

The Right to External Self-Determination

A Case Analysis of Kosovo

Abbreviation List

AO	Advisory Opinion
Art.	Article
CSCE	Commission on Security and Security in Europe
DoI	Declaration of Independence
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
KFOR	The Kosovo Force
KLA	Kosovo Liberation Army
LN	League of Nations
NATO	North Atlantic Treaty Organization
OSCE	Organization for Europe and Cooperation in Europe
Para.	Paragraph
PISG	Provisional Institutions of Self-Government
Res.	Resolution
UDI	Unilateral Declaration of Independence
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
US	United States
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNSG	Secretary General
VDPA	Vienna Declaration and Programme of Action
SCC	Supreme Court of Canada
SFRY	Socialist Federal Republic of Yugoslavia

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Summary

This thesis investigates whether international law provides a right to *external* self-determination, and under which circumstances such a right can be invoked. Secondly, the thesis investigates whether Kosovo's claim to independence, exercised through secession, presents a case subject to the threshold of *external* self-determination identified. This discussion is based on international instruments, soft law, cases and the remedial secession approach. The right to self-determination is analyzed in accordance to international law, however, as other legal frameworks have been applicable to the case of Kosovo, the constitutional law of Serbia along with the international interim administration is taken into consideration. Although, the central focus of this thesis is based on the legality of *external* self-determination, any denied right to *internal* self-determination is crucial to evaluate, as it creates a justifying incentive to claim the right to secession. Kosovo as a case has potential to develop the interpretation of self-determination building on existing international law and previous cases. The thesis therefore evaluates the rights applicability in situations of systematic human rights violations and subjection to oppressive policies aimed at groups with distinctive features from the majority population of the state. Based on the findings, this thesis suggests that Kosovo presents all the conditions required to meet the threshold according to the remedial secession approach. However, as secession is based on a neutrality-principle under international law, *external* self-determination is yet to be developed through *opinio juris* or integrated into a treaty right, before considered a right authorized under international law.

1. Introduction

Kosovo's unilateral declaration of independence poses a crucial case for determining where and how the right to self-determination applies in contemporary international law. Kosovo is a case with a pertinent and deep-seated historical context that has the potential to substantially develop the interpretation of self-determination, building on existing international law and previous cases.

The legal international order exists and operates through international law governed by a number of entities, primarily sovereign states, which through the regulations of rules and principles further manage the relations between the sovereign and equal states. This international and legal platform is utilized to realize political values, interests and preferences subsequently to be developed and integrated into international law.¹ As an actor, a nationally sovereign state has full monopoly to exercise its authority and jurisdiction within its own territory and population, without interference from other states.² Accordingly, the right to state sovereignty entails the right to have its territorial integrity respect by other actors, therefore to preserve and protect its borders, whenever threatened. Though this comprehension has long prevailed; with contemporary law arising from agreement to promote human rights for both individuals and groups within a state, this inevitably and controversially challenges the once fundamental state-centric foundation of law.³

One principle in particular has challenged the sovereignty and territorial integrity of the state, which is the principle of self-determination. This asserts that people are entitled to choose their development and political status freely, and has two important components, namely *internal* and *external* self-determination. The right to *internal* self-determination is compatible with the territorial integrity of the state, since it is normally fulfilled through internal arrangement to better conditions for people within the framework of the existing state.⁴ In contrast, the right to *external* self-determination is exercised through secession with the aim to be established as an independent state,⁵ and therefore aims to territorial changes of its administering state. In this view, self-determination and secession constitute central issues of international law, as it questions the administering state's sovereignty and territorial integrity.⁶

¹ Martti Koskenniemi, *What Is International Law For?* in: Malcolm D. Evans (ed.), *International Law*, 2014, p. 32.

² United Nations, *Charter of the United Nations (UN)*, 24 October 1945, 1 UNTS XVI, Art. 2(7).

³ Christian Walter, *Introduction*, in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), *Self-Determination and Secession in International Law*, 2014, p. 1.

⁴ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 126 [hereinafter: Reference re Secession of Quebec].

⁵ David Raic, *Statehood and the Law of Self-Determination*, 2002, p. 2.

⁶ Walter, *supra* note 3, p. 1.

The mere idea of a right to self-determination itself can be traced back to the 18th century during the American and French Revolutions, as well as the Latin American wars of independence in 19th century – all of which constituted early examples of the demand to self-determination.⁷ However, the object, purpose and definition of the right to self-determination have varied based on the international community's comprehension of the right, which firstly occurred as political norm rather than as a common, codified legal right.

The modern version of self-determination however was articulated by both the American President Woodrow Wilson and socialist leaders. It was presented as a guiding principle primarily concerned with retrenching colonialism, freeing people whose territories were under military occupation, and allowing national and ethnic minorities to determine their own destiny.⁸ The principle was later codified as a right, when incorporated into the Charter of the United Nations (UN). While the discussions preceding the inclusion of self-determination in the Charter focused on the debate of what could be deduced from the right, colonial movements utilized it to justify their secession from an existing state, and achieve independence.⁹

With the end of decolonization, the international community had been reluctant to endorse this aspect of *external* self-determination,¹⁰ which generated a great legal debate on whether the understanding of self-determination had advanced as to be applicable in the post-colonial era. This is reflected in the UN Charter, which is interpreted as intending to express more for a right to self-government, than that of secession. However, the post-World War II political landscape characterized by the dissolution of the Soviet Union and Yugoslavia, saw its constituent entities rely on self-determination to justify and legitimize their independence as a sovereign state. More recently, subgroups within states, based on their distinctive characteristics of ethnicity, language, religion or culture, have either declared independence as a unilateral action or held referendums, as evidenced in Kosovo, Catalonia and Northern Iraq. All of which highlights that *external* self-determination has, and still is, sought after by secessionist groups, and is therefore a highly relevant discussion in the contemporary international law context.

The Kosovo case takes as its point of departure from existing international sources an analysis concerning the legal issue of *external* self-determination. The aspiration of Kosovo to

⁷ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 1998, p. 11.

⁸ Cassese, *supra* note 7, p. 14.

⁹ Martti Koskenniemi, "National Self-Determination Today, Problems of Legal Theory and Practice," *International and Comparative Quarterly*, vol. 43, no. 2 (1994), p. 241.

¹⁰ Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in: Christian Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, p. 9.

be independent and secede from the sovereign state of Serbia, to which it belongs, is based on the alleged right to *external* self-determination. Serbia as the administering state, has naturally attempted to preserve its territorial *status quo*. The legal questions of the case evaluate the superiority of conflicting principles, which have confronted the international community for some time. In addition the thesis aims to investigate the development of the right to self-determination beyond the decolonization or military occupied context. Thus, it evaluates the rights applicability in situations of continuous human rights violations and subjection to oppressive policies aimed at groups with distinctive features from the majority population of the state. The right to self-determination is predominantly analyzed from an international perspective, without neglecting any other legal framework that is applicable to the case of Kosovo. The constitutional laws and international interim administration that the people of Kosovo have been subjected to is therefore taken into consideration. Although, the main investigation is based on the legality of *external* self-determination, any denied right to *internal* self-determination is furthermore crucial to evaluate, as it creates a justifying incentive to claim a right to secession.

Besides the first chapter, which lays out the research questions and the methodology, this thesis is divided into three parts. The second chapter provides an outline of the political situation in Kosovo from its time under the Socialist Federal Republic of Yugoslavia and presents the factual circumstances that are relevant for the study of self-determination. The third chapter identifies and discusses the international instruments and cases as well as the remedial secession theory necessary to evaluate the development of *external* self-determination. Understanding this development will contribute to defining the circumstances under which a claim can be justified in accordance with international law. In chapter four, the identified circumstances are applied to the case of Kosovo, alongside the examination of the Serbian Constitution and the legal framework of resolution 1244, to establish whether its claim is legally justified. The conclusion will summarize the general remarks of each chapter, and therefore determine whether the practice of the right to *external* self-determination is sufficient to interpret it as an international customary law.

1.2 Research area

The dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), and later the Federal Republic of Yugoslavia (FRY), subsequently resulted in six independent states. The independence of the Yugoslavian states was supported by the right to *external* self-determination under different circumstances, under the two respective constitutions. The

dissolution of SFRY resulted from the conflicts in the 1990's. In particular, the violent conflict in Kosovo in 1998-1999 with human rights violations, oppressive policies of ethnic cleansing and discrimination towards the Kosovo Albanians, made continued Serbian sovereignty over the province unattainable.¹¹ This resulted in the minority group of Albanians, belonging to Serbia's sovereignty, demanding first *internal* and then *external* self-determination, which inevitably threatened the territorial integrity of the state and the protection of stability and peace.¹² Consequently, political initiatives of a settlement on the status of Kosovo have proved insufficient due to the lack of willingness of compromising sovereignty on both sides, which stagnated the situation prior to the demands of independence.

This thesis investigates whether international law provides a right to *external* self-determination, and under which circumstances such right can be claimed and invoked. This is accomplished through considering the role of the remedial secession theory. Secondly, this thesis investigates whether the historical and contemporary context of Kosovo's unilateral declaration of independence presents a case subject to the threshold of *external* self-determination considered.

1.3 Methodology

The methodology utilized in this thesis follows the traditional legal-dogmatic research. This methodological approach is based on research in positive law, interpretation of international law sources, such as treaties, constitutions, and case law. These sources give rise to tangible research questions, and enable the explanation, description and analysis of the legal principles applied in this thesis. The methodology is further supplemented with the *travaux préparatoires* of the positive law, which takes account of the object and purpose of the written rules, alongside judicial opinions, and written and oral statement by participating states during court proceedings, in order to deliver a comprehensive reflection of the sources investigated. The utilization of a legal-dogmatic approach enables this thesis to highlight, whether the principle of self-determination in its external form, has developed based on the international instruments.

The investigation of whether international law provides for a right to *external* self-determination is firstly determined based on interpretation of international instruments. These sources include United Nations (UN) documents, soft law instruments, and case law.

Additionally, the thesis will include the remedial secession theory, and moreover judicial opinions; UN member states statements, and general principles of international law.¹³ This

¹¹ Ker-Lindsay, *The Path to Contested Statehood in the Balkans*, 2009, p. 4.

¹² Walter, *supra* note 3, p. 1.

¹³ United Nations, *Statute of the International Court of Justice (ICJ)*, 18 April 1946, art. 38(1)(b).

contributes to the interpretation of the right to *external* self-determination in contemporary international law, which is analyzed together with the remedial secession theory in the case of Kosovo.

UN Documents

Although the UN Charter is legally binding and constrains the sovereignty of member states,¹⁴ only few provisions and articles have been applied and interpreted in the context of self-determination. The predominant focus in research on UN documents has been resolutions of the UN General Assembly (UNGA), which have provided a comprehensive elaboration on the legal development of the principle of self-determination. Besides improving the definition of the purpose, object and the availability of the principle's applicability, the UNGA resolutions are recommendations as a rule and have no binding effect in the operational realm of international peace and security,¹⁵ which has been accounted for in this thesis. Unlike recommendations, the resolutions from the Security Council (UNSC) are binding on all UN Member states, as it has the primary responsibility for the maintenance of international peace and security.¹⁶ However, it is further acknowledged that law can be influenced and developed by non-legislative acts in appropriate cases, where it can be formative of the *opinio juris* or state practice that generates customary law,¹⁷ and legitimize conduct.

Soft law instruments

The examined and analyzed documents from the Conference on Security and Cooperation in Europe (CSCE later renamed to OSCE), the Helsinki Final Act and the Copenhagen Document are considered soft law instruments. Their decisions do not have a legal effect of binding treaties, but operate rather politically binding for all its participating states.¹⁸ Serbia is a participating state to the OSCE, and was, under Yugoslavia, a contracting party to the two documents, which contributes to the examination of Kosovo's claim to *external* self-determination. It has been taking into consideration that the non-binding nature of these documents have upon examination made reference to existing treaty obligations, and been referred to in UNSC resolutions. In other words, its collective character to bring forward soft

¹⁴ Ian Hurd, *International Organization: Politics, Law, Practice*, 2nd ed., 2014, p. 102.

¹⁵ Marko Divac Öberg "The Legal Effects of Resolutions of the UN Security Council And General Assembly in the Jurisprudence of the ICJ." *The European Journal of International Law*. Vol. 16, no. 5 (2006) p. 883-884.

¹⁶ Charter of the UN, *supra* note 2, art. 24.

¹⁷ Alan Boyle, *Soft Law in International Law-Making*. in: Malcolm D. Evans (ed.), *International Law*, 2014, p. 119.

¹⁸ Organization for Security and Co-Operation in Europe (OSCE), "Permanent Council" (available at: <http://www.osce.org/permanent-council>).

law initiatives enables states to adopt a detailed agreement more willingly,¹⁹ and although not being an expression of *opinio juris*, due to limited representation, they can influence the development of international law.²⁰

Cases

The examination of Kosovo's right to *external* self-determination is further supported by the state practice of the right traced from the contemporary circumstances presented in the Åland Islands and Quebec cases. Chapter 3.2 depicts the legal grounds, on which independence was assessed and the justification of its conclusions in the advisory opinions and later analyzed concurrently with the circumstances of Kosovo in chapter 4. It is further discussed whether the practice has been consistent with international rules, and if it has established a customary law.

Remedial Secession Theory

The thesis takes into consideration that secession is not included in the positive international law sources applied. However, to investigate the right to secession in the case of Kosovo, it is crucial to supplement the thesis with this theoretical approach, with its premise of *ubi jus ibi remedium*, to establish its validation in international practice. This theory is selected intentionally, as it is in favor secession, without complementing other theories, such as the classical and romantic approach, to investigate whether secession could still be materialized in the case of Kosovo.

Structure

The structure of the selected sources is determined to reflect the substantiation of the right to self-determination in its legal form, which necessitated the order of interpretation based on the aforementioned international instruments prior to the application of the theory. The identification of the circumstances presented under international law to justify an exercise of the right to *external* self-determination is compared to the preconditions presented from the theoretical approach, and consequently the established analysis will therefore be reflected in international law. The supporting and relevant acknowledgements of the right to *external* self-determination are further supplemented with academic writings, reports, official government statements, and newspaper articles.

¹⁹ Ulrike Barten, *Minorities, Minority Rights and Internal Self-Determination*, 2015, p. 71.

²⁰ Boyle, *supra* note 17, p. 121.

2. The political status of Kosovo

The conflict over Kosovo can be traced back to the long battle between the Ottoman Empire and Serbia in the First Balkan War (1912). The territorial area of Kosovo was reintegrated into the Kingdom of Serbia, and thus became a part of the Yugoslavia Kingdom in 1929.²¹ However, the current conflict originates after this period, where Kosovo-Metodija was established as an autonomous region in 1946 with limited self-governance within the Republic of Serbia.²² Kosovo therefore borders with Serbia to the north and east; Albania to the southwest, and Macedonia and Montenegro to the southeast and west. Prior to the breakup of Yugoslavia, the population of Kosovo was 1.58 million (estimated in 1981) in which 77.4 percent were Albanians and 13.2 percent Serbs,²³ whereas the population estimation in 2006 increased to 2.1 million. The ethnic composition has been reshaped as well; the ethnic Albanian group has increased to 92 percent, whereas the ethnic group of Serbs has decreased to 5.3 percent.²⁴

The region experienced an increase in autonomy under the 1974 Yugoslav Constitution (SFRY), wherein internal arrangements were made in regards to minority rights as: “each nationality shall be guaranteed the right freely to use its language and alphabet, to develop its culture”.²⁵ Its political representation was also guaranteed, as Kosovo had its own administration, assembly, and judiciary, and was a member of both the Serb and Federal institutions, such as the Federal Chamber.²⁶ The Chamber, which was composed of delegates from each republic and autonomous province, decided amendments to the SFRY Constitution.²⁷ Thus, the status of autonomous provinces were nearly equivalent to that of republics, however with limited rights, as “the Nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession”²⁸ was only applicable to the six republics, and not autonomous provinces. Kosovo was classified as a nationality rather than a nation, and therefore not considered beneficiary of Yugoslavia’s

²¹ Heike Krieger, *The Kosovo Conflict and International Law, An Analytical Documentation 1974-1999*, 2001, p. xxxi

²² Ker-Lindsay, *supra* note 11, p. 10.

²³ James Summers, *Kosovo: From Yugoslav Province to Disputed Independence*, in: James Summers, *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-determination and Minority Rights*, 2011, p. 4.

²⁴ *ibid.*

²⁵ *The Constitution of the Socialist Federal Republic of Yugoslavia (SFRY)*, 21 February 1974. Art. 247.

²⁶ The Independent International Commission on Kosovo, *The Kosovo Report, Conflict, International Response, Lessons Learned*, 2000. (available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>). p. 35-36.

²⁷ *The Constitution of the SFRY*, *supra* note 25, art. 284.

²⁸ *The Constitution of the SFRY*, *supra* note 25, preamble.

sovereignty rights.²⁹ It is further noteworthy to emphasize that the Constitution, despite its inclusion of secession, lacked mechanism to which secession could be allowed.³⁰

Its autonomous significance was nevertheless recognized, the territory of an autonomous province may not be altered without the consent of the autonomous province and likewise for any change of the Federal's frontiers, as consent was required from all entities. However, followed by the death of the Yugoslav President, Josip Broz Tito, in 1980, the Serbian Government, under the leadership of Slobodan Milošević, had unilaterally terminated the autonomy of Kosovo and its assembly by 1989. Consequently, its competence to object to amendments was revoked, and the Assembly of the Serbian Republic was authorized to change the Constitution³¹ without consent from autonomous provinces, which proved to be in strong contravention to the SFRY Constitution. Republican control over the provinces was thus enhanced. During its time, programmes³² and laws were adopted, in order to improve the positions of Serbs living in Kosovo with separate municipalities, while the institutions in Kosovo were closed and the Albanian language was suppressed.³³

In response to the termination of the Kosovo Assembly and the rise of oppression, the Kosovo Albanians established parallel institutions, and later announced a formal declaration of independence on 22 September 1991. This resulted from a secret referendum with 87 percent participation, from which 99.87 percent voted in favor of independence.³⁴ The declaration was only approved by Albania, who recognized Kosovo as a sovereign and independent state,³⁵ while the majority of the international community took another approach. The latter is explained by the declarations of independence by Slovenia and Croatia in June 1991, which were rejected by the Yugoslav authorities and resulted in the federal army entering the states.³⁶ The CSCE alerted that states should “never [...] recognize any changes of borders, whether external or internal, brought by force”³⁷ and further supported by a joint declaration by the European Community (EC), United States and the Union of Soviet Socialist Republics, stated that changed frontiers caused by force were unacceptable, and thus signalized their support for

²⁹ *ibid.*

³⁰ Roland Rich, “Recognition of States: The Collapse of Yugoslavia and the Soviet Union,” *European Journal of International Law*. Vol. 4, no. 1 (1993) p. 38.

³¹ 1989 Amendments of the Serbian Constitution. Amendment: XL VIII, in: Krieger, *supra* note 21, p. 8.

³² Programme for the Realization of Peace and Prosperity in Kosovo, in: Krieger, *supra* note 21, p. xxiii.

³³ Law on the Activities of Organs of the Republic in Exceptional Circumstances, in: Krieger, *supra* note 21, p. xxiii.

³⁴ Rich, *supra* note 30, p. 61.

³⁵ Statement by Albania, the People's Assembly of Albania, 22 October 1991, cited in: Krieger, *supra* note 21, p. 12.

³⁶ Suzanna, Lalonde. *Determining Boundaries in a Conflicted World, The Role of Uti Possidetis*. 2002. p. 175.

³⁷ Lalonde, *supra* note 36, p. 176

the preservation of SFRY federal territory.³⁸ Thus, firstly reaffirming the principle of *uti possidetis juris*, and Kosovo's lack of sovereignty and classification as a republic to declare itself independent.

The wish for independence was soon reflected within the republics of Macedonia, and Bosnia-Herzegovina as well, who attempted to disintegrate from the SFRY and declared independence. This resulted in the establishment of an Arbitration Commission of the Conference on Yugoslavia by the EC, also called the Badinter Committee. Its purpose was to provide legal advice on questions concerning the Republics' inquiry for secession, in which the Commission, without providing a clear answer, stated, "the Socialist Federal Republic of Yugoslavia is in the process of dissolution"³⁹ due to referendums held in the four republics on independence. Serbia addressed the question of whether the Serbian population in Croatia and Bosnia-Herzegovina had the right to self-determination, in which the Commission emphasized the principle of *uti possidetis juris*, thus self-determination could not bring changes to existing frontiers at the time of independence. On this basis, self-determination did not entail territorial rights, and the only way such changes could be materialized was by agreement. The Commission was therefore partially reaffirming the SFRY Constitution article 5, wherein the territory of SFRY was subjected to alteration solely based on the consent of republics and autonomous provinces. Instead, "ethnic, religious or language communities had the right to recognition of their identity under international law".⁴⁰

Although, the Commission did not take a position on Kosovo, its opinions reflected a reluctance to acknowledge the practice of secession. The Commission thus disregarded SFRY Constitution's articles 1 and 2, which allowed for secession, while reaffirming other articles, however in the context of the Federal's frontiers, instead of the Republics. In other words, the opinions reaffirmed the principle of *uti possidetis juris*, which has been in strong contrast to *external* self-determination.

The dissolution foreseen by the Commission took form in 1992, in the form of newly declared states of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia.⁴¹ The declarations were made with respect to human and minority rights, emphasizing national and ethnic groups, which were observed by a monitoring process and consequently recognized by the

³⁸ *ibid.*

³⁹ Conference on Yugoslavia, Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, January 11 and July 4 1992, 31. ILM, Opinion 1, section 3 [hereinafter Conference on Yugoslavia, Arbitration Commission]

⁴⁰ Conference on Yugoslavia Arbitration Commission, *supra note* 39, opinion 2, section 2.

⁴¹ James Summers, *Kosovo*, in: Christian Walter, et. al. (eds.), *Self-determination and Secession in International Law*, 2014, p. 237.

Commission.⁴² The SFRY had thus ceased to exist.⁴³ The remaining republics of Serbia and Montenegro established the Federal Republic of Yugoslavia (FRY) together with the autonomous province of Kosovo. The FRY requested to continue as the legal successor of SFRY, however denied by the UN, which stated that it “cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia”.⁴⁴ While this transformation took place, there was a humanitarian crisis in the form of ethnic cleansing in Bosnia-Herzegovina,⁴⁵ which shadowed Kosovo and its internal struggles. The 1992 FRY Constitution, which Kosovo was subjected to, had made no reference to its former status as an autonomous province, nor to the right of self-determination, arguably to avoid another occurrence of dissolution. The new Constitution deviated from the principles of the SFRY, as “the frontiers of the Federal Republic of Yugoslavia shall be inviolable. The boundaries between member republics may be changed only to subject to their agreement”⁴⁶ which did not account for the autonomous province or its consent to changed frontiers.

Whilst the conflict in Bosnia-Herzegovina was resolved with the Dayton Agreement, another human rights crisis was emerging in Kosovo. The UNGA expressed its concern of discriminatory measures in the legislative, administrative and judiciary areas, while acts of violence, of police brutality and torture were directed against the ethnic Albanians in Kosovo, and further condemned the actions carried out by the authorities of FRY.⁴⁷ Despite international attention, Milošević’s oppressive policies towards non-Serbs in Bosnia-Herzegovina and Croatia in previous years continued in Kosovo with an ethnic cleansing campaign that involved terror and violence to force deportation. This is a recognized ‘crime against humanity’ to systematically have Kosovo Albanians to leave the region.⁴⁸ This led to a violent resistance by the Kosovo Liberation Army (KLA). Inevitably, in 1998 an armed conflict broke out between the KLA and the Yugoslav Army with support from Serbian police in the central and western Kosovo.⁴⁹ This resulted in a humanitarian crisis with “crimes against humanity, which were part of a widespread or systematic attack against the Kosovo Albanian

⁴² Cassese, *supra* note 7, p. 271.

⁴³ United Nations Security Council resolution 777, *Adopted by the Security Council at its 3116th meeting on 19 September 1999*, S/RES/777 (19 September 1992)

⁴⁴ United Nations General Assembly resolution 47/1, *Recommendation of the Security Council of 19 September 1992*, A/RES/47/1 (22 September 1992), para. 1.

⁴⁵ UN Security Council resolution 780, *adopted by the Security Council at its 3119th meeting on 6 October 1992*, S/RES/780 (6 October 1992), preamble.

⁴⁶ *The Constitution of the Federal Republic of Yugoslavia*. 27 April 1992. Art. 3

⁴⁷ UN General Assembly resolution 48/204, *Situation of human rights in Kosovo*, A/RES/49/204 (23 December 1994), paras. 1-2.

⁴⁸ Judith Armatta. *Twilight of the Impunity – The War Crimes Trial of Slobodan Milosevic*. 2010. p. 26.

⁴⁹ Krieger, *supra* note 21, xxxi.

civilian population”.⁵⁰ The armed conflict continued in the Drenica region of Kosovo, where Albanians were displaced from their villages and homes, while KLA members and other Albanians were executed. As the situation deteriorated, the UNSC issued resolutions 1160 and 1199, requiring the FRY authorities withdraw their forces, while agreeing that the solution for Kosovo necessitated autonomy and self-administration,⁵¹ and therefore “should be based on the territorial integrity of the Federal Republic of Yugoslavia”.⁵²

The humanitarian crisis and ethnic cleansing were brought to an end by the North Atlantic Treaty Organization (NATO), which launched a military air campaign, Operation Allied Force, in March 1999, as a response to the inability of the international community to resolve the conflict by other means.⁵³ After 78 days, on 10 June the operation was suspended, after the FRY accepted to withdraw its military, police and paramilitary forces. On the same day, the UNSC adopted res. 1244, which firstly recalled the request for self-administration and autonomy from res. 1160, and determined that the situation was a continuous threat to international security and peace, and therefore established an international civilian and security presence under the auspices of the UN.

3. The development of external self-determination

In the following chapter, the thesis establishes a comprehension of the right to *external* self-determination by depicting different perspectives and developments based in international legal instruments (3.1), soft law documents (3.2), state practice from cases (3.3) and lastly the theory of remedial secession (3.4). The first section provides the factual and legal background of the right, to which soft law documents reflects the general development of the right, further highlighted by state practice and its interpretation of those instruments and documents. Lastly, the theory sets out premises reflecting general international law and that former types of sources support secessionists movements to secede from its administering state.

3.1 International legal instruments

This section discusses whether international law has established and developed a right to *external* self-determination, and under which circumstances such right can be claimed.

⁵⁰ *Prosecutor v. Milutinovic et al.*, Judgment – Trial Chamber, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2009, para. 13.

⁵¹ United Nations Security Council resolution 1160, *Adopted by the Security Council at its 3868th meeting on 31 March 1998*, S/RES/1160 (31 March 1998), para. 5.

⁵² United Nations Security Council resolution 1199, *Adopted by the Security Council at its 3930th meeting on 23 September 1998*, S/RES/1199 (23 September 1998), preamble.

⁵³ NATO, “Kosovo Air Campaign (Archived) Operation Allied Force.” 7 April 2016, (available at: https://www.nato.int/cps/ic/natohq/topics_49602.htm).

According to the UN Charter art. 25, decisions from the UNSC, those adopted under Chapter VII as resolutions, are binding on its Member States.⁵⁴ Contrary to the UNSC, the UNGA resolutions do not perform as law making instruments, and therefore have no legal force. However, they still reflect an important legal thinking and an expression of *opinio juris* of a point in time shared by a majority of states.⁵⁵

Self-determination as a principle was first introduced in the UN Charter art. 1(2) “[...] to develop friendly relations among nations based on respect for the principle of equal right and self-determination of peoples”.⁵⁶ Further in art. 55, the principle is elaborated to promote development related to economic, social, cultural and human rights conditions. The scope of the principle of self-determination is arguably limited to the framework of promoting development and independence in the context of colonies, as described in articles 73 and 76.

Moreover, based on the *travaux préparatoires*, a number of UN member states were hesitant and concerned about the inclusion of the principle. Columbia formally addressed: “[...] on the other hand, as connoting a withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy, and we should not desire that it should be included in the text of the Charter”.⁵⁷ Thus, prior to the adoption of the Charter the narrative of the negotiations directed the inclusion of self-determination towards limitation to internal matters.⁵⁸

Considering the inability to provide a precise definition of self-determination, and peoples, as to what it entails and to whom such right applies,⁵⁹ reflects the impact from the Charter’s *travaux préparatoires*. The interpretation of the Charter in its entirety suggests that an objective of a universal right to self-determination for peoples was intended, however inadequately formulated and adopted. Articles 73 and 76(b) imply that the interpretation of self-determination and peoples, enshrined in art. 1(2) should be made in reference to inhabitants of Non-Self-Governing (NSG) and Trust territories as subjects to reach self-governance. Furthermore art. 76 is the only immediate, but rather vague, obligation imposed on colonial powers to promote and develop self-governance. Articles 1(2) and 55 formulate self-determination as a mean to international peace and security. This abstract presentation makes it difficult to attribute any legal weight, or to implement it as a legal principle. On this basis, the

⁵⁴ Charter of the UN, *supra* note 2, art. 25.

⁵⁵ Boyle, *supra* note 17, p. 119.

⁵⁶ Charter of the UN, *supra* note 2, art. 1(2).

⁵⁷ Cassese, *supra* note 7, p. 39.

⁵⁸ Alexandra Xanthaki, *The Right to Self-determination: Meaning and Scope*, in: Nazila Ghanea and Alexandra Xanthaki, *Minorities, Peoples, and Self-Determination, Essays in Honor of Patrick Thornberry*, 2005, p. 16.

⁵⁹ Cassese, *supra* note 7, p. 42

Charter does not impose immediate legal obligations on its Member States on the right to self-determination beyond those imposed on colonial powers.⁶⁰

The UNGA was the first platform utilized to clarify the ambiguity from the Charter through a number of adopted decisions from 1960 and onwards. Contrary to the Charter's formulation of a principle, res. 1514 recognized self-determination as a right of peoples,⁶¹ which established materiality to "freely determine their political status and freely pursue their economic, social and cultural development".⁶² It further indicated it was a fundamental right: "subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights".⁶³

This res. signifies an internal and external aspect of the right to self-determination, which was further matured by res. 1541, adopted the day after. Principle IV describes the ways for NSG territories, under Chapter XI of the Charter, to reach self-governance by "emergence as a sovereign independent State; free association with an independent State; or integration with an independent State."⁶⁴ It is evident that the declaration was adopted for the purpose of decolonization,⁶⁵ when immediate steps and support towards independence for NSG and Trust territories⁶⁶ were articulated in the preambles and in paragraph 5.⁶⁷ This is further supported by how res. 1541 expressed a right to self-determination to be claimed by NSG territories, and territories defined as 'geographical, ethnical and cultural distinctive' from their administering state.⁶⁸ The declarations do not seize the opportunity to define the terms peoples, only to the extent wherein a territorial, ethnical and cultural concept is conceived. Nevertheless, still significant as peoples are those who are free to determine their political status, whether with an internal or external dimension.

On the other hand, the universal applicability of the right is challenged by the inclusion of the principle of territorial integrity, which reads: "Any attempts aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN".⁶⁹ Territorial integrity is enshrined in the UN

⁶⁰ Cassese, *supra* note 7, p. 43

⁶¹ United Nations General Assembly resolution 1514(XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514(XV) (14 December 1960), para. 2.

⁶² *ibid.*

⁶³ UN General Assembly resolution 1514(XV), *supra* note 61, para. 1

⁶⁴ United Nations General Assembly resolution 1541(XV), *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*, A/RES/1541(XV) (15 December 1960), Principle VI.

⁶⁵ Barten, *supra* note 19, p. 190.

⁶⁶ UN General Assembly resolution 1514(XV), *supra* note 61, principle V.

⁶⁷ UN General Assembly resolution 1514(XV), *supra* note 61, preamble.

⁶⁸ Xanthaki, *supra* note 58, p. 16

⁶⁹ UN General Assembly resolution 1514(XV), *supra* note 61, principle V

Charters chapter of purposes and principles, in articles 2(4) and 2(7), which in this case poses two conflicting stands. On the basis of secession, the emergence of new independent and sovereign states will inevitably disrupt the territorial integrity of the parent state, which therefore can limit the applicability of the self-determination.⁷⁰ Secondly, such limitation on the principle arguably disrupts the commitment to self-determination in regard to national unity.

The Friendly Relations Declaration (res. 2625) also affirmed the importance of territorial integrity, both in its preambles and principles, following the lines from previous resolutions by stating ‘any attempt aimed at the disruption of territorial integrity is incompatible with the UN Charter’.⁷¹ However by this time, it is rather questionable whether decolonization is equivalent to secession. The elaboration of principle (e) clarifies such doubt by stating; “the territory or a colony or other NSG territories has, under the Charter, a status separate and distinct from the territory of the State administering it”,⁷² provided that the territory was giving a separate status, the right to self-determination is granted, and only applicable “until the people of the colony or NSG territories have exercised their right of self-determination”.⁷³ Once the status of colonial or NSG territories were terminated, and whether established as an independent, free association or reintegrated with an independent state, the principle of territorial integrity would find its application and thus prevent further secession.⁷⁴ In this rationale, the right to self-determination is not equal to secession. On the other hand, those in favor of secession might find leverage in the elaboration of principle (e) as the right is found appropriate when peoples are under “subjugation, domination and exploitation”⁷⁵ this extends the right to self-determination to beneficiaries beyond those from colonies, which is further supported by the statement that “Every State has the duty to refrain from any forcible action, which deprives peoples [...] of the present principle of their right to self-determination”.⁷⁶ This was the predominant understanding of the time, and more firmly grounded once the International Covenants of Human Rights⁷⁷ entered into force in 1976. Its common article 1 reads; “All peoples have the right of self-determination. By virtue of that right they freely

⁷⁰ James Crawford, “State Practice and International Law in Relation to Secession,” *British Yearbook of International Law*, vol. 69, no. 1 (1999), p. 92.

⁷¹ United Nations General Assembly resolution 2625(XXI), *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, A/RES/2625(XXV) (24 October 1970), preamble.

⁷² UN General Assembly resolution 2625(XXI), *supra* note 71, Principle (e).

⁷³ *ibid.*

⁷⁴ Loper, *supra* note 74, pp. 178-179.

⁷⁵ *ibid.*

⁷⁶ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle 1

⁷⁷ United Nations General Assembly resolution 2200A(XXI), *International Covenant on Civil and Political Rights*, A/RES/2200A(XXI) (16 December 1966); United Nations General Assembly resolution 2200(XXI), *International Covenant on Economic, Social and Cultural Rights*, A/RES/2200(XXI) (16 December 1966).

determine their political status and freely pursue their economic, social and cultural development”.⁷⁸ The expansion of peoples right to ‘all peoples right’ indicates that it is no longer restricted to colonial beneficiaries. Another provision, which is in favor of such expansion, is art. 3: “The State Parties to the present Covenant, including those having responsibility of the administration of NSG and Trust territories”.⁷⁹ The wording of ‘including’ implies that other states, not merely the NSG and Trust territories, have an obligation to “promote the realization of the right of self-determination”⁸⁰ for all peoples.

With the expanded beneficiaries, other groups of people were included in res. 2625 principle 5, paragraph 7, those who were discriminated against on the basis of their race, and not represented in the state “[...] States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed a government representing the whole people belonging to the territory without distinction as to race, creed or color”.⁸¹ This broadens the scope of the principle beyond decolonization and separate status to one, which is termed by a various judicial authors, of a last resort situation, wherein people are denied political representation based on race.⁸²

One could argue that the ICCPR cause confusion in regards to a legal formality, in which the Optional Protocol to the ICCPR states in its preamble that a Human Rights Committee must be set up “to receive and consider [...] communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.”⁸³ On one hand it is assumed that “all peoples right to self-determination” is merely a right in theory, since it is only individuals, who can invoke violations of art. 1 and communicate to the HR Committee on Civil and Political Rights, as there is no mention of a collective right.⁸⁴ In this rationale, the holders of the right are the contracting state parties to the Covenant, and the people are the receivers of such right.⁸⁵ However, the Covenant in its entirety set forth an understanding that the states shall promote such right on behalf of the people, and that peoples in fact have the right to self-determination. Additionally, adopted as a General Comment in the HRC, common art. 1 on self-determination presupposes the other human rights written in the two Covenants.⁸⁶

⁷⁸ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 1.

⁷⁹ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 2.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Loper, *supra* note 74, p. 179

⁸³ United Nations General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁸⁴ Cassese, *supra* note 7, p. 143.

⁸⁵ *ibid.*

⁸⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, (13 March 1984) art. 1.

Hitherto, the development of self-determination in UN documents has extended the scope to all peoples, making them entitled to an international right.

In 1993, the Vienna Declaration and Programme of Action (VDPA), a human rights declaration, was adopted by 171 States in consensus, and later endorsed by UNGA as res. 48/121.⁸⁷ Both instances expressed an *opinio juris* of an international understanding to realize the right to self-determination,⁸⁸ which is stated in principle 2.2: “affirms the right of peoples to take legitimate action in accordance with the UN Charter to realize the right to self-determination”.⁸⁹ Not only did the declaration recall the Friendly Relations Declaration principle 5, but also expanded it “to people whose government does not represent the whole people, without any distinction of any kind”.⁹⁰ This removes the limitation to decolonization and discrimination based on race and ethnicity; instead foreseeing the necessity of taking account of peoples under “other forms of alien domination or foreign occupation”.⁹¹ One could argue that this reasoning arose prior to the adoption of VDPA, from the historical events in the early 1990’s where new states emerged on the global scene as a result of the dissolution of the Soviet Union and the breakup of Yugoslavia. These events demonstrated an exercise of *external* self-determination invoked by claims of independence justified by alien domination or foreign occupation. The declaration further states that the denial of self-determination is a “violation of human rights and underlines the importance of the effective realization of this right”,⁹² thus recognizing peoples absolute right to be exercised by legitimate actions. The latter is rather unclear, however it can be interpreted that illegitimate actions are those violating the principles and purposes of the UN Charter, and those that may “impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”⁹³. However, self-determination as a fundamental and human right does not underplay the importance and prioritized principle of territorial integrity in the VPDA either.

In conclusion, the development of self-determination through international instruments have broaden the scope from a principle of peoples, to a right of all peoples, which states are obliged to promote. However, it is questionable whether this right entails a legal justification for *external* self-determination and secession. While res. 2625 and the ICCPR have not drawn

⁸⁷ United Nations General Assembly, *Vienna Declaration and Programme of Action (VDPA)*, 12 July 1993, A/CONF.157/23.

⁸⁸ Loper, *supra* note 74, p. 181.

⁸⁹ UN General Assembly, *VDPA*, *supra* note 87, para. 2.2.

⁹⁰ UN General Assembly, *VDPA*, *supra* note 87, para. 2.3.

⁹¹ *ibid.*

⁹² UN General Assembly, *VDPA*, *supra* note 87, para. 2.3

⁹³ UN General Assembly, *VDPA*, *supra* note 87, para. 2.2

a limitation to its application, which also makes its effectiveness considerably unclear,⁹⁴ the UN documents have allowed for an expansion of self-determination based on two conditions, the process of decolonization and when under foreign domination and occupation.⁹⁵ While res. 2625 and the VPDA take a further step by including conditions of exclusion from representation to invoke the right, it is not contested that *external* self-determination entails a right to secession by definition, or that it is prohibited, however limited to the extent of when territorial integrity becomes applicable. It is arguable, that the inclusion of self-determination in international legal instruments, is expected to be exercised in the light of specific provisions, and does therefore not perform as an absolute right independent from its context.

3.2 Soft law

In order to scrutinize a broader comprehension of the right, it is convenient to examine other international texts, which has a soft law character, but addresses the right to self-determination. The texts, the Helsinki Final Act 1975 (Final Act) and its follow-up the Copenhagen Document, were adopted within the CSCE framework. The organization, OSCE, does not have a legal personality subjected to law, and its consensus-based decisions are therefore only politically binding, but serve a platform to debate state relations, human rights and self-determination for its members from Europe, Asia and North America.⁹⁶

The Act was an attempt to enhance the relations between the East and the West,⁹⁷ and by doing so, provisions from the first chapter, concerning, sovereign equality, territorial integrity, respect for human rights and fundamental freedom, equal rights and self-determination of peoples, were the foundation of such relations, which were to be fulfilled in good faith of obligations under international law.⁹⁸ While principle I recalls state sovereignty, it highlights that respect must be paid to everyone's right to "choose and develop its political, social, economic and cultural systems, as well as its right to determine its laws and regulations".⁹⁹ These entitlements are addressed to the contracting parties, in contrast to former articles, which refers to a right of peoples to determine their political status. The parties must also consider that their frontiers can be changed, but no elaboration is provided on how such change may

⁹⁴ Loper, *supra* note 74, p. 180.

⁹⁵ Cassese, *supra* note 7, p. 278.

⁹⁶ OSCE, *supra* note 18.

⁹⁷ Alexandre Charles Kiss & Mary Frances Dominick, "Inter Legal Significance of the Human Rights Provisions of the Helsinki Final Act", *Vanderbilt Journal of Transnational Law*, vol. 13 (1980), p. 294.

⁹⁸ *Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki*, Helsinki, 1 August 1975, *Organization for Security and Co-operation in Europe (OSCE)* (available at: <http://www.osce.org/helsinki-final-act?download=true>).

⁹⁹ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle I.

occur, besides: “by peaceful means and by agreement”.¹⁰⁰ However, the limitation of changeable frontiers is presented by the inviolability of frontiers (principle VIII), which assures that no frontiers must be changed based on attempts of seizing, annexation nor assault from the contracting parties. Thus, any occupied territory as a result of the use of force, will not be recognized as legal.¹⁰¹ The principle of territorial integrity is therefore concurrently confirmed with the right to develop and determine legal systems and legislation. In cases of asserting one’s right to *external* self-determination, new or changed frontiers with forceful means utilized, can immediately be deemed as a violation of the Final Act and the UN Charter. This is further supported by the fact that any group which undermines the state’s authority, political independence and or territorial integrity would arguably be associated to conduct activities aimed at ‘violently overthrow a regime’, as described in principle VI. It is anticipated that *external* self-determination undermines the administering state’s territorial integrity, since declared claims of independence will inevitably lead to session and changed frontiers. This suggests that the concerns from the UN Charter’s *travaux préparatoires* are still voiced by a smaller representation through the Final Act.

Considering the time of the CSCE, with participants such as the Soviet Union and Yugoslavia, and East and West Germany, much attention was drawn to self-determination and proposals were forwarded by several delegations.¹⁰² Eventually the final text was adopted as principle VIII, which first reads: “The participating States will respect the equal rights of peoples and their right to self-determination”.¹⁰³ The wording is noticeably similar to the UN Charter’s art. 2(4). However, the Final Act takes a deviating step from previous instruments by stating “[...] all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status [...]”.¹⁰⁴ The wording of this paragraph answers earlier questions. The right is timeless by its phrase of ‘*always*’, and when and as ‘*they wish*’. Followed from res. 1541’s principle IV of reaching self-governance by the three options, the Final Act proceeds to make self-determination a continuous right, despite reaching any level of independence, sovereignty or free association.

It can be suggested that the wording of ‘without external interference’¹⁰⁵ is similar to the meaning of ‘freely to determine’ from res. 1541 and 2625.¹⁰⁶ The free will of the people is

¹⁰⁰ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle IV.

¹⁰¹ *ibid.*

¹⁰² Cassese, *supra* note 7, p. 279

¹⁰³ CSCE: *Final Act of Helsinki*, *supra* note 98, principle VIII.

¹⁰⁴ *ibid.*

¹⁰⁵ Cassese, *supra* note 7, p. 286.

¹⁰⁶ See also: UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 1.

expressed through the underlined ‘in full freedom’, but the right is also applicable in a broader term, arguably excluding internal influence as well. In other words, people are free from state influence to determine a political, economic, social, and cultural status that is different from its administering state. However, the wording of ‘without external influence’ also implies the non-intervention principle, that third-state cannot intervene in the domestic affairs of another state by means of force or threat.¹⁰⁷ It additionally indicates that a third-state’s assistance to the administering state in preventing the exercise of peoples right to determine their internal and external political status would be misconduct. The Final Act provides a shift from previous legal instruments by introducing two dimensions of political status, an internal and external. Firstly, it can be assumed that a right to *external* self-determination is being, if not legally, then politically negotiated and accepted. The participating states of the Final Act did not find reason to include a clause to restrict the right to decolonization, foreign occupation or racist regimes, in doing so, it deviates from earlier instruments, such as res. 2625.

By now, can a group of people, by the virtue of the right to self-determination, rightfully secede from the state to which they belong? Essentially, the ‘peoples’ in the Final Act predominantly refers to people living in the sovereign states of Europe and North America, which were not colonized or under foreign occupation.¹⁰⁸ This proves to have an impact on the scope of the right to *external* self-determination, since the right is interpreted to be exercised by the wish and will of the whole people from the participating states, and not by a minority group. Therefore, the whole people can in full freedom declare a new political status through a referendum, changing their international status and frontiers to either re-merge with a state, or separate as two independent states,¹⁰⁹ without internal influence from the state.

As a soft law instrument, the Act refers to good faith, and makes it clear to follow its principles. On one hand, it is debatable whether soft law can appear weak in obliging states, but when a political agreement is established, it is expected that the state fulfill and uphold the content of the agreement.¹¹⁰ The Act also makes reference to hard law, such as the UN Charter, which reinforces and reaffirms its many purposes and principles, to the extent that in events of conflicting obligations, the rules from the UN Charter prevails.¹¹¹ However, as a non-legally binding document, it poses no challenge to be conflicted with other legally binding obligations, which makes this reassurance rather unnecessary.¹¹²

¹⁰⁷ Charter of the UN, *supra* note 2, art. 2(7).

¹⁰⁸ Loper, *supra* note 74, p. 180.

¹⁰⁹ Cassese, *supra* note 7, p. 286.

¹¹⁰ Barten, *supra* note 19, p. 68.

¹¹¹ Charter of the UN, *supra* note 2, art. 103.

¹¹² Barten, *supra* note 19, p. 75.

The Final Act attempted to broaden the scope of *external* self-determination based on earlier instruments, however its preambles and provisions suggest that the right to self-determination was a contributing component in promoting and developing better relations between states, with the main objective to strengthen world peace and security.¹¹³ It proves in its entirety to take a strong position on territorial integrity and frontiers;¹¹⁴ since no territorial changes may take place without the whole peoples opinion to reintegrate by nonviolent means and by agreement. One interpretation is that no provisions were provided, to suggest cases in which self-determination would amount to a greater materialization than that of territorial integrity, as the exercise of determining the external political status of a state, would not violate the territorial integrity of the state. Conclusively, the Final Act follows the position of the UN charter, in which the right to *external* self-determination is evidently absent, and therefore does not authorize self-determination as a right to secession exercised by a group.

After the CSCE Conference, meetings were held to affirm and evaluate the implementation of the Final Act's ten principles. The Concluding Document of the Vienna Meeting recalled self-determination by its formulation from the Act,¹¹⁵ however without its contributing role to better relations between States. The document directed its focus on internal aspects of self-determination, increasing improvements on minority rights and the promotion of democracy.¹¹⁶ This led to the establishment of a conference on the human dimension of the CSCE, which presented the Copenhagen Document in 1990. The document first stressed democratic measures through periodic, free and fair elections,¹¹⁷ expressing the will of the people, and the government's legitimacy and authority. It is noteworthy to highlight that the document was adopted while the Soviet Union was experiencing instability within its union, which led to its dissolution in 1991, and its fifteen constituent republics became independent countries. This was accounted for in the preambles, which marked the new era for democratic ideals to be pursued by the rule of law, and where found appropriate, international and national observes would improve the electoral processes, to ensure the will of people was respected. On the other hand, it can be argued that fair and free elections would be a mean of strengthening the right to self-determination from the Final Act, 'without external freedom' to have the whole

¹¹³ CSCE: *Final Act of Helsinki*, *supra* note 98.

¹¹⁴ Koskenniemi, *supra* note 9, p. 242.

¹¹⁵ *Conference on Security and Co-operation in Europe (CSCE): Concluding Document of the Vienna Meeting 1986 of the participating states of the CSCE in Europe, held on the basis of the provisions of the Final Act relating to the follow-up to the conference*, Vienna, 4 November 1986 (available at: <http://www.osce.org/mc/40881?download=true>) principle 3.

¹¹⁶ *ibid.*

¹¹⁷ *Conference on Security and Cooperation in Europe (CSCE): Document of the Copenhagen Meeting of the Conference on Human Dimension*, Copenhagen, 29 June 1990, *Organization for Security and Co-operation in Europe (OSCE)* (available at: www.osce.org/odihr/elections/14304?download=true), para. 6.

people participating in referendums, and consequently voice their choices and right to determining the state's political status.

Secondly, the document stressed national minorities rights, believing the safeguarding of those right would contribute to the preservation of peace and security. Para. 2 states that belonging to a national minority is an individual choice, and thus once declared, the individual is entitled to a set of rights concerning their ethnic, cultural, linguistic or religious identity, which are to be freely expressed or preserved as wished, and without attempts to assimilate individuals or national minorities.¹¹⁸ The clarification of the attributes of being free to speak in their mother tongue, maintain educational, cultural and religious institutions, serve great opportunities for national minorities to be given equal status.¹¹⁹

The respective states thus became responsible to adopt adequate measures to guarantee the human rights of national minorities.¹²⁰ One interpretation suggests that despite its remarkable focus on human rights, the safeguarding requirements, in which the state is responsible for, implies rather the rights of minorities being conditioned by two aspects. One is, based on the wordings of 'where necessary; in conformity with applicable national legislation; in accordance with the policies of the State concerned',¹²¹ which leaves sufficient opportunity to result in different interpretations, since the participating states have different comprehension of the issues at stake,¹²² and thus create less likelihood to be practiced. The second aspect is the application of minority rights, which are only made available if national law includes it in its regulations. Thus, individuals and minorities rights, to preserve their identity, might not exist to be exercised, due to the existing national legislation. Otherwise states would have to amend legislation, which can only be required by a process of ratifying a legally binding treaty, and as the Copenhagen Document lacks a legal force, it performs as a political agreement without formalities of ratification.¹²³

Nevertheless, the highlighted respect for human rights of national minorities, does provide for a broader scope than evidenced before, national minorities are the subjects of the right to *internal* self-determination, and have the right, in full freedom, to choose their identity and preserve its attributes. Further supported by the states respect for minorities to "effective participation in public affairs" and that instructions of their mother tongue be used before public authorities. At first, it can be interpreted to indicate a greater applicability of the right, as

¹¹⁸ CSCE: *Copenhagen Document*, *supra* note 117, para. 32.

¹¹⁹ Barten, *supra* note 19, p. 104.

¹²⁰ CSCE: *Copenhagen Document*, *supra* note 117, para. 32.

¹²¹ CSCE: *Copenhagen Document*, *supra* note 117, paras. 33, 34, 35.

¹²² Barten, *supra* note 19, p. 120.

¹²³ *ibid.*

representation is granted to every national minority, and not merely restricted to that of race as described in res. 2625. Secondly, “appropriate local or autonomous administrations” may be established to create better conditions for national minorities, which would express the state’s respect for national minorities distinctive ethnicity, language or religion, and thereby its peoples right to self-determination.¹²⁴ On the other hand, to safeguard representation and grant local or autonomous administration is yet conditioned by the states, on the basis of whether autonomy would correspond to the national legislation and rule of law principles of the state. The Copenhagen Document must therefore be interpreted with caution, as it might give the impression that national minorities have the right to achieve self-governance, which is misleading, since such wording is absent in the document. Inherently, the state, as the last entity to determine whether national minority should be granted autonomy in a territorial area, comprises the right, as it cannot be granted regardless of its national legislation. Lastly, the Copenhagen Document repeats the same ambiguity of UN instruments, by lacking a definition of national minorities, besides that any individual can choose to belong to a national minority. This leaves the state to interpret and determine under which conditions a group can be entailed to the rights, and will lead to inconsistency practice of the principle of self-determination.

The focal point of the internal aspect is arguably a reflection of the political landscape of the time of its adoption. It was calculated accordingly to context of the dissolution of old states, the Soviet Union, Yugoslavia and also Czechoslovakia, wherein new entities would claim independence and statehood,¹²⁵ therefore an attempt to avert a situation from evolving to international anarchy. Further supported by the references made to other international obligations, in the Final Act and UN Charter, however in particular the principle of territorial integrity. The latter is arguably superior to that of self-determination, as the preservation of national minority rights should not be in contravention of the prevailing principle of territorial integrity of states. In conclusion, the argument is that the Copenhagen Document does not provide for a right to *external* self-determination, and therefore grants no right for a national minority group to pursue independence based on secession. However, the internal aspect of self-determination, the situation within the existing state,¹²⁶ is heavily emphasized and elaborated to the extent where the state have the final saying in supporting the initiatives set forth in the document.

¹²⁴ Krieger, *supra* note 21, p. xxxiii.

¹²⁵ Koskenniemi, *supra* note 9, p. 246.

¹²⁶ Krieger, *supra* note 21, xxxiii.

3.3 Cases

The following investigates the development of the right to self-determination based on two cases: the Åland Islands and Quebec. These two cases reflect the state practice of the right, since both have claimed a right to *external* self-determination as the legal ground to redefine their international political status. Firstly, this chapter investigates under which circumstances, and on what basis, the right to *external* self-determination has either been granted or rejected. This includes the *travaux préparatoires*, the applied principles of international law and the international judicial institution's reasoning of its decisions. Secondly, as the decisions are interpretations of established principles in international law, other judicial statements will be evaluated to whether an international custom has been established, based on *opinio juris* and state practice. Thirdly, it also examines whether case law decisions have created any precedents for future conduct. The findings in this chapter will make a comparison contribution to the case of Kosovo.

3.3.1 The Åland Islands Dispute

The Åland Islands, mainly inhabited by people of Swedish origin, went from Swedish to Russian control, despite demilitarization, alongside Finland as a result of Sweden's defeat and the subsequent Frederiksham Treaty.¹²⁷ After the Russian Revolution, Finland declared independence based on the principle of self-determination of peoples in 1917, which was recognized by the Russian leaders.¹²⁸ Until that time, the Åland Islands were perceived as part of Finland, however they seized the opportunity to claim a right to self-determination for their own people, as they wished to be reunited with the Swedish Kingdom.¹²⁹ The latter recognized the secession movement, whereas the claim was met with resistance from Helsinki who held the belief that it was a domestic matter, and that the Islands belonged to the sovereignty of Finland. After years of territorial dispute, the question of the Islands was finally submitted to the League of Nations (LN) to settle the dispute of their status. Two commissions were appointed by the LN, as the Council of the League requested an advisory opinion from the International Committee of Jurists, to determine whether the case was of international concern, and its legal aspects. And secondly the Commission of Rapportuers, whether international law

¹²⁷ Hannum, *Autonomy, Sovereignty and Self-Determination - the Accommodation of Conflicting Rights*. 1996. pp. 370-371.

¹²⁸ Oliver Diggelmann, "The Aaland case and the Sociological Approach to International Law," *The European Journal of International Law*, vol. 18, no. 1 (2007), p. 136.

¹²⁹ *ibid.*

could allow Ålands Islands union with Sweden by the principle that peoples have the right of self-determination.¹³⁰

The Committee of Jurists started with a clear reference to the Covenant of the LN, which included no provision of the principle of self-determination, and that its recognition by multiple positive international treaties was insufficient to consider it as an international legal norm, and thus the principle was merely a part ‘in modern political thought’.¹³¹ Neither did positive international law recognize a right for national groups to separate themselves from their administering state. Moreover, under normal conditions, a vote or referendum carried out by a group of the population to determine their political fate was a quality only a definitely constituted and sovereign state could initiate. Suggesting that issues of national groups self-determination falls within the domestic jurisdiction of the concerned state. It was argued that allowing a national group the right to *external* self-determination would breach the sovereignty of the state, leading to instability and endangering ‘the interests of the international community’.¹³² This suggests that the time, in which the LN was to be terminated and transfer its assets to the new organization of the UN, conventional thoughts of self-determination were, to an extent, conveyed from the Covenant to the Charter, based on concerns of international anarchy.

Furthermore, the Commission found Finland to lack the features of a definitely constituted state, which meant Finland, had not yet gained sovereignty over the Islands during its disintegration with Russia.¹³³ To clarify, due to the lack of sovereignty Finland enjoyed over the Åland Islands¹³⁴, self-determination could not find any application. With the case deemed within international jurisdiction and with LN competent to advice, it appointed a Commission of Rapporteurs, as the second commission, who filed a report to answer the question to whether the minority of Ålanders had the right to separate itself from Finland, in order to be incorporated with another state or to declare its independence.¹³⁵ In the light of res. 1541, the incorporation into Sweden would be deemed possible on the grounds of colonization, alien and foreign subjugation, or as in res. 2625 based on lack of representation. However, before these conditions were considered and issued as resolutions, the Commission of Rapporteurs found:

¹³⁰ The Council of the League of Nations, Commission of Jurists, *Report of the International Committee 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 questions*, LN Official Journal, Suppl. no. 3, (1920)

¹³¹ Report of the International Committee of Jurists, *supra* note 130, para. 2.

¹³² *ibid.*

¹³³ Hannum, *supra* note 127, p. 371.

¹³⁴ Cassese, *supra* note 7, p. 29.

¹³⁵ The Council of the League of Nations, Commission of Rapporteurs, *The Aaland Island Question - Report Submitted to the Council of The League of Nations by the Commission of Rapporteurs*, LN Council Doc. B7 21/68/106 (1921), p. 318.

“the Ålanders have neither been persecuted nor oppressed by Finland”¹³⁶, and the real issue at stake was the protection of the Swedish language, as the population was only threatened in its language and culture.¹³⁷ It was not an intended policy carried out by the Finnish government, to endanger that part of the Ålanders identity. The LN found no reason to comply with the Ålanders request to separate, solely because of a wish without further oppression. This was interestingly later included in the Final Act, that the right to self-determination could be exercised when and as they wish, to determine their external political status.¹³⁸ As it was concluded as a right of the whole people, the case of Ålanders however implies the whole people wished to separate evidently proved insufficient.

The solution was to ensure the preservation of the minority group’s social, ethnical and religious character, intentionally excluding any reasons to allow for a separation. Thus far *internal* self-determination is realized by guarantees for minority rights, legal basis cannot be found. Two contributing factor in the rejection of the Ålanders right to *external* self-determination was based on assumptions as it would be “incompatible with the idea of the State as a territorial and political unity”¹³⁹ and that the international system would suffer yet again from instability. Territorial integrity and sovereignty in line with international stability, overruled self-determination as a political thought without legal influence, even when Finland was considered to lack definitive sovereignty.

In addition, the idea of the state to guarantee rights of preservation of identity, was reaffirmed in the VDPA wherein the promotion and protection of human rights and minority rights was the responsibility of governments,¹⁴⁰ and separately stated in res. 47 that “States shall protect the existence and the national or ethnic cultural [...] linguistic identity of minorities within their respective territories”.¹⁴¹ The Commissions of Jurists further stated that the principle of self-determination is aligned with the protection of minorities, as “both have a common object – to assure to some national group the maintenance and free development of its social, ethnical or religious characteristics”.¹⁴² The question of which the LN was concerned with, was those of protection of minorities, and the territorial integrity of states, which meant self-determination was considered as a mean of achieving certain rights internally, rather than infringing territorial integrity by initiating a secessionist movement. Thus, as opposing notions,

¹³⁶ Commission of Rapporteurs, *supra* note 135, p. 317.

¹³⁷ *ibid.*

¹³⁸ CSCE: *Final Act of Helsinki*, *supra* note 98, principle VII.

¹³⁹ Commission of Rapporteurs, *supra* note 135, p. 318.

¹⁴⁰ UN General Assembly, *VDPA*, *supra* note 87, para. 1.

¹⁴¹ United Nations General Assembly resolution 47/135, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, A/47/135 (1992), para. 1.

¹⁴² Report of the International Committee of Jurists, *supra* note 130, para. 5.

self-determination was modified to have the object of protecting minority rights,¹⁴³ and given that such rights were guaranteed; *external* self-determination in the form of secession could not be justified.¹⁴⁴ The Åland Islands' claim to self-determination was rejected on the basis of the Commission of Rapporteurs's report adopted by the Council of the LN. It was concluded, that the Islands would remain under Finnish sovereignty on the conditions that Finland increased the autonomy of the Islands and guaranteed the preservation of their language, of their culture and of their local Swedish tradition.¹⁴⁵ After World War II, the significance of minority rights was included in several international instruments, such as res. 47. This was further expressed in the Finnish Autonomy Act in 1951, which increased the Åland Islands' autonomy.¹⁴⁶ The principle of self-determination led to an autonomous government in Åland, which was remarkable of its time, as legal rights of granting representative government or local rule did not exist, but later reaffirmed in the Copenhagen Document.

The Commission's efforts to reject the Åland Islands' right to self-determination went to great length, however without dismissing exceptional situations. If the only way to preserve the Swedish language was the incorporation with Sweden, the LN would not have hesitated to consider this solution. Thus, suggesting that when *internal* self-determination is guaranteed, there will be no need of an external dimension to the solution. Secession from Finland would be granted only as a last resort based on conditions when, "the State lacks either the will or power to enact and apply just and effective guarantees"¹⁴⁷ or in cases where the state would abuse their sovereign power by implementing oppressive policies towards minorities.¹⁴⁸ This was later recalled in res. 2625¹⁴⁹ and the VPDA, stating that self-determination is pertinent for "people whose government does not represent the whole people".¹⁵⁰ However, the Ålanders had never been oppressed, why the right of *external* self-determination was not admitted.

Nevertheless, *external* self-determination was not completely disregarded, when the report further stated "there would be another possible solution, and it is exactly the one which we wish to eliminate".¹⁵¹ Therefore, if incapable of guaranteeing Åland Islands' autonomy, then *external* self-determination would be justified. Another persuasive interpretation is that

¹⁴³ Koskenniemi, *supra* note 9, p. 256.

¹⁴⁴ "The Åland Islands Solution: A precedent for successful international disputes settlement. Remarks by Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel, United Nations, 12 January 2012 (available at: http://legal.un.org/ola/media/info_from_lc/POB%20Aalands%20Islands%20Exhibition%20opening.pdf).

¹⁴⁵ Commission of Rapporteurs, *supra* note 135, p. 320.

¹⁴⁶ Hannum, *supra* note 127, p. 371.

¹⁴⁷ Commission of Rapporteurs, *supra* note 135, p. 318.

¹⁴⁸ Cassese, *supra* note 7, p. 33.

¹⁴⁹ UN General Assembly resolution 2625(XXI), *supra* note 71, principle 5.

¹⁵⁰ UN General Assembly, *VPDA*, *supra* note 87, para. 2.3.

¹⁵¹ Commission of Rapporteurs, *supra* note 135, p. 327.

the right to *external* self-determination and secession are matters concerning domestic jurisdiction, in order not to disrupt the international community of established and sovereign states.¹⁵² Whereas, exceptional situations, in which self-determination evolves from a political thought to a right, and is conditioned on the absence of *internal* self-determination, is an international concern which allows separation to foster international order. The latter was not found applicable in this case, and thus the *status quo* prevailed.

The Åland Islands case was the first interstate dispute referred to a higher international authority with questions concerning minority rights and self-determination before the establishment of the International Court of Justice (ICJ). Although, the advisory opinion interpreted self-determination as a political thought without any legal weight, it still gained importance in relation to oppression of cultural identity, and thus acquired legal ground for minority rights. This has proven to create an approach for how future questions of self-determination have been comprehended, or arguably how it has formed the principle in other international legal instruments, leading to its establishment as customary international law.¹⁵³

3.3.2 Quebec v. Canada

In another region, Quebec the province of Canada was under French sovereignty until surrendered to Britain in 1867, where Quebec gained its status as an autonomous province. The province, inhabited by a majority of French speaking people, requested an amendment to Constitution to guarantee the preservation of the French language, which in 1974 became an official language in Canada.¹⁵⁴

However, the wish for greater sovereignty grew, and in 1990 the National Assembly of Quebec appointed a Commission on the Future of Quebec to investigate its possibilities. The final report, Bélanger-Campeau, found that in order for Quebec to become sovereign, it could not be found on the principle of equal rights and self-determination of peoples, as the application of such principle was only possible in the context of colonial peoples, or peoples subjected to foreign occupation.¹⁵⁵ This decision was clearly in line with res. 1541 and 2625. The Final Act included no restrictions on the right to self-determination, as peoples always have the right, however as a soft law instrument without legal weight, it was not considered in the Commission's report. The Commission did state that minority groups enjoyed rights, but contemporary international law did not provide for territorial rights within the scope of self-determination. On the one hand, territorial integrity is recalled, to an extent, by the same line

¹⁵² Koskenniemi, *supra* note 9, pp. 246-247.

¹⁵³ O'Brien, *supra* note 90, p. 3.

¹⁵⁴ Cassese, *supra* note 7, p. 248.

¹⁵⁵ Lalonde, *supra* note 36, p. 207.

of reasoning as stated in res. 1514, that nothing must be aimed at the disruption of national unity and territorial integrity.¹⁵⁶ The LN, which represented the international community before the UN, determined in the Åland case that self-determination shared common ground with minority rights, thus guaranteed free development of a people.¹⁵⁷ This was generally accepted as the purpose of self-determination by states, and again concluded in this case, which supports the custom established on the basis of a consistent and general practice by the international community of states.

As independence was still sought for, two referendums were held in 1980 and 1995, which insisted on a political and economic association with Canada instead of federal ties, as Quebec allegedly had a right to secession under constitutional and international law.¹⁵⁸ Both referendums had a negative turnout, the last with 50.58 percent votes against.¹⁵⁹ Consequently, the Prime Minister of Canada firstly proposed to grant Quebec the status of a distinct society within Canada,¹⁶⁰ which the House of Commons of Canada adopted. And secondly, referred the case of secession to the Supreme Court of Canada (SCC) to establish the legal ground. It is imaginable that this was an effort to invalidate further movements or attempts of secession by the people of Quebec, without suppressing the will of the people.

The three questions addressed to the SCC concerned: whether Quebec could unilaterally secede from Canada under constitutional law; whether a right of self-determination under international law would allow Quebec to secede; and the last question concerned a possible conflict of domestic and international law, however was never answered given no conflict arose.¹⁶¹ The *amicus curia* objected the Court's authority in settling the legal framework of Quebec's wish to secede due to lack of jurisdiction. However, the SCC decided that when "legal questions touching and concerning the future of the Canadian federation"¹⁶² and as secession would involve future implications, it found itself competent.

In the first assessment, the Court based its judgment on principles of federalism, democracy, the rule of law, constitutionalism and respect for minorities, in answering secession under Canadian law. The principle of federalism is prominent to the question of self-

¹⁵⁶ UN General Assembly resolution 1514(XV), *supra* note 61, principle V.

¹⁵⁷ Report of the International Committee of Jurists, *supra* note 130, para. 5.

¹⁵⁸ Peter Leslie, "Canada: The Supreme Court Sets Rule for the Secession of Quebec", *Publius*, vol. 29, no. 2 (1999) p. 136.

¹⁵⁹ Daniel Turp, "From an Economic and Political Partnership Between Quebec and Canada to a Canadian Union", *Constitutional Forum*, vol. 7, (1996) p. 91.

¹⁶⁰ "Que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d'un Canada uni" free translation: "that this House recognizes that the Quebecois form a Nation within a united Canada" in: Erin Hurley, *National Performance: Representing Quebec from Expo 67 to Céline Dion*, 2011, p. 190.

¹⁶¹ *Reference re Secession of Quebec*, *supra* note 4, p. 218.

¹⁶² *Reference re Secession of Quebec*, *supra* note 4, para. 20.

determination, as it recognizes “the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction”.¹⁶³ Federalism has thus granted culturally unique groups autonomy, presuming unique means distinctively different from the majority, to preserve their language and culture, which Quebec has enjoyed without discrimination, but with legal guarantees. The SCC noted that the confederation accommodated distinctive interests with the creation of provincial government with significant power.¹⁶⁴

Further supported by the principle of democracy with the goal to promote self-government, the Constitution is the basis of how entities are constituted, and no law can override it. This prevented Quebec to overrule the Constitution by passing laws within its own autonomous entity. Suggesting that self-governance within Canada is conditioned to abide by its constitution, “the idea that the political representatives of the people of a province have the capacity and power to commit the province to be bound into the future by the constitutional rules being adopted”.¹⁶⁵ The Copenhagen Document included this conditionality; rights of minority groups are granted in so far they are in conformity with ‘national legislation’,¹⁶⁶ which is interpreted from the SCC’s statement as well, when concerning self-governance, as it must be in accordance with the constitutional provisions of Canada.

Another arguable interpretation is that the Constitution represents the will and sovereignty of the majority of people. If found insufficient by the majority of Quebecers, they must negotiate with the majority of Canada to amend the constitution, and if desired, constitutional arrangements could be made in order to give a right to secede.¹⁶⁷ In this way, rights all of people would be guaranteed and respected.¹⁶⁸ This follows the interpretation of the Final Act, in which one minority group cannot invoke the right to *external* self-determination, as it must be the will of the whole people that declare a new international political status.

Accordingly, Quebec’s autonomy was assured by the constitutional provisions on minority rights, herein the preservation and promotion of their language, culture and presentation within the federal Parliament.¹⁶⁹ Hereby, rights of *internal* self-determination were asserted to the Quebecers, however rights of political and cultural development, was not a

¹⁶³ *Reference re Secession of Quebec*, *supra* note 4, para. 58.

¹⁶⁴ *Reference re Secession of Quebec*, *supra* note 4, para. 48.

¹⁶⁵ *Reference re Secession of Quebec*, *supra* note 4, para. 59, 76.

¹⁶⁶ CSCE: Copenhagen Document, *supra* note 63, para. 32.

¹⁶⁷ *Reference re Secession of Quebec*, *supra* note 4, para. 85.

¹⁶⁸ Roya M. Hanna, “Right to Self-Determination in Re Secession of Quebec”, *Maryland Journal of International Law*, vol. 23, no. 1 (1999) p. 217.

¹⁶⁹ *Reference re Secession of Quebec*, *supra* note 4, para. 59.

right to secede.¹⁷⁰ Hence, the Canadian constitutional law did not allow for Quebec to secede unilaterally. The only approach to make secession possible would be a constitutional amendment.

The second question, “is there a right to self-determination under international law that would [...] give the right to effect the secession of Quebec from Canada unilaterally?”¹⁷¹ was initially rejected by the *amicus curia*, since a domestic matter was not a matter of international law. However, international law had guided other decisions issued by the SCC, thus appropriate to follow same guidelines in this case.¹⁷²

The SCC defined the implications of secession, which “is the effort of a group [...] to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane”.¹⁷³ However, the “Constitution is silent as to the ability of a province to secede from Confederation”.¹⁷⁴ International law has neither established whether secession is prohibited or permitted, making it a neutral field within law,¹⁷⁵ and it is therefore neither illegal nor legal for a group or region to declare themselves independent and to seek separation from its states under international law.¹⁷⁶ Although, neutrality does not imply that secession can be lawfully justified, it could as “an act of secession [...] alter the governance of Canadian territory [...] which is inconsistent with our current constitutional arrangement”.¹⁷⁷ The mere absence did not allow a right to secession, and as international law emphasizes the territorial integrity of states, secession would be incompatible with constitutional law.¹⁷⁸ Furthermore, a unilateral secession without negotiations with the provinces or the federal government, which is required, was further in contravention to the constitution and territorial integrity, and the argument of non-prohibition of unilateral secession was thus invalid.

However, to what extent was the SCC’s decision in conformity with principles of international law of its time? In its decision, the SCC examined the International Covenants of Human Rights, res. 2625, the VDPA, and the Final Act, in doing so; the right of a people to

¹⁷⁰ *ibid.*

¹⁷¹ *Reference re Secession of Quebec*, *supra* note 4, page. 218.

¹⁷² Hanna, *supra* note 169, p. 215.

¹⁷³ *Reference re Secession of Quebec*, *supra* note 4, para. 83.

¹⁷⁴ *Reference re Secession of Quebec*, *supra* note 4, para. 84.

¹⁷⁵ Olivier Corten, “Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law,” *Leiden Journal of International Law*, vol. 24 (2011) p. 88.

¹⁷⁶ Hurst Hannum, “The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?” *Leiden Journal of International Law*, vol. 24 (2011) p. 155.

¹⁷⁷ *ibid.*

¹⁷⁸ Hanna, *supra* note 169, p. 222.

self-determination was reaffirmed to be a general principle of international law.¹⁷⁹ The SCC proceeded to note that the principle was ‘normally’ realized through *internal* self-determination, focusing on people’s political, social and cultural development within the administering state.¹⁸⁰ However, as previously confirmed, the term “peoples” is still undefined, and the only consideration made was that a people did not necessitate the inclusion of the entire state’s population, and that Quebec did have characteristics of a people without further elaboration. This implied that without a definitive classification of a people, other preconditions must be met before claiming the right.¹⁸¹

The SCC defined *external* self-determination based on its interpretation of res. 2625, “the establishment of a sovereign, and independent State, the free association, or integration with an independent State [...] constitute modes of implementing the right of self-determination by that people”.¹⁸² However, an earlier interpretation of res. 2625 concluded the right to self-determination was intended for NSG and colonial territories to be exercised, and to an extent, people who were under ‘subjugation, domination and exploitation’. The application of self-determination does therefore not equal secession, which is partially supported by SCC’s own comprehension, as such right could only be claimed in extreme situation, “under carefully defined circumstances”¹⁸³, this was decided both in the Quebec and Åland Islands case.

The opposing legal principle to *external* self-determination was, again, the respect for territorial integrity of existing states. As stated in res. 2625 and the VPDA, nothing must be aimed to disrupt the territorial integrity of the administering state, and later reaffirmed in other instruments. The exercise of the right is limited by territorial integrity, in order to prevent threats to the sovereign state and to international stability.¹⁸⁴ Further supported by the Final Acts, one must “refrain from any violations of this principle (territorial integrity) and thus from any action aimed [...] at violating the territorial integrity, political independence, or the unity of a State.”¹⁸⁵ Any actions, such as secession, breaching this principle would be deemed illegal by the participating states. On the one hand, it asserted that participating states cannot, in the aftermath of secession, recognize the new state as independent and sovereign. This re-evaluates secession, which is not governed by international law, rather conferred as a legal-neutrality

¹⁷⁹ *Reference re Secession of Quebec*, *supra* note 4, para. 114. See also: Cassese, *supra* note 7, pp. 171-172.

¹⁸⁰ *Reference re Secession of Quebec*, *supra* note 4, para. 126.

¹⁸¹ *Reference re Secession of Quebec*, *supra* note 4, para. 122.

¹⁸² UN General Assembly resolution 2625(XXI), *supra* note 71, principle V.

¹⁸³ *Reference re Secession of Quebec*, *supra* note 4, para 126.

¹⁸⁴ Lalonde, *supra* note 36, p. 208.

¹⁸⁵ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle V.

argument,¹⁸⁶ to be legally limited, when its actions are aimed at breaching the principle of territorial integrity.

On the other hand, while reaffirming territorial integrity, it sought to find that peoples right to determine its external political status through the state by a referendum,¹⁸⁷ meant that territorial change cannot be carried out, either by the central authorities or a people, if in contrast to the will of the whole people of that state.¹⁸⁸ This supports the SCC precondition set forth in question one, which requires amendments of the constitution based on the consent of all people of Canada. However, this conflicts with its first statement on the term ‘peoples’ which did not have to concern the whole people to invoke the right, which the Final Act, as interpreted earlier, does. The conflicting issue of *external* self-determination and territorial integrity can be avoided, if followed by the same rationale from the Åland Islands case, where the state represents the whole people within the state’s territory. In this way, self-determination serves and provides protection of people by internal arrangements, which further decreases incentives for *external* self-determination.

The circumstances the SCC saw fit, for secession, were “in situations of former colonies; where a people is oppressed [...]; or when a group is denied meaningful access to government to pursue their political, economic, social and cultural development”.¹⁸⁹ The *amicus curiae* text forwarded to the SCC, stated that the people of Quebec had not been subjected to human rights violations or attacks on its physical existence, it was therefore determined that “the Quebec people is not an oppressed people”,¹⁹⁰ neither were they a colonized people. Considering Quebec’s representation in legislative, executive and judicial institutions, they had not been denied to fulfill their right to *internal* self-determination, and have therefore been free to pursue their own development. In fact, post-WWII was dominated by a majority of Quebecers in the Cabinet, and as Prime Ministers of Canada.¹⁹¹ Furthermore, the SCC asserted, Canada as a “sovereign and independent state conducting itself 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”.¹⁹² Thus, no justification to secession was found.

¹⁸⁶ Corton, *supra* note 176, p. 93.

¹⁸⁷ CSCE: *Final Act of Helsinki*, *supra* note 98, principle VIII.

¹⁸⁸ Cassese, *supra* note 7, p. 287.

¹⁸⁹ *Reference re Secession of Quebec*, *supra* note 4, para. 138.

¹⁹⁰ *Reference re Secession of Quebec*, *supra* note 4, para. 135.

¹⁹¹ *Reference re Secession of Quebec*, *supra* note 4, para. 137.

¹⁹² *ibid.*

On this basis, Quebec did not meet the threshold, and therefore no right of unilateral secession, neither under constitutional nor international law, could allow Quebec to secede from Canada. Quebec enjoyed rights of an autonomous province provided by the Confederation. Furthermore, autonomies representing a distinctive group within the territory of a state are not provided with rights to freely determine their external status under international law.¹⁹³ The SCC was consistent with the Bélanger-Campeau report, which stated self-determination, under international law, did not provide for territorial rights.

It is noteworthy that the threshold holds a condition, in which *external* self-determination is based on the absence of the internal aspect, therefore when prevented from exercising the right internally, a last resort to secede becomes relevant. Firstly the term ‘last resort’ has not been included in previous international documents, but the reasoning is nevertheless reflected in res. 2625: “every state has the duty to refrain from any forcible action, which deprives peoples of the principle of equal right and self-determination”.¹⁹⁴ However arguable that even in situations of states depriving people its internal right was not accounted to grant a remedy of a last resort to secede.

In conclusion, there was no right, constitutional or international to secede, based on Quebec’s guaranteed rights and representation within the Confederation. Furthermore, the advisory opinion, as a judicial decision contributed to state practice of the right, and was established as a source of law.¹⁹⁵ The case, although without being established as a precedent, has been used as a continuous reference in other cases concerning secession, and without reservation in this respect, the opinion is a “subsidiary means for the determination of rules of law at the international law”.¹⁹⁶

3.4 Remedial secession theory

The investigation of the development of *external* self-determination in contemporary law has thus far been unclear in its authorization of secession from existing states. As such this thesis turn towards the remedial secession theory, as presented by Allen Buchanan, which argues for a remedial right to secede, when a set of conditions can be met, to claim and exercise the right to *external* self-determination in the form of secession. The theoretical assumptions are thus examined in regard to its compatibility with the UN documents, soft law instruments, case law, judicial decisions and advisory opinions, all of which may reflect an international custom in law.

¹⁹³ Cassese, *supra* note 7, p. 251.

¹⁹⁴ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle V.

¹⁹⁵ Barten, *supra* note 19, p. 37.

¹⁹⁶ Statute of the ICJ, *supra* note 13, art. 38(1)(d).

The political philosophy of John Locke's revolution theory can be said to have provided the foundations for the thinking of remedial secession theory. The revolution theory suggested that when a government no longer adheres to its authority granted by the people and their consent, such government could be defeated. The objective of the revolution theory is that people have a right to overthrow the government, when fundamental rights of people have been violated and when the government is inconsistent with the consent given by the people.¹⁹⁷ Locke foresaw the inevitable consequence of unrepresentative governments, to which people will rise when suffering continuous injustices.¹⁹⁸ This theoretical assumption was later echoed in legal instruments, such as the Universal Declaration on Human Rights (UDHR), which reads that whenever: "a man is not to be compelled to have resources, as a last resort, to rebellion against any tyranny and oppression, that human right should be protected by the rule of law".¹⁹⁹ Although sharing a common denominator, the remedial secession theory does not aim to overthrow the government, instead "to sever the government's control over that portion of the territory".²⁰⁰ Also different from Locke, gross human rights violations are usually perpetrated against a group situated in a region instead of the whole population. The right to secede is therefore not a general right, but a right that can be exercised as a last resort by the portion of the population, which meets the preconditions.

The theory finds a group eligible to have a right to secede in three situations, when the physical existence of its members is threatened by the state; when people suffer human rights violations; and when the territory, which once was theirs, was occupied unjustly.²⁰¹ The theory does therefore not find the right applicable in situations beyond these preconditions. The situations can be traced in existing international instruments, as the first condition resonates with res. 1514, in regards to self-determination as a right of people, in which people are free to determine their political, economic, social and cultural development²⁰² focusing on territories which are ethnically and culturally distinctive from the state. When one groups' existence is threatened, it is evident that the whole people of the state is not entitled to exercise their right of self-determination: "every state has the duty to refrain from any forcible action, which deprives people [...] their right to self-determination"²⁰³ and that such denial of self-

¹⁹⁷ Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs*, vol. 26, no. 1 (1997) p. 35.

¹⁹⁸ Buchanan, *supra* note 197, p. 36.

¹⁹⁹ United Nations General Assembly resolution 3/127, *Universal Declaration of Human Rights*, A/RES/3/217/A (10 December 1948) preamble.

²⁰⁰ Buchanan, *supra* note 197, p. 36

²⁰¹ Buchanan, *supra* note 197, p. 37.

²⁰² UN General Assembly resolution 1514(XV), *supra* note 61, para. 2.

²⁰³ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle V.

determination is a human rights violation²⁰⁴ which is incompatible with res. 2625²⁰⁵ and the VDPA. This condition was further used as an objection to allow secession in the case of Quebec, in which the *amius curiae* found that its people had not suffered attacks on its physical existence. Secondly, gross human rights violations such as the prohibition on genocide and torture are categorized as *jus cogens*, in other words, peremptory norms under international law, which have been reaffirmed by judicial decisions,²⁰⁶ and are legally binding on all states in which no derogation of the norms must take place,²⁰⁷ regardless of ratification of the Conventions.²⁰⁸ Moreover, as set forth in the Copenhagen Document, states must guarantee human rights of minorities, however whenever the government is engaged in activities that endanger such rights, the targeted group cannot be expected to obey its authority.²⁰⁹ On this basis, the theory of remedial secession builds its legal basis from existing legal sources, and therefore, to an extent, is reflected in international law.

The last situation is recalled in the Final Act, to which occupied territories, as a result of use of force, or annexation resulting in new frontiers are illegal.²¹⁰ Further supported by the prohibition on the use of force from the UN Charter, art. 2(4) “[...] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state [...]”.²¹¹ Thus, just as Locke’s thesis, the right to secession is limited to a response to injustices, in a form of a last resort when a group “has no reasonable prospect of relief short of secession”.²¹² This suggests that a group does not have a general right, whenever found convenient, to secede from a just state without a discriminatory political system.²¹³

Considering these circumstances, this was arguably how *external* self-determination was intended to be included in international law, hence under conditions of subjugation of foreign occupation, whereas *internal* self-determination has been advanced in terms of minority rights. Nevertheless, as witnessed in the case of Quebec, the external aspect in the form of secession

²⁰⁴ UN General Assembly, *VDPA*, *supra* note 87, principle 2.3.

²⁰⁵ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle V.

²⁰⁶ *Prosecutor v. Kupreskic et al.* Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000, para. 520. See also: *Questions relating to the Obligation to Prosecute or Extradite*, (Belgium v Senegal), Judgment, International Court of Justice (ICJ), 20 July 2012, para. 99.

²⁰⁷ *Vienna Convention on the Law of Treaties (VCLT)*, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p. 331, art. 53.

²⁰⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, *United Nations Treaty Series*, vol. 78, p. 277, art. 1. See also: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, *United Nations Treaty Series*, vol. 1465, p. 85, art. 2.

²⁰⁹ United Nations General Assembly resolution 3/127, *supra* note 199, preamble.

²¹⁰ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle IV.

²¹¹ Charter of the UN, *supra* note 2, art. 2.4.

²¹² Buchanan, *supra* note 197, p. 46.

²¹³ Buchanan, *supra* note 197, p. 37.

was later developed as a last resort to preserve the existence of a group distinctive from the majority of the state, when people were prevented from exercising their right to *internal* self-determination. As presented earlier, the inhabitants of neither Quebec nor Åland Islands were oppressed or subjected to policies that compromised their identity. If their right to *internal* self-determination were deprived, meaning that if Finland was unable to guarantee the preservation of the Swedish language, and if Quebec had no access to governmental representation, then secession could take place. Does this imply, that the LN and the SCC would find legal ground to grant the two groups a right to secession? The LN acknowledged secession as a possibility, but one it wished to eliminate.²¹⁴ Since both groups had the means to achieve the objectives of *internal* self-determination, secession was unjustifiable. On the other hand, state practice does suggest, as the theory proposes, that secession insinuate the right to secession as a *ubi jus ibi remedium*, which means that under circumstances of violations of rights, the victim should have a reasonable remedy under international law, in other words “if international law is to remain faithful to its own premises, it must give the actual victims a remedy enabling them to live in dignity”.²¹⁵

3.4.1 Saving clause

The right to remedial secession, which subsequently overrules the sovereign and territorial integrity of a state, and phrased by state practice as a last resort, places its leverage in the so-called ‘*saving clause*’ from res. 2625 principle 7. This reads: “nothing [...] 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” only as long as, states are “conducting themselves in compliance with the principle of equal rights and self-determination of peoples,” and the last sentence represents a last requirement “and thus possessed of a government representing the whole people belonging to the territory without distinction to race, creed or color”.²¹⁶ One interpretation, which the approach of remedial secession theory supports, is that the wording focuses on the *internal* part of self-determination, and implies that if the government is not considered representative, but discriminate towards certain groups, the territorial integrity and political unity of the sovereign state may then not be applicable, thus overruled by a possible mean of secession.²¹⁷ Whereas when states with democratic and non-discriminatory political systems perform representative

²¹⁴ Commission of Rapporteurs, *supra* note 135, p. 327.

²¹⁵ Tomuschat, *supra* note 10, p. 9.

²¹⁶ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle VII.

²¹⁷ Loper, *supra* note 74, p. 179.

are not subjected to the *saving clause*.²¹⁸ In favor of such interpretation, remedial secession can be elaborated to have a status of *de lege lata*, that international law recognizes a range of remedies for oppressed groups, namely individual and minority rights and then ‘secession as the ultimate remedy’.²¹⁹

On the other hand, the *clause* starts emphasizing the principle of territorial integrity, which is sacred for states and have consistently been reaffirmed throughout international instruments. Considering the scope of *external* self-determination restricted to colonial and foreign occupation, also echoed in the Declaration’s *travaux préparatoires*: “self-determination only referred to colonial or military-occupied peoples”,²²⁰ and if the *clause* intended to entail a sanction for secession, its formulation would not appear this vague. Thus, international instruments do not imply recognition of the right to secession.²²¹

The UN Charter and the Common Article 1 intended a universal applicability of the right to self-determination, however res. 2625 have restricted the universality to groups, when denied basic rights of equal access to political and governmental institutions, based on their race, color or creed. On this account, the whole people of the sovereign state cannot claim a right self-determination, whether internal or external. It is noteworthy that groups distinctive from the majority based on origin, language and culture have not been included, however considered, during the clauses *travaux préparatoires*, too risky for the inviolable principle of territorial integrity. However, inspired by the ICCPR, this categorization was later developed to entail “persons belonging to national, or ethnic, religious and linguistic minorities”.²²²

In as much as these internal objectives of self-determination are denied for the groups, the state does not possess a government representing the whole people belonging to the territory without distinction to race, color and creed. However, does violations of basic right of representation give a right to secession? Firstly, one would aim to ensure, preserve and promote minority rights through national legislation, as proposed in the Final Act. When such initiatives are proven insufficient, and human rights violations increase to gross injustices, wherein peaceful settlement to the dispute is excluded, just then, can *external* self-determination be allowed for the groups to claim.²²³ *External* self-determination is yet conditioned on the absence of *internal* self-determination. Nevertheless, this interpretation is

²¹⁸ Hurst Hannum, “Rethinking Self-Determination. Self-Determination”, *Virginia Journal of International Law*, vol, 43, no. 1, (1993) p. 17.

²¹⁹ Hannum, *supra* note 218, pp. 46-47.

²²⁰ FR, A/AC.125/SR.113 (1970) p. 23, as cited in Cassese, *supra* note 7, p. 110.

²²¹ Hannum, *supra* note 218, p. 23.

²²² UN General Assembly resolution 47/135, *supra* note 141, para. 1.

²²³ Cassese, *supra* note 7, p. 119.

arguably rationalized by the reasoning of Buchanan, wherein secession is restricted to the same circumstances, in which it performs as a response to tyranny and can be the only relief.

Nevertheless, states that allow access to government institutions without discrimination are in compliance and thus respect the right to self-determination and can therefore not have their territorial integrity impaired. This interpretation was reflected by the SCC, which assured that Canada was not subjected to the *clause* since it was: “conducting itself in compliance with the principle of equal rights and self-determination of peoples” and further, “possessed of a government representing the whole people belonging to the territory without distinction”.²²⁴ However, in situations of continuous gross injustices, “the validity of a state’s claim to territory cannot be sustained if the only remedy that can assure the fundamental rights of the group will be respected is secession”.²²⁵

Throughout the drafting and adoption of international instruments, territorial integrity has been a central element from which self-determination has developed from, supported by the Quebec case, which stated: “the international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states.” The inclusion of self-determination also “contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity”.²²⁶ The two principles have therefore been interlinked, wherein one is superior to the other. As evident in the Åland Islands case “to concede minorities [...] the right of withdrawing from the community to which they belong [...] would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity”.²²⁷

The theoretical approach does not dismiss the importance of territorial integrity, instead it is suggested that the theory is consistent with “what is generally regarded as the single most fundamental principle of international law; the principle of territorial integrity of existing states”²²⁸ and if integrated in international law, it will be less of a threat, as it upholds the principle, rather than violating it. The theory and the *saving clause* are restrictive in allowing a right to *external* self-determination that amounts to secession. In this rationale, whenever a just state is performing while respecting *internal* self-determination, the remedial secession premise will provide protection and support to states claiming their territorial integrity, and therefore not allow secession. Instead, internal arrangements can be provided for, in terms of autonomy

²²⁴ Reference re Secession of Quebec, *supra* note 4, para. 137.

²²⁵ Allen Buchanan, *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession*, in: Hurst Hannum & Eileen Babbitt, *Negotiation Self-Determination* (ed.) 2005, p. 85.

²²⁶ Reference re Secession of Quebec, *supra* note 4, para. 127.

²²⁷ Commission of Rapporteurs, *supra* note 135, p. 318.

²²⁸ Buchanan, *supra* note 197, p. 45.

and self-governance, which are compatible with upholding the territorial integrity of the concerned state, and as a result dismemberment is avoided.²²⁹

In conclusion, the *saving clause* has been utilized to support the theory of remedial secession, but without substantial reflection in customary law. However, it must be established that state practice based on the cases and international instruments, have recognized that the deprivation of *internal* self-determination, together with human rights violations, can amount to an exceptional case, in which a right to secession may arise. In line with this recognition, the same sources, have expressed consistent concern for the territorial integrity of states, hence opposed any direct and legal authorization of secession. Thus, secession could be materialized, but has never been legally granted which excludes the practice of such recognition.

3.5 The scope of external self-determination

The development and identification of the right to *external* self-determination has established its scope based on international instruments, soft law, cases and the remedial secession theory, which the thesis will use to clarify whether Kosovo's claim of secession in the form of unilateral declaration of independence, can be considered legally justified.

The right to self-determination as a principle of international law, developed through UNGA instruments, and has under political imperatives of decolonization²³⁰ advanced into a right of self-determination,²³¹ belonging to all people.²³² Further emphasized to people under 'alien subjugation, domination and exploitation' who has been subjected to discrimination based on race and ethnicity, and denied access to democratic representation.²³³ The development supports the assumption that the UN Charter is intended to be universally applicable, and that it was never considered to be an exclusive right for colonial people only,²³⁴ but extends to all states 'to promote the realization of the right self-determination'.²³⁵

The effective realization of the right proved vital in soft law instruments such as the VDPA, which reiterated the previous documents and affirmed peoples right to self-determination, and any denial of the right is a violation of human rights.²³⁶ The continuous effort of the development has predominantly been aimed to create internal arrangements within the framework of the state without jeopardizing the territorial integrity and political

²²⁹ Buchanan, *supra* note 197, pp. 52-53.

²³⁰ Hannum, *supra* note 219, p. 12.

²³¹ UN General Assembly resolution 1514(XV), *supra* note 61, principle 2.

²³² UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 1.

²³³ UN General Assembly resolution 2625(XXI), *supra* note 71, principle (e).

²³⁴ Tomuschat, *supra* note 10, p. 2.

²³⁵ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 3

²³⁶ UN General Assembly, VDPA, *supra* note 87, para. 2.3.

independence of the state. The Final Act and the Copenhagen Document extended its availability while accounting for minority rights, however conditioned by state efforts and legislation. While the scope of *external* self-determination has been interpreted to be exercised in line with specific provisions, it is concluded that no international instruments, whether it be legally or politically binding, authorizes a right to *external* self-determination in the form of secession.

Any argument of contemporary evidence in favor of the right to *external* self-determination is found in the interpretation of international instruments by state practice. The Åland Islands indicated that exceptional situations could lead to the Islands' reintegration with Sweden,²³⁷ if the Finnish government proved unable to guarantee the preservation of the inhabitant's identity.²³⁸ This interpretation was repeated in the case of Quebec, the Court stressed that secession in international law remains neutral, however that it may be allowed in as much people are threatened and not represented in the government.²³⁹ All of which suggested that the internal dimension of self-determination was prioritized, thus to avoid any disruption of established states within the international community,²⁴⁰ before endorsing any right to an external aspect amounting to secession. This is further supported by the SCC's reiteration of a government that is in compliance with equal right and self-determination, which cannot claim a right to secession.

Furthermore, the premise of the remedial secession theory suggests that an ethnic group, subjected to gross human rights violation in a persistent manner by the state to which it belongs, can claim a right to *external* self-determination by the means of secession as a *ubi jus ibi remedium*.²⁴¹ Although no authorization of secession is found in the international instruments, the theory still finds support from the instruments. Most importantly from the *saving clause* of unrepresentative governments, the Copenhagen Document wherein the law shall guarantee all persons equal and protection without discrimination,²⁴² and further from the VDPA to support all peoples right to determine their political status freely.²⁴³ Secession is considered a last resort, when a people are prevented from exercising their right to *internal* self-determination due to lack of guarantees and protection in domestic legislation. This approach was also evident from the case of Quebec, as the Court acknowledged a right to

²³⁷ Commission of Rapporteurs, *supra* note 135, p. 327.

²³⁸ Cassese, *supra* note 7, p. 33.

²³⁹ *Reference re Secession of Quebec*, *supra* note 4, para. 138.

²⁴⁰ Koskenniemi, *supra* note 9, pp. 246-247

²⁴¹ Buchanan, *supra* note 197, p. 37, 46.

²⁴² CSCE: *Copenhagen Document*, *supra* note 117, Part IV, paras. 5(9), 6-7, 7(5).

²⁴³ UN General Assembly, *VDPA*, *supra* note 87, para. 2.

secede, as a last resort, if the people of Quebec were threatened and had been subjected to human rights violation in line with denied access to government. However, as the case of Quebec proved insufficient to meet such threshold, no right of secession was granted. Thus, it has been proven that in so far law guarantees internal arrangements, the territorial integrity of the concerned *just* state cannot be impaired with.²⁴⁴ Furthermore the legal conception of *ubi uis ibi remedium*, have earlier been endorsed in UNGA resolutions, in situations of foreign occupation, domination and exploitation,²⁴⁵ to reach self-governance in the form of a sovereign independent state, free association within an independent state or integration with an independent state.²⁴⁶ However, without integration in the international legal paradigm, secession is yet perceived as unauthorized by contemporary law of self-determination.²⁴⁷ Even though, the international instruments have arguably been drafted and adopted in a colonial context, its contribution to the scope of *external* self-determination provide conditions such as oppression and neglected rights, which are scrutinized in a modern interpretation of self-determination. Therefore, when the scope is applied to the case of Kosovo and its claim to independence in the next chapter, the right will be interpreted in a contemporary situation, as “[...] a juridical fact must be appreciated in the light of the law contemporaneous with it, and not of the law in force at the time when a dispute in regard to it arises or fall to be settled”.²⁴⁸

4. The case of Kosovo

This chapter examines firstly whether the intervention by the UN intended to recognize and grant Kosovo a right to either *internal* or *external* self-determination. Secondly, whether its unilateral declaration of independence (UDI), as an expression to exercise its right to *external* self-determination, can be legally justified under the Serbian Constitution, the international legal framework provided by the interim administration under UNMIK, and lastly in accordance with principles from international law, with regards to the ICJ’s advisory opinion. Thirdly, the case is further supplemented with the theoretical approach of remedial secession, to evaluate whether Kosovo qualifies as a case of an exceptional situation wherein secession performs as a remedy of a last resort.

²⁴⁴ Buchanan, *supra* note 197, pp. 52-53.

²⁴⁵ UN General Assembly resolution 1514(XV), *supra* note 61, paras. 1-2.

²⁴⁶ UN General Assembly resolution 1541(XV), *supra* note 64, Principle VI.

²⁴⁷ Hannum, *supra* note 219, p. 67.

²⁴⁸ *The Island of Palmas Case* (Netherlands v. the United States of America) Permanent Court of Arbitration (PCA), 4 April 1928, part III, p. 845.

4.1. Resolution 1244

Within a time period of two years, the UNSC issued four resolutions to relief the situation in Kosovo by exhausting diplomatic and economic means.²⁴⁹ However without compliance to these resolutions, the UNSC adopted res. 1244, which since 1999 has formed the legal structure in Kosovo.²⁵⁰ The mandate provisions were adopted under the UN Chapter VII²⁵¹ to establish an international security presence to ensure the withdrawal of the FRY forces, enforce a ceasefire where necessary and destabilize the KLA, under the unified command of NATO (KFOR).²⁵² Simultaneously, an international civilian presence was established, the United Nations Interim Administration Mission in Kosovo (UNMIK), to provide “an interim administration for Kosovo under which the people can enjoy substantial autonomy within the Federal Republic of Yugoslavia”.²⁵³ These international presences would be operational, while pending a final agreement and facilitating a political process to determine Kosovo’s future status.²⁵⁴ The resolution’s focus on autonomy by provincial institutions, as earlier enjoyed under the 1974 SFRY Constitution, opened a wide spectrum on the discussion of Kosovo’s future. It is therefore important to establish whether UNSCR 1244 and UNMIK had an intention, beyond that of humanitarian relief, to recognize a right to self-determination for the people of Kosovo.

If argued that res. 1244 is a formal recognition of a group to enjoy a right to self-determination within a sovereign state, and under special circumstances, it is noteworthy to unfold such interpretation. Assuming that the UNSC granted the ethnic group autonomy, with the consent of the FRY,²⁵⁵ the Council could not have invented it, without substantial support from existing international sources.²⁵⁶ The resolution’s reference to the Final Act is arguable made in regards to the principle of self-determination.²⁵⁷ This, as earlier determined in chapter three, asserts that ‘people’ always have the right to determine their internal and external status, when exercised by the whole people. This corresponds to res. 1244, as Kosovo, under the

²⁴⁹ See: United Nations Security Council resolution 1160, *supra* note 51.; United Nations Security Council resolution 1199, *supra* note 52.; United Nations Security Council resolution 1203, *Kosovo*, S/RES/1203, (24 October 1998) and; United Nations Security Council resolution 1239, *Kosovo*, S/RES/1239 (14 May 1999).

²⁵⁰ Marcelo G. Kohen and Katherine Del Mar. “The Kosovo Advisory Opinion and UNSCR 1244(1999): A Declaration of ‘Independence from International Law’?” *Leiden Journal of International Law*, vol. 24, (2011) p. 115.

²⁵¹ United Nations Security Council resolution 1244, *on the deployment of international civil and security presences in Kosovo*, S/RES/1244 (10 June 1999) annex 2, para. 3.

²⁵² UN Security Council resolution 1244, *supra* note 251, para. 9(a)-(b).

²⁵³ UN Security Council resolution 1244, *supra* note 251, para. 10.

²⁵⁴ UN Security Council resolution 1244, *supra* note 251, para. 11(e).

²⁵⁵ UN Security Council resolution 1244, *supra* note 251, annex 2.

²⁵⁶ Dietrich Murswiek, *The Issue of a Right to Secession – Reconsidered*, in: Christian Tomuschat, *Modern Law of Self-determination*, 1993, p. 34.

²⁵⁷ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle VIII.

sovereignty of FRY, is expected to cultivate a political settlement with FRY, indicating the participation of the whole people. Also, the mandate of UNMIK only has authorization to facilitate the settlement, thus without interfering as an external party.

On the other hand, due to the ambiguity concerning the political process, which is expected to determine Kosovo's future, it is rather questionable whether res. 1244 also implied a right to *external* self-determination. This is supported by para. 11(e), which reads: "in a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".²⁵⁸ The transfer process of these provincial institutions have not been clarified nor restricted to that of the state's sovereignty and territorial integrity. Secondly, the wording of Kosovo's future is without reference to its status as a province under the FRY. Furthermore, the political settlement is not formulated as an agreement, to which both parties to the territorial dispute must agree, but nevertheless obliged to follow the UN Charter, which requires any settlements to be "in conformity with the principles of justice and international law".²⁵⁹ As well as this, an interpretation deriving from the preamble language may discredit any right to *external* self-determination and secession, which reads: "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia." Indeed, UNMIK was established so that "Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia".²⁶⁰ As a general rule of interpretation of a treaty, the preamble must be interpreted together with the articles of a treaty.²⁶¹ Thus, it is arguable that the resolution's object and purpose were directed to have the security and civilian initiatives carried out within the administrative boundaries of the FRY. This highlights how the legal right of self-determination continuously develops in ways, which respect the principle of territorial integrity.²⁶² It is imaginable that the members of the UNSC desired this arrangement, as to have the issue of Kosovo solved within the territorial integrity of the FRY, which was formally addressed by China, as it preferred to have a "peaceful settlement of the question of Kosovo on the basis of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and guarantees [...] interest of all ethnic groups in the Kosovo region".²⁶³ Additionally, the established autonomy, transfer of provincial institutions and the political process of a pending settlement are all conditioned by annex 1 and

²⁵⁸ UN Security Council resolution 1244, *supra* note 251, para. 11(f).

²⁵⁹ Charter of the UN, *supra* note 2, art. 1.

²⁶⁰ UN Security Council resolution 1244, *supra* note 251, para. 10.

²⁶¹ Vienna Convention on the Law of Treaties (VCLT), *supra* note 207, Art. 31.

²⁶² *Reference re Secession of Quebec*, *supra* note 4, para. 127.

²⁶³ China, UN Doc S/PV.4011 9, see also: Argentina, UN Doc S/PV.4011 9; Russia, UN Doc S/PV.4011 7, cited in: Summers, *supra* note 41, p. 241.

2, which state “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 principle of sovereignty and territorial integrity of the FRY”.²⁶⁴ Secondly, considering the domestic jurisdiction, the FRY Constitution, in contrast to the 1974 SFRY Constitution, includes no right to self-determination or secession, arguably to prevent further dissolution as witnessed in 1992.

In conclusion, the argument for a right to self-determination from res. 1244 is limited to the internal aspect. It was therefore intended to allow the Kosovo Albanians to exercise their right to *internal* self-determination. At the time of the resolution Kosovo was not an autonomous self-governing entity, as its autonomous rights were denied after the amendments to the FRY Constitution. Based on the constitutional framework, prior to res. 1244, which was in contravention to res. 2625 as it deprived people from their right to self-determination, and violated a human right,²⁶⁵ it became evident that the international efforts were directed towards implementing basic rights of *internal* self-determination, rather than endorsing a right to *external* self-determination, due to the territorial integrity of the FRY. However, when territorial integrity is examined in line with the phrase of ‘pending a final settlement’ and with the establishment of an interim political framework, it can be comprehended to be of a temporary character, which highlights the ambiguity of the resolution.

4.2 Unilateral Declaration of Independence 2008

The following years after res. 1244 are worth mentioning, as the two actors involved interpreted the political situation differently. Serbia came to terms with regarding Kosovo Albanians as a minority group entitled to their minority and human rights, whereas the Kosovo Albanians perceived themselves as a ‘people’ with a right to self-determination.²⁶⁶ In addition, a number of initiatives fell short, first UNMIK and Kosovo Security Force (KFOR) were decided to be “established for an initial period of 12 months”,²⁶⁷ but continued as violence still occurred.²⁶⁸ Secondly, the transfer of authority to provisional institutions by benchmarks of ‘standards before status’ was an obstacle to *external* self-determination, together with the slow process of UNMIK with absence of police and judicial processes. Thirdly, in 2005, Martti

²⁶⁴ *ibid.*

²⁶⁵ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 1.

²⁶⁶ Kaiyan H. Kaikobad, *Another Frozen Conflict: Kosovo’s Unilateral Declaration of Independence and International Law*, in: James Summers, *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-determination and Minority Rights*, 2011, p. 66.

²⁶⁷ UN Security Council resolution 1244, *supra* note 251, para. 19.

²⁶⁸ Human Rights Watch, *Failure to Protect, Anti-Minority Violence in Kosovo*. (March 2004) (available at: <https://www.hrw.org/report/2004/07/25/failure-protect/anti-minority-violence-kosovo-march-2004>)

Ahtisaari was appointed as a Special Envoy by the UNSC to facilitate the negotiations of the final status,²⁶⁹ a process that was led by a Contact Group who issued Ten Guiding Principles. The principles stated that Kosovo could not return to its pre-March 1999 status,²⁷⁰ in which there could be no partition, or unification with a neighboring country. However, there was division within the Contract Group itself, with Russia opposing measures that could breach the sovereignty of their long-term ally, Serbia.²⁷¹ In 2007, Ahtisaari produced a proposal with recommendations for Kosovo, by proposing an independency, which would be subjected to international supervision.²⁷² The proposal was met with rejection from Serbia, while the Kosovo Albanian leadership endorsed the recommendations.²⁷³ Conclusively, international efforts proved insufficient, and the democratically elected representatives of Kosovo responded with a unilateral declaration of independence on 17 February 2008.²⁷⁴ This was arguably a manifestation of the people's will and wish for independence and statehood.²⁷⁵ Also, taking into consideration that Serbia was no longer the central administration, which Kosovo had to adhere to, there was a better prospect to be subjected to international law than previously by the declaration of independence in 1991.

4.2.1 Serbian constitutional law

The classification of Kosovo from the SRY never advanced beyond that of a nationality.²⁷⁶ This was evident by the events of 2002, where the FRY was reconstituted by the Constitution of the State Union of Serbia and Montenegro, wherein Kosovo regained its status of an autonomous province “under international administration in accordance with the UNSC resolution 1244”.²⁷⁷ This implied the acceptance of UNMIK, based on the fact that Kosovo still belonged to the sovereignty and territorial integrity of the Union. The same Constitution provided that only member states could “initiate the procedure for the alternation of state status, that is for leaving the State Union”²⁷⁸ through referendums, which clearly excluded Kosovo. Montenegro utilized this right and became an independent state in 2006, with

²⁶⁹ Summers, *supra* note 41, p. 242.

²⁷⁰ Contact Group. *Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo* (November 2005) (available at: http://www.esiweb.org/pdf/kosovo_Contract%20Group%20-%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf) principle 6.

²⁷¹ Summers, *supra* note 41, p. 242.

²⁷² Comprehensive Proposal For the Kosovo Status Settlement, Ahtisaari, 2 February 2007, art. 1.10.

²⁷³ Christopher J. Borgen, “Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition,” *American Society of International Law (ASIL)*, vol. 12, no. 1 (2008).

²⁷⁴ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, para. 12.

²⁷⁵ Anne Peters, “Does Kosovo Lie in the Lotus-Land of Freedom,” *Leiden Journal of International Law*, vol. 24 (2011) p. 107.

²⁷⁶ Rich, *supra* note 30, p. 38.

²⁷⁷ *Constitutional Charter of the State Union of Serbia and Montenegro*, 4 February 2003, preamble.

²⁷⁸ *Constitutional Charter of the State Union of Serbia and Montenegro*, *supra* note 278, art. 60.

recognition from the international community.²⁷⁹ Serbia as the successor, with its renewed constitution, defined Kosovo as a province with the status of having “a substantial autonomy within the sovereign state of Serbia”.²⁸⁰ This reaffirmed the wording from res. 1244,²⁸¹ with the only difference of enjoying substantial autonomy from within the FRY to Serbia. According to art. 182, citizens of autonomous provinces can exercise their right to the provincial autonomy, which is conditioned by the Constitution. However, the spheres of jurisdiction within this autonomy are not elaborated. Instead, the local government entities of local municipalities are provided with an extensive list of competences concerning education, culture, healthcare and social welfare.

In terms of its territorial integrity, it states that any alternation with the borders of Serbia have to be proposed as an amendment to the Constitution.²⁸² This was also stated in the case of Quebec, as to have the will and sovereignty of the majority of the country represented by a process entailing negotiations and referendums. On the one hand, it is arguable that the Serbian constitutional law follows the lines from the Final Act, in which the whole people must agree upon a new political status.²⁸³ It therefore implies similar procedure to that of Quebec, by proposing in its art. 182: “territory of autonomous provinces may not be altered without the consent of its citizens given in a referendum”.²⁸⁴ An interpretation would assume that Kosovo Albanians could hold a referendum to amend the Constitution, and subsequently change the frontiers of Kosovo. However, on the other hand, the Constitution holds that “the subject of the referendum may not include duties deriving from international contracts, laws pertaining to human and minority rights”²⁸⁵ thus, firstly indicating that the constitutional law and its sovereignty prevail over laws concerning human and minority rights. Secondly, it excludes the opportunity of an autonomous province, herein Kosovo, to initiate negotiations for any amendments. It can therefore be interpreted that others may set a referendum in motion, wherein the only condition is that it cannot be “altered without the consent of its citizens.”²⁸⁶ Therefore, if a referendum should be held concerning Kosovo frontiers, the latter would be able to vote against any unfavorable alternation, but not to initiate referendums.

²⁷⁹ Daniel Högger, *The Recognition of States, A Study on the Historical Development in Doctrine and Practice with a Special Focus on the Requirements*, 2014, p. 68.

²⁸⁰ *Constitution of the Republic of Serbia*, 30 September 2006, preamble.

²⁸¹ UN Security Council resolution 1244, *supra* note 251, annex 2, para. 10.

²⁸² *Constitution of the Republic of Serbia*, *supra* note 280, art. 8.

²⁸³ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle VIII.

²⁸⁴ *Constitution of the Republic of Serbia*, *supra* note 280, art. 182.

²⁸⁵ *Constitution of the Republic of Serbia*, *supra* note 280, art. 108.

²⁸⁶ *Constitution of the Republic of Serbia*, *supra* note 280, art. 182.

Considering that the Serbian Constitution ruled out any referendums subjected to minority and human rights, the case deviates from the Quebec case, wherein the only possibility of unilateral secession was that of a constitutional amendment. It is therefore arguable that the restriction on the autonomous province, despite requiring the consent of all its citizens was decided on, as it would relate to self-determination, and herein a human right, which is secondary to the national law. This gives reason to assume that an UDI was prohibited, which then invalidates several provisions. Firstly, the right to self-determination as a treaty right deriving from common article 1 to freely determine one's political status.²⁸⁷ Secondly, the principle of all peoples, which always have the right, in full freedom, to determine their internal and external political status, without external interference.²⁸⁸ As interpreted in chapter three, the latter provision asserts that the administering state, or a third-state assistance to the state, cannot prevent the exercise of peoples right to determine their political status, as it would be misconduct²⁸⁹ and a human rights violation.²⁹⁰ Thirdly, the limited guarantees for the people of Kosovo and the excluded right of self-determination, contradicts with Serbia's obligation to promote the realization of the right to self-determination on behalf of the people.²⁹¹ When compared with the case of Quebec, it is unambiguous that Canada represented the will of all people living within its territory, in which self-determination, provincial autonomy and perseverance of identity were guaranteed. The same provisions concluded that the people of Quebec were ineligible for independence.²⁹²

The Serbian Constitution included considerably simplified provisions on minority rights, such as "the constitution shall guarantee [...] directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and law".²⁹³ This recalls the state's responsibility described in the VPDA and the Copenhagen Document, to guarantee adequate measures for national minorities human rights.²⁹⁴ It has furthermore been stated that state responsibility must exceed to the protection of national, ethnic, cultural and linguistic identity of minorities within their respective territories.²⁹⁵ However, as concluded in chapter three, national law must include such measures in its

²⁸⁷ Walter, *supra* note 3, p. 2.

²⁸⁸ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle VIII.

²⁸⁹ Charter of the UN, *supra* note 2, art. 2(2).

²⁹⁰ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 1.

²⁹¹ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 2-3. See also: CSCE: *Copenhagen Document*, *supra* note 117, para. 32.

²⁹² *Reference re Secession of Quebec*, *supra* note 4, para. 59.

²⁹³ *Constitution of the Republic of Serbia*, *supra* note 280, art. 18.

²⁹⁴ CSCE: *Copenhagen Document*, *supra* note 117, para. 3.2 see also; UN General Assembly, *VPDA*, *supra* note 87, para. 1.

²⁹⁵ United Nations General Assembly resolution 47/135, *supra* note 141, art. 1.

regulations. This is rather unclear in the Constitution, since there is no inclusion of the Albanian language, the only guarantee is the prohibition of discrimination based on race, national origin, culture and language.²⁹⁶ One provision even set forth a right “to free development of his personality”²⁹⁷ however, the mere preservation of identity, language, culture and heritage is lacking. According to the Constitution law art. 18, human and minority rights guaranteed by generally accepted rules of international law should be guaranteed in the Constitution, is firstly conflicting with the absence of such provisions. Secondly, based on general international law, self-determination, as a treaty right, should also have been included. However, this demonstrates the different interpretation of the guarantee of minority rights agreed upon in non-legal documents,²⁹⁸ which conceive less likelihood of the provisions to be practiced. In conclusion, the Serbian Constitution includes no right to self-determination, nor correlates its other provisions to the development of self-determination as evidenced from the Quebec case. Thus, Kosovo did not have the right to a unilateral declaration of independence, as an expression for secession, under domestic law.

4.2.2 Interim administration

The international legal framework of Kosovo was, and still is, under the auspices of UNMIK. It was determined early that laws applicable to the province prior to its presence in 1991 would continue to apply. This indicated that the three constitutions (from the FRY, State Union and Serbia) were valid on the condition that they did not conflict with the mandate of UNMIK, in terms of international recognized human rights standards and non-discrimination.²⁹⁹ In 2001, it was decided that “the exercise of the responsibilities of the Provisional Institutions of Self-Government [...] shall not affect or diminish the authority of the Special Representative of the Secretary-General to ensure full implementation of UNSCR 1244”.³⁰⁰ Therefore, although the Serbian Constitution opposes any unilateral declaration of independence and secession, res. 1244 is arguably of a *lex specialis* character,³⁰¹ which overrides the constitutional law as *lex generalis*,³⁰² when related to subjects of human rights.

²⁹⁶ *Constitution of the Republic of Serbia*, *supra* note 280, art. 21.

²⁹⁷ *Constitution of the Republic of Serbia*, *supra* note 280, art. 23.

²⁹⁸ Barten, *supra* note 12, p. 120.

²⁹⁹ UNMIK Regulation 1999/1, *On the Authority of the Interim Administration in Kosovo*, UNMIK/REG/1999/1, (25 July 1999) section 3.

³⁰⁰ UNMIK Regulation 1999/1, *supra* note 299, preamble.

³⁰¹ Theodore Christakis, “The ICJ Opinion on Kosovo: Has International Law Something to Say about Secession?” *Leiden Journal of International Law*, vol. 24 (2011) p. 81.

³⁰² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, International Court of Justice (ICJ), report, 22 July 2010, para. 99. [herein after: *Accordance with International Law of Declaration of Independence of Kosovo*]

However, this per definition does not allow for a unilateral action from the people of Kosovo, as addressed by the President of the UNSC to the UN Secretary-General (UNSG), “the final decision on the status of Kosovo should be endorsed by the Security Council”.³⁰³ The Special Representative further supported this: “Kosovo is under the authority of the UNSCR 1244. Neither Belgrade nor Pristina can prejudge the future status of Kosovo [...] any unilateral statement in whatever form which is not endorsed by the Security Council has no legal effect on the future status of Kosovo”.³⁰⁴ Since the UDI received no authorization from the UNSC, it must be established that the independence of Kosovo was without legal effect, until otherwise decided by the UNSC³⁰⁵. This raised strong opposition to the UDI, as it both was noncompliant with the UNSC and the *lex specialis* of res. 1244, which was the only applicable law to answer the question forwarded to the UNGA³⁰⁶. The ICJ, in its advisory opinion (AO), did not accept such reasoning, since “nor can such a prohibition be derived from the language of the resolution in its context considering its objects and purpose.”³⁰⁷ Also, the objective of the res. was to establish an interim administration with substantial autonomy for the people of Kosovo, “without making any definitive determination on final status issues”.³⁰⁸ This highlighted the ambiguity of the resolution, which made the UDI, as a status matter, less subjected to the international framework conditioned by res. 1244. On the other hand, the UNSC or a body authorized by the UNSC, are the only bodies that can give an authentic interpretation of a res., in its true sense,³⁰⁹ and without a UNSC regulation on the subject of UDI,³¹⁰ indicates that it was beyond the competences of the ICJ to determine the object and purpose of the resolution. Nonetheless, the ICJ further interpreted that the resolution neither prohibits nor prevents Kosovo’s secession, and it therefore remained silent on the final status of Kosovo.³¹¹ On this basis, it was concluded that the “declaration of independence did not violate the Security Council resolution 1244”.³¹²

³⁰³ United Nations Security Council S/2005/709, *Letter Dated 10 November 2005 from the President of the Security Council to the Secretary-General*, S/2005/709 (10 November 2005), annex, page 1.

³⁰⁴ Statement by the Special Representative of the United Nations Secretary-General, 7 November 2002

³⁰⁵ Dissenting Opinion by Judge Mohamed Bennouna, 22 July 2010, p. 10, para. 53.

³⁰⁶ Dissenting Opinion by Judge Leonid Skotnikov, 22 July 2010, p. 6, para. 18.

³⁰⁷ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 118.

³⁰⁸ *ibid.*

³⁰⁹ Michael C. Wood, “The interpretation of Security Council Resolution,” *Max Planck Yearbook of UN Laws*, vol. 2 (1998) p. 82.

³¹⁰ Dissenting Opinion, Judge Skotnikov, *supra* note 305, p. 2, para. 8.

³¹¹ Borgen, *supra* note 273.

³¹² *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 119.

4.2.3 UDI under international law

The circumstances from the Serbian Constitution and the interim administration did not prevent members of the international community from recognizing Kosovo, as the U.S, U.K, France and other EU states recognized Kosovo only a few days after its UDI.³¹³ In response, Serbia requested UNGA to assess the legality of the UDI under international law. Subsequently, as a legal question, it was adopted on 8 October 2008 as res. 63/3, and forwarded to the ICJ to deliver an advisory opinion. The following question was to be answered: “is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law”.³¹⁴ When assumed, based on common art. 1, that self-determination is the right to freely determine one’s political status, Serbia’s diplomatic offence to prevent further recognition, firstly implied a disapproval of the independence based on its constitutional law.³¹⁵ Secondly, it suggested that the Kosovo Albanians did not have a right to self-determination under international law. Nonetheless, on 22 July 2010, the ICJ adopted their opinion in answering whether the UDI was in accordance with international law.

The ICJ’s focus on general international law highlights two main points. It firstly relied on state practice, from the eighteenth to the early twentieth century, wherein, “international law contained no prohibition of declarations of independence”.³¹⁶ Secondly, the ICJ acknowledged the development of self-determination to “create a right to independence”,³¹⁷ within the context of subjugation, domination and exploitation.³¹⁸ And further determined that the establishment of new states outside such context has not initiated a new rule prohibiting a declaration of independence (DoI).

The participating states during the proceedings, presented other principles of international law to ensure that the UDI was in compliance with the territorial integrity of Serbia. Spain, which has the autonomous region of Catalonia, recently initiated their own secessionist movement, as well as the Basque region with similar historical movements, summed its interpretation of the principle in para. 25: “there can no doubt that respect for the

³¹³ Kosovo Thanks You (available at: <https://www.kosovothanksyou.com>) (Accessed 12 December 2017)

³¹⁴ United Nations General Assembly resolution 63/3, *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* A/RES/63/3 (8 October 2008).

³¹⁵ Helen Quane, “A Right to Self-Determination for the Kosovo Albanians? *Leiden Journal of International Law*”, vol. 13, (2000) p. 226

³¹⁶ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 79.

³¹⁷ *ibid.*

³¹⁸ UN General Assembly resolution 1514(XV), *supra* note 61, paras. 1-2. See also: UN General Assembly resolution 2625(XXI), *supra* note 71, Principle (e).

sovereignty and territorial integrity of States is inscribed in the essential, non-derogable core of the basic principles of international law”.³¹⁹ Also Russia, as an important ally of Serbia, emphasized similar wording, with basis in the UN Charter and the Final Act, to which the “principle of territorial integrity [...] has today acquired the character of a universal and peremptory norm”.³²⁰ It was further acknowledged that the objective of the UDI was to establish a new state by separating itself from Serbia, which is “contrary to the requirement of preserving the territorial integrity of Serbia”.³²¹ However, the ICJ’s interpretation of the applicability of territorial integrity deviated from the written statements, as it concluded, “the scope of the principle of territorial integrity is confined to the sphere of relations between states”.³²² The reasoning was nonetheless based on the same international instruments, as Spain and Russia referred to, herein the UN Charter, res. 2625 and the Final Act. As the latter document articulates that, “participating states will respect the territorial integrity of each of the participating States”³²³ it is arguable that the ICJ comprehended the UN and CSCE as organizations formed by states. On this basis, it found no applicability to the case of a UDI made by representatives of the Kosovo people. On the contrary, the written statements made reference to extended applicability of territorial integrity to non-state actors as found that: “nothing [...] shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”³²⁴ Despite such efforts, the ICJ still concluded that territorial integrity did not apply to non-state actors.

The ICJ’s argument on the circumstances of an illegal UDI in international law was based on the cases of Northern Cyprus and Turkey, Republica Srpska and the FRY with issued UNSC resolutions.³²⁵ Also, to support their reasoning in the following “the illegality attached to the declaration of independence thus stemmed not from the unilateral character of these declaration as such, but from the fact that they were [...] connected with the unlawful use of

³¹⁹ Written Statement of the Kingdom of Spain, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 14 April 2009, para. 25.

³²⁰ Written Statement by the Russian Federation, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 16 April 2009, para. 78.

³²¹ Written Statement by the Russian Federation, *supra* note 320, para. 76.

³²² *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 80.

³²³ CSCE: Helsinki Final Act, 1975, principle IV.

³²⁴ *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, art. 8(3).

³²⁵ United Nations Security Council resolution 541, *Cyprus*, S/RES/541 (18 November 1983), art. 2. See also: United Nations Security Council resolution 787, *Bosnia and Herzegovina*, S/RES/787 (16 November 1992).

force”.³²⁶ This is further supported by that self-determination should be exercised with legitimate action in accordance with the UN Charter.³²⁷ However, as the ICJ further noted, the UNSC had not taken such position on the matter of Kosovo. Thus, DoI cannot be condemned, as they are primarily domestic affairs, unless it involves a separate violation of international law, such as the prohibition on the use of force.³²⁸ The prohibition on the use of force is an interstate principle, as it is enshrined in the UN Charter art. 2(4). Its applicability to non-state actors is arguably explained by the possibility of a customary law principle.³²⁹ On the one hand, if followed by such reasoning, the emphasis on territorial integrity being non-derogable, as stated by the written statements, should have been equally included, since both perform as general principles of international law.³³⁰ Instead, it suggests that the ICJ relied on the practice from the UNSC to condemn any DoI’s that involves the use of force.

On the other hand, the representatives of Kosovo were consistent with the prohibition on the use of force. Attempting independence on the part of Kosovo Albanians did not include any use of military force, and the authority of UNMIK through res. 1244 was continuously respected, irrespective of the UDI. It is arguable that if the ICJ had utilized the principle of territorial integrity, then justifications for breaching the principle might not have been avoided, which made it all more essential to restrict the applicability to state actors only.³³¹

In the AO’s general conclusions, the ICJ found that “the adoption of the declaration of independence of 17 February 2008 did not violate general international law” and as a reassurance of its conclusion, it was further stated, “the declaration did not violate any applicable rule of international law”.³³² Certain dissenting opinions differed from the AO’s conclusions. One position argued that an unregulated subject, such as the UDI, does not equal a right, instead the lack of regulation means there are no rules to prohibit such action. Therefore, the conclusion of ‘not illegal’ does not necessarily mean that it is legal.³³³ Another position stipulated that unregulated or non-prohibited matters under international law must be permitted.³³⁴ In this view, with no prohibition from a treaty law or an established custom, the

³²⁶ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 81.

³²⁷ UN General Assembly, *VDPA*, *supra* note 87, art. 2.2. See also: CSCE: *Final Act of Helsinki*, *supra* note 98, Principle IV.

³²⁸ Borgen, *supra* note 273.

³²⁹ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 81.

³³⁰ Walter, *supra* note 331, p. 21.

³³¹ Walter, *supra* note 331, p. 22.

³³² *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 122.

³³³ Declaration of Judge Bruno Simma, 22 July 2010, p. 3, para. 9.

³³⁴ Dissenting Opinion by M. Loder, 07 October 1927, no. 9, p. 34.

UDI must be exercised in full freedom.³³⁵ This has been criticized to be an outdated view of law,³³⁶ as it reflects the Lotus principle³³⁷ that no conventional or customary law imposed on “the subject (state) is under international law legally free to behave as it pleases”.³³⁸ The third position invalidates the two opposing arguments, on the basis of the neutrality-principle, that DoI’s are neutral in international law, and therefore primarily falls within domestic jurisdiction. Considering that international law regulates the relations between states and not within,³³⁹ the question was incompatible to be assessed in conformity or in violation of international law.³⁴⁰ The ICJ, based on its dismissal of territorial integrity,³⁴¹ arguably used this same reasoning. Thus, it is arguable that principles of international law could have found its applicability more sufficiently,³⁴² if the question had been reformulated. This could have included whether third state’s recognition of Kosovo’s UDI³⁴³ would violate their obligations of interfering with the territorial and political independence of Serbia. On the other hand, the question could have been more straightforward were there a similar phrasing used to that of 1992 during the Badinter Commission,³⁴⁴ on whether the Kosovo Albanian population had the right to self-determination. However, as the Committee drew attention to the effects of dissolution rather than self-determination,³⁴⁵ demonstrates the difficulty in answering questions of such nature. On the other hand, it might have allowed the question to be more open for examination, as evidenced from the Quebec case. Instead, the ICJ avoided to address these substantive issues of the legality of Kosovo’s UDI, and its conclusions therefore operates on a political level rather than a judicial.³⁴⁶

As a remark, the ICJ’s rather minimalistic approach of the legality of the UDI is evidenced by three accounts. The first aspect is the dismissal of territorial integrity, which has otherwise proven to prevent secessionist movements. Secondly, that the illegality attached to UDI’s is the violation of the prohibition on the use of force. Thirdly, without assessing the legal consequences of the declaration is arguably to support the inevitable indirectly, thus

³³⁵ Dissenting Opinion by M. Nyholm, 07 October 1927, para. 215.

³³⁶ Declaration of Judge Simma, *supra* note 334, p. 1.

³³⁷ *The Case of SS Lotus* (France v. Turkey) Permanent Court of International Justice (PCA), PCIJ Series A. No 10, 7 September 1927, para 18-19.

³³⁸ Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, 2009, p. 215.

³³⁹ Hannum, *supra* note 176, p. 158.

³⁴⁰ Corten, *supra* note 175, p. 94.

³⁴¹ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 80.

³⁴² Christakis, *supra* note 301, p. 77.

³⁴³ Hannum, *supra* note 176, p. 158.

³⁴⁴ Conference on Yugoslavia Arbitration Commission, *supra* note 39, Opinion 2.

³⁴⁵ *ibid.*

³⁴⁶ Peters, *supra* note 275, p. 107. See also: Dissenting Opinion by Judge Mohamed Bennouna, *supra* note 305, para. 21.

independence and secession from Serbia. On this basis, it is arguable that secession per se was not concluded to be illegal.

Although, the ICJ is entitled to address additional issues,³⁴⁷ the question of self-determination was not assessed, since it only needed to “determine whether the declaration of independence violated either general international law or the *lex specialis*”.³⁴⁸ However, this is rather misleading when its first statement on self-determination was recognized to have created a right to independence. It is incomprehensible as to why there was no need for further examination. The ICJ took a different standpoint in the *Wall Opinion*, wherein the applicability of the right, in the context of decolonization and military occupation, was acknowledged.³⁴⁹ However, with ICJ’s own recognition and the identification established in chapter three, there should have been little incentive for the inclusion of self-determination in the AO. In the defense of the Court, it is arguable that if it had delivered a broader response, it might have been subjected to criticism for judicial activism.³⁵⁰

Nevertheless, the participating states during the proceedings went to great length to discuss self-determination, which by some was perceived as a mean to *external* self-determination and thus secession. Spain voiced its concern regarding the ICJ’s inability “to respond appropriately to the question put by the General Assembly”³⁵¹ if not taking into consideration that “the objective to be achieved through the Unilateral Declaration of Independence is the creation of a new State separate from Serbia”.³⁵² This suggests that if the UDI was to be determined in conformity with international law, it would be a breach of *uti possidetis juris*, as interpreted by the Badinter Commission.³⁵³ In contrast, the written statement by the Netherlands stipulated that the UDI would not infringe the *uti possidetis juris*, as “the international boundaries of Kosovo follow existing international boundaries and former internal borders”.³⁵⁴ By such virtue, the UDI respects the findings from the Badinter Commission.

³⁴⁷ Separate Opinion of Judge Bernardo Sepúlveda-Amor, 22 July 2010, p. 7, para. 34.

³⁴⁸ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 83.

³⁴⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice (ICJ) report, 9 July 2004, para. 118.

³⁵⁰ Peter, *supra* note 275, p. 98.

³⁵¹ Oral Statement by the Kingdom of Spain. Verbatim Record 2009/30, 8 December 2009, para. 17.

³⁵² *ibid.*

³⁵³ Gulara Gullyeva, *Kosovo’s Independence: Re-Examining the Principles Established by the EC Badinter Commission in Light of the ICJ’s Advisory Opinion*, in: James Summer, *Kosovo: A Precedent?: The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights*, 2011, p. 292.

³⁵⁴ Written Statement of the Kingdom of the Netherlands, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 17 April 2009, para. 3.8. See also: Written Statement of the Kingdom of Denmark, *Accordance with International Law of the*

In conclusion, Kosovo, under the authority of the UN, did not violate nor undermine such authority through the non-illegal UDI, as the prohibition on the use of force was respected. Thus, the objective of the UDI was examined to not ‘overthrow a regime violently’.³⁵⁵ On this basis, it can be established that international law primarily recognized Kosovo’s right to *internal* self-determination, without authorizing any legal right to *external* self-determination.

4.3 The right to self-determination

Although the ICJ did not address questions of self-determination and secession, the questions still remain crucial. This last section will first investigate whether Kosovo Albanians are capable of invoking a right to self-determination, and secondly study whether they can use their right to self-determination as a justification for secession through its UDI. The established scope of self-determination from chapter three, based on international instruments, soft law, case law and legal theory, is applied in line with ICJ’s Advisory Opinion and the Ahtisaari Proposal.

4.3.1. Qualification as a people

In order to invoke the right to self-determination, one must be considered a people subject of the right to self-determination. However, the conception of ‘a people’ outside a decolonization context has regrettably been ambiguously placed within international law. Furthermore it proves to be limited without providing any specific criteria to define it, beyond the expansion to ‘all peoples’.³⁵⁶ In this regard, the conclusions of different interpretations have correlated around distinctive characteristics. One is the territorial approach based on res. 1541, statement of “a territory and its peoples”.³⁵⁷ This group is interpreted to share common features of language, culture and religion, distinctive from the majority of the state, and is thus the beneficiary of the right to self-determination.³⁵⁸ Another description, though not a definition, is that from 1989 UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, which provided a list with common features. This includes historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity and territorial connection. Additionally, such a group cannot be a mere association of individuals, but must consist of a certain number of people, which must have the

Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, 17 April 2008, p. 12-13.

³⁵⁵ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle VI.

³⁵⁶ UN General Assembly resolution 2200A(XXI), *supra* note 77, art. 1.

³⁵⁷ UN General Assembly resolution 1541(XV), *supra* note 64, Principle II.

³⁵⁸ Murswiek, *supra* note 256, p. 27.

will to be identified as a people, and must have institutions or other means of expressing their will for identity.³⁵⁹

In the examination of both Åland Islands and Quebec's claim to independence and self-determination, each group was referred to as territorialized groups, hereby distinctive as Ålanders and Quebecers, rather than Finnish or Canadians. In the former case, a guarantee of the preservation of language was granted, whereas in the latter it was already preserved. This proves the groups are distinguished from the majority of the state to which they belong. In the case of Kosovo, a further distinction is made by the definition of 'Kosovo Albanians', hereby stressing the ethnic Albanians in Kosovo, rather the whole population of the territory. As evidenced by the Quebec case, 'people' does not necessitate the inclusion of the whole population before the right to self-determination can be invoked. Furthermore, as stated by the SCC, the Quebecers had the characteristic of a 'people', assuming such assessment was based on distinctive features of language, ethnicity and heritage. This, together with aforementioned descriptions, is applicable to the Kosovo Albanians; a group in Kosovo that is linguistically, religiously and traditionally united. Furthermore the established parallel institutional framework, which already took form prior to the first declaration of independence in 1991,³⁶⁰ expresses a will of identity.

Considering the state practice and provided descriptions, the Kosovo Albanians can also be classified as a 'people' having been territorial cohesive and distinctive as an ethnic group within the FRY, which was subjected to grave human rights violations and not represented in the government.³⁶¹ An UNMIK regulation from 2001, stated, "Kosovo is an entity [...] which, with its people, has unique historical, legal, cultural and linguistic attributes",³⁶² such statement emphasize the linguistic, historical and cultural features that identifies the Kosovo Albanians distinct from the Serbian population. In conclusion, the Kosovo Albanians are eligible to be subjected to self-determination under international law.

4.3.2 Invoking the right under international law

The ICJ has thus far acknowledged the relationship of self-determination and independence,³⁶³ and therefore the exercise of the right involves the act of independence.³⁶⁴ It has earlier been

³⁵⁹ United Nations Educational, Scientific and Cultural Organizations CONF. 602, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, UNESDOC SHS-89/CONF.602/7 (available at: <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>) para. 22.

³⁶⁰ Rich, *supra* note 30, p. 61.

³⁶¹ Quane, *supra* note 315, p. 219.

³⁶² United Nations Interim Administration in Kosovo (UNMIK), regulation 2001/9, *A Constitutional Framework for Provisional Self-Government in Kosovo*. UNMIK/REG/2001/9 (15 May 2001), art. 1.1.

³⁶³ *ibid.*

identified that this right could be exercised by other options than that of independence, hereby as the establishment of a free association or integration with an independent state, “or the emergence into any other political status freely determined by a people”.³⁶⁵ As a continuous right, the wish of changed political status and frontiers through referendums or independence³⁶⁶ is valid as long as it is established through the will of the people.³⁶⁷ Throughout the same international sources, the principle of territorial integrity has challenged the right to *external* self-determination, as nothing must be done to impair a sovereign states’ territorial integrity.³⁶⁸ In the Åland case, territorial integrity prevailed without dismissing that it might be comprised, if it, during the time of the conflict, could present more stability, then “self-determination of peoples may be called into play”³⁶⁹ as a mean of future settlements. Kosovo has, under the sovereignty and territorial integrity of the FRY and Serbia, been under domination against its will, when its autonomy and self-governance was terminated. Additionally, the Albanian language was suppressed,³⁷⁰ and violence was directed towards the ethnic group, all of which concludes the Kosovo Albanian’s exercise of their right to *internal* self-determination was denied. As the foreseeable future, at the time, did not offer any expectation of realizing internal arrangement to preserve its identity and political representation, the international community therefore intervened with res. 1244. Although international initiatives were launched with the purpose of resolving the issue, Kosovo’s status remained frozen until its UDI.

Prior to the UDI, the most comprehensive plan was the Ahtisaari Proposal, by the Special Envoy to the UNSC, which the UNSG Ban Ki-Moon fully endorsed, by stating that “Kosovo [...] shall govern itself democratically”³⁷¹ and that it further “shall adopt a Constitution”³⁷². Throughout article 1 of general principles, the Proposal suggested independence based on statehood attributes, to which Kosovo should “have the right to negotiate and conclude international agreements, and the right to seek membership in international organizations”³⁷³

³⁶⁴ Tamara Jaber, “A case for Kosovo? Self-Determination and Secession in 21st Century.” *The International Journal of Human Rights*. vol. 15, no. 6 (2011) p. 934.

³⁶⁵ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle (e).

³⁶⁶ Cassese, *supra* note 7, p. 286.

³⁶⁷ CSCE: *Final Act of Helsinki*, *supra* note 98, principle VIII. See also: *CSCE: Copenhagen Document*, *supra* note 117, para. 6.

³⁶⁸ UN General Assembly resolution 1514(XV), *supra* note 61, principle V. See also: UN General Assembly resolution 2625(XXI), *supra* note 71, Principle (e).

³⁶⁹ Report of the International Committee of Jurists, *supra* note 130, p. 6.

³⁷⁰ Krieger, *supra* note 21, p. xxiii.

³⁷⁰ Rich, *supra* note 30, p. 61.

³⁷¹ Martti Ahtisaari, Special Envoy to Secretary General, *Comprehensive Proposal for the Kosovo Status Settlement* (2 February 2007) (available at:

<https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>) art. 1.1.

³⁷² Ahtisaari, *supra* note 372, art. 1.2.

³⁷³ Ahtisaari, *supra* note 372, art. 1.5.

with “its own distinct, national symbols, including a flag, seal and anthem”.³⁷⁴ The participation of these arrangements is only open for sovereign states, exemplified by the UN membership.

One significant proposition is that of territorial claims, in which “Kosovo [...] shall seek no union with, any state or part of any state”.³⁷⁵ This follows the same reasoning set out by the statement of the Netherlands, that Kosovo’s boundaries have no influence on *uti possedetis juris*, as it continues with the borders it possessed at the moment. Further supported by the Ten Guiding Principles, in which the possibility of unifications of a ‘neighboring country’ was excluded.³⁷⁶ This indicates two suggestions; one is that the territorial integrity of Serbia, as emphasized in the preamble language of res. 1244, would be compromised. Also, notably when stated, “property of the FRY or the Republic of Serbia located within the territory of Kosovo [...] shall pass to Kosovo”.³⁷⁷ Secondly, the same general principles conflicts with the right to self-determination, since the options of integration with an independent state, or by any other political status wished and determined by the people,³⁷⁸ are excluded. Nonetheless, res. 1541 was adopted with the object and purpose within a colonial context, whereas the Ahtisaari Proposal was directed towards a different turnout, herein to create a constitutional framework that would respect the rights of minorities.

Regardless of the international community’s and Kosovo’s readiness to move forward, Serbia “unambiguously rejected the Ahtisaari’s Proposal as an unlawful [...] attempt to dismember our state.”³⁷⁹ It was clearly articulated that such proposal violated the sovereignty and territorial integrity of Serbia and it could therefore not “recognize the existence of another independent state on its sovereign territory”.³⁸⁰ However, the Special Envoy was convinced that “reintegration into Serbia is not a viable option”³⁸¹ while the continued international administration is not sustainable” and therefore concluded that “independence with international supervision is the only viable option”.³⁸² On the other hand, the ICJ comprehended it to some extent differently, as it neither endorsed nor prohibited such

³⁷⁴ Ahtisaari, *supra* note 372, art. 1.7.

³⁷⁵ Ahtisaari, *supra* note 372, art. 1.8.

³⁷⁶ Contact Group, *supra* note 270, principle 6.

³⁷⁷ Ahtisaari, *supra* note 372, art. 8.3.

³⁷⁸ UN General Assembly resolution 1541(XV), *supra* note 64, Principle IV.

³⁷⁹ “Serbia rejects Ahtisaari’s proposal before UN Security Council and request new international mediator” Address by Prime Minister of Serbia Vojislav Kostunica to the UN Security Council, New York, 3 April 2007 (available at: <https://reliefweb.int/report/serbia/serbia-rejects-ahtisaaris-proposal-un-security-council-and-requests-new-international>).

³⁸⁰ *ibid.*

³⁸¹ United Nations Security Council 2007/168, *Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council*, S/2007/168 (26 March 2007) para. 6.

³⁸² UN Security Council 2007/168, *supra* note 382, para. 10.

possibility; “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.”³⁸³ This firstly illustrates the difficulty of distinguishing between the legality of the UDI and the right to self-determination, however any consideration of self-determination and its consequences were vaguely dismissed.

Nevertheless, when the Proposal was finalized it was invited by the UNSG to be discussed within the UNSC, however such discussion was never formally recorded or written in the official agenda.³⁸⁴ This was due to the continuity of the debate on independence versus autonomy. Russia’s acknowledgement of Serbia’s disapproving standpoint, addressed that “legally speaking, any UDI by Pristina, should be declared null and void”³⁸⁵ based on res. 1244. The Proposal would have been presented under Chapter 7 of the UN Charter, but to accommodate Russian concerns, Kosovo would have been described as a special case without proclaiming it as an independent state,³⁸⁶ which was beyond the authority of the UN. However, it would have been inevitable to avoid that the resolution paving the way for Pristina to declare independence. What stands in contradiction to the Russian argument, is the neutrality-principle of DoI’s under international law,³⁸⁷ and later the ICJ’s conclusion of the UDI to be in conformity with res. 1244 and the principles of international law.³⁸⁸

While the international instruments stress great importance to territorial integrity,³⁸⁹ without authorizing the right to *external* self-determination, international efforts have generated possibilities of independence. This has been evident through the ambiguity of res. 1244, and through recommendations by the Contact Group, the Troika Talks and the Ahtisaari Proposal. The ICJ AO itself did not exclude the possibility of Kosovo breaking away from Serbia. A persuasive interpretation is that the international community had not collectively, but rather politically endorsed Kosovo’s independence as a means to secession, given initiatives for a political settlement with consent³⁹⁰ from Serbia have failed multiple times. It is further arguable that the ICJ’s AO, rather indirectly, fell on the assessment of the validity of the

³⁸³ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 426, para. 56

³⁸⁴ New York Times. 2008. "An Independent Kosovo Can Never Join UN, Russia Warns" (available at: <http://www.nytimes.com/2008/01/17/world/europe/17iht-kosovo.4.9299507.html>).

³⁸⁵ *ibid.*

³⁸⁶ Ker-Lindsay, *supra* note 11, p. 71.

³⁸⁷ Hannum, *supra* note 176, p. 155.

³⁸⁸ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, p. 403, para. 122.

³⁸⁹ UN General Assembly resolution 1514(XV), *supra* note 61, Principle V. See also: UN Charter articles 2(4) and 2(7); UN General Assembly resolution 2625(XXI), *supra* note 71, preamble; UN General Assembly, *VDPA*, *supra* note 87, principle 2.2.

³⁹⁰ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle I.

conclusions from the Ahtisaari Proposal.³⁹¹ The latter, without mentioning or phrasing Kosovo as a state, did intend to direct Kosovo towards a path of independence, which is arguably reflected in the ICJ AO.³⁹² The ICJ therefore came to terms with the same realities on the ground that the Special Envoy Ahtisaari articulated by proposing statehood attributes, since no other alternative, to balance the interests of the involved actors, could be realized.

In conclusion, Kosovo as a people were entitled to invoke the right to self-determination, based on its distinctive features of ethnicity, language, and culture. It has further been established that international law primarily recognized Kosovo's right to *internal* self-determination. However, international initiatives proved to endorse its settlement issue of independence, but with resistance from Serbia and Russia, the legal right to *external* self-determination was never authorized. Furthermore, when multiple attempts at resolving the issue of its status did not produce any substantial results, and *internal* self-determination proved insufficient for the wish of the people, *external* self-determination was invoked, as a last resort, to realize their political, social, cultural and economic development.³⁹³

4.4 A remedial right to secession

The right to remedial secession is theoretical based. However, as established in chapter three, to an extent also reflected in international law as it builds its premises on pre-existing international instruments. The application of the remedial approach and international law contributes to the investigation of whether the case of Kosovo meets the threshold to invoke its right to *external* self-determination, based on the presented circumstances amounting to an exceptional situation, wherein international law would authorize secession.³⁹⁴ The exceptional circumstances are evaluated from the basis of human rights violations, the denial of *internal* self-determination, and wherein no other mean, than that of secession, can be realized to resolve the conflict.

The sphere of jurisdiction of secession has thus far been established on a neutrality-principle, in which no legal basis prohibits the action. Simultaneously however, it is not considered a principle under positive international law,³⁹⁵ which explains the international instruments' lack of recognition of groups' right to secede from its administering state. On the account of this, it was expected that the ICJ would have provided an assessment to determine

³⁹¹ Dissenting Opinion by Judge Mohamed Bennouna, *supra* note 305, p. 3, para. 12.

³⁹² Peter Hilpold, *The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Pre-Requisites*, in Peter Hilpold, 2012, *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010*, p. 19-20.

³⁹³ Ahtisaari, *supra* note 372, art. 1.3-1.4.

³⁹⁴ Corten, *supra* note 175, p. 92.

³⁹⁵ Hurst Hannum, *Rethinking Self-Determination*, *Virginia Journal of International Law*, (1993), vol. 34:1, p. 9.

whether a norm of secession had developed.³⁹⁶ Regardless of the ICJ's inability to create law in its judicial opinions, it could have enabled a development of the right. Regrettably the ICJ only recognized the Member States' concern regarding secession, but found it unnecessary to assess in this case.³⁹⁷ Nonetheless, other judicial bodies, although not contemporary, provided limited evidence to the existence of the rule. As established in chapter three, the opinion concerning the Åland Islands dispute stated, "the separation of a minority from the State of which it forms part [...] 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".³⁹⁸ The following opinions, which are considerably more recent, elaborate on the circumstances that amount to exceptional situations. The African Commission on Human Rights in its case of the Katangese People's Congress, required "concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question" and further required evidence that "the people of Katanga are denied the right to participate in government".³⁹⁹ The same preconditions were recalled by opinions of Judges in the case of *Loizidou v. Turkey*, that a right to self-determination through secession was only applicability as long as "human rights are consistently [...] violated" or if they were "under-represented in an undemocratic and discriminatory way".⁴⁰⁰ These expressions of secession endorse the two first preconditions of the remedial secession theory, whereby human rights violations, and further attacks on the physical existence of a group carried out by the state, are justified to invoke secession as a last resort.⁴⁰¹

4.4.1 Human rights violations

Prior to international presence in Kosovo, the FRY under the leadership of Milošević, had on numerous counts perpetrated human rights violations against the Albanians in Kosovo. As early as in 1994, it was evidently recognized by UNGA that "the serious [...] discriminatory and repressive practices aimed at Albanians in Kosovo [...] constituted a form of ethnic cleansing".⁴⁰² This included acts of violence that amounted to killing, arrests, forced evictions

³⁹⁶ Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion," *European Journal of International Law*, vol. 26 no. 2 (2015) p. 433-434.

³⁹⁷ *Accordance with International Law of Declaration of Independence of Kosovo*, *supra* note 203, paras. 82-83.

³⁹⁸ Commission of Rapporteurs, *supra* note 135, p. 318.

³⁹⁹ African Commission on Human and People's Rights, Communication 75/92, *Katangese People's Congress v. Zaire*, Decision taken at its 16th Session, Banjul, The Gambia, 1994, para. 6.

⁴⁰⁰ *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, Concurring Opinion of Judge Wildhaber, Joined by Judge Rysdall.

⁴⁰¹ Buchanan, *supra* note 197, p. 37.

⁴⁰² United Nations General Assembly resolution 49/204, *Situation of Human Rights in Kosovo*. A/RES/49/204 (23 December 1994) Preamble (g).

and torture.⁴⁰³ The grave violation of torture, as a numbered operative paragraph, was requested by UNGA to “take all necessary measure to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo” which further included “the practice of torture, and other cruel, inhumane or degrading treatment”.⁴⁰⁴ The request was repeated in another UNGA resolution a year later.⁴⁰⁵ Although, UNGA resolutions have no enforcement power, only competence to forward recommendations to UN Members,⁴⁰⁶ the prohibition on torture, as presented in chapter three, is a *jus cogens*, which is universally binding on all states, without possibility of derogation. Thus, it stands clear that the FRY violated such prohibition by its policies and actions. By 1998, the UNSC recognized the “use of excessive force by Serbian police forces against civilians [...] in Kosovo.”⁴⁰⁷ In 1999 the human rights situation escalated to a conflict, wherein the Commission on Human Rights expressed concern over the campaign of repression, and the ethnic cleansing against the Kosovars. It further condemned the “widespread and systematic practice of ethnic cleansing perpetrated by the Belgrade and Serbian authorities against the Kosovars”.⁴⁰⁸

According to the theory, and the expressed views of the international community through organs of the UN, it is indisputable that the ethnic groups of Albanians in Kosovo were subjected to gross human rights violations in a persistent and systematic manner. Secondly, as the state authorities of the FRY carried out the violations and physical attacks on the group,⁴⁰⁹ it only strengthens the right to secession. This act of sovereign abuse, with policies of ethnic cleansing against the Kosovo Albanians under the authority of the FRY,⁴¹⁰ meets the conditions set out in the Åland case in which the LN found that secession as a last resort was appropriate “when the state lacks either the will or the power to enact and apply just guarantees”.⁴¹¹ The lack of will and power to apply just guarantees was evident by the police brutality, killing, the harassment and persecution, the intimidation and imprisonment of ethnic Albanians⁴¹² which was “committed by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro)”.⁴¹³ The Special Envoy of the UNSG later acknowledged that “the

⁴⁰³ *ibid.*

⁴⁰⁴ UN General Assembly resolution 49/204, *supra* note 403, para. 3(a).

⁴⁰⁵ United Nations General Assembly resolution 50/190, *Situation of Human Rights in Kosovo*, A/RES/50/190 (22 December 1995) para. 2(a).

⁴⁰⁶ Charter of the UN, *supra* note 2, art. 10, 13.

⁴⁰⁷ United Nations Security Council resolution 1160, *supra* note 51, preamble.

⁴⁰⁸ UN, Commission on Human Rights resolution 1999/18, *Situation of Human Rights in Kosovo*, E/1999/23-E/CN.4/1999/167, Report on the Fifty-Fifth Session (22 March – 30 April, 1999), preamble.

⁴⁰⁹ Buchanan, *supra* note 197, p. 37.

⁴¹⁰ Cassese, *supra* note 7, p. 33.

⁴¹¹ Commission of Rapporteurs, *supra* note 135, p. 318.

⁴¹² UN General Assembly resolution 50/190, *supra* note 406, preamble (a)-(g).

⁴¹³ UN General Assembly resolution 49/204, *supra* note 403, para 1.

revocation of Kosovo's autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their elimination from public life" was due to the repression from Belgrade.⁴¹⁴ The human rights crisis was only deescalated when NATO together with FRY agreed to the Military Technical Agreement,⁴¹⁵ and when UNMIK became operational with UNSCR 1244 as *lex specialis*. Despite the continuous pattern of human rights violations, which the theoretical approach of remedial secession finds justifiable, this finds little justification in res. 1244. The UNGA resolutions, both prior and after the issuance of res. 1244, recognized and condemned "the grave violations of human rights in Kosovo that affected the ethnic Kosovo Albanians, prior to the arrival of personnel of UNMIK [...] as demonstrated in the many reports of torture, indiscriminate and widespread shelling [...]".⁴¹⁶ Thus, the wording that lacked in res. 1244 to justify a remedial right to secession, have sufficiently been present and supported in the UNGA resolutions.

Based on the abovementioned conditions, it was proved accurate that Kosovo Albanians were more prone to human rights violations, given attacks on their physical existence with the means of torture and indiscriminate shelling, which was inflicted upon in a persistent manner.⁴¹⁷ Invoking the right of secession as a last resort has been reaffirmed in the case of human rights violations in the Katangese and Louziou v. Turkey cases. The latter, in line with Åland and Quebec, repeatedly phrased that a circumstance of an "exceptional" case must arise, before endorsing the right to *external* self-determination and secession. Since no definition or elaboration have been provided in terms of an "exceptional" case, it is interpreted that the violations of human rights and oppression of a people is sufficient to establish such a situation. Kosovo clearly presents an exceptional case in which such circumstances can be depicted. The practice of torture, operate as a separate violation of international law, based on its legal status as a *jus cogens*, which increases the gravity of the human rights crisis.

While this interpretation is in favor of secession, it must simultaneously be argued that caution was exercised, as to grant a right to *external* self-determination. This explains the preferred wording of 'ethnic cleansing, killing, indiscriminate, and torture, and inhumane treatment' included in UNGA resolutions, herein to avoid any formal or legal obligations. However, it referred to the highest authority decision of res. 1244, to affirm "that the human

⁴¹⁴ UN Security Council 2007/168, *supra* note 382.

⁴¹⁵ NATO, "NATO's role in Kosovo, Military Technical Agreement" (2 August 1999) (available at: <https://www.nato.int/kosovo/docu/a990609a.htm>).

⁴¹⁶ United Nations General Assembly 54/183, *Situation of Human Rights in Kosovo*. A/RES/54/183 (29 November 2000) preamble.

⁴¹⁷ OSCE, "Kosovo As Seen, As Told". 12 May 2003 (available at: <http://www.osce.org/odihr/17772?download=true>).

rights and humanitarian crisis in Kosovo shall be addressed within the framework of a political solution based upon the general principles annexed to UNSCR 1244”.⁴¹⁸ Although grave human rights violation were addressed, it was reaffirmed that a solution to the human rights crisis be based on res. 1244, which states the necessity of respecting the territorial integrity of FRY, and thus discouraging a right to *external* self-determination. Regardless of the wording of both UNGA and UNSC resolutions, the remedial approach accounts for other prerequisites to invoke a right to secession.

The remedial approach further finds its applicability whenever the state is treating its citizens unjustly.⁴¹⁹ Based on this, it is arguable that two interpretations can lead to the identification of an *unjust* state, one is the violence and threatening of existence directed towards an ethnic group, as presented above. Another interpretation is the lack or will to guarantee the minority rights of all its citizens within its sovereign borders. The case of Åland and Quebec demonstrated ways in which secession was found unjustifiable on the basis of guaranteed rights to the preservations of identity, and secondly none of the groups were oppressed by the states. This further demonstrates how state practice has been aligned with this theoretical assumption.⁴²⁰ That the FRY thus had a character of an *unjust* state is therefore not only apparent in its human rights violations, but also in its lack or will to guarantee the minority rights of all its citizens. The FRY, then as a participating party to the CSCE,⁴²¹ disregarded its responsibility to reassure minority rights and to safeguard human rights. By the virtue of the right self-determination every individual “may choose to belong to whatever ethnic, religious or language community he or she wishes”.⁴²² As a consequence of the oppressive policies, the Albanian people did not have the right to express or preserve, as they wished, their ethnic, cultural, linguistic nor religious identity without discrimination.⁴²³ As recognized “the elimination in practice of the Albanian language”⁴²⁴ and the “imprisonment of ethnic Albanian journalists”,⁴²⁵ all of which infringes the individual choice of belonging to a national minority.⁴²⁶ However, as established in chapter three, these guarantees are conditioned by the state legislation, meaning that the state can interpret and determine how and under which circumstances a group is entitled to such rights. It is evident that such guarantees on the

⁴¹⁸ United Nations General Assembly 54/183, *supra* note 417, para. 2.

⁴¹⁹ Buchanan, *supra* note 197, p. 52.

⁴²⁰ Commission of Rapporteurs, *supra* note 135, p. 317. See also: *Reference re Secession of Quebec*, *supra* note 4, paras.135, 138.

⁴²¹ CSCE: *Copenhagen Document*, *supra* note 117, preamble.

⁴²² Conference on Yugoslavia, Arbitration Commission, *supra* note 39, p. 168-169.

⁴²³ CSCE: *Copenhagen Document*, *supra* note 117, para. 6.

⁴²⁴ UN General Assembly resolution 49/204, *supra* note 403, preamble (f).

⁴²⁵ UN General Assembly resolution 49/204, *supra* note 403, preamble (g).

⁴²⁶ CSCE: *Copenhagen Document*, *supra* note 117, para. 2.

preservation of the Albanian identity have not been found adequate to be accounted for in the Constitution. Thus, these conditions alongside excluded provisions of the right to self-determination in the FRY Constitution, does therefore not merely demonstrate a lack of adopting measures to guarantee human and minority rights, but also a lack of will to do so. Therefore, as the state has a duty to serve as agents of the people, which are the ultimate sovereign,⁴²⁷ Serbia fails to perform as a *just* state. When the latter is relevant, it qualifies, based on the state practice and the remedial secession theory, to a remedy in which a last resort becomes applicable.

In conclusion, the two conditions applied to Serbia as an *unjust* state are established on the basis of grave human rights violations together with breaching a *jus cogens*, exercised by the FRY and Serbian authorities. Secondly based on the lack and will to guarantee human and minority rights of the Kosovo Albanians in its national and constitutional law. These acts stands in contravention with the obligation, ascribed to Serbia, to promote the realization of the right to self-determination,⁴²⁸ on behalf of the Kosovo Albanian people, belonging to its sovereign territory.

4.4.2 Denial of internal self-determination

Another main principle in remedial secession theory, which can authorize a right to secession, is the condition of unrepresentative governments that is embedded in the *saving clause*.⁴²⁹ The *clause* sets forth that territorial integrity and national sovereignty cannot be impaired with, as long as “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed a government representing the whole people belonging to the territory without distinction as to race, creed or color”.⁴³⁰ Thus, if the government conducts itself in compliance with principles of equality before the law and right of peoples to self-determination, and represents the whole population without discrimination, then the right to self-determination cannot be interpreted to authorize secession.⁴³¹ The *saving clause* is restrictive in its applicability, which is supported in the theory as the state’s claim to its territory is protected whenever the state is performing *just* and is therefore not subjective to the clause. Thus, a right to secession is allowed when the state deprives peoples of their right to *internal* self-determination. This was supported during the proceedings of the AO

⁴²⁷ Allen Buchanan, *Justice, Legitimacy and Self-Determination – Moral Foundations for International Law*. 2012, p. 354.

⁴²⁸ UN General Assembly resolution 2200A(XXI), *supra* note 77, articles 2 and 3. See also: *CSCE: Copenhagen Document*, *supra* note 117, para. 32.

⁴²⁹ Tomuschat, *supra* note 10, p. 19.

⁴³⁰ UN General Assembly resolution 2625(XXI), *supra* note 71, Principle 7.

⁴³¹ Cassese, *supra* note 7, p. 119.

“international law protects a State’s territorial integrity to the detriment of the right of peoples to self-determination if its government represents the whole population without any form of discrimination”.⁴³² The demand of *external* self-determination by Kosovo was a consequence of the deprivation of its *internal* self-determination by the state authorities. Its competences were firstly compromised in 1989, when the Serbian Parliament unanimously proposed and adopted an amendment to its Constitution, by revoking Kosovo’s competence to objectify amendments.⁴³³ This was in contradiction to Kosovo’s status as an autonomous province with required consent to any amendments under the SFRY. A month later, the Kosovo Assembly had allegedly granted Serbia control of its internal affairs, however riots between Kosovo and the FRY police took place only a few days after,⁴³⁴ and the lack of evidence has since been worrisome. The following years, Kosovo became formally less significant as a province, losing its competences completely, as the Serbian Republic gained administrative authority over Kosovo and could nullify any public decisions found beyond the interests of the Republic.⁴³⁵ This was a continuous pattern, which involved the suppression of the language, and its institutions. Thus, in response to the ‘broken autonomy agreement’ the autonomists, herein Kosovo Albanians, became secessionists and subsequently Serbia attempted to suppress the secession with use of force.⁴³⁶ In chapter three, it was interpreted that the establishment of appropriate local or autonomous administration can increase the conditions for national minorities,⁴³⁷ and thereby demonstrate the state’s respect for its peoples of national minorities and their right to self-determination.⁴³⁸ On this basis, it is highly arguable that Serbia under the FRY, did not respect autonomy for its national minority, and therefore neither the political agreement to which they were a participating party.⁴³⁹ Again, the lack of respect for Kosovo’s self-determination became more evident in the events of 1990, almost a decade before interference from the UN. This was further evidenced by supportive documentation from UNGA, which stated “various discriminatory measures taken in the legislative, administrative and judicial areas”.⁴⁴⁰ These categorizations of discrimination were further elaborated to the “[...] dismissal of ethnic Albanians, civil servants, notably from the ranks of the police and

⁴³² Written Statement by the Confederation of Switzerland, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. 25 May 2009, para. 62.

⁴³³ Krieger, *supra* note 21, p. xxxiii.

⁴³⁴ *ibid.* See also: Buchanan, *supra* note 429, p. 358.

⁴³⁵ Krieger, *supra* note 21, p. xxxiii.

⁴³⁶ Buchanan, *supra* note 429, p. 357.

⁴³⁷ CSCE: *Copenhagen Document*, *supra* note 117, para. 35.

⁴³⁸ Krieger, *supra* note 21, p. xxxiii.

⁴³⁹ CSCE: *Copenhagen Document*, *supra* note 117, preamble.

⁴⁴⁰ UN General Assembly resolution 50/190, *supra* note 406, preamble.

judiciary [...] the closing of Albanian-language secondary schools and the university, as well as the closing of all Albanian cultural and scientific institutions.”⁴⁴¹

Considering the deprivation of *internal* self-determination, herein the termination of autonomy, the discriminatory measures and the human rights violations, it must be established that the government was not representative. Furthermore the discrimination and exclusion from the legislative, administrative and judicial areas of the government was arguably based on the ethnicity of the Albanians. In this view, a right to *external* self-determination, by remedial secession, is made available and is no longer restrictive, since the circumstances under which secession can be claimed, are justifiable in the case of Kosovo.⁴⁴² It can be further argued, that the *saving clause* implicitly authorizes secession, when referred to in state practice. Canada applied the same *a contrario* argument, 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.”⁴⁴³ In addition, based on a previous interpretation from chapter three, self-determination is a continuous right,⁴⁴⁴ and as such still relevant in the aftermath of the atrocities of 1999. Serbia’s State Union with Montenegro and its own independent Constitution, proved limited autonomy to Kosovo, without explicit provisions on the guarantees of minority rights for the people of Kosovo, irrespective of its prohibition of discrimination.⁴⁴⁵ With the acceptance and help from UNMIK to have self-governance re-established in Kosovo, it is rather unclear whether the restoration of autonomy was due to international demands, or whether it was a wish from the Serbian authorities.

In addition, participating states provided their interpretation of the *saving clause* during the proceedings of the ICJ AO. Germany formally stated “(self-determination) may exceptionally legitimize secession if this can be shown to be the only remedy against a prolonged and rigorous refusal of *internal* self-determination”.⁴⁴⁶ The resistance Kosovo met, in regards to the Ahtisaari Proposal, the UDI, and secession, was not only from Serbia, but also from Russia. The Federation, however unexpectedly, admitted: “it is also true that the clause may be construed as authorizing secession under conditions”.⁴⁴⁷ These conditions would entail ‘an armed attack by the parent state’ which in fact acts, as conditioned by the remedial

⁴⁴¹ UN General Assembly resolution 50/190, *supra* note 406, preamble (b).

⁴⁴² Jure Vidmar, “International Legal Response to Kosovo’s Declaration of Independence,” *Vanderbilt Journal of Transitional Law* (2009) p. 817.

⁴⁴³ *Reference re Secession of Quebec*, *supra* note 4, para. 135.

⁴⁴⁴ CSCE: *Final Act of Helsinki*, *supra* note 98, Principle VIII.

⁴⁴⁵ *Constitution of the Republic of Serbia*, *supra* note 280, art. 21.

⁴⁴⁶ Written Statement by the Republic of Germany, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. 17 July 2009, p. 34.

⁴⁴⁷ Written Statement by the Russian Federation, *supra* note 320, para. 88.

approach, “threatening to the very existence of the people in question”.⁴⁴⁸ This supports the threshold of the remedial approach, which validates its reflection in the *saving clause*. It can be argued that Russia, within the same year changed its position from opposing independence to acknowledging a remedial right of secession, due to the justification of its intervention in Georgia, which resulted in a war with two secessionist entities, Abkhazia and South Ossetia.⁴⁴⁹

Assuming that the *saving clause* presents a great opportunity to invoke a right to *external* self-determination, in which Kosovo has a solid case, it is nonetheless important to stress that the *travaux préparatoires* intended no interpretation of a right to secession.⁴⁵⁰ Some states interpreted self-determination in the context of colonial people or military occupation.⁴⁵¹ However, when Canada justified its decision to reject the right to secession, it was nonetheless based on the *saving clause*.⁴⁵² This upholds the interpretation accordingly to the remedial approach, in which the *clause* allows for secession. On the other hand, the restricted comprehension of the *clause* based on the *travaux préparatoires*, was grounded in the sacred principle of territorial integrity. While the comprehension of the territorial integrity of states has often been prioritized over self-determination, Serbia cannot claim or sustain its right to territory, if its only remedy to ensure fundamental human rights is that of secession.⁴⁵³ The preference of the two principles is thus based on the situation, which must be judged on its individual merits.⁴⁵⁴ In so far, as human rights together with denied access of *internal* self-determination have been evident; the territorial integrity of Serbia is challenged and therefore subjected to the *saving clause*. A Judge Declaration issued, in reference to the ICJ AO, supports this “external self-determination is accepted in cases of systematic repression, crimes against humanity, persecution, discrimination or tyranny by its host state”.⁴⁵⁵

The examination of the aforementioned facts concerning Kosovo reveals a clear case of documented human rights violations,⁴⁵⁶ non-representation with discriminatory measures against the Albanians, within the state to which it belongs. Therefore, it is established that a denial to *internal* self-determination was present.

⁴⁴⁸ *ibid.*

⁴⁴⁹ Roy Allison, “The Russian case for military intervention in Georgia: international law, norms and political calculation” *European Security*, vol. 18, no. 2 (2009) p. 186.

⁴⁵⁰ Cassese, *supra* note 7, p. 110, footnote 15.

⁴⁵¹ France, A/AC.125/SR.113, at 23 and Australia, A/C.6/SR.1178, para. 39, in: Cassese, p. 110, footnote 15.

⁴⁵² *Reference re Secession of Quebec*, *supra* note 4, para. 154.

⁴⁵³ Buchanan, *supra* note 225, p. 85.

⁴⁵⁴ Koskeniemi, *supra* note 9, p. 265.

⁴⁵⁵ Separate Opinion of Judge Antônio Augusto Cancado Trindade, 22 July 2010, p. 73, para. 173. See also similar argumentation in: Separate Opinion of Judge Abdulqawi A. Yusuf, 22 July 2010, pp. 95-96, para. 7-9.

⁴⁵⁶ UN General Assembly resolution 50/190, *supra* note 406, preamble (b).

4.4.3 A last resort settlement

The remedy of a last resort is materialized when other solutions to the issue have been exhausted to the extent that only secession can guarantee the fundamental human rights of the people in question. On this basis, it has been debatable whether the process of secession, as a last resort to prevent further oppression, was justified by the UDI in 2008.⁴⁵⁷ The challenging justification is based on the decreased acts of violence, considering the human rights violations in the 1990's, and the restored autonomy included in the Serbian Constitution. Also, Serbia has since the removal of Milošević in 2000, argued that concern over repression under its authority was no longer applicable.⁴⁵⁸ All of which makes the case for a last resort for relief of oppression less applicable.⁴⁵⁹

While UNMIK and KFOR started stabilizing the situation in June 1999, a final settlement was still pending. The remedial approach accounts for the efforts of such agreement, as other option that may relieve the situation must be realized before invoking the right to secession.⁴⁶⁰ Additionally, such solution must further be settled within the state structure.⁴⁶¹ In the case of Kosovo, it is arguable that such composition must take account of two pillars: the involvement of the Serbian government, and the involvement of UNMIK. This is to respect the applicable laws from the sovereign state of Serbia and the international legal framework of res. 1244. The latter has also required that “the final decision on the status of Kosovo should be endorsed by the Security Council”,⁴⁶² and any solutions that fall short of meeting this requirement, would have no legal effect on the future status of Kosovo.⁴⁶³

Assuming that secession was delayed, and therefore less justified, one must first account for the protection of human rights and minorities after 1999⁴⁶⁴ until the time of the UDI. As the conflict and humanitarian crisis deescalated shortly after the deployment of KFOR and UNMIK, the applicable law in Kosovo was clarified in UNMIK regulations 1999/1 and 1992/4, to prevent further escalation. These regulations articulated that “all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards” these were defined to be the; UDHR, ICCPR, ICESCR

⁴⁵⁷ Vidmar, *supra* note 444, p. 817.

⁴⁵⁸ Summer, *supra* note 41, p. 241.

⁴⁵⁹ Helen Quane, *Self-Determination and Minority Protection after Kosovo*, in: James Summers: Kosovo A Precedent? The Declaration of Independence, The Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights, 2011, p. 298.

⁴⁶⁰ Buchanan, *supra* note 198, p. 46.

⁴⁶¹ Cassese, *supra* note 7, p. 120.

⁴⁶² United Nations Security Council S/2005/709, *supra* note 303.

⁴⁶³ *ibid.*

⁴⁶⁴ Kohen & Del Mar, *supra* note 250, p. 120.

and the Convention against Torture.⁴⁶⁵ On the other hand, while some human rights concerns remained to be addressed post-1999, the Serbian authorities were no in the position to threaten the existence of Kosovo Albanians with the use of force. However, it must not be neglected that the following years were characterized by inter-ethnic violence in 2000 and 2004.⁴⁶⁶ Today, the ethnic tensions are particularly present in the Serbian dominated North Mitrovica of Kosovo, and since it borders with Serbia, its inhabitants almost live entirely under Belgrade's authority. The bridge of the Ibar River divides Serbian North Mitrovica from the Albanian South Mitrovica. Hence, violence still occurs when the two ethnic groups clash. In 2004, three Albanians boys were allegedly drowned in the Ibar River by Serbs, which quickly resulted in a demonstration with former KLA fighters.⁴⁶⁷ Secondly, the closing of the bridge in 2007 brought the Kosovo Police in an exchange of open fire with the Albanians who demonstrated against the closure.⁴⁶⁸ The Serbian population in Mitrovica has rejected any formal integration with Kosovo, and despite the international presence with UNMIK, they continue to adhere to the central government in Belgrade, instead of Pristina. On the account of this, one may argue that Kosovo, at this time, was not eligible to a right of *external* self-determination, as there were no human rights violations that threatened their existence, despite ethnic tensions. Secondly self-governance was being re-established under the auspices of UNMIK. A dissenting Judge opinioned the situation after the ICJ AO that "international law should not allow an ethnic group to break away from its state on the basis of a wish to independence."⁴⁶⁹ This recalls the same interpretation from the Åland Islands case, wherein it was decided that a wish without a legal basis could foster more instability than restoring stability. However, can the same be applied to the Kosovo Albanians, that it was merely an expressing of a wish to become independent. The counterargument or the justification of the UDI in 2008 is based on the fact that Kosovo's right to remedial secession was more a delay of years of oppression,⁴⁷⁰ and international efforts. It is arguable that the international community aimed to find a solution of internal arrangements, rather than endorsing a right to *external* self-determination.

⁴⁶⁵ UNMIK Regulation 1999/24, *On the Law Applicable in Kosovo*. UNMIK/REG/1999/24 (12 December 1999) section 1.3. See also: UNMIK Regulation 2000/59, *Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo*, UNMIK/REG/2000/59 (27 October 2000).

⁴⁶⁶ Amnesty International (2014/2015) (available at: https://www.justice.gov/sites/default/files/pages/attachments/2015/05/19/amnesty-international_2014_serbia.pdf) p. 319.

⁴⁶⁷ Summers, *supra* note 23, p. 35.

⁴⁶⁸ Amnesty International, *supra* note 467.

⁴⁶⁹ Dissenting Opinion of Judge Abdul Koroma, 22 July 2010, p. 468, para. 4.

⁴⁷⁰ Vidmar, *supra* note 444, p. 817.

But when all attempts at negotiating an internal settlement, between Belgrade and Pristina, have failed, secession would be a last resort.⁴⁷¹

The political process of a final status was enhanced in 2005, where the Contact Group led by the US, France, Italy, Germany, UK and Russia, proposed the settlement be based on the Ten Guiding Principles. It reaffirmed human rights, multi-ethnic access to institutions, unchangeable frontiers, and an international supervision of the implementation of the settlement.⁴⁷² It also requested authorities in Belgrade to encourage Serbs of Kosovo, North Mitrovica, to participate in Kosovo institutions,⁴⁷³ and reaffirmed the necessary endorsement by the UNSC. After fifteen rounds of negotiations in 2006, it was emphasized that Kosovo was "shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999, and the extended period of international administration under UNSCR 1244 which must be taken into account, when negotiating a status plan".⁴⁷⁴ However due to division within the Group and with lack of Russian support, the Special Envoy, Athisaari, was called in to propose a settlement.⁴⁷⁵

The Athisaari Proposal ascribed statehood attributes to Kosovo in its plan. His arguments of independence relied on the fact that "Kosovo had been governed in complete separation from Serbia for eight years", which meant that a return to Serbian rule would not be "acceptable to the overwhelming majority of the people of Kosovo".⁴⁷⁶ This reiterates the remedial approach that the people are the ultimate sovereign, and a state must serve the consent and will of its people.⁴⁷⁷ This is also in line with Final Act and the state practice in which Canada guaranteed the rights of all its citizens by expressing their will. However, the Proposal was not endorsed by the UNSC as Russia indicated to utilize its veto power.⁴⁷⁸

When the Athisaari Proposal failed to be endorsed, the Special Envoy stated: "it is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted".⁴⁷⁹ But the UNSG established another round of negotiations, with the Troika (EU, Russia and the US) as mediators.⁴⁸⁰ This initiative also proved insufficient without achieving an agreement, due to old positions. The UNSG viewed this

⁴⁷¹ Tim Judah, *Kosovo, What Everyone Needs to Know*, 2008. p. 141.

⁴⁷² Contact Group, *supra* note 270, preamble, principles 1, 3, 4, 6 and 10.

⁴⁷³ *ibid.*

⁴⁷⁴ Kosovo Contact Group Statement (31 Januar 2006) (available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf). para. 2.

⁴⁷⁵ Summers, *supra* note 23, p. 38.

⁴⁷⁶ UN Security Council 2007/168, *supra* note 382, paras. 6-7.

⁴⁷⁷ Buchanan, *supra* note 429 p. 354.

⁴⁷⁸ New York Times, *supra* note 385.

⁴⁷⁹ UN Security Council 2007/168, *supra* note 382, para. 3.

⁴⁸⁰ United Nations Security Council S/2007/723, *Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council. S/2007/723* (4 December 2007).

worrisome, “events on the ground could take a momentum of their own, putting at serious risk the achievements and legacy of the UN in Kosovo”.⁴⁸¹ It is arguable that when all diplomatic, peaceful and consensual attempts⁴⁸² had been exhausted to settle the political status, and without an UNSC agreement, the necessity of terminating the interim administration and declare independence was foreseeable. This was even supported by the UNSG in 2007 that “if Kosovo's future status remains undefined, there is a real risk that the progress achieved by the United Nations and the Provisional Institutions in Kosovo can begin to unravel”.⁴⁸³ This was crucial as to prevent the conflict from remaining frozen for too long, in which the UDI became justified, as an exceptional measure of last resort.⁴⁸⁴ Thus, challenges of settling the dispute to find a compromise was both reflected inside and outside the UNSC, herein between Kosovo and Serbia. The Troika Talks reported to the UNSG in 2007 that, “the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo”.⁴⁸⁵ The UNSC slowly realized that an endorsed solution was near impossible, since the main parties were unwilling to agree. In addition, the UDI reassured implementation of the Ahtisaari Proposal, which would be ‘in conformity with principles of justice and international law’.⁴⁸⁶ According to the Proposal’s art. 1, there would be “full respect for the rule of law”⁴⁸⁷ and further “respect for the highest level of internationally recognized human rights and fundamental freedoms”,⁴⁸⁸ while subjected to international supervision. Considering that self-determination does not grant a legal right to secession, it may be argued that in the case of Kosovo, the international community was ready to endorse independence as a last resort,⁴⁸⁹ in the form reflected in the Ahtisaari Proposal. According to the remedial approach, the UDI is justified, as other means of settling the dispute proved a lack of success. It must thus be established that the international community was compelled to the same understanding and acceptance of Kosovo’s right to secession. Nonetheless, the characteristics of Kosovo was “a unique case” that demanded “unique

⁴⁸¹ United Nations Security Council S/2007/768, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*. S/2007/768 (19 December 2007) para. 33.

⁴⁸² CSCE: *Final Act of Helsinki*, *supra* note 98, Principle I.

⁴⁸³ United Nations Security Council 2007/395, *Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council*, S/2007/395 (26 March 2007), para. 33.

⁴⁸⁴ Ralph Wilde, “Self-Determination, Secession and Dispute Settlement after Kosovo Advisory Opinion”, *Leiden Journal of International Law*, vol. 24, no. 1 (2011) p. 151.

⁴⁸⁵ UN Security Council S/2007/723, *supra* note 481, para. 2.

⁴⁸⁶ Charter of the UN, *supra* note 2, art. 1.

⁴⁸⁷ Ahtisaari, *supra* note 372, art. 1.1.

⁴⁸⁸ Ahtisaari, *supra* note 372, art. 1.2.

⁴⁸⁹ Walter, *supra* note 331, p. 18.

solutions”, to which its course of action, and its reflection of the remedial approach “does not create a precedent for other unresolved conflicts”.⁴⁹⁰

Conclusively, it is determined that secession is justified when all attempts at negotiating an internal settlement have failed. This was predominantly due to the resistance from Serbia and Russia. However, some have argued that the Serbian administration in 2008 was more willing to negotiate and accommodate Kosovo with the right of *internal* self-determination,⁴⁹¹ as the *ubi jus ibi remedium*, instead of secession. Kosovo perceived independence as the only solution, and thus accepted nothing less than independence.⁴⁹² However, it is important to unfold the circumstances offered by the means of *internal* self-determination by Serbia. In the ‘Plan for the Political Solution in Kosovo and Methodija’, Kosovo was offered a high level of autonomy, “more than autonomy, but less than independence”.⁴⁹³ On the other hand, a legal condition was that the Kosovo Serb municipalities, herein North Mitrovica, would be “an autonomy within an autonomy”⁴⁹⁴. This arguably indicated that being autonomous within Kosovo, would lead to another scenario of implementing policies in favor of the Serbs, rather than ensuring the same level of autonomy for everyone. Pristina rejected this, as Mitrovica is a part of Kosovo⁴⁹⁵ and would lead to changed frontiers, and breach the principle of *uti possidetis juris*, which the international community would be unsupportive of.

Lastly, considering Kosovo to qualify as a hard case under international law may stimulate the development of new rules, and strengthen the right to *external* self-determination.⁴⁹⁶ State practice has further recognized the possibility of a right to remedial secession in exceptional cases of human rights violations, which has been accounted for in judicial cases.⁴⁹⁷ On the other hand, it has been stated that Kosovo, as a special case, poses no precedents. Secondly, without the mere practice of such right, it is hard to establish it as a customary rule, since *opinio juris*, the subjective element to which state possess the belief that it is acting on the basis of a legally binding rule, is lacking. The latter is evident as secession is a neutrality principle under international law. It was further expressed by the ICJ in the *Nicaragua* case, that there is a need of a more direct expression of *opinio juris*, than a mere

⁴⁹⁰ United Nations Security Council, *Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council*, S/2007/168 (26 March 2007) paras. 1-3.

⁴⁹¹ Jabar, *supra* note 365, p. 942.

⁴⁹² Ker-Lindsay, *supra* note 11, p. 22.

⁴⁹³ *ibid.*

⁴⁹⁴ *ibid.*

⁴⁹⁵ Ker-Lindsay, *supra* note 11, p. 22.

⁴⁹⁶ Krieger, *supra* note 21, preface.

⁴⁹⁷ Jaber, *supra* note 365, p. 941.

reference from state practice.⁴⁹⁸ It must therefore be determined that the right to *external* self-determination has not been established as a customary law. Nonetheless, the right remains highly relevant and thus prone to development, since secessionist movements are present today.

In conclusion, the remedial approach does not advocate secession as a general right; rather a right to be invoked when human rights violations and the denial of *internal* self-determination are present and no peaceful solutions are evident. The last condition has been proved to take place prior to the UDI. Other proposals of settlement and negotiations were found insufficient, which posed secession as the only remedy available, and the UDI provided a solution of last resort,⁴⁹⁹ since other initiatives failed. The UDI proved to conform to general principles of international law and the UN Charters art. 1(2) and 55, although the latter refers to a decolonization context, it stresses on peace and stability. It is thus arguable that if the UDI was predicted to increase tensions, then self-determination would be disregarded, as its objective would raise possibilities of conflicts between states.⁵⁰⁰ The UDI has proved to be endorsed by a large portion of the international community, since over 100 sovereign states have recognized Kosovo's independence.⁵⁰¹ This expresses that it was the solution to foster stability than instability in the international relations between states.

⁴⁹⁸ Military and Paramilitary Activities Nicaragua, (Nicaragua v. United States) Judgment, International Court of Justice, 27 June 1986, para. 207.

⁴⁹⁹ Written Statement by the Confederation of Switzerland, *supra* note 433, para. 68.

⁵⁰⁰ Cassese, *supra* note 7, p. 43.

⁵⁰¹ Kosovo Thanks You, *supra* note 313.

5. Conclusion

The development of the right to self-determination from decolonization to a contemporary international law context has been presented throughout the different sources of international instruments, soft law documents, and cases. The first assessment of self-determination was shown to be a political norm without legal weight in the Ålands Islands case. It was later introduced, as a legal principle in the UN Charter, which lays the legal framework of the international community, however was originally understood to be limited to promoting and developing independence in a decolonization context. While such efforts were rightfully legal, early concerns of *external* self-determination were voiced through the *travaux préparatoires* of the Charter and subsequently echoed through the following sources. It then further developed to a fundamental human right, as a treaty right applicable outside the context of decolonization in the ICCPR, in which the denial of self-determination would constitute a human right violation. The latter was recalled in the Friendly Relations Declaration and the VDMA, which stated that all states had a duty to refrain from any forcible actions depriving people of the right. The Declaration holds a clause, which included the relationship between territorial integrity and self-determination, wherein the latter is prioritized whenever a government is discriminatory. This *saving clause* was also interpreted and used as a legal reasoning for not granting Quebec the right to secession, as Canada fulfilled all the conditions, preventing the impairment of its territorial integrity. The soft documents, the Final Act and Copenhagen Document did not include conditions from which secession could be authorized, however encouraged states to guarantee their respective minority groups the right to *internal* self-determination. It is arguable that whenever *internal* self-determination is guaranteed, as evidenced by the cases, there is little incentive for minority groups to secede, and little ground from which the concerned group can claim a right to *external* self-determination.

The right to self-determination is nonetheless ambiguous on two accounts; firstly it is unclear in defining ‘a people’. This thesis has shown however that based on the characteristics provided by UNESCO and earlier UNGA resolutions, the Kosovo Albanians with distinctive features of ethnicity, language, culture and religion, can be classified as a people and be subjected to the right of self-determination. This is expressed through their mobilization as a people with their will to preserve their identity.

Secondly, the *external* aspect of self-determination in the form of secession is positioned as a neutral field within international law, and the possibility of invoking the right has been evaluated on individual merits in different cases. On this basis, the thesis has attempted to investigate whether other legal framework could provide for a right to *external* self-

determination. The presence of UNMIK and res. 1244 have been taken into consideration, to which it was interpreted that the resolution, despite its ambiguity, allows for a right to *internal* self-determination, without interfering or determining Kosovo's future political status. In this view, the right to *external* self-determination was neither prohibited nor authorized based on the ambiguous provisions on the political settlement of Kosovo's final status. The Serbian Constitution, which was applicable alongside res. 1244, did not provide either a right to self-determination, as earlier evidenced by the SFRY and State Union Constitution, nor any minority rights exclusively reserved or guaranteed for the Kosovo Albanian people. Moreover, The Advisory Opinion from the ICJ further assessed that the UDI was in conformity with general principles of international law, since no prohibition had developed to prevent people from declaring independence. In addition, the legal framework of res. 1244 had no definitive demands on Kosovo's future outside the interim political framework, and therefore the UDI was not found in contravention to the resolution either. However, had the use of force been utilized as a means to independence, the case would have been condemned on this basis, violating the prohibition of use of force, as evidenced in previous cases of such character. Therefore, despite the Serbian Constitution providing no right to self-determination or secession as well as UNMIK's silence on the political status, international law nonetheless recognized Kosovo's right to *internal* self-determination. It has been argued that the right of determining their external political status was partially endorsed, since the ICJ avoided assessing the legal consequences of the UDI, which would inevitably lead to independence. Thirdly, a settlement was proposed for Kosovo to gain attributes of statehood and thus independence, however rejected by Serbia, as it would impair with the territorial integrity of its sovereignty. Although the UNSC was ready to endorse the plan, but met resistance from Russia, a lack of positive law concerning the determination of *external* self-determination is still present.

Lastly, the thesis investigated the circumstances of Kosovo's claim to a right to *external* self-determination based on state practice and the remedial secession approach. This has been supplemented with earlier findings from international instruments in clarifying the conditions to evaluate Kosovo's claim to *external* self-determination in the form of secession. In this endeavor, the thesis investigated three conditions, firstly human rights violations, the denial of *internal* self-determination, and the last resort of secession after exhausting other means. Serbia, under the FRY, was concluded to be an unjust state based on the grave human rights violations from 1994 until NATO's interference in 1999, which constituted a physical attack on the existence of Kosovo Albanians, in the form practice of torture, killing, and ethnic

cleansing. The excessive use of force by the Serbian authorities further indicated both the lack and will to guarantee human and minority rights of the Kosovo Albanians. The denial of *internal* self-determination was also evident from the early termination of autonomy in Kosovo to discriminatory measures in the legislative, administrative and judiciary areas. Therefore, the FRY's territorial integrity has arguably been subjected to the *saving clause* from the Friendly Relations Declaration, wherein the territorial integrity of a state is only protected when it consists of a government that is representative and non-discriminatory. Thus, based on the documented human rights violations, and non-representation within the government of the FRY, it is established that a denial to *internal* self-determination was present. On the other hand, the *saving clause* presents some ambiguity, as its *travaux préparatoires* mainly did not intend to expand self-determination beyond that of internal arrangements, however other states, during the ICJ AO proceedings, have interpreted a possibility of a last resort to secession based on the same clause. The last condition of remedial secession has been highly debatable, as during the year of the UDI events were perceived to present circumstances different from the conflict in 1999. However, as Kosovo has been placed under the auspices of the UN since the FRY withdrew its forces, its political status became unexpectedly stagnated, until its declaration of independence. It has therefore been established that its claim to *external* self-determination was not merely a wish, but a delay of years of oppression and delay in a political settlement. The extensive negotiations between Serbia and Kosovo with different mediators, such as the Contract Group, the Troika Talks, and the UN Special Envoy Athisaari with prospects of a settlement, were found insufficient. This justified secession as the only *ubi jus ibi remedium* available, as provided through the UDI. The Athisaari Proposal, with expectation of endorsement within the UNSC, proved a willingness and acceptance of Kosovo's independence, as a last solution. This is argued in consideration of the possible consequences, as Kosovo's independence could foster more stability than anarchy. This has been the primary concern of *external* self-determination, from the Åland Islands to the drafting history of the UN Charter, wherein secession would dismember international security and peace. It is difficult to define the underlying intentions of the settlement proposal, whether it has been an acceptance of independence and secession by preventing further violations of *internal* self-determination and preserve stability, or if it was intended to accept the creation of a new state.

Nonetheless, in accordance to the remedial approach, Kosovo meets the threshold by presenting all of the preconditions in justifying its right to *external* self-determination in the form of secession. However, with secession applied predominantly outside a positive international law paradigm, *external* self-determination is yet to be more firmly and

consensually developed through *opinio juris* or integrated into a treaty right, before considered a right authorized under international law. That said, it has been evident that individual sovereign states, based on their interpretation of *external* self-determination, have managed the issue through their recognition of Kosovo as an independent state, on a political footing with legal reasoning, rather than exclusively legal. This is due to the continuous concern of endorsing and authorizing a right to *external* self-determination within the international community. This has explained the lack of integration into positive international law, and the necessity of excluding Kosovo as a precedent. However, without dismissing the willingness to endorse such a remedy, whenever a situation proves exceptional, as evidenced from the Åland Islands and Quebec case. It appears evident that the democratic elected representatives of Kosovo followed the recommendations of a unique solution, as the best settlement, which could foster international stability and peace. Despite Kosovo is defined as a special case, without creating precedent, it has demonstrated to other secessionist groups across the world that their wish, as a people, to determine their internal and external political status, is more a political rather than a legal question. Nevertheless, Kosovo's political status is still contested by the continuous lack of complete international recognition and therefore the need for further settlement between Belgrade and Pristina is necessary to truly secure its self-determination.

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