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Secession in Theory and Practice: the Case of Kosovo and Beyond

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Abstract

Since 17 February 2008 - the day of Kosovo's declaration of independence from Serbia - it has become rather pressing to understand whether this act has legal precedential value and hence what its consequences are. This article carves out the place of secession in international law by appeal to fundamental principles and legal doctrine. It also explores major socio-political aspects in Kosovo's history, from the battle of Kosovo Polje in 1389 to Security Council resolution 1244 (1999) that set up the United Nations Interim Administration Mission in Kosovo (UNMIK). By following these two analytical paths Kosovo is exposed as a case of remedial secession and thus as a potential legal precedent. While the elements of remedial secession are gathered, it is argued that states deprived this instance of practice of its precedential value and made it a legally insignificant act. In other words, the international community missed a rare opportunity to clarify the concept of remedial secession and to reassert its preventive force as a non-traditional human rights protection mechanism.

A. Introduction

> "It is quite obvious that such a development [the EU's recognition of Kosovo's independence] would create a serious negative precedent from the point of view of international law. It will be seen as a precedent by many people, perhaps far too many people, across the world."[1]

Imperfect as it may be, the focus of the global media may serve as an indicator of the priorities of the international community's agenda, not least in what concerns delicate legal issues. Since the mid 1990's, Kosovo[2] has been increasingly present in the international media. However, until 2007, news about its potential independence and the consequences thereof were at best sporadic. This situation changed radically in 2008 along with the developments on the ground. The concerns of some states – such as Russia,

1 Vladimir Chizhov, Ambassador of the Russian Federation to the European Union as quoted in 'Russia warns EU over Kosovo recognition', *Financial Times*, 7 February 2008.

2 *Kosovo* as opposed to Kosova will be used throughout the article since it is the term used in most English language publications.

which spearheads the group of countries rejecting an independent Kosovo without the consent of Belgrade, on the basis that it will set a legal precedent and fuel separatist movements worldwide – have been duly reflected by the press.[3] On the other hand, independent media analyses were put forward that, on their own volition, pointed to possible secessionist implications.[4] Not least, as one news title stresses, "breakaway territories watch and wait".[5] Leaving aside the sometimes inflated spirit of the media, the Kosovo precedent theory is of outmost interest in particular for the legal field at least since 17 February 2008, the date of Kosovo's declaration of independence from Serbia. And it remains in the limelight despite, or because of, the Advisory Opinion on the *Unilateral Declaration of Independence* handed down by the International Court of Justice (ICJ) in July 2010.[6] Questions related to whether a legal precedent has been created, as well as concerning the content and consequences of this possible precedent ought to be asked. As suggested by the introductory quote, the intensely championed idea is that the Kosovo precedent would revolutionize state creation by introducing a right to secession in international law. Against this background, the current article is an exploratory study on the place of Kosovo's secession in international law and its potential legal consequences for other secessionist movements. It attempts to put forward a lucid account of the legal implications of Kosovo's independence by exploring the international regulations on secession, as well as the circumstances which led to the case at hand.

3 For the Russian view on the consequences see 'Russia warns EU over Kosovo recognition', *The Financial Times*, 7 February 2008; for the Cypriot and Romanian view see 'Romania and Cyprus confirm opposition to Kosovo independence', *EUObserver.com*, 7 February 2008.

4 For the possible implications of the "Kosovo precedent" in the Balkans: 'Kosovo: Gerechte Grenzen sind nicht zu haben', Le Monde diplomatique (Swiss edition in Die Wochenzeitung), 15 January 2008; in East Asia: 'Whose problem is it?; Kosovo, China and Taiwan', *The International Herald Tribune*, 31 January 2008; in the former Soviet Union area: 'If Kosovo goes free; the independence precedent', *The Economist*, 29 November 2007; in other regions: 'Breakaway regions look to Kosovo precedent', *Reuters*, 9 December 2007.

5 'Breakaway territories watch and wait', *Financial Times Deutschland*, 25 January 2008. See also 'Kosovo's "inevitable" independence sets important precedent for Transdnistria', *The Tiraspol Times*, 31 January 2008.

6 *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, 22 July 2010, available at http://www.icj-cij.org/docket/files/141/15987.pdf (last visited 23 August 2010).

The study is constructed as a juxtaposition of theory and practice: an inquiry into the legal theory on secession and an analysis of state practice in the case of Kosovo. Intuitively one acknowledges that if secession were accommodated by international law as a legal modality of state creation, then the Kosovo case would not set a precedent as such and any further discussion in this direction would be redundant. Once the issue of the existence/non-existence of a right to secession is clarified, the socio-political underpinnings of Kosovo's independence can be analyzed. These research steps will subsequently permit an assessment of the potential legal precedent.

In international law, the notion of precedent has to be regarded within the wider framework of creation and change of customary international law. International custom as one of the sources of law[7] has two constitutive elements: state practice and *opinio iuris*. The latter refers to states acting out of a sense of legal obligation, "as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[8] This element permits the distinction between norms and other rules of behavior,[9] or otherwise put "the role of *opinio iuris* […] is simply to identify which acts out of many have legal consequence"[10]. What becomes evident and salient for the current study is that there are different types of acts performed by states, not all having relevance in the formation of international custom or, in other words, not all having precedential value. In the *North Sea Continental Shelf* judgment, while recalling cases in which continental shelf boundaries have been delimitated according to the

7 Article 38 of the Statute of the International Court of Justice identifies the sources of international law: "a. international conventions […]; b. international custom, as evidence of a general practice accepted as law; c. general principles of law […]; d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations […]", Statute of the International Court of Justice, 26 June 1949, 33 U.N.T.S. 993.

8 *North Sea Continental Shelf Cases (Germany v. Netherlands), Judgment, ICJ Reports 1969*, 3, 44, para. 77 [*North Sea Continental Shelf*].

9 R. Bernhardt, 'Customary international law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law, Volume I* (1992), 898, 899. See also T. Treves, 'Customary International Law', *Max Planck Encyclopedia of Public Internationl Law* (last updated November 2006), paras 11-13, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690e1393&recno=1&author=Treves%20%20Tullio (last visited 24 August 2010).

10 A. D'Amato, 'Trashing Customary International Law', 81 *American Journal of International Law (1987)* 1, 77, 102.

equidistance principle, the International Court of Justice concludes that there are several grounds that deprive those acts of weight as precedents.[11] Anthony D'Amato refers to those acts that can create or change customary law as "articulated precedential situations". The term "articulated" implies that the state's act is not merely a behavioral panache, i.e. habit, comity, courtesy, expediency, moral requirements, but a legally significant act.[12] If other states accept an action that is inconsistent with established and generally accepted practice then "the action enters into the flow of authoritative precedent giving rise to a new practice which is generally accepted"[13]. Similarly in the *Military and Paramilitary Activities* decision, the ICJ found that "reliance by a State on a novel right or an unprecedented exception to the principle right, if shared in principle by other States, tend towards a modification of customary international law"[14]. Consent expressed by all states of the international arena, while theoretically possible, is highly unlikely. Therefore, acquiescence – i.e. silence or absence of protest in circumstances which demand a positive reaction[15] – and protest, understood as a form of communication from one subject of international law to another objecting to conduct by the latter as being contrary to international law,[16] particularly coming from specially affected States are essential acts.

B. Theory: Secession in International Law

> "Not surprisingly, existing States have shown themselves to be "allergic" to the concept of secession at all times."[17]

11 *North Sea Continental Shelf*, *supra* note 8, para. 77.

12 A. D'Amato, *The Concept of Custom in International Law* (1971), 105, 76, 174.

13 O. Schachter, *International Law in Theory and Practice* (1991), 23, 27.

14 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The United States of America), Merits, Judgment*, ICJ Reports 1986, 14, 62, para.109 [*Military and Paramilitary Activities*].

15 C. Parry *et al*., *Encyclopedic Dictionary of International Law* (1986), 4-5.

16 W. Karl, 'Protest', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume III (1997), 1157.

17 M. Kohen, 'Introduction', in M. Kohen (ed.), *Secession. International Law Perspectives* (2006), 1, 3.

I. Defining Secession

A starting point for any attempt to find *the* definition of secession is the recourse to the two Vienna Conventions which deal with state succession, as one would normally expect these documents to mention and explain the classification of state creation. Unsurprisingly for some observers, the Conventions are (symbolically) silent on the topic of secession: the preferred formula "separation of parts of a State" does not distinguish between a separation made with or without the accord of the predecessor state.[18] The concept of secession is not an object of agreement among the legal scholarship, with different authors interpreting the boundaries of the notion in a broader or narrower sense. There are significant implications of this lack of uniformity: whereas according to one definition a case is considered as secession, according to a narrower understanding the same case can be regarded as dissolution.[19] In the context of state succession, Matthew Craven discusses the problematic aspects of the lack of doctrinal consensus on the "schemata of principles to be applied" which in turn is translated in dissimilar taxonomies. In other words, the definition of secession is dependent on the chosen ordering principle, mutual consent or the issue of personality.[20]

In line with the above, three streams of interpretation of the meaning of secession, differentiated by certain particularities, are prevalent in literature. Julie Dahlitz proposed that "[t]he issue of secession arises whenever a significant proportion of the population of a given territory, being part of a State, expresses the wish by word or by deed to become a sovereign State in itself or to join with and become part of another sovereign

[18] Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978 Art. 34, 1946 UNTS 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983, Art. 17, 30, 40, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (last visited 25 August 2010); M. Kohen, 'La création d'Etats en droit international contemporain', in J. Cardona Llorens (ed.), *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Volume VI (2002), 590.

[19] To illustrate the dilemma, appeal to the case of SFRY will be made. Some authors consider the independence of the Yugoslav republics to represent instances of secession, given that they broke away from Yugoslavia. According to the definition employed in this paper the independence of the republics is the result of Yugoslavia's dissolution. The issue of consent is essential; it was Serbia that did not give its consent to the independence, however Serbia was not the parent state, but the SFRY.

[20] M.C.R. Craven, 'The Problem of State Succession and the Identity of States in International Law', 9 *European Journal of International Law* (1998) 1, 142, 146-147.

State."[21] In the view of James Crawford "[s]ecession is the creation of a State by the use or threat to use force without the consent of the former sovereign"[22], whereas Marcelo Kohen sees secession as

> "the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter. […] [also] in order to be incorporated as part of another State"[23].

The latter definition, while reducing the scope of Dahlitz' proposal, brings with it a critical element – the lack of consent of the predecessor state. The import of this particular aspect lies in its profound resonance with practice. It is the lack of consent of the parent state that makes secession such a disputed topic in international law; it is this factor that gives rise to disputes between the predecessor and the newly independent entity, that compels the latter to look for legal justifications for its creation "elsewhere"[24] and hence, it is this that generates the precedent hysteria. The lack of consent, as was pointed out, *can* spark violent disputes, thus it appears that Crawford's qualification – that secession ought to *necessarily* involve the threat or use of force on the part of the seceding entity – is a rather double restrictive element.

Yet another aspect concerning the definitional scope must be clarified. Some authors regard the decolonization process as instances of secession.[25] Martti Koskenniemi, referring to decolonization, asserts that "as a matter of international law, secessionism could explain itself as compliance – and opposing it as an international crime or possibly a breach of a peremptory norm of international law".[26] Arguably, this could be an interpretation of Art. 19.3.b. of the Draft Articles on State Responsibility as these have been adopted by the International Law Commission on first reading in 1980, i.e. "an international crime may result, inter alia, from … a serious breach of an international obligation of essential importance for

21 J. Dahlitz, 'Introduction' in J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (2003), 6.

22 J. Crawford, *The Creation of States in International Law*, 2nd ed. (2006), 375.

23 M. Kohen, *supra* note 17, 3.

24 *Id*.

25 See J. Crawford, *supra* note 22, 384.

26 M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 42 *International and Comparative Law Quarterly* (1994) 2, 241.

safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination."[27]

Rosalyn Higgins offers an opposing view to the one above, with an argumentation path that echoes the etymological roots of the word secession – the Latin verb *secedere*, *se* meaning "apart" and *cedere* "to go", hence the meaning to withdraw.[28] Thus, decolonization did by no means imply that the people "withdraw" their territory, but that the colonial rulers were the ones who had to leave. Another persuasive argument builds on the Friendly Relations Declaration, which states that "[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it"[29]. The discussion cannot be framed in terms of separation of territories given the existence of distinct and separate territories.

To equate the process of decolonization with a long series of secessions would in fact imply that there is consistent state practice that admits secession as a legal means of creating new states, which evidently would be of outmost relevance for the study at hand. Nevertheless, as pointed out above, such an understanding of the decolonization process is rather exceptional in legal doctrine and major legal texts appear to speak against it.

[27] Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, January 1997, Art. 19(3)(b), at 105, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf (last visited 20 August 2010). As is well known the term "international crime" did not make it in the 2001 Draft Articles adopted by the International Law Commission. Nonetheless, the term has resonance in Article 40 and 41 of the of the 2001 version. Again, it should be underlined that the term secession does not appear in either version of the Draft Articles. See specifically footnote 651 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at 113, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 25 August 2010).

[28] R. Higgins, "Self-Determination and Secession", in J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (2003), 21, 35.

[29] GA Res. 2625 (XXV), 24 October 1970 [Friendly Relations Declaration]; Kohen, *supra* note 18, 590.

II. Secession and Fundamental Principles of International Law

A potential right to secession cannot exist in a legal vacuum; therefore it is only reasonable to assume a certain interconnectivity with general principles of international law.

1. The Principle of Self-Determination

Self-determination matured throughout the last three centuries: from the seeds planted by the Declaration of Independence of the United States of America in 1776, to the principle heralded by nationalist movements during the 19th and early 20th century[30], to the principle enshrined in Article 1(2) and 55 of the UN Charter, and to the right of "all peoples" stipulated by Article 1 common to the International Covenants, and finally to a right giving rise to an obligation *erga omnes* as authoritatively interpreted by the ICJ in the *East Timor* judgment.[31] Subsequently, in *The Wall* opinion, the Court adopted the "post-colonial view of self-determination", which does not restrict the application of this right to a historic period but looks beyond colonialism.[32]

The central question for the purpose of the current research is whether self-determination and secession cover the same content. One author notes the tendency throughout history to condemn secession whereas self-determination has gained sympathy, implying further that the difference between the two is a difference in name.[33] However, not all exercises of self-determination involve territorial change. In fact, to *non-avisées* it is rather the internal aspect of self-determination, i.e. the right of the peoples to determine their political status and pursue their economic, social and

30 See D. Thürer & T. Burri, 'Self-determination' in *Max Planck Encyclopedia of Public International Law* (last updated December 2008), paras 1-4, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e873&recno=3&author=Thürer%20%20Daniel (last visited 25 August 2010).

31 *East Timor (Portugal v. Australia), Judgment*, ICJ Reports 1995, 90, 101, para. 29.

32 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Higgins, Advisory Opinion, ICJ Reports 2004, 207, 214, paras 28-30.

33 L.B. Serapiao, 'International Law and Self-determination: The Case of Eritrea', 15 *Issue: A Journal of Opinion* (1987), 3.

cultural development that is spelled out in the International Covenants.[34] The Covenants and the General Comment 12 of the Human Rights Committee on the implementation of the right do not explicitly enunciate the external component of self-determination. Nonetheless, the Committee[35] makes unequivocal reference to the consensually adopted Friendly Relations Declaration, which indeed lists "establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people" as modalities of implementing the right to self-determination.[36] Accordingly, the external feature amounts to the freedom of the peoples to decide their international status, which in turn includes the option for independent statehood.

One of the crucial aspects of determining the applicability of the right to self-determination lies in the long debated concept of peoples. The subject of the right to self-determination is notoriously undefined in the same documents that proclaim it. It has been UN practice that relied on territorial entities with a historical or administrative background, thus favoring the formula "un Etat=un peuple".[37] Marcelo Kohen concludes that based on this practice "c'est le territoire qui définit le peuple et non le contraire."[38] According to this, clearly the first to be recognized as peoples are the peoples of states. And in this context the principle of self-determination does not play the revolutionary role so often attributed to it, but contributes to the legitimation of the principles of sovereign equality and non-intervention.[39] As the Human Rights Committee put it, "States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination"[40].

34 International Covenant on Civil and Political Rights, 19. December 1966, Art.1, 999 U.N.T.S. 171, 173 and International Covenant on Economic, Social and Cultural Rights, 19. December 1966, Art.1, 993 U.N.T.S. 3, 5.

35 General Comments Adopted by the Human Rights Committee, No. 12 – The Right To Self-Determination (art. 1) [1984], 134, para. 4, UN Doc HRI/GEN/1/Rev.6 [General Comment No.12].

36 Friendly Relations Declaration, *supra* note 29.

37 G. Alfredsson, 'The Right of Self-determination and Indigenous Peoples' in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 41, 46.

38 M. Kohen, *supra* note 18, 585.

39 J. Summers, *Peoples and International Law. How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2007), 167-170.

40 General Comment No.12, *supra* note 35, 135, para. 6.

Operationalizing further the concept of peoples gives one incontestable subject: colonial people. As Daniel Thürer and Thomas Burri point out based on the jurisprudence of the ICJ "[s]elf-determination […] clearly emerged as the legal foundation of the law of decolonization"[41]. Yet, another widely employed category in UN practice are peoples under foreign or alien domination. Although this latter category might seem clear-cut, once particular cases are being discussed it becomes obvious that consensus falls prey to politics.[42] Be that as it may, it would be incorrect to equate a right to independent statehood of peoples under colonial regime or foreign occupation with the right to secession. As was pointed out earlier, the peoples in question are not breaking away or separating their territory, but it is the colonial power or the occupier that is to leave, which in turn means that not all exercises of external self-determination are acts of secession. In conclusion, it appears that a potential right of secession resulting from the right to self-determination would apply only to people outside the decolonization and occupation contexts.

An example of people outside the decolonization and occupation settings which enjoy the right to self-determination and (sometimes) expressly to secession are people recognized by states as existing within themselves. Some states, albeit few, chose to recognize in their constitutive acts peoples, their explicit right to self-determination and even to secession. Article 39 of the Ethiopian Constitution explicitly reunites all the mentioned elements.[43] Following the model of the Soviet Constitution, the constitutive law of Russia recognizes in its preamble and Article 5 (3) peoples with a right to self-determination "in the Russian Federation".[44] Famously, the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (SFRY) recognized the right of its "nations" to self-determination, which includes

41 D.Thürer & T.Burri, *supra* note 30, para. 15. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 31, para. 52; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, 31, paras 54–59.

42 Summers, *supra* note 39, 169-171.

43 See the Constitution of the Federal Democratic Republic of Ethiopia, Art. 39, available at http://www.erta.gov.et/pdf/Constitution.pdf (last visited 25 August 2010).

44 Arguably, the qualification 'in the Russian Federation' circumscribes the right to self-determination to its internal aspect, this interpretation however is not evidenced by the provisions in the preamble. Constitution of the Russian Federation, available at http://www.constitution.ru/en/10003000-01.htm (last visited 25 August 2010).

also the right to secession.[45] Bosnia and Herzegovina proclaims "Bosnian, Croats and Serbs as constituent peoples (along with others)"[46]. Such recognition could be interpreted as evidence for a shift from the purely territorial definition towards one that accepts nationality or ethnicity as differentiation factors.[47]

The recently adopted UN Declaration on the Rights of Indigenous People could be said to prove that international law has moved away from the enunciated territorial formula. The Declaration proclaims the right to self-determination of indigenous peoples, however, proceeds by apparently restricting it to the internal component, i.e. "autonomy or self-government".[48] Despite this clear restriction, several states with considerable indigenous populations cautiously rejected the document based on "language on self-determination".[49]

2. International Human Rights and Remedial Secession

The conceptual journey of peoples does not end here. Much rather it resembles an odyssey, given, some argue,[50] the different theoretical lenses one can choose to look at the concept. The ongoing debate revolves around whether cultural minorities[51] have in certain conditions the right to self-

45 The Constitution of the Socialist Federal Republic of Yugoslavia, Extracts, 1974, in H. Krieger (ed.), *The Kosovo Conflict and International Law* (2001), 2.

46 Constitution of Bosnia and Herzegovina, Preamble, available at http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf (last visited 25 August 2010).

47 On the contrary Marcelo Kohen asserts that the recognition by states of their multinational character amounts to "[l]'exception qui confirme la règle', Kohen, *supra* note 18, 586.

48 GA Res. 61/295, 2 October 2007, Art 3, 4.

49 UN Department of Public Information, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President', available at http://www.un.org/News/Press/docs/2007/ga10612.doc.htm (last visited 25 August 2010).

50 Natural law and positivist viewpoints are discussed in R. Lefeber & M. Zieck, 'Africa: Lost between Self-determination and *Uti Possidetis*', in C. Brölmann, R. Lefeber & M. Zieck (eds), *Peoples and Minorities in International Law* (1993), 37, 53-54; A. Falk, 'The Coherence of Doctrine Versus the Incoherence of Experience' in W. Danspeckgruber & A. Watts (eds), *Self-Determination and Self-Administration: A Sourcebook* (1997), 55.

51 Cultural minority, cultural group or minority are used interchangeably throughout this article and are taken to mean: a group which is numerically inferior to the rest of the

determination, including to the external aspect of self-determination that is secession. There have been constant attempts to redefine peoples in non-territorial terms,[52] however, as Aureliu Cristescu confirms in his comprehensive study on UN practice, these attempts have not been embraced by states. Hence, in his words: "Le peuple ne se confond pas avec les minorités ethniques, religieuses ou linguistique."[53] In a recent assessment, James Summers notes that "the lack of any positive intention to extend self-determination to minorities, at least in a form that includes secession" is evident from both the drafting of legal instruments and state practice.[54] Positivists rightly argue that state practice is scarce and conventional legal texts are silent on minorities becoming peoples.[55]

While admitting the above, proponents of remedial secession build on the momentum of international human rights law and attempt to bridge a gap in the legal provisions. As Christian Tomuschat asserts in a powerful argument: "States are no more sacrosanct. […] [T]hey have a specific *raison d'être*. If they fail to live up to their essential commitments they begin to lose their legitimacy and thus even their very existence can be called into question."[56] In other words, respect for human rights has become a pillar-principle of today's world, in addition to the principles of sovereignty and non-intervention in the affairs of other states. And it is this general principle that gradually emerged which prohibits gross and large-scale violations of human rights and fundamental freedoms.[57] In this (modern) context, if a state excludes or persecutes parts of its population, then that population might legitimately secede to form a more representative government.[58] Remedial secession sets a high threshold for those groups

population of a State, in a non-dominant position, whose members posses ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who maintain a sense of solidarity if only implicitly, directed towards preserving their culture, traditions, religion and language. F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), 102, para. 568.

52 A. Cristescu, *Le droit à l'autodétermination: développement historique et actuel sur la base des instruments des Nations Unies* (1981), 37, para. 271; C. Tomuschat, 'Self-Determination in a Post-Colonial World', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 16.

53 A. Cristescu, *supra* note 52, 38, para. 279.

54 J. Summers, *supra* note 39, 333.

55 See C. Tomuschat, 'Secession and self-determination', in M.G. Kohen (ed.), *Secession. International Law Perspectives* (2006), 23, 35-36.

56 C. Tomuschat, *supra* note 38, 9..

57 A. Cassese, *International Law*, 2nd ed. (2005), 59.

58 J. Summers, *supra* note 39, 343-344.

invoking the right to secession, since the human rights violations perpetrated by the state in discriminatory fashion against the specific group must be "grave and massive"[59]. Consequently, the criterion for acknowledging this right is not the mere existence of a people in cultural terms, but the existence of grave and massive violations of the human rights of such a people. Moreover, remedial secession is an exceptional solution of last resort which can be called upon only after all realistic and effective remedies for the peaceful settlement have been exhausted.[60] Yet, other authors add to these the necessity for the cultural group to be concentrated and majoritarian on the territory for which it seeks secession.[61]

It would appear that what is ultimately proposed by advocates of remedial secession – either explicitly or implicitly – is that a cultural minority becomes a people only when the high threshold of human rights abuse has been reached and when no other remedies are available. By becoming a people the right to self-determination is triggered, including in its external aspect, thus giving rise to the right to secession. Ultimately, the term "remedial" in the context of secession implies a remedy for grave and massive human rights wrongs, a correction by way of state creation at a center of which is a cultural minority turned people.

The high threshold of human rights abuse, the last remedy conditionality, as well as other characteristics that the cultural group ought to fulfill appear to narrow the scope of remedial secession to very few, if not singular, cases. In the end, not the implosion of the international system by a wave of secessionist movements is envisaged, but a remedy for situations, which by their existence can endanger peace and security. In fact, Lee Buchheit, who coined the term remedial secession, regards it as a conservative doctrine geared to protect the state-centered order. It is in the

59 The example given by Tomuschat is that of genocide. C. Tomuschat, *supra* note 52, 9. Hannum sees only those 'rare circumstance when the physical existence of a territorially concentrated group is threatened by gross violations of fundamental human rights' as giving rise to remedial secession, H. Hannum, 'Rethinking Self-Determination', 34 *Virginia Journal of International Law* (1993) 1, 46-47.

60 D. Thürer, 'Self-determination', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 371; J. Dugard & D. Raič, 'The role of Recognition in the law and practice of secession' in M.G. Kohen, (ed.) *Secession. International Law Perspectives* (2006), 109.

61 D. Murswiek, 'The Issue of A Right of Secession-Reconsidered', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 27; T. Christakis, *Le droit à l'autodétermination en dehors des situation de décolonisation* (1999), 315.

power of the states not to let the situation reach the threshold and hence avoid opening the door to remedial secession.[62]

It goes without saying that the different streams of thought that argue that cultural nations must become political states, would *a priori* raise objections to remedial secession.[63] Certainly, remedial secession can be subjected to many moral and factual challenges. It does introduce a double standard in recognizing the existence of a people and it does not offer a remedy to minority groups which experience discrimination short of massive and grave. It may involve tremendous human costs and does not offer a certain solution for peaceful coexistence and stability once the secession is consummate.[64] In legal doctrine, however, it is not these caveats that are central to the dispute; the unwillingness to accommodate remedial secession is rather based on its presumed failure to pass the legal scrutiny test.

The safeguard clause of the Friendly Relations Declaration is regarded as the starting point for inferring the right to remedial secession:

"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[65]

The first part of the text appears to represent a rejection of secession, while the second section comes to condition the rejection by the existence of a representative government. Arguments against implying a right to secession from the Friendly Relations Declaration stress upon the contextuality of the safeguard clause, i.e. the paragraph requiring representation has been envisaged against the South African and Southern

62 L. C. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978), 222-223.

63 André Liebich classifies these argumentation paths in definitional, causal or functional and moral, A. Liebich, 'Must Nations Become States?', 31 *Nationalities Papers* (2003) 4, 453-469.

64 N. Sambanis, 'Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature', 52 *World Politics* (2000), 4, 437-483; S. Kalyvas, *The Logic of Violence in Civil War* (2006), 330-363.

65 Friendly Relations Declaration, *supra* note 29.

Rhodesian racist regimes.[66] Nonetheless, as the apartheid regime in South Africa was dismantling, in 1993, the UN World Conference on Human Rights included in its Vienna Declaration a very similar phrase,[67] the same example was followed by the GA Declaration with the occasion of the fiftieth anniversary of the UN in 1995.[68] Against this background, the validity of the contextuality thesis can be questioned.

Even admitting that remedial secession can be implied from the above documents it remains a fact that all of them amount to soft law.[69] In the eyes of some scholars, the non-binding legal character makes them short of law proper, hence at best a shaky ground for the remedial secession theory. Consensual adoption, corroborated with the principle of *bona fide* – of which the states were surely aware while agreeing to the texts – have to amount to more than uncertain grounds. Discounting this would equate with assuming that states did not express disagreement, however did not intend to follow the letter of the declarations either, therefore acted in bad faith.

Another line of thought insists on the temporary character of a government that pursues discriminatory policies. Hence, a radical solution, remedial secession, would be chosen to resolve a provisional situation, while the struggle for restoration of human rights would be more appropriate.[70] Resort to economic and political sanctions by the international community is also regarded as the less legally controversial means to determine governments to stop abuses.[71] Indeed an interesting argumentation path. Nevertheless, at least since Einstein's discovery, one would have to acknowledge that time is relative. The temporary character of a regime committing extreme abuses against part of its population seen

66 M. Kohen, *supra* note 17, 10.

67 "In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.", Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23, 12 July 1993.

68 GA Res. 50/6, 24 October 1995.

69 C. Tomuschat, *supra* note 55, 35-36.

70 M. Kohen, *supra* note 17, 11.

71 G. Welhengama, *Minorities' Claims: From Autonomy To Secession, International Law And State Practice* (2000), 246-247.

through the eyes of that particular group might not look that temporary after all, and this image might linger beyond the actual taking place of the abuse. Indeed, psychological and sociological factors may at times step in to complicate situations. Even after a perpetrator seized to be a perpetrator, it tends to be difficult for a victim to peacefully live and strive alongside its former abuser. The second suggestion, which relies on the international community willingness or, as coined more recently by UN language, responsibility to protect, is obviously preferable to remedial secession. Besides experience which comes to contradict that this option is always validated – either because the world community fails to act or because its actions have no impact on the perpetrator government – such a path places the already massively and grave oppressed group in the position of a *dependent* victim.

Perhaps best to summarize the discussion regarding the *de lege lata vs. de lege feranda* status of remedial secession is by reference to the findings of the Supreme Court of Canada: "it remains unclear whether this […] actually reflects an established international law standard".[72] With the risk of emitting truisms, this section concludes that the legal concept of people as subject of the right to self-determination – with its internal and external components – remains a social construction and hence its boundaries continue to be fluid, regardless of the apparent present preference for a purely territorial formula.

3. Sovereignty and Its Corollary Principles

As Helmut Steinberger asserts, "[t]he history of the notion of sovereignty in international law is almost identical with the full-scale history of international law itself."[73] The principle of sovereignty has become the backbone of the world system; respect for territorial integrity and non-intervention in the affairs of other states, as corollary principles, are tenets of the Westphalian Model designed to sanction and safeguard the status quo in this system.[74] The prohibition on the threat or use of force, on the other hand, belongs to the new conceptual developments prompted by

[72] Supreme Court of Canada, Reference re Secession of Quebec, [1998], 2 S.C.R. 217, 75, available at http://www.canlii.org/en/ca/scc/doc/ 1998/1998c anlii793/199 8can lii793 .pdf (last visited 25. August 2010).

[73] H. Steinberger, 'Sovereignty' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 500, 501.

[74] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), 333.

the devastation of the two World Wars; it gained its status as fundamental principle of international law through its proclamation in Art. 2(4) of the UN Charter.

Territorial integrity refers to the material elements of a state, the physical and demographic resources that lie within the frontiers of the state.[75] It is beyond question that this principle applies generally in inter-state relations, and hence it represents a guarantee "contre tout démembrement du territoire".[76] The question in the context of secession is whether a secessionist movement, as a non-state actor, is equally bound by this principle.

A differentiation has to be made here based on the character of the secessionist movement, i.e. whether the entity seeking secession is a people or not. As was discussed earlier, a people – subject to its recognition as such by the international community – has the right to internal and external self-determination and therefore respect for territorial integrity would not be opposable to it. On the contrary, the territory for which people seek independent statehood cannot be dismembered, by, for example, the former colonial power.[77] In the latter case, Olivier Corten discerns from current practice an oscillation between a traditional neutral approach towards secession and developments condemning the breach of territorial integrity by secessionist movements.[78] Traditionally, international law is said to be "legally neutral" to secession, envisaging the modus operandi "ni autorisée, ni interdite".[79] Since secessionist groups are not regarded as subjects of international law, international regulations on the issue of territorial integrity are not extended to them. The second tendency is to oppose to (violent) secessionist movements the respect for the principle of territorial integrity.[80] By virtue of this development, the neutrality of international law

75 C. Haverland, 'Territorial integrity and political independence', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (2000), 813.

76 M. Kohen, *supra* note 18, 579.

77 Friendly Relations Declaration, *supra* note 29. For example, in the context of Mauritius' exercise of its right to self-determination, the General Assembly "*[i]nvites* the Administering Power [the United Kingdom] to take no action which would dismember the Territory of Mauritius and violate its territorial integrity." GA Res. 2066 (XX), 16 December 1965.

78 O. Corten, 'Are There Gaps in the International Law of Secession', in M.G. Kohen (ed.), *Secession. International Law Perspectives* (2006), 231, 232.

79 *Id*.; See also J. Crawford, *supra* note 22, 390.

80 O. Corten, *supra* note 78, 231; See for example for a very strong statement in the context of the Abkhazia – Georgia conflict SC Res. 876, 19. October1993.

in respect to secession appears to be challenged, rather an interdiction of secession could be inferred. It remains to be seen whether this trend will develop in opposition to the clear statement by the ICJ in its Advisory Opinion on the *Unilateral Declaration of Independence* which clearly confines the scope of the principle of territorial integrity to the "sphere of relations between states".[81]

The principle of non-intervention in the affairs of other states, as it has been postulated by the ICJ, in a positive definition, involves "the right of every sovereign State to conduct its affairs without outside interference".[82] The principle of non-use of force enshrined in Article 2(4) of the UN Charter prohibits states from using or threatening to use force in the conduct of their international relations. Collective enforcement measures (Chapter VII), individual and collective self-defense (Article 51), enforcement measures by regional agencies with the authorization of the Security Council (Chapter VIII) and Articles 106 and 107 on former "enemy states" are the exceptions to the prohibition on the use of force.

In the context of the present discussion on secession, again, a distinction has to be made between peoples that exercise their right to self-determination and movements that are not recognized as having such a right. In the latter case, states are bound to abstain from giving any kind of support to such entities.[83] If the actions of the secessionist movement involve the threat or use of force, the assisting state would be in breach of both the principle of non-intervention and the prohibition on the use of force.[84] Article 16 on "aid and assistance in the commission of wrongful acts" of the ILC Draft Articles refers to situations between two states, and thus may arguably not be applicable to a situation in which a state is complicit in violations committed by a non-state entity such a secessionist

81 In the opinion of this author the statist position of the ICJ and its wide scope contrasts strongly with the increased awareness among the members of the international community in respect to the relevance of non-state actors and the importance of bringing them under the realm of norms. *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, *supra* note 6, para. 80.

82 Case Concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. USA)*, Merits, ICJ Reports 1986, 14, 106, para. 202 [Military and Paramilitary Acitivites].

83 A. Cassese, *supra* note 57, 53.

84 Friendly Relations Declaration, *supra* note 29; *Military and Paramilitary Activities*, *supra* note 82.

movement.[85] However, in the *Genocide Convention Case*, the ICJ resorted to the complicity test entailed by Article 16 to inquire whether Serbia and Montenegro aided and assisted the Republika Srpska – a non-state entity – in the commission of the Srebrenica genocide.[86] With Northern Cyprus as *res ipsa loquitur* example, it is argued more generally, that a shift from the *laissez faire* doctrine or neutrality of international law in respect to secession towards the principle of legality is at stake.[87] In other words, the conformity of newly created states with the existent legal order – among which the principles of non-intervention and non-use of force – is required, whereas solely effectiveness[88] becomes insufficient.

The case of peoples exercising their right to self-determination depicts a threefold relation informed by the principles of non-intervention and non-use of force. The first refers to the relation between a people seeking independent statehood in the view of its right to self-determination and the state against which it is opposing the claim. The state "has the duty to refrain from any forcible action" against the people;[89] if the state fails to respect this obligation the situation amounts to a particular case of self-defense, hence the people is granted "a legal license" to use force.[90] This however is not to say that the peoples have the right to use forcible means to exercise their right to self-determination, which indeed remains debated

85 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), available at http://untreaty.un.org/ilc/texts/instrum ents/english /commentaries/9_6_2001.pdf (last visited 25 August 2010), 65-67.

86 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections* (Yugoslavia *v.* Bosnia and Herzegovina), 2007, paras 420-424.

87 T. Christakis, *supra* note 61, 137-138; M. Kohen, *supra* note 18, 629-631; G. Nolte, 'Secession and external intervention', in M.G. Kohen (ed.), *Secession. International Law Perspectives* (2006), 65, 78, 93.

88 The principle of effectiveness is "le principe selon lequel une entité qui réussit à réunir les trois éléments constitutifs de l'Etat [population, sise sur un territoire déterminé et dotée d'un gouvernement effectif et stable] accède au statut d'Etat et a donc droit à la protection que le droit international accorde à ce statut." T. Christakis, 'The State as a 'primary fact': some thoughts on the principle of effectiveness', in M. Kohen (ed.), *supra* note 17, 140, 143; C. Warbick, 'States and Recognition in International Law', in M.D. Evans, *International* Law, Second Edition, (2006), 231-240.

89 GA Res. 2625 (XXV), 24 October 1970 [Friendly Relations Declaration]. Again, also here, the concept of complicity might be of relevance if a state is complicit in the denial by another state of the right to self-determination of a people. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *supra* note 85, 65-67.

90 A. Cassese, *supra* note 57, 63; M. Kohen, *supra* note 18, 582.

among states and the doctrine.[91] From the Friendly Relations Declaration it is clear that third states are also duty-bound not to assist the state denying self-determination. Moreover, the peoples are legally entitled to receive from third states assistance "in accordance with the purposes and principles of the Charter."[92] In the view of some of the scholars, the phrase is to be interpreted as aid short of military support. Nonetheless, military assistance or armed intervention by a third state on behalf of a people remains controversial and probably the major stumble block for agreement over the crime of aggression and the Comprehensive Convention on Terrorism.[93]

The tension between sovereignty and corollary principles on one hand, and secession on the other is notorious. On a continuum of significations the relation is depicted as irreconcilable, necessary in order to sustain an un-chaotic world or compatible. Context, however, is the key element in explaining all the attributed significations, as has been shown in the previous sections.

III. An Intermezzo: On State Practice and Secession

The current chapter on the theory of secession was introduced by a citation emphasizing the allergy of states towards the concept of secession. The quote could as well be employed to describe the behavior of states, or state practice, towards secession. Beyond the decolonization and occupation contexts – which, as has been underlined, cannot serve as evidence of secession[94] – state practice very rarely sanctions instances of secession.[95]

For example, the new states created after the demise of the Soviet Union in the early 1990s were, allegedly, a result of dissolution not of secession. It is noteworthy that recognition and membership to the UN had been considered only after the Soviet Government recognized the "new"

91 Summers, *supra* note 39, 375-376.

92 Friendly Relations Declaration, *supra* note 89.

93 Cassese, *supra* note 57, 63; Summers, *supra* note 39, 376-379.

94 For the case of Eritrea belonging to the decolonization setting see F. Ouguergouz & D. L. Tehindraznarivelo, 'The Question of Secession in Africa', in M. G. Kohen (ed.), *supra* note 17, 266-267; in respect to East Timor see Tomuschat, *supra* note 55, at 34. For another interpretation of the two cases see Kohen, *supra* note 17, at 19-20.

95 See discussion in Crawford, *supra* note 22, 391. See also C.J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia', 10 *Chicago Journal of International Law* (2009) 1, 9-10, see in particular footnote 28.

republics.[96] In the case of Yugoslavia, it became generally accepted that the process at stake was one of dissolution, and not one of successive secessions. The Badinter Commission even announced the finality of the process of dissolution in its Opinion no. 8 and UN membership was granted to the former republics only after the SFRY renounced any territorial claims over them.[97] Lastly then, one should recall the case of Bangladesh. The break-away of the former East Pakistan from Pakistan in 1971 is proclaimed by some as a successful case of remedial secession.[98] However, others doubt the entrance of Bangladesh in the community of states via the remedial secession route and point much rather to the *fait accompli* theory corroborated with the renunciation of title over the territory by Pakistan in 1974.[99] What speaks for this interpretation is state practice, or absence thereof if one wishes, since the international community remained silent on the issue of self-determination in the case of Bangladesh.[100]

Drawing on the work of James Crawford, one author asserts, "for a secession claim to be considered legal, State practice tends to emphasize consent of the parties involved as a necessary condition"[101]. This interpretation however seems to regard recognition as an equivalent to a claim of legality, while this might not hold true implicitly. For example, recognition can be lawfully granted when the recognizing state is merely convinced that the seceding state is not in violation of international law, which in turn does not automatically mean that there is a right to secession of that state but only a lack of an express prohibition. The ICJ appears to offer a similar interpretation when it argues that

"the illegality attached to the declarations of independence [by the Security Council] thus stemmed not from the unilateral character of these

96 C. Tomuschat, *supra* note 55, at 30-31. J. Crawford, *supra* note 22, 394. In the case of the Baltic republics which suffered Soviet illegal occupation since the 1940s, the decolonization and occupation framework ought to be applied.

97 Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No. 8, July 4, 1992; See also D. Fierstein, 'Kosovo's Declaration Of Independence: An Incident Analysis Of Legality, Policy And Future Implications', 26 *Boston University International Law Journal* (2008), 430-431.

98 J. Dugard & D. Raič, *supra* note 60,120-123.

99 See T.G. McLellan, 'Kosovo, Abkhazia, and the Consequences of State Recognition', *5 Cambridge Student Law Review* (2009)1, 11-12 and C. Tomuschat, *supra* note 55, 29-30.

100 See GA Res. 2937 (XXVII), 29 Nov. 1972.

101 D. Fierstein, *supra* note 97, at 430.

declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law"[102].

In the end, outside the decolonization context, on the rare occasion when an act of secession is sanctioned by state practice, the latter appears not to be grounded in the right to self-determination or remedial secession.

IV. Is There a Right to Secession?

This chapter should have been placed under a warning of high complexity! Much too often the discussion was framed in conditional tenses and much too often a clear conclusion has not been reached. Yet, to paraphrase Martti Koskenniemi, this is the beauty of international law.[103]

In a nutshell:

There is no general *jus secedendi*.

There are instances in which a right to secession is recognized under international law. These refer to states explicitly acknowledging a right to secession in their domestic law or multinational states recognizing that their constituent peoples have the right to self-determination.

There is one controversial case that divides scholarship, the one of remedial secession.

Lastly, there is a trend towards the legality principle governing secessions as distinguished from the traditional neutrality doctrine.[104]

C. The Kosovo Practice

"What I experienced in our brotherly union, I wouldn't wish on my own brother."

"We will do our best not to have any more fratricide. We will stop being brothers."*[105]*

[102] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, supra note 6, para. 81.

[103] M. Koskenniemi, *Address at the New York University School of Law*, 4 April 2006, as quoted in C. Leathley, "An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?", 40 *Journal of International Law and Politics* 1 (2007), 270.

[104] This trend is clearly visibly in respect to secessions that came about as a result of grave violations of international law.

Given the findings in the previous chapter, it appears that remedial secession represents the core of the legal precedent debate in the Kosovo case. In the same time however, if the Constitution of Serbia in force at the time of Kosovo's secession provided for a right to secession then the precedent question would not have any relevance in the first place. It becomes obvious that the legal implications need to be fleshed out from socio-political and historic events.

I. Kosovo in History

1. History and Myth

It has become a tradition – for reasons of symbolism rather than historic accuracy – to seek the roots of the Kosovo conflict in the battle of Kosovo Polje (1389) when the Serbs were defeated by the Ottoman Empire.[106] Five hundred years later, in 1912, as a result of the First Balkan War, Serbia reacquired control over Kosovo. A memorandum sent to the Great Powers by the Serbian government in 1913 provided the justification for Belgrade's rule over Kosovo:

"[T]he moral right of a more civilized people; the historic right to an area which contained the Patriarchate buildings of the Serbian Orthodox Church and had once been part of the medieval Serbian empire; and a kind of ethnographic right based on the fact that at some time in the past Kosovo had had a majority of Serb population, a right which […] was unaffected by the "recent invasion" of Albanians."[107]

While the first argument that relies on a (rightly) repudiated civilization doctrine does not deserve further discussion, the following two are essential and have deep implications on the current political configuration. Noel Malcolm argues that Kosovo as the Jerusalem of Serbian Orthodoxy is an "exaggeration": a holy place in Christianity does

105 Aphorisms by Aleksandar Baljak and Rastko Zakic, as quoted in "Serbs find comfort in dark wit", *The International Herald Tribune*, 2 December 2007, available at http://www.nytimes.com/2007/12/02/world/europe/02iht-serbs.4.8561725.html?_r=1 (last visited 26 August 2010).

106 H. Krieger, *supra* note 45, xxxi; M. Glenny, *The Balkans. Nationalism, War and the Great Powers (1804-1999*) (1999), 11.

107 N. Malcolm, *Kosovo. A Short History* (1998), xxxi.

not play a similar role as in Judaism. Moreover, the seat of the Orthodox Church was arguably not founded in Kosovo, but moved here after the initial foundation in central Serbia got burnt. In addition, the institution of the Patriarchate is said not to have any continuous history.[108] Rebutting the claim for continuation, several authors assert that the Serbian empire was a medieval state that had its origins in Rascia, not in Kosovo.[109] Not least, the ethnographic factor is one of the most disputed issues in the history of the region. One can find accounts that depict Albanians as majoritarian even during the days of the medieval Serbian empire; other instances recall that no Albanians at all lived in Kosovo until the end of the seventeenth century. An explanation of today's demographics, said to be closer to historic evidence, would take into account both migration flows from Albania and the significant expansion of the indigenous Albanian population in Kosovo.[110]

Noel Malcolm's deconstruction exercise may be perfectly valid; nonetheless, what tends to be important are not facts, but the perception of facts or, otherwise put, the myth. Perception has been reinforced by the folk tradition of epic poetry and in modern times by nationalistic discourse. Hence the Serbs' emotional attachment to Kosovo as the source of Orthodoxy remains strong, equally their narratives of the battle of Kosovo and the loss of an empire. For the Albanians on the other hand, Kosovo represents the birthplace of Albanian nationalism, where in 1877 the League of Prizren was created as a response to the Treaty of San Stefano. Its goal was to defend Albanian territories and to seek autonomy within the Ottoman Empire.[111] One can trace the aspirations towards the creation of a Greater Albania to those days. Whereas Albania gained its independence from the Porte in 1912, Kosovo by contrast became controlled by Serbian-Montenegrin rule[112]; the Kosovo Albanians regarded this event as colonization[113], which in turn reinforced their ideal of a Greater Albania.

Writers agree that the story of a perpetual ethnic conflict raging in Kosovo is a brutal oversimplification of a quite different reality, one that in

108 *Id*.

109 *Id*.; T. Judah, *The Serbs. History, Myth and the Destruction of Yugoslavia* (1997), 18.

110 Malcolm, *supra* note 107, xxxii, 139-140; J.R. Lampe, *Yugoslavia as history: Twice There Was a Country*, 2nd. Edition (2000), 26.

111 M. Vickers, *The Albanians. A Modern History* (1999), 30-31, 34.

112 With an interruption between 1941-1943, when a brief union of the biggest part of Kosovo with Albania – itself under Italian tutelage – took place. *Id*., 144.

113 Miranda Vickers points to the existence of Serbian official documents that envisage a colonization policy of the Kosovo Albanians. *Id.*,127-129.

fact saw the two groups themselves split along other types of allegiances than ethnic ones, or that witnessed them fight side by side as allies. That is however not to deny that, since the nineteenth century, ethnicity has became a significant element and today the same 1912 event is recalled by the Serbs as national liberation while the Kosovo Albanian portray it as colonization – two narratives forced to coexist.

2. Kosovo under Tito and the Titoists

After the end of World War II, Josip Broz Tito thought to forge legitimacy for communist Yugoslavia by invoking the mythology of the Partisan movement. The common resistance against Nazism was portrayed as the bonding element of the nations and nationalities of Yugoslavia, inter-ethnic cooperation that should have continued under the communist banner. In addition to the doctrine of brotherhood and unity, the federalization of Yugoslavia and the granting of autonomy to Kosovo and Vojvodina were measures intended to respond to ethnic grievances, seen as central to the failure of pre-war Yugoslavia.[114] In 1964, with the passing of a new fundamental act, Kosovo-Metohija's status was elevated from that of an autonomous region to the equal of Vojvodina's, i.e. an autonomous province. Responding to increasingly sharp ethnic frictions among which the risings of Kosovo Albanians in 1968, the years to come saw further constitutional amendments in the direction of devolution, a process that culminated in the adoption of the 1974 Constitution. It granted Kosovo and Vojvodina nearly the same rights as to the six republics – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia – in terms of administrative and economic power, as well as representation at the federation level. The crucial differentiation was that while the *narodi* (nations) were granted the status of republics, *narodnosti* (nationalities) were designated autonomous provinces. It is reckoned that this distinction is the *oeuvre* of the architects of the first Yugoslav constitution who considered that nations as potentially State forming units are those that have their principal homeland inside Yugoslavia, whereas nationalities as displaced segments of other nations had their homeland outside

[114] S.P. Ramet, *The Tree Yugoslavias. State Building and Legitimation, 1918-2005* (2006), 163-165, 185; P. Lendvai & L. Parcell, "Yugoslavia Without Yugoslavs: The Roots of the Crisis", 64 *International Affairs (Royal Institute of International Affairs 1944)* (1991) 2, 252.

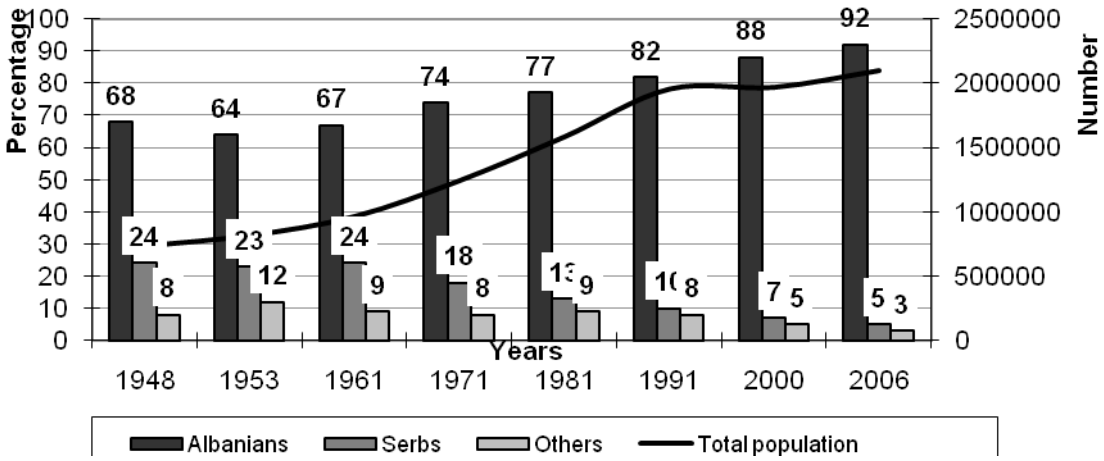
Yugoslavia.[115] Consequently, it was only *narodi* that received the constitutional right to self-determination, which explicitly included the right to secession.

To mention the almost equal status of Kosovo with that of the republics does not mean to idealize the on the ground situation in Kosovo. As an autonomous region of Serbia, Kosovo was regarded as a developed region and did not benefit of economic aid until the mid 1950s. As Sabrina Ramet shows "Kosovo was by all measures, the poorest, most backward region in the SFRY". Employment in the social sector and representation in the party ranks remained discriminatory of the Albanian majority population until the mid 1970s, only to become discriminatory of the Serbs few years later.[116] Clearly, these facts fueled inter-ethnic tension and deepened the distrust within Kosovo; chiefly, the measures intended to ameliorate the lives of the members of one ethnic group were perceived as a threat to the other.

115 R. Caplan, 'International Diplomacy and the Crisis in Kosovo', 74 *International Affairs* (1998) 4, 745, 748.

116 S.P. Ramet, *supra* note 114, 298-299; P. Radan, *The Break-up of Yugoslavia and International Law* (2002), 197.

Graph 1 – Kosovo population by ethnic composition 1948-2006[117]



Legend

1948, 1953, 1961, 1971, 1981: population censuses of the Yugoslav Federation Office of Statistics (YFOS)
1991: census boycotted by Kosovo Albanians, the data is an assessment of the YFOS
2000: data from the Living Standard Measurement Survey 2000
2006: assessment of the Statistical Office of Kosovo, residents (living within Kosovo, missing from permanent place for less than 12 months)
Others: Roma, Turks, others

[117] Source of the data used in the graph: Statistical Office of Kosovo, *Demographic Changes of the Kosovo Population 1948-2006*, 2008, available at http://www.ks-gov.net/ESK/, 15 June 2008; Statistical Office of Kosovo, *Kosovo and Its Population*, 2003, available at available at http://www.ks-gov.net/ESK/eng/index.php?option=com_docman&task=doc_download&gid=521&Itemid=8 (last visited 25 August 2010), 15 June 2008; M. Vickers, *Between Serb and Albanian. A History of Kosovo* (1998), Appendix: Population Data, 318.

Above all, while the Serbs experienced the sentiment of losing Kosovo, the Albanians' dissatisfaction continued to point to what they perceived as the original wrong, the lack of republic status within the federation. Soon after Tito's death in 1980, what started as a protest against food conditions in the cafeteria of the University of Pristina turned into a series of political protests with open demands for a Kosovo republic within Yugoslavia.[118] The snowball was set in motion: accusations of brutalities committed by Albanians against Serbs were pouring and the rhetoric of the sufferings of the Serbs augmented sharply, culminating in the elites' articulation of the "physical, political, legal, and cultural genocide of the Serbian population in Kosovo and Metohija" in the Memorandum of the Serbian Academy of Sciences and Arts.[119] Whereas several commentators note that some claims of violent actions against Kosovo Serbs were undeniable reality,[120] the accusation of genocide does not gather any support.[121]

3. The Milošević Era

It is argued that Slobodan Milošević had sensed already in the mid 1980s the potential political gains from linking the rising intellectual

118 N. Malcolm, *supra* note 107, 334-335.

119 Memorandum of the Serbian Academy of Sciences and Arts, English translation, available at http://www.trepca.net/english/2006/serbian_memorandum_1986/serbia_memorandum_1986.html (last visited 25 August 2010), 20 May 2008; See also M. Weller, *The Crisis in Kosovo 1989*-1999, International Documents and Analysis, Vol. 1, 36; For a more detailed account of the reawakening of nationalist discourse among Serb intellectuals see N. Malcolm, *supra* note 107, 337-341.

120 K. Beurmann, 'Human Rights in Kosovo', 9 *Human Rights Review* (2008), 41, 79; M. Vickers, *supra* note 111, 220.

121 Louis Sell mentions a number of five inter-ethnic murders for the period 1981-1987 in Kosovo, two of which were committed by Albanians against Serbs and three by Serbs against Albanians. L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (2003), 79; Discussing the allegations of numerous rapes, Noel Malcolm notes the results of a study carried out by an independent committee of Serbian lawyers which shows that the frequency of rape and attempted rape in Kosovo was significantly lower than in other parts of Yugoslavia (for the period 1982-1989) and that in the great majority of cases the perpetrator and the victim had the same ethnic background. N. Malcolm, *supra* note 107, 339.

nationalist movement to the advancement of his own power.[122] By the end of 1987, Milošević had ousted the Titoist leader of the Serbian Communist party and abandoned the bonding policy of Yugoslavia, the doctrine of brotherhood and unity. In a bid for legitimacy, Milošević sought the blessing of the Serbian Orthodox Church, while purging the leadership of Kosovo's and Vojvodina's communist parties and suspending the authority of the provincial police and judiciary.[123] "Strong Serbia, strong Yugoslavia" was the mass mobilizing slogan which demanded an end to the provinces' autonomy and parity with Serbia, the latter being long perceived as reducing Serbia to a minority status within its own federal unit.[124] In 1988 and 1989, while avoiding to take the legal route of the revision of the SFRY Constitution, the Serbian Parliament brought a series of amendments to the Serbian Constitution which in practice stripped Kosovo and Vojvodina of their federal status.[125] It is highly likely that abolishing in this way Kosovo's status as a federal unit was unlawful under the SFRY Constitution, and hence null and void.[126] The Yugoslav Constitutional Court itself has ruled some of the amendments as unconstitutional.[127] The new Serbian Constitution adopted in 1990 which sealed the full subordination of Kosovo[128], sounded the death bells for the SFRY, even for the few remaining Yugoslav optimists.

Kosovo responded with a declaration of sovereignty and after holding an underground referendum – boycotted by the Serb population – with the declaration of independence of 22 September 1991. Shortly after, three options were put forward in a political declaration[129]:

122 A. March & R. Sil, *The "Republic of Kosova" (1989-1998) and the Resolution of Ethno-Separatist Conflict, CIAO* (1999), available at http://www.ciaonet.org/wps/sir01/index.html (last visited 25 August 2010).

123 M. Vickers, *supra* note 111, 229-230.

124 S.P. Ramet, *supra* note 114, 347; V. Pesic, 'Serbian Nationalism and the Origins of the Yugoslav Crisis', *Peaceworks* No. 8 (1996), 15.

125 Amendments to Constitution of the Socialist Republic of Serbia, 1989, in H. Krieger, *supra* note 45, 8; M. Weller, *supra* note 119, 47-48.

126 M. Weller, 'The Rambouillet Conference on Kosovo', 75 *International Affairs (Royal Institute of International Affairs 1944-)* (1999) 2, 215.

127 L.J. Cohen, 'Post-Federalism and Judicial Change in Yugoslavia: The Rise of the Ethno-Political Justice', 13 *International Political Science Review* (1992) 3, 301, 307.

128 See especially Art. 109, 110, 112, The Constitution of the Socialist Republic of Serbia, 28 September 1990, in H. Krieger, *supra* note 45, 9; See also P. Radan, *supra* note 116, 197.

129 Declaration of the Coordinating Committee of Albanian Political Parties in Yugoslavia, October 1991, as quoted in M. Vickers, *supra* note 117, 250-254.

The status of nation of the Kosovo Albanians and of republic within Yugoslavia for Kosovo, if the internal and external borders of the SFRY were to remain unaltered;

The founding within the SFRY of an Albanian Republic incorporating Kosovo and the territories inhabited by Albanians in central Serbia, Montenegro and Macedonia, in case the internal borders were to be changed;

Unification with Albania and the creation of an "undivided Albanian state" with the boundaries proclaimed by the League of Prizren in 1878, if external borders were to be altered.

Whereas Slovenia and Croatia gained recognition of their independence in 1992, after the international community had accepted earlier that the SFRY was in a process of dissolution,[130] the sole state to recognize the Republic of Kosovo was Albania.[131]

4. The Human Rights Situation (1990-1997)

The Yugoslav/Serb government is reckoned to have conducted "repression … very much officially and under a veritable legislative programme".[132] Thus, the scale and kind of abuse which took place in Kosovo are documented not only by UN bodies and special procedures[133] and NGOs[134], but also by Serbian laws which themselves legalized

130 *Opinion No. 1*, Conference on Yugoslavia, Arbitration Commission, 29 November 1991, in A. Pellet, Appendix, 3 *European Journal of International Law* (1992**)** 2, 182-183.

131 J. Mertus, *Kosovo: How Myths and Truths Started a War* (1999), xvii.

132 M. Weller, *supra* note 119, 122.

133 See for example General Assembly resolutions: GA Res. 47/147, 18 December 1992; GA Res. 48/153, 20 December 1993; GA Res. 49/204, 23 December 1994; GA. Res. 50/190, 22 December 1995; GA Res. 51/111, 5 March 1997; Resolutions of the Commission on Human Rights: 1992/S-1/1, 14 August 1992; 1992/S-2/1, 1 December 1992; 1993/7, 23 February 1993; 1994/76, 9 March 1994; 1995/89, 8 March 1995; 1996/71, 23 April 1996; 1997/57, 15 April 1997; 1998/79, 22 April 1998; Reports of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia: E/CN.4/1992/S-1/9; E/CN.4/1992/S-1/10; A/47/666-S/24809; E/CN.4/1993/50; A/49/641-S/1994/1252; E/CN.4/1995/57; E/CN.4/1996/107; E/CN.4/1998/9; E/CN.4/1998/15; E/CN.4/1998/164.

134 See for example reports and press releases of Human Rights Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992* (1992); *Open Wounds: Human Rights Abuses in Kosovo* (1993); *Human Rights Abuses of Non-Serbs in Kosovo, Sandzak & Vojvodina* (1994); *Yugoslavia (Serbia and Montenegro): Persecution Persists, Human Rights Violations in Kosovo* (1996); *Kosovo – Fair Trail for Albanians* (1997); for

discrimination.[135] Based on these reports distinct categories of abuses can be identified for the period 1989-1998: discrimination in relation to property and resettlement; removal of ethnic Albanians from public office, commercial firms, the education system and the judiciary branch; large scale infringements of the freedom of the press; lack of fair trial; impunity for perpetrators; arbitrary arrests and seizures; torture and mistreatment; police brutality and disproportionate use of force; imposing of a Serb curricula which prompted the general break down of the official education system.

In short, Human Rights Watch in its report covering the period 1990-1992 notes that "the Serbian government has blatantly and systematically violated the most basic tenets set forth in international human rights documents."[136] In 1996, the UN Committee on the Elimination of Racial Discrimination summarizes the situation as one that "deprived [the ethnic Albanians] of effective enjoyment of the most basic human rights provided for in the Convention".[137]

5. The Kosovo Albanian Resistance and Milošević's Response

Non-violent resistance was the initial response of the Kosovo Albanians to the new situation. A shadow state had been created, with a parallel government and parliament of which Ibrahim Rugova, the leader of the Democratic League of Kosovo (LDK) was elected President. Some authors explain Rugova's peaceful resistance – and non-alignment/lack of support for either Croatia or Bosnia-Herzegovina – as a sort of waiting period. In other words, Ibrahim Rugova had hoped that Krajina and the Republic of Srpska could join Serbia, which in turn would have set a precedent for Kosovo joining Albania.[138] The merit of this interpretation is however uncertain. In a 1992 interview, Bujar Bukoshi, the premier of the non-recognized Republic of Kosovo, affirmed that Kosovo should be

reports and briefings of Amnesty International see *Further Allegations of abuses by police* (1991); *Yugoslavia: Ethnic Albanians-Victims of Torture and Ill-Treatment by Police* (1992); *Yugoslavia: Ethnic Albanians: Trial by Truncheon* (1994); *Yugoslavia: Police Violence in Kosovo Province - the Victims* (1994).

135 The Report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia E/CN.4/1993/50 comprises a list of legislation considered to be discriminatory of the ethnic Albanians at paras 155-159.

136 Human Rights Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992* (1992).

137 CERD, Concluding Observations, 15-16 March 1996, as quoted in M. Weller, *supra* note 119, 122-124.

138 T. Judah, *supra* note 109, 306-307.

"independent, neutral and open to both Serbia and Albania", whereas the unification with Albania would be postponed for "the third millennium, for example".[139] Others point to the pacific strategy as a continuation of a tradition of democratic opposition and peaceful resistance dominant in Eastern Europe during the communist period.[140]

Be it as it may, by 1993 some started to voice their disappointment towards the adopted non-violent path which seemed impotent. The LDK began to lose support in the mid-1990s when mostly the younger generation shifted its allegiances to more radical ethnic-Albanian groups.[141] The alternative to the pacific path that divided the Albanians from Kosovo and the diaspora alike came from the Kosovo Liberation Army (KLA). In 1996, the KLA claimed responsibility for a series of bomb attacks and proclaimed the liberation of Kosovo through armed struggle as its goal.[142] Whereas the collapse of the Albanian state meant access to weapons and training camps for the group, tapping into the disillusionment of Albanians meant support and swelling ranks; by 1998, the KLA staged several attacks that left them in control over the Drenica region.[143]

The campaign of the Serbian security forces, termed as the fight against Albanian terrorism, was launched in February 1998. Reports from governmental sources or NGO accounts note unequivocally the atrocities against civilians. Establishing a balance sheet intended to compare the abuses committed by the Serbian government versus the ones for which the KLA was responsible would be a rather cynical exercise. With this restraint in mind however, and since the atrocities are an essential aspect in the context of remedial secession, the conclusion of Human Rights Watch should be recalled: "The vast majority of these abuses were committed by Yugoslav government forces … The Kosova Liberation Army … has also violated the laws of war … Although on a smaller scale than the

139 'News briefing with Bujar Bukoshi, Prime Minister, Republic of Kosova, National Press Club, Washington D.C.' in *Federal News Service*, 21 October 1992.

140 The Independent International Commission on Kosovo, *The Kosovo Report. Conflict, International Response, Lessons Learned (*2000), 44.

141 International Institute for Strategic Studies, *Serbia. (Kosovo). Historical Background.* Armed Conflict Database, available at http://www.iiss.org/ (last visited 25 August 2010).

142 'Kosovo Liberation Army emerges from the shadows', *BBC News*, 4 March 1998; International Institute for Strategic Studies, *supra* note 141.

143 International Institute for Strategic Studies, *supra* note 141; R. Caplan, *supra* note 115, 752.

government abuses, these too are violations of international standards, and should be condemned."[144]

Regardless whether an *Operation Horseshoe*[145] existed or not, there is evidence that Serbian forces in Kosovo pursued a policy of ethnic cleansing at least since 20 March 1999. There is widespread agreement among those who documented and studied the 1999 events in Kosovo that a systematic and forced removal of Kosovo Albanians from their homes and communities had taken place.[146] In May 1999, after meeting refugees from Kosovo in the F.Y.R. Macedonia, Mary Robinson, the then High Commissioner for Human Rights, said: "the full magnitude of the problem and its tragic consequences can only be realized when seen first hand."[147] Yet outside observers can grasp the scale of the atrocities by referring to the OSCE Kosovo Verification Mission estimates, which put forth that over 90 percent of the Kosovo Albanian population – over 1.45 million people – had been displaced by 9 June 1999.[148]

To sum up with the evidently negotiated and hence diplomatic conclusion of the Independent International Commission on Kosovo: the "Serb oppression included numerous atrocities that appeared to have the character of crimes against humanity in the sense that this term has been understood since the Nuremberg judgment."[149]

144 Human Rights Watch, *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo*, Vol. 10, No. 9, (1998); See also Human Rights Watch, *Kosovo War Crimes Chronology January 1998-April 1999*, available at http://hrw.org/campaigns/kosovo98/timeline.shtml (last visited 25 August 2010).

145 The Operation Horseshoe was allegedly a plan of the Serbian government outlining the systematic expulsion of Albanians from Kosovo. The existence of this plan has been denied by the authorities in Belgrade and it remains highly controversial in literature. See for a discussion Select Committee on Foreign Affairs, Fourth Report, 23 May 2000, paras 90-8, available at http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm (last visited 25 August 2010).

146 OSCE, *Kosovo/Kosova: As Seen, As Told* (1999), at viii; The Independent International Commission on Kosovo, *supra* note 140, 74, 80, 88-9; U.S. Department of State, *Erasing History: Ethnic Cleansing in Kosovo* (1999); U.S. Department of State, *Ethnic Cleansing in Kosovo: An Accounting* (1999).

147 OHCHR, "High Commissioner For Human Rights, Ending Visit To Former Yugoslav Republic Of Macedonia, Calls Again For End To Ethnic Cleansing In Kosovo", 5 May 1999.

148 OSCE, *supra* note 146, at ix.

149 The Independent International Commission on Kosovo, *supra* note 140, 164.

II. The International Community and Kosovo

1. The Response of the International Community Prior to 1998

From the early 1990s onwards, the abuses and discrimination on the ground have been duly noted by international organizations and subsequently condemned in statements and resolutions. Nonetheless, the status of Kosovo was largely left out from the European Community (EC) Peace Conference on Yugoslavia, the London Conference and later the Dayton negotiations. On 22 December 1991, Kosovo formally applied for recognition in a letter addressed to Lord Carrington, the Chair of the Peace Conference on Yugoslavia; the application was never forwarded to the Arbitration Commission of the Conference on Yugoslavia and hence was not addressed by the latter.[150] Regardless, some commentators see certain relevance in the findings of the Badinter Arbitration Commission in what concerns the status of Kosovo. As such:

> "1. The Committee considers: […] d) that in the case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the federal organs represent the components of the Federation and wield effective power."[151]

Paragraph 1.d. of Opinion No.1 could be interpreted as speaking in favor of Kosovo's independence claim since, under the 1974 Constitution, it had been a federal entity equally represented in the federal institutions and possessing a high level of autonomy.[152] On the other hand, Opinion No.2 which dealt with the question whether "the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination" concluded that the Serbian population

150 The Arbitration Commission of the Conference on Yugoslavia, known as the Badinter Arbitration Committee after the name of its president, was set up in 1991 by the European Community. It provided the Peace Conference on Yugoslavia with legal advice. See A. Pellet, 'The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples', 3 *European Journal of International Law* (1992) 1, 178 and M. Weller, *supra* note 119, 75.

151 *Opinion No. 1*, *supra* note 130, 182-183.

152 M. Weller, *supra* note 119, 76.

is "entitled to all the rights concerned to *minorities* and *ethnic groups* under international law"[153]. By analogy and given the status of Kosovo under the 1974 Constitution as *narodnosti* – even more so under the controversial 1990 Serbian fundamental act – the Committee's findings would speak against a right to self-determination of the Kosovo Albanians. This later interpretation is consistent with the view taken by some authors who regard the refusal to even submit Kosovo's claim for independence to the Badinter Commission as a confirmation of the EC's readiness to grant recognition solely to the republics of Yugoslavia.[154] The 1992 EC statement which reminded "the inhabitants of Kosovo that their legitimate quest for autonomy should be dealt with in the framework of the EC Peace Conference" comes to confirm the above.[155] What it does not suggest is the subsequent reality: the Hague, London and Dayton conferences did not foster any substantial discussion on Kosovo and failed to deal with its status. This silence is explained by an already rich and thorny agenda, the desire not to alienate Milošević, whose support was regarded as essential, and paradoxically the absence of violence in Kosovo given Rugova's pacific resistance strategy.[156]

2. The Breakout of Violence and the Response of the International Community

The course of action taken by the international community after the violence in Kosovo came to mirror, somehow cynically, President Bush's letter addressed to Slobodan Milošević already in 1992: "In the event of conflict in Kosovo caused by Serbian action, the United States will be prepared to employ military force against the Serbs in Kosovo and Serbia proper."[157] If in February 1998, the U.S. special envoy to the Balkans Robert Gelbard pointed to Washington's readiness to lift several of the

153 *Opinion No. 2*, *supra* note 130, 183-184 (emphasis added).

154 P. Radan, *supra* note 116, 200; D. Kumbaro, *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention* (2001), 37.

155 EC Press Statement, Luxembourg, 15 June 1992, as quoted in R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *European Journal of International Law* (1993) 1, 36, 62.

156 R. Caplan, *supra* note 115, 749-751; The Independent International Commission on Kosovo, *supra* note 140, 59.

157 R. Caplan, *supra* note 115, 753.

sanctions imposed earlier on Belgrade[158], the following month he threatened with the reverse in case no amelioration of the Kosovo Albanians' situation would be visible.[159] It is undeniable that the interest in the Kosovo conflict grew proportionally with the violence occurring on the ground. From March 1998 onwards, Kosovo caught the attention of the international community and several fora addressed the situation on the ground, as well as the status issue; four of this institutional responses are of central importance for the further analysis.

The Security Council – which remained silent on the issue of human rights violations in Kosovo prior to 1998 – passed a series of resolutions under Chapter VII of the Charter. The potential of conflict spillover, the humanitarian dimension within Kosovo as well as the problem posed by the refugee flows are usually seen as being the key considerations which dismissed, in the eyes of the Security Council, the traditional objection brought by the Federal Republic of Yugoslavia (FRY), i.e. Kosovo as a matter essentially within the domestic jurisdiction.[160] The Council imposed an arms embargo upon the FRY "including Kosovo"[161] and demanded, among others, that the FRY ceases "all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression" and that it enters "immediately into a meaningful dialogue without preconditions and with international involvement" aimed at negotiating a political solution for the "issue of Kosovo".[162] The rough criticism of the Belgrade government was balanced by two elements. The first amounts to the condemnation of "acts of terrorism by the Kosovo Liberation Army".[163] Secondly, an aspect of great importance for the determination of Kosovo's status is the recurrent affirmation of the "commitment … to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[164]

In June 1998 the European Council, gathered in Cardiff, condemned in its Declaration on Kosovo "in the strongest terms" the indiscriminate use of force by Milošević's security forces, underlining that brutal military repression of the own citizens would disqualify any state from finding a

158 *Id.*
159 'US envoy pressures Serbia over Kosovo', *BBC News*, 19 March 1998.
160 M. Weller, *supra* note 119, 179-180.
161 SC Res. 1160, 31 March 1998.
162 SC Res. 1199, 23 September 1998.
163 SC Res. 1160, 31 March 1998.
164 *Id.*; SC Res. 1199, 23 September1998.

place in modern Europe.[165] The continuation of the repression would require in the words of the Council "a much stronger response of a qualitatively different order". In the same time, the Council reiterated that "the European Union remains firmly opposed to [Kosovo's] independence."[166] Despite this clear stance, in early 1999 important political figures of the time could be heard advocating for either independence or a Kosovo placed under an international protectorate.[167]

The Contact Group[168] as a modern concert of powers that had omitted to deal with Kosovo on the Dayton occasion plunged in the midst of the mediation process aimed at resolving the conflict. In July 1998, it declared that it supported neither the preservation of the status quo, nor Kosovo's independence.[169] With both Ambassador Hill's shuttle diplomacy[170] and the Holbrooke agreement[171] having failed, the Contact Group summoned the

165 Cardiff European Council 15 and 16 June 1998, Presidency Conclusions, Annex II, Declaration on Kosovo, SN 150/1/98/REV1, 35-37, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/54315.pdf (last visited 27 August 2010)

166 *Id.*

167 G. Welhengama, *supra* note 71, 295-296.

168 The Contact Group established in spring 1994 served as a coordination forum of the crisis management efforts of France, Germany, Italy (since 1996), the Russian Federation, the United Kingdom and the United States of America, during the crisis in Bosnia as well as in Kosovo. C. Schwegmann, *The Contact Group And Its Impact On The European Institutional Structure* (2000), available at http://www.iss.europa.eu/uploads/media/occ016.pdf (last visited 27 August 2010).

169 Contact Group Statement, Bonn, 8 July 1998, available at http://www.ohr.int/other-doc/contact-g/default.asp?content_id=3554 (last visited 25 August 2010).

170 On the Hill process see Weller, *supra* note 119, 348-350.

171 The Holbrooke agreement provided among others the full compliance with SC Res. 1199 (1998) by the FRY, the establishment of the OSCE Kosovo Verification Mission, air-surveillance by NATO to verify compliance by all parties, and the agreement to reach a political settlement for broad self-government of the Kosovo Albanians. C. Schwegmann, *supra* note 168; Weller, *supra* note 119, 350; for the KLA part of responsibility for the failure of the agreement see T.W. Crawford, 'Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement failed', 116 *Political Science Quarterly* (2001-2002) 4, 499-523; see also the Reports of the Secretary-General prepared pursuant to resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council S/1998/1221 of 24 December 1998, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/404/20/PDF/N9840420.pdf?OpenElement (last visited 27 August 2010) and S/1999/293 of 17 March 1999, available at http://daccess-dds-

parties to the Rambouillet conference on 6-23 February 1999. The NATO, which since October 1998 had kept the activation order authorizing air strikes against targets on FRY territory in place, reiterated its threat[172] and added the teeth – and the controversy – to the summons of the Contact Group.

The Rambouillet agreement was intended to be an interim mechanism – as its name fittingly suggests – aimed at achieving peace and self-government in Kosovo. The balancing between the interests of the parties is excellently illustrated by the preambular provision of Chapter 1:

Desiring through this interim Constitution to establish institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which the authorities of governance set forth herein originate.[173]

The two pillar elements of the agreement are: 1. the establishment of a system of wide autonomy for Kosovo; 2. the guarantee for the territorial integrity and sovereignty of the FRY. The third crucial element is the time-boundness of the Rambouillet agreement. After three years upon the entry into force, an international conference was to be convened in order to establish

a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act.[174]

The key to the reading of the first two elements is this last provision, which suggests that the status of Kosovo is not agreed upon beyond the three years period. Kosovo's interpretation was that it would not find itself locked by this agreement to respect the territorial integrity of the FRY beyond the three years period. Moreover, the mechanism to be established after the three years period in order to deal with Kosovo's final status was to operate, *inter alia,* based on the will of the people and in accordance with the Helsinki Final Act. The reference to the 1975 CSCE document has a

ny.un.org/doc/UNDOC/GEN/N99/074/86/PDF/N9907486.pdf?OpenElement (last visited 27 August 2010).

172 Statement by the North Atlantic Council on Kosovo, 30 January 1999, available at http://www.nato.int/docu/pr/1999/p99-012e.htm (last visited 25 August 2010), para. 5.

173 Interim Agreement for Peace and Self-Government in Kosovo, 23 February 1999, Chapter 1, Constitution, Preamble, available at http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html (last visited 25 August 2010).

174 *Id.*, Amendment, Comprehensive Assessment, and Final Clauses, Article I: Amendment and Comprehensive Assessment.

neutral effect on the future status question since the Helsinki Act stipulates both the respect for territorial integrity and the right to self-determination of peoples. On the other hand, the specific mention of the term people is even more so noteworthy. Given the legal implications of this term (which were pointed out in the first part of this article) one has to wonder if the Rambouillet agreement does not in fact open the door to Kosovo's secession.

The agreement was signed during the follow up meeting in Paris by Kosovo and rejected by Serbia/the FRY.[175] Much controversy surrounds the Rambouillet agreement and much of this debate needs to be understood in the context of the NATO's subsequent military operation against Serbia.

If there is a consensus among commentators regarding the NATO's Operation Allied Force launched on 24 March 1999, then that consensus refers to the interventions' controversial character. Not only the legality of the intervention is questioned, but equally the means and methods employed, as well as the practical result and the legal consequences. Given these circumstances, the current article will assume the shortcoming of not entering into an extensive discussion on the issue. Yet an important aspect needs to be retained: The NATO's official justification of the bombing campaign was "the massive humanitarian catastrophe."[176] It was noted earlier that according to doctrine, massive and grave abuse represents the threshold for remedial secession. Given the official explanation of the NATO's intervention, it appears that the trigger of the military campaign coincides with the threshold of remedial secession. By inference then, if humanitarian intervention was *presented* and *perceived* as legal by the NATO states, the same states should have theoretically followed the same logic subsequently in respect to remedial secession.

Given the prohibition on the use of force, if one regards the NATO bombing campaign on Serbia as illegal, then the question has to be asked, if this intervention can be seen as support on behalf of the Kosovo secessionist movement. As many doubts as there might be regarding the legality of humanitarian intervention, there is simply no plausible evidence that the NATO's goal was Kosovo's secession and not the declared one of avoiding

175 M. Weller, *supra* note 126, 235-236.

176 'The Situation in and around Kosovo', Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, 12 April 1999, para. 2, available at http://www.nato.int/docu/pr/1999/p99-051e.htm (last visited 25 August 2010); The Independent International Commission on Kosovo, *supra* note 140, 85-86.

a humanitarian catastrophe and halting the spread of conflict. Security Council resolution 1244 (1999), while – in the view of this author – not legalizing the attack *a posteriori*, did address the precise humanitarian concerns previously exposed by the NATO and hence did legitimize the goal of the attack. Nonetheless, these series of "ifs" remain probably the major caveat of Kosovo's secession from Serbia.

3. United Nations Interim Administration Mission in Kosovo

Security Council Resolution 1244 (1999) of 10 June 1999 is the result of the accord reached between members of the NATO and the Russian Federation during the G8 meeting in May 1999, an accord subsequently accepted by the Belgrade authorities.[177] The resolution authorizes an international security presence in Kosovo with "substantial North Atlantic Treaty Organization participation … deployed under unified command and control" (KFOR) and an international civil presence "in order to provide an interim administration for Kosovo".[178]

The United Nations Interim Administration Mission in Kosovo (UNMIK) has two overarching responsibilities. The first refers to "promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords."[179] A gradual process of devolution of power was provided for, so as to relocate the administrative responsibilities towards Kosovo's local provisional institutions. Moreover, "in a final stage", UNMIK is to oversee the transfer of authority from the provisional institutions to the "institutions established under a political settlement."[180] The second major task is the facilitation of the "political process designed to determine Kosovo's future status, taking into account the Rambouillet accords."[181]

The UNMIK February 2008 update on the situation in Kosovo acknowledges that the process of democratic institution building has been accomplished in a way which has allowed UNMIK to renounce its executive role and retreat in a position of monitoring and support to the local

177 M. Kohen "Le Kosovo : Un Test pour la communauté internationale", in V. Chetail (ed), *Conflits, sécurité, et coopération* (2007), 371.
178 SC Res. 1244, 10 June 1999.
179 *Id.*
180 *Id.*
181 *Id.*

institutions; "UNMIK in its present form is now in its final chapter before status resolution."[182] Referring back to the elements required for a State to come into being, the UNMIK statement could be interpreted as the fulfillment of the principle of effectiveness by Kosovo.[183]

Since late 2005, the Special Envoy of the UN Secretary-General of the United Nations, Martti Ahtisaari, led the political process for the future status for Kosovo. In effect he was endorsed by the Council to implement the provisions related to the future status of resolution 1244 (1999). The Contact Group "informed" the parties involved in the negotiation that the resolve was to respect a number of principles, among which sustainable multi-ethnicity and the protection of cultural and religious heritage in Kosovo, in particular the Serbian Orthodox sites.[184] While neither independence nor autonomy is advocated, principle 6 rejects the partition of Kosovo or the union with another country or part of a country. The Contact Group is firm in its view regarding the process that ought to be followed for a final status: "Any solution that is unilateral or results from the use of force would be unacceptable".[185] In 2006, in a statement resonant of remedial secession argumentation, the Contact Group added a new principle to its requirements, i.e. the acceptability of the settlement to "the people of Kosovo".[186]

182 UNMIK, *Kosovo In February 2008*, 1, available at http://www.unmikonline.org/docs/2008/Fact_Sheet_February_2008.pdf (last visited 25 August 2010).

183 See also the view of Jean d'Aspremont concerning the "external *effectivité*" conferred upon Kosovo by the recognition of Western states. J. Aspremont, 'Kosovo and International Law: A Divided Legal Scholarship', *Interest Group on Peace and Security*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272194 (last visited 25 August 2010).

184 Guiding Principles of the Contact Group for a settlement of the status of Kosovo, 7 October 2005, available at http://www.unosek.org/docref/Contact%20Group%20%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf (last visited 25 August 2010).

185 *Id*, Principle 6.

186 "Ministers recall that the character of the Kosovo problem, 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, must be fully taken into account in settling Kosovo's status. […] Ministers look to Belgrade to bear in mind that the settlement needs, inter alia, to be acceptable to the people of Kosovo. The disastrous policies of the past lie at the heart of the current problems. Today, Belgrade's leaders bear important responsibilities in shaping what happens now and in the future." Statement by the Contact Group on the Future of Kosovo, Washington, 31 January 2006, available at

Before addressing the Ahtisaari Plan, it is necessary to distinguish the position of the Security Council vis-à-vis the status question. In other words, did the Council through its resolution forbid secession or did it endorse it? In the light of the theoretical part of this study, the principle of territorial integrity and the right to self-determination of peoples will be emphasized.

The preambular clause of Security Council resolution 1244(1999) reaffirms

the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2. [187]

Whereas Annex 2, Article 8 stipulates that the "interim political framework agreement" shall take full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK.[188]

The reference to territorial integrity is often presented as the paramount guarantee against Kosovo's secession.[189] However, a correct reading of the text reveals that the commitment is towards territorial integrity – *nota bene* of FRY, not of Serbia – "as set out in the Helsinki Final Act and annex 2".[190] Indeed, territorial integrity appears to be qualified by the Helsinki Final Act and the Rambouillet accords, as has been noted also by the USA in their Written Statement to the ICJ in the Kosovo proceedings.[191] While the Helsinki Final Act proclaims both the principle of territorial integrity and the right to self-determination, the Rambouillet agreement clearly refers to Kosovo Albanians as a people.

http://www.state.gov/p/eur/rls/or/62459.htm (last visited 25 August 2010); see also UNOSEK, *Origins of UNOSEK*, available at http://www.unosek.org/pressrelease/Origins%20of%20UNOSEK.doc (last visited 25 August 2010).

187 SC Res. 1244 10 June 1999, preamble.

188 *Id.*, Annex 2, Art. 8.

189 For an argumentation in this direction see Kohen, *supra* note 179, 371-372, 381; see also more recently M. Kohen, 'Pour le Kosovo: une solution 'made in Hongkong', *Le Temps*, 18 February 2008.

190 SC Res. 1244, 10 June 1999, preamble

191 See *Written Statement of the United States of America concerning the request of the United Nations General Assembly for an advisory opinion on the question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 61., 17 April 2009, available at http://www.icj-cij.org/docket/files/141/15640.pdf (last visited 25 August 2010).

Moreover, Annex 2 does not deal with the final status of Kosovo, but with the interim solution, as is also observed by the ICJ:

The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.[192]

Thus the territorial integrity requirement appears to apply to Kosovo's interim status solely. Article 11(e) which refers to the political process aimed to determine the future status makes no mention of territorial integrity, on the contrary it stresses the need to take account of the Rambouillet agreement. The latter as has been pointed out earlier remains neutral in respect to Kosovo's final status, or else it even opens the door to secession via the self-determination route.

Throughout the English text of the resolution (including its annexes) the term "people" is mentioned three times, and at least twice in contexts which would suggest that the Kosovo Albanians are addressed[193], as distinguished from all inhabitants of Kosovo. In the same time, in the preamble, a phrase that appears to be directed towards all inhabitants refers to the "Kosovo population".[194] The French text on the other hand refers solely to "*population*" throughout the resolution.[195]

While it cannot be said with absolute certainty, that resolution 1244 (1999) regards the Kosovo Albanians as a people with the right to self-determination and hence to secession, it certainly cannot be claimed that it prohibits secession as a solution for the final status by making appeal to the territorial integrity of the FRY.

The Ahtisaari Plan does not mention Kosovo's independence, but it surely describes it. The Comprehensive Proposal incorporates the principles outlined by the Contact Group regarding multi-ethnicity and the prohibition on partition or union with another State or part of a State.[196] There is no provision which could suggest a relation of subordination towards Belgrade;

192 *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, *supra* note 6, para. 100.

193 SC Res. 1244, 10 June 1999, para. 10 and Annex 2, para. 5.

194 "Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party", *Id.*, preamble.

195 Resolution 1244, 10 June 1999, Préambule, para. 10, annexe 2, paras 4 and 5.

196 Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, Art. 1(8).

in fact Kosovo and the Republic of Serbia are encouraged "to pursue and develop good *neighborly* relations".[197] The Plan puts forward a series of provisions which are clear attributes of a statal entity. Famously, it stipulates the right to negotiate and conclude international agreements and the right to seek membership in international organizations[198], the right to have "its own, distinct, *national* symbols", including a flag, seal and anthem[199], and in language reminiscent of the Vienna Conventions on State Succession, the duty to take over part of the external debt of the Republic of Serbia[200], whereas immovable and movable property of SFR or Serbia located within the territory of Kosovo shall pass to Kosovo.[201]

Martti Ahtisaari's recommendation for Kosovo's final status presented to the Security Council on 26 March 2007 and supported by the UN Secretary General Ban Ki-moon was "independence, supervised by the international community".[202] The "categorical, diametrically opposed positions of Belgrade and Pristina" – the former demanding Kosovo's autonomy within Serbia, the latter demanding independence – exhausted, in the view of the UN Special Envoy, the potential to produce any mutually agreeable outcome through negotiations.[203] The recommendation for independence is based upon:

a history of enmity and mistrust exacerbated by oppression, systematic discrimination and repression of the Milošević regime during the 1990s

the recent reality of *de facto* discontinued Serbian rule over Kosovo given the UNMIK administration

the will of the "overwhelming majority of the people of Kosovo".[204]

Martti Ahtisaari's considerations in support of Kosovo's independence are unquestionably identical to the reasoning for remedial secession.

The lack of reaction of the Security Council, which did neither endorse the plan nor rejected it, is the consequence of disagreement amidst its members. The United States and the European Union (EU) members of the Council agreed – more or less enthusiastic – that the Ahtisaari solution

197 *Id*, Art. 1(10).
198 *Id.*, Art. 1(5).
199 *Id.*, Art. 1(7) (emphasis added).
200 *Id.*, Art. 8(2).
201 *Id.*, Art. 8(3).
202 Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168 of 26 March 2007, 2.
203 *Id.*
204 *Id.*, 3.

was the only viable one and supported a draft resolution for its endorsement.[205] Russia, being a veto power, has remained supportive of Belgrade's claim over Kosovo. The official discourse pointed to the legal precedent that was to be created by Kosovo's unilateral move to independence. Thus, the Russian Federation's resolution proposal is said to have asked for open-ended negotiations in order to allow the parties to come to a mutual acceptable solution.[206]

In summer 2007, to break the deadlock in the Council, the Contact Group agreed for a troika comprising representatives of the EU, the Russian Federation and the United States to lead further negotiations between Belgrade and Pristina.[207] After four months of efforts, the troika reported its failure to assure consensus, since "[n]either party was willing to cede its position on the fundamental question of sovereignty over Kosovo", however a commitment to non-violence was extracted.[208]

4. The Republic of Kosovo

On 17 February 2008, the Assembly of Kosovo declared Kosovo's independence, accepted "the obligations for Kosovo contained in the Ahtisaari Plan", welcomed "an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission" and invited "the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo."[209] The Serbian Parliament rejected Kosovo's independence prior to its

205 'Bush backs plan for Kosovo independence', *AFP*, 17 February 2008; 'U.N. Resolution on Kosovo Circulated', *Associated Press*, 11 May 2007; 'Revised Kosovo Resolution Submitted to U.N. Security Council', *USINFO*, 20 June 2007.

206 'Russia says more time for Belgrade, Pristina to reach agreement', *RIA Novosti*, 12 September 2007; 'Russia rejects U.N. Kosovo resolution', *Associated Press*, 20 June 2007.

207 Secretary-General Welcomes Agreement On New Kosovo Initiative, SG/SM/11111, 1 August 2007, available at http://www.un.org/News/Press/docs/2007/ sgsm11111. doc.htm (last visited 25 August 2010).

208 Report of the European Union/United States/Russian Federation Troika on Kosovo, S/2007/723, 4 December 2007, at 4.

209 Kosovo Declaration of Independence, 17 February 2008, Art. 3 & 5, available at http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en (last visited 25 August 2010); All 109 deputies present voted in favour, the 10 Kosovo Serb deputies did not attend the session. 'Secretary-General in Security Council Statement says United Nations Aim in Kosovo: Stable Political, Security Situation, Protection of Population, Minorities', SG/SM/11426 SC/9253, 18 February 2008.

proclamation and declared the planned deployment of the European Union Rule of Law Mission in Kosovo (EULEX) contrary to international law. It also initiated an Action Plan by means of which governmental institutions are to make use of all legal modalities to preserve Kosovo within Serbia.[210] The position was reiterated subsequently to Kosovo's declaration of independence:

> These acts represent a violent and unilateral secession of a part of the territory of the Republic of Serbia and this is why they are invalid and void. These acts do not produce any legal effect either in the Republic of Serbia or in the international legal order.[211]

Russia, in the words of the Serbian Prime Minister Vojislav Koštunica is "a firm and principled ally all the while, defending … Serbia's right not to have its territory usurped"[212]; the Russian Federation denounced Kosovo's independence as contrary to international law and as a challenge to the state system posed by its precedential value.[213]

There is little doubt that the Declaration of Independence has received US blessing and was coordinated with the EU, despite the latter's remaining divisions on the issue of recognition. The day preceding the Declaration of Independence, the Council of the European Union decided to launch the EULEX and to appoint the EU Special Representative for Kosovo[214], both

[210] Resolution of the National Assembly on the Protection of Sovereignty, Territorial Integrity and Constitutional Order of the Republic of Serbia, 26 December 2007, available at http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=42050 (last visited 25 August 2010).

[211] Decision on the Annulment of the Illegitimate acts of the Provisional Institutions of Self-government in Kosovo and Metohija on their Declaration of Unilateral Independence, 17 February 2008, available at http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43159 (last visited 25 August 2010).

[212] Seventh Sitting of The Second Regular Session of The National Assembly of The Republic of Serbia in 2007, 26 December 2007, available at http://www.parlament.sr.gov.yu/content/eng/aktivnosti/skupstinske_detalji.asp?Id=1238&t=A (last visited 25 August 2010).

[213] 'Russia denounces Kosovo declaration', *Associated Press*, 17 February 2008; 'Russia says independence for Kosovo undermines international law', *RIA Novosti*, 19 February 2008.

[214] Council of the European Union, Kosovo: Council establishes an EU Rule of Law Mission, appoints an EU Special Representative, 16 February 2008, 6613/08/, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98768.pdf (last visited 25 August 2010).

mechanisms being provided for in the Ahtisaari plan.[215] Most of the EU states, as well as the USA, have recognized the independence of Kosovo.[216] According to the view espoused by the declaratory school, an act of recognition does not have a constitutive effect, it simply "acknowledges as a fact something that has hitherto been uncertain."[217] In the same time however, recognition cannot occur when an entity is created in breach of international law.[218] The recognition of Kosovo by several states could be interpreted as a proof of these latter states' consideration that Kosovo's independence is not the result of an illegal situation. In other words, potentially, that remedial secession is not prohibited under international law.

And lastly, the ICJ has contributed in July 2010 to advising on the unilateral declaration of independence of Kosovo, but not much beyond that. Unsurprisingly, given the request of the General Assembly[219], the insistence of states for confinement in interpreting the scope and meaning of the question[220] and the record of the Court in approaching sensitive questions, the ICJ gave a "narrow and specific"[221] interpretation of the case at hand. In order to respond to the question posed to it, the Court does it not consider necessary to answer or even touch upon either of the following:

- The legal consequences of the declaration of independence, in particular "the validity or legal effects of the recognition of

215 An 2007 ICG report mentions planning teams for the EULEX mission to have been on the ground for over one year, International Crisis Group, *Kosovo Countdown: A Blueprint for Transition* (2007), 21.

216 The list of states which have recognized Kosovo, as well as the recognition statements are available online at http://www.kosovothanksyou.com/ (last visited 25 August 2010).

217 On the other hand, in the absence of recognition an entity is not able to enter into relations with other states, therefore lacking one of the traditional criteria of statehood. In this sense then, recognition does have a certain role to play in the process of state creation. J. Dugard & D. Raič, *supra* note 60, 96-101.

218 M. Kohen, *supra* note 18, 627.

219 In its 2008 resolution the General Assembly requested the Court to advise on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?", see GA Res. 63/3, 8 October 2008.

220 See for example the view of the USA, *Written Statement, supra* note 191, 41. and that of Germany, *Statement of the Federal Republic of Germany, Verbalnote No. 54*, 15 April 2009, available at http://www.icj-cij.org/docket/files/141/15624.pdf (last visited 25 August 2010).

221 As the Court considers the question to be, see *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, *supra* note 6, para. 51.

Kosovo by those States which have recognized it as an independent State" or whether Kosovo has achieved statehood.[222]

- Whether international law conferred a positive entitlement on Kosovo to declare unilaterally its independence[223]
- Whether international law generally confers an entitlement on entities situated within a State to break unilaterally away from it, that is a general right to secession.[224]

It finds that Kosovo's declaration of independence did not violate general international law because "the Court considers that general international law contains no applicable prohibition of declarations of independence". Read together with the Court's statement in paragraph 56, it is entirely possible for a particular act, such as a unilateral declaration of independence, not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.

The finding cannot be construed as implying that there is a right to secession for Kosovo, even less so for other secessionist movements. A prohibition on declaring independence is similarly not contained by Security Council resolution 1244. This, again, should not be understood as giving rise to a right to secession, since in the view of the Court the language of the resolution does not make any definitive determination on the final status.[225] Bluntly put, the ICJ opinion adds little to the controversy over the legal precedent allegedly set by Kosovo and whether this would consist in a right to remedial secession.[226]

222 *Id.*

223 *Id*, para. 56.

224 *Id.*

225 *Id.*, para. 118; Although it goes beyond the scope of the article to offer an exhaustive analysis of the Court's decision, it should be noted here that the Court introduces a sort of *dédoublement* for the Assembly of Kosovo, differentiating between this acting as a Provisional Institution of Self-Government in the past, as opposed to "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" while declaring independence. The later situation thus put the Assembly of Kosovo, or so the Court considers, outside the responsibility set forth by the Constitutional Framework, paras 102-109, 120-121.

226 The only paragraphs where the Court mentions secession are intended to decline its competence, as such: "[t]he Court considers that it is not necessary to resolve these questions in the present case" and "that issue is beyond the scope of the question posed by the General Assembly". Secondly, it notes that "radically different views were expressed by those taking part in the proceedings and expressing a position" on whether the right to self-determination in its external aspects applies beyond the

D. Impact of Practice on Theory: the "Kosovo Precedent" and Beyond

> "[A]fter having worked with UN officials for eight years, the Kosovars' plan can no longer be viewed as "unilateral" but rather as continually prepared and "the most unsurprising and predictable event" that South Eastern Europe has seen for generations."[227]

I. Kosovo's Independence as an Act of Remedial Secession?

In legal language, the diplomatic phrase "coordinated independence"[228] stands for secession. Kosovo's independence proclaimed in 2008 represents the separation of a part of the territory and population of Serbia without the consent of the latter. These are and will remain factual elements virtually impossible to dispute. What is called into question is the right of Kosovo to secede from Serbia.

This article concludes that international law accommodates beyond controversy the right of an entity to secede, when the state it is part of explicitly acknowledges in its domestic law such a right or when it recognizes that its constituent peoples have the right to self-determination. This is not the case of Kosovo. Even arguing on the base of the 1974 Constitution, Kosovo as a federative unit, was an autonomous province, and the Kosovo Albanians a *narodnost* without the right to self-determination. Part of Kosovo's struggle throughout its 20th century history aimed precisely at gaining the status of republic within Yugoslavia. As it was faced with the break-up of Yugoslavia in the 1990s, the international community upheld the territorial integrity of Serbia and rejected Kosovo's claimed right to secession.

Remedial secession then remains the sole maybe-legal option. As was discussed, the doctrine is conspicuously divided on the issue of the existence of a right to remedial secession. The legal grounds for remedial

decolonization and occupation context and on remedial secession. Id., paras 55-56, 83 and para. 82.

227 Agim Ceku, Prime Minister of UN-administered Kosovo (March 2006 - January 2008) as quoted in 'EU prepares for early 2008 Kosovo independence', *EUObserver*, 5 December 2007.

228 'Kosovo premier mulls deadline on independence', 15 July 2007, available at http://www.independent.co.uk/news/world/europe/kosovo-premier-mulls-deadline-on-independence-458096.html (last visited 25 August 2010).

secession are disputed but foremost the lack of practice is invoked. It is this perpetual debate regarding the status as *de lege lata versus de lege ferenda* which makes the Kosovo case so precious for both advocates and rejectionists of remedial secession.

The second part of this article has shown that the case of Kosovo gathers the factual elements of remedial secession:

- The Milošević regime carried out a policy of systematic discrimination followed by the perpetration of massive and grave abuses against the Kosovo Albanians.
- The Kosovo Albanians are a cultural group within Serbia, concentrated and majoritarian on the territory of Kosovo.
- The potential to produce any mutually agreeable outcome through peaceful settlement of disputes has been exhausted.

This analysis also emphasizes that the abuses of the late 1990s determined a shift in the position of part of the international community towards the Kosovo Albanians' status. A gradual move towards elevating the Kosovo Albanians from a cultural minority to the status of a people has taken place. Despite the widespread discourse that depicts Security Council Resolution 1244 (1999) as the guarantee against secession, as has been shown in this article, the resolution does contain the seeds of the right to self-determination of the Kosovo Albanians. The most revealing evidence of this shift in status is to be found in the Rambouillet accords and the Ahtisaari plan. These documents, which linger as non-agreements between Kosovo and Serbia, did however gather the agreement of part of the international community. Lastly, states have recognized and continued to support Kosovo's independence. This support appears to contradict existent state practice, since in the past states have recognized new state entities - created either as a result of secession or dissolution - only after the parent state consented to the separation.[229] Along these lines then, state practice in the case of Kosovo would appear to set a precedent and crystallize remedial secession as a legal option for state creation.

[229] See *supra* B.III; An Intermezzo: On State Practice and Secession; and also O. Corten, 'Le reconnaissance prématuré du Kosovo: une violation du droit international', *Le Soir*, 20 February 2008.

II. And Yet the Exceptionality Discourse!

In order to verify the precedential value of Kosovo's remedial secession it is necessary to reframe the analysis. As was discussed in the beginning paragraphs, an action that is novel or inconsistent with current practice gains precedential value if other states accept it. As was indicated, acquiescence and protest are the fundamental state reactions to an action, therefore those are of interest in the case of Kosovo.

Serbia, as the state with most interest in resolving the Kosovo case, has strongly protested against the legality of Kosovo's secession. The protest's effectiveness, clearly, cannot be discarded as a mere 'paper protest', not least given Serbia's diplomatic actions which resulted in the UN General Assembly's request for an Advisory Opinion on the *Unilateral Declaration of Independence*.[230] Moreover, Serbia belongs to the category of 'specially affected' states. In the *North Sea Continental Shelf*, the ICJ found that a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.[231]

Given Serbia's protest, applying the ICJ test to the current matter would mean that Kosovo's unilateral declaration of independence did not set a precedent of remedial secession. However, there are two aspects that need to be pointed out at this stage. First, it would seem that granting to the parent state the status of 'specially affected' in a case of remedial secession would ironically reward and entrust the perpetrator of massive and grave human rights' abuses with the possibility of blocking the remedy sought by its victim. Second, the framework in which the *North Sea Continental Shelf* case test was applied was very different from the Kosovo remedial secession case – both in terms of procedural matters and substance. On the one hand, remedial secession is not to be inferred as a customary rule from a purely conventional rule. In fact, there is no clear rule in respect to remedial

230 See for example C. Eick, 'Protest', in *Max Planck Encyclopedia of Public Internationl Law* (last updated July 2006), available at http://www.mpepil.com/app?letter=P&service=page&script=yes&page=subscriber_article&id=/epil/entries/law-9780199231690-e1460&recno=64& (last visited 25 August 2010).

231 *North Sea Continental Shelf*, *supra* note 8, para. 74.

secession, conventional or otherwise and hence the major importance of precedence and the legal effect of protest. On the other hand, it is submitted that in the case of remedial secession the notion of 'specially affected' does not do 'sufficient justice'.[232] Hence, if one accepts that massive and grave human rights' abuse gives rise to the right of self-determination of the cultural people – a right that attaches an obligation *erga omnes* – one also has to cede that remedial secession cannot be the special concern of only one state or just of few but of all states. Thus, the notion of 'specially affected' would appear to be inapplicable or on the contrary universally applicable with all states equally affected.

Other states such as Russia, China, Argentina, Spain, Sri Lanka, Slovakia and Romania protested or decided to withhold recognition. Regardless whether these states are genuinely concerned with the preservation of the current system of international rules, or attempt to avoid possible destabilization effects, or would like to show loyalty towards Serbia or realize that their human rights record *vis-à-vis* their own minorities might lead to endangering their borders following the Kosovo model, they all officially identify the potential of setting a legal precedent as a reason for protest or withholding recognition.

The fascination about the Kosovo case lies in the discourse of those states that chose to support and recognize Kosovo as an independent state. The United States of America through the voice of Condoleezza Rice asserts that:

> "The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today."[233]

Along similar lines, the Foreign Ministers of the European Union states declared:

[232] For a similar argumentation path in respect to certain international conventions see M.E. Villiger, *Customary International Law and Treaties* (1985), 44.

[233] U.S. Department of State, *U.S. Recognizes Kosovo as Independent State*, Washington D.C., 18 February 2008, http://www.america.gov/st/peacesec-english/2008/February/20080218144244dmslahrellek0.9832117.html; see also C. J. Borgen, *supra* note 97, 11.

> "The Council […] underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions."[234]

But surely the most staggering statement is made by Kosovo itself in its own declaration of independence:

> "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation."[235]

Throughout the years it sought independence from Serbia, Kosovo has maintained that it has the legal right to do so, yet in its proclamation of independence it declares its case unique, and hence without legal consequences. This discourse portraying Kosovo's path to independence as unique has been echoed in recent years also by writings of legal scholars.[236]

Unquestionably there are some specific features about the Kosovo case, notably the long period of international administration in a non-colonial setting. To this author, however, the uniqueness argument appears logically problematic, but legally potent. Some explanations are in order. Excluding the possibility that another entity will ever gather similar

234 Council of the European Union, Press Release, 2851st Council Meeting, General Affairs and External Relations, Brussels, 18 February 2008, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf (last visited 25 August 2010).

235 Kosovo Declaration of Independence, 17 February 2008, Preamble, available at http://www.assembly-kosova.org/?cid=2,128,1635 (last visited 25 August 2010).

236 See for example Bing Bing Jia who enumerates the following elements which contribute to the singular character of Kosovo: "first, a territory in question has to be placed under international supervision after violent events have resulted in a physical split of territory of an existing State. Secondly, the root of the events may vary from one case to another, but always involves a minority different, in terms of ethnicity, culture, language or other grounds, from the majority of the State from which the territory in question separates. Thirdly, any hope for holding together the union of these two parts of the State is dashed politically." B.B. Jia, "The Independence of Kosovo: A Unique Case of Secession", 8 *Chinese Journal of International Law* 1 (2009), 30. See also Daniel Thürer who observes that "Kosovo is distinct from other cases in important regards, notably in that the international community has administered Kosovo for almost ten years", D. Thürer & T. Burri, *supra* note 30, para. 43.

characteristics to the ones in the Kosovo case borders on premonition. As particular as the circumstances in the case of Kosovo may have been, involving grave and massive human rights' abuses targeted at a cultural minority and foreign intervention to stop these abuses followed by international administration of the territory of the said minority, one simply cannot exclude the possibility that in the future a similar situation takes place.

Regardless of its imprecise logic, the uniqueness discourse has significant legal consequences. By virtue of their recognition of Kosovo's independence, the recognizing states have made a claim – albeit implicit – that the state entities were created not in breach of international legal norms.[237] However, by systematically arguing that Kosovo's remedial secession does not represent a precedent, the international community deprived this instance of practice of its precedential value and made it a legally insignificant act. After all, only acts that appear as articulated precedential situations, such as acts intended to have legal consequences can create or change customary international law. The Kosovo secession has been articulated, but as a non-precedential situation. In the end, "states are both subjected to international law and create and authoritatively interpret it."[238] And in this case, even the recognizing states have consciously and clearly opted not to create a general rule governing remedial secession.

Ultimately, states have guarded the *status quo* and continued to act allergic to a right to remedial secession with set boundaries and clear coordinates. Given the protests expressed by those who opposed Kosovo's secession and the uniqueness-and-no-precedent discourse of those who recognized its independence, a precedent for remedial secession cannot be inferred. Ironically, the consistent state practice is evidence of the absence of a customary right of remedial secession.[239]

[237] In the view of Oliver Corten by "prematurely" recognizing Kosovo third states are in breach of the principle of sovereignty and of non-intervention in the internal affairs of Serbia. O. Corten, 'Le reconnaissance prématuré du Kosovo : une violation du droit international', *Le Soir*, 20 February 2008.

[238] G. Nolte & H. P. Aust, 'Equivocal Helpers- Complicit States, Mixed Messages and International Law', 58 *International and Comparative Law Quarterly* (2009), 27.

[239] The recognition of South Ossetia and Abkhazia by Russia does not alter the situation in any significant way, as long as Russia continues to oppose Kosovo's independence, *inter alia*, because of its precedential value. Perhaps, these seemingly mixed messages of Russia are best understood by appeal to the framework developed by Nolte and Aust starting from Scelle's *dédoublement fonctionnelle*; see *supra* note 238.

E. Conclusion: A Missed Opportunity

It is not the moment for naivety; states are fearful of setting a precedent. It is the fear of fueling nationalism, of legitimizing secessionist movements or of making their own cultural groups aware of the remedial secession option in case their minority rights are systematically refused, or autonomy and self-governance brutally denied. While not setting a legal precedent, the Kosovo precedent hysteria lingers. Claims for statehood will continue to be made, be they legitimate or not. The no-precedent safeguard will not discourage anyone.

The consequences of not assuming the precedent are, regrettably, far more important. The force of remedial secession lies in its prevention potential - empowering minority groups to hold governments accountable to their international obligations. It is not an implosive weapon within the Westphalian system, but a non-traditional human rights mechanism. By presenting Kosovo as unique, the international community undermined the theory of remedial secession, and made states and their borders sacrosanct even when governments by way of their discriminatory and repressive actions against part of their population question their own *raison d'être*. It is a perverse implication that states will have to deal with when another unique Kosovo enters the international arena.

Kosovo represents a missed opportunity of clarifying the concept of remedial secession: the 'required' threshold of abuse, the needed characteristics of a cultural group, the alternatives to be exhausted, the effect of time and democratization of the parent state on a secessionist claim, and not least, the question of *uti possidetis iuris*. Clarifying these aspects would have meant to offer a (more) objective yardstick for the international community to measure claims of secession. Today, arbitrariness prevails.

Thirty-nine years ago, Bangladesh seceded from Pakistan. The debate whether Bangladesh set a precedent for a right to remedial secession continues. Regrettably, Kosovo is merely a Bangladeshi *déjà-vu*.