford, James, *ibid.*, p. 401

²⁹¹ There are, of course, different opinions, such as Shaw’s: “any attempted ethnic reconfiguration of the former Yugoslavia on a totally free-for-all basis, without the presumptive *uti possidetis* rule with regard to boundaries, would most likely have produced an even worse situation than that which did occur. In addition to the deeply destabilizing effects that such an approach would have internally, in terms of the international situation it would remove substantial restraints from states contemplating intervention when faced with a civil war involving ethnic kin in a neighboring state.” Shaw, Malcolm (1997): *Peoples, Territorialism and Boundaries*, European Journal of International Law, Vol. 8, p. 502

modern international community where respect for human rights and diversity represents an important aspiration. If a state is breaking up, forcing its population to coexist within unchangeable administrative borders will not produce a higher level of peace and security or respect for human rights – on the contrary. In the end, it should be highlighted that *uti possidetis* is binding only to those parties who have expressly agreed to it. As Judge Abi-Saab stated in his separate opinion in the Frontier Dispute case “this principle, like any other, is not to be conceived in the absolute; it has always to be interpreted in the light of its function within the international legal order.”²⁹²

The doctrine of *uti possidetis* is a simple solution since it offers an easy exit from a complex situation of conflicting territorial claims. The objection to the application of this principle is that, simply, better solutions in certain situations might be found. For instance, if a political solution cannot be found through negotiations and international mediation, there is always the possibility of going before the international court or arbitration which can reach a decision or a recommendation relying on expert opinions on territorial issues. Other important considerations are public opinion tested through referendum and factors such as identity, linguistic boundaries, natural frontiers, tradition and history, etc. This would, of course, mean that every case has to be individually assessed and every decision carefully weighed, because it would present an indicator for future cases. Ratner, for instance, proposes a reversion to the original Roman-law meaning of *uti possidetis* - to preserve the status quo only until states can resolve their competing claims. If new entities cannot agree on appropriate division of territory, they should respect existing lines of control until an authoritative decision is reached on new boundaries. He admits that this places a heavy burden on decision makers, diplomats or international commissions or courts, but points out that to date, states, courts and scholars have agreed that there is no universal rule for arriving at an ideal line to divide territory - whether by adopting linguistic boundaries, natural frontiers or *uti possidetis*. However, such a transformed norm of *uti possidetis* would not require that a provisional or disputed, let alone illegitimate or illegal border becomes permanent, and thus it does not mandate the status quo as a solution to unresolved or active claims.²⁹³

²⁹² Frontier Dispute (Burkina Faso v Mali), Separate Opinion of Judge Abi-Saab, p. 661

²⁹³ Ratner, Steven, *ibid.*, p. 617-619

19 *Conclusion*

In the post-colonial era self-determination is often advanced as a destructive force, a tool of ethno-national groups who use it in their struggle for statehood. This resurgence of violent conflicts fueled by the desire for independence led many scholars to proclaim self-determination as an unworkable concept, run over by time. However, it was shown that self-determination went through a process of transformation, and in this process the internal dimension of self-determination gained advantage over the previously dominant external dimension. Self-determination is a dynamic concept, and it is now inseparable from human and minority rights. The definition of self-determination as ‘the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development’ leaves space for various interpretations. Additionally, it should not be forgotten that self-determination is more than a rule of customary international law – it is also a principle of international law, and therefore it has an equal weight as other important principles such as sovereignty, territorial integrity or equality of persons, which means that it has to be taken into consideration during the decision-making process in the international community. However, the gap between the doctrinal account of self-determination and nationalistic resurgence which uses the rhetoric of self-determination results in significant controversy which now surrounds this concept.

In conclusion, we can summarize the progress of self-determination:

1. Self-determination is a general right and a principle of international law;
2. Self-determination applies to all peoples;
3. All peoples have a right to be free from alien subjugation, domination and exploitation;
4. Self-determination is most often exercised by the establishment of a sovereign and independent state;
5. Colonial peoples were the main beneficiaries of the territorial approach to self-determination – they have the right to independence and formation of their sovereign states;
6. Since the era of decolonization is over, the concept of self-determination is undergoing another transformation whose main feature is connection with human rights;

7. Transformation of subjects of self-determination occurred as well – all peoples, nations, ethnic groups and minorities have a right freely to pursue and develop their culture, traditions, language and religion; this is the internal aspect of self-determination – the right of all peoples to determine democratically their own socio-economic and political system of governance;
8. Remedial secession – systematically oppressed subgroups within a state have the right to self-determination including the right to secede;
9. Principles of state sovereignty, territorial integrity and non-intervention in the internal affairs of other states remain central to the right.

Since the decline of decolonization, from the end of the 1970s, alternative models of self-determination have emerged. Gerry Simpson gives an analysis of these competing models that are each, in their essence, a renewal of a historical movement. They are national self-determination, democratic self-determination, devolutionary self-determination and secession. Each of these models contains an opposing idea of self-determination that in a sense demises the original and each is a mode of only partial satisfaction of claims to self-determination. Secession is a remedy of last resort, an exercise of the ultimate collective human right in order to secure basic individual human rights where devolutionary, democratic, and colonial models of self-determination have failed.²⁹⁴ Simpson believes that, despite the conflict with the principle of territorial integrity, the international community has become more sympathetic to secession.

²⁹⁴ *National self-determination* puts national identities in the foreground and leaves little room for participatory forms of self-determination. This model is extremely hostile to secessionist movements within the ‘nation’. However, the nation state no longer exists and all nations carry within their territories other nations. That makes this model unsophisticated and exclusionary, because, apart from denying territorial self-determination to other nations within an often arbitrarily defined national territory, there must come a point at which secessionist option becomes a reality because national expression through cultural form is inadequate or unprotected. On the other hand, *democratic self-determination* is represented in internal self-determination as a right of peoples to choose the type of government by which they wish to be represented. This view assumes that group self-determination is an extension of personal political self-determination. The main problem is whether group rights to self-determination can be satisfied on the majoritarian model. This model is not capable of resolving challenges from indigenous, national and devolutionary forms of self-determination and the feminist critique of self-determination. *Devolutionary self-determination* means constitutional arrangements such as federalism, regional autonomy or subsidiarity, which result from a process of decentralization or noncentralization. This model is taken more seriously by states and supranational bodies. It is sometimes characterized as a preemptive model, because timely vertical distribution of power can prevent resort to violence, interethnic secessionist conflicts or political disintegration. The problem is that federalism can be incompatible with certain forms of national expression or that governments will refuse to implement this model. In such cases it is necessary to turn to the remedy of last resort, secession. Simpson, Gerry, *ibid.*, p. 45-56

There is a detectable shift away from an absolute, unconditional right to political sovereignty and territorial integrity toward more flexible, less statist positions. A new postcolonial right to limited secession is at the point of materializing. The grievances of ethnic peoples are no longer an exclusive concern of the sovereign state, and a right to deal with these internal claims is no longer an exclusive domain of the sovereign state, especially when ethnic conflicts might pose a threat to the peace, or violations of fundamental human rights and freedoms are particularly grave. Despite the possibility of violence which secession creates, and despite the fact that it is not an ideal form of self-determination, it can be a valid response to situations that pose a serious threat to international peace and security.

However, a new trend among scholars and Western governments appeared – the internal dimension of self-determination is receiving more attention. Scholars began to write about an emerging norm of democratic governance based on the right of self-determination, so democratization and decentralization partially turned the focus away from the external dimension of self-determination. This turning toward the internal aspect of self-determination and rights related to democratic governance in the last two decades is visible not only in the legal doctrine, but also in the international community, where states vigorously express their commitment to principles of democracy. However, Thomas Franck was right to recognize that the forces of globalization bring people closer together, which can sometimes be dangerous since the clash of cultures may produce a bigger need to stress the identity. According to him, such a development may lead to ‘post-modern tribalism’ that is characterized by an effort to constitute uni-cultural and uni-national unites. “On the other hand, there is considerable evidence that, in the new era of postmodern tribalism, whatever the meaning of the admittedly continuing right of self-determination, it has not been endowed by States in texts or practice with anything remotely like an internationally-validated *right*, accruing to every secession-minded peoples anywhere, to secede territorially, at will, from established States that are members in good standing in the international community”.²⁹⁵

General interpretation of the right of self-determination in positive law is that sub-national groups do not have the right to external self-determination, but only to forms of internal self-

²⁹⁵ Franck, Thomas , *ibid.*, p. 16

determination and minority protection. The reality of international relations is that territorial integrity represents a value above all others to states. So, “this conclusion may not come as a surprise as it cannot be expected that states should subscribe to international instruments or to issue legal opinion which, at first sight, undermine the stability of the world order. Following a natural law interpretation of self-determination, however, it can be maintained that a serious and persistent denial of internal self-determination sets aside the principle of territorial integrity and imposes corresponding obligations at international community to realize the ensuing right of external self-determination.”²⁹⁶

The right to remedial secession is crystalizing in international law. A case of secession is considered remedial if several criteria are fulfilled. Firstly, the subject of secession must be a ‘people’, and this ‘people’ must constitute a territorially concentrated numerical minority in the state from which they want to secede, since secession involves a separation of a part of territory from the parent state. Secondly, the existence of a territorial bond between the people that wish to secede and the territory they want to take with them is important. Secessionists need to have a strong claim to the territory they intend to separate from the parent state. Thirdly, the right of internal self-determination of the people concerned has to be seriously and persistently violated, so that it transforms into the right to external self-determination. The breach of the right of internal self-determination can be a result of widespread, systematic and serious violations of fundamental human rights or a direct or indirect denial of a people’s right to participation by their government. As previously mentioned, the main problem with this criterion is the question of the degree of discrimination which gives rise to the right of secession, and how it is to be determined whether this violation of the right to internal self-determination is so grave that it overrides the principle of territorial integrity of states. It is usually proposed that discrimination has to reach such a degree that it endangers the existence and the collective identity of the people in question. Fourthly, secession has to be a realistic prospect of conflict resolution and peace. And finally, secession must be the *ultimum remedium*, which means that all judicial and political remedies must be exhausted before recourse to secession. Only in cases where it is clear that there is no possibility of peaceful coexistence between the minority that demands statehood and the majority of the population of the state they wish to secede from, can the minority validly

²⁹⁶ Klabbers and Lefeber, *ibid.*, p. 51-52

claim a right to secede. The *raison d'être* of these criteria is to stress that secession is a serious step, since changing the territorial arrangement of states entails serious risks to the international peace and security. Remedial secession is compatible with the emerging trends in international law which emphasize the internal dimension of self-determination. Self-determination in the post-colonial context is increasingly being seen as an entitlement to democracy, a right of peoples to participate in the political life of their country. This right to political participation is normally supportive of the territorial integrity of a state, but in cases when a government does not represent the whole people belonging to the territory without distinction of any kind, the territorial integrity of that state is no longer sacrosanct. When a minority is systematically discriminated against, it becomes excluded from the political life of its country, and members of that minority are no longer full citizens of that state, which puts them in a situation comparable to that of colonial peoples. This means that when the right to participation is non-existent, when minority rights are denied and violated so that no solution can be found within the framework of the existing state, secession as a remedy of last resort should not be absolutely excluded.

In the end, Cassese's warning should not be disregarded: "as long as self-determination is perceived primarily as a right to independent statehood it will remain more a source of conflict than a substantive component in the settlement of disputes. States will continue to oppose with force peoples invoking their right to self-determination, characterizing the members of liberation groups as terrorists intent on dismembering the country. At the same time, those entitled to self-determination will lean towards rigidity and intransigence; convinced that the right to self-determination entitles them to absolute independence, they will be reticent to negotiate if sovereignty does not immediately appear in the offing."²⁹⁷

²⁹⁷ Cassese, Antonio, *ibid.*, p. 350

Part II

Political Theories on Secession

1 *Introduction*

Before World War I, there were hardly any discussions about secession. It was simply seen as a common way of creating new states. In following decades of the 20th century the situation changed – decolonization was a controlled process, and the statehood of a colony was normally achieved with the consent of the former sovereign. Nevertheless, there were always attempts to secede without that consent. The fact remains that no new state formed outside the process of decolonization during the Cold War has been admitted to the UN without the consent of the former sovereign. In cases of unilateral secession, the majority of states are very reluctant to recognize the entity that tries to achieve statehood. Still, these attempts continuously emerge, and if the parent state opposes secession, they have little chance of gaining international recognition and support, even if the criteria of effectiveness, substantial public support for independence in the seceding unit and even remedial oppression have been met. Crawford poses the question whether international law is even moving toward some form of prohibition of secession, because state practice in the matters of secession has been relatively consistent and remarkably conservative. However, this evident aversion of the international community to anything that can be interpreted like support for secession has not made unilateral secession actually unlawful for two reasons. First is the lack of any articulated basis for such a change in international law and secondly, because there is ultimately no point in the refusal to recognize facts not brought about in violation of international law.²⁹⁸ The post-Cold War era witnessed a significant proliferation of ethnic and separatist armed conflicts, although secessionist conflicts also existed during the Cold War. However, since 1991, these conflicts have become one of the most complicated and unsolvable among numerous security challenges. Radical forms of separatism turned out to be

²⁹⁸ Crawford, James (2001): *The Right of Self-Determination in International Law: Its Development and Future*, p. 55

one of the most prominent problems that the international community had to face, and state-building one of the often used phrases in the international sphere. Secessionist struggles became the focus of interest of the international community, while states and international organizations began to take a more active role in these conflicts.

Philip Allott is right to describe self-determination as a complex social phenomenon. When analyzed at a systematic level, this phenomenon suggests an explanation as to why self-determination creates high levels of tension and psychic and social energy. This comes from the powerful interaction and struggle of three things. First is desire – of individual human beings and collective desires of involved societies that pursue their different self-creating desire-strategies within one self-determination complex. Second is power – constituted, unconstituted or semi-constituted social power of oppressed or excluded society members, public realm power of state versus the power of dissidents, partisans, irregulars, insurgents, anarchists, terrorists. Third is a struggle of ideas – those that structure social systems as well as those that structure human desires. Of course, there are many other social situations that can be analyzed as struggles of these three things, but what makes a self-determination situation liable to generate exceptionally high levels of psychic and social energy are three specific factors. First is that desire, power and ideas involved with self-determination are about ultimate things, ultimate aspects of personal and social identity. Second is that self-determination means other-redetermination, especially when a claim to self-determination is a claim to a new set of social relationships, and simply because human identity is identity-through-difference (we are who we are because you are who you are; we are as we are because we are not as you are). The third factor is the revolutionary nature of self-determination, because it is a situation that cannot be resolved routinely within the available sub-systems of social systems, so it causes a breakdown of society's self-re-forming capacity.²⁹⁹

One can often read quotations of Robert Lansing's (President Wilson's Secretary of State) statement that "the phrase [the right of self-determination] is simply loaded with dynamite."³⁰⁰

²⁹⁹ Allot, Philip, *ibid.*, p. 177-180

³⁰⁰ Lansing, Robert (1921): *The Peace Negotiations: A Personal Narrative*, Houghton Mifflin Company, Boston, p. 97; In his notes at the Peace Conference he wrote: "the more I think about the President's declaration as to the right of 'self-determination', the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and create trouble in many lands... Will it not breed discontent, disorder and rebellion? The phrase is simply loaded with dynamite. It will raise hopes which

The revolutionary nature of self-determination lies in the possibility of intervention of various non-state groups in legal order and institutions. It also means that legitimacy of the entire constitutional order of a state is questioned. The very fact that secession takes place outside of the ordinary legal order means that legal constraints are, at the very least, limited. The connection between revolution and secession is easy to notice – the disruption of the existing constitutional order. Although secession is territorially restricted, it involves a transition of authority as its most striking revolutionary feature. As Cobban notices, “the history of self-determination is a history of the making of nations and the breaking of States.”³⁰¹

Of course, theorists and international lawyers have different perspectives on the right of self-determination and the right to secession. “In resolving the issue of what self-determination means, an author validates or authorizes a theory of the interpretation of international law. The choice of an interpretive theory determines how to talk about the meaning of self-determination: it endorses one kind of reasoning and invites one kind of response to argument.”³⁰² Controversy surrounds especially the issues of external self-determination and the question who the ‘people’ are, besides colonial peoples. There is also the question of connection between internal and external self-determination, since many scholars link external self-determination to the state’s failure to secure internal self-determination. It is important not only to define and explain the right to secession, but also to offer different interpretations of this right. Since international law, as shown in the previous chapters, does not provide a clear guide for responding to the new wave of secessions which began in 1989, we shall turn to political theories and analyze deliberations on the issue of secession in this field. Secession is one of the most controversial subjects in the legal, political and social sciences, and it raises many theoretical questions worth looking into. However, it is interesting to note that the core question on which many different political theories are built upon is not how or why secessions occur, but how can secession be justified. Precisely this question and various answers proposed to it are analyzed in the following chapters, as the most important examinations of secession from the legal perspective were subject of Part I.

can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What a calamity that the phrase was ever uttered! What misery it will cause!”

³⁰¹ Cobban, Alfred, *ibid.*, p. 42-43

³⁰² Knop, Karen, *ibid.*, p. 10

Normative theories, based on ethical and political norms and principles, try to provide a theoretical justification of specific conditions and attempts of secession.

There are fundamentally two kinds of theories on secession in philosophical literature. They are given different names by scholars, but essentially, the first kind is based on a notion of just cause. According to that theory, a group has a right to secede if it has suffered injustices, so secession is a remedy to these injustices. It is called remedial right only theory, it is also marked as legal theory (as opposite to political theories), or, often, just-cause theory. Other major theory sees secession as a political right and according to it, groups have a general right to secede which arises from the freedom of association. These theories are called choice theories, or plebiscite or associative theories. Some scholars divide theories into three categories, the third being national self-determination theories. Since this category is similar to choice theories (they differ basically on the dimension of ethnicity), they can be analyzed as belonging to the same group that Buchanan calls primary right theories. He divides that group into associative and ascriptivist (nationalist) theories. Primary right theories assert that certain groups can have a general right to secede in the absence of any injustice, and can practice that right to secede from a just state that is performing all legitimizing functions of a state, but pose various conditions that groups must satisfy in order to have a right to secede. The only thing all three categories of theories have in common is that they attribute the right of unilateral secession, under different conditions, to territorially concentrated groups within established states (while groups that are dispersed or intermingled with other groups cannot under any circumstances possess a right to establish a state of their own). It should be emphasized that this categorization is conditional, that these theories cannot be clearly separated. Some authors might even find themselves surprised to read their name in a group of authors that advocate one theory or principle.

2 *Associative (choice) theories*

Under associative or choice theories, the legitimacy of the state depends on the consent of the population, so if a majority of the population removes its consent, that state is no longer considered sovereign. That is why these theories are also called consent theories of political legitimacy and according to them all citizens must consent to government. These theories do not

require that a seceding group has any ascriptive characteristics, such as ethnicity or common culture, or that is a victim of injustice. Nor do they require that secessionists have any common connection to the territory they want to separate from the mother state. The choice of the majority of the population within a seceding region is sufficient to give legitimacy to their right to secede and to bind other states to allow them to secede. Determining boundaries is a matter of majority rule. The majority in question is not a majority of people, of the citizens of the entire state, but a majority of a subset of people, of the citizens within a portion of the state's territory. The right of secession formulated by theorists that follow this strand of thought is far more liberal than that asserted by just-cause theory, but it is closer to fundamental principles of democracy, such as political freedom and individual autonomy. It is also called the choice approach, because it validates any group's aspiration to a separate political identity, including the choice of secession. Analogy with no-fault divorce is often used to explain secession³⁰³ and this no-fault secession is justified by principles of consent, democracy, and freedom of association or individual autonomy. Theorists that advocate choice theory, such as Harry Beran, Christopher Wellman and Daniel Philpott, consider secession legitimate when a territorially concentrated majority expresses a wish to secede in a plebiscite, and base their arguments on the right of political association and values of individual autonomy. The simplest version of this theory is the 'pure plebiscite theory', where a majority in any region of the state has a right to secede if it wants to govern itself. However, according to most authors, there are additional criteria that a group must satisfy, such as adherence to democratic values and rights, accordance with the liberal 'harm' principle (a group has a right to secession provided that secession causes no harm to the legitimate interests of the non-secessionist group), respect for minority rights, viability of a would-be state, lack of other alternatives, etc. This way, the right of secession is based not on injustices suffered by a group that wishes to secede, but on the right of free political association -

³⁰³ Kai Nielsen explains this analogy in the following way: "the right of secession should be treated like the right to a no-fault divorce...If the parties want to split in either case they have the right to split provided certain harms (not all harms) do not accrue to the other party. If Mary wishes to split Michael she should have the right to do so provided there is a fair settlement of their mutual properties, adequate provision and care of any children they may have is ensured, and the like. Similarly if Quebec wishes to split with Canada it should have the right to do so provided a fair settlement of mutual assets and debts is made and the like." Nielsen, Kai (1993): *Secession: The Case of Quebec*, Journal of Applied Philosophy, Vol. 10, p. 35; however, one can argue against this analogy for several reasons – for instance, unlike personal property, state territory is not tradable for goods; boundaries and identity are crucial and often contested issues when secession is concerned, so there is hardly a comparable situation regarding divorce; and, unlike in the case of divorce, there is no higher, judicial authority to judge secessionist disputes.

democracy and the right to secession are closely related, because both are legitimated by the democratic decisions of people. Seceding groups are not required to establish some special claim to the territory they wish to withdraw from the state – the fact of occupancy suffices. Brilmayer believes that it is erroneous to link theories of democratic participation with a right of secession: “traditionally, the self-determination norm on which secessionists base their claims is thought to turn on democratic principles of consent and popular sovereignty. According to this argument, self-determination represents a liberal democratic value (with secession as the liberal democratic alternative), while the principle of territorial integrity remains feudal, undemocratic, and oppressive. The idea that government must stem from the consent of the governed seems to allow a disaffected group the right to opt out of an existing state. If consent is the keystone of legitimacy, then a non-consenting individual must be allowed to leave. In this way, principles of democratic government translate into a right of secession.”³⁰⁴ The error is that government by the consent of the governed does not necessarily encompass a right to opt out – it just requires availability of a right to participate through electoral processes, and these participatory rights do not entail a right to secede.

Harry Beran is one of the most prominent scholars that represent this permissive liberal-democratic view (sometimes also called the voluntarist theory), according to which groups have the right of self-determination, and those who wish to secede do not have to justify secession, since they are simply exercising their right of free association. A state is rightful only if membership is voluntary. His rather radical theory is based on the human right to personal autonomy, on each individual’s right to determine its political associations, so it can be termed as a right of no-fault secession. Individuals have the right of personal self-determination that allows them to remove themselves from their state. Since the right of emigration is not sufficient for a community to stay intact, they must be allowed to take their territory with them by seceding, if the majority of the population inhabiting a part of a state’s territory wishes to do so. This right is based on a consent theory of political obligation, according to which the consent is the basis of political obligation and it confers legitimacy on the state. Citizens are obligated to obey the state only if they consent to it, and they are allowed a right to ‘exit’ if they so choose. As a consequence, individuals within the state should be allowed to redefine political boundaries.

³⁰⁴ Brilmayer, Lea, *ibid.*, p. 184

Although the right to secession in Beran's theory originates from individual rights related to freedom of association and autonomy, the subjects of the right to secession are territorial communities. The separatists may, but need not be a nation.

If a group has a moral right to self-determination, it is entitled freely to determine its political status, and this can be done by seeking independence, by transferring to another state or by remaining part of an existing state. Not only states and colonies have a moral right of self-determination, but also groups that are sufficiently large, with awareness of itself as a distinct group, and that are concentrated territorially so that they can be politically independent. And if a group possesses that right, it does not matter if it is oppressed or not. On the other hand, nationalism cannot provide a comprehensive theory of rightful political boundaries, since it makes the individual citizen a captive of birth and history. Since 'people' cannot be interpreted as nation, and political community is too vague a distinction, he claims that different political units which reflect the willingness of a people to live together have the right to determine their political relationships, and that right flows from their right of personal self-determination. This approach would work in practice by making groups that wish to live together as separate political communities self-defining, and that means that they themselves specify the territory which is to secede by using the majority principle recursively, so that rightful political boundaries are based on the actual personal consent.³⁰⁵ He contemplates the right of political self-determination as part of a comprehensive normative theory of borders. A comprehensive normative theory of borders analyzes the problem of rightful borders and of rightful secession by using democratic principles to determine the rightfulness of the political borders and of the unity of the state that are normally taken for granted.³⁰⁶ "Therefore, the rightful unity of the state has to be based on the willingness of its citizens to be part of one state. This in turn implies that individuals must have the right of emigration and groups which have the right to occupy the territory on which they live must have the right of collective self-determination, including secession."³⁰⁷ Those territorial communities that have the right of habitation and the right to determine their political status must exercise that right in accordance with the majority principle. This is the core of his democratic

³⁰⁵ Beran, Harry (1988): *Self-Determination: A Philosophical Perspective*, in Macartney, Allan (ed.): *Self-Determination in the Commonwealth*, p. 23-31

³⁰⁶ Beran, Harry (1998): *A Democratic Theory of Political Self-Determination for a New World Order*, in Lehning, Percy (ed.): *Theories of Secession*, p. 33-35

³⁰⁷ *Ibid.*, p. 35

theory of political self-determination, and he admits that this doctrine is highly permissive with regard to secession.³⁰⁸ His position is that secession should be permitted, unless the state can show that it would lead to harm so great that it overrides the presumption in favor of permitting secession.

In short, self-determination is the right of every group which (1) has awareness of itself as a distinct group; (2) is the majority in a territory; and (3) is viable as an independent political entity.³⁰⁹ The right to secession is limited not only by viability³¹⁰ of a would-be state, but also by the rights of minorities in the new state. The right of groups to self-determination should be recognized only if those groups will respect human rights of all individuals who live in the newly formed states. This condition requires the recursive use of the majority principle, so that territorial minorities within secessionist entities have the same right to secession.³¹¹ Minorities are allowed the right to further secession, but under the same conditions (for instance, they would have to be territorial minorities). The reiterated use of the majority principle is the best way to settle disputes about political borders: “the reiterated use of the majority principle seems to be the only method of resolving such conflicts that is consistent with the voluntary association principle. According to this method, a separatist movement can call for a referendum, within a territory specified by it, to determine whether there should be a change in this territory’s political status, e.g. whether it should secede from its state. If there is a majority in the territory as a whole for secession, then the territory’s people may exercise its right to self-determination and secede. But there may be people within this territory who do not wish to be part of the newly independent state. They could show, by majority vote within their territory, that this is so, and then become independent in turn, or remain within the state from which the others wish to secede. This use of the majority principle may be continued until it is applied to a single community (i.e. a community which is not composed of a number of communities) to determine

³⁰⁸ Beran, Harry (1988): *Self-Determination: A Philosophical Perspective*, p. 32

³⁰⁹ Beran, Harry (1993): *Border Disputes and the Right of National Self-Determination*, History of European Ideas, Vol. 16, p. 484

³¹⁰ The issue of a community’s viability as an independent political entity can be raised with respect to its ability to govern itself, to sustain itself economically, and, questionably, to defend itself successfully in war. Beran, Harry (1998): *A Democratic Theory of Political Self-Determination for a New World Order*, p. 36-38

³¹¹ Beran, Harry (1984): *A Liberal Theory of Secession*, Political Studies, Vol. 32, p. 29

its political status.”³¹² This generates what Buchheit calls the problem of ‘indefinite divisibility’.³¹³

Beran also proposes that the following conditions may justify not allowing secession:

1. The secessionist group is not sufficiently large to assume the responsibilities of an independent state;
2. It is not prepared to permit subgroups within itself to secede in accordance with the principles that justify its own secession;
3. It wishes to exploit or oppress a subgroup within itself which cannot secede;
4. Its secession would create an enclave;
5. It occupies territory which is vital to the interests of the state from which it wishes to secede;
6. It occupies territory which has a disproportionately high share of the economic resources of the state from which it wishes to secede.³¹⁴

However, even with these additional conditions, his position can be described as a “recipe for anarchy.”³¹⁵ The gravest objection to his theory is that the procedures he describes as the best solution for the problem of secession would more likely cause a domino effect, one case of secession leading to another. Furthermore, it is highly unlikely that his theory would ever be taken seriously by the international community consisting of sovereign states. Every unsatisfied group in the world might try to destabilize its government, numerous competing claims would clash and probably produce violence, and even if every case could be solved peacefully, countless problems concerning state succession would emerge. Buchanan notices another serious problem with the consent theory, and that is the issue of claims to territory. Rightful title to the land has nothing to do with consenting to form a state – consent subjects individuals to the

³¹² Beran, Harry (1998): *A Democratic Theory of Political Self-Determination for a New World Order*, p. 39-39

³¹³ Buchheit, Lee, *ibid.*, p. 19; Beran proposes four answers to this objection: (1) secession is almost never justified if it leads to war, although if opponents of an otherwise justified secession start the war, they, not the secessionists, should be blamed for it; (2) the liberal case for secession overrides the objection of indefinite divisibility; (3) in practice the tendency towards indefinite divisibility would be limited by the self-interest of groups considering self-determination; and (4) the problem of indefinite divisibility could be diminished by enlightened concessions by states from which secession is sought. Beran, Harry (1984): *A Liberal Theory of Secession*, p. 29-30

³¹⁴ Beran, Harry, *ibid.*, p. 30-31

³¹⁵ Miller, David (1994): *The Nation-State: A Modest Defence*, in Brown, Chris (ed.): *Political Restructuring in Europe: Ethical Perspectives*, p. 154

authority of other individuals or creates bonds among individuals, but these bonds cannot generate a claim to the territory. The right of individuals to associate with one another cannot explain why associated individuals, simply by virtue of their association with one another, have a right to territory claimed by others.³¹⁶ He adds that consent theory represents a license for anarchy, because any group that wants to secede, no matter how small, is allowed to do that, and so on indefinitely. On the other hand, if at any point a limit on fragmentation was placed by allowing the will of the majority to override the will of those who did not consent to the existing state, it would mean that political obligation does not require consent, so the consent theory of political obligation, which is the basis of Beran's theory of secession, is abandoned. Another reason to criticize Beran's principle of the recursive use of the majority principle is that it forces persons to choose one group or another, while in fact many of them do not want change. There are persons who do not have strong feelings of belonging to any particular ethnic group, although their number may be small, and persons who are comfortable with their multiple identities and do not wish to give up on any of them.

Daniel Philpott takes the principal standpoint of democratic choice theory because he emphasizes individual rights, the value of autonomy and *prima facie* right to self-determination, so his Utopians³¹⁷ become more autonomous with the exercise of this right. The source of both self-determination and democracy is autonomy, meant as individual moral autonomy. The value of autonomy requires, among other things, freedom of association, which also implies the freedom of dissociation. In this respect his theory is similar to Beran's, although with more emphasis on democracy than on liberalism. Self-determination is not justified by the mere fact of the members' choice – the ground of the right to self-determination is democratic autonomy, which is a positive good. This is why the analogy between self-determination and divorce breaks down, although it usefully illustrates key features of the principle. In a divorce spouses do not seek a positive good in itself, having failed to realize the good of marriage, but in self-determination a

³¹⁶ Buchanan, Allen (1997): *Self-Determination, Secession, and the Rule of Law*, in McKim and McMahan (eds.): *The Morality of Nationalism*, Oxford University Press, New York, p. 314-315

³¹⁷ In order to justify the right to self-determination as he designs it, grounded in liberal democracy as a democratic right, he describes a Utopian group, an ideal case which does not require any qualifications and clauses. This group is enclosed in a demarcated territory, without minorities in its midst, unanimously desiring self-determination. It respects its own individuals and is liberal and democratic. Philpott, Daniel (1995): *In Defense of Self-Determination*, *Ethics*, Vol. 105, No. 2, p. 355; Of course, he is criticized by many authors because of the use of this ideal case, since it does not solve any of the self-determination dilemmas, just poses impossible conditions.

group seeks not just the dissolution of a bond, but a positive good in itself - self-government, realized autonomy which amounts to much more than the choice to leave.³¹⁸

Self-determination is a unique kind of democratic institution, a legal arrangement that promotes participation and representation, which are the political activities of an autonomous person. It is a unique institution in the following respect – it promotes democracy for a group whose members: firstly, claim to share an identity for political purposes and secondly, seek a separate government, as opposed to a larger portion of representatives in their current state’s government. Self-determination should redraw political borders to circumscribe the residents of Utopia as tightly as possible, and self-determining group is demarcated in conformity with their identity. According to him, any group of individuals within a defined territory which desires to govern itself more independently enjoys a *prima facie* right to self-determination, but this right is qualified.³¹⁹ This group of individuals does not need ethnicity or any other objective trait as the criterion of identification, although he admits that it is typically a nation, a group united by cultural characteristics that aspires to political autonomy. Not only that the group does not need any objective characteristics, it does not need to establish a claim to land in addition to its claims to a new government. The decisive fact is the expressed preference for self-government.

He defends the permissive right to self-determination, although this right is qualified, limited by the same liberal democratic commitments which ground it. He restricts the right of self-determination in case its exercise may interfere with the autonomy of individuals in the remaining state. The protection of human rights within a seceding group is another important condition. A group cannot use its right to political autonomy in order to establish a regime that denies the individual autonomy protected by basic human rights – self-determination is not allowed for groups which deny some of its members any semblance of freedom. Basically, self-determining groups are required to be at least as liberal and democratic as the state from which they are separating, to demonstrate a majority preference for self-determination, to protect minority rights and to meet distributive justice requirements. Additional requirement of proportional consequences, similar as in the just-war theory is posed – that the means of

³¹⁸ Philpott, Daniel (1998): *Self-Determination in Practice*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, p. 82

³¹⁹ Philpott, Daniel (1995): *In Defense of Self-Determination*, p. 353-359

obtaining self-determination, and the evil consequences of the struggle, such as war and refugees, be proportionate to the amount of justice being sought. Furthermore, secession is justified if there is injustice, so because of this possibility and because of the concern for the legitimate interests of existing states he comes close to remedial theory. However, his view differs from both other authors who defend plebiscitary self-determination and the authors who promote remedial theory, because he asserts that a group needs not suffer an injustice in order to warrant self-determination, but its own perpetration of injustice might invalidate or limit the *prima-facie* right.³²⁰

Philpott does not believe that the universal validity of the principle of self-determination has to include a right to secession, as long as other means for exercise of the right to internal self-determination, such as a federal structure, remain available. His general formula for secessionist self-determination is as follows: “a candidate group is granted a general right to self-determination within a candidate territory when the group’s likely potential for justice – that is, its degree of liberalism, majoritarianism, and treatment of minorities – is at least as high as the state from which it is gaining self-determination; its claim is enhanced, and more justifiably takes the form of secession, when it suffers threats and grievances; but if its separation limits the autonomy of the larger state’s members, then it must be limited or modified to minimize or compensate for this harm; and, finally, the prospects for war and chaos must be weighted proportionately against the justice of self-determination and any injustice that the group has suffered. Secession, by this formula, truly becomes a last resort; it should be endorsed only when a people would remain exposed to great cruelty if left with a weaker form of self-determination.”³²¹

It is hard to imagine that a certain group would want to secede if there was not some kind of injustice, or a perception of it. As Wayne Norman explains, “people who actually want to secede almost always want to do so for certain reasons, and it is these reasons they advance to their fellow citizens in order to get them to join the movement or at least to vote for secession in a

³²⁰ *Ibid.*, p. 353-359

³²¹ *Ibid.*, p. 382

referendum. People do not merely proclaim that they should secede because they want to.”³²² Since it is true that a portion of population that wishes to secede usually has reasons other than exercising their right of free association, secession is problematic for liberalism, because of its individualism and universalism. As Keith Dowding points out, liberals can find reasons for supporting or opposing secessionist movements in practice, but in a broader conception of the state, there can be no just reason for one group to wish to secede from a just liberal state, because the only reason that justifies secession is social injustice, which does not occur in the just liberal state.³²³ Another criticism of choice theories is that a collective right is derived from individual freedom. According to Buchanan, the argument that the same values which justify democracy ground a majoritarian right to secede is weak. Democratic values actually point against a majoritarian right to secede, because recognition of such a right stimulates destructive strategic behavior, weakens the incentives of citizens for political participation and overall, undermines the conditions for a flourishing democracy. A plebiscitary right to secede expresses a wish to avoid the problems of political disagreement by drawing a boundary around oneself and those who agree with one: “in a world in which states can be dismembered at any time and repeatedly, through the exercise of a plebiscitary right to secede, the results of democratic processes can be nullified simply by voting to change political boundaries. When new states can be formed whenever local majorities can be assembled, the significance of political decisions made within any given state is diminished and with it, the rationality of investing in the political processes that generate those decisions.”³²⁴

In Christopher Wellman’s theory individual autonomy, on which a right to secession is grounded upon, is in the foreground. He affirms the right to secede, even unilaterally from a legitimate state and without the condition that the separatists represent a culturally distinct group. Although

³²² Norman, Wayne (2003): *Domesticating Secession*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*, p. 5

³²³ Dowding, Keith (1998): *Secession and Isolation*, in Lehning, Percy (ed.): *Theories of Secession*, p. 71-72; Beran’s claim that a state has authority over an individual only if that individual consents is surely problematic. Dowding makes a good point about the right of self-government and Beran’s account of actual consent with his analogy between state and parents. Duty to the state comes with birth, and the degree of duty depends on how much the state gives to you (and that is based upon a theory of justice). A person also does not ask to be born, but that does not stop having obligations to parents, as long as they bring the person up properly. This lack of consent does not affect moral duties, towards parents or community, so it is hard to see how we can justify self-government of any particular territory from this sort of account. *Ibid.*, p. 77

³²⁴ Buchanan, Allen (1998): *Democracy and Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, p. 22

he admits that groups victimized by their states have a right to secede, he adds that it is wrong to think that this remedial claim exhausts the right to political self-determination. Furthermore, granting that national groups usually have the greatest interest in political self-determination, he asserts that this does not mean that every nation should have a right to form its own state. Political abilities are central to secessionist claims, not cultural features. According to him, any secessionist appeal must ultimately be adjudicated by the strength of its claim to territory – “a secessionist party must argue not only that it owes no allegiance to its current political union, but also that it (rather than the current state or some third party) has the legitimate claim to control jurisdiction over the territory of the proposed seceding region.”³²⁵

The territorial boundaries of current states may be redrawn in accordance with the wishes of their inhabitants, in a way that is politically feasible. So, besides consent, an additional element is important in his theory – the requirement that both the seceding entity and the remaining state must be capable of performing the functions of a state (a similar element as in Beran’s and Philpott’s theories). Absolute freedom of association alone is not enough for the grounding of secessionist rights – it would simply produce anarchy.³²⁶ Because of the benefits of political stability, self-determination claims should be accommodated only in those cases in which a separatist group can adequately perform the requisite political functions. Unlimited secessionist rights based on the freedom of association conflict with political stability, but this does not mean that there can be no primary right to secede in cases in which respecting this right would not be excessively harmful. He combines choice theory with a teleological component of his theory of political legitimacy which leads him to conclude that the case for secession is defeated only in those circumstances in which its exercise would lead to harmful conditions: “because harmful conditions would occur in only those cases in which either the seceding region or the remainder state is unable to perform its political function of protecting rights, secession is permissible in any case in which this peril would be avoided. Therefore we can conclude that *any* group may secede as long as it and its remainder state are large, wealthy, cohesive and geographically

³²⁵ Wellman, Christopher (1995): *A Defense of Secession and Political Self-Determination*, Philosophy and Public Affairs, Vol. 24, p. 144

³²⁶ “If everyone were given the opportunity freely to withdraw from their countries, the institutions that remained would be so diminished in population and fragmented in territory that they would no longer merit the title of states. Most importantly, these territorially porous, voluntary associations would not be able satisfactorily to perform the functions of a modern state.” Wellman, Christopher (2005): *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press, Cambridge, p. 7-8

contiguous enough to form a government that effectively performs the functions necessary to create a secure political environment...If both the seceding group and the remainder state would be able to perform the functions a state must, then the secessionist party has the right to the territory and the remainder state has a duty not to interfere with the political divorce. Precisely what the size and nature of a group must be is a difficult empirical matter that could be decided only on a case-by-case basis.”³²⁷ So, in cases when either the separatist group or the rump state is unable to defend citizens’ basic rights, claims to political self-determination are limited, hence it is actually the political capacity of a group that determines its entitlement to political self-determination. If a state is unable to secure the peace and protect rights, it does not have a valid claim to its territory against another party that is able and willing to perform this function.

While Beran defends the consent theory of political obligation, Wellman’s theory, which he calls the functional theory of secession, bases a right to secede on the right to democratic government. Although group autonomy has basic value, and group as a whole exercises the right to self-determination, “it is the *individuals*, qua members of this group, who are wronged when the right is violated.”³²⁸ His approach is individualistic, because respect for group autonomy stems from respect for group’s individual members. “In the end, plebiscitary rights to secede are merely an extension of the principle of democratic governance to the issue of territorial boundaries.”³²⁹ Wellman supports the recursive use of the majority principle, so that territorial minorities within secessionist entities have the same right to secession. He agrees with Beran that the reiterated use of the majority principle represents the best way to settle disputes about political borders, as long as states are not divided into units that are incapable of performing the requisite political functions.³³⁰ So the citizens should decide on the drawing of political borders, but these borders need to be consistent with maintaining politically viable states. A simple majority vote on a single plebiscite should be taken as decisive. No super-majority is required, but it is adequate to demand two plebiscites, the one to first to initiate the political divorce and a follow-up referendum after the separation settlement to confirm the group’s stable desire to form a state.³³¹

³²⁷ Wellman, Christopher (1995): *A Defense of Secession and Political Self-Determination*, p. 161-162

³²⁸ Wellman, Christopher (2005): *A Theory of Secession: The Case for Political Self-Determination*, p. 56

³²⁹ *Ibid.*, p. 54

³³⁰ *Ibid.*, p. 60

³³¹ *Ibid.*, p. 62-63

He believes that the moral rights to political self-determination should be institutionally protected, given the substantial progress in this field in the last fifty years, as well as in the field of human rights thanks to the ascendance of liberal democratic values in international relations. Unlike remedial right only theorists, he claims that the burden of proof should be placed on those who would restrict secessionist rights. However, it would be an enormous transformation to revise the international legal system in accordance with his theoretical postulates. The transformation he proposes would include an adjudication of the International Court of Justice on the secessionist conflicts - the Court judges if the right is qualified, and continues to oversee a plebiscite in the secessionist territory to ensure that the majority of citizens support independence. The Court also oversees the political divorce settlement to ensure a fair division of the collective debts and assets. This is followed by a second plebiscite in order to confirm a stable desire to secede.³³² Still, he concludes that perhaps it is not yet the time to engage in such a transformation: “on the one hand, the moral rights to political self-determination give us compelling reasons to reform existing international law immediately. On the other hand, the potential perverse incentives of these new laws provide reasons to refrain from institutionally protecting rights to political self-determination until democratic principles enjoy a greater international following...In the meantime, we can at least affirm one, more modest conclusion: Once liberal democratic values have ascended to such an extent that the world’s leaders might in fact legalize primary rights to secede, there will be a decisive moral case in favor of doing so.”³³³

In the choice theories analyzed above, a permissive standpoint on secession is based on the importance of autonomy. However, there are various objections to these theories. Firstly, from the perspective of nationalist theories, choice theories ignore the ethno-cultural dimension which is present in all modern day secessionist movements – complexity of ethnic conflict is disregarded. Secondly, it is questionable whether individual autonomy is seriously improved by having the power not only to decide on internal matters of the state but also on its borders. Thirdly, this approach is also deficient on the account of its answer to the question of what grounds the secessionists’ right to the territory on which they want to establish a new state. There is no valid claim to the territory, since it depends only on the will of the majority in a portion of a

³³² *Ibid.*, p. 157-158

³³³ *Ibid.*, p. 180

state, which can be democratic and just. Apparently, a valid claim to the territory according to these theories is demonstrated by a mere presence in that territory and a wish to secede. Fourthly, another valid question, which also remains unanswered, is why some citizens of the state should be more equal than others: if all persons are equal, why a decision to secede should be determined by the majority of the population in a portion of the territory of an existing state, instead by the majority of all citizens. Furthermore, there is the problem of territorially intermixed groups with different political aspirations, and if this problem cannot be solved by recursive secessions, dissenting individuals are forced to be in association with persons with different political preferences as they are outvoted, and their individual autonomy is thereby violated. Fifthly, if the plebiscitary theory were incorporated in international law as some authors propose, international system would be seriously jeopardized. In the world where no-fault secession is legalized, secessionist anarchy would cause dangerous fragmentation, balkanization and violence.³³⁴ Sixthly, a no-fault secession would, despite the condition of viability of secessionist entities, create the danger of proliferation of puppet states, de jure independent but de facto dominated by other states, which would further compromise the functioning of the international system. Seventhly, the institutionalization of the plebiscitary theory would turn numerous governments against the strategies of decentralization and federalism, since they would be seen as the first steps toward secession. Eighthly, when exit is too easy, citizens lose their motivation to participate and improve on democratic mechanisms. The threat of secession would be used as a bargaining tool by territorially concentrated minorities, which would thereby gain an unlimited veto power over majority decisions. And finally, states would have reasons to limit immigration in order to prevent a pro-secessionist majority from forming in a portion of the

³³⁴ There are authors such as Alan Patten who develop a democratic account of secession which aims to overcome this objection, by proposing a heavily qualified, instead of a permissive right to secession. According to him, any rights claimed under the plebiscitary theory should satisfy the following conditions: (1) the citizens of the secessionist unit collectively have a valid claim to the territory of that unit; (2) the terms of secession proposed by the secessionists are fair; (3) the creation of the new state is unlikely to generate serious violations of standard liberal rights, or to conflict with the realization of other standard elements of liberal justice; (4) the citizens of the secessionist unit form a group eligible for secession; and (5) the secession will not pose a serious threat to peace and security. He introduces a further condition in order to restrict the democratic right to secede – the failure of recognition condition. This condition requires that, under conditions of identity pluralism, priority be given to accommodating minority national identities within a set of multinational constitutional arrangements that recognize the substate, as well as the statewide national identity. Where a state does not violate the condition of minimal justice and if there is no distinct failure by the state (the failure of recognition), a democratic mandate does not, on its own, generate a right to secede, so such a state needs not worry about secession. However, compared to remedial theory, his theory can lead to a comparative proliferation of secessions. Patten, Alan (2002): *Democratic Secession from a Multinational State*, Ethics, Vol. 112, p. 562-565

state territory. Applied to Kosovo, this theory would allow Kosovo Albanians, and even Albanians in the southern Serbia, to secede because a sufficient number of individuals expressed their political preference to do so. On the other hand, the Kosovo Serbs would have the right to secede recursively from Kosovo and join Serbia.

3 *Ascriptivist (nationalist) theories*

Norman has said that it is a curious fact that a full-blooded nationalist theory on secession provides self-legitimization for just about every serious secessionist movement in the 20th century, and yet, in its full-blooded form, it has virtually no defenders in the recent philosophical literature.³³⁵ Contemporary philosophical theories on national self-determination mainly take a moderate form that does not always insist on the right of secession for national minorities, but on different forms of political autonomy. The right of self-determination is ascribed to ethnic groups, nations, it does not belong to individuals as in choice theories - it is held collectively. These theories explain that members of the same nation have special obligations toward one another and that nations have a right to political self-determination. The right of the nation to self-determination is usually interpreted as a moral right to secede and form its own state, although many scholars such as Yael Tamir, Margaret Moore or David Miller claim that political self-determination does not need to amount to the form of complete sovereignty, but grounds a number of special political rights and autonomy. Accordingly, every nation has a right to some degree of self-government, and presumably, a right to secede. Even the authors who proclaim that every nation should have its own state do not claim that this is an unqualified right, applicable in any circumstances.

Traditional dichotomy in literature dealing with the principle of nationalism, and one of the most heavily employed, is the civic/ethnic dichotomy.³³⁶ According to civic nationalism which

³³⁵ Norman, Wayne (1998): *The Ethics of Secession as the Regulation of Secessionist Politics*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, p. 35

³³⁶ To oversimplify this dichotomy, the civic conception of nationalism denotes a standpoint according to which subjective elements in the definition of a nation are in the foreground, and the will of individuals is emphasized. The ethnic conception of nationalism is mostly based on objective elements, such as shared ethnicity, language, culture, tradition, religion, etc. and nation as a collective is above individuals. According to the nationalist principle, each nation should have its own state, while civic nationalists are more found of the term people, but since this term usually coincides with national groups, the civic nation-state also in a way accepts the nationalist principle that

emphasizes citizenship, rights and interests of individuals need to be protected by their national state, individual autonomy is in the foreground and nationality is considered voluntaristic – even non-members can acquire it over time. It is the citizenship that determines nationality, not citizens' ethnicity. On the other hand, ethnic nationalism requires subordination of the rights and interests of the individual to his national state, and preservation of one's ethnic community has an intrinsic value; nationality and national identity are considered inherited and they are defined by a myth of common descent, while individual will plays no role in this conception. Common culture, manifested in a vernacular language and shared traditions is of central importance. This dichotomy, however, has mainly lost its function, since the civic conception is by far dominant among theorists.³³⁷ Ethnic nationalism seems to have lost its place in liberal democracies.

Modern analysts define nations by using both 'ethnic' and 'civic' characteristics, so those definitions usually include objective elements such as ethnicity, language, culture, religion etc., and subjective elements which are usually denoted as a shared will of the members of the nation to stay together.³³⁸ Most authors who study the concept of a nation conclude that it is a deliberate

ethnic nations should correspond to nation-states. A good explanation of this dichotomy, which can also be denoted as universalism/particularism, and its usage among modern scholars can be found in Seymour, Couture and Nielsen (eds.): *Rethinking Nationalism*, University of Calgary Press, Calgary; another useful study on this subject is presented by Per Buhn, and he writes that according to civic nationalism, the nation is a community of individual right holders who are entitled to have their rights protected by their state. According to ethnic nationalism, the nation is an ethnic community (community with a common culture, which is defined in terms of a common language, a common ancestry, common traditions, or any combination of these factors) and the state should protect this ethnic community. This, however, does not imply that the rights of individual members of that community should be protected. He concludes that while ethnic nationalism is untenable as a normative doctrine, a certain form of civic nationalism can be defended as being consistent with a universalistic theory of human rights. Buhn, Per (1995): *Nationalism and Morality*, Lund University Press, Lund

³³⁷ There are different views – for instance, according to Kai Nielsen, all nationalisms are cultural, and civic nationalism is a myth, because the conception of a civic nation is too thin for a society to give its people a sense of national identity: “there is not, and probably cannot be, such a thing as a pure civic nationalism. All nationalisms are cultural nationalisms of one kind or another. There is no purely political conception of the nation, liberal or otherwise.” Nielsen, Kai (1999): *Cultural Nationalism, Neither Ethnic nor Civic*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, State University of New York Press, Albany, p. 127

³³⁸ There are different opinions - Paul Gilbert criticizes the fact that modern writers like Tamir, Miller, MacCormic, Raz and Margalit use a combination of objective and subjective characteristics of a nation. While many authors consider such definitions as progressive because nationalism and nations cannot be defined by using only objective or only subjective characteristics, Gilbert believes that such juxtaposition produces a radical incoherence, because voluntarist and involuntarist conceptions of nationalism are mutually exclusive. A nation can be defined as imagined community, constituted by the beliefs of its members, so objective characteristics mean nothing, or, conversely, these empirical features constitute a nation and national consciousness plays no role. According to him, a claim to secede should be upheld only if there is a real community, not if people merely believe there is one, or wish there is. The alleged will of the people or supposed cultural distinctness are not enough, and can be dangerous as a sole basis of a secessionist claim. He defines a nation as a group that has the right to statehood. Gilbert, Paul (1998): *The Philosophy of Nationalism*, Westview Press, Boulder, p. 16

construction and a result of modernization, and emphasize the subjective aspect of national sentiments, the sense of belonging and personal identification with national group, whose objective reality cannot be denied (as in Benedict Anderson's 'imagined community'). On the other hand, other categories emerge, such as cultural or liberal nationalism. Liberal nationalists associate individual autonomy with respect for membership in national communities, whose prosperity, as well as that of common national identity, is considered fundamental for each individual. Cultural nationalism combines cultural and civic aspects of the nation, underlining the importance of cultural belonging and cultural features of the nations.³³⁹

According to ascriptivist theories, groups whose membership is defined by ascriptive characteristics have the right to secede. Another condition is that they are concentrated territorially. Nations are moral communities, and national self-determination is important for the preservation of their shared identity. Some authors prefer the term cultural groups. Besides these ascriptive characteristics such as common language, ethnicity, history, religion, traditions, values and institutions, members of such groups consciously identify with one another and see themselves as belonging to the group. Most scholars who belong to this discourse, such as Miller, Moore, Margalit and Raz, emphasize the importance of cultural group's or nation's historical attachment to a particular territory, a homeland. Members of such groups feel that they have special obligations and responsibilities to their conationals. Because of this personal identification with a group of people without personal relationship with most of its members, nations are often denoted as 'imagined' communities.³⁴⁰ Margaret Moore explains that this does not mean that nations are in any way less 'real' communities which enable personal identification: "the fact that nations are socially constructed does not suggest that they are less real or are to be regarded with suspicion. Some people focus on the fact that they are 'imagined' communities to suggest that they may have no basis in 'reality'. Here it is important to distinguish between 'imagined' communities and 'imaginary' ones."³⁴¹ Since it is not possible to

³³⁹ The term 'cultural nationalism' is used in Seymour, Couture and Nielsen (1996): *Introduction: Questioning the Ethnic/Civic Dichotomy*; according to them, two authors who systematically argue for a certain kind of cultural nationalism are Yael Tamir and David Miller, although Tamir's work is perhaps better characterized as liberal nationalism, since her conception of a nation is primarily individualistic, even if she emphasizes the cultural aspects of the nation and cultural belonging.

³⁴⁰ After Benedict Anderson's famous book *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 1993, Verso, London

³⁴¹ Moore, Margaret (2001): *The Ethics of Nationalism*, Oxford University Press, Oxford, p. 13

present a full account on different and numerous definitions of a nation offered by these theories,³⁴² a definition by Margalit and Raz will suffice. According to them nations are encompassing cultural groups, which are large-scale and anonymous. Such groups have a common culture that encompasses many significant aspects of life for its members, so membership in such a group means belonging, it is important for self-identification of its members. They stress that the identity of an encompassing cultural group includes the idea of a historical attachment to a particular territory, the notion of a homeland.³⁴³ The additional characteristic is that such groups enjoy, or aspire, self-government.

A consensus emerged among modern theorists of nationalism on few things: nations are a result of modernity and their emergence is usually related to Industrial Revolution or Enlightenment. Furthermore, nations are constructed, artificial, not natural or organic communities, and they are, as already mentioned, imagined communities (large, anonymous groups whose members do not know each other and have little in common except this shared membership). Culture (called a societal culture, vernacular culture, encompassing culture, organizational culture or pervasive culture) is another thing that the members of the same nation share, and various definitions of a nation are given in cultural terms. This cultural component, present in virtually all conceptions of a nation, explains the main aim of a nationalist movement – to preserve, protect and insure the

³⁴² There are even authors who define nations in organic terms. For instance, Neil MacCormick writes that “a nation is constituted by a relatively large grouping of people who conceive themselves to have a communal past, including shared sufferings and shared achievements, from which past is derived a common culture that represents a form of cultural continuity uniting past and present and capable of being projected into the future. This continuity is not a static one, but is in a sense ‘organic’... Consciousness of belonging to a nation is one of the things that enable us as individuals in some way in this earthly existence to transcend the limitations of space, time and mortality, and to participate in that which had meaning before us and will continue to have meaning beyond us.” MacCormick, Neil (1999): *Nation and Nationalism*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, p. 191-193

³⁴³ Margalit and Raz (1990): *National Self-Determination*, *The Journal of Philosophy*, Vol. 87, p. 443-447; More precisely, they identify six characteristics of groups that are relevant to a case for self-determination. The first characteristic is a common culture that encompasses many important aspects of life. Secondly, the group’s culture profoundly influences individuals, so the prosperity of the group and the well-being of individuals are connected. Thirdly, membership in the group is a matter of mutual recognition, and this membership is a matter of informal acknowledgment of belonging by others generally, and by other members specifically. The fourth feature is the importance of membership for one’s self-identification – it is an important identifying feature for group members, one of the primary facts by which people are identified. The fifth one is that membership is a matter of belonging, not of achievement. And the sixth characteristic is that the groups concerned are not small, face-to-face groups, but anonymous groups where mutual recognition is secured by the possession of general characteristics. Groups that manifest these six features are called encompassing groups and the authors argue that interests and self-respect of individuals are bound with flourishing of these groups, so the best protection of individuals who belong to nations is that nations are self-governing. Since membership in such groups is intrinsically valuable, an encompassing group that forms a substantial majority in a territory has the right to determine whether that territory shall form an independent state, since there is no effective enforcement machinery in international politics.

flourishing of the national culture. Cultures provide their members with meaningful ways of life, enables them to make autonomous choices and express their identity, they are important to individual's well-being, and this proposition is then connected to national self-determination, which embodies the right to ensure the existence and development of a distinct culture. This is how self-determination of minority cultures is justified, and devolution of state powers or decentralization is demanded, so that members of cultural groups maintain the integrity of their cultures. Different cultural groups should be able to express themselves in the public sphere, and strong state decentralization is the best response to challenges of cultural diversity that exist in most modern states. Alternative that is usually proposed by these scholars is independence. This is the first type of argument for the thesis that nations have a right to secede (a *prima facie* right to secession). It comes down to the premise that identity and interests of individuals are inseparably connected to the flourishing of the nation to which they belong, and the prosperity and security of a nation are best insured if a nation has its own state. The second main type of argument is instrumental, based on the thesis that when citizens are co-nationals they are more able and better motivated to promote and further democracy and distributive justice (as Miller maintains).

Authors who base their theories on the principle of nationalism normally assert that there is a moral right of secession which can be exercised by a group without showing that it is a victim of injustice. So it is a no-fault right, based on the need to preserve a distinct national and cultural identity. National identity is vital for the self-respect of peoples, for their sense of belonging and security, which are things of fundamental value to human beings.³⁴⁴ A sense of nationality is a constitutive part of identity for individuals, and respect for nationality requires acknowledgment of political demands. This is why a nation needs to have a substantial degree of self-government, and it will be most secure when it has a sovereign state of its own. Neil MacCormick equates self-determination with independence, and concludes that “the evident need that the nation be free to express its will leads logically to the view that there must be self-determination of nations

³⁴⁴ All people have roots in a particular culture, and this sense of national identity enables human flourishing. Without an encompassing culture which pervades the whole range of an individual's major life activities and functions as an indispensable source of self-identification and self-definition, and without social structures and complex cluster of independent institutions that this culture requires, people would experience anomie and alienation. Nielsen, Kai (1998): *Liberal Nationalism and Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, p. 125

and that, since the sovereign state is supreme form of political-legal order each nation must be or become a sovereign state.’³⁴⁵ However, this is an extreme position - most authors do not believe that independence is the only option available. Will Kymlicka, for instance, develops a nuanced account of rights which are available to ethnic groups, and argues in favor of granting special (group or collective) rights to minority nations. According to him, autonomous individuals value their national identity because a thin national culture provides the context within which individuals develop and exercise their autonomy. Cultural structure provides the context for choice which is essential for self-respect and self-identity, and national minorities seek to protect their societal cultures.³⁴⁶ He tries to explain why precisely nations, among other cultural groups, have a right to self-government. Other groups, distinct from nations, have different rights. There are two broad patterns of cultural diversity – national minorities (or nations) represent a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture so they demand various forms of autonomy or self-government to ensure their survival as distinct societies, while in the second case cultural diversity arises from immigration, and these ethnic groups wish to integrate into the larger society but often seek greater recognition of their ethnic identity.

The first pattern is present in multination states, the second one in polyethnic states. There are three forms of group-differentiated rights which can be claimed by these groups. The first form are the aforementioned self-government rights present in multinational states that take some form of political autonomy such as federalism. Then there are the polyethnic rights which help groups express their cultural particularity and take various forms of public funding of cultural practices of ethnic groups, but they promote integration into the larger society, not self-government. And the third are special representation rights which are a response to some systematic disadvantage or barrier to representation of group’s interests in the political process, and they are, unlike the

³⁴⁵ MacCormick, Neil (1982): *Legal Right and Social Democracy*, Oxford University Press, Oxford, p. 255

³⁴⁶ A societal culture is a culture which provides its members with meaningful ways of life across the full range of human activities, encompassing both public and private spheres; these cultures tend to be territorially concentrated and based on a shared language, embodied in common economic, political and educational institutions. Kymlicka, Will (1995): *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford University Press, Oxford, p. 76; His primary thesis is that cultural membership is a necessary condition for individual autonomy because culture provides a meaningful context for choice and a secure sense of identity and belonging, which, on the other hand, enables autonomy, so culture is a precondition for individual freedom. This is the core of the relationship between cultural identity and individual freedom, which is the central principle of liberalism. Membership in a cultural community might be seen as what Rawls calls a primary good, and it justifies special cultural rights and protections.

previous two categories, seen as temporary measures.³⁴⁷ Self-government rights may include the possibility of a peaceful secession, if viable independent states can be created.³⁴⁸

However, authors that defend the principle of nationalism do not assert that every nation can proclaim independence. Those who affirm the right of nations to statehood do not consider this right as unqualified, but pose specific limitations to the right of political self-determination, such as protection of minority rights, that the new state accepts democratic system of government, credible guarantees that human rights will be respected, boundaries negotiated, a fair division of the national debt made, etc. For instance, Margalit and Raz claim that although nations have the right to independent statehood, this right is qualified – nations can secede only if: more than a simple majority of votes supports the new state; the right is exercised for the right reason (to secure conditions necessary for the prosperity and self-respect of the group); the basic rights of all inhabitants of the new state are respected; secession does not endanger the fundamental interests of the inhabitants of the new state and others who may be affected by this decision (those in the rump state or minorities in the new state – no large-scale minority problem should be generated), so that just interests of other countries are not gravely damaged.³⁴⁹ David Copp also proposes the right of self-determination that is not absolute. In some circumstances it is not permissible to exercise this right - unjust seizure of territory from another group, seriously unjust political and economic system of the new state, if the requirements of international peace and

³⁴⁷ *Ibid.*, p. 11-33; Little can be added to Buchanan's criticism of Kymlicka's convincing argumentation: "but if 'polyethnic rights', which do not include rights of self-government, suffice for cultural groups that are not nations, why are they not sufficient for nations as well? Either 'polyethnic rights' protect a culture well enough so that it can supply a meaningful context for choice for its members or they do not. If they do, then why do any cultural groups, including nations, need rights of self-government in addition? If 'polyethnic rights' do not protect cultures well enough to provide a meaningful context for choice, then every cultural group must have self-government, and 'polyethnic rights' are simply a waste of time." Buchanan, Allen (1996): *What's So Special About Nations*, in Seymour, Couture and Nielsen (eds.): *Rethinking Nationalism*, p. 301; It seems that Kymlicka is chiefly motivated by the political considerations of divisions in Canada. When the position of different ethnic groups, national minorities and indigenous peoples in Canada is considered, it is completely clear what he tries to achieve, but if his theory applies in a different context Buchanan's criticism is correct.

³⁴⁸ "Perhaps we should be more willing to consider secession. We tend to assume that secession is a moral and political catastrophe, but I suspect that few people today condemn the secession of Norway from Sweden in 1905... It is difficult to see why liberals should automatically oppose such peaceful, liberal secessions. After all, liberalism is fundamentally concerned, not with the fate of states, but with the freedom and well-being of individuals, and secession need not harm individual rights." Kymlicka, Will, *ibid.*, p. 186

³⁴⁹ Margalit and Raz, *ibid.*, p. 457-461

security or global distributive justice are not respected, or if the remaining parts of the original state would be so fragmented that they could not form themselves into a viable state.³⁵⁰

Margaret Moore argues that theories of justified secession do not make sense since they apply liberal arguments, principles or theories to the issue of secession, whereas the legitimacy of nationalist claims should be the primary concern. A theory of secession should also consider potential problems attached to conferring political rights on nations, the dynamics of national mobilization and national conflict. She understands nationalism as “a normative argument that confers moral value on national membership, and on the past and future existence of the nation, and identifies the nation with a particular homeland or part of the globe.”³⁵¹ Since national communities have both intrinsic and instrumental moral value, she argues that there are good reasons to institutionally recognize and accommodate national identities. Constitutive elements of identity, such as group’s conception of their homeland and attachment to territory are important. If recognizing national identities is accepted as morally valuable, it follows that territorial recognition, where possible, is justifiable. She examines four kinds of arguments most commonly employed by nationalists to claim superior entitlement to land. Those are Divine right (Chosen people), superior culture, indigenosity and historic claims, which she assesses according to two criteria – conflict resolution and generalizability (whether ‘special’ claims for rights over territory can be generalized).³⁵² While these arguments could be valid for generating some limited rights, they cannot be used to deny the rights of other groups to self-determination. On the other hand, the ‘occupancy principle’ – present occupancy of the land as an argument “is

³⁵⁰ Copp, David (1997): *Democracy and Communal Self-Determination*, in McKim and McMahan (eds.): *The Morality of Nationalism*, p. 280; According to Simon Caney, three persuasive arguments in defense of the proposition that nations are entitled to secede from multicultural states to create their own nation-states are: (1) the ‘well-being’ argument: this maintains that self-determination and secession are legitimate because and to the extent that they promote well-being of the members of a nation; (2) the ‘Rousseauian’ argument: this maintains that self-government and secession are legitimate because they create an association in which people’s ‘autonomy’ is furthered; (3) the ‘injustice’ argument: this maintains that nations are entitled to secede because and to the extent that this is necessary to avoid unjust treatment at the hands of their existing state. Additional conditions that he offers in order to justify secession are: (4) the newly created nation state must be able to survive - without this it would not be able to promote people’s well-being, to protect individuals from exploitation nor attain the Rousseauian ideal; (5) the new state must treat its citizens justly (for example, respect the political and economic rights of minorities within it); (6) the state must honor its international obligations, and thus treat people of other states justly (amongst other things, it should not jeopardize other just political arrangements). Caney, Simon (1998): *National Self-Determination and National Secession: Individualist and Communitarian Approaches*, in Lehning, Percy (ed.): *Theories of Secession*, p. 151-175

³⁵¹ Moore, Margaret (2001): *The Ethics of Nationalism*, p. 5

³⁵² *Ibid.*, p. 176-191

the only one that follows directly from the understanding that rights to territory are implicit in the notion of democratic governance.”³⁵³ Miller adequately explains this principle of continued occupancy as a nation’s claim to political authority over land: “the people who inhabit a certain territory form a political community. Through custom and practice as well as by explicit political decision they create laws, establish individual or collective property rights, engage in public works, shape the physical appearance of the territory. Over time this takes on symbolic significance as they bury their dead in certain places, establish shrines or secular monuments and so forth. All of these activities give them an attachment to the land that cannot be matched by any rival claimants. This in turn justifies their claim to exercise continuing political authority over that territory.”³⁵⁴ So, in a case where the national group resides as an overwhelming majority on land which it claims or thinks of as its historic territory, such group has a right to self-determination. If, after a fair democratic plebiscite or series of plebiscites, it is clear that the vast majority of people in a particular national group aspire to be self-determining, and if there are no geographically concentrated national minorities that wish to secede, this constitutes a compelling moral argument for allowing the secession of that part of the state. In such cases, legitimate nationalism recognizes not only the right of one’s own nation to self-determination, but also the equal rights of other nations.

So, self-determination should be permitted to nationally-mobilized local majority on their historic territory, and they should be able to exercise self-determination only over the territory which they occupy and which they did not acquire unjustly. According to Moore, this does not mean that secession should be allowed only along the lines of existing administrative boundaries, because that principle makes sense only when there is a political space but no conception of nationhood, as in Africa during the decolonization period, when states just began the process of nation-building. The principle that self-determination can occur only within existing administrative units is inappropriate if the unit in question is dominated by a particular ethno-national majority but also incorporates concentrated minorities. On the contrary, boundaries should be drawn *around* groups and it is possible to redraw administrative boundaries to allow a group to be collectively self-governing. The territorial boundaries should be demarcated

³⁵³ *Ibid.*, p. 193

³⁵⁴ Miller, David (1998): *Secession and the Principle of Nationality*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, p. 68

according to national principle only in cases where the group is nationally mobilized (and members overwhelmingly share the same national identity) and different national groups are not commingled on the same territory (in cases where they are, self-determination cannot take a secessionist form). She also suggests that if the local minority group is both territorially concentrated and strongly opposed to the secessionist project, it may have the option of exercising its own right to self-determination.³⁵⁵

She also discusses a constitutional right to secession, and the issue of boundaries in that context. A right to secede should be included in domestic constitution, since this would bring more clarity in the debate on national self-determination. A constitutional right to self-determination would have to indicate groups and areas to which the right applies – in a multinational state, those are republics, but there should also be some kind of procedure to allow a region to leave one subunit and join another or form its own. Good examples and guides for constitutionalization of a right of secession are the ‘rolling cantonization’ procedure in Switzerland and procedural requirements specified by the Canadian Supreme Court in the reference case on Quebec secession.³⁵⁶ As to the question of who should have this constitutional right to secession, Moore gives a vague answer that “in many cases, especially where national minorities are historic communities, the territory where majority and minority national communities live is well known, and can be addressed at the constitutional level in the form of group rights to exercise self-determination or secede from the state.”³⁵⁷ In the end, she admits that institutionalizing a legal right of national self-determination in international law seems more promising, because international institutions have greater capacity to act as impartial arbiters (since it is often the central government that persecutes national minorities). She offers superb argumentation, but national self-determination could hardly become internationally institutionalized because of the fears of fragmentation and threats it poses to international peace and stability.

Miller stresses the cultural aspects of the nation and explains why the nation-state represents the best model of political community. He takes a communitarian perspective and combines liberal

³⁵⁵ Moore, Margaret (2001): *The Ethics of Nationalism*, p. 217

³⁵⁶ *Ibid.*, p. 206-210; The procedure of ‘rolling cantonization’ allows cantonal units to be partitioned if the people desire this. For example, in 1980 plebiscites were held and a new commune – the Swiss Jura was produced, as a result of internal secession from the Berne administrative unit.

³⁵⁷ *Ibid.*, p. 207

and social elements in his theory, which rests on a social-democratic concept of social justice. Nations are ethical communities and each individual has obligations towards his/hers fellow nationals, which are more extensive than the obligations which he/she has towards human beings as such. Belonging to a national culture is important for one's self-identification and identity, and it is best for a culture to be protected by a nation-state, because cultural membership demands political structure to enable public expressions required by a culture. The nationality principle is not only instrumentally valuable, national feelings also have intrinsic ethical significance. He asserts that nations should have their own states not only in order to protect common culture and collectively determine their own destiny, but also because that leads to unity which is essential for success in achieving the redistribution of wealth that justice requires – nationalism facilitates valuable social goals such as redistributive justice. This means that in a way, nations facilitate democratic features of a state system. Nations require self-determination because states with strong national identities and without internal communal divisions are more successful in achieving social justice within their borders.³⁵⁸

The territorial connection of nations and states is important, because if the boundaries of nation and state coincide, citizenship and nationality produce the same obligations, thereby strengthening the solidarity and social justice. Miller admits that although nations have strong claims to self-determination, or *prima facie* right to self-determination, other forms of political independence can suffice in some cases. He distinguishes between two ways in which national self-determination theories can be supported. One is by arguments that show that states need to be mononational, and the other by arguments that show that nations need states, either in order to be able to protect themselves from threats to their distinctive character or in order for co-nationals to have the institutional resources that enable them to fulfill the special obligations they owe to one another as members of an ethical community. The conclusion he draws from these arguments is that they weigh in favor of some form of political self-determination for nations, but he does not claim that international law should acknowledge the right to statehood for all nations. However, he does assert that mononational states are more able to achieve distributive justice. There are two critical arguments against this conclusion. Firstly, from a perspective of liberal cosmopolitanism, neither nations nor states have primary ethical value – if co-nationals

³⁵⁸ Miller, David (1995): *On Nationality*, Clarendon Press, Oxford, p. 96

have special obligations to one another this does not mean that these special obligations are necessarily moral ones, or that nations are necessarily moral communities. Secondly, from the international relations perspective, institutionalization of the right to national self-determination that he proposes might give incentives to discriminate against foreigners and, equally important, there would be no enticement for wealthy states to help states which are in need. So even if Miller is correct in his contention that nationalism facilitates redistributive justice at the state level, at the international level it might have the opposite effect.

Miller writes that nationality comprises three interconnected propositions. The first one concerns personal identity, because nationality may be its constitutive part.³⁵⁹ The second is an ethical proposition - bounded duties to fellow national exist and nations are ethical communities. The third proposal is political, and states that people who form a national community and in a particular territory have a good claim to national self-determination, should be enabled to decide collectively matters that concern primarily their own community. He claims that political authorities are more likely to function most effectively when they embrace a single nation community, and relies on arguments which appeal to the political consequences of solidarity and cultural homogeneity.³⁶⁰ Two criteria should be applied to any group of would-be secessionists. The first criterion is that the group should form a nation with an identity that is clearly separate from that of a larger nation from which they wish to disengage, and secondly, the group should be able to validate its claim to exercise authority over the territory it wishes to occupy. If both criteria are met, the group in question has a serious claim to be allowed to secede. He warns that these criteria cannot be applied mechanically, because their application requires historical understanding.³⁶¹ The existing boundaries are put in question only where a *nationality* is denied

³⁵⁹ “These five elements together – a community (1) constituted by shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture – serve to distinguish nationality from other collective sources of personal identity.” Miller, David (1995): *On Nationality*, p. 27

³⁶⁰ “[T]o the extent that we aspire to form a democracy in which all citizens are at some level involved in discussion of public issues, we must look to the conditions under which citizens can respect one another’s good faith in searching for grounds of agreement. Among large aggregates of people, only a common nationality can provide the sense of solidarity that makes this possible... where a nation is politically autonomous, it is able to implement a scheme of social justice; it can protect and foster its common culture; and its members are to a greater or lesser extent able collectively to determine its common destiny.” *Ibid.*, p. 98

³⁶¹ Miller, David (1998): *Secession and the Principle of Nationality*, p. 69

self-determination, and that should be distinguished from the situation of an ethnic group which feels it is denied rights of cultural expression.

When a group is dissatisfied with current political arrangements, the question to ask is not ‘Does this group now want to secede from the existing state?’ but ‘Does the group have a collective identity which is or has become incompatible with the national identity of the majority in the state?’ When the answer to the second question is that state as presently constituted contains two or more nations with radically incompatible identities, so there is no realistic possibility of formulating a shared identity, the minority group presently incorporated in a multinational state has a *prima facie* case for secession. However, a few conditions need to be met. Firstly, there has to be some way of redrawing the borders so that two viable states are created. Secondly, the territory claimed by the seceding minority should not contain minorities whose own identity is radically incompatible with the new majority’s. Thirdly, some considerations must be given to small groups who may be left behind in the rump state, because they may be left in a very weak position. In conclusion, the principle of nationality does not generate an unlimited right of secession, but states and their constitutions should be arranged so that each nation is as far as possible able to secure its common future.³⁶² It is important that he deliberates not only on the position of the ‘new’ minority in the rump state and on the consequences of the new reality on its political rights and identity, but also on the dangers of escalation of conflicts that often follow secession because of the creation of new ethnic cleavages. Furthermore, he asserts that qualitative judgments about how the status and welfare of different groups would be altered by the creation of a new state must be made – for instance, would minority rights be better or worse protected if secession occurred. However, his suggestion that in cases where physically

³⁶² Miller, David (1994): *In Defence of Nationality*, in Gilbert and Gregory (eds.): *Nations, Cultures and Markets*, Ashgate, Aldershot; He also addresses the issues of limits placed by others nations’ claims to national self-determination on one nation’s exercise of rights of sovereignty. Obligations that nation has toward other states whose claims to national self-determination are equally good (supposing that these states are not engaged in acts of aggression or other unjust acts against their neighbors) are as following. First is the duty to abstain from materially harming another state either by acts of military aggression or by physical damage in other forms. Second is the duty not to exploit states which are one-sidedly vulnerable to that nation’s actions. Third is the duty to comply with whatever international agreements have been reached. Fourth are obligations of reciprocity, arising from practices of mutual aid whereby states come to one another’s assistance in moments of need, whether or not there is a formal agreement to provide aid. The fifth obligation is a problematic one – to ensure the fair distribution of natural resources. All that seems realistic to impose here is a rather general obligation on resource-rich countries to help out countries in economic hardship caused by the lack of resources. Miller, David (1994): *The Nation-State: A Modest Defence*, p. 148-158

intermingled communities cannot live together it may be necessary to contemplate exchange of population so that two more or less nationally homogenous entities are created is problematic.³⁶³

It can be concluded that Miller clearly favors nation-state and assigns it a central role in political sphere. It is presented as the best possible political arrangement in the modern age and for the modern society. The problem with his position, as with most theories on nationalism, is that such a state, accorded to a cultural majority, necessarily entails few or many national minorities who may be endangered by this conception which implies that they are not an equally important part of the political community. And if the cultural majority wishes to secede, individuals which are not a part of this majority are forced to follow its political program, or alternatively, an immense redrawing of borders would occur, so that they coincide with cultural nations. If his theory were institutionalized, many irredentist movements would feel encouraged and most multicultural states in the world would be endangered. If, on the other hand, all of the aforementioned limitations to secession that he proposes were strictly applied, one can hardly imagine which territories, inhabited by one cultural nation, would have the right to secede. For instance, according to him, secessions that seriously threaten the ethnic or national identity of groups within or outside seceding entity are not justified and should not be recognized, and this criterion qualifies the majority of attempts to secede as unjustifiable.

Yael Tamir is another proponent of liberal nationalism and she sees national self-determination as a right of individual members of a nation to express their national identity and preserve and protect the existence of their nation through political institutions.³⁶⁴ She, basically, says that although the era of illusion that homogenous nation-states are possible is over, nationalism will not fade away, so liberals need to rethink their beliefs and policies in order to adapt them to the changing world, and explore ways in which national values might contribute to liberal discourse. Liberal values, such as personal autonomy, reflection, choice and individual rights and freedoms, and national values, such as belonging, solidarity, loyalty, membership and cultural affiliations

³⁶³ Miller, David (1998): *Secession and the Principle of Nationality*, p. 72

³⁶⁴ Tamir, Yael (1993): *Liberal Nationalism*, Princeton University Press, Princeton, p. 69; Most authors who belong to the discourse of liberal nationalism, such as Joseph Raz, argue that individual rights are the central case of rights, and although groups also have rights, those collective rights are extensions of individual rights, which have the primacy. Raz, Joseph (1994): *Rights and Individual Well-Being*, in Raz, Joseph (ed.): *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Clarendon Press, Oxford, p. 44

are not mutually exclusive, although certain tensions between them exist. She remains faithful to the civic, individualistic concept by seeing nation as compound of individual citizens, but on the other hand, she emphasizes the value of cultural belonging as the core of nationalist sentiments.³⁶⁵ Nations are cultures that provide their members with meaningful ways of life across the full spectrum of human activity, and the value of national identity is linked with the value of cultural membership because this membership promotes a sense of belonging and relationships of mutual recognition. Cultural membership is important, because people, in order to make autonomous choices, need a cultural context. In this way she connects membership in a cultural community, as a precondition of autonomous moral choices, with individual liberty.

How does this reflect on self-determination? The expression of this cultural identity requires some degree of national self-determination. She develops a distinction between the right to national self-determination whose essence are demands for a public sphere in which the cultural aspects of national life come to the fore, and the right to self-rule, which is the right to take part in the political institutions and it derives from democratic theory.³⁶⁶ She draws a line between political and cultural spheres, asserting that national claims are not synonymous with demands for political sovereignty. Nations, defined in cultural terms, and states, defined in political, can be separated so that the right of a nation to preserve its culture needs not be united with the democratic right of a people to rule their own state. National self-determination is a process whereby individuals publicly express their national identity, while self-rule denotes a fair opportunity to participate in the political process, in the government. According to her, “when members of a particular group sharing some identifying national characteristics define themselves as a nation, they ought to be seen as one, lest they become victims of a needless injustice.”³⁶⁷ Fears about the possible fragmentation of the political system are overrated, since not behind every demand for national recognition stands a separatist claim for the establishment of an independent nation-state. Although nation-state can ensure the widest possible degree of

³⁶⁵ According to her, nation is a community whose members share feelings of fraternity, substantial distinctiveness and exclusivity, as well as a belief that they have common ancestors and that their community exhibits a continuous genealogy. Tamir, Yael (1996): *Reconstructing the Landscape of Imagination*, in Caney, George and Jones (eds.): *National Rights, International Obligations*, Westview Press, Boulder, p. 86

³⁶⁶ Tamir, Yael (1993): *Liberal Nationalism*, p. 9

³⁶⁷ *Ibid.*, p. 68

national autonomy,³⁶⁸ not all nations can attain this because of two restrictions – the number of nations limits the possibility of all of them exercising the right to statehood and secondly, the difference in their geographical circumstances, size and natural resources makes it impossible for some of them to achieve the status of nation-states. Taking this into account, the right to national self-determination should be satisfied through a variety of political arrangements, such as federal or confederal states, establishment of national institutions or autonomous communities, having in mind that solution depends on the particular conditions of each case. So the exact form of self-determination is not so important, the main thing is that the culture has some form of public expression. This approach, although attractive, is perhaps overly idealistic – although such combination of various political arrangements is possible (as the structures of the European Union show), the problems of nation-state and boundaries remain, and it is unclear how such divorce between political and cultural spheres can be helpful in this respect. Even if one can see the contours of the end of nation-states as she predicts it in the complex arrangements of the EU, it is uncertain whether other continents can and want to follow Europe's example.

Michael Walzer asserts that all over the world, especially in Eastern Europe, men and women are reasserting their local and particularist, their ethnic, religious, and national identities.³⁶⁹ And so the tribes have returned, and the dream of their return is greatest where their repression was most severe. The reality is such that we have to think about divorce, despite its difficulties and despite the fact that there does not seem to be any humane way to disentangle the tribes - self-determination for many different kinds of tribes is bound to be complicated, and constrains that follow upon separation various.³⁷⁰ According to him communities are social constructs: imagined, invented, put together, and their members have the right that goes with the membership – they ought to be allowed to govern themselves. He essentially affirms that every nation state has a moral right to self-determination, because an independent political community based on a shared culture is always valuable. However, he predicts anarchy if series of

³⁶⁸ “The right of national self-determination can be fully realised only if the national group is recognised by both members and non-members as an autonomous source of human action and creativity, and if this recognition is followed by political arrangements enabling members of the nation to develop their national life with as little external interference as possible. It has commonly been assumed that this requires granting members the widest possible degree of autonomy, namely, the right to establish their own sovereign nation-state.” *Ibid.*, p. 74

³⁶⁹ Walzer, Michael (1994): *Notes on the New Tribalism*, in Brown, Chris (ed.): *Political Restructuring in Europe: Ethical Perspectives*

³⁷⁰ *Ibid.*, p. 187-189

separations are permitted. These series will be endless – each divorce justifying the next one, smaller and smaller groups claiming the right to self-determination and the politics that result will be noisy, incoherent, unstable and deadly. He concludes that the principle of self-determination is subject to interpretation and amendment, and what has been called ‘the national question’ does not have a single correct answer.³⁷¹

In deliberation on this issue, he concludes that several factors are important. For instance, just treatment of national minorities depends on two sets of distinctions: firstly, between territorially concentrated and dispersed minorities, and secondly, between minorities radically different and those that are only marginally different from the majority population. There is also the matter of unequal economic resources of the different tribes as an incentive to divorce: “long established patterns of cooperation cannot be abruptly terminated to the advantage of the most advantaged partners. On the other hand, the partners are not bound to stay together forever – not if they are in fact different tribes, who meet the democratic standards for autonomy or independence.”³⁷² His conclusion is: “rather than supporting the existing unions, I would be inclined to support separation whenever separation is demanded by a political movement that, so far as we can tell, represents the popular will. Let the people go who want to go. Many of them will not go all that far. And if there turn out to be political or economic disadvantage in their departure, they will find a way to re-establish connections. Indeed, if some sort of union – federation or confederation – is our goal, the best way to reach it is to abandon coercion and allow the tribes first to separate and then to negotiate their own voluntary and gradual, even if only partial, adherence to some new community of interest. Today’s European Community is a powerful example, which other nations will approach at their own pace. But – again – one nation’s independence may be the beginning of another nation’s oppression. Reading the newspaper these days, it often seems as if the chief motive for national liberation is not to free oneself from minority status in someone else’s country but to acquire (and to mistreat) minorities of one’s own.”³⁷³

³⁷¹ *Ibid.*, p. 190-191

³⁷² *Ibid.*, p. 196

³⁷³ *Ibid.*, p. 197

In his earlier work, Walzer was concerned with the possibility of external intervention.³⁷⁴ He has asserted that intervention is justified when what is at issue is the national liberation or secession, when the goal of intervention is providing help in achieving freedom for a struggling group.³⁷⁵ He explains that a struggling group represents a distinct community if it has “rallied its own people and made some headway in the ‘arduous struggle’ for freedom”, so there is “need for political or military struggle sustained over time.”³⁷⁶ This is mentioned here because a dangerous conclusion can be inferred from his words - groups that do not fight are not entitled to self-determination. The struggle for freedom and the appeal to self-determination cannot be relevant criteria for identification of entities entitled to self-determination. Such a viewpoint could also imply that, since self-determination is a process, nations would have to fight continuously in order to retain their status as nations. This conclusion, although it can be deduced logically, brings his position to a point of absurd. However, if his claims are accepted, a wave of interventions would follow, because every group ready to fight could have a justified external support.

There are several critical arguments against these theories. Firstly, it is hard to defend ethnicity as a justifiable argument for secession - ethnic secession is fundamentally incompatible with democracy and the principle of equality. Insisting on ethnic homogeneity can lead to suppression of other ethnic and cultural groups, because it creates difficulties in the acknowledgement of distinct identities and rights of other groups. In reality, most states are so heterogeneous and most nations so dispersed that it is almost impossible to realize a nation-state without some form of coercion and violence over identities. Nationalism is often associated with a romantic approach that sees nationhood as something primary and essential, as a crucial identification with one's community and ultimate readiness to fight for its independence. “The romantic notion attaches value to statehood only to the extent – if at all – that it represents the communal identification of the people or the nation it enjoins. As such, this notion buttresses struggle and self-denial; the subordination of individual ends to the end of the whole community – with the

³⁷⁴ Walzer, Michael (1992): *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York

³⁷⁵ *Ibid.*, p. 90; Unilateral intervention of a third state is justified in three cases: first, when another foreign state intervenes in support of one side in a civil war, other powers may intervene in support of the unaided party; second, humanitarian intervention is allowed in cases of massacre or enslavement, and the third is the aforementioned case of helping new nations to achieve their freedom.

³⁷⁶ *Ibid.*, p. 93

always close prospect of justifying tyranny and xenophobia as long as they can be dressed in nationalist rhetoric.”³⁷⁷ Many scholars depict nationalism as something irrational and chaotic, a grey area where atavistic drives take primacy over rationality. Karl Popper claims that nationalism “appeals to our tribal instincts, to passion and prejudice, and to our nostalgic desire to be relieved from the strain of individual responsibility which it attempts to replace by a collective or group responsibility.”³⁷⁸ Michael Ignatieff explains the toxicity of nationalism by calling it the narcissism of minor differences. Nationalism does not express a pre-existing identity - it constitutes one, it is an invented identity, a form of narcissism: “this phrase – the narcissism of minor differences – illuminates a paradox, the smaller the real differences between two groups, the larger such differences are likely to loom in their imagination...Nationalism is the transformation of identity into narcissism. It is a language game that takes the facts of difference and turns them into a narrative justifying political self-determination. In the process of providing legitimacy for a political project – the attainment of statehood – it glorifies identity. It turns neighbors into strangers, turns the permanent boundaries of identity into impassable frontiers.”³⁷⁹

Buchanan criticizes the principle of nationality’s impact on the political discourse and world order: “in the real world, where there are hardly any states that contain only members of one nation, using national identity to frame politics – treating the state primarily as a resource for furthering the life of one nation only – is a recipe for discrimination, exclusion and marginalization of all who are not part of *the* nation. ‘Nation-building’ – which involves nation-destroying so far as other groups are concerned – has proved to be one of the major sources of ethnic conflict in the past several decades.”³⁸⁰ Such criticisms create impediments for the construction of a general theory of nationalism, and only in the last two or three decades did the field of political philosophy receive a significant amount of literature which deals with this eclectic discourse. Most theories analyzed here belong to the string of liberal nationalism, since scholars elaborating on the compatibility of these two doctrines produced theoretically

³⁷⁷ Koskenniemi, Martti, *ibid.*, p. 250

³⁷⁸ Popper, Karl (1962): *The Open Society and Its Enemies*, Vol. 2, Routledge and Kegan Paul, London, p. 49

³⁷⁹ Ignatieff, Michael (1999): *Nationalism and the Narcissism of Minor Differences*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, p. 95-96

³⁸⁰ Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, p. 389

challenging and well-grounded arguments, logically coherent and consistent (a rarity among previous writings on this topic, which were, for this reason, neglected).³⁸¹

Most national self-determination theories examined here are moderate theories which primarily call for different degrees of political autonomy in order to protect culture and identity of ethnic groups. Popular solutions are federal structures and other forms of political autonomy, and secession becomes an option in cases when there are no other possibilities to improve individual autonomy. Although the line of reasoning in most of the above analyzed theories is impeccable, one can reach different conclusions on the secession issue. This is the reason that these theories are analyzed at length - to show that despite sound arguments of the moderate liberal nationalistic discourse, national claims to self-determination should be supported only in cases where forms of internal self-determination are demanded, while the external dimension – secession, should be upheld only in cases of extreme oppression, as the remedial theory suggests.

Another objection, generally applied to all theories based on cultural nationalism can be added: one's identity does not have to depend primarily on cultural membership, and indeed, cultural identity is more important for some members of certain cultures than it is for others. Furthermore, there is a not quite explained jump from the importance of cultural membership to the necessity of political recognition and protection which should or must include independent statehood. These theories claim that nations as cultural groups have ethical value to their members - their importance for individual's well-being indicates their ethical value. However, it is unclear why nations, and not some other encompassing group such as, for example, religious communities, have this ethical value. There are other groups equally or more important for individual's well-being than nations, family being just one of them. Also identities, including

³⁸¹ Yael Tamir makes a remark about personal reasons that can be decisive for the determination of authors to get entangled with issues related to nationalism, and therefore, may also be significant in analyzing their conclusions. She writes: "individuals embark on the study of nationalism for a variety of personal reasons that influence their theoretical approach. Will Kymlicka's main objective is to protect the needs and rights of the native peoples of Canada as well as of the Québécois, while sustaining the integrity of the Canadian federation. Brilmayer has in mind the needs and rights of Eritreans, as well as of some other disadvantaged African nations. David Miller views nationalism from a social democratic perspective and deals with its contribution to the development of the welfare state. Neil MacCormic, Joseph Carens and I each from his/hers own national experience attempt to demonstrate that it is possible to reconcile liberal and national values even in circumstances of an ongoing national conflict. And Michael Ignatieff revisits his own past when he travels across lands affected by the most tormented national conflicts, and sees blood and misery everywhere he looks." Tamir, Yael (1999): *Theoretical Difficulties in the Study of Nationalism*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, p. 77

national identities, are fluid and nations are not fixed, they are no more than social constructs. A related argument from the remedial right theory perspective is the problem with the recognition of national identity which devalues other identifications by arbitrarily elevating the status of one group above others. This way one particular identity is chosen for special recognition and promotion. The usual response to this criticism is that it is simply not possible to design social and political arrangements which would equally recognize several different identities (for example, one public language must be chosen), but this retort does not show that the original argument is incorrect.

Moreover, the principle of nationality justifies disintegration and break-up of perfectly legitimate states, and directly endangers the territorial integrity of most states of the world. When confronted with such danger states can, on the other hand, implement policies designed to avert groups from organizing politically in order to prevent self-determination movements, so the position of national minorities in many states would probably deteriorate. Secessionist movements would gain further public support when faced with such policies, and states would continue to resist secession, hence the spiral of confrontations, conflicts and possibly violence would expand. In contrast to these theories, remedial right theory offers incentives for states to act more justly and perhaps even to prevent secessionist movements from arising by offering autonomy to minority groups. National self-determination might also lead to the creation of second class citizens – small and dispersed minorities are often oppressed in new states, and can suffer various forms of discrimination by the new majority (especially the members of the ethnic group which was the majority in the mother state and who remained in the new secessionist state). Most societies today are multinational and multicultural, and to single out one nation as entitled to self-determination means to disrespect other sources of identification. Nation does not have to be the primary source of identification even for individuals who are its members, let alone for other citizens in a multicultural society.

There are several other arguments against nationalist theories. As previously mentioned, there is the domino effect argument – the possibility of one case of secession leading to another. Furthermore, one of the most important critiques is that there are by far more nations and

potential nations in the world than territories where they can be organized into states.³⁸² Also, whenever a territorially concentrated minority feels dissatisfied, it can start mobilizing for self-determination, potentially just as means of blackmailing the majority for certain advantages and subsidies of a sort. Of course, there are certain good points of the above analyzed authors that defend the principle of nationality. They are right to claim that it would be impossible to explain the dynamic of almost all secessionist movements without the principle of nationality. Groups which express a prolonged wish to secede and also have the capacities to engage in a secessionist conflict are usually national groups. Especially the theories which emphasize the occupancy principle are correct to presume that nations have the right to some form of self-determination, but such positions cannot escape the criticism about the long history of abuses perpetrated by national groups. Simply put, history shows that nationalism has more often produced violence than tolerance and peaceful coexistence. Although many conclusions of these authors, especially about the significance of culture as a source of identification, underlying forces and dynamics of secessions are right on the mark, their theories can still be characterized as too permissible, when current developments in international relations and international law are taken into consideration. Although one has to concur with Margaret Moore's brilliantly developed argumentation, it is nevertheless possible to reach different conclusions. The main standpoint of remedial right theory (which is analyzed below) is more acceptable. This does not change the fact that almost every case of secession that this theory would characterize as justifiable would be, in fact, a result of some nation's claim to political self-determination. On the other hand, this does not mean that every nation's claim to secession is justifiable, but only those which fulfill the criteria posed by remedial right theory. Nations as such have the right to internal self-determination – from democratic governance to special minority rights and autonomy. However, they are not entitled to secede from a multinational state and form a state of their own unless they are victims of grave injustices. This possibility, of course, exists for all victimized groups, but in reality it is

³⁸² Buchanan calls this 'The Infeasibility Objection'. It is the most familiar objection to the idea that nations as such have rights of self-determination, since there are too many nations, whose members are mixed together, and too few territories capable of being viable states. According to him, the emphasis should be on the fact that nations are so intermingled in most parts of the world, so if the idea that every nation has a presumptive right to its own state is legitimized, existing territorial disputes and ethno-national conflicts would be exacerbated. The second important argument which he presents is 'The Equal Respect Objection' – it states that singling out nations for rights of self-government is arbitrary, and this arbitrariness violates the principle of equal respect for persons. It is a form of discrimination, since singling out nations as such as being entitled to self-government means to devalue other allegiances and identifications, and to show less than equal respect to those persons whose allegiances and identifications they are. Buchanan, Allen (1996): *What's So Special About Nations*, p. 283-309

normally nations that demand independent statehood. Clearly the positions of the two theories can coincide in praxis, when applied to particular cases, since probably all cases of secession which remedial right theory would characterize as justifiable involve national groups, so they are by default also justifiable by ascriptive theory, but remedial right theory is more restrictive, therefore it would not justify all secessionist demands which are justifiable according to ascriptive theory. Applied to Kosovo, this theory gives Kosovo Albanians a right to secede, because they comprise a nation, but the Kosovo Serbs would also have the right to join Serbia, as this theory, just as the choice theory, criticizes the *uti possidetis* principle (the application of remedial right theory to Kosovo is explored in the final part of the study).

4 *Remedial right theory*

Remedial right theory values the international order and territorial integrity more than primary right theories, by insisting that secession is a remedial right, not a general, primary one, and that it needs a serious justification, as a sort of a necessary evil. Basic presumption is against secession, so heavier burden of proof is placed on the secessionists. A remedial right to secede is available to a group that has suffered grave injustices, and the only way out from an unbearable situation for this group is to remove itself (and the territory) from the repressive state. It is somewhat similar to John Locke's theory of revolution, since it links the right to resist tyranny and the right to self-determination. This theory is also called just cause theory, and it is based on the liberal 'rights' tradition, but it is aware of the negative aspects and consequences of secessionist conflicts. According to remedial right theory, the legitimacy of states and political boundaries depends on the respect and guarantees of *individual* rights that states offer to all citizens.³⁸³ If a government fails to fulfill this obligation, individuals have the right to resist or

³⁸³ Legitimacy is hard to define, since there are many different understandings of this concept, not just by different scholars but across disciplines – sociology, philosophy, or political theories. According to the shortest and simplified explanation (from a liberal perspective), the first associations with the concept of legitimacy are the ideas of justice and equality as accepted moral principles. Since we are concerned with the legitimacy of a state, other related notions are democracy – the consent of the governed, and human rights. Other side of the coin is the conception of political legitimacy as political authority, which implies political obligation of citizens to obey, so the basic question for political philosophers is when citizens are justified in opposing state power. In political sciences, the majority of scholars consider states as legitimate if they protect basic human rights and freedoms and have democratic and righteous institutions. Their legitimacy is thus derived from the vital functions they perform, among which are, besides the protection of human rights and freedoms, protection of peace and security of all citizens. This means that it is important that people consent to a democratic governance because they believe that it is in their best interest. On

secede. The fundamental criterion of internal legitimacy of a state is respect for human rights of its citizens. This connection between human rights and the right to self-determination enables remedial theory to ground the right to self-determination within the framework of human rights. Scholars labeled as just-cause theorists usually propose a number of criteria that need to be applied when judging a concrete historical case of secession and its legitimacy. Of course, different scholars concentrate on different situations which they consider as unjust and sufficient to legitimize secession. Among those are, usually, heavy discrimination against a group, seizure of territory (such as illegal incorporation in recent history), revocation of territorial autonomy, genocide and other serious and systematic violations of human rights and freedoms. A right to defend the territorial integrity of the original state is also considered. Careful analysis of every individual case needs to be conducted, and no *a priori* right to secession could stem from choice or ethnicity. A case for secession can only be built on discrimination and grave injustices committed upon a group that wishes to secede, and only as a remedy of last resort, when no solution other than secession is available. These conditions serve to prevent a proliferation of secessions; they deter nationalist claims to self-determination which can be a project of elites, without any real and widespread support. Simply put, the right of exit should not be made too easy to exercise.

The right of secession, according to remedial theory, relies on an analogy with the right of revolution, by making oppression a necessary condition of the right. “If, as liberal democrats believe, there are conditions in which there is a right of revolution by the people against a tyrannical government, there may be an analogous right of secession, where a minority is subjected to tyranny in circumstances in which a revolution by the majority would be unlikely, ineffective or unjust.”³⁸⁴ Buchanan points out that the right to secede is in important respects similar to the right to revolution, as the latter is understood in the mainstream of normative theories of revolution, such as Locke’s theory. The chief difference between these two rights is that the right to secede accrues to a portion of the citizenry, concentrated in a part of the territory of the state, and the object of the exercise of this right is to sever the government control over

the other hand, if the people do not accept the authority of the state, if they do not consent to be ruled by the state which ceased to perform its crucial functions, its legitimacy becomes questionable.

³⁸⁴ Freeman, Michael (1998): *The Priority of Function over Structure: A New Approach to Secession*, in Lehning, Percy (ed.): *Theories of Secession*, p. 16

that portion of territory, not to overthrow the government. According to this standpoint, secession may be justified as a response to selective tyranny when revolution is not a practical prospect.³⁸⁵ In line with this view, a state has legitimate authority over territory only if it is just to its citizens, and a legitimate right to secede emerges only as a remedy of last resort. According to Buchanan, a group has to show that it is a victim of systematic injustice and exploitation, that its culture and existence are in danger, but it is also required to show that it has a valid claim to the territory it wants to withdraw from the parent state. That means that there is no *prima facie* right to secession, because the burden is on separatists to demonstrate a territorial claim and to show that they have suffered certain injustices.

Certain scholars had advocated the position that separatists have a right of secession if they suffer serious harms long before the modern debate on these issues took hold in the 1990s. For example, Henry Sidgwick wrote about the right of disruption, as he called it, back in 1891.³⁸⁶ According to him, such a right exists only in cases of one or more following grievances: 1.) severe oppression; 2.) gross misgovernment or 3.) persistent and harsh opposition to legitimate desires of the population. Otherwise, unity of the state should be maintained in the face of the demand for secession. The additional conditions under which secession should be permitted are: 1.) the two portions of a state's territory are separated by a long interval of sea, or other physical obstacles; 2.) the two populations of a state have divergent needs and demand very different things from their government because of differences of race, religion, history or social conditions; 3.) the external relations of the two populations of a state would be quite different, if they had independent states, from what they are under one government.³⁸⁷ The basic idea of his theory concerning these issues cannot be called anachronistic.

³⁸⁵ Buchanan, Allen (1997): *Theories of Secession*, Philosophy and Public Affairs, Vol. 26, p. 35-36

³⁸⁶ Sidgwick, Henry (1919): *The Elements of Politics*, Macmillan, London, as quoted in Beran, Harry (1994): *The Place of Secession in Liberal Democratic Theory*, in Gilbert and Gregory (eds.): *Nations, Cultures and Markets*

³⁸⁷ Sidgwick also gives the following six arguments in support of his claim that there is no right of secession simply in virtue of distinct statehood or because it is in interests of the separatists: 1.) secession reduces the power and prestige of the existing state; 2.) if secession occurred there would be a minority in the new state who were against secession and who would suffer; 3.) secession may deprive the existing state of natural resources it does not have in the rump of its territory; 4.) if the separatist did not accept a fair share of the national debt, secession would result in an increase of this debt per person in the rump state, and if they did accept a share of the debt, it would be difficult to enforce the agreement; 5.) secession may destroy the natural boundaries of a state; 6.) the community from which secession is proposed will dislike the loss of territory involved. *Ibid.*, p. 51

The predecessors of remedial right theory can be found even earlier in history, in natural law theories, as Buchheit notices.³⁸⁸ For instance, Hugo Grotius, although denying the inherent right of men to resist civil authority, allowed a right to minority secession under extreme circumstances. Just as the state has no right to cede part of its territory without the inhabitants consent, a segment of state's population cannot unilaterally withdraw from the state "unless it is evident that it cannot save itself in any other way".³⁸⁹ In organic terminology that he uses the state is represented as the body (or the head) and citizens are component organs of that body and "the right which the part has to protect itself [is greater than]...the right of the body over the part".³⁹⁰ In cases of severe oppression a right to self-defense exists, both for individuals and minorities: "I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the last resource of necessity in such a way as meanwhile not to abandon consideration of the common good".³⁹¹ Similar is the conclusion of Johannes Althusius, who postulates that the state is composed of smaller communities which he saw as concentric association levels (the family, the corporation, the local community, the province, and the state). Each of them participates in wider associations, but retains certain natural rights and among the rights not surrendered by the provinces when they form the state is the right to secede from the state if necessary.³⁹² Other scholars that have developed the doctrine of a natural right of resistance, such as Emmerich de Vattel or John Locke, have not believed that this right includes a group right to secession. Even though the natural law theory is considered obsolete, these are interesting examples and they show that even the theories which are without a doubt a product of modern age might have a distant origin in several centuries old doctrines.

The most notable author in this field, Allen Buchanan, is also the one who started the avalanche of writings on the morality of secession, after he published "Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec" in 1991.³⁹³ He pointed out that the issue of the morality of secession had received very little consideration from a normative perspective, and

³⁸⁸ Buchheit, Lee, *ibid.*, p. 46-58

³⁸⁹ Grotius, Hugo (1964 Francis Kelsey translation): *De Jure Belli Ac Pacis Libri Tres*, Oceana Publications, New York, as quoted in Buchheit, Lee (1978): *Secession: The Legitimacy of Self-Determination*, p. 50

³⁹⁰ *Ibid.*, p. 50

³⁹¹ *Ibid.*, p. 53

³⁹² *Ibid.*, p. 49-50

³⁹³ Buchanan, Allen (1991): *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press, Boulder

his wishes of initiating a debate on that subject were fulfilled, because since then numerous authors from different fields such as political philosophy, international law and comparative and international politics have started taking interest in this topic. He develops an institutional moral theory of international law, according to which secession is a remedial right only, a general right which arises only in response to serious and persisting grievances. A right to secede from a just state is not allowed, except in cases of special rights - secession by mutual consent of the state and the secessionist group, and secession based on a constitutional right to secede. Secession is a remedy of last resort to escape serious injustices, such as persistent violations of human rights (including the right to participate in democratic governance) and the unjust taking of a territory, if that territory was previously a legitimate state or a portion of one. Only legitimate states are protected by the principle of territorial integrity, and legitimate states are those that fulfill the criteria of being democratic and respecting basic human rights.³⁹⁴

According to him, the right to secede, understood as the unilateral right or nonconsensual entitlement to seek independent statehood by groups presently within the jurisdiction of a state, is a remedial right only, a right that a group comes to have by virtue of persistent and serious violations of the human rights of its members, or of rights conferred on them by intrastate autonomy agreements, or by virtue of violations of the rights of legitimate states, as when one state unjustly annexes another. These three sorts of injustices are sufficient to generate a unilateral right to secede, but on somewhat different grounds. In the case of massive and serious violations of human rights such as genocide, the central idea is simple: “individuals are morally justified in defending themselves against violations of their most basic human rights. When the only alternative to continuing to suffer these injustices is secession, the right of the victims to defend themselves voids the state’s claim to the territory and this makes it morally permissible for them to join together to secede. This is not surprising, given that the basis of the state’s claim to territory in the first place is the provision of justice, understood primarily as the protection of basic human rights.”³⁹⁵ In cases where secession is the recovery of unjustly taken sovereign

³⁹⁴ Buchanan deliberates on the issue of legitimacy in several papers, and the most important ones are *Recognitional Legitimacy*, *Philosophy and Public Affairs*, Vol. 28 and *Democracy and Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*; see also *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, Oxford University Press

³⁹⁵ Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, p. 354

territory the secessionists are simply taking back what was lawfully theirs, rectifying the injustice of the wrongful taking of what international law recognized as their territory. Unjust annexations also usually involve massive violations of human rights, so the goal of this condition is both to deter violations of basic human rights, including the right to self-government, and to empower the remedy of self-help when that right is violated. The third set of conditions under which international law ought to recognize a unilateral right to secede are serious and persistent violations of intrastate autonomy agreements by the state. There is a common sequence of events in these cases: pressures from a minority group eventually result in the state agreeing to an intrastate autonomy arrangement; the state breaks the agreement; in response to the broken autonomy agreement autonomists become secessionists; and then the state violently attempts to suppress the secession. He points out that “unless the international community is willing to press for serious monitoring of intrastate autonomy arrangements, at least in cases where the risk of a breakdown of the agreement is significant, it would be irresponsible to hold states accountable for continuing to recognize a group’s right of intrastate autonomy regardless of how those rights are being exercised.”³⁹⁶ In order to generate a unilateral right to secession, it is not enough that the state has seriously and persistently violated an intrastate autonomy agreement. Such legal right should be recognized if two additional conditions are satisfied – that the state is responsible for the breakdown of the autonomy arrangement (and that a suitable formal international legal inquiry determines that fact) and that secession is a remedy of last resort.

Norman names five kinds of injuries to a group that are considered to give just cause for secession: “(1) that it has been the victim of systematic discrimination or exploitation, and that this situation will not end as long as the group remains in the state; (2) that the group and its territory were illegally incorporated into the state within recent-enough memory; (3) that the group has a valid claim to the territory it wants to withdraw from the state; (4) that the group’s

³⁹⁶ *Ibid.*, p. 357-358; The cases which he mentions are brutal secessionist conflicts that have occurred in Chechnya, Sudan, Eritrea, the Kurdish region of northern Iraq and Kosovo. He considers Kosovo as a case where both parties have possibly failed to fulfill their obligations, because there is dispute about who violated the terms of the autonomy agreement first – Serbia under Milosevic when it unilaterally revoked Kosovo’s autonomy in 1989 or Kosovar Albanians when they abused their right of autonomy, by using the Kosovar Communist Party as a corrupt patronage system that excluded Serbs and by engaging in violent attacks on Serbs. He concludes that whether or not Kosovar Albanians had a valid claim to attempt to set up their own state is a complex matter, but the relevant factor to the evaluation is whether they sabotaged a legitimate autonomy agreement or were victims of the state’s destruction of it.

culture is imperiled unless it gains access to all of the powers of a sovereign state; (5) that the group finds its constitutional rights grossly or systematically ignored by the central government or the supreme court.”³⁹⁷ Sunstein asserts that secession is a justified response when a sub-unit of a state is denied civil liberties and rights, especially when other institutions cannot protect them. When oppression is pervasive, and not otherwise remediable, sub-unit is entitled to leave the nation that is oppressing it. He adds that while economic self-interest cannot provide justification for secession, economic exploitation provides a more serious argument, as a form of discrimination, so in some cases it might justify secession. Another sufficient moral reason for secession is the injustice of the original acquisition which resulted from unjustified aggression, as was the case with the Baltic States, so secession corrects the original injustice. The last reason for secession that he analyses is cultural integrity of the sub-unit that entitles it to self-determination, which was the idea that often fuelled secessionist movements in Eastern Europe and elsewhere. He concludes that it is impossible to say, in the abstract, whether secession can be justified on this ground, but this depends on the context. However, if this argument stands alone, it is doubtful that it justifies a right to secede.³⁹⁸

Per Bauhn argues that a minority may have a right to secede on cultural grounds, but secession is the last resort – oppressed minority should seek solutions other than secession, but if everything fails, secession is morally justified. One owes loyalty to one’s state only if that state protects its citizens’ rights to freedom and well-being, including the right to leave one’s nation and join another.³⁹⁹ The most important issue is in what way is the minority culture endangered: “is it endangered by its own members voluntarily choosing to join the dominant culture of the state? Or is it endangered because it does not receive sufficient support from the state to maintain its own schools and its various traditional practices? Or is it endangered because its members are persecuted, killed, deported, or forced to abandon their traditions by the state?”⁴⁰⁰ In the first two

³⁹⁷ Norman, Wayne, *ibid.*, p. 41; Anthony Birch assumes that secession should not be encouraged, but serve as the last option in certain problematic cases, fairly similar although more permissive compared to Buchanan’s, such as: (1) continuous refusal on the part of a people to give consent to membership in a union; (2) failure of the government to protect the basic human rights and security of the citizens of the region; (3) prolonged and continuous failure to safeguard political and economic interests of a region; (4) failure to keep a bargain made to preserve the interests of a region which would be outvoted nationally. Birch, Anthony (1989): *Nationalism and National Integration*, Unwin Hyman, London, p. 64-66

³⁹⁸ Sunstein, Cass, *ibid.*, p. 27- 37

³⁹⁹ Bauhn, Per, *ibid.*, p. 114

⁴⁰⁰ *Ibid.*, p. 105

cases secession cannot be morally justified, because the response to violations of rights should be proportional to the harm caused by the violations. Civil disobedience is justified as the response to non-violent but permanent discrimination, and secession as the response to state-inflicted violations of basic rights. If the policy of discrimination can be abolished by a change of government, there will be no need for secession, but if the unjust government is firmly supported by the majority of the members of the dominant culture, so there is no hope for a change of policy, and if the state responds to civil disobedience by increasing repression so that the basic rights of the members of the minority culture are violated, secession is morally justified.⁴⁰¹

Diane Orentlicher tackles an interesting issue of implications of democratic principles on assessments of separatist claims in international law.⁴⁰² She suggests that international law recognizes unilateral right to secede only when secession is a remedy of last resort for serious injustices, and that international law is developing in that direction since the Paris Peace Conference after World War I and the Aaland Islands dispute.⁴⁰³ A right to democratic governance is already an integral part of international law, although it did not occupy a significant place in the domain of statecraft until recently. Orentlicher explores how relevant the right to democratic governance and international community's new commitment to democratic principles are in assessing separatist claims and questions of boundaries, and implies that democratic principles, depending on circumstances, may be in favor of or against international recognition of secessionist claims. She admits that the implications of Franck's right to democratic governance are potentially quite radical, because by affirming popular sovereignty, this emerging right may undermine international law's foundational principle of territorial integrity as a ground for opposing separatist claims. The core of the argument is that since "a basic attribute of sovereignty is the power to alienate a portion of a state's territory; once international law established democracy as the only legitimate form of government, it ineluctably

⁴⁰¹ *Ibid.*, p. 112

⁴⁰² Orentlicher, Diane (2003): *International Responses to Separatist Claims: Are Democratic Principles Relevant*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*

⁴⁰³ "In sum, then, international law has long disfavored separatist claims. But alongside this general disapproval, international instruments and other relevant sources have long reserved a possible exception: implicit in international law's core commitment to basic human rights and democratic principles is recognition of last-resort, remedial right for a subnational group to secede when these rights are denied its members." *Ibid.*, p. 25

vested the exercise of state sovereignty in ‘the people’; if ‘the people’ wish to break off a portion of the state’s territory and form a new state, they possess the power to do so.”⁴⁰⁴

In democracy, a mutually consensual outcome is the preferred way to resolve disputes over separatist claims, and a negotiated agreement serves democratic values much better than unilateral actions. If resolving disputes through negotiations is to succeed, the negotiating partners must accept secession as a possible outcome. Equally important is the role of plebiscite or referendum in the process, but only within a broader context of negotiations, not as a sole way of resolving contested separatist claims. Additionally, an effective institutional design for negotiations must be able to address situations in which it is not possible to achieve a mutually accepted result. Usually mediators play a significant role in attempting to resolve such disputes. The situation in the former Yugoslavia is the best example of recent instances of such mediation where the novel role of democratic principles in the recognition process and in the work of the Badinter Commission came to full expression.⁴⁰⁵ Although the recognition policy and the opinions of the Badinter Commission were flawed and controversial, the underlying model of an intergovernmental institution that assists in resolving territorial claims may be useful. Rights-related preconditions to membership in intergovernmental organizations would induce states to improve their treatment of minorities while creating an expectation among secessionists that there would be a protracted period before their claims for recognition might even be considered.⁴⁰⁶ However, democratic principles also entail a commitment to full participatory rights within states, so this emerging right to democratic governance also lends support to separatist claims when those rights and principles have been profoundly and irrevocably breached. If all attempts to achieve internal self-determination have failed, remedial secession becomes justified as a solution.

⁴⁰⁴ Orentlicher, Diane (1998): *Separation Anxiety: International Responses to Ethno-Separatist Claims*, Yale Journal of International Law, Vol. 23, p. 51-52

⁴⁰⁵ “In effect, the EC recognition process forced Bosnia to seek recognition under the gun. As noted, the declaration establishing that process required Yugoslav republics seeking recognition to apply within a week. The Badinter Commission precipitated another disastrous development when it suggested that Bosnia hold a referendum. The EC’s ill-considered deployment of democratic process was, proverbially, like pouring kerosene onto a fire.”

Orentlicher, Diane (2003): *International Responses to Separatist Claims: Are Democratic Principles Relevant*, p. 36

⁴⁰⁶ *Ibid.*, p. 37

The most important element in the work of proponents of remedial right theory is discrimination as the basis for secession. It is usually described as deliberate and systematic, without a realistic prospect of remedy other than secession. Alexis Heraclides explains that two reasonably objective measures of discrimination should be established. First, the level of discrimination, exploitation or sheer neglect of the minority should be assessed on the basis of well-known indicators of income, social level, social mobility and participation on public office that is roughly proportionate to a group's numbers. The second task is to establish whether or not discrimination is the result of a consistent and deliberate policy on the part of the central government with regard to the minority community in question. According to a minority interpretation of the relevant UN resolutions, such as the Friendly Relations Declaration, if a minority is the victim of 'alien domination and exploitation', then it is entitled to the right to self-determination.⁴⁰⁷ In addition to these core attributes, several other issues are also relevant to the right to secessionist self-determination: the use and extent of armed violence; the respective numbers involved; the unity or cleavage in the secessionist leadership; the quality of the leadership of separatist insurgents; the indigenous power capabilities of the movement including manpower, educational personnel, funds, arms, equipment, suitability of terrain for protracted warfare and international outlet; and the international dimension, notably third-party involvement, world opinion and the possibility of external instigation.⁴⁰⁸

⁴⁰⁷ Heraclides, Alexis (1992): *Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis*, Journal of International Affairs, Vol. 45, p. 411; He advocates the extension of the right of secession to oppressed nations and non-nations, and in some cases to partially disadvantaged nations, but not to ethnic groups simply on the basis of their being ethnic groups and demanding independence. According to him, core attributes for a qualified right to secessionist self-determination are: (1) the existence of a distinct and sizeable self-defined community or society within a state, compactly inhabiting a distinct and fairly integral region of a country, which overwhelmingly supports independent statehood; (2) a pattern of constant and systematic discrimination, exploitation or domination against a sizeable self-defined collectivity on the part of the state or the dominant ethnic group; (3) cultural domination, either by rejecting the regional group's culture and seeking assimilation against the will of the group concerned, or by treating it as an inferior culture hardly worthy of respect; the state's rejection of dialogue with the sizeable regionally based group and the repudiation of any form of internal self-rule. *Ibid.*, p. 409; Even if only some of these prerequisites apply, a case could be made for internal self-rule. Other important elements, acting as 'floating criteria' for both secessionist and non-secessionist self-determination, are worth including as corroborative indicators: (1) a realistic prospect of conflict resolution and peace as a result of the independence, autonomy or federation envisaged, and not the likelihood of new ethnic conflicts and internal balkanization; (2) that the prospective state will not in its search for communal identity follow unacceptable policies, akin to fascism or Nazism and other forms of authoritarianism (including various forms of religious fundamentalism) that clamp down on fundamental freedoms and cultural pluralism. Heraclides, Alexis (1994): *Secessionist Conflagration: What is to be Done*, Security Dialogue, Vol. 25, p. 289

⁴⁰⁸ Heraclides, Alexis (1992): *Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis*, p. 415

Buchanan emphasizes that not every demand for self-determination is, or should be a demand for complete independence.⁴⁰⁹ A group may have a legitimate interest in self-determination without having a right to secede, and the international legal order ought to provide active support for a wide range of intrastate self-determination arrangements, because failure to do so greatly increases the risk that human rights will be violated and for other reasons, including efficiency and the enhancement of participation in democratic governance. This is why, when contemplating the bringing of the right of self-determination under the rule of law, it is important to articulate a range of possible forms of self-determination besides secession, and to make it clear that in many cases some combination of these more moderate forms can better serve the legitimate interests of a group. This is what he calls the 'isolate and proliferate' strategy. There is a variety of self-determination forms short of secession, including minority rights and self-administration and various types of federations and federative rights (such as special rights of representation that give disproportional weight to minorities, supermajority requirements for some categories of federal legislation or rights of nullification and veto). International law should support the legitimate interests of national minorities by strengthening human rights and by encouraging states to explore forms of intrastate autonomy, rather than by recognizing a right to self-determination of peoples that legitimizes secession by such groups. This is why a unilateral right to intrastate autonomy should be recognized in certain special, rather narrow circumstances. First, when international law recognizes a group's right to secede, it should also recognize the right of that group to opt for intrastate autonomy if it so chooses. Second, when a group qualifies on remedial grounds to secede but opts instead for intrastate autonomy, the international legal order should recognize its legal right to autonomy and play a constructive role in negotiations to formulate an appropriate intrastate autonomy arrangement and apply appropriate measures to monitor compliance with it. Third, international law should recognize and support intrastate autonomy arrangements for indigenous groups when they are needed in order to rectify serious injustices suffered by such groups. Fourth, where establishment of an intrastate autonomy regime for a minority is the only way to prevent it from suffering large-scale violations of basic human rights, an intrastate autonomy regime may be imposed upon a state through an appropriate

⁴⁰⁹ Buchanan, Allen (1997): *Self-Determination, Secession, and the Rule of Law*, p. 305-312

international legal process.⁴¹⁰ Clearly these remedial grounds for international legal recognition of a group's right to autonomy are less demanding than those for international legal recognition of a unilateral right to secede. However, even these intrastate autonomy regimes should be seen as remedial devices, needed only as back-ups for failures to protect minorities from various discriminations and violations of human rights, since there are many things that states can do that would largely obviate the need for autonomy regimes. It is a mistake to begin by promoting autonomy. Instead, the presumption should be that more must be done to protect minorities by respecting their individual rights.⁴¹¹

Thus, an international consensus is necessary - secession is generally to be regarded as the last resort, after these less extreme forms of self-determination are tried. This principle is supported by respect for the territorial integrity of existing states. Accordingly, starting point should be the presumption against secession in contested cases. What follows is the development of ethically sound and politically feasible principles for responding to self-determination movements that want full sovereignty. Hence, principles and procedures for guiding the process of secession should be developed.⁴¹² Correspondingly, conditions under which a group ought to be recognized as having a *prima facie* right to secede should be specified. That means that the secessionists would have to demonstrate that the primary justification grounds apply in their situation, while an authoritative international body would make a ruling to that effect. This view is criticized as too restrictive since it requires that secessionists bear a burden of argument to show that they are victims of injustices, so there is a strong presumption against secession in contested cases. He concludes that "above all, it should be kept in mind that providing a comprehensive blueprint for resolving all possible secessionist conflicts is almost certainly not a realistic goal. The aim, rather, is to begin to develop principles and institutions for constraining and containing attempts at state breaking within the rudiments of the rule of international law while at the same time

⁴¹⁰ Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, p. 437

⁴¹¹ Buchanan, Allen (2006): *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession*, in Hannum and Babbitt (eds.): *Negotiating Self-Determination*, p. 95

⁴¹² Such as procedures designed to achieve (1) an equitable settling of boundaries; (2) a fair division of the national debt; (3) the continuation, renegotiation, or dissolution of treaties with third parties; (4) adjudication of claims for compensation for private property lost or devalued as a result of changes in property rights systems; (5) measures to avoid disruptions of national defense and security; and, above all, (6) credible guarantees of the rights of minorities in both the seceding area and in the remainder state. *Ibid.*, p. 308

providing protection and support for those who have a legitimate interest in forming their own state in order to avoid serious injustices.”⁴¹³ Restriction of the unilateral right to secede to a remedial right would liberate states to consider intrastate autonomy arrangements without embarking on a slippery slope toward their own dissolution.

Rainer Bauböck also believes that a federal arrangement is a solution superior to secession. Multinational federations are not a mere second best solution to nation-states, but the best possibility for building viable and just democracies, while independent statehood remains necessary only for colonies and annexed territories. “If a democratic state consists of several territorially concentrated collectivities that conceive of themselves as distinct political communities and if the unity of the state has not been created and maintained by oppression, colonization, or recent annexation, then a federal solution will be generally preferable either to a centralized structure of government or to the break-up of such a state.”⁴¹⁴ Democratic states should devolve political power toward federal provinces because federal arrangement is the best solution to conflicts over a division of political powers involving one or more territorially concentrated groups which have consistently asserted claims of self-government. If their demands are conformed in such a way, the danger that these demands will escalate to independent statehood is reduced, because participating in fair arrangements of federal power-sharing creates commitments toward the common good of the larger polity. On the other hand, if multinational states consistently deny their national minorities any autonomy and representations, or if autonomy rights are persistently violated, a right to secession for these groups emerges.⁴¹⁵

There is a variety of suggestions supporting the institutionalization of secession through instruments of international or constitutional law in both remedial right only theory and primary

⁴¹³ *Ibid.*, p. 320

⁴¹⁴ Bauböck, Rainer (2000): *Why Stay Together? A Pluralist Approach to Secession and Federation*, in Kymlicka and Norman (eds.): *Citizenship in Diverse Societies*, Oxford University Press, Oxford, p. 381

⁴¹⁵ Although federal arrangement does not guarantee stability, alternative solutions are more unstable, and there are four reasons which shape a widespread preference for maintaining unity in democratic multinational federations: “multinational federalism can achieve integration through (1) concession: by granting partial self-government and special powers at the federal level; (2) moderation: by undercutting support for extreme nationalists through free competitive elections; (3) participation: by involving minorities and their representatives in federal schemes of power-sharing; (4) multiple identities: by allowing for geographical and marital mobility across boundaries and by promoting an overarching identity of federal citizenship.” *Ibid.*, p. 381

right theories, some more and some less realistic and feasible. It is important to evaluate not just the compatibility of these proposals with international law, but also to assess the impact and effects that such procedures would have on international relations. This entails the implications which institutionalization of these proposals would have on international peace and stability - would they lead to fragmentation and balkanization (multiplication and creation of semi-independent states) or to positive changes even for ethnic groups fighting for freedom and independence. When associative theories are considered, the conclusion is that they are easily applicable but would produce bad consequences – if a democratic right to secede became recognized in international law, destructive incentives would be created, not only for states and the principle of territorial integrity, but also for self-determination movements (for example, states might prevent minorities to concentrate in certain regions of the country). Ascriptivist theories put more hurdles on the way to independence but may still lead to a gloomy future of microstates and postmodern tribalism that Franck describes. Additionally, these theories are not realistic, since states are still the main creators of international law, so it is unlikely that they would allow institutionalization of theories that could endanger them.

It seems that scholars defending these theories do not realize why the principle of sovereignty is significant. It is one thing to assert that this concept has changed in the post-modern world, and another to disregard its importance for the integrity of the international legal order. Attempts to institutionalize associative theories would inevitably cause disruption of the international system. States would never permit it, not just because of the probable proliferation of secessionist movements and fear of their own dismemberment, but also because the loss of stability in never-ending conflicts that would endanger numerous lives would follow. Buchanan believes that this erosion of territorial integrity and fragmentation would clasp even the states that respect human rights and justice. “Primary Right Theories are not likely to be adopted by the makers of international law because they authorize the dismemberment of states even when those states are perfectly performing what are generally recognized as the legitimating functions of states. Thus Primary Right Theories represent a direct and profound threat to the territorial integrity of states – even just states.”⁴¹⁶ On the other hand, institutionalization of the remedial right to secede requires some impartial international adjudicative procedure for any exercise of the right to

⁴¹⁶ Buchanan, Allen (1997): *Theories of Secession*, p. 45

secede on remedial grounds. Such a procedure would not make exit too easy, on the contrary – it would, on the one hand, reduce the risk of groups attempting unilateral secession when the conditions for their having a remedial right are not in fact satisfied, and on the other hand, by erecting an additional hurdle this procedural requirement would reduce the risk that groups will resort to secession too quickly, instead of making a sincere effort to gain redress for their grievances while remaining within the state.

Buchanan advises to bring secessionist crises under the rule of international law, and emphasizes that such proposal has to be both morally progressive (in a sense that it better serves basic values than the status quo) and at least minimally realistic at the same time. He notices that most theories do not distinguish between two different normative questions about secession.⁴¹⁷ The first question is under what conditions does a group have a moral right to secede, independently of any questions of institutional morality, and in particular apart from any consideration of international legal institutions and their relationship to moral principles. The second is a question about how international institutions and international legal institutions ought to respond to secession, under what conditions should a group be recognized as having a right to secede as a matter of international institutional morality, including a morally defensible system of international law. Political theories of secession that answer the first question are not attractive as guides to institutional reform, because they create perverse incentives and they are of little use for developing an international response to problems of secession. The institutional question is the more urgent one because secessionist crises tend to have international consequences that call for international responses.

He articulates criteria that should be met by any moral theory of the right to secession that can provide useful guidance in determining how international legal institutions ought ethically to respond to secession. Criteria for evaluating proposals for an international legal right to secede are: minimal realism of the proposal (in a sense that it has some significant prospect of eventually being implemented); ‘progressive conservatism’ - consistency with well-entrenched, morally progressive principles of international law (such as the morally progressive

⁴¹⁷ Buchanan, Allen (1998): *The International Institutional Dimension of Secession*, in Lehning, Percy (ed.): *Theories of Secession*, p. 227-254

interpretation of the principle of the territorial integrity of existing states); absence of perverse incentives (it should not encourage behavior that undermines morally sound principles of international law); moral convergence of the theory (a theory whose principles can be affirmed from the perspectives of a number of different existing ethical views, both secular and religious, is preferable) and moral accessibility of the proposal to a broad international audience (the implementation of the theory should not involve unacceptable moral costs).⁴¹⁸ Remedial right theory, compared to primary right theories, recognizes the seriousness of secessionist matters, and accordingly places significant constraints on unilateral secession by proclaiming a unilateral right to secede only when independence is the remedy of last resort against serious, persisting injustices. It minimizes the problem of perverse incentives, because states that protect basic human rights and honor autonomy agreements do not have to fear legally sanctioned unilateral secession. On the contrary, they are entitled to international support for maintaining their territorial integrity. This is why states will have an incentive to act more justly. As far as other criteria of moral progressivity, progressive conservatism and moral accessibility go, remedial right theory also scores high, since its incorporation in international law would, besides exerting pressure on states to improve their behavior, reduce the risk that responses to secessionist crises would exhibit the inconsistency that characterized the international community's response to the dissolution of Yugoslavia. And finally, the incorporation of remedial right theory into international law would not pose a risk of large-scale violence and instability. This theory also exhibits the virtue of moral convergence, since a wide range of moral views support the commitment to human rights, recognize the right to take back unjustly taken sovereign territory, and acknowledge the importance of the keeping of agreements, including autonomy agreements.⁴¹⁹

⁴¹⁸ He concludes that "because of a lack of *institutional* focus, Primary Right Theories fail to appreciate the importance of states, both practically and morally. Once we focus squarely on institutions, and hence on the importance of states, we see that Primary Right Theories (1) are deficient according to the criterion of minimal realism (because they neglect the role of states as the makers of international law), (2) are not consistent with morally progressive principles of international law (because they contradict the principle of the territorial integrity even when it is restricted to the protection of morally legitimate states), and (3) create perverse incentives (because their proposed international principles would encourage morally regressive behavior by states in their domestic affairs). My contention has been that by failing to take institutional considerations seriously in attempting to formulate a right to secede these analysts have produced normative theories that have little value as guides to developing more humane and effective international responses to secessionist conflicts." Buchanan, Allen (1997): *Theories of Secession*, p. 59-60

⁴¹⁹ Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, p. 370-371

Wayne Norman makes a case for constitutionalizing a right to secession.⁴²⁰ His main argument is that making secession legally possible could render secession and the disruption of secessionist politics less likely in a democratic multinational state. Norman concentrates on the constitutional options for states that exhibit the following characteristics: advanced and reasonably stable democratic system with at least one territorially concentrated ethnocultural minority group with national or quasi-national identity and political-territorial jurisdiction in which this minority forms a majority; a dominant secessionist movement within this group that is committed to democratic pursuit of independence; and a level of support for secession within the minority group or its region that fluctuates somewhere between 20 and 60 per cent.⁴²¹ Those are countries like Belgium, Canada, France, Spain, Switzerland, and the United Kingdom. The most compelling justification for secession is remedial, but it would be unfair to the secessionists to require them to prove that they have been the victims of injustice (biased referee problem), so instead, they must satisfy other, normatively neutral procedural conditions, such as a supermajority vote in favor of secession, holding a series of referendums over a period of years, etc. Basically, he claims that the consequences of not having a legal secession procedure may be worse than the consequences of having one. If the central government legalized rules on secession, they would be much more demanding than those that the separatists would set for themselves. Additionally, a secession clause can enhance the quality and strength of the federal union.

He claims that the secession clause does not necessarily encourage secessionist politics. On the contrary, appropriate proceduralization of a qualified right to secede would make secession harder to exercise and would even reduce the very incentives to engage in secessionist politics, because, for instance, political leaders could not mobilize enough support to make secessionist threats credible in the absence of genuine oppression by the central government, and on the other hand, the secession clause can help push a state in the direction of arrangements that enhance the autonomy of minorities. However, an opposite conclusion is possible as well - the right to secede

⁴²⁰ Norman, Wayne (2003): *Domesticating Secession*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*, p. 193-237

⁴²¹ *Ibid.*, p. 195-196; he also proposes that the secession clause prescribes “that an affirmative vote would be followed by another vote asking people whether they would like their county or electoral district to go with the seceding state or to stay with the original state.” p. 54

should not be constitutionally protected because that would imperil the political process. Most arguments revolve around the endangerment of democratic decision-making by allowing minorities to exploit this right by systematic blackmail which would pervert democracy. For example, Cass Sunstein explains that “to place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions, create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.”⁴²² The most common objection to constitutionalized right to secession is, accordingly, the possible abuse of this right by minorities. For example, they can exploit the threat of political division even in day-to-day political decisions when they are outvoted by the majority, by using fears of disruption to their advantage. To prevent minority groups from gaining such an effective veto power, Buchanan, for example, proposes institutional devices which should discourage such groups and strategies. He does not, as Sunstein, believe that constitutionalizing secession should be barred, but that additional obstacles should be posed in order to make secession more difficult to achieve. He recommends, for instance, that secessionist groups are required to pay an exist cost or to demand that more than a simple majority prefers secession.⁴²³ Such impediments should not discourage real independent movements, but they could prevent groups from pretending to have an interest in secession in order to procure certain benefits and increase their bargaining powers.

Finally, another important point has to be considered – Buchanan’s concept of recognitional legitimacy. In short, the right of self-determination is constrained by the claims of legitimacy, and hence ultimately by justice. According to Buchanan, justice, understood as the protection of basic human rights, ought to be a primary goal of the international legal system. Justice and legitimacy are distinct concepts – legitimacy does not require perfect or full justice, but the legitimacy of states must be defined in terms of some threshold approximation to perfect or full justice, and the concept of basic human rights should serve as that threshold. He defines political legitimacy as follows: “an entity has political legitimacy if and only if it is morally justified in

⁴²² Sunstein, Cass (1991): *Constitutionalism and Secession*, University of Chicago Law Review, Vol. 58, p. 634

⁴²³ Buchanan, Allen (1991): *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, p. 98-100

exercising political power. The exercise of political power may be defined as the (credible) attempt to achieve supremacy in the making, application and enforcement of laws within a jurisdiction. I will argue that an entity that exercises political power is morally justified in doing so only if it meets a minimal standard of justice, understood as the protection of basic human rights.”⁴²⁴ This general conception of political legitimacy serves as the basis for his proposal for an international legal practice of recognizing only legitimate states, and he calls it recognitional legitimacy, or international legitimacy. He argues for a normativized practice of recognition according to which new entities ought to be incorporated into the society of states only if they satisfy justice-based criteria, that is, only if they do a credible job of protecting the basic human rights of their citizens and refrain from serious violations of the basic human rights of those beyond their borders.

The content of the concept of recognitional legitimacy is the bundle of juridical characteristics that define independent statehood or sovereignty. Recognition is an act with serious moral implications and as such ought to be governed by rules that are themselves morally justifiable. The minimal requirements of justice that are necessary for recognition are respect for basic human rights, both within the state and in the state’s interactions with those beyond its borders. He writes: “the criteria for recognitional legitimacy of states I propose include (1) a minimal internal justice requirement, (2) a nonusurpation requirement, and (3) a minimal external justice requirement... My suggestion is that to be recognized as a legitimate state an entity should meet minimal requirements of justice both internally and in its external relations and also should not have come about through usurpation, where this means forcibly displacing a legitimate state or unjustly taking part of the territory of a legitimate state.”⁴²⁵ Because there are cases where new claimants to the status of legitimate statehood may not be willing or able to satisfy fully these

⁴²⁴ Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, p. 233-234

⁴²⁵ *Ibid.*, p. 266-267; He further explains that although the nonusurpation condition is perhaps demanding and controversial, it enables us to avoid becoming an accomplice to injustice, and it applies only to the creation of new states from the destruction of legitimate states, it has no application to the creation of new states out of entities that were not legitimate. The internal and external minimal justice requirements are to be explicated in terms of basic human rights, which include the right to physical security, the right to resources for subsistence, minimal rights of due process and equality before the law (including the right against arbitrary seizure, the right to be apprised of the charges against one and to respond to them, the right to counsel, and a weighty presumption against retroactive criminal offenses), the right against at least the more serious forms of discrimination on grounds of race, religion, ethnicity, or gender, the right to freedom of expression as at least including the right to criticize one’s government, the right against servitude and slavery, the right to freedom of association, and the right against torture.

criteria all at once, a normativized international legal practice of recognition should include the option of ‘unbundling’ sovereignty and conferring the attributes of legitimate statehood in stages, as the process of building a rights-respecting state progresses. Although the international legal order often fails to protect the rights of minorities within exiting states, the international community has more leverage over groups seeking recognition than it has over exiting states because secessionist entities generally crave recognition and they are weaker, so it is easier to impose conditions on them. Furthermore, the attempt to impose conditions on new entities is not threatening to existing states and hence is more likely to be supported by the international community. However, if a justice based rule of state recognition is to provide an effective force for improving state behavior, it must be accompanied by institutional mechanisms that make recognition a matter of legal obligation, not discretionary political judgment, which means imposing significant penalties on states that grant recognition when it is not warranted by that rule.⁴²⁶ A short sketch of Buchanan’s conception of recognitional legitimacy was necessary, as it is complementary to his theory on secession. International law should accord the unilateral right to secede only to those groups for which secession is a remedy of last resort for one of the three above specified injustices (violations of human rights, unjust annexation of a legitimate state’s territory, or serious and persisting violations of an intrastate autonomy agreement). At the same time, international law should recognize as legitimate states only those secessionist entities that have a unilateral right to secede and make credible commitments to internal and external justice. When these conditions are satisfied, all states are legally obligated to recognize the new entity as a legitimate state, and when these conditions are not met, all states are legally obligated not to recognize the secessionist entity. This represents a significant erosion of the state sovereignty, as recognition and non-recognition become obligatory, instead of discretionary acts.

5 *Conclusion*

As we have seen, according to remedial right theory, international law should recognize a remedial right to secede, but not a general right of self-determination that includes the right to secession for ethnic groups. The unilateral right to secede is a remedial right only, a last resort for serious injustices. Accordingly, the international legal order should support states’ efforts to

⁴²⁶ *Ibid.*, p. 273-274

preserve their territorial integrity as long as they do a credible job of protecting basic human rights, but deny that states have the right to suppress secession when it is a remedy of last resort against serious injustices. Therefore, international law should encourage alternatives to secession by supporting intrastate autonomy regimes and other arrangements of self-government short of full sovereignty. A comprehensive theory of self-determination must include not only an account of the right to secede but also a broader normative framework for evaluating and responding to claims to self-determination. In line with Buchanan, a limited right to unilateral secession understood as the remedial right only needs to be uncoupled from the question of intrastate autonomy, since there are many possible forms of intrastate autonomy and a wide variety of considerations that must be weighed up before deciding that a particular group is entitled to any of them.

Furthermore, the remedial right to secede entails a right to abolish the existing state's control and attempt to achieve the status of a legitimate state, but not the right to be recognized as a legitimate state under international law. It is a claim-right that accords legitimacy to secessionists' attempt to achieve statehood. But acknowledging the right to secede in this weaker sense does not imply that secessionists have a right to recognitional legitimacy, that states are obligated to recognize the new entity as a legitimate state. The ground of the right to recognitional legitimacy is that the secessionist entity has satisfied the appropriate justice-based criteria previously described, while the ground of the right to secede is that by persisting in grave injustices toward the group the state has voided its own claim to that part of its territory, and this makes it permissible for secessionists to repudiate the state's authority and to attempt to exert their own control over that territory with the ultimate goal of achieving recognition of statehood.⁴²⁷ If this proposal is incorporated into international law, the arbitrary restriction of the right to secede to colonial categories of non-self-governing and trust territories might be eliminated without creating an over-expansive right to self-determination. Additionally, this strategy would uncouple the right to secede from legitimate interests that groups have in intrastate autonomy and from issues of negotiated or consensual secession.

⁴²⁷ *Ibid.*, p. 334-336

The major problem with theories on secession is how to incorporate them into the existing body of international law. The main obstacle is the fact that a development that would give (external) self-determination rights to minorities undermines the stability of the international order and threatens the integrity of states. There is a need to build a pragmatic approach, to analyze how international law could be developed in order to deal successfully with secession. Buchanan argues that remedial theory has an advantage over primary right theories because it better corresponds to changes in the international community and international law. Primary right theories, especially theories based on choice seem easier to operationalize, but only on the first glance. This simplicity of application comes from the fact that they do not dabble with the legitimacy problem. Important feature of just-cause theories is that they emphasize the strong link between human rights and the external dimension of self-determination, and also connect secession to the legitimacy of states. The legal right to secede arises when a state acts unjust, so the presumption that its authority is legitimate becomes questionable. Since choice theories suggest that state authority originates from the sovereign authority of the people, legitimacy of the state depends upon the consent of the majority (which is much easier to determine than the question whether the state has conducted itself in a manner that requires a moral remedy – hence the simplicity of operationalization). But what if a state acts in accordance with the will of the majority and the result is injustice and the mistreatment of the minority (given the problem of nationalism, such a scenario is not hard to imagine)? There are further problems with operationalization when authors present additional conditions. Most of these conditions are impractical. How can it be decided, for instance, whether the new state will be likely to respect the fundamental interests of its inhabitants, or if secession is feasible or disruptive to the international order, etc.?

The conclusion is that remedial right theory scores better on the issue of operationalization than primary right theories, which, accordingly, have less value as guides to developing more humane and effective international responses to secessionist conflicts. Remedial right only theory, firstly, places a significant constraint on unilateral secession, thereby acknowledging that state breaking, like revolution, requires a weighty justification. Unlike primary right theories, it does not pose pervasive threats to the territorial integrity of existing states, and therefore it is more likely to be incorporated into international law. In this aspect it shows consistency with well-entrenched,

morally progressive principles of international law, such as the principle of the territorial integrity of existing legitimate states. Furthermore, compared to other theories, it makes an effort to accommodate the desires for autonomy of minority groups within states, by encouraging options such as decentralization and federalism. Secondly, this theory is compatible with a permissive stance on negotiated or constitutional secession, so it is not as conservative as it first appears. Thirdly, it provides the right incentives – states that are just remain protected from legally sanctioned unilateral secession and are entitled to international support if their territorial integrity is jeopardized. One of the main advantages of remedial theory, when compared to primary right theories, is that if it were operationalized, it would not produce perverse incentives toward minorities – on the contrary, it would give states an incentive to treat their minorities justly and perhaps secure a higher degree of political autonomy for minorities and a better protection of minority rights, because the danger of using this autonomy for secessionist mobilization would be diminished.

There are, of course, critiques of remedial right theory coming from scholars who develop and defend different approaches. For instance, Margaret Moore identifies as the main problem of remedial right theory the fact that many secessionist movements are not primarily about justice or injustice, so this theory fails to capture the dynamic that is fuelling the secessionist movement in the first place – “the political significance of cultural and especially national identity is ignored on this approach, because the argument appeals to a conception of fundamental human interests and erects liberal rights and rules and conceptions of legitimacy on that basis. Justice may be a good criterion for assessing government; but it does not seem to be the primary factor in understanding the quest to secede, or even making sense of the massive movement to decolonize in the 1960s; or the importance that the international community is currently placing on democratic legitimacy.”⁴²⁸ This may be so, but if remedial right theory is seen as an integral part of a wider theory of self-determination that includes a principled account on when intrastate autonomy arrangements warrant international support, it will properly address the concerns of ethnic groups in cases when they do not have a unilateral right to secede. An objection can be made regarding the concept of recognitional legitimacy as well. Simply, normative standards

⁴²⁸ Moore, Margaret (1998): *Introduction: The Self-Determination Principle and the Ethics of Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, p. 6

such as recognitional legitimacy, despite their just and moral goals, can hardly become legally binding, because this is an area of traditional display of sovereign power that states will not give up easily. However, the achievement of statehood can heavily depend on the formal recognition of the new state. This recognition is vital for the new state - it confirms it as a subject of international law and international politics and enables its membership in international organizations. Not many states will argue against the contention that a state which flagrantly violates fundamental human rights is illegitimate and not entitled to enjoy the privileges of a full-fledged member of the international community. This leads to a conclusion that no member of international community should recognize such a state. Nevertheless, many states will make the decision whether to recognize the emerging state with dubious reputation concerning the respect of individual and minority rights guided by current political goals and their national interest, not higher moral goals. After all, many illegitimate states have been recognized throughout modern history.

Another critical remark could be made – remedial right theory also suffers from problems related to institutionalization and operationalization. There is, for instance, the problem with different understandings of just cause, which is especially obvious in secessionist struggles. Furthermore, it is clear that some mechanism for determining whether a secessionist group has a just cause is needed, but its design remains disputed. If a supreme or a similar court is to serve that purpose, the problem of biased judge arises. In the case of an international court this danger is diminished, but another difficulty typical for secessionist movements arises, as Wayne Norman warns: “does anyone really believe that such a movement is going to fold up and die if it loses its day in court? If anything, the reverse is more likely: being stonewalled by a judgment from the supreme court would be held up by minority nationalists as yet another humiliating example of their people’s internal colonization, and hence a further reason to secede.”⁴²⁹ Even with this objection in mind, it seems plausible that states are more likely to agree with the remedial right approach than with the principle of nationalist secession or with any plebiscitary theory, because remedial right theory protects the territorial integrity of states which meet the minimal standard of justice and democracy, while the other main theories lead to a possible disintegration of even legitimate states.

⁴²⁹ Norman, Wayne (1998): *The Ethics of Secession as the Regulation of Secessionist Politics*, p. 51

However, one inference comes to mind – each situation must be judged on its individual merits. Proposed criteria can act as a useful guideline, but the reference to general principles when dealing with a concrete political conflict may not lead far. “It is a paradoxical characteristic of a generally formulated right or a principle such as ‘self-determination’ that, stated *in abstracto*, it seems to convey a value that most people will immediately endorse. The more concrete it is made, however – that is, the more it is applied as a right of this or that entity – the more controversial it starts to appear, with the result, finally, that it becomes useless when it seems most needed: in a dispute about the boundaries of a particular ‘self’ against another. The more, in other words, juristic discussion turns away from affirmations of the abstract principle to particular cases of application, the more it seems necessary to have recourse to an evaluation of the particular character or practices of those communities (including their self-identification principles and the manner in which they proceed to fulfill their goals) whose boundaries have become overlapping.”⁴³⁰

⁴³⁰ Koskenniemi, Martti, *ibid.*, p. 264

Part III

Case of Kosovo

Satan's comment upon arriving in Hell:

*Here we may reign secure, and in my choice
To reign is worth ambition though in Hell:
Better to reign in Hell, than serve in Heaven.*

John Milton, *Paradise Lost* (1667)

1 *Introduction*

In the spring of 1999, Kosovo's road to separation from Serbia, most probably irreversible, was definitely set. How did this development occur? Was Kosovo justified in unilaterally seceding from Serbia, or to rephrase, were Kosovo Albanians a 'people' entitled to self-determination? Which legal and political theories justify Kosovo's independence? Why was this instance of secession politically supported by the Western states, which usually tend to be more critical toward secessionist movements? Is Kosovo really a unique case of secession? Does the unilaterally proclaimed state of Kosovo fulfill the relevant criteria of statehood? And what are the consequences of international recognition of Kosovo's statehood by many states, including the majority of the Western states? Were there viable alternative solutions short of independence, was independence indeed the last remedy available? Before the analysis of legal and political consequences of Kosovo's independence, history and events that were the catalysts for the apogee of crisis need to be examined.

According to the rationalist framework, claims to secession are typically linked with the character of the region whose population wants to secede. According to Donald Horowitz, the two most important variables for creating a simple matrix of potential secessions are the positions of ethnic groups and regions relative to others in the state.⁴³¹ The interplay of these two

⁴³¹ Separatist ethnic groups are characterized as 'backward' or 'advanced'. Advanced groups are those that have benefited from opportunities in education so they are represented in bureaucratic, commercial and professional

variables determines the emergence of separatism, and the largest number of secessionists can be characterized as backward groups in backward regions. Kosovo falls into this category according to the characteristics such as denial of proportionality in the civil service while the state is dominated by members of other groups, so they are not able to compete outside their home region, and according to symbolic issues like language and religion. Kosovo was one of the poorest and most backward areas in Yugoslavia which consumed vast resources through the Federal Fund for the Development of Underdeveloped Regions. In 1948, the proportion of illiterates in the population over the age of ten was only 2.4 per cent in Slovenia but 62.5 per cent in Kosovo. The difference in income was largest between Slovenia and Kosovo, two regions with about the same population (c. 1.9 million) - Slovenia's national income amounted to 36.55 million dinar, Kosovo's to only 3.97 million in 1989. Because of the low level of economic development, high illiteracy rates, patriarchal attitudes towards marriage and family, and other socio-cultural factors, the population in Kosovo has the highest birth rate in Europe (around 23 per 1000), along with a very low age structure (52 per cent of the population is under 19, and the average age is 24).⁴³² Since the 1990s the rates of unemployment were extremely high – around than 50 per cent, and Kosovo's economy remains the poorest in Europe.⁴³³ It is a deficit region that received subsidy from the center, and after the unilateral proclamation of independence, its economic viability is questionable, despite immense financial assistance from the international community and countries that enabled its secession.

A related characteristic of this category is that the decision to secede is made despite the economic costs. In such cases, the political benefits are considered worth the economic

employment and have a high per capita income. These groups are regarded as motivated, intelligent, diligent and dynamic. On the other hand, backward groups have the opposite position in the society and are regarded as not disposed to achievement. The second variable is the position of regions, and they are also characterized as backward or advanced by the relative economic position of the region, as measured by regional income per capita excluding remittances from other regions. Accordingly, separatist movements fall into one of the four possible categories - backward groups in backward regions, advanced groups in backward regions, advanced groups in advanced regions and backward groups in advanced regions. Horowitz, Donald (2000): *Ethnic Groups in Conflict*, University of California Press, Berkeley, p. 233-262

⁴³² Calic, Marie-Janine (2000): *Kosovo in the Twentieth Century: A Historical Account*, in Schnabel and Thakur (eds.): *Kosovo and the Challenge of Humanitarian Intervention*, United Nations University Press, Tokyo, p. 25

⁴³³ According to the EC, unemployment stood at 45,4 per cent of the active labor force in 2010, and Kosovo has made no progress toward establishing a functioning market economy; European Commission, Kosovo Under UNSCR 1244, 2011 Progress Report, the 12th of October 2011, SEC (2011) 1207, see also http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf, last visited on the 7th of September 2012

sacrifices. Further on, it is typical for backward groups in backward regions that their elite, or as Horowitz calls them, advanced segments of backwards groups do not resist but usually lead the secessionist movement.⁴³⁴ Although the region as whole will suffer the loss of subsidies which, in most cases, strikes a huge blow to region's economic functionality, elite normally gains from such situations. Smaller, although poorer, is better for them, because the highest state positions become open and most of the competition is in another state. Calculations of cost and benefit are subdued to selfish interests of the elite, and to eruption of ethnic sentiments among mass.

“Secession can be seen as a solution, then, to an intransigent struggle between a state and an assertive sub-state nationality unit. The parties may negotiate, entertain each other, double talk and deceive, but often in the end, they remain irreconciled, each seeing itself as self-righteous and the other as evil. In moments of communal passion, irreconcilability may provoke the state to attempt desperate solutions, such as genocide, mass expulsion, totalitarian repression and, most dreaded of all, assimilation of the ethnic enemy. Secessionist leaders rise to the challenge equaling the level of inanity, barbarism and outright insanity of its adversary.”⁴³⁵ It necessary to admit that both sides to the conflict, as it often happens, used a variety of repressive tactics - Serbia first, while Kosovo was under its jurisdiction, and Kosovo during the fight for its independence and after its proclamation. There is a dreadful irony in the fact that both sides, just in different periods and depending on opportunities, used repressive means such as: deliberate creation and provocation of violent incidents; suppression of minority's religion, official use of language, political parties, media, institutions of education; using the media to stigmatize the opponent; attacks on political activist and leaders; police brutality in all occasions - threats, arrests, disappearances, assassinations, executions of prisoners without trial, torture; and as an atrocious climax, mass-executions, pogroms and ethnic cleansing.

⁴³⁴ These groups are convinced that they cannot compete in the undivided state, since they are subjected to uncongenial policies on language, religion or other symbols of state ownership. They are willing to attempt independence, heedless of economic costs, including the loss of subsidies from the center. Clearly, one of the reasons for the relative attractiveness of secession resides in the position of ethnic group leaders – to become big fish in a small pond. “That is the very meaning of ethnic secession, after all. For ethnic elites, small is indeed beautiful; it provides them with the prerogatives, the perquisites, and the trappings of power. Better to be the president of Abkhazia or Transnistria than to be leader of an ethnically differentiated, permanent opposition party in Georgia or Moldova.” Horowitz, Donald (1997): *Self-Determination: Politics, Philosophy, and Law*, in Shapiro and Kymlicka (eds.): *Ethnicity and Group Rights*, New York University Press, New York, p. 425-426

⁴³⁵ Premdas, Ralph (1990): *Secessionist Movements in Comparative Perspective*, in Premdas, Samarasinghe and Anderson (eds.): *Secessionist Movements in Comparative Perspective*, St. Martin's Press, New York, p. 13

Kosovo's secession, as the majority of cases of secession in modern age, lays at the juncture of internal and international politics: "whether and when a secessionist movement will emerge is determined mainly by domestic politics, by the relations of groups and regions within the state. Whether a secessionist movement will achieve its aims, however, is determined largely by international politics, by the balance of interests and forces that extend beyond the state."⁴³⁶ In Kosovo, secessionist sentiments have been smoldering for decades, and were supported more or less openly only by Albania. Despite the fact that Kosovo Albanians failed, regardless of immense lobbying, to incorporate their agenda into the Dayton Agreement, it was the radicalization of the secessionist movement and the repressive response of the Serbian regime that put the Kosovo question on the international agenda. Only after years of direct involvement of the international community and protracted support of some of the most powerful countries in the world did Kosovo officially proclaim independence and is still, several years after that proclamation, fighting to be recognized by the majority of the UN members states.

The final part of the study deals with the Kosovo conflict in the following way. Firstly, Kosovo's history is shortly outlined in order to trace the process of mobilization of ethnic nationalism and secessionist aspirations. Further on, different phases of the conflict are in this manner presented, its dynamics and the changing of the conflict over time – from peaceful to violent, from the claims that the group is subject to discrimination and repression to claims to self-determination. It is shown that the coming in power of a political group which wants nothing less than independence and engages in a struggle which is seen as a zero-sum game led to violence. The response of the central government and the escalation of the violence, as an attempt of resolution of the secessionist problem, eventually led to the internationalization of the conflict. International involvement, including the NATO intervention and the activity of the interim administration after the 1999 war, is also analyzed. After the examination of Kosovo's unilateral declaration of independence and its effects, the most important questions for this study are explored. They include the issues of remedial secession (is Kosovo an example of remedial secession), uniqueness of Kosovo's situation (its precedential potential), and the ICJ's Advisory Opinion on Kosovo. A proposal for the solution of the Kosovo problem is presented next, and in conclusion

⁴³⁶ Horowitz, Donald (2000): *Ethnic Groups in Conflict*, p. 230

the main consequences of the Kosovo episode, including its influence on the situation in South Ossetia and Abkhazia, are investigated from the international relations perspective.

2 *History*

It is interesting to note that until 1946, Kosovo did not exist as a separate legal entity. History of this region was by far more turbulent than peaceful, and there has practically always been a dual interpretation of events – one provided by the Serbs, and the other by the Albanians. The Slavs came down from central Europe to Balkan during the 5th and the 6th century, gradually expanding towards the south as the Roman Empire retreated. The Albanians first appear in historical records in the 11th century, and they are mentioned in an Italian document from the 13th century, as ruling the area that is today's northern Albania.⁴³⁷ The Albanians claim that they are the descendants of the Illyrians, and consequently the original inhabitants of Kosovo. The Slavic origin of the name Kosovo contradicts the Albanian argument that they had lived there before the Serbs, and historians believe that Serbs were the majority in Kosovo until the Ottoman conquest, after which the demography of Kosovo began slowly to change.⁴³⁸ Kosovo was held by Bulgarian tsars from the mid-9th century until the Byzantine reconquest in the 11th century, but by the end of the 12th century it was conquered by the Serbs under King Nemanja. He abdicated the throne in 1196 to become a monk on Mount Athos and his son Stefan was crowned King of Serbia by a papal legate in 1217. Serbian Kingdom controlled Kosovo until the late 14th century when the Ottoman Empire army defeated the Serbs in the Battle of Kosovo,⁴³⁹ which is an important event in Serbian history, as it reflects a significant part of their collective identity. Kosovo is considered to be the 'cradle' of Serb nationhood. In the early 13th century, it became the cultural and religious center of the Serbian kingdom, and the patriarchal throne of the Orthodox Church was permanently established at the Pec monastery in 1346. This was under the

⁴³⁷ Malcolm, Noel (1998): *Kosovo: A Short History*, New York University Press, New York, p. 28

⁴³⁸ Judah, Tim (2008): *Kosovo: What Everyone Needs to Know*, Oxford University Press, New York, p. 31-32; the name 'Kosovo' comes from the Serbian word 'Kos', which means blackbird.

⁴³⁹ The Battle of 1389 is one of the most important dates in Serbian history. Serbian armies lost that day (but losses were heavy on both sides), and their decline began, but this event is central in the narratives about Serbian identity. On that day, a coalition army, including Albanian princes, under the leadership of prince Lazar lost to Ottoman forces under Sultan Murat I. Lazar's decision to fight the Ottomans rather than submit to vassalage was revered as a choice between a 'worldly kingdom' of power without honor and a 'heavenly kingdom' at the cost of death. The narrative of the battle was heavily used by the Serbian nationalist movement in the 19th century and later.

rule of Stefan Dusan, crowned as Emperor of the Serbs, Greeks, Bulgarians and Albanians, whose empire stretched from the Danube to the Gulf of Corinth. His forces were even threatening Constantinople, but he died in 1355 and the empire began to dissolve. Although the Serbian state survived until 1455 by accepting Ottoman vassalage, the battle of Kosovo was a symbol of its disintegration. In 1455 another Ottoman army came and the Serbian territories were one by one brought under direct Ottoman rule by 1459.

During the Ottoman rule many Serbs left Kosovo, especially during the major exodus called ‘the Great Migration’ in 1690, in the wake of the failed attempt by Austria to conquer the territories inhabited by Serbs.⁴⁴⁰ Similar events occurred after the Austro-Turkish war of 1788-1791, when another great exodus of Serbs took place because of the great pressure to convert to Islam. In 1804 the Serb revolt against the Ottoman government began, and some Serbs from Kosovo took part, but the pashas of Kosovo and northern Albania fought against the Serb forces. Although the Ottomans prevailed, a renewal of revolt convinced the Sultan to give extensive powers of self-administration to Serbia, whose autonomy gradually increased until its full independence was won by war in 1878 and confirmed at the Congress of Berlin (however, Macedonia and Kosovo remained in the Ottoman Empire). At that point the first reliable census figures for the whole population of Kosovo were published in an Austrian study during the 1890s, which shows that the Serbs were a minority in Kosovo even back then.⁴⁴¹ The exodus of 1690 was most probably the starting point of the change of demographic structure of Kosovo in favor of Albanians.

⁴⁴⁰ The early stage of the Ottoman government was not hard on the peoples of Balkan – social and administrative system was mainly preserved, the orthodox churches survived (even the Patriarchate of Pec was re-established in 1557) and islamicization only increased from the 16th century, but the Christians were second-class citizens. The beginning of the 17th century was marked by growing numbers of Muslims in Kosovo, partially due to increased immigration from northern Albania. Additionally, of all the Balkan peoples under Ottoman rule, Albanians converted to Islam in greatest numbers, which gave them the same status as Turks, so they supplied many of the empire’s top officials, including grand viziers. However, the situation worsened for the Christians – besides paying higher taxes (often including surrendering their oldest son to be converted to Islam and enrolled in the sultan’s service), they were at an extreme disadvantage in legal disputes with Muslims, could not carry arms and were subjected to various indignities such as having to dismount while passing a Muslim. Not only did the tax burdens on the Christians increase disproportionately, but many of them had to leave Kosovo after revolting against the Ottomans in 1689-1690. During the Ottoman-Habsburg war (1683-1699), in 1689 Austrian army invaded Kosovo, but at the beginning of 1690 the Austrians withdrew, and Ottoman and Tatar army devastated Kosovo on their return. Around forty thousand Serbian families, including the Patriarch of Pec Arsenije III Carnojevic, went as refugees with the Austrians to Hungary. Terrible reprisals were carried out in Kosovo by the Ottoman forces, and they were followed by another wave of islamicization and new taxes on Christians were imposed. During the following century there was a steady flow of Albanians into Kosovo, and most of them, as well as the remaining Slav population, converted to Islam because of the social privileges.

⁴⁴¹ Malcolm, Noel, *ibid.*, p. 194

The geographic entities that are now Albania and Kosovo comprised the Turkish provinces of Shkodra, Ioannina, Kosovo and Monastir but, as such, neither was ever a separate political entity and had been under the Ottoman Empire sovereignty since 1517. Kosovo is important to the Albanians since the province played a crucial role in the period of 1878-1912 when the Albanian national movement developed. The movement started at a meeting in Prizren in 1878, taking a form of a military-defensive organization known as the 'League', which declared its loyalty to the Sultan and that it would stop any territory from being occupied by foreign troops. Eventually it accepted the autonomist programme and led to the declaration of independence of Albania in 1912. Dissatisfaction with reforms which the Young Turks initiated after the 1908 revolution was great in Kosovo, so in response, Ottoman troops instituted a reign of terror throughout Kosovo and northern Albania. The turmoil caused by the fighting in 1911 led to an estimated 150,000 people fleeing Kosovo, of whom roughly 100,000 were Serbs, just under a third of Kosovo's estimated overall Serbian population. The other Balkan states saw in the Porte's weakness their chance to take advantage of the situation and realize long-cherished territorial designs on Ottoman territory.⁴⁴² Widespread Albanian insurrection broke out in January 1912 and by September all of Kosovo, central and southern Albania were in the hands of the rebels. In the first half of 1912 the Balkan states pressed forward and formed the Balkan League with the principal goal being the expulsion of the Ottomans from Europe.

During the First Balkan War (1912-1913) large parts of Ottoman provinces, including Kosovo, were occupied by the Serbian, Greek, Bulgarian and Montenegrin forces who committed widespread atrocities against the civilians, taking revenge on them because the Albanian population sided with the Porte against Belgrade. After the war, the Great Powers reached political settlement and established an Albanian state in 1913, but many Albanians were left outside its borders. The geographic entity that today comprises Kosovo, whose population was 64,1 per cent Albanian, was assigned to the Kingdom of Serbia as a reward because it had lost one fifth of its population during World War I. Kosovo became a part of the larger Kingdom of Serbs, Croats and Slovenes in 1918. Almost half a million Albanians living in Kosovo, Montenegro, southern Serbia and Macedonia became a minority with no considerable rights in

⁴⁴² Vickers, Miranda (1998): *Between Serb and Albanian: A History of Kosovo*, Hurst & Company, London, p. 71

the new state (for example, there were no schools or publications in the Albanian language), and thousands of them emigrated between the two world wars.⁴⁴³

When Germany invaded Yugoslavia on the 6th of April 1941, the country was divided and most of Kosovo and western Macedonia were occupied by Italian forces. They were united with Albania (which was previously annexed by Italy and administrated by the Albanian Fascist Party), thus creating a unified state for all Albanians for the first time. Albanian fascist army groups such as Skanderbeg Group and Skanderbeg SS Division were created by Balli Kombetar (the main proponent of violence against Serbs and Montenegrins), and the Second League of Prizren was founded, which collaborated with the Italians and Germans after Italy's capitulation in 1943. During this period, Serbian villages were burned to the ground, many Serbs were sent to concentration camps in Pristina and Mitrovica and tens of thousands of Serbs were expelled from their homelands (realistic estimation is 50,000), while thousands of Albanians moved to Kosovo. The partisan movement unsuccessfully tried to organize resistance in Kosovo, because Albanians did not want to join a Slav-led movement and as they considered the Serbs, not Germans or Italians, as their real enemy.⁴⁴⁴ When Kosovo was liberated from Germans, Kosovo Albanians reacted with general insurrection against partisans. The Yugoslav government reacted by declaring martial law in February 1945 and military directorate took over the administration and pacification of Kosovo. The resistance to the Communists continued for almost a decade in some parts of Kosovo.⁴⁴⁵ The partisan forces' actions against suspected collaborators degenerated into general persecution of Albanians.⁴⁴⁶ When the Yugoslav partisans under Tito decided to rebuild Yugoslavia as a socialist federation, the Assembly of National Representatives of Kosovo in Prizren in July 1945 decided to transform Kosovo into a constituent of federal Serbia.⁴⁴⁷ However, it should be stated that the Albanians were a minority in this Assembly and the

⁴⁴³ According to official Yugoslav sources 19,279 ethnic Albanians emigrated to Turkey and 4,322 to Albania between 1927-1939, but only because the 1938 agreement between Yugoslavia and Turkey, according to which 200,000 Albanians were supposed to emigrate from Kosovo and Macedonia to Turkey, was never implemented. Malcolm, Noel (2006): *Is the Complaint about the Serb State's Deportation Policy of Albanians Between the Two World Wars Based on Myth?*, in Di Lellio, Anna (ed.): *The Case for Kosova: Passage to Independence*, Anthem Press, London, p. 61

⁴⁴⁴ Judah, Tim, *ibid.*, p. 48

⁴⁴⁵ Malcolm, Noel (1998): *Kosovo: A Short History*, p. 311-312

⁴⁴⁶ King and Mason (2006): *Peace at Any Price: How the World Failed Kosovo*, Cornell University Press, Ithaca, p.

32

⁴⁴⁷ Calic, Marie-Janine, *ibid.*, p. 20-21

decision was made without a vote. The new Yugoslavia wanted to win over the Albanians to the communist cause, so they prohibited 50-60,000 Serbs and Montenegrins who had fled Kosovo during the war to return, while border was open to new immigrants from Albania until Tito's split with Stalin in 1948.⁴⁴⁸

Under the 1946 Constitution of the Federal People's Republic of Yugoslavia, Kosovo became an Autonomous Region within the People's Republic of Serbia. The Albanians were free to use their language in education and official life, and Albanian schools re-opened, but restrictions were imposed on Islam.⁴⁴⁹ The 1953 Constitutional Law of the Federal People's Republic of Yugoslavia confirmed in Article 113 that the "self-governance of the autonomous province of Vojvodina and of the autonomous region of Kosovo-Metohija is guaranteed."⁴⁵⁰ The 1963 Constitution of the Socialist Federal Republic of Yugoslavia transformed Kosovo into a province, but it remained an integral part of the Republic of Serbia.⁴⁵¹ It introduced the term 'nationality' to replace the previously used term 'national minority'. In 1966 the infamous vice president of Yugoslavia Slobodan Rankovic, who had been directly responsible for the security police (UDB) and a proponent of Serbian centralism, was replaced and condemned for discriminatory and illegal practices contrary to the Yugoslav constitution, especially in relation to Kosovo Albanians. The purge of the state security service was confirmed at the Brioni Plenum in 1966, where a decision was made to further promote the principle of decentralization. The removal of Rankovic was celebrated both in Kosovo and Vojvodina, and by removing the police pressure the government was encouraging Kosovo Albanians to become more conscious of their national rights and culture, and Albanian nationalism was soon revived.

⁴⁴⁸ Vickers, Miranda, *ibid.*, p. 144-145

⁴⁴⁹ Over 73 per cent of Albanians in Yugoslavia were illiterate, so the new government not only opened schools for Albanian children – 157 between 1945 and 1950 – but provided courses for illiterate adults. Scholarships were awarded to encourage Albanians to register at high schools. At the same time, a campaign was waged against 'backwardness', to give Albanian woman equal rights and enable her to go to school, and to encourage her not to cover her face and eyes with veils. Numerous cultural and educational societies, theaters and reading rooms were set up for Kosovo Albanian population in order to develop their national culture. *Ibid.*, p. 152-153

⁴⁵⁰ Constitutional Law on the Basis of Social and Political Organization of the Federative People's Republic of Yugoslavia and Federal Bodies of Power, the 13th of January 1953, Official Gazette of the FPRY No. 3/1953, Article 113

⁴⁵¹ Constitution of the Socialist Federal Republic of Yugoslavia, the 7th of April 1963, Official Gazette of the SFRY No. 14/1963

The demand of Kosovo Albanians to become a federal republic was first put into words by the Kosovo Albanian demonstrators in November 1968 in Pristina. After that the slogan 'Kosovo Republic' was echoed at all subsequent demonstrations until the break-up of Yugoslavia. As Miranda Vickers concludes "instead of being satisfied with the considerable increase in equality and personal security which they had enjoyed since the taming of the Province's Serb dominated UDB-a after July 1966, the politicized strata of the rapidly-growing Albanian minority, now nearly 1 million strong, were demanding more of the same and the transformation of their region into the seventh Yugoslav republic in which the Albanians, as the local majority, would be politically dominant. The demonstrations in Kosovo and their echoes in western Macedonia witnessed the return of the national question to centre-stage among Yugoslavia's problems."⁴⁵² The official reaction to violent demonstrations was pacifying – amendments to the constitution were issued, giving greater autonomy to Kosovo, an independent University of Pristina was created, the Albanian and Serbo-Croat languages were accorded equal status, the name of the province was changed from Kosovo and Metohija to Kosovo and Kosovo Albanians were permitted to fly the Albanian flag as their own national emblem. Kosovo Albanians were heavily represented on managerial boards of state enterprises, in the civil service and government. The 1974 Constitution of the Socialist Federal Republic of Yugoslavia gave Kosovo a very high degree of autonomy and extensive powers of self-government, and during the period it remained in force, until the break-up of Yugoslavia, the Albanian authorities possessed de facto federal status which they used to start a policy of Albanization, that was harshly criticized by the local Serb population.⁴⁵³ The Albanization of public life in Kosovo was caused by positive discrimination in favor of Kosovo Albanians prescribed by the new constitution – bilingualism became a condition for employment in public services, four-fifths of available posts were reserved for Albanians on a parity basis, and national quotas were strictly applied when nominations were made for public functions.

According to the 1974 Yugoslav Constitution, Kosovo possessed strong elements of statehood. Powers of the Federation were considerably reduced, and while Kosovo and Vojvodina remained autonomous provinces and a part of Serbia, they had a status equivalent in most ways to that of

⁴⁵² Vickers, Miranda, *ibid.*, p. 169

⁴⁵³ Calic, Marie-Janine, *ibid.*, p. 21

the six republics, as both nations and nationalities were declared 'free and equal'. The Autonomous Province of Kosovo was vested with the right to its own constitution, legislative power, presidency, constitutional and supreme court. Like the republics, Kosovo was responsible for implementing, enforcing and amending the Yugoslav constitution, as well as the ratification of international agreements and the formulation of Yugoslav foreign policy. Besides the direct representation on the federal bodies and the right to have its own constitution, parliament and judiciary, Kosovo had the right to establish its own banking policy, within the common currency issue policy.⁴⁵⁴ One can certainly characterize the then constitutional status of Kosovo as largely equal to that of republics, especially because of representation in all the central organs of Yugoslavia, but de jure status of republics and provinces was in certain fundamental aspects different. This constitution was among the rare ones that endowed all nations of the federation with the right to self-determination which expressly included the right of secession. Since federal republics represented the political form of the constituent nations, this provision of the 1974 Constitution was often used in debates during and after the dissolution of the SFRY. The 1974 Constitution provided that "the nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people – the Socialist Federal Republic of Yugoslavia..."⁴⁵⁵ It is clear that according to the Constitution, the Kosovo Albanians form a nationality, not a nation entitled to self-determination including a right to secession.

After the death of Josip Broz Tito in 1980, political tensions between Serbia and Kosovo increased, since Serbia wanted to revise the 1974 Constitution and regain previous powers over its autonomous provinces. Additionally, economic situation in Kosovo was grave – the unemployment rate was the highest in all Yugoslavia (27 per cent, compared to 2 per cent in Slovenia), while the per capita income had declined from 48 per cent of the Yugoslav average in

⁴⁵⁴ Constitution of the Socialist Federal Republic of Yugoslavia, the 21st of February 1974, Official Gazette of the SFRY No. 9/1974, Art. 1, 2, 244, 260, 271, 276-279, 291, 292, 398-403, 369, 370, 375-381

⁴⁵⁵ Constitution of the Socialist Federal Republic of Yugoslavia, 1974, Basic Principles, Section I

1954 to 33 per cent by 1975, and 27 per cent by 1980.⁴⁵⁶ From 1961 to 1981 the demography of Kosovo changed dramatically - the proportion of Kosovo Albanians virtually doubled while the Serbs and Montenegrins decreased from a quarter of population to one-sixth.⁴⁵⁷ So, while the per capita income in Kosovo was several times lower than the country's average, the natural increase of its population was several times higher, and many Yugoslavs resented having to subsidize the huge Albanian birthrate.

While the Serbs believed that they were discriminated against because more and more Kosovo Albanians entered the public offices, this period of power and freedom encouraged the political leaders of Kosovo Albanians to make further demands. In the 1980s it became clear that the 1974 compromise for Kosovo is not functioning, and that the situation was beginning to deteriorate once again. In 1981 mass demonstrations by Kosovo Albanians led to a declaration of a state of emergency, as the Serb citizens of Kosovo were beaten, their homes and businesses burned, and their shops looted. The state of emergency was followed by a change in Kosovo's government – a pro-Yugoslav regime was established. This was the first time that federal authorities used open and brutal force in Kosovo, which they justified as a legitimate defense of constitutional order against 'counter-revolutionary' events. It is not completely clear why these mass demonstrations started – they developed from a student protest related to conditions in student's cantina at the Pristina University, and soon the workers joined in and the slogans 'Kosovo Republic' and 'Unification with Albania' were shouted once again. After that, the number of Kosovo Albanians convicted on political charges in Yugoslavia started to grow, and many were sentenced to serve several years in prison only for writing 'hostile slogans' such as Kosovo-Republic. However, hostile activities such as defacing government buildings and desecrating communist monuments and Serbian cemeteries were occurring often in the years

⁴⁵⁶ Rusinow, Dennison (1988): *Yugoslavia: A Fractured Federalism*, Wilson Centre Press, Washington, D.C., p. 70

⁴⁵⁷ Vickers, Miranda, *ibid.*, p. 170; the 1971 census established that 73,6 per cent of Kosovo's population were now Albanian, and whereas the natural rate of population increase per 1,000 inhabitants in Yugoslavia as a whole was 9,6 that in Kosovo was 29,6. The high birth rate was a consequence of a patriarchal family structure and of a way of life still governed by outdated traditional customs. In the early 1980s a Kosovo Albanian scholar described the patriarchal family system: "the position of a woman is that of a human being deprived of fundamental rights. Women were still kept secluded at home when they did not work in the fields, they received minimal education, and were totally subordinate to male authority. The emancipation of women is the first and foremost task for the Kosovars as a people in order to achieve full emancipation. A community denying half of its members access to a full education can never be a civilized community." Accordingly, Kosovo had the highest illiteracy rate in Yugoslavia for persons over ten years of age – 31,5 per cent, as against 1,2 per cent in Slovenia in 1979. *Ibid.*, p. 186-187

after the 1981 riots, and the Serbs were once again emigrating from the province. And while the events of 1966-68 that raised mass self-confidence among Albanians also brought about increased Serb emigration from Kosovo, after 1981 “emigration had taken the form of flight – reportedly encouraged by letters, threats, burnings, beatings, murders and Serbian monasteries and monuments in Kosovo being vandalized.”⁴⁵⁸ In that period anti-Albanian propaganda in Serbian newspapers started to spread and to feed the growing uncertainties among the Serb population.

The hostility caused by increasing emigration of Serbs from Kosovo was further fuelled by the Memorandum of the Serbian Academy of Arts and Sciences of 1986, in which three demands were put forth: (a) annulment of all ‘confederal’ elements in the federal constitution, (b) annulment of the constitutional position of Kosovo and Vojvodina, and (c) strengthening of the central government’s powers.⁴⁵⁹ According to the Memorandum, ‘the physical, political, juridical and cultural genocide’ of the Serbian population in Kosovo represents a worse historical defeat than any experienced in the liberation wars waged by Serbia from the First Serbian Uprising in 1804 to the uprising in 1941. It further states that unless things change radically, in less than ten years’ time there will no longer be any Serbs left in Kosovo, and ‘ethnically pure’ Kosovo, that unambiguously stated goal of the Greater Albanian racists, will be achieved. The general conclusion was that the ‘integrity of the Serbian people’ must be the overriding concern of future policy. The Serbian Academy of Arts and Sciences, the Serbian Orthodox Church and the Association of Serbian Writers began to exploit the Kosovo myth for national homogenization, developing an image of Serbs as martyrs, victims of Albanian genocide. The main allegations were that Kosovo Albanians had greater minority rights than any other national minority in Europe, and they still sought to create the Greater Albania and take ‘Serbia’s sacred land’ with them. They were creating an ‘ethnically pure Kosovo’ using discrimination and even the high birth rate (which is a deliberate strategy to outnumber the Serbs in Kosovo). The anti-Albanian atmosphere was further invigorated by accusations occurring almost on a daily basis of widespread rape of Serbian women by Albanian men. Such allegations shaped the opinion that these crimes were perpetrated as a deliberate act and as part of a larger genocidal strategy of

⁴⁵⁸ *Ibid.*, p. 212

⁴⁵⁹ Magas, Branka (1993): *The Destruction of Yugoslavia, Tracking the Break-Up 1980-1992*, Verso, London, p. 42-43

Kosovo Albanians. Contrary to these claims, statistics show that the rate of inter-ethnic rape was significantly lower than the rate of rape within ethnic groups, and that the frequency of this crime was lower in Kosovo than in other parts of Yugoslavia.⁴⁶⁰ Serbian publicists wrote in the early 1980s that 200,000 or more Serbs left Kosovo because of oppression, discrimination and violence, but official censuses show that it could not have been more than 50,000.⁴⁶¹ Probably more people left because of the poor economic situation in Kosovo, but some did migrate to Serbia because of the deterioration of conditions for the Slavs in Kosovo. An additional reason for the steady rise of the proportion of Kosovo Albanians in the population of Kosovo from the 1960s (28 per cent Serbs and 68 per cent Albanians) to the 1990s (11 per cent Serbs) was the fact that Kosovo Albanians have the highest birth rate in the present-day Europe, while there has been a steep decline in the Serbs' birth rate due to urbanization.⁴⁶² However, even during this period Kosovo Albanians and the Serbs continued to coexist, and the province maintained a high degree of political autonomy, although economy continued to worsen. It can be said that between the 1970s and the rise of Slobodan Milosevic in the late 1980s Kosovo Albanians had a better situation in terms of representation and cultural autonomy "than they had known at any time since the end of the Ottoman Empire and arguably in their entire history."⁴⁶³

Meanwhile, the independence movement in Kosovo developed, and in Serbia Slobodan Milosevic, a communist party apparatchik, rose to power by using nationalistic rhetoric and exploiting the hysteria in Serbia. He has convinced the public that the Kosovo Serbs are victims of genocide and that Kosovo Albanians attempt to drive the Serbs out of the province. He

⁴⁶⁰ Anastasijevic, Duska (2000): *The Closing of the Kosovo Cycle: Victimization Versus Responsibility*, in Schnabel and Thakur (eds.): *Kosovo and the Challenge of Humanitarian Intervention*, p. 50-51

⁴⁶¹ According to the official censuses which recorded the number of Serbs and Montenegrins in Kosovo, a pattern of demographic decline was clearly present, but not on the scale alleged by Serbian publicists: 264,604 (1961) and 215,346 (1991). Malcolm, Noel, *ibid.*, p. 329

⁴⁶² *Ibid.*, p. 329-332; he lists another reason for this growing disproportion between the Serb and Kosovo Albanian population – a high rate of abortion among Serbian women, while Albanian women were hostile to abortion on religious grounds, and adds, rather appallingly, that "on this point at least, it could be said that they had only themselves to blame." *Ibid.*, p. 333

⁴⁶³ "In defense of their actions, Albanians claimed that they felt subordinated and as a result had to act defensively. But this had not been the case since 1974, and therefore they had to assume a certain responsibility for their actions. Albanians from Kosovo tended to blame others for their plight, seeing themselves always as exploited and as victims of circumstances beyond their control. This had certainly been true in the inter-war years but had largely ceased to be so after the fall of Rankovic. Since the 1974 Constitution the Kosovo Albanians were not repressed culturally. Kosovo was in effect an Albanian polity with the Albanian language in official use, Albanian television, radio and press, and with an ethnic Albanian government leadership. Even the courts, which were used to persecute those calling for a republic for Kosovo, were staffed by ethnic Albanian judges." Vickers, Miranda, *ibid.*, p. 217

irreversibly extinguished the communist ideology of ‘brotherhood and unity’, announcing the eventual death of project ‘Yugoslavia’. He managed to subdue opposition, remove from position of Party Chairman his mentor Ivan Stambolic and takeover the Serbian Communist party machinery by the end of 1987. He organized mass rallies (the so-called ‘Meetings of Truth’), based mainly on the issue of Kosovo, and replaced the provincial Party leaders in Kosovo with more compliant persons. By deposing the leaderships in Montenegro and Vojvodina as well, he managed to secure four votes in the federal decision-making organs. Finally, in 1989 changes to the Constitution of the Republic of Serbia and subsequently the new constitution of Serbia⁴⁶⁴ suspended Kosovo’s status as an autonomous province. Kosovo was suddenly transformed from a self-governing entity into one completely subordinate to Belgrade, and Kosovo Albanians became excluded from the decision-making process. This was followed by strikes and series of protests, until troops were sent to Kosovo and a state of emergency was declared.

New waves of demonstrations followed, violent clashes with the police took place in January 1990, and the demonstrators demanded the ending of the state of emergency and the resignation of current Kosovo leadership. In some parts of Kosovo the homes of local Serbs were attacked, and this provided the excuse for authorities to send over 15,000 police and army personnel to the province. The Serbian assembly decreed new measures which permitted Serbian officials to administer the affairs of Kosovo directly, and included the suppression of the Albanian language newspapers, the closing of the Kosovo Academy of Arts and Sciences, dismissal of thousands of state employees, among others.⁴⁶⁵ Responding to this act, the Albanian members of the Kosovo

⁴⁶⁴ The new constitution was adopted on the 28th of September 1990, and according to it Serbia became a ‘democratic state of the Serbian people’, merely noting the rights of other ‘nations and national minorities’. That meant that Kosovo Albanians no longer constituted a nationality – they were reduced to being a national minority. Constitution of the Socialist Republic of Serbia, the 28th of September 1990, Official Gazette of the Republic of Serbia No. 1/1990, Article 1; when a new federal Yugoslavia was established, composed only of Serbia and Montenegro, it adopted a new constitution in 1992 according to which the status of Kosovo is degraded to ‘territorial autonomy’. Constitution of the Federal Republic of Yugoslavia, the 27th of April 1992, Official Gazette of the FRY No. 1/1992, Article 6

⁴⁶⁵ “Programme for the Realization of Peace, Freedom, Equality and Prosperity in Kosovo” and “Yugoslav Programme of Measures to be Taken in Kosovo” included measures to improve the position of the Serbs, such as creating new municipalities for them, building new houses for the Serbs who returned to Kosovo, and annulling retrospectively sales of property to Albanians by departing Serbs. In addition, temporary measures based on the “Law on the Activities of Organs of the Republic in Exceptional Circumstances” included the aforementioned dismissals of state employees, the closing of the Kosovo Academy and the suppression of the Albanian-language newspapers. National Assembly of Serbia, Programme for the Realization of Peace, Freedom, Equality and Prosperity in Kosovo, the 30th of March 1990, Official Gazette of the Republic of Serbia No. 5/1990; National

Assembly have declared on the 2nd of July 1990 that Kosovo is an independent and equal constituent unit within the framework of the Federation of Yugoslavia, and that Kosovo would continue to comply with the Yugoslav federal constitution but not with the changes brought about unilaterally by Serbia.⁴⁶⁶ The Serbian authorities dissolved both the assembly and the government of Kosovo on the 5th of July.

The Kosovo Albanian deputies of the dissolved assembly met at Kacanik and adopted the Constitution of the Republic of Kosovo on the 7th of September 1990. The constitution, ‘on the basis of the right to self-determination to the point of secession’, defined Kosovo as a democratic, sovereign and independent state of the Albanian people and members of other nations and national minorities.⁴⁶⁷ A formal declaration of independence followed a year later, on the 22nd of September 1991, after the declarations of independence of Slovenia and Croatia. After the declaration, Kosovo Albanians organized a semi-clandestine referendum in which, according to its organizers, 87 per cent of voters took part and 99 per cent voted for the independence of Kosovo, so the parallel Assembly of Kosovo declared the Republic of Kosovo which was recognized only by Albania in October. In the following period a parallel political system of the Republic of Kosovo was developed – in October 1991 a Kosovo Albanian shadow government was established, and in 1992 Dr. Ibrahim Rugova, the leader of the Democratic League of Kosovo (LDK) was elected as the president (being the only candidate).

When the European Community invited the Yugoslav republics to state whether they wished to opt for independent statehood by the 23rd of December 1991, Kosovo formally applied for recognition in a letter to Lord Carrington on the 22nd of December. However, this request was not even considered by the Badinter Commission. Milosevic’s party confirmed its dominance on the political scene in the rump Yugoslav elections in 1992 and it can be assumed that, if Kosovo Albanians had participated in the elections, the results would have been different: “the million Albanian votes could undoubtedly have ousted Milosevic, but as the Kosovar leadership

Assembly of Serbia, Law on the Activities of Organs of the Republic in Exceptional Circumstances, the 26th of June 1990, Official Gazette of the Republic of Serbia No. 30/1990

⁴⁶⁶ Constitutional Declaration, the 2nd of July 1990, in Weller, Marc (1999): *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing, Cambridge, p. 64

⁴⁶⁷ Constitution of the Republic of Kosovo, the 7th of September 1990, Preamble and Articles 1-2, in Weller, Marc, *ibid.*, p. 66

admitted at the time, they did not want him to go. Unless Serbia continued to be labeled as profoundly evil – and they themselves, by virtue of being anti-Serb, as the good guys – they were unlikely to achieve their goals. It would have been a disaster for them if a peacemonger like Panic had restored human rights, since this would have left them with nothing but a bare political agenda to change borders.”⁴⁶⁸ Instead the LDK decided to dismiss those Kosovo Albanians who advocated participation in the elections as traitors. However, the approach Rugova chose seemed to show results when the Conference for Security and Cooperation in Europe deployed the Missions of Long Duration in Kosovo, Sandzak and Vojvodina. Even though the mission, which started in September 1992, did little to help the situation on the field, it provided some reassurance to local population in Kosovo.⁴⁶⁹ Milosevic decided to terminate the mission in the summer of 1993 in response to the decision to suspend the rump Yugoslavia from participation in the work of the CSCE, and his decision was criticized by the Security Council which adopted a resolution calling Yugoslavia to readmit the CSCE mission (which was the only action of the Security Council related to Kosovo until 1998).⁴⁷⁰

In that period, serious human rights violations against Kosovo Albanians were committed, and the Kosovo society was almost completely segregated. However, Kosovo managed to maintain its relative peace. As stated by the Special Rapporteur for Yugoslavia, established in a special session of the UN High Commission for Human Rights in August 1992, Kosovo Albanians were subjected to a systematic denial of their basic human rights, which included discriminatory

⁴⁶⁸ Vickers, Miranda, *ibid.*, p. 268; “Kosovo Albanians could have contributed to the fall of the regime which they perceived as the source of their oppression. This chance was actually wasted in the early days of Milošević’s rule, on the 1992 republican and presidential elections. Milošević was confronted with the candidacy of the then Federal Prime Minister, a pragmatic, US-based businessman, Mr. Panić, who was backed by all relevant Serbian opposition parties. On a specially convened, behind the scene meeting, one of the ministers from Panić’s government tried to persuade one of the political leaders of Kosovo Albanians, Mr. Fehmi Agani, to support the Federal Prime Minister. He received a fair and outright answer, that the real goal that Albanians were interested in – independence – could be far more easily achieved with Milošević in power. This information was provided to the author in a private conversation with the aforementioned envoy of the Federal Prime Minister.” Jovanovic, Miodrag (2011): *Is Kosovo and Metohija Indeed a “Unique Case”?*, in Summers, James (ed.): *Kosovo: A Precedent? Implications for Statehood, Self-determination and Minority Rights*, Brill, Leiden, p. 14

⁴⁶⁹ The Human Rights Rapporteur Mission pointed out that “generally speaking, there is a considerable discrepancy between legal rules and norms on the one hand and the actual implementation of such rules and norms on the other hand. Despite official declarations at various levels, human rights are frequently violated in many respects, in some places even systematically.” CSCE Mission in Kosovo, Report of the Human Rights Rapporteur Mission to Yugoslavia, the 24th of January 1992, CSCE Communication No. 41, in Weller, Marc, *ibid.*, p. 97-99

⁴⁷⁰ Security Council of the United Nations, Resolution 855 (1993) on the Refusal of the Authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to Allow the CSCE Special Missions in Kosovo, Sandzak and Vojvodina, the 9th of August 1993, S/RES/855, 48 SCOR 3262th mtg.

measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests, discriminatory dismissals from public institutions, including schools and hospitals, and banning the use of the Albanian language.⁴⁷¹ In addition, economic collapse due to the international economic sanctions imposed on Serbia and Montenegro during the war in Bosnia affected both Serbia and Kosovo, causing massive poverty and the development of the black market (it is estimated that by 1998 unemployment in the Kosovo Albanian community was higher than 70 per cent). The General Assembly adopted several resolutions in the period 1993-1998 titled “Situation of Human Rights in Kosovo” in which it strongly condemned discriminatory policies, measures and violent actions committed against ethnic Albanians in Kosovo.⁴⁷²

The elimination of cultural and political autonomy of Kosovo since 1989 was followed by massive support of Kosovo Albanians for the strategy of non-violence. This strategy was adopted

⁴⁷¹ United Nations Human Rights Committee, Office of the UN High Commissioner for Human Rights (UNHCHR), Sub-Commission on Human Rights Resolution 1993/9, adopted on the 20th of August 1993, with reference to the report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the UNHCHR “Situation of Human Rights on the Territory of the Former Yugoslavia”, UN Doc. E/CN.4/1993/50

⁴⁷² General Assembly of the United Nations, Resolution 48/153, the 20th of December 1993, A/RES/48/153; Resolution 49/204, the 23rd of December 1994, A/RES/49/204; Resolution 50/190, the 22nd of December 1995, A/RES/50/190; Resolution 51/111, the 12th of December 1996, A/RES/51/111; Resolution 52/139, the 1st of December 1997, A/RES/52/139; Resolution 53/164, the 9th of December 1998, A/RES/53/164; In a slightly different language, these resolutions state: “taking note of the reports of the Special Rapporteurs of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, in which they describe the situation in Kosovo, the various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo and the continuing deterioration of the human rights situation in Kosovo, including:

- (a) Police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice, including the recent trials of ethnic Albanian former policemen;
- (b) Discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against ethnic Albanian pupils and teachers, the closing of Albanian-language secondary schools and the university, as well as the closing of all Albanian cultural and scientific institutions;
- (c) The harassment and persecution of political parties and associations of ethnic Albanians and their leaders and activities, their maltreatment and imprisonment;
- (d) The intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language;
- (e) The dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin;
- (f) The elimination in practice of the Albanian language, particularly in public administration and services;
- (g) The serious and massive occurrence of discriminatory and repressive practices aimed at ethnic Albanians in Kosovo, as a whole, resulting in widespread involuntary migration.” Resolution 50/190, Situation of Human Rights in Kosovo, the 22nd of December 1995, A/RES/50/190, 50 UN GAOR Supp. (No. 49)

by Ibrahim Rugova and the Kosovo Albanian elite, who promoted it until 1996, when the disappointment because of the outcome of the Dayton Peace Accord prevailed, and when, on the nights of the 14th and the 15th of February a series of well-coordinated bomb attacks against Serb refugees camps in several towns throughout Kosovo announced the entry of the Kosovo Liberation Army (KLA) to the scene.⁴⁷³ This pacifist strategy was born not out of principle but rational calculation, because the Kosovo Albanian leaders were aware that without the international support they had no chance.⁴⁷⁴ Rugova's policy had several main aims – to prevent violent revolt, to create parallel state institutions of Kosovo,⁴⁷⁵ to internationalize the Kosovo problem by seeking international political involvement, and to constantly deny the legitimacy of Serbian rule by boycotting elections. Despite some promises from Western leaders that the issue of Kosovo will be considered at Dayton, there was no solution for the entire Balkan region.⁴⁷⁶ The international response was focused on praising the moderation of Rugova's politics, but no significant pressure was directed at Milosevic to change his attitude toward Kosovo.

By building up the aspirations of Kosovo Albanians over the years, Rugova's strategy led to unfulfilled ambitions, and eventually to enhanced support for more radical tactics to achieve the goals that his pacifist strategy could not produce. This disappointment was the fertile ground from which the KLA emerged and started growing, radicalizing Kosovo's population on the way. Their argument was that if the Bosnian Serbs could win their own republic within Bosnia

⁴⁷³ The KLA officially announced itself in April, in a letter to the BBC World Service Albanian-language sector, claiming responsibility for the killings of Serbs in Decani and Pec, where gunmen launched a series of attacks. The letter stated that 'a UCK guerilla detachment undertook an armed assault against Serbian aggressors' and that it was 'operating a struggle for the liberation of Kosovo that would continue until complete victory.' As quoted in Vickers, Miranda, *ibid.*, p. 292-293

⁴⁷⁴ Mehmet Kraja, a LDK cofounder, explained: "we weren't for the military option, not because we were peaceful, but because it was impossible." Rugova himself justified pacifism on these grounds in April 1992: "we are not certain how strong the Serbian military presence in the province actually is, but we do know that it is overwhelming and that we have nothing to set against the tanks and other modern weaponry in Serbian hands. We would have no chance of successfully resisting the army." As quoted in Kuperman, Alan (2008): *The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans*, International Studies Quarterly, Vol. 52, p. 68

⁴⁷⁵ Parallel state institutions were financed by large Kosovo Albanian diasporas in Western Europe and North America, and the LDK also imposed a 3 per cent tax on all Kosovo Albanians to help pay for the burgeoning services, which included setting up their own schools and medical clinics in houses and basements.

⁴⁷⁶ However, one mechanism was established for exerting international pressure on Serbia - the 'outer wall of sanctions' specified by the Dayton Accord. These sanctions excluded Yugoslavia from international organizations such as the UN and the OSCE and prevented it from getting help from the IMF, the World Bank and the European Bank for Reconstruction and Development. Apart from entering into dialogue on a peaceful resolution of Kosovo's status, the conditions stipulated by the international community included cooperation with the International Criminal Tribunal for the former Yugoslavia, as well as respect for freedom of the press.

through war, why were Albanians expected to tolerate their status in Kosovo? After Dayton many Kosovo Albanians were convinced that the international community did not understand the language of non-violence, but only of war. “Initial armed operations commenced in 1996. Some of these extended to attacks against Serbian police and paramilitary installations. Others would target ethnic Albanian ‘collaborators’ who were in contact with the Serbian administration. In other instances still, Serb civilian targets such as bars or cafes frequented by ethnic Serbs were bombed. This profile of operations led to the condemnation of the KLA, which claimed responsibility for the actions, as a terrorist organization by the US and other governments. The UN Security Council also condemned terrorist tactics.”⁴⁷⁷

Another factor which contributed to the weakening of Rugova’s position was the crisis in Albania in the spring of 1997, when the collapse of several large financial pyramid schemes was followed by the breakdown of state institutions, including the army. An insurrection broke out, aimed at the overthrow of president Sali Berisha, who was the supporter of Rugova, and what was more important, weapon stores of the Albanian army were looted all over the country. This massive amount of weaponry ended up in Kosovo, to be used by the KLA. The non-violence approach soon became marginalized, together with other alternative, civic and democratic options, and a new form of direct action developed – shootings and bomb attacks against Serbian institutions and officials. An increasing number of young Kosovo Albanians was opting for the violent solution, as the LDK’s political struggle, masked as basically impotent human rights campaign, provided little result.⁴⁷⁸

The KLA was combating Serbian military and police forces, but was also involved in intimidating and kidnaping non-Albanian civilians, as well as Kosovo Albanian moderates who continued to support Rugova’s strategy. Their funds were provided by smuggling, drug dealing,

⁴⁷⁷ Weller, Marc (2009): *Contested Statehood: Kosovo’s Struggle for Independence*, Oxford University Press, Oxford, p. 77

⁴⁷⁸ As one Kosovo Albanian activist declared “there is nothing unexpected, wondrous or surprising in the emergence of the UCK. At a time when the seven-year-old Kosovar movement can be pronounced a failure without any concrete results. At a time when the international community has been underestimating and seriously ignoring the Albanian factor, reducing it to a problem of minorities requiring solutions in ridiculous frameworks within Serbia, when Serbia’s only way of communicating with Albanians is violence and crime, one should not be amazed if part of the people decide to end this agony and take the fate of Kosovo and its people in its own hands.” Luljeta Pula-Beqiri, Bulletin for the Ministry of Information of the Republic of Kosovo, No. 321, the 7th of December 1997, as quoted in Vickers, Miranda (1998): *Between Serb and Albanian: A History of Kosovo*, p. 313

and from Albanians living abroad. The Human Rights Watch estimated that in 1998 138 people were abducted by the KLA, and according to Amnesty International “the KLA has been held responsible for a number of abductions. The dead bodies of those abducted have been found left lying in roadsides”.⁴⁷⁹ The abducted and executed persons were both Serbs and Albanians (suspected of collaborating with the Serb regime or being too ‘friendly’ with their Serbian neighbors). The international observers recorded a pattern of the Yugoslav forces using excessive force and committing extra-judicial executions and abductions. As its presence grew, the KLA was observed committing the same kinds of offences though on a smaller scale.⁴⁸⁰

During the summer of 1998 the Yugoslav forces launched a major offensive to vanquish the KLA and to recapture the Drenica Valley which was under their control, thereby causing the first large-scale flight of Kosovo Albanians from their villages to the hills. As a result of the KLA’s terrorist attacks and brutal reprisals of the Serbian military and police forces, between March and October 1998 almost 2,000 Albanians were killed, many houses, shops and schools destroyed and almost 400,000 Albanian civilians were forced to leave their homes.⁴⁸¹ Kosovo Albanian villages suspected of collaborating with the KLA were surrounded by the armed forces, including artillery and tank units, and shelled, and the “wholesale destruction visited upon the Albanian villages” was reported.⁴⁸² Michael Ignatieff recorded Richard Holbrook’s interview with a Kosovo Albanian editor conducted in order to get a journalist’s perspective on the new political leadership – the KLA. According to Ignatieff, Veton Surroi explained in December 1998 that Rugova lost all credibility because he has made too many compromises with the Serbs. “Initiative is passing to harder men, like Adem Demaci, who spent a decade in Tito’s jails for demanding Kosovar rights and who has links with the shadowy military command of the KLA. The Kosovar’s taste for compromise is vanishing fast. There is already talk that the hidden Kosovar strategy is to provoke the Serbs into massacres and reprisals which would force NATO troops to intervene. The first stage in provoking a NATO intervention would be to drive out the unarmed monitors. Armed NATO troops would replace them and impose independence, or at

⁴⁷⁹ Bellamy, Alex (2000): *Human Wrongs in Kosovo: 1974-99*, The International Journal of Human Rights, Vol. 4, p. 119

⁴⁸⁰ King and Mason, *ibid.*, p. 43

⁴⁸¹ Demjaha, Agon (2000): *The Kosovo Conflict: A Perspective from Inside*, in Schnabel and Thakur (eds.): *Kosovo and the Challenge of Humanitarian Intervention*, p. 34

⁴⁸² OSCE Report, Annex V in United Nations Secretary-General Report, the 2nd of July 1998, UN Doc. S/1998/608, in Weller, Marc (1999): *The Crisis in Kosovo 1989-1999*, p. 68

least partition, on Milosevic. Such, at any rate, is the desperate dream.”⁴⁸³ It turned out that this strategy was not only realistic but also successful. Emrush Xhemajli, a cofounder of the KLA, admitted that they had launched their attacks based on a belief that they could attract humanitarian intervention in order to achieve their goal of Kosovo’s independence: “when we took the decision to start the war in 1993...we thought it was essential to get international support to win the war. You could not stand against the world... we thought that with the international community on our side, we could win the war. But otherwise we would plan for a 10- to 15-year war, with a strategy to get the international community on our side.”⁴⁸⁴ Although Rugova and his party won the elections in March 1998, the negotiating team for the Rambouillet conference, formed under the US influence, was practically dominated by the KLA and opposition forces.

Even though Rugova refused to support the KLA, by 1998 they had managed to take over the Drenica region, and fighting erupted when Serbian security forces sought to re-establish their authority. Kosovo Albanian civilians were the main victims in the conflict, and local population was driven out of their villages. At that point the Security Council reacted, adopting an arms embargo under Chapter VII of the UN Charter. The resolution condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the KLA. The prohibitions imposed by this resolution were to be terminated when Serbian authorities begin a substantive dialogue, cease action by the security forces affecting the civilian population and allow access to Kosovo by humanitarian organizations, including the return of the OSCE long-term missions.⁴⁸⁵ None of these conditions were met - instead a massive displacement crisis was generated, driving over 200,000 Kosovo Albanians from their homes during 1998, according to the UNHCR. The UN Secretary General

⁴⁸³ Ignatieff, Michael (2000): *Virtual War: Kosovo and Beyond*, Metropolitan Books, New York, p. 27-28

⁴⁸⁴ Interview with Emrush Xhemajli by Alan Kuperman, on the 9th of August 2000, Pristina, as quoted in Kuperman, Alan, *ibid.*, p. 69; The KLA members understood perfectly well that their attacks would provoke massive retaliation against the province’s civilians, and there were reports that this was precisely their intention, to provoke Milosevic so that they could show the world that they were the victims. For example, Hashim Thaci said “we knew full well that any armed action we undertook would trigger a ruthless retaliation by Serbs against our people...we knew we were endangering civilian lives, too, a great number of lives.” Similarly, a KLA fighter told the BBC “it was guaranteed that every time we took action they would take revenge on civilians.” Jakup Krasniqi said that “the danger that Serbs would retaliate against the civilian population was well known.” *Ibid.*, p. 67-69

⁴⁸⁵ Security Council of the United Nations, Resolution 1160, the 31st March 1998, S/RES/1160, 53 SCOR 3868th mtg.

reported on a sharp escalation of military operations as a result of an offensive launched by the Serb forces in central, southern and western Kosovo,⁴⁸⁶ and in his final report before the issuing of the threat of force, he stated that “in the last few weeks, the international community has witnessed appalling atrocities in Kosovo, reminiscent of the recent past elsewhere in the Balkans. These have been borne out by reporting by the Kosovo Diplomatic Observer Mission and other reliable sources. I reiterate my utter condemnation of such wanton killing and destruction. It is clear beyond any reasonable doubt that the great majority of such acts have been committed by security forces in Kosovo acting under the authority of the Federal Republic of Yugoslavia. But Kosovar Albanian paramilitary units have engaged in armed action also, and there is good reason to believe that they too have committed atrocities.”⁴⁸⁷ Even the International Committee of the Red Cross decided to issue regular reports on its findings in Kosovo, contrary to its earlier practice not to publicly comment on developments it is involved in. In September 1998 the ICRC issued a formal statement, confirming that from a humanitarian perspective “it has become apparent that civilian casualties are not simply what has become known as ‘collateral damage’. In Kosovo, civilians have become the main victims – if not the actual targets – of the fighting.”⁴⁸⁸ The International Criminal Tribunal for the Former Yugoslavia responded to these reports of violence and forced deportations in Kosovo with indictments against the FRY leadership during NATO’s intervention.⁴⁸⁹

The Contact Group (France, Italy, Germany, Russia, the United Kingdom and the United States) attempted to establish dialogue among the parties and stabilize the situation, and NATO issued a

⁴⁸⁶ Weller, Marc, *ibid.*, p. 194

⁴⁸⁷ United Nations Secretary-General, Report of the Secretary-General Prepared pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council, the 3rd of October 1998, UN Doc. S/1998/912

⁴⁸⁸ International Committee of the Red Cross, Position on the Crisis in Kosovo, the 15th of September 1998, International Review of the Red Cross, No. 325, see also

<http://www.icrc.org/eng/resources/documents/misc/57jppq.htm>, last visited on the 7th of September 2012

⁴⁸⁹ Before the war ended, on the 24th of May 1999, Louise Arbour of the UN International Criminal Tribunal for the Former Yugoslavia formally announced the indictments against Milosevic, President of Serbia Milan Milutinovic, Federal Yugoslav Deputy Prime Minister Nikola Sainovic, Chief of the General Staff of the Yugoslav Armed Forces Dragoljub Ojdanic and Serbian Minister of the Interior Vljako Stojiljkovic. The Tribunal asserted that these individuals had planned, instigated, ordered, committed or otherwise aided a campaign of violence conducted by the forces of the FRY/Serbia in Kosovo. In the presidential election in 2000 Milosevic lost to opposition led by Vojislav Kostunica and Zoran Djindjic. He tried to resist the election result, but after a general strike erupted, on the 6th of October he conceded defeat to Kostunica. He was arrested in March 2001, and in June he was delivered to The Hague to stand trial for war crimes. He died in his jail cell in The Hague on the 11th of March 2006.

formal threat of the use of air strikes.⁴⁹⁰ It was noticed that “the Contact Group combined three elements of persuasion. Russia was perceived as a state which could ‘deliver Milosevic’ due to its general support for the position of the FRY/Serbia. The EU members would be able to dangle in front of Belgrade the prospect of closer economic integration with Europe, and direct financial incentives. The United States would come to represent the driving force behind the tougher action, including the possibility of the use of military force. All three combined could virtually guarantee that the Security Council would back their joint demands, inasmuch as four out of the five permanent members were represented in the Contact Group.”⁴⁹¹ However, the Contact Group remained largely ineffective - its only accomplishment during the crisis was setting in motion the accelerated efforts of what was to become the Hill process of negotiations.

Christopher Hill, the US ambassador to Macedonia, realized shortly after the commencement of negotiations that agreement on Kosovo’s status would be impossible, as both Serbian and Kosovo leadership did not want to abandon their positions. The first formal draft was presented to the parties on the 1st of October 1998, and it was silent on the issue of the status of Kosovo, providing instead for a complex assignment of public authority, dividing powers between individual communes, the federal level and Kosovo’s organs. In the meantime the Holbrook agreements were concluded, so a new, more detailed Hill draft emerged on the 2nd of November, enhancing the status of Kosovo as a legal entity. Serbia did not commit itself to this document but organized its own conference attended by ‘national communities’ of Kosovo (Kosovo Serb, Gorani, Egyptian, Romani and Turk) and submitted a counter-proposal, which was rejected by Kosovo. The third Hill proposal was presented on the 2nd of December and it was rejected by both sides, so the peace process seemed to have reached a dead end. However, the Hill team produced one more draft, two days before the Contact Group decided to summon the parties to Rambouillet.⁴⁹² The Rambouillet agreement was actually based on the Hill package.

⁴⁹⁰ On the 12th of August, NATO Secretary General Javier Solana indicated that the Alliance, in its efforts to support the international community in encouraging a negotiated settlement had “today reviewed military planning for a full range of options to bring an end to violence and to create the conditions for negotiations. These include the use of ground and air power and in particular a full range of options for the use of air power alone. They ensure that NATO can act swiftly and effectively should the need arise.” North Atlantic Treaty Organization, Statement by NATO Secretary-General, the 12th of August 1998, NATO Press Release 98/93, see also <http://www.nato.int/docu/pr/1998/p98-094e.htm>, last visited on the 7th of September 2012

⁴⁹¹ Weller, Marc, *ibid.*, p. 221

⁴⁹² A detailed description of the Hill process, including all relevant documents, can be found in Weller, Marc (1999): *The Crisis in Kosovo 1989-1999*, p. 347-391

The day after the Security Council adopted Resolution 1199, the North Atlantic Council decided to take NATO to an increased level of military preparedness.⁴⁹³ In order to ensure compliance with the demands made by the Security Council in Resolutions 1160 and 1199, the US decided to send Special Envoy Richard Holbrooke to Belgrade. In order to certify his success, on the 13th of October NATO issued an unprecedented ultimatum, ordering for limited air-strikes and a phased air campaign to commence after the expiry of a period of 96 hours.⁴⁹⁴ The threat was successful - the OSCE verification mission was the result of the Holbrook-Milosevic Agreement which was endorsed by the UN Security Council in Resolution 1203.⁴⁹⁵ NATO was not to carry out air strikes, and Milosevic agreed to return Serbian armed forces to February 1998 level, accept deployment of the Kosovo Verification Mission (KVM) and NATO air verification mission over Kosovo and cooperate with the ICTY. The goal of the KVM was to avert the humanitarian disaster predicted for Kosovo Albanians who had fled the violence and taken to the hills, and to create greater stability which would be propitious for a successful conclusion of the negotiation process brokered by the EU. It was clear by the end of December 1998 that the KVM, consisting of 2,000 unarmed civilian verifiers, was not able to prevent further violence.⁴⁹⁶

The KLA immediately occupied the territory from which the Serbian forces had withdrawn and continued its attacks, and Milosevic's response was to resume with indiscriminate use of force. According to the UN Secretary-General's report of the 24th of December, "Kosovo Albanian

⁴⁹³ North Atlantic Treaty Organization, Statement by NATO Secretary-General Following the ACTWARN Decision, the 24th of September 1998, available at <http://www.nato.int/docu/pr/1998/p980924e.htm>, last visited on the 7th of September 2012

⁴⁹⁴ North Atlantic Treaty Organization, Statement by NATO Secretary-General Following Decision on the ACTORD, the 13th of October 1998, available at <http://www.nato.int/docu/speech/1998/s981013a.htm>, last visited on the 7th of September 2012

⁴⁹⁵ Security Council of the United Nations, Resolution 1203, the 24th of October 1998, S/RES/1203, 53 SCOR 3937th mtg.

⁴⁹⁶ William Walker, the Chairman in Office for the mission, wrote that "KVM verified an escalating number of human rights abuses including: right to life, right to liberty, freedom from torture and ill treatment, and freedom of movement. These, combined with humanitarian law violations that occurred in Racak, Rogovo, Rakovina and other villages, affirmed that the Belgrade authorities were in almost total non-compliance with the spirit and letter of the October agreements. First evident in mid-January in the wake of KVM denunciation of crimes committed in the village of Racak and the government's reaction, by mid-March it was clear that the Belgrade authorities were no longer exercising even the pretence of cooperating with the KVM. Nor were its army and special police shy about employing grossly excessive force in their operations, most often actions clearly in violation of the Holbrook-Milosevic agreement." Walker, William (2000): *OSCE Verification Experiences in Kosovo: November 1998 - June 1999*, The International Journal of Human Rights, Vol. 4, p. 134

paramilitary units have taken advantage of the lull in the fighting to re-establish their control over many villages in Kosovo, as well as over some areas near urban centers and highways. These actions... have only served to provoke the Serbian authorities, leading to statements that if the Kosovo Verification Mission cannot control these units, the Government would.”⁴⁹⁷ In December 1998 and early January 1999 hostilities and attacks against civilians were renewed, culminating in the Racak massacre in which 45 Kosovo Albanians were killed.⁴⁹⁸ This atrocity was widely reported upon, and since the OSCE Head of Mission sharply condemned the act, he was declared *persona non grata* in Serbia. During the Rambouillet conference the FRY armed forces started to build up in Kosovo in violation of the Holbrook agreement. Finally, it was concluded that the KVM was unable to perform its mandated tasks due to the increasingly impossible security situation, and on the 19th of March it was decided to withdraw the mission. The KVM spent the next three months in Macedonian and Albanian exile, and the mission was significantly reduced. Right after the mission withdrew from Kosovo, the NATO bombing began and thousands of refugees poured across Kosovo’s borders to Macedonia and Albania. The mission ended in mid-June when Milosevic accepted the entry of NATO troops, and the summary report “Kosovo/Kosova. As seen, As told” was published by the OSCE Office for Democratic Institutions and Human Rights on the 6th of December 1999.

3 *Humanitarian intervention – NATO’s 1999 Operation Allied Force*

The Racak massacre of January 1999 was the turning point for the international community. The Contact Group has demanded that the parties assemble at Rambouillet near Paris in order to achieve a settlement within a period of maximum three weeks, backed by the threat of force by

⁴⁹⁷ United Nations Secretary-General, Report of the Secretary-General Prepared pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998), the 24th of December 1998, UN Doc. S/1998/1221

⁴⁹⁸ There are, however, reports that Milosevic ordered the counter-insurgency as a response to the KLA actions of taking advantage of the cease-fire to reoccupy territory and renew attacks against the Serbs. The confidential minutes of the North Atlantic Council cite the KLA as “the main initiator of the violence”, stating that “it has launched what appears to be a deliberate campaign of provocation.” Similarly, the German vice president of the OSCE Willy Wimmer has said that the organization observers agreed that it was the KLA, not Yugoslav forces, that had “systematically evaded” the Holbrook agreement. Likewise, General Klaus Naumann, chairman of NATO’s military committee, has said that the head of the verification mission William Walker “stated in the NAC that the majority of violations was (sic) caused by the KLA.” As quoted in Kuperman, Alan, *ibid.*, p. 66

NATO.⁴⁹⁹ The Conference was opened on the 6th of February 1999 at the Chateau Rambouillet. The Kosovo delegation⁵⁰⁰ was unwilling to sign the interim agreement, but after a few days of meetings and persuasions of the US Secretary of State Madeleine Albright and intensive diplomatic efforts (the Albanian foreign minister even came to Paris), they accepted the agreement, but decided to sign it after consultations at home. Although there were some indications that Serbia might agree on the political settlement by the end of the conference (the 23rd of February), at the follow-up Paris conference devoted to the issues of implementation which started on the 15th of March, only Kosovo signed. Serbia presented a counter-draft in order to re-open the discussion on the political settlement, and the Contact Group declared that only technical adjustments could be considered. As the process reached a dead end, the text of the agreement in its form of the 23rd of February was opened for signature on the 18th of March, and Kosovo signed it in a formal ceremony. Serbia's delegation rejected the Rambouillet plan⁵⁰¹ and NATO rejected Serbia's counter-proposal.⁵⁰² The Contact Group claimed that they had done everything possible short of the use of force to get Serbia to accept what was, according to them, a very reasonable compromise deal, since it confirmed "the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."⁵⁰³ The period between the collapse of the Rambouillet plan and the adoption of Resolution 1244 was characterized by grave human rights violations, due to which almost a million civilians were displaced. Milosevic has probably believed that NATO's unity will not be sufficient to launch airstrikes, given the hesitant positions of Greece, Italy, Germany and some other NATO

⁴⁹⁹ The North Atlantic Council issued a statement on the 30th of January 1999, requesting compliance with the Holbrook agreement, in particular a cessation of hostilities and reduction of Yugoslav armed forces, and additionally, a positive response to the demand that a political settlement be achieved within the framework established by the Contact Group. In support of these aims, the "Council has therefore agreed today that the NATO Secretary-General may authorize air strikes against targets on FRY territory". North Atlantic Treaty Organization, Statement by the North Atlantic Council on Kosovo, the 30th of January 1999, NATO Press Release 99/12, see also <http://www.nato.int/docu/pr/1999/p99-012e.htm>, last visited on the 7th of September 2012

⁵⁰⁰ The delegation included members of the KLA and was led by Hashim Thaci, not Ibrahim Rugova. Members of Rugova's moderate LDK party, which formed the Kosovo government at the time, constituted only one third of the delegation.

⁵⁰¹ Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), the 23rd of February 1999, United Nations Security Council, the 7th of June 1999, UN Doc. S/1999/648

⁵⁰² This counter-proposal was made by the Serbian National Assembly on the 23rd of March 1999, the day before NATO started bombing. In the proposal, Serbia condemned the withdrawal of the KVM, proposed wide-ranging autonomy for Kosovo within Yugoslavia and stated its willingness to examine the character and extent of an international presence in Kosovo once there was a political agreement acceptable to all parties. Chomsky, Noam (1999): *The New Military Humanism: Lessons from Kosovo*, Monroe Common Courage Press, Maine, p. 108-110

⁵⁰³ Interim Agreement for Peace and Self-Government in Kosovo, Preamble

members. However, on the 23rd of March NATO Secretary General Solana announced that he had directed General Clark to begin air operations against Yugoslavia, and on the following day NATO began the bombardment.

However, the opponents of the intervention claim that Rambouillet was an offer Serbian side could not have accepted. The agreement required Serbia to accept a NATO-led 28,000-strong Kosovo Force (KFOR) to oversee the implementation process (in addition to a sizeable OSCE element) and be allowed to use force if necessary against any parties violating the agreement.⁵⁰⁴ There was no mention of any KFOR accountability to the UN or any other international body except NATO.⁵⁰⁵ That force was to be allowed freedom of movement, access and action throughout Yugoslav territory, airspace and waters according to the Appendix B of the agreement. Although it was to be expected that NATO would not leave the borders of Kosovo, it was unusual to require from Serbia to accept such conditions. However, it is unclear why the FRY did not seek clarification or modification of this provision at the Paris follow-up conference. Within 180 days of the agreement coming into force, all regular armed forces of the FRY would have to be withdrawn from Kosovo. Furthermore, the Agreement practically allowed for Kosovo's independence three years after the entry into force: "three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."⁵⁰⁶ The will of the people meant the will of the people of Kosovo, not Serbia or Yugoslavia, to be expressed in a referendum, as the US Secretary of State Madeleine Albright assured the Kosovo delegations.⁵⁰⁷ That meant that Kosovo Albanians were in a win-win situation – either Serbia will reject the deal and NATO will intervene, or Serbia will accept the deal and after three years they will gain independence.

⁵⁰⁴ *Ibid.*, Chapter V, Article IV.2b

⁵⁰⁵ NATO participation was to be "subject to the direction and political control of the North Atlantic Council (NAC) through the NATO chain of command." *Ibid.*, Chapter VII, Article I.1b

⁵⁰⁶ *Ibid.*, Chapter VIII, Article I.3;

⁵⁰⁷ Weller, Marc (1999): *The Rambouillet Conference on Kosovo*, International Affairs, Vol. 75, p. 219

Former US Secretary of State Henry Kissinger claimed that “the Rambouillet text... was a provocation, an excuse to start bombing.”⁵⁰⁸ The point of the meeting were not negotiations - State Department spokesman James Rubin insisted that “the real point of Rambouillet was to persuade the Europeans, especially the Italians who tended to think of the Albanians as terrorists and drug traffickers, that they were actually ‘the good guys’. Rambouillet was necessary, in other words, to get the Europeans to ‘stop blaming the victims’ and to build the resolve at NATO to use force.”⁵⁰⁹ A republican foreign-policy aide reported that he had heard a senior Administration official saying that “we intentionally set the bar too high for the Serbs to comply. They need some bombing, and that’s what they are going to get.”⁵¹⁰ Since the US president Bill Clinton was at the time dealing with the impeachment proceedings for lying about his relationship with the White House intern Monika Lewinsky, it was Madeleine Albright who shaped the US policy in the case of Kosovo. The intervention was often called ‘Albright’s War’, as she considered the campaign against Milosevic as her main legacy as Secretary of State. “It seems clear that the diplomatic stance of the American Secretary of State, Madeleine Albright, was to oppose any sort of flexibility in dealing with Belgrade in the lead-up to the war and, further, to oppose seeking seriously to engage the United Nations in the process of offering protection to the people of Kosovo. This inflexibility was exhibited in several ways, including by relying exclusively on an American negotiator in discussions with Milosevic, excluding Russia and China from the effort to find a diplomatic solution based on a political compromise, and drafting conditions for the NATO role in Kosovo in such an extravagant fashion that it would assure that Belgrade would not possibly accept them.”⁵¹¹ As anticipated, Belgrade did not accept them so for the first time in its 50-year history, NATO went to war, and between the 24th of March and the 10th of June dropped or fired 26,614 bombs and rockets on Kosovo and Serbia.⁵¹²

⁵⁰⁸ Plummer, Simon Scot, *NATO’s War in Kosovo Illegal, Says Lawyer*, The Telegraph, the 13th of November 1999, available at http://www.oocities.org/cpa_blacktown_03/1999111405.htm, last visited on the 7th of September 2012

⁵⁰⁹ Ignatieff, Michael, *ibid.*, p. 56

⁵¹⁰ Ackerman, Seth, *What Reporters Knew About Kosovo Talks – But Didn’t Tell. Was Rambouillet Another Tonkin Gulf?*, FAIR Media Advisory, the 2nd of June 1999, available at <http://www.peace.ca/whatreportersknew.htm>, last visited on the 7th of September 2012

⁵¹¹ Falk, Richard (1999): *Kosovo, World Order, and the Future of International Law*, American Journal of International Law, Vol. 93, p. 854

⁵¹² According to the UK Ministry of Defense, as quoted in King and Mason (2006): *Peace at Any Price: How the World Failed Kosovo*, p. 2

The use of armed force is strictly forbidden by international law,⁵¹³ with two exceptions (the mechanism of the so-called enemy-state-clauses in Articles 53 and 107 of the UN Charter should be left aside because it is obsolete). The first one is the right to individual or collective self-defense (Article 51).⁵¹⁴ The second exception is collective measures by the Security Council decided under Chapter VII of the UN Charter.⁵¹⁵ The Security Council, after having determined that a threat to the peace, breach of the peace, or act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the member states. Otherwise, interventions to stop large-scale violations of the most basic human rights are prohibited under international law. On the other hand, the obligation of states to respect and protect the basic rights of all persons is the concern of all states, that is, it is owed *erga omnes*. Consequently, in the event of material breaches of such obligations, every other state may lawfully consider itself legally ‘injured’ and is thus entitled to resort to countermeasures against the perpetrator. Under international law in force since 1945, countermeasures must not involve threat or use of armed force.⁵¹⁶ If the Security Council determines the existence of any threat to the peace, breach of the peace or act of aggression (Article 39 of the Charter), it may call upon the state members of the UN to apply coercive measures, including the use of armed force, in order to protect international peace and security (Articles 41 and 42 of the Charter). It has to be emphasized that the Security Council has to mandate the use of force explicitly, and any wording that falls short of such explicit authorization (for example ‘the SC demands’ or ‘the SC insists on’) is an insufficient legal basis. Security Council may use a regional or other organization for enforcement action under its authority, but Article 53 of the Charter provides that no

⁵¹³ Article 2(4) of the UN Charter declares that “all members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This prohibition is part of *jus cogens*, it is a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law that also has preemptory character.

⁵¹⁴ Article 51 of the UN Charter reads: “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

⁵¹⁵ Article 42 of the UN Charter reads: “should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

⁵¹⁶ Simma, Bruno (1999): *NATO, the UN and the Use of Force: Legal Aspects*, European Journal of International Law, Vol. 10, p. 2

enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.⁵¹⁷

Clearly, none of these rights could have been invoked in favor of NATO action, especially since Yugoslavia was not a member of the regional organization.⁵¹⁸ If the Security Council's approval had been sought, Russia and China would have vetoed it. Another legal reference point is Article 103 which establishes that in the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. This means that the primary obligation that supersedes all other agreements and obligations of member states, including the obligations flowing from the NATO membership, is the ban on armed force as specified in Article 2(4). To conclude, "if the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a 'humanitarian intervention' by military means is permissible. In the absence of such authorization, military coercion employed to have the target state return to a respect for human rights constitutes a breach of Article 2(4) of the Charter... In the absence of any justification unequivocally provided by the Charter 'the use of force could not be the appropriate method to monitor or ensure...respect [for human rights]', to use the words of the International Court of Justice in its 1986 *Nicaragua* judgment."⁵¹⁹ Clearly, the ICJ has found that humanitarian intervention has not attained a legal status in customary international law, that there is no emerging customary norm rivaling Article 2(4).⁵²⁰ Then again, even if a right to

⁵¹⁷ Thomas Franck confirms this prohibition of any humanitarian intervention that involves the use of military force, but he calls its violation technical when such measures are taken in situations of civil war or against regimes engaged in egregious human rights violations. He also points out that whenever the Security Council authorized humanitarian intervention, additional factors were cited to legitimize Council action. In none of the cases did the humanitarian justification for action stand alone. The Charter prohibits the use of force by one or several states acting without prior Security Council authorization, without exception, even for instances of massive violations of human rights, because states are not to use force except in self-defense. Franck, Thomas (2002): *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, Cambridge, p. 135-138

⁵¹⁸ "The unauthorized threat or use of force against a state which is not a member of a certain international organization, and which might therefore not share this organization's 'common interests and values', appears even more indefensible than force employed within the organization's circle of members." Simma, Bruno, *ibid.*, p. 20

⁵¹⁹ *Ibid.*, p. 5

⁵²⁰ The conclusion of a British Foreign Office statement recapitulates the problem of unauthorized humanitarian interventions: "the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem to specifically incorporate such a right; secondly, State practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention,

humanitarian intervention had developed in customary international law by 1999, such a customary rule would not have been enough to override Article 2(4), since treaty rules prevail over customary rules according to the hierarchy of sources of international law. The Kosovo intervention would have been legal under current international law, only if a right to humanitarian intervention had become *jus cogens*.

Several UN resolutions concerning Kosovo were adopted in 1998, but in none of them did the Security Council authorize NATO to act on its behalf. In resolution 1160 of the 31st of March 1998, adopted under Chapter VII, the Security Council has called upon the parties to negotiate a settlement based on the territorial integrity of the FRY, expressing its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-determination (preamble). The Council, however, emphasized that “failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures” (paragraph 19).⁵²¹ In resolution 1199 of the 23rd of September 1998 the Council has identified the deteriorating situation in Kosovo as a threat to peace and security in the region and, acting under Chapter VII, demanded the taking of immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe. It expressed grave concern at the increased fighting, including excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army which had resulted in numerous civilian casualties and the displacement of over 230,000 persons from their homes. In the same resolution the Council condemned all acts of violence by any party, as well as of

and, on most assessments, none at all; and finally, on prudential grounds, the scope for abusing such a right argues strongly against its creation.” United Kingdom Foreign Office, UK Foreign Office Policy Document No. 148, *British Yearbook of International Law*, Vol. 57, 1986, p. 614; Also, Albrecht Randelzhofer states that: “some try to justify humanitarian intervention by referring ‘to the need for balancing the sometimes opposite goals of conflict-minimalisation and protection of human rights.’ That is why in ‘certain extreme situations’, it is said, forcible humanitarian intervention should be recognized as lawful. Such a weighing of interests, however, would clearly be contrary to the systematic interpretation of the Charter, which makes it clear that the individual States are to be divested of the use of force as an instrument of their international policy. Thus, there is no room for the concept of humanitarian intervention to continue to exist, in addition to the UN Charter, as a rule of customary international law. Finally, there is no evidence at all of State practice or *opinio iuris* that would have led to an amendment of the UN Charter, by means of customary international law, in the sense of recognizing humanitarian intervention as an exception to the prohibition laid down under Article 2 (4). Nor could the *Nicaragua* Judgment of the ICJ possibly be read as endorsing such an exception. Under the UN Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful.” Randelzhofer, Albrecht (2002): *Article 2(4)*, in Simma, Bruno (ed.): *The Charter of the United Nations: A Commentary*, p. 130-131

⁵²¹ This resolution imposed an arms embargo on the Federal Republic of Yugoslavia; Security Council of the United Nations, Resolution 1160, S/RES/1160

terrorism (referring to the activities of the KLA) and all external support for terrorist activity in Kosovo (preamble). The Council decided “should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region” (paragraph 16).⁵²² In Resolution 1203 of the 24th of October the Council again called for granting Kosovo a substantially greater degree of autonomy and meaningful self-administration, reaffirmed the commitment of all member states to the sovereignty and territorial integrity of the FRY and welcomed the agreement providing for the OSCE to establish a verification mission in Kosovo (preamble).⁵²³ Although the Security Council has found that the situation in Kosovo constitutes a threat to the international peace and security, and although its demands require unconditional compliance, these facts do not amount to a legal authorization for third states to implement these demands through the threat or use of force. None of these resolutions granted legal mandate whatsoever for the use of force against the FRY.⁵²⁴

When NATO bombing started, the Russian ambassador demanded the convening of the Security Council. Franck notices that on that occasion, the debate demonstrated that there were essentially three camps. The first camp consisted primarily of NATO states, which have argued that NATO’s action is justified and necessary to stop the violence, since all diplomatic means have been exhausted. However, they were reluctant to use the traditional legal fictions such as self-defense or countermeasures. Rather, the emphasis was on the particular facts and the extreme necessity for acting to prevent something far worse than a use of force in technical violation of Article 2 (4). The second camp consisted of countries who considered NATO to be in flagrant violation of the UN Charter, such as Russia, China, India and Namibia. They have maintained that the unilateral use of force will lead to a situation with truly devastating humanitarian

⁵²² Security Council of the United Nations, Resolution 1199, the 23rd September 1998, S/RES/1199, 53 SCOR 3930th mtg.

⁵²³ This resolution endorsed the Holbrook-Milosevic Agreement; Security Council of the United Nations, Resolution 1203, S/RES/1203

⁵²⁴ Ian Brownlie reached a similar conclusion: “it is clear that the action which was launched on 24 March 1999 was not authorized expressly by any SC Resolution...Resolution 1160 (1998) emphasizes the need for a peaceful solution of the crisis in Kosovo...There is no language justifying the use of force. Resolution 1199 (1998) similarly contains no language referring to the use of force. Resolution 1203 (1998) repeats the substance of Resolution 1160 and 1199... Consequently, the bombing of Yugoslavia did not fall within any of the generally recognized exceptions to the principle prohibiting the threat or use of force stipulated in Article 2, paragraph 4, of the United Nations Charter.” Brownlie and Apperley (2000): *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, International and Comparative Law Quarterly, Vol. 49, p. 895

consequences and create a dangerous precedent that will lead to global destabilization. They have also added that Kosovo is an internal matter of the FRY. Russia, India and Belarus drafted a resolution condemning the NATO intervention as a breach of the UN Charter Articles 2(4), 24, and 53. This caused a serious debate over the legitimate use of force.⁵²⁵ The third camp consisted of a few states which tried to hold both positions simultaneously, such as Malaysia and Gabon.⁵²⁶

There are several explanations that try to clarify how NATO came to launch the intervention. One of the important factors is the experience of war in Bosnia.⁵²⁷ The failure in Bosnia convinced the Western leaders in the benefits of a preventive action, as well as in the advantages of air power. The Clinton Administration has already learned that Milosevic's ruthlessness is unlimited, and that he, as learned from the Bosnian experience, responds only to the threat of and the use of force. Another significant fact was that the US Administration considered the entire Balkan as extremely unstable area. This conviction, combined with the instability of the Macedonian state where localized violence erupted occasionally in this period, might have been perceived as one of the reasons to act quickly, and, if necessary, without the authorization from the Security Council. The fear of another refugee crisis was also a contributing factor for the pro-intervention decision. Later on, the decision to use only air strikes, without committing ground forces, was questioned for its tactical appropriateness for several reasons.⁵²⁸ These geostrategic and humanitarian reasons combined influenced the decision of the Western countries to engage in the bombardment. Before embarking on the analysis of legal and legal-political justifications of the NATO intervention, other political reasons which underpinned NATO's operation can be

⁵²⁵ The draft resolution was defeated by twelve votes to three (Russia, China and Namibia).

⁵²⁶ Franck, Thomas, *ibid.*, p. 166-169

⁵²⁷ On the eve of NATO war against Yugoslavia, NATO Secretary General Javier Solana recalled the lessons learned by the Alliance in Kosovo: "resolute action can bring results. Before NATO took action in Bosnia, experts on all sides warned of the risks. They warned that air strikes would not encourage the parties to negotiate – instead the air campaign directly led to Dayton." Javier Solana, *Lessons learned from Bosnia*, the 12th of March 1999, The Instituto De Defesa Nacional, Portugal, available at <http://www.nato.int/docu/speech/1999/s990312a.htm>, last visited on the 7th of September 2012

⁵²⁸ Obvious reason was that the violence and harassment were conducted not only by regular armed and police forces of Serbia, but mostly by irregular militias and groups with or without government approval. Some of these groups were not vulnerable to air attack, especially many of the irregular units that were operating among the population that NATO was supposed to protect. Surely the efficacy principle demands for more than sole air power in enforcement operations – ultimately effective enforcement has to involve a ground commitment, besides substantial air support. The decision to use only air power contributed significantly to the high costs of punishing the target and severe military mistakes, such as the errant bombing of the Kosovo Albanian refugee convoy, attacking a bridge at the moment when a civilian train was crossing, thereby destroying the bridge and the train, and the bombing of the Chinese embassy.

mentioned. One of the most important is the regional stability argument, according to which the crisis in Kosovo could easily spill over and jeopardize not only Macedonia but the entire Balkan peninsula. Related to this is the previously mentioned argument that the intervention was necessary in order to prevent enormous refugee flows which concerned some NATO members, particularly Italy and Germany. Besides the preservation of stability in this part of Europe, another important consideration the maintenance of NATO's credibility. However, these reasons are of secondary importance and will not be further analyzed, since they created problems for Europe, not the US which were the main force behind the intervention.

One of NATO's main justifications was that it carried out the collective will of the society of states as it was expressed in the Security Council resolutions. However, there were influential states which opposed the intervention,⁵²⁹ so it is questionable whether there was such a collective will, and additionally, it is presumable that NATO states had not exhausted all available remedies before unilaterally resorting to armed force (for example, turning to the UN organs such as the ICJ or using the United for Peace Resolution in order to avoid ineffectiveness of the Security Council). There is a strong argument in this context proposed by Nigel White. NATO leaders could have backed up their line of argumentation by placing the issue before the General Assembly. The General Assembly has legal competence to recommend military measures when the Security Council is unable to exercise its primary responsibility for maintaining international peace and security, so the 1950 United for Peace Resolution might have been used for this purpose, since it was a way of going around the Soviet veto in the Security Council during the Cold War.⁵³⁰ Hypothetically, if Milosevic's government had continued to fail to comply with the Security Council resolutions, NATO could have placed a draft resolution before the Security Council authorizing it to use force against the FRY. If Russia and China had vetoed the draft

⁵²⁹ Following the intervention, the 133 developing states of the G77 twice adopted declarations unequivocally affirming that unilateral humanitarian intervention was illegal under international law. See Ministerial Declaration, the 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, the 24th of September 1999, and Declaration of the Group of 77 South Summit, Havana, Cuba, 10–14 April 2000, paragraph 54: “we reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.” The 133 states in question included 23 Asian states, 51 African states, 22 Latin American states, and 13 Arab states. As quoted in Byers and Chesterman (2003): *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in Holzgrefe and Keohane (eds.): *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge University Press, Cambridge, p. 184

⁵³⁰ White, N.D. (2000): *The Legality of Bombing in the Name of Humanity*, *Journal of Conflict and Security Law*, Vol. 5, p. 38-41

resolution, they would have been publicly exposed as states that did not want to stop violence and atrocities. But if they had cast their vetoes, NATO would have been able to put a procedural resolution forward requesting the matter to be transferred to the General Assembly. This is why White argues that had NATO “won both a procedural vote in the Security Council and a substantive vote in the General Assembly, NATO then would have had a sound legal basis upon which to launch its air strikes.”⁵³¹ However, NATO governments were aware that they could not guarantee the two thirds majority of the General Assembly to pass a resolution recommending military action. Had such approval been gained, it would have provided a higher threshold of legitimacy compared to the Security Council.

According to the official statements about NATO’s motivation to go to war, one of the main reasons was the credibility of NATO. US Secretary of Defense William Cohen and General Henry Shelton, Chairman of the US Joint Chiefs of Staff in their action review statement before the Senate have stated that NATO had three major interests in going to war in Kosovo: preventing the destabilization of NATO south-eastern region, ending repression by Serbia which had produced a refugee flow “overtaxing bordering nations’ infrastructures and fracturing the NATO alliance”, and “responding to Serbian conduct which had directly challenged the credibility of NATO.”⁵³² As Noam Chomsky notices, NATO’s obsession with credibility made them eager to show that NATO had a post-Cold War role to play. This new role included the extension of NATO’s operations outside the NATO area, and establishing the acceptability of US-led NATO action without constraints being imposed by the UN, and even establishing US dominance in interpreting or rejecting international law.⁵³³ As already shown, the main way of justifying the bombing was representing it as the only way of enforcing the will of the international community to prevent massive human rights violations, a will expressed in 1998 Security Council resolutions. Such interpretations did not coincide with reality, as many states opposed the bombing and called for a diplomatic solution, so such claims were designed to influence public opinion in NATO countries. The initiators of the campaign, the US, made no attempt to provide a legal justification for their actions. As Myron Nordquist notices, “in the

⁵³¹ *Ibid.*, p. 42

⁵³² US Department of Defense, Joint Statement on the Kosovo After Action Review, the 14th of October 1999, News Release No. 478-99, see also <http://www.defense.gov/releases/release.aspx?releaseid=2220>, last visited on the 7th of September 2012

⁵³³ Chomsky, Noam, *ibid.*, chapter 6

post-World War II era, it is difficult to conceive of a more classical act of war than to begin bombing a foreign capital without a mandate from the UN Security Council or without articulating a viable self-defense rationale under customary international law”, and neither the Security Council nor the Senate approved NATO’s deployment to Kosovo as required by the UN Charter and US Constitution.⁵³⁴ He traces the debate in the US Senate after the NATO intervention and shows that many senators felt that the Clinton administration had played “fast and loose with the truth” about why the bombing was necessary and about the expected duration of the US military commitment in Kosovo. For instance, Senator Robert Smith stated that Kosovo had been a colossal mistake and that the air war against Serbia had been inaccurately portrayed: “the administration had grossly exaggerated the results of the air campaign in an attempt to buy public support for the war. The main result of the bombing was to trigger a refugee crisis. The real threat to NATO is that it had abandoned its defensive posture and blundered and contorted into a post-cold war crisis management agency with a lost sense of mission. NATO’s bombing killed innocent civilians and raised regional tensions. By demonizing Milosevic, the United States had become a tacit ally of the Kosovo Liberation Army, a terrorist group.”⁵³⁵

So the first argument used by NATO was that the existing UNSC resolutions provided for an implicit authorization of the intervention, and the second main argument was that the bombardment was justified as a humanitarian intervention, albeit on moral, not legal grounds. The Independent International Commission on Kosovo, chaired by Richard Goldstone, came to the conclusion that the intervention had been “illegal, but legitimate”.⁵³⁶ The NATO

⁵³⁴ Nordquist, Myron (2002): *A Review of the Debate in the United States Senate over the Deployment of Ground Troops in Kosovo*, in Ando, McWhinney and Wolfrum (eds.): *Liber Amicorum Judge Shigeru Oda*, Vol. 2, Kluwer Law International, The Hague, p. 1556

⁵³⁵ *Ibid.*, p. 1571; Senator Sessions considered the Kosovo intervention as a colossal failure of diplomacy and a colossal failure of foreign policy, stating that “we have forgotten the true facts of the situation, but we were told that we were commencing and carrying out this war to stop ethnic cleansing. There had not been ethnic cleaning until the bombing started. It was 3 days after the bombing started that Milosevic sent his troops south into one of the most vicious displays of violence...against a basically defenseless people.” Senator Inhofe criticized the UK Foreign Secretary Robin Cook, who had to answer claims that the government leaders mislead the public on the scale of civilian deaths in Kosovo. Cook said that at the height of the war, western officials spoke of a death toll as high as 100,000, but Senator Inhofe quoted a Spanish pathologist responsible for accurate body count (Emilio Perez Pujol) who had stated that the final figure of dead in Kosovo will be 2,500 at the most. *Ibid.*, p. 1563-1565

⁵³⁶ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, 2000, Oxford University Press, Oxford; however, other official enquiries produced somewhat different conclusions. The UK House of Commons Foreign Affairs Committee, after hearing extensive evidence on

governments have advanced the argument that their action is politically and morally justified because it is aimed at averting a humanitarian catastrophe. Further still, it is in conformity with Security Council Resolutions 1199 and 1203, which demanded Serbian forces to stop their violations of human rights in Kosovo. In this manner, NATO tried to create the impression that it was acting as an enforcer of the UN and its resolutions.⁵³⁷ However, the NATO governments have not claimed that a new customary law of humanitarian intervention is being created in order to portray the action as more lawful.

The only explanation of the legal basis of NATO intervention was provided by the Blair government, which claimed that it had been legal for NATO to use force against Yugoslavia even without the Security Council authorization. This explanation could be found in a Foreign and Commonwealth Office paper circulated to NATO capitals in October 1998. This paper stated: “a UNSCR would give a clear legal base for NATO action... But force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR. The following criteria would need to be applied: (a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved; (c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim.”⁵³⁸ Basically, the right of states to use force in cases of

the legality of the operation, concluded that “at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action legally questionable.” Similarly, the Netherlands committee of legal experts, commissioned by the Netherlands Ministry for Foreign Affairs, concluded that “current international law provides no legal basis for such intervention, and also that no such legal basis is yet emerging.” The committee has proposed that those wishing to intervene, in cases when the Security Council is taking no action, should turn to the UN General Assembly for authorization. A report of the Danish Institute of International Affairs stated that “under current international law there is no right for states to undertake humanitarian intervention in another state without prior authorization from the UN Security Council.” As quoted in Weller, Marc (2009): *Contested Statehood: Kosovo’s Struggle for Independence*, p. 161-162

⁵³⁷ For instance, France commented on Yugoslavia’s non-compliance with SC Resolutions 1199 and 1203 and argued that “the legitimacy of NATO’s action lies in the authority of the Security Council”, while Germany emphasized the humanitarian disaster that made military intervention necessary and argued that NATO’s action, though unauthorized by the Security Council, was nevertheless consistent with the “sense and logic” of the Council resolutions. Simma, Bruno, *ibid.*, p. 12

⁵³⁸ As quoted in Roberts, Adam (1999): *NATO’s ‘Humanitarian War’ over Kosovo*, Survival, Vol. 41, p. 106; Belgium was the only state that asserted before the ICJ that NATO’s action was a “lawful armed humanitarian intervention”, since NATO acted to protect fundamental *jus cogens* values. Furthermore, the intervention was compatible with Article 2(4) of the UN Charter because it was directed against neither the territorial integrity nor the political independence of Yugoslavia.

overwhelming humanitarian necessity was proclaimed as the legal basis for the intervention. Somewhat similar criteria regarding the humanitarian intervention have been suggested by some government officials and scholars and they mostly revolve around: emphasizing the primacy of preventive measures and the primary role of the Security Council; the limitations on the use of force through the principle of territorial integrity and the purpose of halting the violations, as well as through the rules governing proportionality and respect for international humanitarian law; the requirement that the violations of human rights which give rise to intervention must be massive and systematic; and action must be collective, with the support of the international community. These criteria are usually based on six *jus ad bellum* principles traditionally applied to assess the legitimacy of the use of force during a war – a just cause, last resort, likelihood of success, proportionality, right intentions and legitimate authority.⁵³⁹

Even if the conditions proposed by the Blair government are accepted as the basis of establishing a normative precedent that might become part of the international law (since it cannot be said that NATO acted in accordance with the existing law), it is questionable whether the three conditions were fulfilled in the case of Kosovo. Firstly, intervention without the Security Council's authorization could be considered legitimate only in cases of immediate and absolute necessity, when all other alternatives were exhausted. The question to be asked is whether all political and diplomatic means were indeed depleted before the NATO bombing - was the intervention in fact the last remedy. It is evident that the terms set in the Rambouillet Agreement were so severe for Serbia, that it is possible they were meant to be rejected by Milosevic. Resolution 1244 offered a compromise precisely on the points which were unacceptable to the Serbian government during the negotiations in Rambouillet (unlimited access to Yugoslavian territory for NATO, reference to referendum for Kosovo Albanians three years after the entry into force, and the international presence endorsed by Resolution 1244 which included forces outside of NATO, such as Russia). Having these facts in mind, doubts arise whether such compromise might have been achieved without the bombing. Secondly, further difficulties exist regarding the conditions of consistency and proportionality of the use of force. Since the intervention breached the UN Charter, the constraints imposed by customary international law,

⁵³⁹ On just war theory see Walzer, Michael (1992): *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York

including those of proportionality and consistency, assume greater importance. As far as consistency goes, it can be accepted that it is impossible to intervene in all regions where serious human right abuses occur (for instance Sierra Leone, Sudan, Rwanda, Chechnya or Congo), but it is unacceptable for some of the intervening parties to commit comparable violations in their territories (Turkey's protracted violations of human rights of the Kurds). The condition of proportionality is equally problematic. Besides the dubiousness of target choice and high altitude bombardment which caused excessive collateral casualties,⁵⁴⁰ it is certain that the intervention triggered unspeakably vicious response of Milosevic's government, causing the mass expulsion of Kosovo Albanians and a far greater number of civilian casualties that would, in all probability, not have happened without the bombardment. It is reasonable to conclude that NATO leaders should have anticipated that their intervention could trigger massive reprisals against Kosovo Albanians, since Milosevic's government was unable to strike back at NATO itself. Since this was a realistic option, to which NATO was unable to respond, as the Alliance was unwilling to use ground forces, the main aim of the intervention - to halt all violence in Kosovo, was at best only partially achieved.

Furthermore, it is beyond doubt that NATO, without the prior authorization of the Security Council, undertook enforcement measures in violation of the UN Charter fundamental principles such as sovereignty and prohibition of the use of force, and thereby deepened the political, legal and institutional crisis of the United Nations Organization. This case indicates that international law is becoming less relevant in solving major international problems. The Secretary-General took the first opportunity (The Hague International Peace Conference on the 18th of May 1999) to express concern about the marginalization of the Security Council as the whole source of legitimacy on the use of force. On his address to the General Assembly he stated: "just as we

⁵⁴⁰ Falk concludes that "NATO's style of bombing after the first few days was to inflict heavy, deliberate damage on civilian targets of a wide variety, relying on mastery of the air, smart weaponry, and a proclaimed intention to continue the bombing on an intensifying scale until Belgrade 'submitted' without conditions. The magnitude and effects of such bombing are difficult to reconcile with the humanitarian claims made by NATO spokespersons. This difficulty is compounded by NATO's reliance on tactics of warfare that minimized the risk of harm to the intervening forces, while shifting that risk to the civilians in the former Yugoslavia, including Kosovo. And in that sense the absence of casualties among the military forces of NATO during the bombing campaign and the killing of two thousand or more civilians in Serbia and Kosovo do seriously damage the humanitarian rationale for the action. Skeptical observers must wonder whether the primary motives for intervention were others than those publicly relied upon, such as keeping NATO alive and testing new weaponry and war-fighting doctrine." Falk, Richard, *ibid.*, p. 855-856

have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples."⁵⁴¹ Precisely that support was missing in the case of NATO's action. After analyzing the intervention, Franck concludes: "if the use of force by NATO in Kosovo is seen as a precedent for a reinterpretation of Article 2(4)'s absolute prohibition on the discretionary use of force by states, the substitution of a more 'reasonable' principle, one that accommodates use of force by any government to stop what it believes to be an extreme violation of fundamental human rights in another state, could launch the international system down the slippery slope into an abyss of anarchy...The danger of treating NATO's use of force in the Kosovo crisis as simply a humane exception, an *in extremis* necessity, is that the law cannot hope to secure acquiescence in a norm that permits its violation at the sole discretion of a party to which it is addressed."⁵⁴²

Additionally, it is very doubtful whether NATO's intervention helped to prevent violence and human rights violations. According to the report of Special Rapporteur of the Commission on Human Rights on the situation of human rights in the former Yugoslavia, NATO air strikes neither prevented mass flight and widespread fundamental human rights violations, nor did they prevent Serbian forces from conducting a systematic campaign of terror. On the contrary, this campaign differed significantly from the armed activity in the months immediately preceding the intervention, and assumed rampant ferocity at the start of the NATO intervention. Moreover, violence and harassment were not limited to a particular ethnicity. Human rights violations were increasingly perpetrated by non-state actors, including Albanian extremists or Kosovo Albanian paramilitaries, so not only Kosovo Albanians but also Serbs and Roma were victims of grave human rights violations, which were sometimes directed especially at the Serbs for no obvious

⁵⁴¹ General Assembly of the United Nations, Verbatim Records of the Plenary Meetings of the 54th Session, the 20th of September 1999, UN Doc. A/PV/54/4

⁵⁴² Franck, Thomas, *ibid.*, p. 171-172; Buchanan concludes that "a military alliance such as NATO is not the sort of entity that would be a plausible candidate for having a right under international law to intervene without UN authorization. The chief difficulty is that such a norm would be too liable to abuse. To appreciate this fact, suppose that China and Pakistan formed a regional security alliance and then appealed to the new norm of customary law whose creation NATO's intervention was supposed to initiate to justify intervening in Kashmir to stop Hindus from violating Muslims' rights in the part of that region controlled by India." Buchanan, Allen (2003): *Reforming the International Law of Humanitarian Intervention*, in Holzgrefe and Keohane (eds.): *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, p. 166

reasons but ethnicity.⁵⁴³ These facts indicate that the emerging norm of humanitarian intervention, or ‘Responsibility to Protect’,⁵⁴⁴ can cause perverse incentives, contrary to its intent to protect civilians from ethnic cleansing. As Alan Kuperman explains, ethnic cleansing and genocidal violence often represent state retaliation against a substate group for rebellion, such as armed secession. The emerging norm, by raising expectations of diplomatic and military intervention to protect these groups, unintentionally fosters rebellion by lowering its expected cost and increasing its likelihood of success. Intervention can sometimes help rebels attain their political goals, but usually it is too late or inadequate to avert retaliation against civilians. The emerging norm thereby causes some genocidal violence that otherwise would not occur, as Bosnia and Kosovo illustrate.⁵⁴⁵

The question whether the high-altitude bombardment was adequately discriminatory as between military and civilian targets is another point of criticism of the intervention (the principle of proportionality).⁵⁴⁶ While this decision was made in order to avoid US casualties, it implies that

⁵⁴³ United Nations Secretary-General, Situation of Human Rights in the Federal Republic of Yugoslavia (Serbia and Montenegro), Report by Special Rapporteur Jiri Dienstbier, the 24th of October 1999, UN Doc. A/54/396-S/1999/1000, para. 98-114; the Special Rapporteur also pointed to: “mass expulsion and ethnic cleansing of hundreds of thousands of Kosovo Albanians; killings of as-yet-untold numbers of civilians as new mass graves continue to be discovered in Kosovo; arrest and arbitrary detention of several thousand Kosovo Albanians, now held in prisons in Serbia; systematic destruction of whole villages, neighbourhoods, means of livelihood and the homes of selected individuals; rape as an instrument of terror; use of landmines and depleted uranium...and the ethnic cleansing of nearly 200,000 non-Albanians from Kosovo.” para 91.

⁵⁴⁴ The International Commission on Intervention and State Sovereignty declared in 2001 the existence of a ‘Responsibility to Protect’. The UN General Assembly at the 2005 World Summit declared the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and to authorize force on a case by case basis should peaceful means be inadequate. General Assembly of the United Nations, Resolution 60/1, 2005 World Summit Outcome, the 24th of October 2005, A/RES/60/1, 60 UN GAOR Supp. (No. 49); however, in the follow-up debate on the R2P concept, organized by the General Assembly in 2009, Special Adviser to the Secretary General explicitly stated: “this is not 1999. Ten years ago the Assembly addressed the concept of humanitarian intervention and found it wanting. Unilateral armed intervention under the guise of humanitarian principles was – and is – seen as morally, politically, and constitutionally unacceptable. That is not the UN way.” Edward C. Luck, Special Adviser to the Secretary General, Remarks to the General Assembly on the Responsibility to Protect, the 23rd of July 2009, p. 2., available at http://www.ipacademy.org/images/pdfs/luck_ga_statement23july2009.pdf, last visited on the 7th of September 2012

⁵⁴⁵ Kuperman, Alan, *ibid.*, p. 49

⁵⁴⁶ NATO’s violations of international humanitarian law (or the laws of war) were committed in several cases. Firstly, collateral damage caused by making mistakes in identifying and attacking targets, what happened, for instance, when NATO bombed Kosovo Albanian refugee convoy in Djakovica or the Chinese Embassy in Belgrade (China considered that bombing deliberate, as the particular embassy floor that was hit housed a Chinese intelligence unit). Secondly, unintentional collateral damage caused by bombing from high altitude also represents a violation of international humanitarian law. Thirdly, NATO bombed civilian installations, infrastructural and dual-use assets (industrial sites, bridges, oil refineries, fuel depots and political offices) which led to an increasing number of Serb civilians being killed. Lastly, the use of cluster bombs gave rise to criticism of their long term

the value of life, the very goal that humanitarian intervention is committed to, depends on nationality. Amnesty International concluded that it had “serious concerns about the extent to which NATO forces participating in Operation Allied Force adhered to the rules of international humanitarian law on the conduct of hostilities, specifically those laid down to protect civilians and civilian objects...NATO forces did commit serious violations of the laws of war leading in a number of cases to the unlawful killing of civilians.”⁵⁴⁷ The Human Rights Watch also questioned the legitimacy of target selection, criticizing the bombing of the Novi Sad bridge and six other bridges in which civilian deaths occurred, since urban and town bridges are not major routes of communication. Furthermore, bombing of the Belgrade civilian radio and television was criticized on the grounds that NATO did not take adequate precautions in warning civilians nor did the attack satisfy the legal requirement in terms of proportionality, concluding that “in this case, target selection was done more for psychological harassment of the civilian population than for direct military effect.”⁵⁴⁸ Additionally, using cluster bombs, NATO attacked a refugee column on the road between Djakovica and Western Kosovo, killing 73 civilians. Although the US claimed that the convoy had represented a legitimate military target, the Human Rights Watch reported that it “found no basis to support the claim that the convoys themselves were composed of military vehicles.”⁵⁴⁹ The UN Commission on Human Rights circulated a paper which criticized NATO for taking on a protective role of the human rights of Kosovo Albanians on the one hand, whilst on the other hand violating humanitarian law. The report pointed out that NATO’s violations were serious and of the utmost gravity “because they are being committed through acts or omissions by a coalition of major powers which has taken upon itself the role of representative of the international community and of the worldwide policemen and guarantor of

environmental damage and high potential to harm civilians long after the conflict was over. The Human Rights Watch examined these four categories of international humanitarian law violations in great detail and concluded that “NATO violated international humanitarian law.” Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, Human Rights Watch, Vol. 12, February 2000, summary section; Amnesty International conducted a similar study and came to the same conclusion that NATO’s means and methods of attack caused unlawful civilian deaths and that the deployment of certain weapons (cluster bombs), as well as grave failures in gathering of intelligence contributed to causing unlawful civilian deaths. Amnesty International, ‘Collateral Damage’ or Unlawful Killings: Violations of the Laws of War by NATO During Operation Allied Force, the 7th of May 2000, EUR 70/018/2000, p. 29

⁵⁴⁷ *Ibid.*, p. 2

⁵⁴⁸ *Civilian Deaths in the NATO Air Campaign*, p. 15

⁵⁴⁹ *Ibid.*, p. 11-12

human rights.”⁵⁵⁰ The report then criticized the use of cluster bombs and the targeting of civil infrastructure, electric power stations and drinking water sources and pipelines. According to the authors of the report, these crimes could be designated as crimes against humanity of the Charter of the Nurnberg Tribunal and of the International Criminal Tribunal for the Former Yugoslavia (crimes against humanity, and in particular (a) murder; and (i) other inhumane acts).⁵⁵¹ Since NATO was unwilling to use ground forces, targeting civilian infrastructure became NATO’s only option to force Milosevic to give up.⁵⁵²

It can be concluded that although human rights violations cannot be shielded by claims of sovereignty, “neither can these claims be overridden by unauthorized uses of force delivered in an excessive and inappropriate manner.”⁵⁵³ This was the first times since the founding of the UN that a group of states used military force without that organization’s approval and justified that as a humanitarian intervention (since no other legal justification was possible). But then certain questions come to mind, such as why was there a lack of willingness to intervene in Chechnya or Tibet? Former US Secretary of State Henry Kissinger, commenting on the argument that the US bombed Yugoslavia because “the suffering in Kosovo is so offensive to our moral sensibilities”, observed that “this leaves open the question of why we do not intervene in East Africa, Sri Lanka, Kurdistan, Kashmir and Afghanistan – to name just a few of the places where infinitely more casualties have been incurred than in Kosovo.”⁵⁵⁴ BBC commented on this selectivity by characterizing it as racism, asking “if the situation in Sierra Leone is so bad, how come there are 50,000 NATO troops in Kosovo and just a few dozen unarmed UN observers in Sierra

⁵⁵⁰ United Nations Secretary-General, Commission on Human Rights, Question of the Violation of Human Rights in Any Part of the World, in Written Statement by the American Association of Jurists to the UN Secretary-General, the 11th of February 2000, UN Doc. E/CN.4/2000/NGO/89, p. 2

⁵⁵¹ *Ibid.*, p. 6; And due to the requests brought before the ICTY, on the 14th of May 1999 the prosecutor of the Court launched an investigation on the merits of charging NATO officials with war crimes. However, in May 2000 the charges were ultimately dismissed by the review committee established by the prosecutor.

⁵⁵² There is a general consensus that it has been a mistake for NATO to publicly declare that this would be exclusively an air operation. It emboldened Milosevic to accelerate ethnic cleansing while hoping that NATO would give up if Serbia held on long enough. As a consequence, the war was protracted longer than necessary. Another unfortunate consequence was that NATO had to target civilian infrastructure in a way that placed non-combatants at risk. The reason for this was that NATO was unsuccessful in attacking legitimate military and security targets, due to high altitude bombardment. Although NATO conducted the most intensive bombing campaign in Europe after World War II, it had inflicted minimal casualties on Serbian military and paramilitary units. Thus the Alliance, in order to force Milosevic to accept its terms, targeted Serbia’s civilian infrastructure.

⁵⁵³ Falk, Richard, *ibid.*, p. 848

⁵⁵⁴ Kissinger, Henry, *Doing Injury to History*, Newsweek Magazine, the 5th of April 1999, available at <http://www.sam.hi-ho.ne.jp/~minovic/kissinger405.html>, last visited on the 7th of September 2012

Leone?...perhaps it is not an exaggeration to suggest, just tentatively, that the international reaction to Sierra Leone might have been very different if all of those people with their limbs chopped off had been white.”⁵⁵⁵ Probably the race does not explain the decision to intervene in some cases and to ignore others, but it is a fact that the US decided to intervene in Europe, in Bosnia in 1995 and in Kosovo in 1999, but ignored perhaps more grave humanitarian situations in Rwanda, Congo and Sierra Leone. In the end, little can be added to India’s arguments during the SC debate on the 26th of March 1999 when Russia’s draft resolution condemning NATO’s intervention was rejected: “international community can hardly be said to have endorsed their actions when already representatives of half of humanity have said that they do not agree with what they have done.”⁵⁵⁶ Another question can be posed – is it possible that Kosovo served as a sort of a testing ground for the concept of humanitarian intervention, as we witnessed the second occurrence of intervention in Libya, over a decade after Kosovo (and an even more shocking absence of any serious international reaction regarding the situation in Syria at the same time)? And does this indicate an emergence of a new doctrine of international relations, one that would make the international system a far more dangerous place for sovereign states? What is the message sent to those states which do not agree with values and rules of NATO – not even membership in the UN can protect you? Cassese’s warning that one cannot confine oneself to hoping that the dramatic departure from UN standards in the case of Kosovo will remain an exception, seems prophetic: “once a group of powerful states has realized that it can freely escape the strictures of the UN Charter and resort to force without any censure, except for that of public opinion, a Pandora’s box may be opened. What will restrain those states or other groups of states from behaving likewise when faced with a similar situation or, at any event, with a situation that in their opinion warrants resort to armed violence?”⁵⁵⁷

⁵⁵⁵ Doyle, Mark, *Sierra Leone Worse Than Kosovo?*, BBC News, the 3rd of July 1999, available at http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/383985.stm, last visited on the 7th of September 2012

⁵⁵⁶ Security Council of the United Nations, Letter dated 24 March 1999 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council (S/1999/320), the 26th of March 1999, UN Doc. S/PV.3989, p. 16; India’s permanent representative at the United Nations also stated: “it is clear that NATO will not listen to the Security Council. It would appear that it believes itself to be above the law. We find this deeply uncomfortable. In New Delhi, earlier today, the External Affairs Minister said that India cannot accept any country taking on the garb of a world policeman. NATO argues that the Serb police in Kosovo act violently and without any respect for law. Unfortunately, NATO seems to have taken on the persona and the methods of operation of those whose activities it wants to curb.”

⁵⁵⁷ Cassese, Antonio (1999): *Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, European Journal of International Law, Vol. 10, p. 25

4 *Resolution 1244 and the Kumanovo Agreement*

Due to the diplomatic efforts of the Troika (Martti Ahtisaari, US/NATO representative Strobe Talbott and the Russian representative Victor Chernomyrdin), on the 3rd of June 1999 the FRY, after a parliamentary debate convened to confirm the decision Milosevic had made the day before, accepted a set of principles for a political solution to the Kosovo crisis. It is a matter of some discussion as to why Milosevic decided to accept the demands of NATO, but with all probability, it is a combination of several reasons which compelled him to surrender. The most important one must have been the threat of a ground invasion, and the growing effectiveness of NATO's bombardment, which included strikes on the electrical grid. He also realized that the cost of continuing the war might have negative effect on his position in Yugoslavia, as the divisions in his inner circle had already taken place. In the end, the support that Russia provided to these demands must have been a heavy blow to his expectations. However, the ICTY war indictments against Milosevic and other members of the FRY leadership hardly played any role in his decision, although many analysts claim otherwise.⁵⁵⁸ The set of principles he finally accepted provided for the withdrawal from Kosovo of all military, police and paramilitary forces and the deployment of international civil and security presence under the auspices of the UN. The agreement was endorsed by the Security Council on the 10th of June 1999 through Resolution 1244.⁵⁵⁹

⁵⁵⁸ Another reason for accepting the agreement was proposed by some, including Ahtisaari. It was because the Russian Operation Trojan Horse had allegedly already been known to Milosevic at the time Ahtisaari and Chernomyrdin proposed the peace agreement in Belgrade on the 2nd of June. This operation was a result of planning undertaken between the Russian Ministry of Defense and the intelligence service, and it seems that even the Foreign Minister Ivanov knew nothing of it. It was planned for Russian troops to enter Kosovo simultaneously with KFOR, so that Russia would be able to negotiate its role within KFOR after having already created new facts on the ground (and indeed, when NATO began its main deployment on the 12th of June they found out that Russian troops had already taken up residence at the Pristina's airbase Slatina, after a march from the Russian SFRO base in Bosnia – it was, however, just a symbolic move as they were unable to reinforce their position). Ahtisaari concluded that this plan must have been known to Milosevic on the 2nd of June and that this was the main reason he accepted the principles, because he had known of the Russian plan to partition the north of Kosovo and to place it under Russian and Serb control: "I could not find any other reason why Milosevic took the deal. I was continually asking myself, 'Why did he agree?' And I could not find anything other than the Russian plan." Norris, John (2005): *Collision Course: NATO, Russia and Kosovo*, Praeger Publishers, Westport, p. 220; However, according to the 18th of June agreement between Russia and the US, Russians would not be given their own sector, their troops would number only 3,600 (compared to 45,000 NATO peacekeepers) and they would be scattered across four sectors.

⁵⁵⁹ Security Council of the United Nations, Resolution 1244, the 10th of June 1999, S/RES/1244, 54 SCOR 4011th mtg.; the resolution was passed by a vote 14-0, with China abstaining.

The Kumanovo Agreement, signed on the 9th of June, complements Resolution 1244 regarding the matters of security.⁵⁶⁰ According to Article 1, the FRY authorities agree that international forces (KFOR) deploy and operate within Kosovo with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo, including the use of military force. The purposes of this agreement are threefold – to establish durable cessation of hostilities, to ensure withdrawal of all Serbian forces and to authorize KFOR to take necessary actions, including the use of necessary force to ensure compliance with the Agreement and the protection of KFOR and international civil presence. The entry into force of this Agreement was the condition for the suspension of military activities (Article 2). After the Agreement had been signed, the withdrawal of Yugoslavian forces began and the air strikes were suspended. The UN resolution was passed on the following day, and KFOR was able to deploy.

The UN Security Council Resolution 1244 defined the legal framework for Kosovo, but it did not and could not change the legal situation of Kosovo.⁵⁶¹ The resolution provided mandate for UNMIK and KFOR. In establishing the international security and the international civil presence the Council was acting under Chapter VII of the UN Charter, which provides sufficient legal ground for the deployment of a territorial administration. There are two main points in this resolution. First is the affirmation of the commitment to the sovereignty and territorial integrity of Yugoslavia. Second is the affirmation of the meaningful self-administration and substantial autonomy for Kosovo, as well as organizing and overseeing the development of provisional institutions, and after the political process of determining Kosovo's future status comes to an end, overseeing the transfer of authority from those provisional institutions to institutions established under a political settlement. The interesting thing is that the resolution did not refer to

⁵⁶⁰ Security Council of the United Nations, Letter Dated June 15, 1999, from the Secretary General Addressed to the President of the Security Council, enclosure: Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, the 9th of June 1999, UN Doc. S/1999/682

⁵⁶¹ Judge Fitzmaurice remarked that “even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that... The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or piece of a territory to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights, - and the right to administer a mandated territory is a territorial right without which the territory could not be governed or the mandate be operated. It was to keep the peace, not to change the world order, that the Security Council was set up.” International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Dissenting Opinion of Judge Fitzmaurice, the 21st of June 1971, ICJ Reports 1971, p. 294

the military intervention of NATO against Yugoslavia at all. This means that the military action of NATO has been neither approved nor condemned ex post facto.

The preamble of the resolution recalls the humanitarian tragedy in Kosovo and the need to comply with all previous SC resolutions. It reaffirms the sovereignty and territorial integrity of the FRY and condemns all acts of violence and terrorist activities. The preamble also welcomes the general principles on a political solution adopted on the 6th May - that was a unilateral statement of G-8 foreign ministers (annex 1 to this resolution), which are elaborated in the 3rd of June Agreement (annex 2 to this resolution).⁵⁶² The 3rd of June Agreement gave consensual, legal basis for the establishment of a UN civil presence with the duty to establish and oversee the development of provisional democratic self-government institutions.⁵⁶³ Secretary-General Special Representative is to act as civil authority in the interim period. The military presence established by “member states and relevant international organizations” is to coordinate closely with the civilian presence. The military presence enjoys a mandate to enforce ceasefire, deter hostilities, ensure withdrawals, demilitarize KLA, ensure public safety and order, conduct border monitoring, and ensure freedom of movement for itself, the civilian presence and other international organizations.

Resolution 1244 did not condemn or endorse the military intervention of NATO - its main goal was to restore the Security Council’s authority in a de facto situation after the intervention. It had no intent of legalizing the intervention itself, only to deal with its effects. There is almost no mention of the final status of Kosovo, only one sentence in paragraph 11 that states that the main responsibilities of the international civil presence include the facilitation of a political process designed to determine Kosovo’s future status, taking into account the Rambouillet Accords. This, however, was often interpreted as an indirect return of the possibility of an independence

⁵⁶² Annex 1 refers to an interim administration of Kosovo to be decided by the Security Council and “a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet Accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region and the demilitarization of the KLA.” Annex 2 consists of a ten point statement presented to the FRY on the 2nd of June 1999.

⁵⁶³ Security Council of the United Nations, Letter Dated June 7, 1999, from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council, enclosure: The 3rd of June Agreement, the 7th of June 1999, UN Doc. S/1999/649

referendum that was a part of the Rambouillet Accords. It can be stated that Resolution 1244, adopted after the military defeat of Serbia, shows more signs of compromise, than the Rambouillet Plan. As mentioned, there is no reference to the three year deadline and referendum – Kosovo is turned into a de facto international protectorate, and the issue of Kosovo’s status is delayed for an indefinite period of time. The preamble of the resolution affirms Yugoslavia’s sovereignty and territorial integrity. Resolution 1244 and the Kumanovo Agreement mention international security presence and force operating under the auspices of the UN, without specifying NATO, and this international security force is mentioned only in terms of being present in Kosovo as opposed to having rights throughout Yugoslavia. However, one thing can be concluded – whether or not the FRY could have been expected to accept the Rambouillet Plan stays debatable, but the Serbian offensive in the end of December 1998 and the Racak massacre were the turning point for the international community. Had Serbia accepted the Hill plan put forward on the 2nd of November 1998, it would have gotten a more favorable political settlement without implementing provisions which include NATO presence. If it had attempted to satisfy international demands for the restoration of autonomy in Kosovo before the events in 1998, even a more modest level of self-government for Kosovo would have been acceptable to the international community. As it were, Milosevic decided to gamble and lost.

Tomuschat concluded regarding Resolution 1244, that “never before had the Security Council exerted its mandate in such a draconian fashion, imparting instructions on how the internal constitutional order of a sovereign State should be framed.”⁵⁶⁴ Crawford takes a similar view: “the use of force itself in Kosovo was not covered by any Chapter VII resolution and remains controversial... Independent of the question of consent (but the more serious given that consent was for a time absent) is the question of the UN authority to establish an interim administration, possessing extensive territorial competence but not based on the trusteeship provisions of the Charter... It is one thing for a State to have multilateral obligations and another for the United Nations to administer its territory in a situation where (whatever may be said about territorial integrity) the issue of secession following ethnic cleansing is very much on the agenda.”⁵⁶⁵ A number of authors questioned the validity of the Kumanovo Agreement because of the elements

⁵⁶⁴ Tomuschat, Christian (2006): *Secession and Self-Determination*, p. 33

⁵⁶⁵ Crawford, James (2006): *The Creation of States in International Law*, p. 559-560

of coercion - the FRY's consent was extorted, it was a result of the use of force. The FRY accepted the principles presented in Belgrade on the 2nd of June 1999, which were the basis for the Kumanovo agreement, but it is clear that the Yugoslavian government acted under pressure and fear from continuation of the air strikes. "In conclusion, the analysis of the arguments actually employed by NATO countries to justify the action, and other possible arguments such as the *ex post facto* endorsement and the enforcement of a right of self-determination reveal that NATO intervention was in violation of the principles of international law embodied in the Charter, hence illegal coercion as a ground of treaty invalidity would apply to the Kumanovo Agreement."⁵⁶⁶ The 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations⁵⁶⁷ in Article 52 provide for the nullity of a treaty whose conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter, but neither of these treaties can be applied (the 1969 Convention regulates treaties concluded by states and the 1986 Convention is not ratified by NATO). However, if the Vienna Convention on the Law of Treaties is customary international law, Article 52 may present ground for the absolute nullity of the Kumanovo Agreement. Nevertheless, it should be noticed that the Serbian side has not at any moment claimed that the Kumanovo Agreement is a result of coercion and that it should be proclaimed null and void, not even in the case against ten NATO member states that Serbia brought before the ICJ.⁵⁶⁸ Also, in the years following the intervention, the Assembly of the Republic of Serbia has adopted several declarations and members of the Serbian government gave numerous statements in which they called for the respect of the territorial integrity of Serbia and the support to the implementation of the Kumanovo Agreement. However, even if coercion was proved, the invalidation by Article 52 would only apply if NATO intervention was found contrary to the rules of *jus ad bellum*.⁵⁶⁹

⁵⁶⁶ Milano, Enrico, *ibid.*, p. 251

⁵⁶⁷ United Nations Conference on the Law of Treaties, Vienna Convention on the Law of Treaties, the 22nd of May 1969, UN Doc. A/CONF.39/11/Add.2; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the 21st of March 1986, UN Doc. A/CONF.129/15

⁵⁶⁸ Yugoslavia brought an action before the ICJ seeking, inter alia, cessation of the use of force by way of interim measures. On the 2nd of June 1999 the ICJ rejected requests filed by Yugoslavia against ten NATO member states. The ICJ declined to grant interim measures of protection and denied jurisdiction without addressing the substantive arguments relating to the use of force. International Court of Justice, Legality of the Use of Force (Yugoslavia v [Belgium and nine other States]), Provisional Measures, the 2nd of June 1999, ICJ Reports 1999, p. 950

⁵⁶⁹ Milano, Enrico, *ibid.*, p. 243

It is arguable that Resolution 1244 was adopted in the first place only because it preserved the territorial integrity of the FRY and subsequently Serbia. The positions of some states, such as Russia and China, supported this claim. Russia repeated its support for Serbia's sovereignty and territorial integrity in every occasion, and China explicitly gave reasons for its abstention from vetoing Resolution 1244: "in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft resolution has reaffirmed the purposes and principles of the United Nations Charter, the primary responsibility of the Security Council for the maintenance of international peace and security and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this draft resolution."⁵⁷⁰ None of the other member states contradicted the positions of Russia and China since it was clear that the preservation of the territorial integrity of Serbia was the condition for the very adoption of the resolution. This is one of the key arguments raised against the unilaterally proclaimed independence of Kosovo – Resolution 1244 does not provide a legal basis for independence, so Serbia must consent to independence for it to be legal, while the proponents of independence argue that Resolution 1244 does not preclude independence nor predetermine Kosovo's final status.

It should be noted that no NATO country has justified the intervention on the grounds of the right to self-determination of Kosovo Albanians. This, however, is the claim of the Albanian side – that they are a people entitled to self-determination and independent statehood within the territorial boundaries of *uti possidetis*. Tomuschat claims that self-determination is implicitly present in the resolution: "autonomy for a given human community cannot be invented by the Security Council without any backing in general international law. In conclusion, Security Council Resolution 1244 can be deemed to constitute the first formalized decision of the international community recognizing that a human community within a sovereign State may under specific circumstances enjoy a right of self-determination."⁵⁷¹ Kosovo Albanians consider their unilateral declaration of independence as compatible with Resolution 1244, based on reasoning similar to Tomuschat's, although it is clear that an external right of self-determination

⁵⁷⁰ Security Council of the United Nations, Verbatim Records of the 4011st Meeting, the 10th of June 1999, UN Doc. S/PV/4011, p. 9

⁵⁷¹ Tomuschat, Christian, *ibid.*, p. 34

for Kosovo Albanians is not recognized in this resolution. However, Resolution 1244 mandates UNMIK to establish meaningful self-administration and substantial autonomy in Kosovo. This language points to the internal right of self-determination. This approach indicates the sensitivity of the issue of self-determination, and shows that the primary aim for the Security Council was to establish peace and security, not to address the territorial question. The Council thereby confirmed the principle that secession should be the last option, one to be avoided as long as other means to solve the conflict exist. These other means obviously include even the creation of a de facto protectorate and a complete suspension of sovereignty by the international community.

5 *The UN interim administration*

The situation during and immediately after the war can be described as a humanitarian catastrophe, which was followed by the collapse of any law and order. Out of a 1,7 million population, 800,000 persons became refugees in neighboring countries, while about half a million were internally displaced.⁵⁷² While Milosevic's efforts to ethnically cleanse Kosovo increased during the NATO intervention, after the war many Serbs left Kosovo because of crimes committed against them by Kosovo Albanians, including killing, rape, forced expropriation, looting and arson.⁵⁷³ "Some Serbs tried to stay, but many of those were intimidated into changing their minds when Serb corpses began appearing around Pristina, some of them headless. On 18 June the International Committee of the Red Cross reported that between 50,000 and 60,000 Kosovo Serb civilians had left Kosovo in the previous two weeks...In the second half of June, Kosovo Albanians forcibly expelled an estimated 5,000 Roma from a neighbourhood in the southern part of the soon-to-be-divided city of Mitrovica. Dozens of people disappeared or were killed outright, most reportedly abducted by men claiming to belong to the KLA. The dead and disappeared included not only members of minority communities but also rival factions within the Kosovo Albanian community. Men claiming to represent the KLA took possession of various public buildings, houses and apartments (a practice that continued through to 2005). The same men also established administrative and security

⁵⁷² Security Council of the United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, the 12th of July 1999, UN Doc. S/1999/779, p. 3

⁵⁷³ *Ibid.*, p. 2

organizations, and asserted their authority as a de facto government.”⁵⁷⁴ The OSCE Report stated that “by the end of October, nearly 300 houses have been burned in Prizren and the surrounding villages. The result of this pressure on the Kosovo Serbs is clear: 97 percent of the pre-war population have left.”⁵⁷⁵

An UNMIK report from July 1999 states that groups of Albanians roamed Pristina evicting and murdering anyone who was not Albanian; robberies and beatings occurred with alarming frequency, and often within sight of KFOR soldiers. Kosovo Serb and other non-Albanian properties were targets, but those of prominent Kosovo Albanians who had not supported the KLA as well.⁵⁷⁶ According to the UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo, the Serbian population steadily diminished as it faced continuous intimidation, forced eviction and house burnings, so the number of Kosovo Serbs remaining in Pristina was estimated to stand at approximately 700-800 in November 1999 as compared with some 20,000 estimated by the UNHCR in 1998.⁵⁷⁷ The International Crisis Group Report, based on information taken from the UN Human Commissioner for Refugees, states that 235,000 ethnic Serbs fled Kosovo after the entry of KFOR.⁵⁷⁸ Not only the Serbs were endangered – other minorities, such as Roma, Ashkali, Egyptian, Bosnian and Gorani were also victims of Kosovo Albanians. As a result, around 100,000 Kosovo Serbs remained in Kosovo, and they have either retreated into small enclaves across the province or live in the northern area of Kosovo which borders Serbia. None have remained in towns where Kosovo Albanians also live. This reverse ethnic cleansing was caused by the fact that Kosovo Albanians have adopted a presumption of collective guilt concerning all Serbs and Roma, and it was justified by some journalists and analysts on the grounds that what the Serbs did was worse: “for example,

⁵⁷⁴ King and Mason (2006): *Peace at Any Price: How the World Failed Kosovo*, p. 50-51; both authors served in the UN Interim Administration in Kosovo.

⁵⁷⁵ Organization for Security and Cooperation in Europe, *Kosovo/Kosova: As Seen, As Told. Part II. A Report on the Human Rights Findings of the OSCE Mission in Kosovo. June to October 1999*, OSCE Office for Democratic Institutions and Human Rights, p. 122–123.

⁵⁷⁶ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779

⁵⁷⁷ United Nations High Commissioner for Refugees / Organization for Security and Cooperation in Europe, *Overview of the Situation of Ethnic Minorities in Kosovo, the 3rd of November 1999*, available at <http://www.osce.org/kosovo/13309>, last visited on the 7th of September 2012

⁵⁷⁸ International Crisis Group, *Finding the Balance: The Scales of Justice in Kosova*, the 12th of September 2002, Balkans Report No. 134, Pristina/Belgrade/Brussels, p. 24; according to the UNHCR registration of IDPs in 2000 and UNHCR statistics from January 2002, the following left Kosovo for Serbia and Montenegro: 147,879 Serbs; 17,606 Montenegrins; 8,339 Bosniaks; 26,168 Roma; 1,496 Albanians; 1,588 Egyptians; 4,071 Others.

journalist Sebastian Junger claims the Serbs committed war crimes whereas the Albanians' actions are 'just violence.' Junger creates moral and legal confusion by ignoring the premeditated, widespread, and systematic nature of the attacks on Serbs, other minorities, and moderate Albanians since June 1999. These abuses fully meet any definition of war crimes or crimes against humanity. The only significant difference is one of scale – a difference of degree, not of kind – and that is largely due to the presence of 40,000 KFOR troops and 4,000 international police.”⁵⁷⁹ On top of that, basic infrastructure was destroyed and the economic situation was catastrophic, almost pre-industrial – there was no standard currency, no system of taxation, no banking system, the material destruction was huge and during the bombing most production stopped, never to restart.

With the deployment of UNMIK and KFOR, Yugoslavia's sovereignty over Kosovo was suspended. All legislative and executive power has been exerted by UNMIK under the Special Representative of the UN Secretary General (SRSG), according to Regulation No. 1 of the 25th of July 1999 (the first legislative act of UNMIK). The Special Representative is empowered to appoint or remove any person, including judges, to positions within the civil administration. Along with UNMIK, the Provisional Institutions of Self-Government (PISG) have been administering the territory since 2001– they were responsible for most of the domestic affairs of the region, although almost always subject to UNMIK supervision. KFOR supports UNMIK but retains an independent position, as it is authorized separately and has a different area of responsibility. The two missions provide for a parallel non-hierarchical structure. KFOR provides for peacekeeping, deterring new hostilities, ensuring that refugees can safely return, humanitarian aid be delivered, and they have the tasks of de-mining and border monitoring. They

⁵⁷⁹ O'Neill, William (2002): *Kosovo: An Unfinished Peace*, International Peace Academy Occasional Paper Series, Lynne Rienner Publishers, Boulder, p. 52-53; he also notices that “in some areas, more destruction occurred following the NATO air campaign than during the bombing. Gnjilane, for example, was a largely Serb city in southeastern Kosovo. Serb forces did not destroy many houses in the town and there was not much violence compared to other parts of Kosovo. Once the Serb forces retreated, however, Gnjilane became a deadly place if you were Serb or Roma. Houses burned, people ‘disappeared’, and looting of Serb-owned businesses was extensive. One of the worst incidents of violence occurred in a village near Gnjilane on July 23, 1999. Fourteen Serb males who were out tending their fields were murdered in broad daylight. Similarly in Prizren, which suffered little damage during the war, the sight of burning houses was a familiar one from June to December 1999. On my first visit in mid-September 1999, I saw at least a dozen plumes of smoke circling into the sky from different parts of the city. These were Serb houses that had been torched by Albanian extremists. Many more houses burned after the NATO bombing than before in Prizren.” *Ibid.*, p. 55; He lists many examples of violence in Kosovo committed by the KLA since June 1999 and documented by the international administration. *Ibid.*, p. 60-73

also have a mandate for peace-enforcement and the demilitarization of the KLA, and were initially a substitution of local police authority.⁵⁸⁰ On the other hand, UNMIK has an all-encompassing authority, a complete control over the legislature, the executive and the judiciary of Kosovo. Humanitarian affairs are the responsibility of UNHCR. Democratization and institution building are tasks of the OSCE. The task of reconstructing the economy and infrastructure is managed by the EU.⁵⁸¹ The regulations of the international administration were applied directly, and they superseded any municipal law. However, UNMIK is limited not only by international law, but also by the sovereignty and territorial integrity of Serbia which has de jure sovereignty over Kosovo under Resolution 1244.

It should be noted that the functioning and the activity of the interim administration has been complicated in two main ways. First is the existence of parallel institutions in Kosovo, developed by the Albanian as well as the Serb population. Even after the unilateral proclamation of Kosovo's independence, Serbian parallel administrative structures function in the north of Kosovo. The second complication was the pressure the interim administration has been under because of the open question of the future status of Kosovo. This meant that every decision and action of the interim administration was interpreted differently by the Serbian and Albanian side. The situation was worsened by the fact that both sides maintain their maximalist positions, so every act of the interim administration was interpreted from that position of zero-sum game.

Since its deployment the interim administration has chosen the approach of gradual process of handing over responsibilities to local actors in Kosovo.⁵⁸² For some time, the only quasi-governmental body that included Kosovo Albanians was the Kosovo Transnational Council, which was designed to provide the Special Representative with advice. According to Regulation No. 2000/1 on the Kosovo Joint Interim Administrative Structure, adopted in January 2000, the Interim Administrative Council was created. The Constitutional Framework for Provisional Self-

⁵⁸⁰ Security Council of the United Nations, Resolution 1244, S/RES/1244, para. 9

⁵⁸¹ *Ibid.*, para. 11

⁵⁸² New institutions in Kosovo were ethnically homogenous – “although it was official UNMIK policy, some parts of the mission made no effort to enforce the use of both the Serbian and Albanian languages. UNMIK tried to find Serbs to employ, but few would defy the order from Belgrade to have no dealings with what the Serbian government regarded as hostile occupation. As a result, some of the new institutions created in 1999 and 2000 were the most ethnically pure ever seen in Kosovo – the apartheid had not been dispelled, merely reversed, and sometimes strengthened in the process.” King and Mason, *ibid.*, p. 70-71

Government in Kosovo, adopted in May 2001, provided for strengthening of Kosovo institutions and the appointment of a President of the Assembly, a Prime Minister and a President of Kosovo, and it was followed by the first general elections to the Kosovo Assembly in November 2001.⁵⁸³ The Constitutional Framework provided for the development of a unique system to allocate governing responsibilities between the SRSG, Kosovo-wide layers of provisional self-government and municipalities.⁵⁸⁴ This regulation which functioned as the constitution for a considerable period of time marked the implicit acceptance of ethnic politics, as these structures, as well as political parties, remained ethnically homogenous. Perhaps it would have been better if another approach had been chosen – to transfer powers at the lower levels of government first. However, the principal aim, to replace the unofficial structures of governance developed previously by Kosovo Albanians, was fulfilled. This approach was only partially successful, since the greatest problem - the security of the minorities – remained unsolved. For this reason the interim administration has received strong criticism on several occasions, since this portion of Kosovo's population remains deprived of their basic rights and freedoms.⁵⁸⁵ They suffer large-

⁵⁸³ The Kosovo Assembly is the main organ of the provisional institutions of self-government, and legislative responsibilities have been progressively transferred from UNMIK to the Assembly since the elections. The Assembly also elects the president of Kosovo and the government which is led by the prime minister. However, if actions of the Assembly or other provisional institutions run counter to Resolution 1244, UNMIK can take appropriate measures, including dissolving the Assembly or not signing its laws. The Constitutional Framework also provides for protection mechanisms for minorities – 20 out of 120 seats of the Assembly are reserved for minority communities and at least two ministers must be from a non-majority community. United Nations Interim Administration Mission in Kosovo, Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, the 15th of May 2001, UNMIK/REG/2001/9; at the first general elections Rugova's LDK won the majority of votes and under the US pressure formed a grand coalition with Haradinaj's AAK and Thaci's PDK. Thaci's man Bajram Rexhepi was elected prime minister and Rugova president.

⁵⁸⁴ In order to ensure the protection of human rights, the Constitutional Framework required that the provisions on rights and freedoms set forth in a number of international human right treaties and instruments were directly applicable in Kosovo (ch.3). The responsibilities of the provisional institutions included economic policy, trade, administrative and operational customs, education, health, environmental policy, infrastructure, agriculture and forestry, tourism and good governance, human rights and equal opportunity (ch.5). These institutions also possessed specific duties in the fields of local administration, judicial affairs, mass media and emergency preparedness. The Constitutional Framework also stipulated certain 'reserved powers and responsibilities' of the SRSG. These included, among others: full authority to ensure that the rights and interests of communities were fully protected; final authority to set financial and policy parameters and approve the Kosovo Consolidated Budget and its auditing; dissolving the Assembly and calling for elections; monetary policy; control of the customs service; appointment, removal and disciplining of judges and prosecutors; assignment of international judges and prosecutors; international legal cooperation, conclusion and implementation of international agreements, and exercise of foreign affairs powers; authority over law enforcement institutions and correctional facilities; and control over the Kosovo Protection Corps. The SRSG also retained a general right to oversee the provisional institutions and to take appropriate measures whenever their actions were inconsistent with Resolution 1244 or the Framework.

⁵⁸⁵ Kosovo Serbs are endangered whenever they are out of their enclaves – for instance, on the 13th of February 2001 five buses carrying 250 Serb civilians, escorted by seven KFOR armoured personnel carriers, were attacked by the Albanian extremists. They detonated a bomb under the road, blowing up the lead bus and killing 11 people,

scale human rights deprivations regarding life, physical integrity, and with respect to their property.⁵⁸⁶

Outbursts of ethnically and politically motivated violence have been occurring regularly since 1999 to this day. The Washington Post wrote in 2000 that “with increasing frequency in recent weeks, ethnic Albanian fighters have raked Serbian villages and homesteads with gunfire and have assaulted Serbs on the way to work or to marketplaces in an apparent effort to drive the remaining Serbs out of Kosovo”⁵⁸⁷ and Tim Judah simultaneously reported for the BBC that “230,000 Serbs, Roma (Gypsies) and others have been ethnically cleansed or fled since the ending of Serbian rule... revenge attacks, ethnically motivated murders, bombings and arson have driven the vast majority of the remaining Kosovo Serbs and other non-Albanians in Kosovo into enclaves guarded by K-For troops.”⁵⁸⁸ In its March 2003 report Amnesty International stated: “almost four years after the end of the war in Kosovo, minority communities are still at risk of killings and assaults, mostly at the hands of the majority community in their area. On a daily basis, they are denied effective redress for acts of violence and other threats to their physical and mental integrity.”⁵⁸⁹ The culmination was the outbreak of violence in March 2004, directed against minority communities. Disagreements between UNMIK and PISG on the implementation of the Constitutional Framework (most notably on the dynamics of transferring authority to the PISG), coupled with economic depression and frustration about the lack of

including a two year old boy. Although the perpetrators of this attack were identified by KFOR almost immediately, none of them was convicted. Similarly, a year before, on the 2nd of February, a UNHCR bus with about forty Serbs on board was returning from Mitrovica, where people did all the shopping, banking, mailing and other errands impossible to do in their isolated enclaves, when a rocket was fired on the bus. The rocket hit the bus but did not explode, so only two people were killed by the impact. The bus contained mostly children and pensioners. The attackers were never caught. Available at <http://planken.org/balkans/chronology/kfor/2001-1>, last visited on the 7th of September 2012

⁵⁸⁶ See Ombudsmanperson Institution in Kosovo, Annual Reports, at

<http://www.ombudspersonkosovo.org/?id=2,0,151,156,e>, last visited on the 7th of September 2012

⁵⁸⁷ Suro, Roberto, *Kosovo Attacks Stir US Concern*, Washington Post, the 15th of March 2000, available at <http://pqasb.pqarchiver.com/washingtonpost/access/51045014.html?FMT=ABS&FMTS=ABS:FT&date=Mar+15%2C+2000&author=Roberto+Suro&pub=The+Washington+Post&edition=&startpage=A.01&desc=Kosovo+Attacks+Stir+U.S.+Concern%3B+Official+Says+NATO+May+Have+to+Fight+Ethnic+Albanians>, last visited on the 7th of September 2012

⁵⁸⁸ Judah, Tim, *Kosovo One Year On*, BBC News, the 16th of March 2000, available at

<http://news.bbc.co.uk/2/hi/europe/676196.stm>, last visited on the 7th of September 2012

⁵⁸⁹ Amnesty International, *Serbia and Montenegro (Kosovo/Kosova) – Minority Communities: Fundamental Rights Denied*, the 31st of March 2003, EUR 70/011/2003

progress towards resolving Kosovo's political status brought Kosovo close to social and political collapse during the March 2004 riots.⁵⁹⁰

Violence was directed against the Serb population, and hundreds of citizens (Kosovo minorities) were injured in mobilization that involved more than 50,000 people.⁵⁹¹ This "failure to protect"⁵⁹² by UNMIK and KFOR was the result of "an organized, widespread and targeted campaign"⁵⁹³ and it showed that ethnically motivated violence against minorities in Kosovo represents an unsolvable problem for international structures. According to the UN 31 people died in the violence, more than 950 injuries were reported among civilians and 184 injuries to police and military officers. Approximately 935 buildings (mostly Serb owned) were damaged or destroyed as well as 36 Orthodox churches, monasteries, and other religious sites. Approximately four thousand Serbs, Romas and Ashkalis were displaced due to the riots, and of the displaced peoples, 82 per cent were Serbs and 18 per cent were Roma and Ashkali.⁵⁹⁴

⁵⁹⁰ De Vrieze, Franklin (2004): *Kosovo After the March 2004 Crisis*, Helsinki Monitor Vol. 15, p. 147-149; Henry Perritt Jr. gives personal observations on Kosovo's road to independence, as he witnessed most of the important events in the 21st century Kosovo. Concerning the outbreak of the March riots, he wrote: "by midnight, rocks and Molotov cocktails were flying. They appeared to be aimed at the symbols of UN authority as much as at the Serbs. Almost every vehicle marked with the large black initials UN against an otherwise white paint job was destroyed by rocks, overturned by hand, or set on fire. Adjacent vehicles bearing the OSCE logo went unmolested. Kosovo Serbs were under attack in their home enclaves as well as in their Serbian Orthodox churches. Recently built religious and educational facilities dedicated to Kosovo Serbs were particular targets. Terrified, some Serbs tried to fight back, some sought police or KFOR protection, and some simply fled. Within and without Pristina, in villages and cities, UNMIK police were on the run as Albanian crowds increased their numbers and attacks. The UNMIK police, for the most part, abandoned their vehicles and ran away when confronted by rioters. NATO's KFOR, by contrast, took no particular notice of the rioting. Despite increasingly frantic calls from UN officials to NATO commanders, the riots were dismissed as simple spring exuberance. NATO officials calmly insisted that the night's events were not NATO concerns and could be handled easily by UNMIK and the Kosovo Police Service." Perritt, Henry Jr. (2010): *The Road to Independence for Kosovo*, Cambridge University Press, Cambridge, p. 8

⁵⁹¹ Human Rights Watch, Criminal Justice System Fails Victims, Human Rights News, the 30th of May 2006, available at <http://www.hrw.org/news/2006/05/29/kosovo-criminal-justice-system-fails-victims>, last visited on the 7th of September 2012

⁵⁹² Human Rights Watch, Failure to Protect: Anti-Minority Violence in Kosovo, March 2004, Human Rights Watch, Vol. 16, July 2004; the report stated that "both the spontaneous and organized elements behind the violence acted with a common purpose: to get rid of remaining ethnic Serb and other minority communities in Kosovo. Once the violence began, it swept throughout Kosovo with almost clinical precision: after two days of rioting, every single Serb, Roma, Ashkali home had been burned in most of the communities affected by the violence, but neighboring ethnic Albanian homes were left untouched." p. 28

⁵⁹³ Security Council of the United Nations, March Violence in Kosovo 'Huge Setback' to Stabilization, Reconciliation, SC Press Release, the 13th of April 2004, SC/8056

⁵⁹⁴ United Nations Peace Operations, Year in Review 2004: UNMIK – Holding Kosovo to High Standards, December 2004, available at <http://www.un.org/en/peacekeeping/publications/yir/2004/ch4.htm>, last visited on the 7th of September 2012; Human Rights Watch, Failure to Protect: Anti-Minority Violence in Kosovo; International Crisis Group, Collapse in Kosovo, the 22nd of April 2004, Balkans Report No. 155, Pristina/Belgrade/Brussels

There is little doubt that the riots were organized, that this “organized, widespread and targeted campaign” was orchestrated in order to draw the attention of the international community to Kosovo’s problems, especially the issue of the final status. Even Henry Perritt Jr., an apologet of Kosovo’s independence and the KLA admits that “prior to the March 2004 riots, there had been little incentive for international decision makers to rock the boat. Kosovo was calm, progress was obviously being made in developing local political capacity, and lots of money was being spent on physical reconstruction, studies and education. The status quo could continue for another ten years or more, many hoped. The March 2004 riots changed all that...Serious talk about final status would not have been possible without March 2004 riots. Jessen-Petersen believes that he himself could not have persuaded the Contact Group or UN Headquarters to put final status at the top of the agenda in, say 2001, or even as late as January 2004.”⁵⁹⁵ And so, “after five years as an international protectorate, with peacekeepers from 37 countries, thousands of experienced civilian engineers, police, jurists, economists and administrators, and billions of dollars in reconstruction aid, hopes that the world would turn Kosovo into a society in which all its members could live in security and dignity had gone up in smoke in a mere 48 hours.”⁵⁹⁶

The October 2004 national elections in Kosovo, boycotted by Kosovo Serbs, resulted in the LDK-AAK coalition, leaving Thaci’s PDK in opposition. Ramush Haradinaj became the prime minister, but he was charged of war crimes during the 1999 Kosovo war by the ICTY.⁵⁹⁷ While

⁵⁹⁵ Perritt, Henry Jr., *ibid.*, p. 79-8; a detailed account of the riots, attacks on minorities, their property and churches, as well as the reactions of KFOR troops is provided by King and Mason (2006): *Peace at Any Price: How the World Failed Kosovo*, p. 9-21

⁵⁹⁶ King and Mason, *ibid.*, p. 6; according to authors, “the victims of the March violence continued to suffer long after the riots had ended. Police often refused to stop their damaged homes from being looted. ‘A month after the riots,’ said one international officer who works with minority communities, ‘I visited a group of 80-year-old women with broken arms and legs and bruises still visible from the beatings they’d taken at the hands of the crowd. In another village, someone managed to steal the entire roof off a recently reconstructed property without the police noticing. While the politicians repeated their diplomatic words, in the towns and villages displaced Serbs are being given every signal that their return is not welcomed.’ President Rugova was asked by a young woman if he felt it was safe for Serbs to come to Pristina, the putative capital of the would-be Kosovo state. He said there was no reason for them to come, and that it was dangerous for them to be there. Serbs, he said, ‘have everything they need in Gracanica’ (a Serb enclave three miles from the city). During the violence, Rugova had pointedly refused to condemn the violence against Serbs.” *Ibid.*, p. 19

⁵⁹⁷ Although he was acquitted of all charges on the 3rd of April 2008, after an appeal, the ICTY had decided to partially repeat the process against Haradinaj, issuing on the 19th of June 2010 a warrant for his arrest. On the 21st of July 2010 Haradinaj was arrested again and transferred to the Netherlands for a repeat trial - according to Hague tribunal president Patrick Robinson the original trial had been marred by witness intimidation. The first indictments of the former KLA fighters by the ICTY were issued in February 2003, and some of the prominent KLA members were indicted. For instance, the ICTY has also held Fatmir Limaj in custody, accusing him of war crimes against

the international community remained silent about the final status issue, Kosovo Albanians were aggressively committed to their goal of independence. After the UN Secretary General requested an assessment of the conditions in Kosovo, a report was submitted by the Secretary General's Standards Review envoy Kai Eide.⁵⁹⁸ He recommended moving to the next phase of the political process although standards implementation had been uneven in Kosovo.⁵⁹⁹ On the 24th of October 2005 the Security Council endorsed "the Secretary General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244."⁶⁰⁰ The Security Council also endorsed the appointment of a special envoy by the Secretary General to lead the future status process, and welcomed the involvement of the Contact Group in supporting the special envoy.⁶⁰¹

On the 15th of November 2005 the UN Secretary General appointed Martti Ahtisaari as UN Special Envoy to start a political process to determine Kosovo's future status. The Office of the Special Envoy of the Secretary General of the United Nations for the Future Status Process for Kosovo (UNOSEK) was to promote stability, non-partition, multi-ethnicity, democracy and human rights. The Contact group was to support the UN-led process by identifying substantive status issues and providing technical expertise. Between November 2005 and March 2007

Serbs and Albanians regarding illegal imprisonment, cruel treatment, inhuman acts, and murders, but he, too, was subsequently acquitted due to lack of evidence. It was alleged that he had been a KLA commander responsible for the operation of the Lapušnik area and the Lapušnik KLA prison camp (about 25 km west of Pristina). After his acquittal on the 27th of September 2007, he reintegrated into the political life in Kosovo as Thaci's right hand. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgement, the 3rd of April 2008, IT-04-84-T; International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Fatmir Limaj, Haradin Bala and Isak Musliu, Judgement, the 27th of September 2007, IT-03-66-A
⁵⁹⁸ Security Council of the United Nations, A Comprehensive Review of the Situation in Kosovo, the 7th of October 2005, Annex to UN Doc. S/2005/635; Kai Eide has stated in his report that the prospect of multiethnic society is grim, that harassment occurs frequently and that the return process has halted. Many believed that the central part of his report supported actually deferring final status determination and that his recommendation at the end of the report to move to the next phase of the political process was added under US pressure.

⁵⁹⁹ "Standards before status" policy refers to certain requirements that must be fulfilled before the final status discussion can begin. This policy was concretized in December 2003 with the publication of the "Standards for Kosovo" and the "Kosovo Standards Implementation Plan" of the 31st of March 2004. The eight standards are: functioning democratic institutions, rule of law, freedom of movement, returns and reintegration, a market economy, property rights, dialogue with Belgrade and Kosovo Protection Corps. United Nations Interim Administration Mission in Kosovo, Standards for Kosovo, Press Release, the 10th of December 2003, UNMIK/PR/1078; United Nations Interim Administration Mission in Kosovo, Kosovo Standards Implementation Plan, the 31st of March 2004, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2004/613

⁶⁰⁰ Security Council of the United Nations, Statement by the President of the Security Council, the 24th of October, 2005, UN Doc. S/PRST/2005/51

⁶⁰¹ *Ibid.*

UNOSEK organized a series of talks with Belgrade and Pristina (usually using the form of shuttle diplomacy), including direct talks between Serbian and Kosovo representatives under the auspices of Martti Ahtisaari. The overall framework for the future status, as set by the Contact Group in January 2006, contained ‘three no’s’: no return to the status Kosovo had until 1999, no union with any other country, and no partition. Although UNOSEC insisted that the four negotiating tracks (decentralization, cultural heritage and holy sites, standards, minority rights and returns, economy and property issues) revolve around more or less technical issues that require a solution regardless of the resolution of Kosovo’s international legal status, it was clear that a number of solutions were envisaged for a sovereign state, and in most areas there was no progress at all. No compromise could have been reached on the issue of the final status, as Kosovo demanded full independence while Serbia proposed various forms of autonomy under Serbia’s sovereignty (Serbia’s platform was “more than autonomy, but less than independence”), and this was confirmed during the direct talks on the 24th of July 2006 between delegations led by president Tadic and prime minister Kostunica of Serbia and Fatmir Sejdiu of Kosovo (he replaced Rugova after his death in January 2006). Finally, the Contact Group encouraged Ahtisaari to prepare a comprehensive proposal for the status settlement, hoping this would motivate the parties to move the negotiating process forward.⁶⁰²

The comprehensive proposal was ready by the end of September, but its publication was delayed pending a series of elections to be held in Serbia. On the 2nd of February 2007 the draft settlement was shared with the parties, allowing them to negotiate and offer suggestions on all parts of the proposal. Serbia, assured by Russia that the proposal would not be passed by the Security Council unless Belgrade signed it, rejected the comprehensive package.⁶⁰³ Belgrade, instead, offered its own version of the proposal, filled with deletions and amendments, but also sought some changes to the specific provisions in the package. A final high level meeting among

⁶⁰² Contact Group Ministerial Statement, the 20th of September 2006, available at http://www.unosek.org/docref/2006-09-20_-_CG%20_Ministerial_Statement_New%20_York.pdf, last visited on the 7th of September 2012

⁶⁰³ The Serbian Parliament adopted a resolution rejecting the comprehensive proposal: “the National Assembly of the Republic of Serbia concludes that the Proposal of UN Secretary General’s Special Envoy Martti Ahtisaari breaches the fundamental principles of international law since it does not take into consideration the sovereignty and territorial integrity of the Republic of Serbia in relation to Kosovo-Metohija.” National Assembly of the Republic of Serbia, Resolution on UN Special Envoy Martti Ahtisaari’s “Comprehensive Proposal for the Kosovo Status Settlement” and continuation of negotiations on the future status of Kosovo-Metohija, the 14th of February 2007, Official Gazette of the Republic of Serbia No. 56/2007

the parties was held in March to review the final version, but Serbia's president again rejected the package because it failed to reaffirm the sovereignty of Serbia over Kosovo. On the 26th of March, the Secretary General has submitted Ahtisaari's report to the Security Council, and recommended that Kosovo should become independent, and supervised for an initial period by the international community.⁶⁰⁴ The report included the Comprehensive Proposal for the Kosovo Settlement, which defined the legal framework of Kosovo's supervised independence, providing detailed measures to ensure the promotion and protection of the rights of communities and their members, effective decentralization of government, protection of religious and cultural heritage, returns and protection of property rights, economy, justice and security and the structure of the international presence.⁶⁰⁵ Because it was clear that Russia would veto a resolution which endorses the Settlement, as it implied statehood for Kosovo and because it was rejected by Serbia, the draft resolution on Kosovo was withdrawn on the 20th of July 2007.

The Troika took over the process in August 2007 after failed attempts to pass a Security Council resolution on the basis of Ahtisaari's Plan. The plan caused a great debate, but it was opposed by Russia, China, India and some of the EU member states, so it was not put to a vote, and the Security Council was at a complete impasse.⁶⁰⁶ The Kosovo Troika (Ambassador Wolfgang Ischinger of Germany for the EU, Alexander Botsan-Harchenko of Russia and Frank Wiesner of

⁶⁰⁴ Security Council of the United Nations, Letter from the Secretary General Addressed to the President of the Security Council, enclosure: Report of the Special Envoy of the Secretary General on Kosovo's Future Status, the 26th of March 2007, UN Doc. S/2007/168

⁶⁰⁵ *Ibid.*; UNOSEK's Comprehensive Proposal designated the International Civilian Representative (ICR) as the final authority on questions of interpretation of the Settlement's civilian components. The ICR could annul laws or decisions adopted by Kosovo authorities and sanction or remove officials from public office. The proposal also contained provisions defining the powers of the EU Security and Defence Policy Mission EULEX that was initially meant to operate under the authority of the ICR (which is also EU special representative), while KFOR would remain as the International Military Presence. Overall, the ICR mandate seemed to provide similar, almost unrestrained powers that the Office of the High Representative in Bosnia has. However, this international involvement was to be limited in time. The package made it clear that Kosovo would have all the powers of governance that attach to statehood, covering the legislative, executive and judicial branches, thereby transferring the governing authorities from UNMIK to the Kosovo authorities. Further on, proposal endowed Kosovo with the capacity to enter into contractual relations with other subjects of international law, and it provided no restrictions as to the conduct of foreign affairs. It also envisaged the right to obtain Kosovo citizenship and the right to have a flag, seal and anthem.

⁶⁰⁶ In July Belgium, France, Germany, Italy, the UK and the US put forward a formal draft resolution which did not formally endorse the comprehensive proposal, but it did not refer to the territorial integrity of Serbia either, stating that the status quo in Kosovo would not be sustainable. Russia and Serbia perceived this as a trap, and Russia opposed the draft. Security Council of the United Nations, Belgium, France, Germany, Italy, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, the 17th of July 2007, UN Doc. S/2007/437

the US), appointed by the Contact Group in its July 2007 meeting, provided for six additional occasions for face-to-face negotiations. During these sessions, the Troika emphasized that it was not making any proposals on its own and that it had no intention of imposing a solution, but only ensuring that all options were being examined by the parties.⁶⁰⁷ This process was not related to the Security Council, and although Russia was a part of it, it did not have a veto. The Secretary General provided his blessing on the 1st of August, welcoming the Troika initiative, and required a report of the Contact Group efforts on the 10th of December 2007, after 120 days. The Troika-led futile negotiations eventually failed by December 2007,⁶⁰⁸ and thus ended the two years of negotiations characterized by the intensified use of informal groups that had conducted crisis management until the process came to a deadlock. UNMIK allowed the Kosovo elections in November 2007, and this time Thaci's PDK got the largest number of votes, followed by the LDK and Haradinaj's AAK. The PDK and the LDK announced a coalition government with Thaci as a prime minister and the LDK leader Sejdiu continuing as a president, while Haradinaj was trialed for war crimes at The Hague.

6 *Independence – the end of the road?*

The unilateral declaration of independence by the Assembly of Kosovo on the 17th of February 2008 was not a surprising event. It is an interesting document, in which the influence of Western politicians and lawyers is obvious. It was designed to directly respond to a number of concerns expressed by states and international observers. In its sixth preambular paragraph the declaration claims that “Kosovo is a special case arising from Yugoslavia’s non-consensual break-up and is not a precedent for any other situation”. The Assembly accepted on behalf of Kosovo all obligations contained in Ahtisaari’s proposal. Kosovo welcomed the international community’s continued support to Kosovo’s democratic development through international presences established on the basis of Resolution 1244. It also invited an international civilian presence to supervise the implementation of the Kosovo Status Settlement, an EU-led Rule of Law Mission and NATO to retain the leadership role of the international military presence in Kosovo and

⁶⁰⁷ Security Council of the United Nations, Letter from the Secretary-General to the President of the Security Council, enclosure: Report of the European Union/United States/Russian Federation Troika on Kosovo, the 10th of December 2007, UN Doc. S/2007/723

⁶⁰⁸ The Troika concluded: “after 120 days of intensive negotiations... the parties were unable to reach an agreement on Kosovo’s status. Neither side was willing to yield on the basic question of sovereignty.” *Ibid.*

implement responsibilities assigned to it under Resolution 1244 and the Settlement. Desire to establish good relations with all neighbours, including Serbia, was also expressed. The declaration stated in Article 12 that “we hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this declaration, including, especially the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244.”⁶⁰⁹ Clearly, since the Ahtisaari Plan was not endorsed by the Security Council, a compromise was made with Kosovo leaders – they would get recognition and financial support, as long as they incorporated the main provisions of the plan into their law.

In the Security Council meeting on the 18th of February President Tadic expressed Serbia’s formal opposition to Kosovo’s unilateral declaration of independence, calling it illegal and a flagrant violation of Resolution 1244. The Secretary General noted that the declaration confirmed Kosovo’s full acceptance of the obligations contained in the Comprehensive Settlement Proposal as well as continued adherence to Resolution 1244. He also noted a Letter from the EU High Representative for Common Foreign and Security Policy, stating that the EU would deploy a rule of law mission within the framework provided by Resolution 1244. The Secretary General confirmed that, pending guidance from the Council, UNMIK would continue to exercise its mandate under Resolution 1244.⁶¹⁰ The Council of the EU in its Conclusions on Kosovo noted that EU member states “will decide in accordance with national practice and international law, on their relations with Kosovo.”⁶¹¹

The unilateral declaration of independence added new legal complexities, since Kosovo was still under the administration of the UN pursuant to Resolution 1244. The declaration was the ultimate proof of the failure of the so-called “standards before status” policy of UNMIK, applied

⁶⁰⁹ Kosovo Declaration of Independence, the 17th of February 2008, available at <http://www.unhcr.org/refworld/docid/47d685632.html>, last visited on the 7th of September 2012

⁶¹⁰ Security Council of the United Nations, Verbatim Records of the 5839th Meeting, the 18th of February 2008, UN Doc. S/PV/5839

⁶¹¹ Council of the European Union, Council Conclusions on Kosovo, 2851st Council meeting, the 18th of February 2009, 6496/08 (Presse 41)

since 2003.⁶¹² Immediately before the declaration, on the 16th of February the EU established the EU Special Representative as Head of the International Civilian Office, and an EU Rule of Law Mission in Kosovo (EULEX), with the task of assisting the Kosovo authorities in establishing a functioning rule of law system. On the 28th of February the EU special representative Pieter Faith was appointed as the International Civilian Representative for Kosovo, exercising the functions and powers outlined in the Ahtisaari Plan. This was envisaged in the Comprehensive Proposal but, due to the lack of Security Council approval, the legality of the two missions is in question. To aggravate this complexity, a plan was issued on the 12th of June 2008 by the UN Secretary General to place EULEX under the umbrella of Resolution 1244 and to configure UNMIK in such a manner that would allow for a gradual transfer of authority from UNMIK to EULEX.⁶¹³

Since the Security Council was not able to order UNMIK to transfer its powers to EULEX, UNMIK was forced to retain executive and legislative powers for an indefinite period of time. When EULEX finally began to deploy in early 2009, it was under a ‘six-point’ plan that

⁶¹² King and Mason, authors who have served in UNMIK, concluded that most of the standards remain unfulfilled: “the EU was supposed to create the conditions for a modern liberal economy; six years on, two thirds of the population had no proper employment, most people still lived off remittances from relatives abroad and most food was imported, despite Kosovo’s large agricultural potential. The UN mission was supposed to build up the rule of law, but most crimes went unprosecuted, local judicial capacity was woefully underdeveloped and organized crime remained endemic. Only a few thousand displaced people returned to their homes and they lived fearfully in isolated enclaves; rapprochement between the two main ethnic groups has been practically non-existent. Instead of turning Kosovo into a pluralist democracy subject to the rule of law, the international community merely presided over a reversal of positions between Serbs and Albanians.” King and Mason, *ibid.*, p. 261

⁶¹³ The EULEX mission has been established, among others, to:

- (a) Monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;
- (b) Ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities;
- (c) Help to ensure that all Kosovo rule of law services, including a customs service, are free from political interference;
- (d) Ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;
- (e) Contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organized crime,
- (f) Contribute to the fight against corruption, fraud and financial crime.

Council of the European Union, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, published in Official Journal of the European Union Vol. 42, p. 92, the 16th of February 2008, Article 3

characterized the deployment as ‘status neutral’ and according to this plan, UNMIK would formally oversee EULEX operations with respect to police, customs, justice, transportation and infrastructure, boundaries and Serbian patrimony.⁶¹⁴ The OSCE would remain in place, addressing the promotion of democratic values and the protection of the interests of communities. NATO would continue to fulfill its existing security mandate. In practice, it was clear that most of functions performed by UNMIK would devolve on the EU mission, with the UN retaining a role focused mainly on reporting and monitoring, and facilitating dialogue between Kosovo and Belgrade. The government of Kosovo formally rejected this plan but did nothing to block it. At the same time, the Serb-populated northern Kosovo is not under the effective control of Pristina. The Kosovo Serbs, after the unilateral declaration of independence, lost almost every hope that their situation and interethnic relations will improve – while in a pool conducted in June 2007 more than 90 per cent of Kosovo Serbs believed that interethnic relations were improving, only 3 per cent of Kosovo Serbs believed so at the end of 2008, stating that the main problem was the attitude of Kosovo Albanian leaders, followed by insufficient efforts to promote integration.⁶¹⁵ On the other hand, 78 per cent of Kosovo Albanians believed that interethnic relations were improving, and 89 per cent were satisfied or very satisfied about how independence was declared, compared with 92 per cent of Kosovo Serbs who were dissatisfied or very dissatisfied.⁶¹⁶

The text of the Kosovo constitution was made public on the 19th of February 2008, after the unilateral declaration of independence. The constitutional drafting was carried out by a group of twenty-one representatives, backed up by a team of advisers from the international implementation agencies present in Kosovo, and tightly managed by the US mission in Pristina.⁶¹⁷ By the 2nd of April the final version of the constitution was certified by the ICR and the Kosovo government for submission to the Kosovo Assembly, which adopted the text without

⁶¹⁴ Security Council of the United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, the 24th of November 2008, UN Doc. S/2008/692; Secretary-General stated that he expects “EULEX to move forward with its deployment in the coming period and to assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella headed by my Special Representative, and in accordance with resolution 1244 (1999). UNMIK has been working closely with EULEX on technical arrangements designed to facilitate its deployment under resolution 1244 (1999).” *Ibid.*, p. 7

⁶¹⁵ United Nations Development Programme, Fast Facts, Early Warning Report No. 23, December 2008, p. 33

⁶¹⁶ *Ibid.*, p. 21

⁶¹⁷ Weller, Marc, *ibid.*, p. 258

modification on the 9th of April 2008.⁶¹⁸ The Constitution took effect on the 15th of June. In order to show that it is fully compliant with the Ahtisaari Plan, the Constitution restated verbatim the key commitments of the Comprehensive Proposal that were mandatory. Kosovo is a democratic state based on the equality of its citizens and the rule of law. The state is indivisible and has no territorial claims, nor shall seek union with any state or part of any state, as required by the Ahtisaari document. International law applies directly, except where not self-executing.⁶¹⁹ The constitution also states that the ICR shall be the final authority regarding the interpretation of the Comprehensive Proposal.⁶²⁰ Unusual characteristics of the Constitution are very extensive provisions on human and minority rights, and the fact that many elements of the Constitutional Framework intended for the period of the UN administration were simply transferred to the Constitution. The minority rights system presents a complex design. First, there is the Ahtisaari document, which contains provision on communities, non-discrimination and full equality in its General Principles, and a detailed listing of commitments in Annex 2. The next layer of protection consists of international conventions rendered directly applicable in Kosovo by virtue of the Ahtisaari document and the Constitution. Then there is the constitution itself, which in addition to a wide catalogue of human rights and fundamental freedoms, contains a chapter on community rights of political representation.⁶²¹ Since there was a significant element of continuity between the Constitutional Framework and the new constitution, the political system has continued to function more or less as before. The Ahtisaari Plan was implemented in the south of Kosovo, including several municipalities with non-Albanian majorities. The north, however, remains outside Kosovo institutions and international civilian authorities.

⁶¹⁸ Constitution of the Republic of Kosovo, the 9th of April 2008, available at <http://www.unhcr.org/refworld/docid/4ae969d32.html>, last visited on the 7th of September 2012

⁶¹⁹ *Ibid.*, Art. 19

⁶²⁰ *Ibid.*, Art. 147; although, according to Article 16, the constitution is the highest legal act of the republic, the Ahtisaari document is in fact the highest legal authority in Kosovo. Article 143 is clear:

1. All authorities in the republic of Kosovo shall abide by all of the Republic of Kosovo's obligations under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. They shall take all necessary action for their implementation.

2. The provisions of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.

3. The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws and other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail.

⁶²¹ Weller, Marc, *ibid.*, p. 253

The institutions in Kosovo are still young and weak, public administration and judicial system are inefficient and corrupt, while inter-ethnic dialogue is practically non-existent, since Serbs live in segregated enclaves (one can even say modern ghettos), completely isolated. The economic situation is also discouraging. Kosovo was the poorest region in Yugoslavia, which had functioned with the help of large amounts of money that had poured into the province for decades from other, richer parts of Yugoslavia. After its economy had been completely ruined during the 1990s, it experienced a temporary grow as a result of the influx of tens of thousands of foreigners and huge amount of international aid (according to the IMF, five billion euros have been spent in Kosovo by 2005).⁶²² Today, “with only 54 percent of the working age population economically active, Kosovo has the lowest labour force participation rate in Europe. Subsistence agriculture is still the largest employer; 85 percent of food produced in Kosovo never makes it to the market. 45 percent of the population in Kosovo lives below the poverty line, on less than €1.4 a day. Registered unemployment has been increasing relentlessly and an additional 30,000 youngsters press onto the labour market every year. Economic growth in the range of 3.1 percent, as forecast by the Ministry of Finance and Economy is nowhere near enough to begin absorbing the existing unemployed.”⁶²³

Furthermore, the Ahrisaari Plan and the ICO proved to be lifeless,⁶²⁴ and EULEX has no credibility with Kosovo Serbs, as it supports Kosovo Albanians’ efforts to push their institutions into the north, despite its claims that it is a neutral, technical mission.⁶²⁵ Kosovo remains deeply divided, and the prospects of it becoming a functional multiethnic society are pretty grim. The beginning of 2011 was not very promising for Kosovo – after the election with so much fraud that another election had to be held in order to sort it out, a Council of Europe report charged Kosovo’s top leadership, including former leader of the KLA Hashim Thaci, of being involved in organ and people trafficking in 1999-2000.⁶²⁶ Another report followed, criticizing Kosovo for its

⁶²² Judah, Tim (2008): *Kosovo: What Everyone Needs to Know*, p. 105

⁶²³ UNICEF, *Getting to Lisbon: Accessing Vocational Training Needs and Job Creation Opportunities for Rural Women*, Kosovar Stability Initiative (IKS), Prishtina, April 2008, p. 14.

⁶²⁴ The Secretary-General had to concede: “while my Special Representative is still formally vested with executive authority under resolution 1244 (1999), he is unable to enforce this authority.” Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692, p. 7

⁶²⁵ For instance, EULEX supported the so-called “Plan for North Kosovo” (drafted by Piter Feith’s office) to introduce Kosovo-Albanian customs, courts and police into the north while pushing aside the UN.

⁶²⁶ Marty’s report, entitled *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, was adopted by the Committee on Legal Affairs and Human Rights in mid-December 2010. Aside from the allegations

failure to protect witnesses of war crimes.⁶²⁷ The endemic levels of organized crime in Kosovo and the involvement of the former KLA leaders were known to any person informed about the Balkan affairs, but this was the first public and official reaction to these problems. Council of Europe's special rapporteur Dick Marty also questions the role of the international community in Kosovo prior to, during and since the NATO bombing, disputing the humanitarian character of the intervention, as the interests of stability were placed before those of justice. He asserts that the international community has further undermined the efforts to strengthen the rule of law in Kosovo by providing de facto impunity from criminal investigation. In return, Kosovo's leadership has sought to discredit the Swiss investigator who authored the trafficking report by labeling it as Nazi-like propaganda, and Thaci has vowed to publicly reveal the names of those who had cooperated with Marty. Marty did not trust EULEX to be able to protect his witnesses and the Human Rights Watch agreed, as it called for an independent prosecutor and an effective witness protection scheme. EULEX, as expected, failed to pursue allegations in Marty's report on prime minister Thaci's and other senior KLA members' involvement in organ trafficking, and blamed Marty for not passing on the names of witnesses.⁶²⁸

of "disappearances, organ trafficking, corruption and collusion between organized criminal groups and political circles in Kosovo", one of the most damning indictments is Marty's assertion that "the international organizations in place in Kosovo favoured a pragmatic political approach, taking the view that they needed to promote short-term stability at any price, thereby sacrificing some important principles of justice". The international community was accused of complicity in down-playing and even ignoring suspected crimes by the KLA. Council of Europe, Committee on Legal Affairs and Human Rights, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, report by Dick Marty, the 12th of December 2010, AS/Jur (2010) 46

⁶²⁷ The Council of Europe report entitled "The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans" is set to shed further light on the challenges facing any potential criminal investigation. The author of the report, Jean Charles Gardetto, notes a lack of effective witness protection and points to cases where "many potential witnesses in Kosovo claim to be perceived as traitors if they testify" and "witnesses who are on the point of testifying [are] being assassinated". Such witness intimidation, as Gardetto notes, makes the role of the international community even more vital in order to ensure that the investigation and prosecution of cases remain free from political and other forms of interference. Council of Europe, Committee on Legal Affairs and Human Rights, The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans, report by Jean Charles Gardetto, the 12th of January 2011, Doc. 12440 rev

⁶²⁸ Gerard Gallucci, a retired US diplomat and UN peacekeeper that served as UN Regional Representative in Mitrovica, Kosovo from July 2005 until October 2008 wrote: "it seems certain that someone was protecting the Kosovo leadership from being investigated. Some cite reports that the US pressured UNMIK not to investigate charges into Thaci's leadership... It is no secret that the US judged Thaci to be key to maintaining control over the Kosovo Albanians. Keeping him as a trusted and cooperative prime minister became in itself an important element of US policy. In return for him keeping the lid on Albanian irredentism and for accepting the form – if not the substance – of the Ahtisaari Plan, Thaci received complete US backing both for him and for Pristina's claim of independence and 'territorial integrity' (meaning control of the north). Thus the US followed the path it has often used in backing the likes of the Shah of Iran, Mobutu, Pinochet, Saddam (before 9/11), Ben Ali, Mubarak and Gaddafi – swallow any reservations about the behavior of 'your man' as long as he remains 'your man'." Gallucci, Gerard (2011): *Will the US Stop Digging Its Kosovo Hole?* Transconflict Review, the 5th of April 2011, available at www.transconflict.com, last visited on the 7th of September 2012

On the 8th of March 2011, under the EU's negotiator Robert Cooper, talks between representatives of Belgrade and Pristina commenced in Brussels. The topics on the agenda were supposed to revolve around resolving the daily problems of citizens regarding the freedom of movement, the sharing of civil registries of births, deaths and marriages and electricity supplies. The negotiations resulted in an agreement on freedom of movement and the sharing of land registration documents. The next round of negotiations that was set to take place in July 2011 was, however, postponed until September as a result of a disagreement between Serbs and Albanians on customs seals. The Kosovo government deployed Special Forces to the administrative gates between Serbia and northern Kosovo in an attempt to gain control over them in July, supported by KFOR and EULEX.⁶²⁹ Many Serbs protested by going to the streets and border posts, sparking clashes with Kosovo Albanian Special Forces troops which resulted in the death of one police officer and with hooligans burning down the border post at Jarinje. A compromise on customs seals was agreed upon by Kosovo and Serbia in the beginning of September, with Belgrade making clear that this agreement does not mean it will accept Kosovo customs at the northern gates. On the 16th of September the conflict was renewed, after the Kosovo Police, EULEX and NATO units airlifted troops from Kosovo-proper to the two border posts in an effort to re-establish control over the north, and that was followed by the construction of dozens of barricades by local Serbs, thereby isolating the troops at the border crossings. A violent confrontation took place on the 27th of September, when KFOR and EULEX used force, including tear gas, rubber bullets and live fire, in order to impose Pristina's political blockade on the northern Serbs.⁶³⁰ In October and November further clashes of Kosovo Serbs with KFOR and EULEX occurred, when KFOR attempted to remove the barricades in the north. Under EU pressure the Belgrade – Pristina dialogue continued and in the beginning of December Serbia and Kosovo reached the border management agreement, deciding to jointly manage their border

⁶²⁹ The week prior to the incident Kosovo banned cross-border trade with Serbia.

⁶³⁰ The EULEX report on the operation called "Reinstating Gate 1" clearly shows that events started moving toward confrontation only when KFOR sought to close an alternate road used by Serbs to circumvent the barricaded official crossing. NATO used force – tear gas and bulldozers – to remove a barricade placed by the local Serbs in Jarinje (Gate 1), subsequently using more force, rubber bullets and live fire to chase away protesting Serbs who were throwing rocks at them. The EULEX report available at <http://www.transconflict.com/2011/09/kosovo-kfor-eulex-violence-and-a-cover-up-289/>, last visited on the 7th of September 2012

crossings and the removal of barricades followed.⁶³¹ In February 2012, four northern Serb-dominated regions held a non-binding referendum to ask if the institutions of Kosovo should be recognized and the vast majority of voters voted against accepting the Kosovo institutions.⁶³² However, the dialogue continued and Belgrade and Pristina agreed on a formula for Kosovo's representation in regional organizations (an asterisk next to the word "Kosovo" notes a footnote that includes the mention of Resolution 1244 and the ICJ opinion). On the 10th of September the International Steering Group for Kosovo officially proclaimed the end of Kosovo's "supervised independence" by the ICO,⁶³³ after the Kosovo assembly had adopted 22 amendments to the Kosovo Constitution on the 7th of September, coupled with a law extending EULEX's mandate until mid-2014. Besides the EU mission, KFOR will continue to operate in Kosovo.

7 *Is Kosovo an example of remedial secession?*

Although there is no explicit and clear basis on which Kosovo has built its claim to statehood and the word 'self-determination' was carefully avoided, the Kosovo conflict is proving to be an ideal test-case for remedial secession theory according to many authors.⁶³⁴ An important question is whether Kosovo is a self-determination unit. If the conclusion is that Kosovo is a legitimate unit of self-determination, implications are serious – self-determination can be seen as evolving in such a manner that it can be invoked by territorially concentrated ethnic groups within states. A claim to self-determination of Kosovo Albanians depends, among other things, on whether they constitute a people under international law, and the main arguments of the proponents of independence are that they are a territorially concentrated and distinct ethnic group, and that they were subject to grave and enduring human rights violations. The

⁶³¹ *Serbia and Kosovo Reach Border Management Agreement*, BBC News, the 3rd of December 2011, available at <http://www.bbc.co.uk/news/world-europe-16014188>, last visited on the 7th of September 2012; Furthermore, Serbian president Boris Tadic proposed a four-point plan for Kosovo in January 2012 (the four points the plan relied on are: a special status for northern Kosovo, protection for the Serbs south of the Ibar, protection for Serb holy sites and cultural heritage and protection for the Serb property in Kosovo). *Kosovo Serbs Want Belgrade-Pristina Deals Scrapped*, B92, the 11th of July 2012, available at http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=07&dd=11&nav_id=81212, last visited on the 7th of September 2012

⁶³² Official Belgrade was against the referendum in northern Kosovo, but the local authorities did not comply with the request by top state officials. 99.74 per cent of residents who turned out to vote in four municipalities in northern Kosovo voted against accepting the Kosovo institutions. The turnout was 75.29 per cent, with 26,727 out of 35,500 registered citizens casting their ballots.

⁶³³ *Kosovo Declared 'Fully Independent'*, BBC News, the 10th of September 2012, available at <http://www.bbc.co.uk/news/world-europe-19550809>, last visited on the 13th of September 2012

⁶³⁴ Tancredi, Antonello, *ibid.*, p. 187

international legal instruments analyzed in Part I show how the right to self-determination evolved over decades, and the question is whether it has evolved in such a manner that groups within independent states possess this right. According to the documents such as the UN Charter, the 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples and the 1966 International Covenant for Economic, Social and Cultural Rights and International Covenant for Civil and Political Rights, the right to self-determination undoubtedly belongs to peoples under colonial domination and to the entire population of a state, but is highly unlikely that Kosovo Albanians could be regarded as a 'people' under any of these documents. However, some support for their claims could be derived from the 1970 Friendly Relations Declaration, or, to be more precise, the Declaration's safeguard clause.

It was shown that the states that conduct themselves in compliance with the principle of equal rights and self-determination of peoples and possess a government that represents the whole people are protected by the principle of territorial integrity, but peoples within existing states that are treated in a discriminatory fashion by a government that does not properly represent them can claim self-determination without fearing that the principle of the territorial integrity will defeat their claim. This is a widely accepted interpretation of the Declaration's safeguard clause, and it suggests that a group which is only one segment of the state's entire population may be regarded as entitled to self-determination. This criterion of representation was, according to common understanding, not satisfied in Kosovo's case. Kosovo can be interpreted as a case where a distinct minority group, after being stripped of its autonomy and subjected to grave violations of human rights, seeks to exercise its right to external self-determination within a certain territory in which it forms the majority.⁶³⁵ Then again, although this interpretation opens the door to

⁶³⁵ Thomas Grant concludes that if the constitutional order in the state prevents a group from participating in the government of that state, "the group, in extreme circumstances of a denial of self-determination in which peaceful change within the existing State has proved unattainable, may exercise self-determination by breaking off and establishing its own State. This is the possibility of 'remedial secession.' It is an exceptional situation, and it rarely arises. Kosovo would appear to be an example – and the slowness and complexity entailed in its eventual separation from Serbia goes to illustrate the presumption against independence as a remedy. The threshold condition is that the incumbent State has failed to satisfy its obligations to a group, and the best efforts of the group to secure its right to participate on a basis of equality and fairness in the government of the State are to no avail. When those efforts are met with even more serious violations of the group's rights, then self-determination is perhaps realized only by breaking away and establishing a new State. Independence remains the exceptional remedy, and to assert it a group must overcome the presumption, vigorous in all events, that favours preserving the territorial integrity of existing States." Grant, Thomas (2009): *Regulating the Creation of States: From Decolonization to Secession*, Journal of International Law and International Relations, Vol. 5, p. 29-30

remedial secession for Kosovo, it has also been shown in Part I that state practice does not confirm the right of secession to ethnic groups or minorities that are victims of severe human rights violations. On the contrary – states have repeatedly supported the territorial integrity of the parent state, even when it has trampled on the human rights of its citizens, as the case of Chechnya (and Kosovo during the 1990s) shows. However, it seems that the state practice is changing in this aspect, if numerous recognitions of Kosovo's independence can be interpreted as the acknowledgment of principles which uphold remedial secession, despite the fact that these states characterize Kosovo as a unique case. Still, this conclusion will have to wait until the majority of states recognize Kosovo, because the international community remains divided on the question of Kosovo's statehood. This means that currently there is insufficient state practice for ethnic groups to be able to legally justify their separatist goals, even on remedial grounds.

Relevant state practice shows that the international community supports the principle of territorial integrity of states. Even during Yugoslavia's break-up, international community's initial response had been to uphold the territorial integrity of the state until serious human rights violations and escalating violence showed that this was not possible. Then the shift was made to recognize new states which complied with the conditions specified in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. However, at the time, it was decided that the borders of the sub-unit within a federation were not to be modified and the groups within the republics had no right to external self-determination. In this manner external self-determination was denied to Republika Srpska, but the right of self-determination at the internal level was not. The same principle applied to the autonomous province of Kosovo. Kosovo was not a constituent republic and the right to secede for Kosovo Albanians could not have been inferred from the state practice during the break-up of Yugoslavia. The international community rejected the possibility of Kosovo's independence, and that implies that Kosovo Albanians did not have a right to self-determination at the time. Although under the 1970 Declaration they can claim to be a people entitled to self-determination because of the government's mistreatment due to their ethnicity, and even though the international community recognized that Kosovo Albanians were subject to considerable repression and exclusion from government, it continued to uphold the territorial integrity of Yugoslavia.

However, as Kosovo's case demonstrated, the status of a territory can change over time, but the Agreement after the NATO campaign was only an interim measure and many authors argue that it did not preclude independence for Kosovo Albanians in the future. So the question to be posed next is whether there was a sufficient change in circumstances that can serve as a basis for Kosovo's declaration of independence and its recognition by a large part of the international community. Or, to put it differently, "does the fact that rights have been infringed in the past mean that independence is necessary to guarantee rights in the future?"⁶³⁶ The human rights violations immediately before and during the NATO bombing could be characterized as severe and massive, thereby reaching a sufficient level to satisfy the criteria that remedial theory of secession poses. The abolition of autonomy was followed by the destruction of the entire social and healthcare system – Kosovo Albanian schools, hospitals, media, libraries were closed down and the only official language in Kosovo was Serbian. The UN Committee on the Elimination of Racial Discrimination expressed alarm over the worsening situation in Kosovo in 1993, and pointed out the enactment of discriminatory laws, the closing of minority schools, the mass dismissal of Albanians from their jobs and the imposition of restrictions on the use of the Albanian language, concluding that Albanians in Kosovo did not participate in public life.⁶³⁷ Situation deteriorated further, and while all citizens of Serbia suffered human rights violations under the rule of Milosevic, minorities were especially targeted. These violations included police brutality against Kosovo Albanians, the deaths resulting from such brutality, arbitrary searches, seizures, arrests, forced evictions, torture, ill-treatment of detainees, discrimination in the administration of justice, including trials of Kosovo Albanian former policemen, discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians and confiscation and expropriation of their property.⁶³⁸ And, as shown above, during and immediately after NATO's bombing the situation worsened,⁶³⁹ and both sides to the conflict attempted to create ethnically pure regions. The

⁶³⁶ Pavkovic and Radan (2007): *Creating New States: Theory and Practice of Secession*, Ashgate, Aldershot, p. 95

⁶³⁷ Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations of the Committee, 43rd Session, August 1993, UN Doc. CERD/A/48/18

⁶³⁸ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 47th Session: Resolution 1995/10, UN Doc. E/CN.4/Sub.2/1995/51

⁶³⁹ The commitment of crimes against humanity, violations of the laws or customs of war, deportation, forcible transfer and persecution on ethnic grounds by the Yugoslav army and Serbian MUP forces between the 1st of January and the 20th of June 1999 in Kosovo was later confirmed in the Milutinovic judgment by the ICTY's Trial Chamber. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Milan Milutinovic, Nikola

pattern was not new – Kosovo Albanian demands for greater autonomy and requests for recognition of their ethnic, cultural and religious distinctiveness were answered with refusals and retaliation by the Serbian government (however, it should be highlighted that Kosovo Albanians were not arbitrarily excluded from the government – Kosovo Albanian representatives voluntarily withdrew from the provincial assembly and established the parallel ‘Assembly of Kosova’ as a reaction to the previous decision of the Presidency of the SFRY to introduce the state of emergency and to use armed forces in Kosovo). Eventually, the peaceful strategy of Ibrahim Rugova was replaced by terrorist tactics of the KLA. The following bloodshed made the reconciliation impossible, and the KLA’s plan to provoke Milosevic’s regime to brutal violations of human rights in order to instigate international intervention was successful.⁶⁴⁰ So, while it is clear that Kosovo Albanian’s right to internal self-determination had been respected in the SFRY (substantial rights had been conferred on Kosovo Albanians by the 1974 SFRY Constitution), under Milosevic’s government these rights were not respected.

However, there is another change in circumstances created by NATO’s intervention and the international presence in Kosovo. An important fact is that since the bombing, Kosovo has been de facto independent from Serbia. Besides, it is very difficult to imagine how Kosovo could be effectively reintegrated into Serbia. Ahtisaari argued that “for the past eight years, Kosovo and Serbia have been governed in complete separation.”⁶⁴¹ So it is not just the denial of fundamental rights, but also the irreversible loss of government over Kosovo that are invoked as the main reasons that justify Kosovo’s independence. It is beyond doubt that the return of Serbian rule over Kosovo, regardless of the degree of autonomy it would enjoy, would be unacceptable to the vast majority of Kosovo’s population and would provoke further violence.

The response of the international community after the bombing was to establish international protection for the population in Kosovo that included territorial administration. As mentioned

Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lukic, Judgment, the 26th of February 2009, IT-05-87-T, Vol. 3, para. 475, 788, 930, 1138

⁶⁴⁰ Abeyasinghe Navaratna-Bandara states that “a determined secessionist campaign may lead to a lengthy social and political crisis at all levels of society. Militarization of political and social life may become unavoidable. As a result, government will become even more authoritarian and repressive. And the secessionist movements may *intend* just that.” Navaratna-Bandara, Abeyasinghe (1995): *The Management of Ethnic Secessionist Conflict*, Dartmouth, Aldershot, p.14

⁶⁴¹ Report of the Special Envoy of the Secretary General on Kosovo’s Future Status, para. 7

above, Resolution 1244 confirmed the internal, but not the external right of self-determination for Kosovo Albanians.⁶⁴² The human rights situation in this region has always been put in the foreground by the international community, whose goal was to ensure the observation of human rights and freedoms and procure self-administration, and not to promote the question of status for Kosovo. The international community, faced with grave human rights abuses in Kosovo, put efforts in fostering internal self-determination, not in interpretations of the right to external self-determination. And after the democratic changes in Serbia in 2000, the circumstances could be characterized as fairly different compared to the situation before and during NATO's intervention. This change provided further support for the precedence of the right to internal self-determination over the right to external self-determination that might have existed in 1999. If it is accepted that the possibility of further human rights violations of Kosovo Albanians by the new Serbian government was highly unlikely, it can be asked why statehood should be granted as a form of compensation for the past wrongs. Furthermore, although the human rights violations of Kosovo Albanians have ceased, the same cannot be said for the human rights violations of Kosovo minorities. The March 2004 riots indicated what would happen to Kosovo minorities if the military forces of the international community left Kosovo.

According to the principles of remedial secession, important facts are that the autonomy of Kosovo was revoked under Milosevic's regime, that crimes and violations were committed by both Milosevic's forces and the KLA and that the Rambouillet negotiations failed. During NATO's campaign, many authors and politicians believed that Kosovo had a just cause for secession, as a remedy for injustices that had been inflicted upon its population, but it is highly questionable whether the same reasoning can be applied at the time of its unilateral declaration of independence for a number of reasons. Firstly, Milosevic was overthrown and a democratic regime was established in Belgrade. Secondly, Kosovo was organized as an international protectorate after the bombing, and the international civil presence and military forces were there to maintain order and to help with institution building. Thirdly, the population of Kosovo was no longer in danger of being persecuted and discriminated against due to stabilization of the situation in the following years. The new government in Serbia was focused on joining the EU

⁶⁴² Annex 2 of Resolution 1244 included the mandate for the "establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations."

and prepared to guarantee far-reaching autonomy to Kosovo. This means that at the time of Kosovo's unilateral proclamation of independence the conditions of remedial secession related to violations of human rights and internal self-determination were not met. As the Supreme Court of Canada opined: "a State whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity."⁶⁴³ This situations warrants a rather unusual conclusion – although Kosovo Albanians had been victims of oppression and their human rights were severely and systematically violated during the 1990s, they are not entitled to remedial secession because at the time of their first proclamation of independence in 1991, the chief of these violations and abuses had not yet happened, and when they proclaimed independence with more success in 2008, there was no danger that such atrocities could be repeated, as a democratic regime was established in Belgrade.⁶⁴⁴ In 1999, when they arguably were entitled to remedial secession, Resolution 1244 had explicitly confirmed the territorial integrity of Serbia, so it is unclear why the right to remedial secession would be triggered a decade later when the situation was stable, the province enjoyed self-government and Serbia became a democratic state.

Fourthly, the existence of Kosovo's effective government could not have been ascertained, because it was still administered by the international administration. The principle of effectivity is highly valued among scholars that dabble with secession issues, and it is unlikely that many of

⁶⁴³ Reference re Secession of Quebec, para. 154

⁶⁴⁴ For Kosovo to be able to rely on remedial secession in 2008, it has to demonstrate that the situation is as grave (or worse) as compared to 1999. "In our opinion, an analysis based solely on facts which occurred almost a decade before the critical date, in fundamentally different circumstances, represents a completely artificial construction which is not acceptable. Such a construction would contravene the general legal principle of *tempus regit actum*", International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion), Oral Statements, Bogdan Aurescu, Romania, CR 2009/32, p. 28; "It is unclear at which point in time human rights violations, which may entitle an entity to remedial secession, must exist. Is there a right to remedial secession only when the entity is subject to gross human rights violations at the time? Or would it be sufficient that these violations lie in the past and render it impossible for an entity to remain part of the oppressive State? If we accept the latter solution, we will have to prove that the process of reintegration really failed. In the case that 20 years or more pass between human rights violations and the secession and the violator State undertakes serious efforts in terms of providing meaningful political solutions while taking into account the interests of the victims, it does not seem very plausible to explain the fact of remedial secession only by relying on those past violations. However, such an assessment would be highly circumstance-dependent." Vashakmadze and Lippold (2010): *Nothing But a Road Towards Secession? – The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Goettingen Journal of International Law*, Vol. 2, p. 637

them would maintain that Kosovo's government had the legitimate authority to declare independence unilaterally, because Kosovo's structures and institutions were highly defective, particularly in the areas of minority rights and democratic legitimacy (ethnic cleansing of non-Albanian population). Also, in 1999 the international community maintained that the recognition of independence of Kosovo could have serious destabilizing effects on Macedonia and Bosnia and Herzegovina, as well as on the entire region, so it is questionable whether these reasons that caused significant concern weakened several years later. Finally, when considering the principle of last resort in remedial theories, it seems that it was not fulfilled in the case of Kosovo. According to this principle, it is necessary to postpone a declaration of independence, as well as recognitions, to the maximum extent possible, and to seriously consider all alternatives to secession, such as federal and other institutional arrangements. The negotiations were held, but they can hardly be described as *bona fide* negotiations. A question whether substantial autonomy, coupled with international guarantees, could have been sufficient to prevent future human right abuses and stop the ongoing ones will remain unanswered.

To return to the aforementioned principle of *effectivité*. As shown in the first part of the thesis, international law allows for a distinction between the two kinds of situation that can characterize accession to independence. The first case is when there is a right to external self-determination, wherein accession to independence is based on legitimacy, as in the case of remedial secession. The second is the case of secession wherein independence is based on effectiveness.⁶⁴⁵ Effectiveness is a part of the factual criteria of statehood and it refers to the effective exercise of state authority over the relevant territory. International law does not ban secession according to this position – secession is neither banned nor prohibited by legal rules, it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case.⁶⁴⁶ In line with this stand, Kosovo was supposed to have a government that effectively controls its territory, an effective governmental apparatus. If Kosovo is assessed solely according to the Montevideo criteria at the time it proclaimed independence, it is hard to conclude that it has attained statehood. If the requirements of a 'permanent population'

⁶⁴⁵ Lalonde, Suzanne, *ibid.*, p. 213

⁶⁴⁶ Cassese, Antonio (1995): *Self-Determination of Peoples: A Legal Reappraisal*, p. 339-40

and a ‘defined territory’ are set aside, the conditions of an ‘effective government’ and ‘capacity to enter into relations with other states’ seem particularly problematic.

When secession is concerned, especially a disputed one such as Kosovo’s, the requirement of effectiveness is strictly applied. The problem with this criterion is the possibility of a twofold interpretation. When Kosovo’s provisional institutions of self-government at the time of independence are assessed in relation to Serbia, it can be said that they had exercised their governmental authority independently. However, when these institutions are assessed from the aspect of completely independent functioning, without external help from members of the international community, they clearly do not satisfy this criterion. In addition, there are severe problems regarding the capability of Kosovo’s institutions to maintain law and order in northern Kosovo, where it is upon UNMIK and KFOR to exercise this function. According to Crawford, independence can be divided into formal and actual or real independence, and a new state attempting to secede has to demonstrate both formal and real independence in order to be regarded as definitively created. Formal independence exists where the powers of a government, both in internal and external affairs, are vested in the separate authorities of the state (*l’exclusivité de la compétence*), and actual independence means the minimum degree of real government power at the disposal of the state authorities (*plénitude de la compétence*), and in cases of conflict of legal rights the second element is especially important.⁶⁴⁷

In the case of Kosovo, both formal and actual independence were questionable, given the mandate of UNMIK under Resolution 1244 and the extensive powers of the ICR and EULEX. Even after Kosovo’s unilaterally proclaimed independence, the UN have continued to assert that Resolution 1244 will remain the legal basis for the exercise of UNMIK mandate to administer Kosovo, and there was never any mention of consent of the newly proclaimed state of Kosovo for the further exercise of UNMIK mandate, as the criterion of independence requires (this criterion requires a state to authorize other states or international organizations to exercise administrative functions in its territory). As Alexander Orakhelashvili notices, “to hold that Kosovo’s independence is lawful because of the effectiveness of its factual existence is to misunderstand the criteria of the creation of states in international law. The argument of

⁶⁴⁷ Crawford, James, *ibid.*, p. 72-88;

according crucial importance to *effectivité* in the case of Kosovo suffers from a more important conceptual failure deriving from the fact that the independence of Kosovo is envisaged as a controlled and supervised independence and much of the burden of which is intended to be shouldered by the EU. There has never been an objectively verifiable indication if and how long Kosovo could survive on its own and without the EU/NATO supervision as an independent state.”⁶⁴⁸ While Kosovo has formed a functional assembly and established a police force, its local administration is weak and ineffective, and other powers, such as the primary responsibility for law and order, customs and monetary policy, are still in the hands of international representatives. Kosovo’s dependence on the international presence is even incorporated into its constitution, which, as shown above, recognizes the final authority of the head of the international military presence and the international civil representative in military and civilian issues respectively.⁶⁴⁹ It is also clear that Kosovo’s capacity to enter into international relations heavily depends on the presence of international forces in its territory.

However, the fact is that many recognized states do not fully satisfy the objective criteria of statehood, and they are still treated as states. But most of these states had, at the time when they proclaimed independence, fulfilled the criteria of statehood, but were destabilized in the following period. Kosovo is exceptional in this regard, since it clearly did not satisfy these criteria at the time of its unilaterally proclaimed independence, and this fact raises questions concerning its speedy recognition as a state by a large part of the international community. As Milena Sterio points out, even if Kosovo is recognized as a new state by most of the world community, its long-term viability remains questionable. If international administrators were to withdraw from Kosovo now, it would most likely crumble as a state (it would be unable to militarily defend its borders, to politically sustain its government, to protect its population, to maintain a sound economic and commercial policy, to explore its natural resources, etc.). She describes Kosovo as an ‘independent dependent’ state - an entity that is officially recognized as a state but cannot in reality function as a state absent strong international support, and wonders whether the precedent of Kosovo is a case when international dependence is simply a step towards independent statehood or a perfect model for inciting state failure. She concludes that

⁶⁴⁸ Orakhelashvili, Alexander (2008): *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, Max Planck Yearbook of United Nations Law, Vol. 12, p. 10

⁶⁴⁹ Constitution of the Republic of Kosovo, Art. 143, 146, 147, 152, 151

the creation of independent dependent states may be the perfect recipe for state failure.⁶⁵⁰ As Kosovo did not meet all the qualitative conditions of statehood, especially the most important one – the existence of its own effective government at the time it unilaterally proclaimed independence, it means that the states that have recognized Kosovo assumed the existence of a right to secession on the basis of which Kosovo could separate from Serbia prior to the establishment of its own effective statehood. This leads to the conclusion that their conduct in this matter shows their conviction that Kosovo had legitimate, remedial grounds to secede, although these states were reluctant in revealing their reasons for recognition of Kosovo's statehood, besides the *sui generis* rhetoric they employed. In conclusion, it can be asserted that Kosovo generally had good grounds to argue for a right to remedial secession in 1999, but not in 2008, and the principle of *effectivité* also does not provide solid grounds for its independence, given the weaknesses in the fulfillment of the classic criteria of statehood.

Furthermore, the failure to integrate the Serbs and other minorities, opposition to the return of Serb refugees, lack of qualified personnel and widespread corruption are among the main problems in the post-1999 Kosovo.⁶⁵¹ Another grave problem and an argument against Kosovo's right to remedial secession are crimes committed by the KLA. Despite the unquestionable support the US provided for the KLA, the Administration was aware that it was dealing with a terrorist organization: "to justify the use of military force against Serbia over Kosovo, Serb atrocities were always noticed and often exaggerated while crimes of the KLA were usually hushed up notwithstanding that shortly before operation Allied Force, President Clinton had qualified KLA as a terrorist organization. It had been reported in Western Media that mujahedin fighters had joined the KLA, dimming prospects of a peaceful solution to the conflict and fuelling fears of heightened violence...The United States special envoy to the Balkans, Robert Gelbard, who had described the KLA as a terrorist organization and had said 'I know a terrorist when I see one and these men are terrorists', soon held talks with men who claimed to be political leaders of the KLA."⁶⁵² Alan Kuperman argues that the political elites of different

⁶⁵⁰ Sterio, Milena (2008): *The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law*, Cleveland-Marshall College of Law, Cleveland State University, Research Paper 08-158, p. 23

⁶⁵¹ International Crisis Group, Kosovo: Towards Final Status, the 24th of January 2005, Balkans Report No. 161, Pristina/Belgrade/Brussels, p. 8-9

⁶⁵² Müllerson, Rein (2009): *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, Chinese Journal of International Law, Vol. 8, p. 9; Müllerson, a former member of the

ethnic minorities might decide to secede even if they are well aware that the state will try to prevent their secession, and even when they are aware that a group has no capacity to defend against state retaliation. In this way they provoke the state to use violence against its ethnic minorities, and they could even intentionally attack the state in order to provoke it, knowing that retaliation on behalf of the state may involve violence against the group's civilians. This is, according to him, the pattern that the KLA followed. Based on extensive fieldwork and information gained from interviews with the top ranking commanders of the KLA, he concludes that the KLA deliberately sought the escalation of violence in 1998, provoking Milosevic to ethnic cleansing of Kosovo Albanians. This resulted in growing media attention which in return boosted support of the international community for Kosovo Albanians, ultimately ending with NATO's military intervention in Serbia. He dismisses all other hypothesis as to why Kosovo Albanians went from pacifist strategies to violent means and argues that the only rationale in the KLA's actions in the late 1990s was a clear prospect of outside humanitarian intervention on their behalf, having witnessed the events of the earlier years of the 1990s, in particular the case of Bosnia.⁶⁵³

It is commonplace that an organization developed in order to uphold separatist claims generally structures itself in a hierarchical and authoritarian way, and it defines its post-independence organization along the similar lines. The fact is that some former KLA members were indicted by the ICJ and local courts, while other escaped legal persecution and now run the Kosovo government. The KLA has been involved in organized crime (drug, cigarette and human trafficking), and it is precisely this problem, besides corruption, that burdens Kosovo the most. According to the Council of Europe Committee on Legal Affairs and Human Rights report "the Parliamentary Assembly was extremely concerned to learn of the revelations of the former Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY), who alleged that serious crimes had been committed during the conflict in Kosovo, including trafficking in human organs, crimes which had gone unpunished hitherto and had not been the

UN Human Rights Committee, further criticizes the use of spin-doctors in justifying the war and lying about its causes and consequences: "[Conor Foley] writes that approximately a year and a half after the NATO attack on Serbia over Kosovo, a former Labour Party spin-doctor was hired by the Kosovo Democratic Party (KLA's political wing), which was headed by the current Prime Minister Hashim Thaci. Conor Foley, who at that time worked in Kosovo, told the spin-doctor that the best way to improve the image of Thaci's party would be to advise them to 'drop the extortion racket, fascism and murdering old age pensioners'."

⁶⁵³ Kuperman, Alan, *ibid.*

subject of any serious investigation. In addition, according to the former Prosecutor, these acts had been committed by members of the ‘Kosovo Liberation Army’ (KLA) militia against Serbian nationals who had remained in Kosovo at the end of the armed conflict and been taken prisoner.”⁶⁵⁴

On the 21st of June 1999, Hashim Thaci, commander of the KLA, signed an ‘Undertaking of Demilitarization and Transformation’ act according to which the KLA would cease to exist as a military organization from the 20th of September. The solution of UNMIK for dealing with the members of the KLA was to create the Kosovo Protection Corps (KPC).⁶⁵⁵ “Early on, KFOR and UNMIK found indications that membership in the KPC did not necessarily mean an ex-KLA fighter had been domesticated. According to classified NATO reports, informers claimed that KPC members not only attacked Serbs, but were involved in illegal trade in prostitutes, cigarettes, fuel, weapons and appliances. ‘Many KPC members, in some cases high-ranking KPC officials, have ties with criminal organizations,’ said one such report prepared in 2000. KPC commanders profited personally from the seizure of vacant apartments and commercial properties, which they often doled out to cohorts as sources of income... Christer Karphammar, a Swedish jurist who was Kosovo’s first international judge, said he directly knew of several cases

⁶⁵⁴ Marty’s report states that “according to the information gathered by the Assembly and to the criminal investigations now under way, numerous concrete and convergent indications confirm that some Serbians and some Albanian Kosovars were held prisoner in secret places of detention under KLA control in northern Albania and were subjected to inhuman and degrading treatment, before ultimately disappearing. Numerous indications seem to confirm that, during the period immediately after the end of the armed conflict, before international forces had really been able to take control of the region and re-establish a semblance of law and order, organs were removed from some prisoners at a clinic in Albanian territory, near Fushë-Krujë, to be taken abroad for transplantation. This criminal activity, which developed with the benefit of the chaos prevailing in the region, at the initiative of certain KLA militia leaders linked to organised crime, has continued, albeit in other forms, until today, as demonstrated by an investigation being carried out by the European Union Rule of Law Mission in Kosovo (EULEX) relating to the Medicus clinic in Pristina. Although some concrete evidence of such trafficking already existed at the beginning of the decade, the international authorities in charge of the region did not consider it necessary to conduct a detailed examination of these circumstances, or did so incompletely and superficially.” *Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo*, report by Dick Marty, Summary

⁶⁵⁵ The KPC was created by UNMIK Regulation 8/1999 and it was supposed to be a civilian emergency response agency whose purposes are limited by law to providing disaster response services; performing search and rescue operations; providing a capacity for humanitarian assistance in isolated areas; assisting in demining activities; and contributing to rebuilding infrastructure and communities. However, there were constant reports of illegal activity and human rights abuses by the KPC which soon became a priority security issue for the international forces. The incidents were so commonplace that UNMIK Police Daily Situation Reports had a separate section for the KPC, and their members were often arrested for a variety of abuses such as extortion and intimidation. Soon it became impossible even for the KPC’s apologists in UNMIK and KFOR to deny the overwhelming evidence of the corps’ participation in premeditated violence against minorities and in organized crime (smuggling, trafficking in women, extortion, illegal seizure of apartments, prostitution). O’Neill, William, *ibid.*, p. 119-121

in which UN and KFOR senior officials opposed or blocked the prosecution of former KLA members, including some now in the KPC. ‘That means some of the former KLA had an immunity. The investigations were stopped on a high level,’ he said.”⁶⁵⁶ General Mini, the KFOR commander, asserted that ‘all members of the KPC were criminals’ and called for the whole institution to be purged.⁶⁵⁷ Clearly, these facts show that the good guys/bad guys dichotomy cannot be applied to Kosovo, and never could. The situation is much more complex, and the answer to the question whether Kosovo had the remedial right to secession is not easy, as it is shown that both sides to the conflict committed crimes and human rights violations. Ultimately, the only important thing is that all perpetrators of crimes and atrocities in Kosovo, whether they are Albanian or Serb, answer for their crimes, and that Serbia and Kosovo continue dialogue that might lead to a solution acceptable to everyone, including the peoples of Kosovo.

8 *The ICJ’s Advisory Opinion on Kosovo*

On the 22nd of July 2010 the International Court of Justice delivered its Advisory Opinion on Accordance with International law of the Unilateral Declaration of Independence (UDI) in Respect of Kosovo.⁶⁵⁸ The UN General Assembly submitted the following question to the ICJ: “is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”⁶⁵⁹ The ICJ came to the conclusion that the

⁶⁵⁶ King and Mason, *ibid.*, p. 59

⁶⁵⁷ *Ibid.*, p. 149; also, an article was published in *Die Welt Online*, according to which a 67-page long, hard-hitting analysis by the German Intelligence Service (*Bundesnachrichtendienst*, BND) about organized crime in Kosovo exists, as well as a confidential report contracted by the German military, the *Bundeswehr*. In contrast to the CIA and MI6, both German intelligence reports accuse Thaci as well as former Prime Minister Ramush Haradinaj and Xhavit Haliti of the parliamentary leadership of far-reaching involvement in organized crime. The BND writes: “the key players (including Haliti, Haradinaj, and Thaci) are intimately involved in inter-linkages between politics, business, and organized crime structures in Kosovo.” The report charges Thaci of leading a “criminal network operating throughout Kosovo” at the end of the 1990s. The BND report also accuses Thaci of contacts to the Czech and Albanian mafias. In addition, it accuses him, together with Haliti, of ordering killings through the professional hitman ‘Afrimi’, who is allegedly responsible for at least 11 contract murders. At the same time, this report explains how Thaci has been protected against any indictments by the United States. See *German Spy Affair Might Have Been Revenge*, *Die Welt Online*, the 30th of November 2008, available at <http://www.welt.de/english-news/article2806537/German-spy-affair-might-have-been-revenge.html>, last visited on the 7th of September 2012

⁶⁵⁸ International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, the 22nd of July 2010, ICJ General List No. 141

⁶⁵⁹ General Assembly of the United Nations, Request for an Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law, the 8th of October 2008, A/RES/63/3, 63 UN GAOR 22nd mtg.

UDI did not violate international law.⁶⁶⁰ The Court's opinion was heavily criticized because of its narrow interpretation of the General Assembly's question, and thereby the Court missed the opportunity to provide legal guidance in areas of secession and self-determination.⁶⁶¹ The ruling implies that whatever international law does not prohibit, is *e contrario* allowed. Judge Simma issued a separate declaration, stating that "the underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the 'Lotus' Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order." The Court's formalistic approach equated the absence of a prohibition with the existence of a permissive rule. According to Judge Simma, the Court thus failed to "move beyond this anachronistic, extremely consensualist vision of international law", while the ideas of the contemporary international legal order render the Court's reasoning on this point obsolete.⁶⁶² It can be observed that "the ICJ applies the Lotus-Presumption to the declaration of independence by representatives of a people (liberty to act unless prohibited by international law), while, on the other hand, it affirms that a people may only exercise its right to independence, i.e. to effect independence, provided it is entitled to do so under the principle of self-determination (taking action only if permitted by international law). Such reasoning may indeed be questioned in terms of its logic, and can be justified only in view of the ICJ upholding the artificial distinction between declaring and effecting independence."⁶⁶³

⁶⁶⁰ The Court's wording reads: "the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law", Advisory Opinion, para. 84.

⁶⁶¹ The Court deliberately evaded addressing these issues, explicitly stating what it was not required to address in its opinion. It stated that the submitted question "does not ask about the legal consequences" of the UDI, just as it "does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State." (Advisory Opinion, para. 51); Furthermore, "it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second." (para. 56) The Court emphasized that the questions, as to whether Kosovo has the right to separate statehood in accordance with international law on self-determination or as a form of 'remedial secession', go "beyond the scope of the question posed by the General Assembly." (para. 83)

⁶⁶² Advisory Opinion, Declaration of Judge Simma, para. 2-3; he concludes: "to not even enquire into whether a declaration of independence might be 'tolerated' or even expressly permitted under international law does not do justice to the General Assembly's request and, in my eyes, significantly reduces the *advisory* quality of this Opinion." para. 10.

⁶⁶³ Muharremi, Robert (2010): *A Note on the ICJ Advisory Opinion on Kosovo*, German Law Journal, Vol. 11, p. 879-880

The Court has analyzed whether the UDI violated principles of general international law or Security Council Resolution 1244. It has concluded, after discussing the applicability of prohibitive rules, that general international law contains no applicable prohibition of declarations of independence, except in cases when they are connected to “unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).”⁶⁶⁴ Furthermore, “the scope of the principle of territorial integrity is confined to the sphere of relations between States” and, therefore, does not concern non-state actors, including secessionist groups.⁶⁶⁵ Clearly, the consequences of these findings might be very serious – secessionist groups might conclude that they have no obligation to respect the *jus cogens* norm of territorial integrity, and that they are free to use violent means in pursuing their goals.⁶⁶⁶ Malcolm Shaw has elaborated on the behalf of Serbia that the only interpretation which lives up to the development of international law is to consider not only States to be bound by the principle of territorial integrity but non-State actors as well.⁶⁶⁷

⁶⁶⁴ Advisory Opinion, para. 81; The ICJ has stated that unilateral declarations were issued on numerous occasions outside of the context of decolonization, and yet “the practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.” para. 79

⁶⁶⁵ Advisory Opinion, para. 80; “whereas the findings in paragraph 79 are firmly based on and respectful of State practice, the final finding of paragraph 80 remains at once unnecessary and rather controversial. This is probably the only paragraph of the advisory opinion where the Court clearly went beyond what had been asked by the General Assembly. The answer it has provided is superficial and ultimately unconvincing, if not misleading.” Gazzini, Tarcisio (2010): *The Kosovo Advisory Opinion from the Standpoint of General International Law*, available at <http://www.haguejusticeportal.net/index.php?id=12077>, last visited on the 7th of September 2012

⁶⁶⁶ Judge Koroma warned that the ICJ’s ruling provides “a guide and instruction manual for secessionist groups the world over”. Advisory Opinion, Dissenting Opinion of Judge Koroma, para. 4; furthermore, “the absence of a clear international legal rule, which would differentiate between terrorists and freedom fighters, coupled with the ICJ’s reasoning that non-state actors are exempted from the duty to respect territorial integrity, seems to reward secessionists, more openly than ever, with a wide range of tactics for the achievement of their ultimate goal. These by no means exclude the resort to violence in order to trigger reprisals, which would in turn change the nature of the conflict into international one and, perhaps, force the international community to intervene on the side of secessionists.” Jovanovic, Miodrag (2011): *After the ICJ’s Advisory Opinion on Kosovo: The Future of Self-Determination Conflicts*, paper presented at The Association for the Study of Nationalities 2011 World Convention, 14-16 April 2011, Columbia University, p. 21

⁶⁶⁷ International Court of Justice, Verbatim Records of the Public Sitting held on Tuesday 1 of December 2009 on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, the 1st of December 2009, CR 2009/24, p. 65-66; According to Shaw, international law tends nowadays to directly address non-state entities, and recent practice demonstrates that non-state entities within existing states are directly addressed in the context of internal conflict and with regard to territorial integrity (SC resolutions relating to Bosnia and Herzegovina, the Democratic Republic of Congo, Somalia and Sudan strongly reaffirmed the importance of the sovereignty and territorial integrity of those states faced with internal secessionist conflicts). Also, numerous legal instruments concerning the protection of minorities and indigenous peoples explicitly stipulate that nothing in the instrument in question may be construed as permitting any activity contrary to, *inter alia*, the sovereignty and the territorial integrity of states. Consequently, he concludes that it is “simply incorrect to maintain that international law does not apply directly to non-State entities nor that the norm of

The Court then addressed the question whether the UDI is in conformity with Resolution 1244, and whether there is a violation of the Constitutional Framework based on it. Serbia has argued that the authors of the UDI acted in their capacity as part of the Provisional Self-Government of Kosovo and were therefore bound by Resolution 1244. This would also mean that they were not allowed to issue the UDI, since Resolution 1244 stressed that the territorial integrity of the FRY must be respected. However, the Court followed the argumentation of Kosovo that the authors did not see themselves as part of the provisional government and acted therefore in a private capacity or respectively as “democratically-elected leaders”.⁶⁶⁸ Furthermore, Resolution 1244 does not preclude the issuance of the UDI because the two instruments operate on a different level - unlike Resolution 1244, the declaration of independence is an attempt to determine the status of Kosovo.⁶⁶⁹ In addition, the ICJ deems it relevant that the SRSG remained silent in the face of the declaration of independence. So the Court decided that the declaration is not an act of secession itself, but a statement of hopes and wishes, and that it is not at all an official act of a governing authority, since the authors of the UDI were not provisional institutions.⁶⁷⁰

Several of the dissenting judges strongly disagreed with the Court’s construction of the identity of the declaration’s authors. Judge Bennouna wondered whether any legal order governed “democratically elected representatives of the people” at the moment of their adoption of the Kosovo declaration of independence.⁶⁷¹ Apparently, the ICJ “here tries to ride on two horses. If the individuals acted outside of the framework of self-governing institutions, they did not have the capacity to act. If they had the capacity to act, they acted within the framework of these

territorial integrity is today limited to third States alone. Practice makes it very clear that such norm is now recognized as applying to non-consensual situations of internal conflict and secessionist attempts. This has been most recently recognized in the Report on the Conflict in Georgia of the Mission established by the Council of the European Union.” *Ibid.*, p. 67

⁶⁶⁸ Advisory Opinion, para. 105-107

⁶⁶⁹ Advisory Opinion, para. 114

⁶⁷⁰ While the declaration itself says that Kosovo is declared “to be an independent and sovereign state” the *Court* does not consider the declaration as an *act* of secession. Thus, it can interpret the question before it as not asking “whether or not Kosovo has achieved statehood....[n]or ... about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.” From this perspective, there is nothing in the Court’s opinion that in any way contradicts the decision of the Republic of Serbia in 2008 that the declaration “did not produce legal effects either in Serbia or in the international legal order”. Moreover, there is nothing in the Court’s decision that would place any constraint on a competing declaration of independence of Kosovar Serbs. Howse and Teitel (2010): *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo*, German Law Journal, Vol. 11, p. 842

⁶⁷¹ Advisory Opinion, Dissenting Opinion of Judge Bennouna, para. 64

institutions. There is no third way.”⁶⁷² Vice-President Tomka argued that the Court’s conclusion “has no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a *post hoc* intellectual construct.”⁶⁷³ Clearly, such ‘intellectual construct’ was necessary for the Court’s finding that the declaration of independence was not in violation of Resolution 1244 and the Constitutional Framework. However, “the ICJ’s holding that the authors of the declaration of independence did not violate Resolution 1244 does not mean that Serbia is not entitled to rely on the Resolution regarding its claims of territorial integrity.”⁶⁷⁴

In the end, several conclusions can be made. The ICJ clearly avoided deciding upon the legality of Kosovo’s independence. The Court’s findings have no consequences for the normative substance of international law, and the legal significance of these findings should be questioned. Hilpold concludes that “it would have been more appropriate for the Court to decline jurisdiction in this case... This Opinion appears, however, to be unpersuasive even if it is judged alone on the basis of the legal reasoning on which it builds and it is therefore not able to create even the appearances of ideological neutrality.”⁶⁷⁵ In the early days after the Court had delivered its Opinion, newspapers and politicians celebrated the Advisory Opinion as confirming the existence of the State of Kosovo. However, it was soon clear that the case of Kosovo remains unsettled, as Kosovo did

⁶⁷² Vidmar, Jure (2010): *The Kosovo Opinion and General International Law: How Far-Reaching and Controversial is the ICJ’s Reasoning?*, available at <http://www.haguejusticeportal.net/index.php?id=12110>, last visited on the 7th of September 2012

⁶⁷³ He pointed out that such interpretation “implies that all relevant actors did not know correctly who adopted the declaration on 17 February 2008 in Pristina: Serbia, when it proposed the question; other States which were present in the General Assembly when it adopted resolution [requesting the advisory opinion]; the Secretary-General of the United Nations and his Special Representative; and, most importantly, the Prime Minister of Kosovo when he introduced the text of the declaration at the special session of the Assembly of Kosovo.” Advisory Opinion, Declaration of Vice-President Tomka, para. 12; he cited numerous UN and UN Member States communications in the context of the request for the advisory opinion, all of which referred to the Provisional Institutions of Self-Government of Kosovo as the authors of the declaration; he also observed that no delegation during the General Assembly debate contested otherwise. Finally, he noted that the signatories were “invited to sign [the declaration] in his/her capacity of either ‘the member of Kosovo Assembly’ or ‘the member of Chairmanship’ of the Assembly.” According to Tomka, the Court’s resolution of this issue is ‘outcome-determinative’ as otherwise Resolution 1244 and the Constitutional Framework prohibited the Provisional Institutions’ declaration of independence. He noted that on two prior occasions, in 2003 and 2005, the Kosovo Assembly drafted and debated declarations of independence, but it was informed by the UNMIK Special Representative that such actions were *ultra vires* and contrary to Resolution 1244. “The Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002-2005, would no longer have any such character in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.” para. 33

⁶⁷⁴ Bothe, Michael (2010): *Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo’s Independence*, German Law Journal, Vol. 11, p. 839

⁶⁷⁵ Hilpold, Peter (2011): *The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question*, p. 48 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734443, last visited on the 7th of September 2012

not benefit from this misinterpretation of the ICJ's opinion in the media – the expected wave of new recognitions of Kosovo's statehood did not occur. Apparently the Court left it to the discretion of individual states to determine the ultimate status of Kosovo in international law: "consequently, the fact that the ICJ did not explicitly address the legality of third-states' acts of recognition of Kosovo might lead many secessionists to conclude that the easiest way for solving intricate legal situations and gaining statehood would be to safeguard recognition of as many states as possible, and preferably the most powerful ones. This would not only fundamentally reverse the abovementioned doctrinal stance that the existence of a state is one thing, its recognition or non-recognition another, but it would open the room for a world of the increasing number of 'Selfistans', which would in international arena dwell as half-recognized 'pet states' of the Great Powers."⁶⁷⁶ Also, "the Court should have confirmed or checked the identity of the members of the assembly that voted for the declaration of independence, and determined whether any of them has criminal charges. It would be contradictory if the Security Council on the one hand created an international tribunal to prosecute criminals responsible for the most heinous crimes, and at the same time approved declarations of independence adopted by those very persons responsible for committing these crimes."⁶⁷⁷

9 *Kosovo – a unique case or a test case?*

The 'unique case' rhetoric was heavily used in the period preceding and following Kosovo's unilateral declaration of independence. Its goal was to attest that the recognition of Kosovo as a state should not be regarded as a precedent for other cases. The US government referred to some 'special circumstances' of Kosovo, and 'unprecedented' character that warranted treating Kosovo as a 'special case':

1. The State of Yugoslavia collapsed in a non-consensual, exceptionally violent way, creating threats to international peace and security that have obliged the UNSC to act repeatedly.
2. Between 1993 and 1999, the UN Security Council (UNSC) issued seven resolutions addressing Kosovo.

⁶⁷⁶ Jovanovic, Miodrag, *ibid.*, p. 23-24

⁶⁷⁷ Arp, Björn (2010): *The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and International Protection of Minorities*, German Law Journal Vol. 11, p. 865

3. Amid massive human-right violations, the Milosevic government repeatedly disregarded UNSC resolutions demanding a halt to hostilities.
4. The Milosevic regime's actions in Kosovo and throughout the region undermined international stability and led to cross-border refugee upheavals.
5. In 1999, NATO's 19 allies reached the consensus decision to take collective action to remove Milosevic's police and military forces from Kosovo.
6. Kosovo is administered by the United Nations under U.N. Security Council Resolution (UNSCR) 1244, unanimously adopted (with China abstaining) June 10, 1999, to address Milosevic's actions. Elements of UNSCR 1244 include: denying Serbia a role in governing Kosovo; setting up an interim UN administration; providing for local self-government; and envisioning a UN-led political process to determine Kosovo's future status."⁶⁷⁸

The day after the independence of Kosovo was unilaterally declared, Secretary of State Condoleezza Rice announced that the US recognized Kosovo as an independent state and explained that "the unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today."⁶⁷⁹

Although each of these arguments is factually correct, when they are examined closely, different conclusions regarding the uniqueness of the Kosovo case can be reached. For instance, argument one, referring to the collapse of Yugoslavia, is hardly an argument in favor of Kosovo's independence.⁶⁸⁰ As shown above, the answer of the international community regarding

⁶⁷⁸ US Department of State, Why Kosovo is Different, the 31st of January 2008, available at www.state.gov, last visited on the 7th of September 2012

⁶⁷⁹ Rice Statement on Recognition of Kosovo as Independent State, the 18th of February 2008, available at http://www.usembassy.it/viewer/article.asp?article=/file2008_02/alia/a8021806.htm, last visited on the 7th of September 2012; the European Union representatives also employed the sui generis thesis, stating that "the Kosovo case is unique", so it cannot serve as a precedent for any other situation. Statement by Krisztina Nagy, spokesperson for European Commissioner Olli Rehn, the 29th of October 2007, available at http://www.mfa.gov.rs/Bilteni/Engleski/b301007_e.html#N5, last visited on the 7th of September 2012

⁶⁸⁰ It is usually argued that the issue of the UDI of Kosovo could not be entirely separated from the dissolution of the former SFRY. Since "Kosovo as an autonomous province enjoyed a status that was largely equal with that of the republics in this Federation" when it was stripped of its autonomy, it was entitled to withdrawal from the federal state and Serbia (International Court of Justice, Verbatim Records of the Public Sitting held on Monday 7 of December 2009 on the Accordance with International Law of the Unilateral Declaration of Independence by the

Kosovo's leadership request to include their agenda into the Dayton Agreement was negative. The international community, following the Badinter Commission's findings, decided that the borders of the sub-unit within a federation were not to be modified and that the groups within the republics had no right to external self-determination. The boundaries of all FRY republics are to be considered inviolable. Furthermore, none of the Security Council resolutions mentioned the independence of Kosovo or questioned the territorial integrity of Serbia. The third and the fourth argument are related and they represent the strongest ground for Kosovo's independence, but not for the uniqueness of the case. Remedial secession is an emerging trend in international law, and international law does not oppose the external self-determination of an entity whose population has been subjected to serious human rights violations and mistreatments for a prolonged period of time. In those cases, when there are no other options available, since all efforts and remedies were to no avail, secession is the last resort. However, there is nothing unique in these sad cases of government oppression and violence against one part of the country's population – "this argument would justify the 'unique case' thesis *if and only if* no other case could be said to match the level of human rights infringements recorded in Kosovo."⁶⁸¹

The fifth argument concerns the use of force against the FRY by NATO. For one, this intervention is considered illegal by many scholars, international lawyers, countries and their highest representatives. Also, it still does not represent a decisive argument in favor of the uniqueness of Kosovo's case, as this was neither the first nor the last case in the last two decades that the US, alone or with their NATO allies, intervened in a sovereign state without gaining approval from the Security Council. As discussed earlier, this intervention shows only that humanitarian reasons are used selectively and therefore have questionable moral authority, and reveals double standard since the Western powers did nothing in other humanitarian emergencies (Rwanda, Sudan, Ethiopia, etc.). Accordingly, the NATO intervention in Kosovo can in no way sustain the *sui generis* thesis, especially when considering the 2011 military intervention in Libya. And finally, it is inaccurate to present Resolution 1244 as supportive to the independence

Provisional Institutions of Self-Government of Kosovo, Written Comments of Croatia, the 7th of December 2009, CR 2009/29, p. 56). However, as previously mentioned, *de jure* status of republics and provinces was in certain fundamental respects different (for instance, the 1974 SFRY Constitution stipulated the right of all Yugoslav peoples, not nationalities such as Kosovo Albanians, to self-determination, including the right to secession), and precisely for that reason Kosovo Albanians repeatedly protested and asked for Kosovo to become a republic. The Badinter Commission opinions confirmed that provinces had different legal status compared to Yugoslav republics.

⁶⁸¹ Jovanovic, Miodrag (2011): *Is Kosovo and Metohija Indeed a "Unique Case"?*, p. 10

of Kosovo, since it clearly commits the states and the UN to the territorial integrity of Serbia. Also, in the process of adoption of Resolution 1244 the requirement that the population of Kosovo decides the status of Kosovo in three years in a referendum did not get sufficient support in order to be integrated in the final text of the resolution. It is unclear how the extended period of UN administration argument strengthens Kosovo's case for independence.⁶⁸² While the international administration may precede a change in the status of a territory (as in the case of East Timor), this is usually not the case. This prolonged period of international administration, although not unique (for instance the United Nations Peacekeeping Force in Cyprus was established back in 1964) did, however, generate a period of self-administration for Kosovo, taking it one more step beyond the reach of the Serbian authority and it can be considered as an assurance that Kosovo will eventually fulfill the classical criteria for statehood. Nevertheless, the very fact that many states are reluctant to recognize Kosovo shows their fear of Kosovo's precedential potential, as it is clear that the arguments employed to support the unique case thesis cannot be sustained. Any entity that proves that its circumstances are similar to Kosovo's could have a strong argument for independence. Therefore it seems that Kosovo is actually closer to being a 'test case' than an 'unique case' - an action brought to ascertain the law, thereby setting a precedent for other cases involving the same principles.⁶⁸³ The most unique thing about Kosovo is the sheer political will of certain states to treat it as unique.

A similar *sui generis* rhetoric, but with reference to the UN Charter, was employed by the Foreign Ministers of the EU Member States in Conclusions of the Council of European Union on the 18th of February 2008, a day after Kosovo's declaration of independence: "the Council reiterates the EU's adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions."⁶⁸⁴ It is clear that the UN Charter was referred to as a basis for the principle of territorial integrity, not as a legal basis for

⁶⁸² Currently there are various forms of the UN's involvement around the world - the list of all current UN peacekeeping missions available at <http://www.un.org/en/peacekeeping/currentops.shtml>, last visited on the 7th of September 2012

⁶⁸³ Brown, Lesley (1993): *New Shorter English Oxford Dictionary*, Clarendon Press, Oxford

⁶⁸⁴ Council of the European Union, Council Conclusions on Kosovo, 6496/08 (Presse 41)

the secession of Kosovo. However, it remains unclear why Kosovo's secession was regarded as a sui generis case. The fact that Council Conclusions mentioned the events of the 1990s and the period of international administration in order to explain the special nature of the case does not provide for any connection with the UN Charter, nor does it provide for any legal clarity. Its only purpose seems to be engaging in extensive endeavors to portray Kosovo's secession and its recognition as unique.

The US was aware how easily the use of legal arguments could backfire. This is why they did not engage in legal justification of NATO's intervention, or in legal justification of Kosovo's independence. Although the US and its allies could have employed credible legal arguments drawing from the right to remedial secession, they were aware that this would lead to a slippery slope. Instead, they decided to use the sui generis rhetoric, but the underlying reason for many states to officially recognize Kosovo was, in fact, the belief that the level of violence and humanitarian emergency that Kosovo had faced justified its secession. The problem with this justification is that by making violence and humanitarian emergency the implicit condition for recognition of secession, incentives are given to other secessionist groups to provoke high levels of violence and civilian suffering in order to achieve their goals. In the end, all secessionist conflicts today, despite numerous differences, have at least one thing in common – they are basically generated when a substate entity, usually an ethnic group, wants to secede from the existing state without its consent.

It is hard to recognize what precisely is so unique about Kosovo, and how come the Western states believed that the recognition of Kosovo as a sovereign state would not be considered as a precedent for similar situations elsewhere in the world. "Finally, there is an even more profound legal problem with the argument that the proposed legal outcome of the Kosovo case (independent statehood) 'should not' serve as a precedent for other cases. It is completely contrary to the logic of precedent to claim that no case could be of such a nature as to justify the implementation of *ratio decidendi* of the already adjudicated case. Consequently, even if the legal outcome of the Kosovo case cannot serve as a precedent 'for any other situation in the world *today*' (Rice), on the account that they differ in certain important aspects, which is highly arguable, to exclude the possibility that such an outcome affect some *future* cases would be not

less than to deny it the character of a legal rule.”⁶⁸⁵ Bruno Coppieters maintains that the case of Kosovo is exceptional but not unique, arguing that unique cases do not refer to general principles, whereas exceptions do – exceptions are rule-bound. He asserts that the case of Kosovo is an exception to the general rule of territorial integrity and that “due to the lack of clear principles justifying the recognition of a unilateral declaration of secession, it is quite understandable that the EU is talking in terms of a unique case.”⁶⁸⁶ He is right on the mark. There are exceptional characteristics in the Kosovo case, but there is no doubt that secessionist groups all over the world quickly understand signals and lessons from the successes and failures of other groups in even remotely similar situations. An additional problem with the *sui generis* rhetoric is that it leads to a logical conclusion that the question of status does not succumb to universal legal principles, but depends on ad hoc solutions and interpretations created to match each particular case.

10 *Proposal for the solution of the Kosovo problem*

An unproblematic secession in which all inhabitants of the secessionist region are united on the secessionist project is a rare thing – in most cases secessionist regions comprise ethnic minorities which strongly oppose secession. As John McGarry explains, secessionists like to compare their projects with the anti-colonial movements after World War II, because the analogy gives them legitimacy and allows them to claim they have the same right to self-determination which colonized people possess under international law, while it casts the existing state in the role of imperialist exploiter. Above all, such comparison conveys an impression that the secessionist regions are united on the independence project as most colonies were. As he puts it, “secession is a political game in which it makes sense to exaggerate support and to downplay division. A territory united in its desire to secede is much more likely to win support from the international community, the remainder of the state, and even from the group the secession movement is based on, than a territory which is seriously divided over the question and which is, consequently, likely to experience divisions after independence. Thus in their language, secessionists usually claim that it is the ‘territory’ that wants to secede, as in ‘Quebec (or Ireland or Croatia) wants

⁶⁸⁵ Jovanovic, Miodrag, *ibid.*, p. 31

⁶⁸⁶ Coppieters, Bruno (2008): *The Recognition of Kosovo: Exceptional but not Unique*, European Security Forum Working Paper, No. 28, p. 3

independence’ or it is the people in the territory who want to secede, as in ‘the people of Ireland (or of Quebec or of Croatia)’. In neither formulation is there any hint of division within the territory on the secessionist project.”⁶⁸⁷

When an ethnic group achieves independent statehood, it has to face the problem of smaller ethnic groups living within the borders of the new state. This is the problem of the ‘trapped minority’, or the minority within a minority. It is usually the ethnic group which was the majority in the parent state before secession. Those are the people that refused to leave their homes, so they remain trapped in a new state which was created because of the strong nationalistic sentiments of that entity’s majority population. What frequently follows are some forms of discrimination, harassment or even violence, as the example of reverse ethnic cleansing of non-Albanian population in Kosovo shows. New secessionist states are usually equally heterogeneous as the states they left, and just as likely to abuse minorities. The members of these minorities react in different ways. Some may decide to migrate to the state in which they are the majority, while others resist secession violently if they believe that their physical security is endangered. Their status as a dominant group has changed, and they feel cut off from their co-nationals and threatened in the new state, so the possibility of further conflict increases. They may demand a state of their own, or they may ask to join the rump state. The application of *uti possidetis* principle creates problems such as this one. The problems of national heterogeneity are usually not solved by seceding, because when secessions occur along administrative lines, difficulties created by national diversity remain, albeit in a different state. For secessionists that contest the territorial integrity of the state from which they want to separate it is indeed difficult to produce strong arguments as to why should their territorial integrity and borders be considered sacrosanct by peoples inside the secessionist entity that are not in favor of its independence.

There are several possible future developments of the Kosovo situation. The easiest solution would be if Serbia, unable to withstand further pressures from the US and the EU, recognized the independence of Kosovo. In that case, it is highly probable that Serbia would gain, in exchange, accelerated membership in the EU. The second option is that Kosovo once again becomes a part

⁶⁸⁷ McGarry, John (1998): *Orphans of Secession: National Pluralism in Secessionist Regions and Post-Secession States*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, p. 217-218

of Serbia, after, for instance, the use of force by the Serbian government to regain effective control over Kosovo, and that is extremely unlikely. Serbia confirmed on several occasions that it will not send troops to Kosovo, so this possibility can be practically excluded. Another implausible option is the union of Kosovo and Albania. A more realistic possibility is another frozen conflict, a protracted de facto situation with occasional disturbances and minor conflicts. Finally, alternative solution is the partition of Kosovo. As Donald Horowitz suggests “if the short run is so problematical, if the constraints on policy innovation are many, if even grand statements need patchwork readjustment, perhaps it is a mistake to seek accommodation among the antagonists. If it is impossible for groups to live together in a heterogeneous state, perhaps it is better for them to live apart in more than one homogenous state, even if this necessitates population transfers. Separating the antagonists – partition, is an option increasingly recommended for consideration where groups are territorially concentrated.”⁶⁸⁸ Ideally, the solution will come from an agreement between Belgrade and Pristina, and all possible efforts should be made to reach a real consensus between the conflicting parties. It is not excluded that such consensus may result in recognition of an independent Kosovo by Serbia and the incorporation of the northern part of the province, mostly inhabited by Serbs, into Serbia.

Clearly, Kosovo as an autonomous region within Serbia is not a realistic option - Albanians in Kosovo would never accept the possibility of subordination at this point. Since reintegration does not appear to be a viable solution, and the recognition of independence is not going the way Kosovo Albanians hoped it would, despite the heavy US pressure in the international community, it seems that the negotiations on the possible partition of Kosovo may prove to be fruitful and beneficial for both sides. The current situation in the north of Kosovo provides further arguments for this solution. Since NATO’s bombardment and anti-Serb riots in 2004, the majority of Serbs lives in northern Kosovo. They are de facto independent from Kosovo Albanian government - when Kosovo proclaimed independence they removed the administrative gates between Kosovo and Serbia, breaking off all contacts with the Kosovo Albanian government. The Serb population in the north has built local administration, health, justice and education systems, while the responsibility for policing the administrative line between Kosovo and Serbia has been placed in the hands of EULEX and local Serb police officers. The Kosovo

⁶⁸⁸ Horowitz, Donald, *ibid.*, p. 588-589

Serbs remain protected during the current transnational period of independence which includes intensive international peacekeeping and monitoring, but the question is how safe can they feel when it is over? Albanian side has so far completely rejected the possibility of partition, even if it would enable them undisputed independence – if Serbia decides to recognize the independence of Kosovo, there is no reason for other countries not to recognize it. The basic argument for partition is a simple one – if Serbia is divisible, then why is Kosovo indivisible? And if Kosovo is indivisible, on what grounds should Serbia be obligated to allow Kosovo's secession? Why should it be impossible for Serbs in the north of Kosovo to secede and rejoin Serbia? They are also a people, ethnically, culturally, linguistically, religiously and socially different from Kosovo Albanians, so they have a right to self-determination comparable to that of Kosovo Albanians. Both ascriptivist and choice theories reject the application of the *uti possidetis* principle, while remedial right theory remains silent on the issue of boundary drawing. However, according to remedial right theory, the Kosovo Serbs should be entitled to choose under which government they want to live – they are a territorially concentrated people that has been subjected to the reverse ethnic cleansing, and they do not participate in the Kosovo government.

The main argument that Kosovo Albanians employ against the partition of Kosovo is the principle of *uti possidetis*. However, the application of *uti possidetis* leads to instability if minority groups remain isolated in the secessionist state and defenseless against human rights violations. Reliance on the *uti possidetis* principle during the Yugoslav crisis was justified on the basis that it would reduce the prospect of armed conflict by providing the simplest and clear-cut solution. However, as demonstrated, this turned out to be a wrong assumption. Even with bloody civil war aside, the case of Kosovo shows that further problems were generated when this solution was adopted. As Hannum asserts: “the principle that borders should not be altered except by mutual agreement has been elevated to a hypocritical immutability that is contradicted by the very act of recognizing secessionist states. The traditional international practice of non-intervention in civil wars has been replaced by a selective rule which prohibits some central governments (for example, Belgrade) from suppressing secession by force, accepts the use of force by others (for example, Colombo and New Delhi), and has yet to make up its mind about even more compelling cases (for example, Kurds and Tibetans)...New minorities are trapped in new ethnically based states not because of any international legal principle which such minorities

can comprehend, but by the historical accident of finding themselves within administrative borders drawn decades ago for domestic purposes by an undemocratic government.”⁶⁸⁹ *Uti possidetis* can easily cause turmoil in the long term. If ethnic identities are smothered by forcing people to live together inside artificially created boundaries, there is always the possibility of attempts to further divide the new state along other administrative lines, as a spill-over of *uti possidetis*. Kosovo and Republika Srpska are just the Balkan examples. This shows that the extension of *uti possidetis* to post-colonial conflicts and state break-ups leads to instability and injustice, and the criticism of this principle was presented in Part I of this study. A rule according to which borders must be transformed in such a manner, without regard to ethnic and historical characteristics, surely needs to be re-examined, as stated by many authors. Hence, the emerging trends in the international law on self-determination, as well as all three major theories on secession, do not exclude the partition option in the case of Kosovo.

Although Margaret Moore wrote on this topic more than ten years ago, her conclusions about Kosovo’s main problems, despite the unilateral proclamation of independence, remain valid. Even then she has warned that the international forces in Kosovo cannot properly protect the Serb national minority. Her proposition for the solution of this problem is fairly similar to the one presented here. Kosovo Albanians should be allowed to secede, but also the Serb minority in Kosovo, in areas where they constitute a majority and that are contiguous with the border, should have the right to choose in which state to live. This is in accordance with the Swiss principle of ‘rolling cantonization’, which allows the partition of administrative units if two rival national communities exist. The Serb minority outside of this area should be able to exercise local self-government and should have their linguistic and religious rights protected. Further important issues are compensation and Serb access to historical and religious sites. She concludes that “just as Serbia/Yugoslavia should not be able to deny the self-governing aspirations of Kosovo, so the Kosovars should not be able to deny the national identities and aspirations that Serbians feel for their own collective self-government.”⁶⁹⁰

⁶⁸⁹ Hannum, Hurst, *ibid.*, p. 68

⁶⁹⁰ Moore, Margaret (2001): *The Ethics of Nationalism*, p. 229

The proposals for partition usually mention river Ibar as a possible boundary, what means that around one eighth of the territory of Kosovo would be re-integrated into Serbia. This solution takes into account the fact that the area of Kosovo north of the river already functions de facto separately from the rest of Kosovo – it is protected and policed by international forces and it has parallel structures of government and administration independent of Kosovo Albanian's government. River Ibar became the unofficial border shortly after NATO's bombardment, and Mitrovica became a divided city. Before the war, Serbs and Kosovo Albanians had lived on both sides of the river, but more Serbs had lived in the north. In the early days of NATO's deployment, French KFOR erected a checkpoint at the river Ibar and effectively divided Mitrovica. Kosovo Albanians were not allowed to cross into northern Mitrovica or into northern Kosovo, which became predominantly Serb. Thus northern Kosovo became the largest Serb sector which also has a direct land border with Serbia.

However, this proposal to partition Kosovo along Ibar means that most sites of Serbian cultural heritage such as monasteries would be passed on to Kosovo Albanians, since they are located in the south of Kosovo, and there is also the problem of Serb villages in the south. However, at least the problem of Kosovo's north would be solved. This solution would inevitably cause certain problems, such as further migrations of the population. The Serbs living south of Ibar would have to either move to the north or live under Kosovo's authority. Population movements would be unavoidable if a division along ethnic lines occurs. One of the arguments against this solution is the fear of entering into a new spiral of conflicts if the status quo is disturbed. However, as Anatol Lieven wrote, "EU governments also need to recognize two realities. First, that just as trying to keep Kosovo in Serbia would lead to Albanian revolt, so too trying to force Mitrovica, the remaining Serbian area of Kosovo, into an independent Albanian state would lead to Serbian revolt. Given the de facto 'ethnic cleansing' by Albanians since the Kosovo war, to ask the Serbs to accept either Albanian or western guarantees of their future safety is absurd."⁶⁹¹ Although this solution confirms the capitulation of the idea of multi-ethnic society, the unfortunate reality is that Kosovo is a deeply divided society, and as soon as the last generations

⁶⁹¹ Lieven, Anatol, *Balkan Unrest Remains a Recipe for Disaster*, Financial Times, the 14th of January 2008, available at <http://www.ft.com/intl/cms/s/0/263788cc-c1f3-11dc-8fba-0000779fd2ac.html#axzz25nrrSN44>, last visited on the 7th of September 2012

that lived under Tito's great experiment of 'brotherhood and unity' die, even the memories of peaceful coexistence in Kosovo during the SFRY will go with them.

Partition is still considered as unacceptable to all sides, but it is probable that only Kosovo Albanians would be dead set against it. Serbia might agree to it, but not while it is still in the middle of diplomatic efforts to prevent further recognitions of Kosovo. There are certain developments on the Serbian side that are in favor of such solution. Perhaps the most important one is bringing into public discourse the fact that Serbian forces committed crimes in Kosovo. Even if a large portion of population still believes that this is western propaganda with the aim of shifting focus from terrorism and criminal activity at Kosovo, an increasing number of institutions, intellectuals and journalists try to emphasize the importance of dealing with the past and facing the fact that both sides committed crimes. The Serbs in the north of Kosovo would undoubtedly prefer this solution, but they are not free to propose it as long as Serbian government pursues other options. The Western states publicly insist that Kosovo can become a functional multiethnic state, but it is reasonable to suppose that if partition were seriously contemplated by all sides, they would also prefer it as a definite solution, compared to the quagmire into which the status issue has condemned the EULEX mission. It is not likely that Russia would block this solution if Serbia agreed to it. The main arguments against it are that it would signify the defeat of the concept of multiethnic democracy and that it might encourage partition along ethnic lines elsewhere in ex-Yugoslavia. However, both arguments are hollow. Clearly, Kosovo is already practically a monoethnic state,⁶⁹² especially since the north of Kosovo is not under Kosovo Albanian control, while all Pristina's institutions are Albanian. Secondly, it is hypocritical to assert that the partition of Kosovo might cause further divides along ethnic

⁶⁹² Eduardo Arboleda, the head of UNHCR in Serbia, insists that "the return of displaced persons literally stopped" following Kosovo's UDI. According to UNHCR statistics, only 631 persons returned to Kosovo in 2009, leaving some 205,835 registered Serb IDPs from Kosovo; a highly-critical report published in summer 2009 by Minority Rights Group International (MRG) detailed how members of minority communities were leaving Kosovo due to persistent exclusion and discrimination. Entitled 'Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo', the report concluded that Kosovo "lacks effective international protection for minorities, which is worsening the situation for smaller minorities and forcing some to leave the country for good". These minorities include not only Kosovo's Serbs, but also Ashkali, Bosniaks, Croats, Egyptians, Gorani, Roma and Turks, who together make up around 5% of the population of Kosovo according to local estimates. MRG's report also describes how "a lack of political will among majority Albanians and poor investment in protection mechanisms have resulted in minority rights being eroded or compromised in the post-independence period" and that Kosovo's UDI has left "a vacuum in effective international protection for minorities". As quoted in Bancroft, Ian (2010): *Kosovo – No Return?*, Transconflict Review, the 21st of April 2010, available at www.transconflict.com, last visited on the 7th of September 2012

lines while supporting or tolerating Kosovo's separation from Serbia. Finally, little can be added to Hannum's observation: "self-determination should be concerned primarily with people, not territory... If our concern is with peoples rather than territories, there is no reason to regard existing administrative or 'republic' boundaries within states as sacrosanct. In most cases, the best way of determining the wishes of those within a new state would be through a series of plebiscites to redraw what were formerly internal boundaries... Accepting the possibility of altering borders might be a useful precondition for recognition of a new state whenever a significant proportion of the population appears not to support the new borders."⁶⁹³

11 Conclusion

The issue of Kosovo's statehood will probably ultimately depend of its recognition by other states. Recognition by other states gives strong evidential value to the question under dispute, because it has a deep symbolic meaning.⁶⁹⁴ Since international law says nothing on the legality of the secession itself, the debates about secessionist attempts tend to shift to the issues of the legality of recognition. It is generally accepted in legal theory that recognition has only declaratory effect. However, as described in the first part of the thesis, since the Cold War the situation has changed, and legitimacy is becoming important (as the EU position on recognition of states which had emerged from the break-up of the Soviet Union and Yugoslavia showed). Consequently, recognition started being described as a process in which human rights, democracy and the principle of good governance are of paramount importance. This context brings forward a selective approach towards the recognition of states, and the EU, by making recognition conditional, shifted the constitutive elements of recognition in the foreground. The resulting situation is that the effects of recognition can neither be qualified as declaratory nor as constitutive, but lie somewhere in between. This adjustment affects the traditional criteria of statehood as well. For instance, in the case of Kosovo, it is doubtful whether the criterion of effective government was fulfilled when it proclaimed independence, so the role of recognition becomes very important. This is an example that shows that recognition today is more political

⁶⁹³ Hannum, Hurst (1998): *The Specter of Secession, Responding to Claims for Ethnic Self-Determination*, p. 15-18

⁶⁹⁴ Coppieters, Bruno 'Introduction' to Coppieters and Sakwa (2003): *Contextualizing Secession: Normative Studies in Comparative Perspective*, Oxford University Press, Oxford, p. 17

than legal matter, and that political considerations carry a greater weight than the de facto fulfillment of objective criteria of statehood.

It is clear that the international community avoids hasty decisions on state recognition (as the case of the Turkish Republic of Northern Cyprus shows). While a considerable number of states accorded recognition to Kosovo, an even greater number has not.⁶⁹⁵ Russia and Serbia insist on legal arguments, claiming that there should be no recognition of Kosovo's statehood because Serbia did not give consent to any redrawing of its borders and reiterate the arguments about importance of sovereignty and territorial integrity for the international system of states in every occasion. As shown, there are no firm grounds in legal doctrine on which its independence can be based. In international law, external self-determination for non-colonial entities is not allowed, except in a narrow case of remedial oppression. Traditional criteria of statehood and the principle of effectiveness do not give a solid basis for independence, as explained above. Although it is shown that there are both pro and contra arguments for the remedial secession of Kosovo, one has to concede that its independence is a *fait accompli*. Kosovo's *effectivité* as a state is questionable at the moment, but a great number of states recognized Kosovo's independence and that is the reality that Serbia's government needs to face. The realization that there is no going back might be useful for the partition option, if it becomes a negotiating issue between the two sides.

However, until Kosovo's UDI, there were no institutional and normative developments that would envisage the independence of Kosovo without revising Resolution 1244, which clearly reaffirms the territorial integrity of Serbia. After the dissolution of the SFRY the aspirations of Kosovo to become an independent state were not upheld, and the issue of Kosovo did not become, despite the efforts and the lobbying of Kosovo Albanians, a part of the Dayton Agreement. After NATO's intervention, there was nothing in the practice of the states or the UN that conveyed any attitude aimed at disrupting the territorial integrity of Serbia. For instance, the UNMIK-FRY common document, adopted in Belgrade on the 5th of November 2001 "promotes the protection of the rights and interests of Kosovo Serbs and other communities in Kosovo,

⁶⁹⁵ As of the 4th of October 2012, 92 out of 193 UN member states recognized the Republic of Kosovo as an independent state.

based on the principles stated in UNSCR 1244, including the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia, as well as in the Constitutional Framework for Provisional Self-Government.”⁶⁹⁶ This document, signed less than two weeks before the elections in Kosovo, affirmed that the new institutions in Kosovo would have no authority to take any steps toward resolving Kosovo’s final status. Later on, by Resolution 1785, adopted on the 21st November 2007 the Security Council “reaffirmed its commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders.”⁶⁹⁷ The Ahtisaari Plan recommended the independence of Kosovo through the revision of Resolution 1244. The membership in the UN is the final confirmation and legitimization of statehood, and until Kosovo becomes a member state of the UN, its statehood will be disputed by the part of the international community that did not recognize it.

Even the fact that the Security Council did not take action for annulling the independence of Kosovo does not imply its approval of the independence. In the Namibia Advisory Opinion the ICJ clearly stated that “the fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed.”⁶⁹⁸ Given these facts, recognition by other states is likely to become the decisive step on Kosovo’s road to statehood. But since, as shown above, Kosovo did not meet all the qualitative conditions of statehood at the time it unilaterally proclaimed independence, the states that recognized Kosovo must have assumed the existence of a right to secession on another basis. These states deliberately concealed their reasons to recognize Kosovo by employing the *sui generis* rhetoric. It is reasonable to suppose that they were convinced that Kosovo had legitimate grounds to secede, such as Kosovo Albanian’s right to external self-determination based on human rights abuses, or their permanent exclusion from the government. Most of these states, however, referred to the uniqueness of Kosovo’s case and the need for regional stability. It seems that the assertion of external right to self-determination or remedial

⁶⁹⁶ UNMIK – FRY Common Document, the 5th of November 2001, available at <http://www.bndlg.de/~wplarre/back011114.htm>, last visited on the 7th of September 2012

⁶⁹⁷ Security Council of the United Nations, Resolution 1785, the 21st November 2007, S/RES/1785, 62 SCOR 5782th mtg.

⁶⁹⁸ International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, the 21st of June 1971, ICJ Reports 1971, p. 36, para. 69

secession was deliberately avoided, although there were references to human rights violations in the 1990s (but they did not give the international community sufficient reasons to support Kosovo Albanians in their struggle for independence at the time). When the recognitions of Kosovo's statehood are scrutinized, the predominance of political motives over legal reasons is evident. By adopting the *sui generis* characterization, the countries that recognized Kosovo intentionally avoided to define a legal basis for Kosovo's independence. Such neglect of legal considerations may lead to the encouragement of secessionist movements elsewhere, which are bound to follow Kosovo's recipe for success, and to pursue their goals with the exertion of force in order to provoke reactions from the international community.

It should be born in mind that successful secessionist movements are likely to have demonstration effects.⁶⁹⁹ But then again international law, as well as the international system remains dominated by states, so it is not likely that any successful case of secession can directly lead to the recognition of the right to secession for ethnic groups. Post-facto rationalizations of different instances of secession will probably prevail, and continue to point out the inconsistencies in international law and practice of states. A more grave consequence of Kosovo's unilaterally proclaimed independence and its support from the Western states is that it might stop discussions on alternative solutions which could accommodate secessionist demands. Solutions short of independence, such as decentralization, territorial and cultural autonomies, federalism and other forms of division of powers are undermined as conflict-solving tools by the events in Kosovo and Georgia. It will become more difficult to convince secessionist groups that federalism or any of the aforementioned institutional mechanisms are appropriate for them while they were unsuitable in the case of Kosovo.

In conclusion, it might be useful to pinpoint the parallels between the cases of Kosovo, South Ossetia and Abkhazia. South Ossetia is an autonomous administrative district (*Oblast*) of Georgia and Abkhazia is an autonomous republic within Georgia. Both entities are effectively

⁶⁹⁹ There are several territories in the world considered as *de facto* states or characterized as frozen conflict zones, in which the effects of Kosovo's independence strongly reverberated. Those are, for instance, post-Soviet *de facto* states (Nagorno-Karabakh, South Ossetia, Abkhazia, Transdniestria), Republika Srpska within Bosnia and Herzegovina, territories inhabited by concentrated minorities such as the Turkic Gagauz minority in Moldova, or Hungarian minority in Romania and Slovakia. Cyprus, Greece and Spain, like Romania and Slovakia, are the EU member states that have not recognized Kosovo's independence because they fear the domino effect.

separated from the rest of Georgia since 1992/1993 (South Ossetia/Abkhazia), and since the cease fire after a civil war,⁷⁰⁰ Russia has maintained a military presence in both entities. However, in 2008 tensions increased and in August Georgian and South Ossetian forces broke the cease fire. When the Georgian armed forces pushed into South Ossetia, Russia accused Georgia of genocide, claiming that thousands of South Ossetian civilians were killed by the Georgian troops. In response, on the 8th of August 2008 the Russian army began a military campaign attacking major ports and cities in Georgia. On the 12th of August, the Russian president ordered a halt to Russian military operations in Georgia, and a peace plan was brokered by the EU, which Russian, Georgian, South Ossetian and Abkhazian leaders signed and endorsed. After a brokered cease fire, Russian troops returned to their bases in South Ossetia and on the 26th of August Russia officially recognized South Ossetia and Abkhazia as independent states, keeping its troops stationed there. The Western states have expressed their support of Georgia and refused to recognize the independence of South Ossetia and Abkhazia.

The main similarities with Kosovo are that the separatists claimed a right to self-determination which includes secession and in all cases there was a military intervention to help the secessionist forces. All three entities had substantial autonomous rights during the Cold War era, and the groups which struggle for independence comprise the majority of the population in their regions. De-facto regimes in South Ossetia and Abkhazia possessed administrative sovereignty since the dissolution of the Soviet Union which is comparable to the system of parallel institutions established in Kosovo during the 1990s. The Georgian government did not govern these territories, and it tried to gain back control by force during the 1990s, although the use of force and the level of violence committed by the Georgian army and the Serbian army cannot be compared. All cases involve ethno-territorial disputes over a historically shared land that led to a grave humanitarian crisis and a flow of refugees. In all cases the primary reason of these entities to fight for independence was oppressive politics and human rights violations by central governments. Furthermore, among the variety of arguments that Russia has used to justify its

⁷⁰⁰ During the disintegration of the USSR South Ossetian nationalists advocated separation from Georgia and union with their coethnics in North Ossetia, on the other side of the Russian border. The Georgian authorities reacted with force, causing over 1,000 deaths and 100,000 people being compelled to flee, mostly to North Ossetia. Again in 2004 Georgian president Mikheil Saakashvili launched a military strike on South Ossetia. In 1992 Georgian military group entered Abkhazia and after several months of fighting Russian armed forces intervened and managed to expel the Georgian fighters from Abkhazia. After that, most of the non-Abkhaz population of almost 250,000 fled.

intervention (ranging from self-defense to the protection of Russian nationals) an especially interesting one was the argument concerning remedial secession, or what Crawford calls *carence de souveraineté*.⁷⁰¹ The Federation Council speaker declared one day before Russia officially recognized the independence of two break-away regions that “the peoples of South Ossetia and Abkhazia have every right to gain independence and one of the main legal principles for recognizing independence is the fundamental principle of international law – the right of people to self-determination.”⁷⁰² Statement by the Ministry of Foreign Affairs of Russia recognizing the independence of South Ossetia and Abkhazia elaborated these arguments: “taking into account the appeals of South Ossetian and Abkhaz peoples, of the Parliaments and Presidents of both Republics, the opinion of the Russian people and both Chambers of the Federal Assembly the President of the Russian Federation decided to recognize the independence of South Ossetia and Abkhazia and to conclude treaties of friendship, cooperation and mutual assistance with them. Making this decision, Russia was guided by the provisions of the Charter of the United Nations, the Helsinki Final Act and other fundamental international instruments, including the 1970 Declaration on Principles of International Law concerning Friendly Relations among States. It should be noted that in accordance with the Declaration, every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence, to adhere in their activities to the principle of equal rights and self-determination of peoples, and to possess a government representing the whole people belonging to the territory. There is no doubt that Mikhail Saakashvili’s regime is far from meeting those high standards set by the international community.”⁷⁰³ Russia has used arguments such as ‘the free will of the people’, ‘the right of peoples to self-determination’ and the remedial right to secession, accusing Georgian leaders of genocide and ethnic cleansing of Ossetians during the August 2008 events.

⁷⁰¹ Russian Minister of Foreign Affairs Sergey Lavrov wrote: “the possession of sovereignty presupposes the duty of a state to refrain from any forcible action which deprives people living on its territory of their right to self-determination, freedom and independence. By giving an order to bomb Tskhinval and planning to use force against Abkhazia, the Saakashvili regime trampled underfoot this norm of international law, enshrined in the 1970 UN Declaration, and itself undermined the territorial integrity of its state.” Sergey Lavrov (2008): *Russian Foreign Policy and a New Quality of the Geopolitical Situation*, Diplomatic Yearbook 2008, Ministry of Foreign Affairs of the Russian Federation, see also http://www.mid.ru/brp_4.nsf/itogi/BC2150E49DAD6A04C325752E0036E93F, last visited on the 7th of September 2012

⁷⁰² *Russian Parliament Recognizes South Ossetia, Abkhazia Independence*, Huliq, the 25th of August 2008, available at <http://www.huliq.com/5/66830/russian-parliament-recognizes-south-ossetia-abkhazia-independence>, last visited on the 7th of September 2012

⁷⁰³ Ministry of Foreign Affairs of the Russian Federation, Statement by the Ministry of Foreign Affairs of the Russian Federation, the 26th of August 2008, Doc. 1246-26-08-2008

The same ideas, although not officially expressed in such a straightforward manner, were behind the recognitions of Kosovo. Claims of oppression and discrimination are accepted as the most legitimate and morally persuasive reasons for pursuing secessionist strategies, and in this way Kosovo has provided useful guidelines for other secessionist groups. However, in this case, these ideas were cynically used by Russia, which previously obstructed an autonomy settlement, in order to pursue its national interests. The international community understood this, and rejected its arguments. The EU asserted “that a peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity recognized by international law, the Final Act of the Helsinki Conference on Security and Cooperation in Europe and United Nations Security Council resolutions. In this context, the Council deplors any action that runs contrary to a solution based on these principles.”⁷⁰⁴

The similarities between these cases stop here. Even if the demographic disparities are disregarded,⁷⁰⁵ there are fundamental differences between Kosovo and the former Georgian provinces. Although Russia tends to present itself as a peacekeeper in South Ossetia, it is involved in the conflict as one of the parties, as it supports the separatists in South Ossetia and Abkhazia. This was confirmed by an order of provisional measures from the ICJ, which states that the parties must provide for basic human rights for Georgians and South Ossetians.⁷⁰⁶ On the other hand, NATO’s intervention was followed by an extensive international presence at Kosovo and there were no official attempts of the US administration to defend the intervention on remedial basis, or to employ any legal argumentation whatsoever. Instead, the US consistently

⁷⁰⁴ Council of the European Union, Council Conclusions on Georgia, 2889th Council meeting, the 15th of September 2008, 13030/08 (Presse 255)

⁷⁰⁵ While the population of Kosovo amounts to two million inhabitants, and over 90 per cent are Kosovo Albanians, the population of Abkhazia is estimated at around 240,000, while South Ossetia has around 70,000 inhabitants. Furthermore, the Abkhaz population in Abkhazia accounts to about 43 per cent. Neither is a serious candidate for a viable state.

⁷⁰⁶ It was Georgia who filed a suit against Russia, contending that the Russian Federation breached various obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, including, among others, launching a war of aggression against Georgia for purposes linked to racial or ethnic discriminatory policies and the denial of self-determination, widespread and systematic discrimination against ethnic Georgians in South Ossetia and Abkhazia and sponsoring and supporting ethnic discrimination by the de facto regimes in South Ossetia and Abkhazia. The Court ordered that the parties must: “do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin, (1) security of persons; (2) the right of persons to freedom of movement and residence within the border of the State; (3) the protection of the property of displaced persons and of refugees...” International Court of Justice, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Provisional Measures, the 15th of October 2008, ICJ General List No. 140

defended the sui generis thesis and justified the intervention with moral argumentation of stopping ethnic cleansing. However, the sui generis argument was commonly rejected by Russia and other states even before Kosovo's unilateral declaration of independence – for instance, in 2006, Vladimir Putin, then Russian president, asked “if people in Kosovo can be granted full independence, why then should we deny it to Abkhazia and South Ossetia?”⁷⁰⁷

There is also the matter of international recognition – Kosovo is partially successful, while Russia's efforts are not, although its military campaign can be characterized as successful (Russia's recognition of the entities was followed by Nicaragua on the 5th of September 2008 and on the 10th of September the Venezuelan President Hugo Chavez also recognized the independence of South Ossetia and Abkhazia during his visit to Moscow). The key difference is the support of powerful states, which South Ossetia and Abkhazia did not possess.⁷⁰⁸ This leads to the conclusion that in order to successfully proclaim the right to external self-determination, it is not enough to show that a people has been oppressed – the support of powerful states seems to be the decisive factor when determining the fate of independence-seeking people.

Unsuccessful attempts of secession, such as Abkhazia, South Ossetia, Chechnya or Tibet confirm this assumption, showing that the political dimension remains dominant over the legal one in disputed cases of self-determination. If a central government enjoys support from powerful countries, as in cases of Turkey and Israel, it can ignore or oppose demands by Kurds or Palestinians. On the other hand, powerful countries like Russia or China, unlike Serbia, can defend their territorial integrity and do not have to fear independence movements. However, in the case of a smaller county, whose central government is unaided by powerful states, secessionist movements have a much better chance to succeed. Since the UN Security Council remains under the control of powerful states, even all decisions to deploy peacekeepers or

⁷⁰⁷ *Russia: Putin Calls for 'Universal Principles' to Settle Frozen Conflict*, Radio Free Europe/Radio Liberty (RFE/RL), the 1st of February 2006, as quoted in Judah, Tim (2008): *Kosovo: What Everyone Needs to Know*, p. 163

⁷⁰⁸ The South Ossetian president stated after Kosovo's unilateral declaration of independence that because of the lack of support of powerful states his country has not become independent, although it has a better legal case for independence than Kosovo. He complained that his region had “more political-legal grounds than Kosovo to have its independence recognized. When I say 'we' I mean both South Ossetia and Abkhazia.” *Russian Parliament Recognizes South Ossetia, Abkhazia Independence*, Huliq, the 25th of August 2008

military troops depend on their policies.⁷⁰⁹ If a secessionist movement is regarded as legitimate by these states, it has considerably higher chances to attract international attention and help, then to internationalize the problem by gaining support for the creation of some form of international administration within the region or even to provoke a humanitarian intervention, and finally, to proclaim independence and receive recognition by other states. The real precedent is not Kosovo's unilateral declaration of independence, but the recognition accorded to it by the Western states. This is why some independence movements succeeded, while other ethnic groups, unable to gain support (such as Tibetans or Chechens), still live under oppressive regimes. Although the right to remedial secession for oppressed peoples is in the process of evolving into a norm of customary law, in practice political support of powerful states seems to be more decisive for the success of the oppressed people's struggle.

Another conclusion that this comparison leads to is that the case of Kosovo is not as unique as the Western states, which promoted the sui generis thesis, wanted to believe. It would seem that at least Russia did not believe in it, as it has justified its recognition of South Ossetian and Abkhazian independence on very similar grounds. Russia argued that Ossetians and Abkhaz could no longer live side by side with Georgians in one state after what they described as genocide and ethnic cleansing. Entities fighting for independence can now argue that their case is sui generis as well, following the example of Kosovo. As President Medvedev argued, "there was a special situation in Kosovo, there is a special situation in South Ossetia and Abkhazia. Speaking about our situation, it is obvious that our decision is aimed at preventing the genocide, the elimination of a people, and helping them get on their feet."⁷¹⁰ There is no doubt whatsoever that the Western support of Kosovo's independence heavily influenced the subsequent events in Georgia. The Russian leadership managed to manipulate the political situation in South Ossetia and Abkhazia by using the rhetoric learned from the Western states. After the Russian recognition of the break-away entities, President Medvedev justified this move by asserting that "Russia had abided by international law in recognizing the two enclaves" but he left no doubt that the

⁷⁰⁹ Sterio, Milena (2010): *On the Right to External Self-Determination: 'Selfistans', Secession and the Great Powers' Rule*, Cleveland-Marshall College of Law, Cleveland State University Research Paper 09-163, p. 26

⁷¹⁰ Levy, Clifford, *Russia Backs Independence of Georgian Enclaves*, The New York Times, the 26th of August 2008, available at

<http://www.nytimes.com/2008/08/27/world/europe/27russia.html?scp=1&sq=russia%20backs%20independence%20of%20georgian%20enclaves&st=cse>, last visited on the 7th of September 2012

decision was in part retaliation for the West's support earlier that year for the independence of Kosovo, which Russia had opposed.⁷¹¹ However, by arguing that Kosovo set a precedent for Abkhazia and South Ossetia, Russia switched to political argumentation, instead of argumentation based on the international law it had employed earlier, presenting itself as a defender of state sovereignty and international law in the case of Kosovo. Thereby it actually lost much of its credibility. This comparison shows that problems created by Kosovo's independence include not only issues related to Kosovo's viability as a state and protection of non-Albanian minorities, but also the fact that Kosovo set a precedent for other secessionist groups around the world. The conduct of the international community in this case (neglecting legal principles and focusing on political aims) has another troubling effect - international law is in danger of losing its authority. This primacy of political considerations encourages secessionist movements elsewhere to use violence in pursuing their goals and to forsake compromises.

The last question to be asked is what are the consequences and the impact of the Kosovo episode on international order? The first evident effect is that the issue of Kosovo managed to deeply divide the international community, and to inspire passionate debates among both governments and scholars. Secondly, the Western states did not succeed in defending the *sui generis* thesis, as the examples of South Ossetia and Abkhazia showed. Thirdly, unless some compromise solution is agreed upon between Belgrade and Pristina, with the support of the international community, the issue of secession will definitely be considered as a zero-sum game and other would-be-secessionists will conclude that violence pays off. This will undermine other possible solutions to secessionist conflicts, such as decentralization, territorial and cultural autonomies, federalism and other forms of division of powers. In the essence, the vital issue is in which direction did the case of Kosovo push the international community – toward new, more humane international order based on the universal values of human rights and freedoms, or toward the breakdown of the classic international system dominated by the United Nations, which is gradually to dissolve in fragmentation, chaos, balkanization and anarchy. The US was determined to demonstrate its unipolar dominance and impose its solutions and policy, while Russia did everything to stand in the way. The United Nations were pushed in the background when most important decisions were made. International rules and mechanisms designed to address problems of this kind were

⁷¹¹ *Ibid.*

circumvented, and international law was only occasionally consulted while composing strategies and making decisions to resolve the crisis. However, a number of positive developments occurred as well – it was shown that sovereignty, already seriously eroded, cannot provide cover for government's mistreatment of its citizens. International commitment to enforce basic values of human rights and freedoms was demonstrated, even at the cost of trampling over sovereignty and territorial integrity of recognized states. The only downside is that instances of such oppression still occur around the globe unsanctioned, so it seems that political motives dominate not only over legal ones, but also over humanitarian ones. This proves that realpolitik still remains the guiding principle for states. It ultimately shows that a new era for the international system is emerging – complex, unpredictable and uncertain post-modern world, in which the core concepts of sovereignty and non-intervention are challenged as the cornerstones of the international order. Numerous ethnic groups threaten states around the globe, and they received encouragement from the case of Kosovo in disputing state boundaries which they consider unjust. The certainties of the classic international system seem lost, as Kosovo pushed the international community one big step closer to fragmentation and chaos. The international institutions and mechanisms do not seem capable of facing the common challenges of the new, fractioned and unpredictable international system.

Précis

The main purpose of this study was to identify the emerging trends in international law on secession, then compare them with the remedial right to secede in political theories, and in the end examine the elements of remedial right to secession in the case of Kosovo. In the first part of the study particular attention was given to the role of self-determination in the process of state formation in international law. It was necessary to identify the meaning, *raison d'être* and main objectives of the legal concept of self-determination. The principle of self-determination entered the international scene in the aftermath of World War I when Wilson proclaimed that a people should not be forced under a sovereignty under which it does not want to live. After World War II the principle acquired a legal status, as it was included in the UN Charter. In the era of decolonization, the right of self-determination became a norm of positive law. Resolutions 1514 and 1541 have proclaimed that all colonial peoples have a right to establish an independent state, or to associate or integrate with an independent state. The core meaning of the right of political self-determination in this period was defined as the right of peoples to decide their political destiny; the right of peoples to govern themselves. The 1966 International Covenants on Human Rights state that *all* peoples have the right to self-determination and by virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development. The Covenants on Human Rights marked a new phase of legal development of the principle of self-determination, by establishing a permanent link between self-determination and civil and political rights. The Declaration on Friendly Relations is considered a landmark in the progressive development of international law, especially because of its safeguard clause, which can be interpreted to imply that a right of secession could arise if the requirement of a representative government that acts in conformity with internal self-determination is not fulfilled. Other international documents such as the 1976 Universal Declaration on the Rights of Peoples, the 1975 Final Act of the Conference on Security and Cooperation in Europe, the 1990 Charter of Paris, the General Assembly Declaration on the Occasion of the Fiftieth Anniversary of the United Nations and the 1993 Vienna Declaration and Programme of Action have confirmed that self-determination is an universal right, not confined to decolonization and that it is a continuing right. They also specified the internal and external right of self-determination and the importance and interlocking of human rights, minority participation and self-determination. The Advisory Opinion of the Supreme Court of Canada represents one of the most important contemporary discussions on the question of external self-determination. This was an important decision

because it addressed the circumstances in which secession may be allowed under international law outside the colonial context. The Court has concluded that there is no incompatibility between the maintenance of territorial integrity and the right of self-determination when a government of a state represents without discrimination all the inhabitants of the state. The Court went on to discuss the issue of remedial secession, elucidating the position of external self-determination in modern international law.

This review of the relevant international legal documents showed main characteristics of the norm of self-determination. The right of self-determination has the status of customary law and an *erga omnes* character. It is a right of a general and permanent character and has a scope and content that states accept as legally binding. It is both a principle and a right, it consists both of general principles and of particular customary rules. One of the often made distinctions concerning self-determination is the division between external and internal self-determination. External self-determination basically means gaining independence after the impairment of the territorial integrity of a state, be that through secession or dissolution of a state. Internal self-determination is, in short, a right to democratic governance, usually related to self-government and autonomy. A question when does the right to internal-self-determination convert into a right to external self-determination is answered by the concept of remedial secession. A substate group which suffers structural discrimination and is denied basic human rights and freedoms is not prohibited from striving for secession after all other methods employed to bring about change have failed. In such cases, the right of internal self-determination converts into a right of external self-determination, but until then, the exercise of the right of self-determination is limited by the right of territorial integrity of states.

Another complex and controversial question is which groups or territories are the units of self-determination. According to relevant legal instruments discussed above, beneficiaries of the right to self-determination are 'peoples'. Those documents do not define this term, but they are clear in separating the rights of 'peoples' and rights of persons belonging to minorities. The essence of this distinction is that peoples have the right to self-determination which includes its external dimension, while minorities possess only the right to internal self-determination. All legal instruments that deal with self-determination refer to the principle of territorial integrity, and this

implies that subgroups within states are envisaged as holders of the right to self-determination, because if nations were the only holders of the right, this emphasis on the principle of territorial integrity would be superfluous. It follows that subgroups or ethnic groups within states, besides the entire population of the state, have the right to internal self-determination. Minorities are entitled to minority rights, in addition to individual rights, and they are normally not recognized by the international community as 'peoples' entitled to external self-determination, since minorities, unlike 'peoples', usually lack an attachment to a particular territory. Indigenous peoples, similarly as minorities, have only the right to internal self-determination under international law – they possess the rights of self-government and rights to cultural integrity. Undisputed subjects of self-determination are: mandated, trust and non-self-governing territories and all entities whose right to self-determination is established under international agreements; the entire population of a state (as the right of the inhabitants of the state to choose their own form of government); the population of sovereign states that has a right of self-determination in case of a foreign domination and territories where self-determination is based upon the agreement by the parties, or is allowed by the constitution of a state. A consensus is emerging that an additional category of entities holds this right - peoples that are severely oppressed and discriminated against, and ethnic groups can appear as 'peoples' only if they fulfill this criterion (entities subject to *carence de souveraineté*). Otherwise they are entitled to internal self-determination only.

The relationship and mutual influences, as well as inevitable conflicts that derive from the confrontation of static principles of international law such as state sovereignty and territorial integrity and the flexible principle of self-determination are also examined. State sovereignty constitutes the foundation of interstate relations according to the UN Charter, but situations may arise when legitimate self-determination claims override the principles of sovereignty and territorial integrity. Territorial integrity is one of the most important principles in international law, but it runs contrary to the essence of self-determination - that oppressed and dominated people within a state have a right to seek statehood. Most scholars stress that the conflict between self-determination of peoples and territorial integrity of states is principally resolved in favor of state sovereignty, with the exception of remedial secession. Another related principle, also conflicting with self-determination, is *uti possidetis*. This principle serves to identify

territorial boundaries that belong to the unit of self-determination. The doctrine of *uti possidetis* basically provides for stability of boundaries, by stating that when a new state gains independence, it will have the same boundaries that it possessed when it was an administrative unit within a territory of a colonial power. This doctrine was used by the international community in order to control the break-up of Yugoslavia, and the Badinter Commission has proclaimed that a 'federal' right of self-determination exists, while the secession of autonomous regions is prohibited. The Commission and its application of *uti possidetis* were heavily criticized not only because there was no legal basis for such a radical transformation of this principle, but also because its opinions, based on political considerations rather than legal reasoning, failed to provide a peaceable solution, prolonging and intensifying violence instead.

Since international law does not provide a clear guide for responding to the new wave of secessions which began in 1989, the contribution of the political theories to the better understanding of the secession issue is also analyzed. The core question on which many different political theories are built upon is not how or why secessions occur, but how can secession be justified. These normative theories, based on ethical and political norms and principles, try to provide a theoretical justification of specific conditions and attempts of secession. Three major groups of theories on secession exist in political philosophy. The first kind is based on a notion of just cause, it is called remedial right only theory or just-cause theory. The second major theory sees secession as a political right and according to it, groups have a general right to secede which arises from the freedom of association. These theories are also called choice theories, or plebiscite or associative theories. The third category is national self-determination theories or ascriptivist theories. The only thing all three categories of theories have in common is that they attribute the right of unilateral secession, under different conditions, to territorially concentrated groups within established states.

Under associative or choice theories, the legitimacy of the state depends on the consent of the population, so if a majority of the population removes its consent, that state is no longer considered sovereign. The choice of the majority of the population within a seceding region is sufficient to give legitimacy to their right to secede according to these theories. The majority in question is not a majority of people, of the citizens of the entire state, but a majority of a subset

of people, of the citizens within a portion of the state's territory. Analogy with no-fault divorce is often used to explain secession, and this no-fault secession is justified by principles of consent, democracy, and freedom of association or individual autonomy. Theorists that advocate choice theory, such as Harry Beran, Christopher Wellman and Daniel Philpott, consider secession legitimate when a territorially concentrated majority expresses a wish to secede in a plebiscite, and base their arguments on the right of political association and values of individual autonomy. However, according to most authors, there are additional criteria that a group must satisfy, such as adherence to democratic values and rights, accordance to the liberal 'harm' principle, respect for minority rights, viability of a would-be state, lack of other alternatives, etc. The main objections to this theory are that if it were institutionalized secessionist anarchy would endanger the international system; governments would turn against the strategies of decentralization and federalism, while territorially concentrated minorities would use the threat of secession as a bargaining tool.

According to theories on national self-determination, the right of self-determination is ascribed to ethnic groups, nations, it does not belong to individuals as in choice theories - it is held collectively. The right of the nation to self-determination is usually interpreted as a moral right to secede and form its own state, although many scholars such as Yael Tamir, Margaret Moore or David Miller claim that political self-determination does not need to amount to the form of complete sovereignty, but grounds a number of special political rights and autonomy. The first type of argument for the thesis that nations have a *prima facie* right to secession is that identity and interests of individuals are inseparably connected to the flourishing of the nation to which they belong, and the prosperity and security of a nation are best insured if a nation has its own state. The second main type of argument is instrumental, based on the premise that when citizens are co-nationals they are more able and better motivated to promote and further democracy and distributive justice. There are several critical arguments against these theories: insisting on ethnic homogeneity can lead to suppression of other ethnic and cultural groups; identity does not have to depend on cultural membership - there are other groups equally or more important for individual's well-being than nations; the principle of nationality justifies disintegration and break-up of perfectly legitimate states, and directly endangers the territorial integrity of most

states of the world; and there are by far more nations and potential nations in the world than territories where they can be organized into states.

Remedial right theory's basic presumption is against secession - secession is a remedial right which needs a serious justification, not a primary right. It is also called just-cause theory, since the remedial right to secede is available to a group that has suffered grave injustices, and the only way out from an unbearable situation for this group is to remove itself (and the territory) from the repressive state. It is somewhat similar to John Locke's theory of revolution, since it links the right to resist tyranny and the right to self-determination. According to the proponents of this theory, there are different situations which they consider as unjust and sufficient to legitimize secession, such as heavy discrimination against a group, seizure of territory, revocation of territorial autonomy, genocide and other serious and systematic violations of human rights and freedoms. A group has to show that it is a victim of systematic injustice and exploitation, but it is also required to show that it has a valid claim to the territory it wants to withdraw from the parent state. This means that there is no *prima facie* right to secession, because the burden is on separatists to demonstrate a territorial claim and to show that they have suffered certain injustices. Only legitimate states are protected by the principle of territorial integrity, and legitimate states are those that fulfill the criteria of being democratic and respecting basic human rights. A right to secede from a just state is not allowed, except in cases of special rights - secession by mutual consent of the state and the secessionist group, and secession based on a constitutional right to secede. Remedial theory has an advantage over choice and ascriptivist theories because it better corresponds to developments in the international community and international law. Unlike these theories, it does not pose pervasive threats to the territorial integrity of existing states and acknowledges that state breaking, like revolution, requires a weighty justification.

Kosovo is an example of a conflict in which a part of the population, an ethnically defined group, successfully rebelled against the central authorities. However, for a considerable period of time, this ethnic group had used peaceful resistance in order to distance itself from the authorities of the state, establishing a parallel system of governance in response to oppression and human rights violations committed by the central government. This strategy was only partially

successful, as the international community did not support Kosovo's request for independent statehood. The KLA tried to change this situation by engaging in concrete action, organizing a series of terrorist attacks throughout Kosovo. As shown, when armed conflict erupted the international community started to take the Kosovo problem seriously. Although it had previously condemned human rights violations in Kosovo, no significant action was undertaken for years. The human rights violations were publicly condemned by the principal political bodies of the EU and the UN, but by the time international agencies became seriously engaged in the crisis, it had become a serious and violent secessionist conflict. The demands made by the Security Council throughout 1998 drew attention to the gravity of the situation in Kosovo. The international community has maintained that Kosovo is entitled to regain autonomy it previously possessed, or even a higher degree of self-governance. The KLA, using terrorist tactics, managed to start a process which eventually led to another war in Europe. The 1999 Kosovo war and the massive displacement crisis and suffering it had caused made any prospect of establishing meaningful autonomy for Kosovo within Serbia unrealistic. In the following years, Kosovo was the responsibility of the international community, and it was governed by international administration. However, during this period it became clear that probably the only possible exit was independence. Kosovo's leadership cooperated with the international community and entered into a dialogue with Belgrade, which turned out to be unsuccessful. When Serbia refused the settlement on the basis of the Ahtisaari Plan, and as the Security Council was unable to take action because it was blocked by Russia, Kosovo unilaterally declared independence. This declaration of independence was supported by many powerful states, including the US. In exchange for this support, Kosovo accepted the limitations on its sovereignty imposed by the Ahtisaari Plan, making itself subject to the obligations contained in this settlement. The states supporting Kosovo maintain that Kosovo is unique and in no way a precedent for action in future cases.

The question whether Kosovo was entitled to remedial secession is hard to answer. Kosovo had two grounds for remedial secession – the denial of the right to representation and repression and human rights violations. On both grounds it essentially satisfies the conditions of remedial secession that different authors pose. Basically, in the first variant, a significant segment of the population of the state that is excluded from the government may claim a right to secession. The

second ground for remedial secession is serious and persistent violations of human rights of a territorially concentrated sub-state group. Kosovo fulfilled both conditions throughout the 1990s. This is in accordance with the 1970 Friendly Relations Declaration and the subsequent international law instruments which included a paragraph similar to its safeguard clause. In international law, only mandated, trust and non-self-governing territories and peoples under foreign domination are entitled to external self-determination, but the emerging trends allow remedial secession in cases where a territorially concentrated sub-state group is oppressed for a long period of time and is denied the participation in the government. It was also shown that few arguments against Kosovo's right to remedial secession can be raised. The first one is the reverse ethnic cleansing of non-Albanian population after the retreat of Serbian forces and administration from Kosovo. The second main argument is that in 2008 the population of Kosovo was no longer in danger of being persecuted and discriminated against, as a democratic regime was established in Belgrade. Although Kosovo Albanians were victims of oppression and their human rights were severely and systematically violated during the 1990s, there was no danger that such atrocities could be repeated in 2008. Finally, it can be concluded that Kosovo must not turn into another frozen conflict. Ideally, the solution will come from an agreement between Belgrade and Pristina, and all possible efforts should be made to reach a real consensus between the conflicting parties. It is not excluded that such consensus may result in recognition of an independent Kosovo by Serbia and the incorporation of the northern part of the province, mostly inhabited by Serbs, into Serbia. The current situation in the north of Kosovo provides further arguments for the partition option, as it is de facto independent from Kosovo Albanian government. The Kosovo Serbs should be entitled to choose under which government they want to live – they are a territorially concentrated people that has been subjected to the reverse ethnic cleansing, and they do not participate in the Kosovo government.

From the perspective of international relations, several main effects of the Kosovo case on the international system can be noticed. The issue of Kosovo's statehood will in the end depend on its recognition by other states. Since the principle of *effectivité* does not provide solid grounds for Kosovo's independence, the states that have recognized Kosovo assumed the existence of a right to secession on the basis of which Kosovo could separate from Serbia prior to the establishment of its own effective statehood. The Western states tried to portray Kosovo's secession and its

recognition as unique, although they could have employed credible legal arguments drawing from the right to remedial secession. They were aware that this could create a precedent, as any entity that proves that its circumstances are similar to Kosovo's could have a strong argument for independence. The problem caused thereby is that incentives would be given to other secessionist groups to provoke high levels of violence and civilian suffering in order to achieve their goals. Even though they decided to use the *sui generis* rhetoric, the underlying reason for many states to officially recognize Kosovo was that they believed that Kosovo had legitimate grounds to secede such as Kosovo Albanian's right to external self-determination based on human rights abuses, or their permanent exclusion from the government. Nevertheless, although other groups persistently excluded from the government of their states have not been accorded a right to external self-determination (for instance, Iraqi Kurds were not offered independence after intervention on their behalf in 1991, nor after a US-led coalition invaded all of Iraq twelve years later), the case of Kosovo can, if its independence consolidates, help to strengthen the arguments of remedial right theory.

Lessons learned from Kosovo soon enough influenced the subsequent events in Georgia, as Russia justified its recognition of South Ossetian and Abkhazian independence on very similar bases. It argued that Ossetians and Abkhaz could no longer live side by side with Georgians in one state after what they described as genocide and ethnic cleansing. Thereby Russia demonstrated that the 'unique case' rhetoric employed by states which support Kosovo's unilaterally proclaimed independence cannot be sustained. The most unique thing about Kosovo is the sheer political will of certain states to treat it as unique. The comparison between Kosovo and South Ossetia and Abkhazia shows that problems created by Kosovo's independence include not only issues related to Kosovo's viability as a state and protection of non-Albanian minorities, but also the fact that Kosovo set a precedent for other secessionist groups around the world. However, unsuccessful attempts of secession, such as Abkhazia, South Ossetia, Chechnya or Tibet show that although the right to remedial secession for oppressed peoples is in the process of evolving into a norm of customary law, in practice political support of powerful states seems to be more decisive for the success of the oppressed people's struggle for independence.

The neglect of legal principles and the dominance of political motives which was demonstrated in the case of Kosovo have another troubling effect - international law is in danger of losing its authority. This primacy of political considerations encourages secessionist movements elsewhere to use violence in pursuing their goals and to forsake compromises, and that will undermine alternative solutions to secessionist conflicts, such as decentralization, territorial and cultural autonomies, federalism and other forms of division of powers. Would-be secessionists around the globe received encouragement from the case of Kosovo in disputing state boundaries which they consider unjust. Besides showing the inconsistencies in international law and practice of states, this episode has demonstrated that realpolitik remains the overriding paradigm for state relations.

Appendix I: Chronology

A brief chronology of events that led to Kosovo's unilateral declaration of independence

1946 - Constitution of the Federal People's Republic of Yugoslavia proclaims that Kosovo is an autonomous region and a constituent part of Serbia

1953 - Constitutional Law of the Federal People's Republic of Yugoslavia, Kosovo's status remains unchanged

1963 - New federal constitution, Kosovo becomes an autonomous province

1968 - Demonstrations in Kosovo

1974 - Constitution of the Socialist Federal Republic of Yugoslavia – substantial autonomy and self-government for Kosovo

1980 - Death of Josip Broz Tito

1981 - Separatist riots in Kosovo, state of emergency is declared, protesters are suppressed by Yugoslav troops

1982 - Numerous convictions of those involved in the riots, further arrests for activities against the state

1986 - Memorandum of the Serbian Academy of Arts and Sciences is published, and Kosovo Albanian nationalism is condemned in Serbia

1987 - Milosevic takes over Serbian leadership, Ivan Stambolic is removed as the President of the Presidency of Serbia; special police units are sent to Kosovo to address the continuing riots, and the authority of provincial police is suspended

1988 - The Yugoslav federal government approves constitutional changes that strengthen the federal government at the expense of regional autonomy

1989 – Both Serbian and Kosovo assembly approve constitutional changes and the autonomy of Kosovo is considerably reduced, bringing the province under Belgrade's direct control; public protests, riots, street violence and strikes in Kosovo lead to the introduction of a curfew; Milosevic is elected as President of Serbia

1990 - New wave of violence in Kosovo, additional troops are sent to the province, Kosovo Albanian leaders resign; Serbian authorities dissolve the Kosovo Assembly which in return issues Constitutional Declaration on the 2nd of July; Kosovo Albanian deputies of the dissolved assembly adopt the Constitution of the Republic of Kosovo on the 7th of September; on the 28th of September new Serbian constitution enters into force

1991 - Slovenia, Croatia and Bosnia break away from Yugoslavia and declare their independence; on the 7th of September Carrington chaired the first session of a peace conference at The Hague; the 8th of September - Macedonian independence referendum; 26-30 September referendum on sovereignty in Kosovo but only Albania recognizes the vote

1992 - On the 27th of April the Federal Assembly of Yugoslavia accepts new constitution, forming the new state of the Federal Republic of Yugoslavia, consisting of Serbia and Montenegro; in May Dr. Ibrahim Rugova is elected as President of Kosovo; on the 3rd of September a permanent International Conference on the Former Yugoslavia is established; in November OSCE Mission of Long Duration is deployed in Kosovo

1993 - On the 25th of May UN Security Council Resolution 827 establishes the International Criminal Tribunal for the Former Yugoslavia; in July OSCE mission withdraws from Kosovo after federal authorities refused to renew its mandate and on the 9th of August UNSC Resolution 855 calls on the FRY to reconsider its refusal to allow OSCE missions in its territory

1994 - On the 23rd of February Serbian government closes the Academy of Arts and Sciences of Kosovo; in April, NATO carries out airstrikes against Bosnian Serbs; on the 18th of November Amnesty International Report warns of a dangerous escalation of human right abuses in Kosovo

1995 - On the 1st of November peace talks in Dayton, Ohio begin and on the 14th of December presidents of Serbia, Croatia and Bosnia formally sign the Dayton Accords in Paris, but Kosovo issues are left unresolved

1996 - The Kosovo Liberation Army emerges and claims responsibility for a number of bombings and attacks against Serbian police and state officials; in November, after winning municipal elections, opposition coalition Zajedno begins daily anti-government demonstrations in Belgrade because Milosevic failed to honor the election results

1997 - Anti-government demonstrations continue in Serbia and on the 4th of February Milosevic recognizes opposition victory in municipal elections; Albania descends into anarchy, arms depots are looted and weapons become available to the KLA; in July Milosevic is elected as President of the FRY; in December all Albanian language schools in Kosovo are closed

1998

March: Elections are held in Kosovo and Rugova's LDK wins; Serbian offensive in Drenica region begins; on the 31st Security Council Resolution 1160 imposes an arms embargo on the FRY

April: Clashes between the KLA and Serbian security forces continue and thousands of civilians are forced to flee their homes; in a national referendum on the 23rd 95% of Serbs reject foreign mediation to solve the Kosovo crisis

May: Christopher Hill is named US Special Envoy to Kosovo; first meeting between Rugova and Milosevic takes place on the 15th, dialogue quickly breaks down while fighting intensifies

June: On the 15th 85 NATO warplanes fly over Albania and Macedonia in a show of force aimed at Milosevic; Holbrooke meets on the 23rd with Milosevic in Belgrade to urge an end to the conflict

July: Ambassador Hill achieves a diplomatic success, as Milosevic promises to give aid agencies full access to Kosovo and Kosovo Diplomatic Observer Mission begins monitoring operations

August: Serbian forces intensify their summer offensive, and the Security Council calls for cease-fire on the 24th of August

September: On the 23rd Security Council Resolution 1199 condemns the use of excessive force by Serbian police forces as well as terrorist acts of the KLA; on the 24th the North Atlantic Council decides to take NATO to an increased level of military preparedness

October: On the 12th NATO approves activation order authorizing preparations for a limited bombing campaign and on the 13th Holbrooke secures an agreement with Milosevic which calls for Serbian compliance with Resolution 1199, a cease-fire, troop withdrawals, elections, substantial autonomy for Kosovo; on the 16th Milosevic signs agreement to allow OSCE verifiers into Kosovo and NATO air monitoring; on the 24th the Security Council approves Holbrook-Milosevic agreement in Resolution 1203

November: On the 2nd new Hill peace draft emerges; KVM monitors begin deploying in Kosovo

December: The third Hill draft was submitted on the 2nd; at the end of December a new offensive of Serbian forces

1999

January: On the 15th Racak massacre; OSCE Head of Mission condemns the act and is declared *persona non grata* on the 18th; the Contact Group meets in London on the 29th and gives Serbia and Kosovo Albanians an ultimatum to attend peace talks in Rambouillet on the 6th of February; on the 30th NATO issues a statement announcing that it is prepared to launch air strikes

February: On the 6th Rambouillet peace conference begins; on the 23rd the final version of the agreement is proposed by the Contact Group, but neither side signs

March: On the 15th the follow-up Paris conference starts, and the Rambouillet Accord is signed on the 18th by Kosovo, but not by Serbia; on the 20th KVM evacuates; on the 22nd Holbrooke is sent to Serbia to deliver a final ultimatum; on the 23rd Holbrooke declares the talks have failed and NATO Secretary General Solana announces that he has directed General Clark to begin air operations against the FRY; on the 24th NATO bombing campaign starts

April: On the 3rd central Belgrade is hit by NATO missiles for the first time; on the 6th Serbia declares a unilateral Easter cease-fire, but NATO rejects the offer and continues daily air attacks; on the 14th news breaks of mistaken NATO strike on column of Kosovo Albanian refugees killing 73 civilians; on the 23rd NATO attacks Serbian television in Belgrade, causing civilian deaths

May: On the 1st NATO bombs a civilian train on bridge near Pristina; on the 6th G-8 adopts a set of principles for a political solution for Kosovo; on the 7th NATO planes bomb Chinese Embassy in Belgrade; on the 24th NATO aircrafts destroy the Serbian power grids; on the 27th the ICTY announces indictment of top FRY/Serbian leadership, including Milosevic; on the 31st a NATO missile goes off-course and strikes a residential neighborhood in Surdulica, killing 20 civilians

June: The 3rd of June Agreement after Talbott, Chernomyrdin and Ahtisaari met with Milosevic; on the 9th Kumanovo Agreement between the International Security Force (KFOR) and the Governments of the FRY and Serbia is signed; on the 10th the Security Council adopts Resolution 1244 and NATO stops bombing; KFOR is deployed on the 12th and Yugoslavian forces withdraw from Kosovo, but Russian troops enter Kosovo before NATO, taking control of Pristina airport; on the 18th agreement over Russian participation in peacekeeping force; under NATO pressure, the KLA agrees to disarm on the 21st

July: Kosovo becomes an internationalized territory and Vieira de Mello, the first Special Representative of the UN Secretary General (SRSG) is replaced by Bernard Kouchner who establishes the Kosovo Transnational Council on the 16th and issues the first UNMIK regulation on the 25th; on the 23rd 14 Kosovo Serb farmers are killed in their fields near Lipljan

2000 - On the 5th of October downfall of Milosevic after elections; on the 7th of October Milosevic resigns and Vojislav Kostunica is sworn as President of FRY; in December parliamentary elections are held and DOS (Democratic Opposition of Serbia) achieves a two-thirds majority

2001 - In January Kouchner is replaced by Hans Haekkerup; on the 1st of April Milošević is arrested by Serbian police; Constitutional Framework for Provisional Self-Government in Kosovo is adopted in May; on the 28th of June Milosevic is transferred to The Hague; on the 5th of November SRSG and Serbian government sign the 'Common Document' in Belgrade, inviting Kosovo Serbs to vote in the forthcoming election; on the 17th of November general election are held throughout Kosovo, LDK wins, and on the 10th of December the newly elected Assembly meets for the first time

2002 - In February new SRSG Michael Steiner arrives in Kosovo; Kosovo Albanian leaders agree to a coalition government, with Rugova as President and Bajram Rexhepi (PDK) as prime minister and on the 12th of June Kosovo's new Provisional Government is formally sworn into office; on the 24th of April declaration of 'Standards before Status' policy by Steiner

2003 - In February the FRY is succeeded by the Union of Serbia and Montenegro; on the 19th of February Fatmir Limaj is arrested and transferred to The Hague; on the 12th of March Serbian prime minister Zoran Djindjic is assassinated; in August new SRSG Harri Holker arrives in Kosovo; on the 10th of December UN outlines a set of standards Kosovo must meet for final status talks

2004 - March riots in Kosovo, Kosovo Albanians target Serbs, their property and churches; on the 31st of March UNMIK releases 117-page Kosovo Standards Implementation Plan; on the 25th of July Kai Eide delivers his Report on the Situation in Kosovo and the sixth SRSG Soren Jessen Petersen arrives; on the 23rd of October municipal and general election are held in Kosovo, boycotted by Kosovo Serbs, and in December Rugova is reelected as president and Ramush Haradinaj becomes prime minister, while Thaci's PDK leads an opposition block

2005 - In March Haradinaj resigns as Kosovo prime minister to face war crimes charges at The Hague, and his deputy Bajram Kosumi becomes prime minister; on the 3rd of June UN Secretary-General Annan appoints Kai Eide to conduct a new assessment of Kosovo's readiness for status talks; on the 7th of October Eide concludes that, although progress has been poor, status talks should begin so on the 24th of October the Security Council endorses his assessment and calls for talks over Kosovo's status

2006 - On the 21st of January president Rugova dies and is succeeded by Fatmir Sejdiu; on the 20th of February negotiations on Kosovo's final status begin in Vienna, presided over by UN Special Envoy Ahtisaari; in March Kosovo prime minister Kosumi steps down and former KLA commander Agim Ceku is asked to form a new government; on the 11th of March Slobodan Milosevic is found dead in his prison cell in The Hague; on the 21st of May in referendum in Montenegro just over the required 55 per cent of voters cast ballots for independence and on the 3rd of June Montenegro declares itself independent from Serbia; on the 24th of July in Vienna high-level meeting between Serbian and Kosovo's leaders takes place; on the 28th and the 29th of October voters in referendum in Serbia approve a new constitution which declares that Kosovo is an integral part of the country

2007 - On the 2nd of February Ahtisaari presents his draft proposal in Belgrade and Pristina - the proposal is welcomed by Kosovo Albanians but rejected by Serbia; on the 26th of March the Comprehensive Proposal and Ahtisaari's Report in which he recommends 'supervised independence' for Kosovo are officially delivered to the UNSC; since Russia rejects draft UNSC resolution on the status of Kosovo, on the 10th of August envoys from US, EU and Russia (the Troika) start 120 days of further negotiations; in November Thaci's PDK wins general elections; in December the Troika concludes that the parties were unable to reach an agreement on Kosovo's status

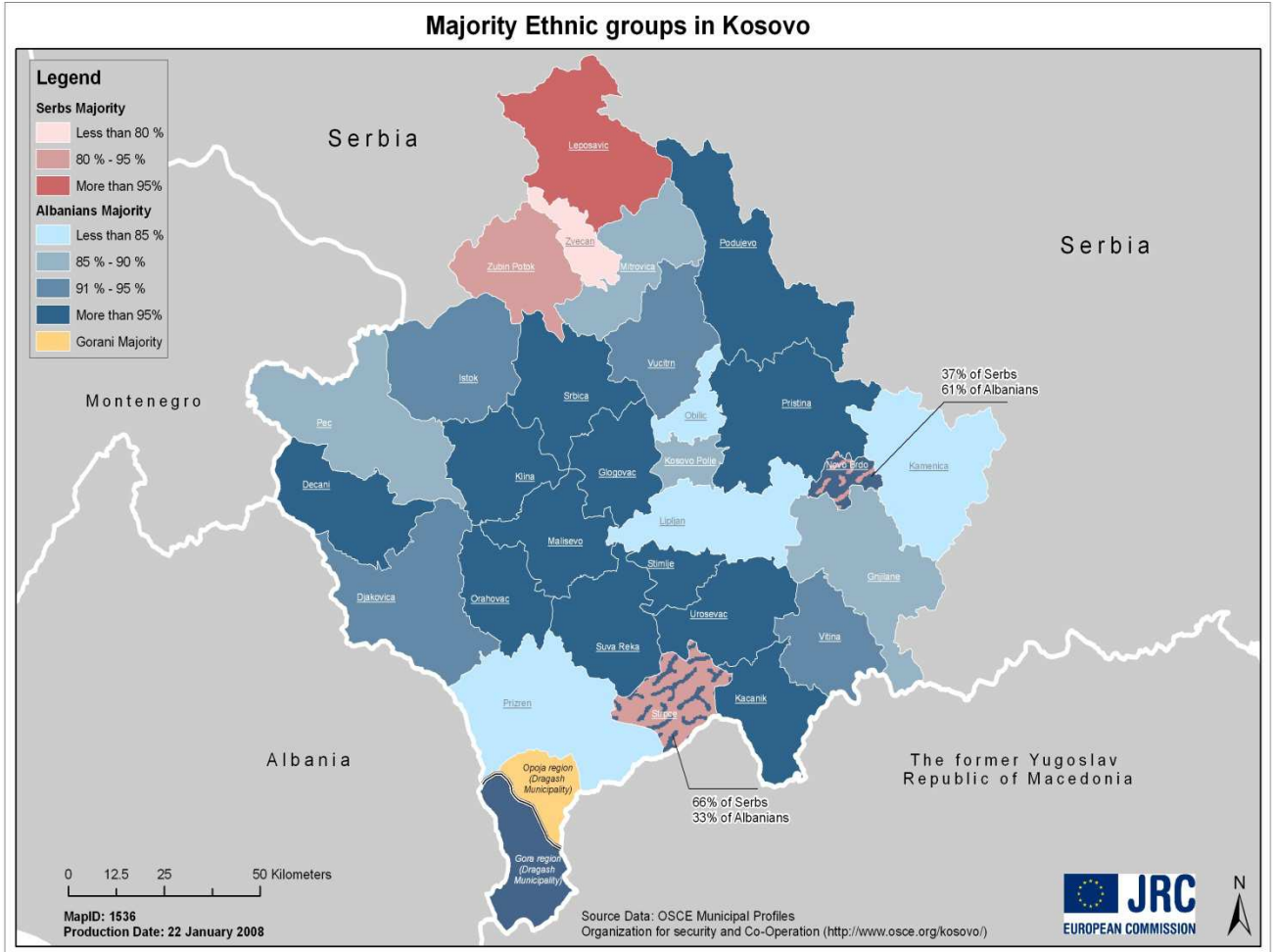
2008 - On the 16th of February the EU Council decides to launch EULEX mission in the wider area of Rule of Law; on the 17th of February Kosovo declares independence; on the 18th of February the US recognizes Kosovo as a sovereign and independent state and the EU declares that member states will decide in accordance with national practice and international law, on their relations with Kosovo; on the 9th of April the Kosovo Assembly adopts a new constitution

Appendix II: Maps

Map of Serbia and Kosovo



Map of Ethnic Groups in Kosovo



Appendix III: Select Documents

African Commission on Human and Peoples' Rights, Communication No. 75/92, Katangese Peoples' Congress v. Zaire, 8th Annual Activity Report of the Commission 1994/1995

Amnesty International, 'Collateral Damage' or Unlawful Killings: Violations of the Laws of War by NATO During Operation Allied Force, the 7th of May 2000, EUR 70/018/2000

Amnesty International, Serbia and Montenegro (Kosovo/Kosova) – Minority Communities: Fundamental Rights Denied, the 31st of March 2003, EUR 70/011/2003

Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation 21, 48th Session, 1996, UN Doc. CERD/A/51/18, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 209 (2003)

Conference on Security and Co-operation in Europe, Final Act of the Conference on Security and Cooperation in Europe, the 1st of August 1975, 14 ILM 1292

Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe, the 21st of November 1990, 30 ILM 193

Constitutional Law on the Basis of Social and Political Organization of the Federative People's Republic of Yugoslavia and Federal Bodies of Power, the 13th of January 1953, Official Gazette of the FPRY No. 3/1953

Constitution of the Socialist Federal Republic of Yugoslavia, the 7th of April 1963, Official Gazette of the SFRY No. 14/1963

Constitution of the Socialist Federal Republic of Yugoslavia, the 21st of February 1974, Official Gazette of the SFRY No. 9/1974

Constitution of the Socialist Republic of Serbia, the 28th of September 1990, Official Gazette of the Republic of Serbia No. 1/1990

Constitution of the Federal Republic of Yugoslavia, the 27th of April 1992, Official Gazette of the FRY No. 1/1992

Constitution of the Republic of Kosovo, the 9th of April 2008, available at <http://www.unhcr.org/refworld/docid/4ae969d32.html>, last visited on the 7th of September 2012

Council of Europe, Committee on Legal Affairs and Human Rights, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, report by Dick Marty, the 12th of December 2010, AS/Jur (2010) 46

Council of Europe, Committee on Legal Affairs and Human Rights, The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans, report by Jean Charles Gardetto, the 12th of January 2011, Doc. 12440 rev

Council of the European Union, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, published in Official Journal of the European Union Vol. 42, p. 92, the 16th of February 2008

EC Conference on Yugoslavia, Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1494

EC Conference on Yugoslavia, Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1497

EC Conference on Yugoslavia, Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1499

EC Conference on Yugoslavia, Opinion No. 8 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 ILM 1521

European Community, Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, the 16th of December 1991, 31 ILM 1486

European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, the 16th of December 1991, 31 ILM 1485

European Court of Human Rights, *Loizidou v. Turkey (Merits)*, No. 40/1993/435/514, the 18th of December 1996, *Human Rights Law Journal*, Vol. 18, p. 50

General Assembly of the United Nations, Universal Declaration of Human Rights, the 10th of December 1948, A/RES/217A (III), 3 UN GAOR (Resolutions, part 1)

General Assembly of the United Nations, Declaration on the Granting of Independence to Colonial Territories and Peoples, the 14th of December 1960, A/RES/1514, 15 UN GAOR Supp. (No. 16)

General Assembly of the United Nations, Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, the 15th of December 1960, A/RES/1541 (XV), 15 UN GAOR Supp. (No. 16)

General Assembly of the United Nations, Convention on the Elimination of All Forms of Racial Discrimination, the 21st of December 1965, A/RES/2106 (XX), 660 UNTS 195

General Assembly of the United Nations, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights, the 16th of December 1966, A/RES/21/2200, 999 UNTS 171, 993 UNTS 3

General Assembly of the United Nations, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, the 14th of October 1970, A/RES/2625 (XXV), 25 UN GAOR Supp. (No. 28)

General Assembly of the United Nations, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 20th of December 1993, A/RES/47/135, 47 UN GAOR Supp. (No. 49)

General Assembly of the United Nations, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations , the 24th of October 1995, A/RES/50/6, 49 UN GAOR Supp. (No. 49)

General Assembly of the United Nations, Resolution 50/190, Situation of Human Rights in Kosovo, the 22nd of December 1995, A/RES/50/190, 50 UN GAOR Supp. (No. 49)

General Assembly of the United Nations, Verbatim Records of the Plenary Meetings of the 54th Session, the 20th of September 1999, UN Doc. A/PV/54/4

General Assembly of the United Nations, Verbatim Records of the Plenary Meetings of the 54th Session, the 22nd of September 1999, UN Doc. A/PV/54/8

General Assembly of the United Nations, Verbatim Records of the Plenary Meetings of the 54th Session, the 24th of September 1999, UN Doc. A/PV/54/13

General Assembly of the United Nations, Resolution 60/1, 2005 World Summit Outcome, the 24th of October 2005, A/RES/60/1, 60 UN GAOR Supp. (No. 49)

General Assembly of the United Nations, Declaration on the Rights of Indigenous Peoples, the 13th of September 2007, A/RES/61/295, 61 UN GAOR Supp. (No. 53)

General Assembly of the United Nations, Request for an Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law, the 8th of October 2008, A/RES/63/3, 63 UN GAOR 22nd mtg.

Human Rights Watch, Civilian Deaths in the NATO Air Campaign, Human Rights Watch, Vol. 12, February 2000

Human Rights Watch, Failure to Protect: Anti-Minority Violence in Kosovo, March 2004, Human Rights Watch, Vol. 16, July 2004

Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned, 2000, Oxford University Press, Oxford

Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), the 23rd of February 1999, United Nations Security Council, the 7th of June 1999, UN Doc. S/1999/648

International Court of Justice, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, the 28th of May 1948, ICJ Reports 1948, p. 56

International Court of Justice, Corfu Channel Case (UK v. Albania), Separate Opinion of Judge Alvarez, the 9th of April 1949, ICJ Reports 1949, p. 39

International Court of Justice, Competence of the GA for the Admission of a State to the United Nations, Advisory Opinion, the 3rd of March 1950, ICJ Reports 1950, p. 4

International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, the 21st of June 1971, ICJ Reports 1971, p. 16

International Court of Justice, Western Sahara, Advisory Opinion, the 16th of October 1975, ICJ Reports 1975, p. 12

International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Judgment, the 27th of June 1986, ICJ Reports 1986, p. 14

International Court of Justice, Frontier Dispute (Burkina Faso v Mali), Judgment, the 22nd of December 1986, ICJ Reports 1986, p. 554

International Court of Justice, East Timor (Portugal v Australia), Jurisdiction and Admissibility, Judgment, the 30th of June 1995, ICJ Reports 1995, p. 90

International Court of Justice, Legality of the Use of Force (Yugoslavia v [Belgium and nine other States]), Provisional Measures, the 2nd of June 1999, ICJ Reports 1999, p. 950

International Court of Justice, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Provisional Measures, the 15th of October 2008, ICJ General List No. 140

International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, the 22nd of July 2010, ICJ General List No. 141

International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Fatmir Limaj, Haradin Bala and Isak Musliu, Judgement, the 27th of September 2007, IT-03-66-A

International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgement, the 3rd of April 2008, IT-04-84-T

International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lukic, Judgment, the 26th of February 2009, IT-05-87-T

International Labour Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, the 27th of June 1989, 72 ILO Official Bull. 59

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of Its 53rd Session, 2001, UN Doc. A/56/10, 56 UN GAOR Supp. (No. 10)

Kosovo Declaration of Independence, the 17th of February 2008, available at <http://www.unhcr.org/refworld/docid/47d685632.html>, last visited on the 7th of September 2012

League of Nations, Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, 1920, League Doc. 69.20/4/238

League of Nations, Report Presented to the Council of the League by the Commission of Rapporteurs, the 16th of April 1921, League Doc. B7.21/68/106

National Assembly of Serbia, Programme for the Realization of Peace, Freedom, Equality and Prosperity in Kosovo, the 30th of March 1990, Official Gazette of the Republic of Serbia No. 5/1990

National Assembly of Serbia, Law on the Activities of Organs of the Republic in Exceptional Circumstances, the 26th of June 1990, Official Gazette of the Republic of Serbia No. 30/1990

Organization of African Unity, Border Disputes Among African States, Resolution 16 (1), First Ordinary Session of the Assembly of Heads of State and Government, the 21st of July 1964, AHG/Res. 16(1)

Organization for Security and Cooperation in Europe, Kosovo/Kosova: As Seen, As Told. Part II. A Report on the Human Rights Findings of the OSCE Mission in Kosovo. June to October 1999, OSCE Office for Democratic Institutions and Human Rights

Permanent Court of Arbitration, Island of Palmas (United States of America v. The Netherlands), 1928, United Nations Reports of International Arbitral Awards, Vol. 2, p. 829

Security Council of the United Nations, Resolution 855 (1993) on the Refusal of the Authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to Allow the CSCE Special Missions in Kosovo, Sandzak and Vojvodina, the 9th of August 1993, S/RES/855, 48 SCOR 3262th mtg.

Security Council of the United Nations, Resolution 1160, the 31st March 1998, S/RES/1160, 53 SCOR 3868th mtg.

Security Council of the United Nations, Resolution 1199, the 23rd September 1998, S/RES/1199, 53 SCOR 3930th mtg.

Security Council of the United Nations, Resolution 1203, the 24th of October 1998, S/RES/1203, 53 SCOR 3937th mtg.

Security Council of the United Nations, Letter Dated June 7, 1999, from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council, enclosure: The 3rd of June Agreement, the 7th of June 1999, UN Doc. S/1999/649

Security Council of the United Nations, Resolution 1244, the 10th of June 1999, S/RES/1244, 54 SCOR 4011th mtg.

Security Council of the United Nations, Verbatim Records of the 4011st Meeting, the 10th of June 1999, UN Doc. S/PV/4011

Security Council of the United Nations, Letter Dated June 15, 1999, from the Secretary General Addressed to the President of the Security Council, enclosure: Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, the 9th of June 1999, UN Doc. S/1999/682

Security Council of the United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, the 12th of July 1999, UN Doc. S/1999/779

Security Council of the United Nations, A Comprehensive Review of the Situation in Kosovo, the 7th of October 2005, Annex to UN Doc. S/2005/635

Security Council of the United Nations, Letter from the Secretary General Addressed to the President of the Security Council, enclosure: Report of the Special Envoy of the Secretary General on Kosovo's Future Status, the 26th of March 2007, UN Doc. S/2007/168

Security Council of the United Nations, Resolution 1785, the 21st November 2007, S/RES/1785, 62 SCOR 5782th mtg.

Security Council of the United Nations, Letter from the Secretary-General to the President of the Security Council, enclosure: Report of the European Union/United States/Russian Federation Troika on Kosovo, the 10th of December 2007, UN Doc. S/2007/723

Security Council of the United Nations, Verbatim Records of the 5839th Meeting, the 18th of February 2008, UN Doc. S/PV/5839

Security Council of the United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, the 24th of November 2008, UN Doc. S/2008/692

Seventh International Conference of American States, Convention on Rights and Duties of States, the 26th of December 1933, International Conferences of American States, First Supplement 1933-1940, Carnegie Endowment of International Peace, Washington, D.C., p. 122

Supreme Court of Canada, Reference re Secession of Quebec, 1998, 2 SCR 217

United Nations, Charter of the United Nations, the 26th of June 1945, 1 UNTS XVI

United Nations Conference on the Law of Treaties, Vienna Convention on the Law of Treaties, the 22nd of May 1969, UN Doc. A/CONF.39/11/Add.2

United Nations, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the 21st of March 1986, UN Doc. A/CONF.129/15

United Nations Human Rights Committee, Human Rights Committee General Comment 12 (21), the 13th of March 1984, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994)

United Nations Human Rights Committee, Human Rights Committee General Comment 23 (50), the 6th of April 1994, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994)

United Nations Human Rights Committee, Office of the UN High Commissioner for Human Rights (UNHCHR), Sub-Commission on Human Rights Resolution 1993/9, adopted on the 20th of August 1993, with reference to the report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the UNHCHR “Situation of Human Rights on the Territory of the Former Yugoslavia”, UN Doc. E/CN.4/1993/50

United Nations Human Rights Committee, Concluding Observations of the Human Rights Committee, the 4th of August 1997, UN Doc. CCPR/C/79/Add.80

United Nations Interim Administration Mission in Kosovo, Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, the 15th of May 2001, UNMIK/REG/2001/9

United Nations Interim Administration Mission in Kosovo, Standards for Kosovo, Press Release, the 10th of December 2003, UNMIK/PR/1078

United Nations Interim Administration Mission in Kosovo, Kosovo Standards Implementation Plan, the 31st of March 2004, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2004/613

United Nations Secretary-General, An Agenda for Peace, Report of the Secretary General to the Security Council, the 17th of June 1992, UN Doc. A/47/277-S/24111

United Nations Secretary-General, Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, 2nd progress report prepared by Mr. Asbjorn Eide, the 1st of July 1992, UN Doc. E/CN.4/Sub.2/1992/37

United Nations Secretary-General, Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Report by Secretary-General, the 14th of June 1995, UN Doc. E/CN.4/Sub.2/1995/33

United Nations Secretary-General, Report of the Secretary-General Prepared pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council, the 3rd of October 1998, UN Doc. S/1998/912

United Nations Secretary-General, Report of the Secretary-General Prepared pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998), the 24th of December 1998, UN Doc. S/1998/1221

United Nations Secretary-General, Situation of Human Rights in the Federal Republic of Yugoslavia (Serbia and Montenegro), Report by Special Rapporteur Jiri Dienstbier, the 24th of October 1999, UN Doc. A/54/396-S/1999/1000

United Nations Secretary-General, Commission on Human Rights, Question of the Violation of Human Rights in Any Part of the World, in Written Statement by the American Association of Jurists to the UN Secretary-General, the 11th of February 2000, UN Doc. E/CN.4/2000/NGO/89

World Conference on Human Rights, Vienna Declaration and Programme of Action, the 25th of June 1993, UN Doc. A/Conf.157/24, 32 ILM 1661

Bibliography

Abi-Saab, George (2000): *The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law*, in Bayefsky, Anne (ed.): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague, 69-74

Alfredsson, Gudmundur (1993): *The Right of Self-Determination and Indigenous Peoples*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 41-54

Alfredsson, Gudmundur (2005): *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter on International Law*, in Ghanea and Xanthaki (eds.): *Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry*, Martinus Nijhoff Publishers, Leiden, 163-162

Allot, Philip (1993): *Self-Determination – Absolute Right or Social Poetry?*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 177-210

Anastasijevic, Duska (2000): *The Closing of the Kosovo Cycle: Victimization Versus Responsibility*, in Schnabel and Thakur (eds.): *Kosovo and the Challenge of Humanitarian Intervention*, United Nations University Press, Tokyo, 44-63

Anaya, James (1990): *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, Iowa Law Review, Vol. 75, 403-411

Anaya, James (2001): *Self-Determination as a Collective Human Right Under Contemporary International Law*, in Aikio and Scheinin (eds.): *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Institute for Human Rights, Abo Akademi University, Turku, 3-18

Anderson, Benedict (1993): *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London

Arp, Björn (2010): *The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and International Protection of Minorities*, German Law Journal, Vol. 11, 847-866

Baker and Dodd (1927): *The Public Papers of Woodrow Wilson*, Vol. 1, Harper Brothers Publishers, New York

Bartkus, Viva Ona (2004): *The Dynamic of Secession*, Cambridge University Press, Cambridge

Barros, James (1968): *The Aaland Islands Question: Its Settlement by the League of Nations*, Yale University Press, New Haven

- Bauböck, Rainer (2000): *Why Stay Together? A Pluralist Approach to Secession and Federation*, in Kymlicka and Norman (eds.): *Citizenship in Diverse Societies*, Oxford University Press, Oxford, 366-444
- Bauhn, Per (1995): *Nationalism and Morality*, Lund University Press, Lund
- Baxter, R.R. (1980): *International Law in her Infinite Variety*, *International and Comparative Law Quarterly*, Vol. 29, 549-566
- Bellamy, Alex (2000): *Human Wrongs in Kosovo: 1974-99*, *The International Journal of Human Rights*, Vol. 4, 105-126
- Bellamy, Alex (2001): *Kosovo: After the War, the War of Words*, *The International Journal of Human Rights*, Vol. 5, 97-110
- Beran, Harry (1983): *The Consent Theory of Political Obligation*, Croom Helm, London
- Beran, Harry (1984): *A Liberal Theory of Secession*, *Political Studies*, Vol. 32, 596-602
- Beran, Harry (1988): *Self-Determination: A Philosophical Perspective*, in Macartney, Allan (ed.): *Self-Determination in the Commonwealth*, Aberdeen University Press, Aberdeen, 23-35
- Beran, Harry (1993): *Border Disputes and the Right of National Self-Determination*, *History of European Ideas*, Vol. 16, 479-486
- Beran, Harry (1994): *The Place of Secession in Liberal Democratic Theory*, in Gilbert and Gregory (eds.): *Nations, Cultures and Markets*, Ashgate, Aldershot, 47-65
- Beran, Harry (1998): *A Democratic Theory of Political Self-Determination for a New World Order*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, 33-60
- Binder, Guyora (1993): *The Case for Self-Determination*, *Stanford Journal of International Law*, Vol. 29, 223-270
- Birch, Anthony (1984): *Another Liberal Theory of Secession*, *Political Studies*, Vol. 32, 596-602
- Birch, Anthony (1989): *Nationalism and National Integration*, Unwin Hyman, London
- Borgen, Christopher (2009): *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, *Chicago Journal of International Law*, Vol. 10, p. 1-33
- Bothe, Michael (2010): *Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo’s Independence*, *German Law Journal*, Vol. 11, 837-839

- Brewin, Christopher (1982): *Sovereignty*, in Mayall, James (ed.): *The Community of States: A Study in International Political Theory*, George Allen and Unwin, London, 34-48
- Brilmayer, Lea (1991): *Secession and Self-Determination: A Territorial Interpretation*, Yale Journal of International Law, Vol. 16, 177-202
- Brown, Bartram (2005): *Human Rights, Sovereignty, and the Final Status of Kosovo*, Chicago-Kent Law Review, Vol. 80, 235-272
- Brownlie, Ian (1988): *The Rights of Peoples in Modern International Law*, in Crawford, James (ed.): *The Rights of Peoples*, Clarendon Press, Oxford, 1-16
- Brownlie and Apperley (2000): *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, International and Comparative Law Quarterly, Vol. 49, 886-894
- Buchanan, Allen (1991): *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press, Boulder
- Buchanan, Allen (1996): *What's So Special About Nations*, in Seymour, Couture and Nielsen (eds.): *Rethinking Nationalism*, University of Calgary Press, Calgary, 283-310
- Buchanan, Allen (1997): *Self-Determination, Secession, and the Rule of Law*, in McKim and McMahan (eds.): *The Morality of Nationalism*, Oxford University Press, New York, 301-323
- Buchanan, Allen (1997): *Theories of Secession*, Philosophy and Public Affairs, Vol. 26, 31-61
- Buchanan, Allen (1998): *Democracy and Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 14-33
- Buchanan, Allen (1999): *Recognitional Legitimacy*, Philosophy and Public Affairs, Vol. 28, 46-78
- Buchanan, Allen (1998): *The International Institutional Dimension of Secession*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, 225-253
- Buchanan, Allen (2003): *The Québec Secession Issue: Democracy, Minority Rights, and the Rule of Law*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*, New York University Press, New York, 238-271
- Buchanan, Allen (2003): *Reforming the International Law of Humanitarian Intervention*, in Holzgrefe and Keohane (eds.): *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge University Press, Cambridge, 130-174
- Buchanan, Allen (2004): *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, Oxford University Press, New York

Buchanan, Allen (2006): *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession*, in Hannum and Babbitt (eds.): *Negotiating Self-Determination*, Lexington Books, Oxford, 81-114

Buchheit, Lee (1978): *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven

Byers and Chesterman (2003): *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in Holzgrefe and Keohane (eds.): *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge University Press, Cambridge, 177-203

Calic, Marie-Janine (2000): *Kosovo in the Twentieth Century: A Historical Account*, in Schnabel and Thakur (eds.): *Kosovo and the Challenge of Humanitarian Intervention*, United Nations University Press, Tokyo, 19-31

Caney, Simon (1998): *National Self-Determination and National Secession: Individualist and Communitarian Approaches*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, 149-178

Canovan, Margaret (1996): *Nationhood and Political Theory*, Edward Elgar Publishing, Cheltenham

Capotorti, Francesco (1991): *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York

Cassese, Antonio (1995): *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge

Cassese, Antonio (1996): *The International Court of Justice and the Right of Peoples to Self-Determination*, in Lowe and Fitzmaurice (eds.): *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge University Press, Cambridge, 351-363

Cassese, Antonio (1999): *Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, *European Journal of International Law*, Vol. 10, 23-30

Castellino, Joshua (1999): *Order and Justice: National Minorities and the Right to Secession*, *International Journal on Minority and Group Rights*, Vol. 6, 389-416

Castellino, Joshua (2000): *International Law and Self-Determination*, Martinus Nijhoff Publishers, The Hague

Castellino, Joshua (2008): *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools*, *Brooklyn Journal of International Law*, Vol. 33, 503-568

- Charney, Jonathan (1999): *Anticipatory Humanitarian Intervention in Kosovo*, Vanderbilt Journal of International Law, Vol. 32, 834-841
- Chatterjee and Scheid (2003): *Ethics and Foreign Intervention*, Cambridge University Press, Cambridge
- Chinkin, Christine (1999): *Kosovo: A 'Good' or 'Bad' War?*, American Journal of International Law, Vol. 93, 841-847
- Chomsky, Noam (1999): *The New Military Humanism: Lessons from Kosovo*, Monroe Common Courage Press, Maine
- Cobban, Alfred (1969): *The Nation State and National Self-Determination*, Collins, London
- Copp, David (1997): *Democracy and Communal Self-Determination*, in McKim and McMahan (eds.): *The Morality of Nationalism*, Oxford University Press, New York, 277-300
- Copp, David (1998): *International Law and Morality in the Theory of Secession*, International Journal of Ethics, Vol. 2, 219-245
- Coppieters and Sakwa (2003): *Contextualizing Secession: Normative Studies in Comparative Perspective*, Oxford University Press, Oxford
- Coppieters, Bruno (2008): *The Recognition of Kosovo: Exceptional but not Unique*, European Security Forum Working Paper, No. 28, 3-7
- Craven, M.C.R. (1995): *The European Community Arbitration Commission on Yugoslavia*, British Year Book of International Law, Vol. 66, 333-413
- Crawford, James (1988): *Self-Determination outside the Colonial Context*, in Macartney, Allan (ed.): *Self-Determination in the Commonwealth*, Aberdeen University Press, Aberdeen, 1-22
- Crawford, James (2000): *State Practice and International Law in Relation to Unilateral Secession*, in Bayefsky, Anne (ed.): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague, 31-61
- Crawford, James (2001): *The Right of Self-Determination in International Law: Its Development and Future*, in Alston, Philip (ed.): *People's Rights*, Oxford University Press, Oxford, 7-67
- Crawford, James (2002): *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge
- Crawford, James (2006): *The Creation of States in International Law*, Clarendon Press, Oxford
- Cristescu, Aureliu (1981): *The Right to Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments*, United Nations, New York

De Vrieze, Franklin (2004): *Kosovo After the March 2004 Crisis*, Helsinki Monitor Vol. 15, 147-159

Demjaha, Agon (2000): *The Kosovo Conflict: A Perspective from Inside*, in Schnabel and Thakur (eds.): *Kosovo and the Challenge of Humanitarian Intervention*, United Nations University Press, Tokyo, 32-43

Doehring, Karl (2002): *Self-Determination*, in Simma, Bruno (ed.): *The Charter of the United Nations: A Commentary*, Vol. 1, Oxford University Press, Oxford, 47-63

Donnelly, Jack (1993): *Third Generation Rights*, in Brölmann, Lefeber and Zieck (ed.): *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers, Dordrecht, 119-150

Dowding, Keith (1998): *Secession and Isolation*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, 71-90

Dugard and Raic (2006): *The Role of Recognition in the Law and Practice of Secession*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 94-137

Dumberry, Patrick (2006): *Lessons Learned from the Québec Secession Reference before the Supreme Court of Canada*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 416-452

Duursma, Jorri (1996): *Fragmentation and the International Relations of Micro-States*, Cambridge University Press, Cambridge

Eide, Asbjørn (1993): *In Search of Constructive Alternatives to Secession*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 139-176

Falk, Richard (1999): *Kosovo, World Order, and the Future of International Law*, American Journal of International Law, Vol. 93, 847-857

Fawcett, J.E.S. (1965): *Security Council Resolutions on Rhodesia*, British Yearbook of International Law, Vol. 41, 103-121

Fawn, Rick (2008): *The Kosovo and Montenegro Effect*, International Affairs, Vol. 84, 269-94

Franck, Thomas (1992): *The Emerging Right to Democratic Governance*, American Journal of International Law, Vol. 28, 46-91

Franck, Thomas (1993): *Postmodern Tribalism and the Right to Secession*, in Brölmann, Lefeber and Zieck (ed.): *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers, Dordrecht, 3-27

- Franck, Thomas (1999): *Lessons of Kosovo*, American Journal of International Law, Vol. 93, 857-860
- Franck, Thomas (2000): *Opinion Directed at Question 2 of the Reference*, in Bayefsky, Anne (ed.): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague, 75-84
- Franck, Thomas (2002): *Recourse to Force: State Action against Threats and Armed Attacks*, Cambridge University Press, Cambridge
- Freeman, Michael (1998): *The Priority of Function over Structure: A New Approach to Secession*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, 13-31
- Freeman, Michael (1998): *The Right to Self-Determination in International Politics: Six Theories in Search of a Policy*, Review of International Studies, Vol. 25, 355-370
- Frowein, Jochen (1993): *Self-Determination as a Limit to Obligation*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 211-224
- Gauthier, David (1994): *Breaking Up: An Essay on Secession*, Canadian Journal of Philosophy, Vol. 24, 357-372
- Gayim, Eyassu (2001): *The Concept of Minority in International Law: A Critical Study of the Vital Elements*, University of Lapland Press, Rovaniemi
- Gazzini, Tarcisio (2010): *The Kosovo Advisory Opinion from the Standpoint of General International Law*, available at <http://www.haguejusticeportal.net/index.php?id=12077>, last visited on the 7th of September 2012
- Gilbert, Paul (1998): *The Philosophy of Nationalism*, Westview Press, Boulder
- Glaser, Daryl (2003): *The Right to Secession: An Antisecessionist Defence*, Political Studies, Vol. 51, 369-386
- Grant, Thomas (1999): *The Recognition of States: Law and Practice in Debate and Evolution*, Praeger Publishers, Westport
- Grant, Thomas (2009): *Regulating the Creation of States: From Decolonization to Secession*, Journal of International Law and International Relations, Vol. 5, 11-57
- Grewe, W. G. (1981): *Status Quo*, in Bernhardt, Rudolf (ed.): *Encyclopedia of Public International Law, Installment 1*, Vol. 7, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 438-446

Groarke, Paul (2004): *Dividing the State: Legitimacy, Secession, and the Doctrine of Oppression*, Ashgate, Aldershot

Gruda, Zejnullah (2005): *Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possidetis, the Ethnic Principle, and Self-Determination*, Chicago-Kent Law Review, Vol. 80, 353-394

Halperin and Scheffer with Small (1992): *Self-Determination in the New World Order*, Carnegie Endowment of International Peace, Washington, D.C.

Hannum, Hurst (1988): *Recent Developments in International Protection of Minority Groups*, in Macartney, Allan (ed.): *Self-Determination in the Commonwealth*, Aberdeen University Press, Aberdeen, 32-40

Hannum, Hurst (1990): *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia

Hannum, Hurst (1993): *Rethinking Self-Determination*, Virginia Journal of International Law, Vol. 34, 1-69

Hannum, Hurst (1993): *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles*, Transnational Law and Contemporary Problems, Vol. 57, 58-69

Hannum, Hurst (1998): *The Specter of Secession, Responding to Claims for Ethnic Self-Determination*, Foreign Affairs, Vol. 77, 13-19

Hannum, Hurst (2006): *Self-Determination in the Twenty-First Century*, in Hannum and Babbitt (eds.): *Negotiating Self-Determination*, Lexington Books, Oxford, 61-80

Henrard, Kristin (2000): *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination*, Martinus Nijhoff Publishers, The Hague

Heraclides, Alexander (1991): *The Self-Determination of Minorities in International Politics*, Frank Cass, London

Heraclides, Alexis (1992): *Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis*, Journal of International Affairs, Vol. 45, 399-420

Heraclides, Alexis (1994): *Secessionist Conflagration: What Is to be Done*, Security Dialogue, Vol. 25, 283-293

Hilpold, Peter (2011): *The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734443, last visited on the 7th of September 2012

- Horowitz, Donald (1997): *Self-Determination: Politics, Philosophy, and Law*, in Shapiro and Kymlicka (eds.): *Ethnicity and Group Rights*, New York University Press, New York, 421-463
- Horowitz, Donald (2000): *Ethnic Groups in Conflict*, University of California Press, Berkeley
- Howse and Teitel (2010): *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo*, German Law Journal, Vol. 11, 841-845
- Ignatieff, Michael (1999): *Nationalism and the Narcissism of Minor Differences*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, State University of New York Press, Albany, 91-102
- Ignatieff, Michael (2000): *Virtual War: Kosovo and Beyond*, Metropolitan Books, New York
- Jennings, Ivor (1956): *The Approach to Self-Government*, Cambridge University Press, Cambridge
- Jennings, Robert (1963): *Acquisition of Territory in International Law*, Manchester University Press, Manchester
- Jia, Bing Bing (2009): *The Independence of Kosovo: A Unique Case of Secession*, Chinese Journal of International Law, Vol. 8, 27-46
- Jovanovic, Miodrag (2011): *Is Kosovo and Metohija Indeed a "Unique Case"?*, in Summers, James (ed.): *Kosovo: A Precedent? Implications for Statehood, Self-determination and Minority Rights*, Brill, Leiden, 343-374
- Jovanovic, Miodrag (2011): *After the ICJ's Advisory Opinion on Kosovo: The Future of Self-Determination Conflicts*, paper presented at The Association for the Study of Nationalities 2011 World Convention, 14-16 April 2011, Columbia University
- Judah, Tim (2002): *Kosovo: War and Revenge*, Yale University Press, New Haven
- Judah, Tim (2006): *Divorcing Serbia: The Western Balkans in 2006*, Fletcher Forum of World Affairs, Vol. 30, 213-220
- Judah, Tim (2008): *Kosovo: What Everyone Needs to Know*, Oxford University Press, New York
- Kimminich, Otto (1993): *A "Federal" Right of Self-Determination*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 83-100
- King and Mason (2006): *Peace at Any Price: How the World Failed Kosovo*, Cornell University Press, Ithaca
- Kingsbury, Benedict (1992): *Claims by Non-State Groups in International Law*, Cornell International Law Journal, Vol. 25, 481-513

- Kingsbury, Benedict (2000): *Reconstructing Self-Determination: A Relational Approach*, in Aikio and Scheinin (eds.): *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Institute for Human Rights, Abo Akademi University, Turku, 19-37
- Klabbers and Lefeber (1993): *Africa: Lost Between Self-Determination and Uti Possidetis*, in Brölmann, Lefeber and Zieck (ed.): *Peoples and Minorities in International Law*, Martinus Nijhoff Publishers, Dordrecht, 37-76
- Knop, Karen (2002): *Diversity and Self-Determination in International Law*, Cambridge University Press, Cambridge
- Kohen, Marcelo (2006): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge
- Koskenniemi, Martti (1994): *National Self-Determination Today: Problems of Legal Theory and Practice*, International and Comparative Law Quarterly, Vol. 43, 241-269
- Krieger, Heike (2001): *The Kosovo Conflict and International Law*, Cambridge University Press, Cambridge
- Kuperman, Alan (2008): *The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans*, International Studies Quarterly, Vol. 52, 49-80
- Kymlicka, Will (1995): *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford University Press, Oxford
- Kymlicka, Will (1995): *The Rights of Minority Cultures*, Oxford University Press, New York
- Kymlicka, Will (1998): *Is Federalism a Viable Alternative to Secession?*, in Lehning, Percy (ed.): *Theories of Secession*, Routledge, London and New York, 109-148
- Kymlicka, Will (2001): *Politics in the Vernacular*, Oxford University Press, Oxford
- Lalonde, Suzanne (2002): *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, McGill-Queen's University Press, Montreal
- Lansing, Robert (1921): *The Peace Negotiations: A Personal Narrative*, Houghton Mifflin Company, Boston
- Lauterpacht, Hersch (1947): *Recognition in International Law*, Cambridge University Press, Cambridge
- Leuprecht, Peter (2001): *Minority Rights Revisited: New Glimpses of an Old Issue*, in Alston, Philip (ed.): *People's Rights*, Oxford University Press, Oxford, 111-126
- MacCormick, Neil (1982): *Legal Right and Social Democracy*, Oxford University Press, Oxford

- MacCormic, Neil (1999): *Nation and Nationalism*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, State University of New York Press, Albany, 189-204
- Magas, Branka (1993): *The Destruction of Yugoslavia, Tracking the Break-Up 1980-1992*, Verso, London
- Malcolm, Noel (1998): *Kosovo: A Short History*, New York University Press, New York
- Malcolm, Noel (2006): *Is the Complaint about the Serb State's Deportation Policy of Albanians Between the Two World Wars Based on Myth?*, in Di Lellio, Anna (ed.): *The Case for Kosova: Passage to Independence*, Anthem Press, London, 59-67
- Margalit, Avishai (1997): *The Moral Psychology of Nationalism*, in McKim and McMahan (eds.): *The Morality of Nationalism*, Oxford University Press, New York, 74-87
- Margalit and Raz (1990): *National Self-Determination*, *The Journal of Philosophy*, Vol. 87, 439-461
- Marsh and Heppner (2003): *When Weak Nations Use Strong States: The Unintended Consequences of Intervention in the Balkans*, *Nationalities Papers*, Vol. 31, 281-293
- Mayall, James (1999): *Sovereignty, Nationalism, and Self-Determination*, *Political Studies*, Vol. 47, 474-502
- McCorquodale, Robert (1994): *Self-Determination: A Human Rights Approach*, *International and Comparative Law Quarterly*, Vol. 43, 857-885
- McCorquodale, Robert (2000): *Self-Determination in International Law*, Ashgate, Aldershot
- McGarry, John (1998): *Orphans of Secession: National Pluralism in Secessionist Regions and Post-Secession States*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 215-232
- McWhinney, Edward (2007): *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law*, Martinus Nijhoff Publishers, Leiden
- Merriam, John (2001): *Kosovo and the Law of Humanitarian Intervention*, *Case Western Reserve Journal of International Law*, Vol. 33, 111-154
- Mertus, Julie (2000): *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, *William and Mary Law Review*, Vol. 41, 1743-1787
- Metta, Spencer (1998): *Separatism: Democracy and Disintegration*, Rowman and Littlefield Publishers, Lanham

- Milano, Enrico (2006): *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, Martinus Nijhoff Publishers, Leiden
- Miller, David (1994): *The Nation-State: A Modest Defence*, in Brown, Chris (ed.): *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London and New York, 137-162
- Miller, David (1994): *In Defence of Nationality*, in Gilbert and Gregory (eds.): *Nations, Cultures and Markets*, Ashgate, Aldershot, 15-32
- Miller, David (1995): *On Nationality*, Clarendon Press, Oxford
- Miller, David (1998): *Secession and the Principle of Nationality*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 62-78
- Moore, Margaret (1998): *Introduction: The Self-Determination Principle and the Ethics of Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 1-13
- Moore, Margaret (2001): *The Ethics of Nationalism*, Oxford University Press, Oxford
- Muharremi, Robert (2008): *Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited*, *Review of Central and East European Law*, Vol. 33, 401-435
- Muharremi, Robert (2010): *A Note on the ICJ Advisory Opinion on Kosovo*, *German Law Journal*, Vol. 11, 867-880
- Müllerson, Rein (2009): *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, *Chinese Journal of International Law*, Vol. 8, 2-25
- Murswiek, Dietrich (1993): *The Issue of a Right of Secession – Reconsidered*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 21-39
- Musgrave, Thomas (2000): *Self-Determination and National Minorities*, Oxford University Press, Oxford
- Nanda, Ved (1981): *Self-Determination under International Law: Validity of Claims to Secede*, *Case Western Reserve Journal of International Law*, Vol. 13, 257-280
- Nanda, Ved (2000): *Self-Determination and Secession under International Law*, *Denver Journal of International Law and Policy*, Vol. 29, 305-326
- Navaratna-Bandara, Abeyasinghe (1995): *The Management of Ethnic Secessionist Conflict*, Dartmouth, Aldershot

- Nielsen, Kai (1993): *Secession: The Case of Quebec*, Journal of Applied Philosophy, Vol. 10, 29-43
- Nielsen, Kai (1998): *Liberal Nationalism and Secession*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 103-133
- Nielsen, Kai (1998): *Liberal Nationalism, Liberal Democracies, and Secession*, The University of Toronto Law Journal, Vol. 48, 253-295
- Nielsen, Kai (1999): *Cultural Nationalism, Neither Ethnic nor Civic*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, State University of New York Press, Albany, 119-130
- Nolte, Georg (2006): *Secession and External Intervention*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 65-93
- Nordquist, Myron (2002): *A Review of the Debate in the United States Senate over the Deployment of Ground Troops in Kosovo*, in Ando, McWhinney and Wolfrum (eds.): *Liber Amicorum Judge Shigeru Oda*, Vol. 2, Kluwer Law International, The Hague, 1555-1574
- Norris, John (2005): *Collision Course: NATO, Russia and Kosovo*, Praeger Publishers, Westport
- Norman, Wayne (1998): *The Ethics of Secession as the Regulation of Secessionist Politics*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 34-61
- Norman, Wayne (2003): *Domesticating Secession*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*, New York University Press, New York, 193-237
- O'Neill, William (2002): *Kosovo: An Unfinished Peace*, International Peace Academy Occasional Paper Series, Lynne Rienner Publishers, Boulder
- Oppenheim, L.F.L (1905): *International Law*, Vol. I, Longmans, Green and Co., London
- Orakhelashvili, Alexander (2008): *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, Max Planck Yearbook of United Nations Law, Vol. 12, 1-44
- Orentlicher, Diane (1998): *Separation Anxiety: International Responses to Ethno-Separatist Claims*, Yale Journal of International Law, Vol. 23, 1-78
- Orentlicher, Diane (2003): *International Responses to Separatist Claims: Are Democratic Principles Relevant*, in Macedo and Buchanan (eds.): *Secession and Self-Determination*, New York University Press, New York, 19-49

Owen, David (1995): *Balkan Odyssey*, Victor Gollancz, London

Partsch, Karl Josef (1982): *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination*, in Vasak and Alston (ed.): *The International Dimensions of Human Rights*, Greenwood Press, Westport, 61-86

Patten, Alan (2002): *Democratic Secession from a Multinational State*, *Ethics*, Vol. 112, 558–586

Pavkovic, Aleksandar (2000): *Recursive Secessions in Former Yugoslavia: Too Hard a Case for Theories of Secession*, *Political Studies*, Vol. 48, 485-502

Pavkovic and Radan (2007): *Creating New States: Theory and Practice of Secession*, Ashgate, Aldershot

Pellet, Alain (1992): *The Opinions of the Badinter Arbitration Committee – A Second Breath for the Self-Determination of People*, *European Journal of International Law*, Vol. 3, 178-185

Pellet, Alain (2000): *Legal Opinion on Certain Questions of International Law Raised by the Reference*, in Bayefsky, Anne (ed.): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague, 85-123

Perritt, Henry Jr. (2010): *The Road to Independence for Kosovo*, Cambridge University Press, Cambridge

Philpott, Daniel (1995): *In Defense of Self-Determination*, *Ethics*, Vol. 105, 352-385

Philpott, Daniel (1998): *Self-Determination in Practice*, in Moore, Margaret (ed.): *National Self-Determination and Secession*, Oxford University Press, Oxford, 79-102

Pippan, Christian (2010): *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*, Vol. 3, 145-166

Pomerance, Michla (1982): *Self-Determination in Law and Practice*, Martinus Nijhoff Publishers, The Hague

Popper, Karl (1962): *The Open Society and Its Enemies*, Vol. 2, Routledge and Kegan Paul, London

Premdas, Ralph (1990): *Secessionist Movements in Comparative Perspective*, in Premdas, Samarasinghe and Anderson (eds.): *Secessionist Movements in Comparative Perspective*, St. Martin's Press, New York, 12-29

- Radan, Peter (2002): *The Break-Up of Yugoslavia and International Law*, Routledge, London and New York
- Raic, David (2002): *Statehood and the Law of Self-Determination*, Martinus Nijhoff Publishers, The Hague
- Randelzhofer, Albrecht (2002): *Article 2(4)*, in Simma, Bruno (ed.): *The Charter of the United Nations: A Commentary*, Vol. 1, Oxford University Press, Oxford, 112-136
- Ratner, Steven (1996): *Drawing a Better Line: Uti Possidetis and the Borders of New States*, American Journal of International Law, Vol. 90, 590-624
- Raz, Joseph (1994): *Rights and Individual Well-Being*, in Raz, Joseph (ed.): *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Clarendon Press, Oxford, 29-44
- Roberts, Adam (1999): *NATO's 'Humanitarian War' over Kosovo*, Survival, Vol. 41, 102-123
- Ronen, Dov (1979): *The Quest for Self-Determination*, Yale University Press, New Haven
- Rusinow, Dennison (1988): *Yugoslavia: A Fractured Federalism*, Wilson Centre Press, Washington, D.C.
- Scharf, Michael (2003): *Earned Sovereignty: Judicial Underpinnings*, Denver Journal of International Law and Policy, Vol. 33, 373-387
- Seshagiri, Lee (2010): *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, Harvard International Law Journal, Vol. 51, 553-598
- Shaw, Malcolm (1986): *Title to Territory in Africa: International Legal Issues*, Clarendon Press, Oxford
- Shaw, Malcolm (1997): *Peoples, Territorialism and Boundaries*, European Journal of International Law, Vol. 8, 478-507
- Shaw, Malcolm (2003): *The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues*, in Dahlitz, Julie (ed.): *Secession and International Law*, Asser Press, The Hague, 243-257
- Sidgwick, Henry (1919): *The Elements of Politics*, Macmillan, London
- Simma, Bruno (1999): *NATO, the UN and the Use of Force: Legal Aspects*, European Journal of International Law, Vol. 10, 1-22
- Simpson, Gerry (1996): *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, in Sellers, Mortimer (ed.): *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples*, Berg Publishers, Oxford, 35-69

Skurbaty, Zelim (2000): *As if People Mattered: A Critical Appraisal of 'Peoples' and 'Minorities' from the International Human Rights Perspective and Beyond*, Martinus Nijhoff Publishers, The Hague

Sterio, Milena (2008): *The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law*, Cleveland-Marshall College of Law, Cleveland State University, Research Paper 08-158

Sterio, Milena (2010): *On the Right to External Self-Determination: 'Selfistans', Secession and the Great Powers' Rule*, Cleveland-Marshall College of Law, Cleveland State University Research Paper 09-163

Sunstein, Cass (1991): *Constitutionalism and Secession*, University of Chicago Law Review, Vol. 58, 633-670

Sunstein, Cass (1994): *Approaching Democracy: A New Legal Order for Eastern Europe – Constitutionalism and Secession*, in Brown, Chris (ed.): *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London and New York, 11-49

Sunstein, Cass (2001): *Should Constitutions Protect the Right to Secede?*, The Journal of Political Philosophy, Vol. 9, 350-355

Sureda, Rigo (1973): *The Evolution of the Right of Self-Determination: A Study of United Nations Practice*, A.W. Sijthoff International Publishing Company, Leiden

Tamir, Yael (1993): *Liberal Nationalism*, Princeton University Press, Princeton

Tamir, Yael (1996): *Reconstructing the Landscape of Imagination*, in Caney, George and Jones (eds.): *National Rights, International Obligations*, Westview Press, Boulder, 85-101

Tamir, Yael (1999): *Theoretical Difficulties in the Study of Nationalism*, in Beiner, Ronald (ed.): *Theorizing Nationalism*, State University of New York Press, Albany, 67-90

Tancredi, Antonello (2006): *A Normative 'Due Process' in the Creation of States through Secession*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 171-207

Thornberry, Patrick (1989): *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, International and Comparative Law Quarterly, Vol. 38, 867-889

Thornberry, Patrick (1993): *The Democratic or Internal Aspect of Self-Determination with Some Remarks to Federalism*, in Tomuschat, Christian (ed.): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 101-138

- Tomuschat, Christian (1993): *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht
- Tomuschat, Christian (2002): *Kosovo and the International Community: A Legal Assessment*, Kluwer Law International, The Hague
- Tomuschat, Christian (2002): *Yugoslavia's Damaged Sovereignty over the Province of Kosovo*, in Kreijen, Gerard (ed.): *State, Sovereignty and International Governance*, Oxford University Press, Oxford, 323-347
- Tomuschat, Christian (2006): *Secession and Self-Determination*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 23-45
- Trebicka, Viola (2007): *Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, Yale Journal of International Law, Vol. 32, 255-267
- Twining, William (1991): *Issues of Self-Determination*, Aberdeen University Press, Aberdeen
- Vashakmadze and Lippold (2010): *Nothing But a Road Towards Secession? – The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Goettingen Journal of International Law, Vol. 2, 619-647
- Verzijl, J.H.W. (1968): *International Law in Historical Perspective*, Vol. 1, Kluwer Law International, The Hague
- Vidmar, Jure (2010): *The Kosovo Opinion and General International Law: How Far-Reaching and Controversial is the ICJ's Reasoning?*, available at <http://www.haguejusticeportal.net/index.php?id=12110>, last visited on the 7th of September 2012
- Vickers, Miranda (1998): *Between Serb and Albanian: A History of Kosovo*, Hurst & Company, London
- Walker, William (2000): *OSCE Verification Experiences in Kosovo: November 1998 - June 1999*, The International Journal of Human Rights, Vol. 4, 127-142
- Walzer, Michael (1992): *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York
- Walzer, Michael (1994): *Notes on the New Tribalism*, in Brown, Chris (ed.): *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London and New York, 187-200
- Weinstock, Daniel (2001): *Constitutionalizing the Right to Secede*, The Journal of Political Philosophy, Vol. 9, 182-203
- Weller, Marc (1993): *International Law and Chaos*, Cambridge Law Journal, Vol. 52, 6-9

- Weller, Marc (1999): *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing, Cambridge
- Weller, Marc (1999): *The Rambouillet Conference on Kosovo*, International Affairs, Vol. 75, 211-251
- Weller, Marc (2009): *Contested Statehood: Kosovo's Struggle for Independence*, Oxford University Press, Oxford
- Wellman, Christopher (1995): *A Defense of Secession and Political Self-Determination*, Philosophy and Public Affairs, Vol. 24, 142-171
- Wellman, Christopher (1996): *Divided We Stand; United We Fall? An Essay on Size, Citizenship, and Secession*, Good Society, Vol. 6, 21-23
- Wellman, Christopher (2003): *Nationalism and Secession*, in Frey and Wellman (eds.): *A Companion to Applied Ethics*, Blackwell, Malden, 267-278
- Wellman, Christopher (2005): *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press, Cambridge
- Whelan, Anthony (1994): *Wilsonian Self-Determination and the Versailles Settlement*, International and Comparative Law Quarterly, Vol. 43, 99-115
- Wheeler, Nicholas (2000): *Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo*, The International Journal of Human Rights, Vol. 4, 144-163
- Whitman, Jim (2000): *The Kosovo Refugee Crisis: NATO's Humanitarianism Versus Human Rights*, The International Journal of Human Rights, Vol. 4, 164-183
- Wildhaber, Luzius (2000): Report [without title], in Bayefsky, Anne (ed.): *Self-Determination in International Law: Quebec and Lessons Learned*, Kluwer Law International, The Hague, 63-65
- Williams and Pecci (2004): *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, Stanford Journal of International Law, Vol. 40, 347-386
- Wilson, Stephanie (2009): *Effectiveness, Legitimacy and the Use of Force in Modern Wars*, VS Verlag für Sozialwissenschaften, Wiesbaden
- Wirth, Louis (1970): *Minority Problems*, in Kurokawa, Minako (ed.): *Minority Response: Comparative Views of Reactions to Subordination*, Random House, New York, 34-42
- White, N.D. (2000): *The Legality of Bombing in the Name of Humanity*, Journal of Conflict and Security Law, Vol. 5, 27-43

Yonah and Friedlander (1980): *Self-Determination: National, Regional and Global Dimensions*, Westview Press, Boulder

Zimmermann, Andreas (2006): *Secession and the Law of State Succession*, in Kohen, Marcelo (ed.): *Secession: International Law Perspectives*, Cambridge University Press, Cambridge, 208-230