

**AN UNCERTAIN STATE: THE LEGALITY AND CONSEQUENCE  
OF KOSOVO'S DECLARATION OF INDEPENDENCE UNDER  
INTERNATIONAL LAW**

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by

**James Jenkins, Bachelor of Laws (Hons), Bachelor of Economics,  
Bachelor of Business, University of Tasmania**

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## ABSTRACT

On the 17 February 2008, Kosovo's Provisional Institutions of Self-Government unilaterally declared their independence from Serbia and, since this time, a significant number of the world's existing states have conferred recognition upon it. Serbia and its allies ardently contest its legality, however; reaffirming their right to territorial integrity and, as such, their continued sovereignty over the territory that is so often said, by the citizens of it, to be the 'heartland' of their country. The Kosovar Albanians, on the other hand, assert their right to self-determination, and the concomitant 'freedom' that it offers them from a regime at whose hands they have suffered – in recent decades in particular – abuses of immeasurable gravity.

This thesis submits that the nascent state of Kosovo satisfies the general requirements of statehood, as set out in the *Montevideo Convention on the Rights and Duties of States* (1933) – especially in light of the leniency with which borderline cases are so often assessed – and, also, that independence was not precluded under the provisions of United Nations Security Council Resolution 1244.<sup>1</sup> As such, and although the resolution did not itself confer a right to independence upon the people of Kosovo, it remained an alternative available to them to the extent that it was also available under the framework of international law in the more general sense.

On this front, this thesis endorses the legality of Kosovo's declaration of independence, and third states subsequent recognition of it, in accordance with what is commonly referred to as a 'remedial right' to secession. This right, it is submitted, allows those 'people' that have suffered 'grievous wrongs at the hands of the parent State from which it wishes to secede' – including the denial of their right to internal self-determination, and/or serious and widespread violations of their fundamental human rights – to break away, as a 'last resort' and in the absence of any further, realistic and effective remedies for the peaceful settlement of the conflict.

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<sup>1</sup> Which was adopted upon the cessation of NATO's campaign of aerial bombardment against the Federal Republic of Yugoslavia, and which has governed the UN's administration of, and involvement with, Kosovo since this time.

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## ACRONYMS AND ABBREVIATIONS

EC – European Commission or European Community, as appropriate

EU – European Union

FRY – Federal Republic of Yugoslavia

GAOR – General Assembly Official Records

ICJ – International Court of Justice

KFOR – Kosovo International Security Force

KLA – Kosovo Liberation Army

LNOJ – League of Nations Official Journal

LNTS – League of Nations Treaty Series

NGO – Non-governmental organization

OAU – Organization of African Unity

OECD – Organisation for Economic Cooperation and Development

PCIJ – Permanent Court of International Justice

PISG – Provisional Institutions of Self-Government

QB – Queen’s Bench, United Kingdom

SCOR – Security Council Official Records

SRSB – Special Representative of the Secretary-General

The Ahtisaari Plan – The *Comprehensive Proposal for the Kosovo Status Settlement*

UN – United Nations

UNCIO – United Nations Conference on International Organization

UNMIK – United Nations Mission in Kosovo

UNTS – United Nations Treaty Series

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## INTRODUCTION

Winston Churchill once allegedly uttered that ‘the Balkans produce more history than they can consume.’ A near half-century after his death, his words echo throughout the globe, as the region is thrust once again – as a result of Kosovo’s declaration of independence – to the forefront of the international community’s mind. Unfortunately, but not unexpectedly, opinions have been polarised – as they so often are in matters concerning this region – upon whether or not the people inhabiting this territory had the right to do so, and what legacy it leaves for those other conflicts – frozen or evolving – that exist, on an ever-increasing basis, in the world today.

On the 17 February 2008, Kosovo’s Provisional Institutions of Self-Government (“PISG”) unilaterally declared their independence from Serbia and, since this time, a significant number of the world’s existing states have conferred recognition upon it.<sup>1</sup> Serbia and its allies ardently contest its legality, however; reaffirming their right to territorial integrity and, as such, their continued sovereignty over the territory that is so often said, by the citizens of it, to be the ‘heartland’ of their country. The Kosovar Albanians, on the other hand, assert their right to self-determination, and the concomitant ‘freedom’ that it offers them from a regime at whose hands they have suffered – in recent decades in particular – abuses of immeasurable gravity.

Both arguments are clearly sustainable and of some merit and, as a result, Kosovo might be considered the quintessential ‘tough case’;<sup>2</sup> the answer to which may be derived only from subsequent state practice and, therefore, with the assistance of hindsight. This thesis submits that, while it most certainly is a tough case – lost somewhere in the grey zone that has evolved between the parties’ respective rights to territorial integrity and self-determination – it is not one which cannot be answered. A plethora of international instruments, doctrines, judicial decisions, and political issues are present, and variously applicable, in disputes of this nature. Given its legal foundations, however, this thesis does not purport to analyse all of them, but will, rather, focus predominantly upon those concerning international law, and the legality – as opposed to the motives – of those actions taken by the parties to it. The most prominent of these are clearly the parties’ respective rights to self-determination and territorial integrity which, either explicitly or

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<sup>1</sup> As of 12 May 2009, 58 of the 192 United Nations member states had recognised the Republic of Kosovo – ‘Who Recognised Kosovo as an Independent State?’, accessed at <http://www.kosovothanksyou.com/> (last accessed 12 May 2009) – 3 of the 5 UNSC Permanent Member States, 22 of the 27 European Union (EU) Member States, 24 of the 28 NATO Member States, 33 of the 47 Council of Europe Member States, 35 of the OSCE Member States, 11 of the 57 OIC Member States, and 7 of the 7 G7 Member Countries, had formally recognised Kosovo as of this date.

<sup>2</sup> Borgen, C.J., ‘Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition’, *The American Society of International Law Insight*, Volume 12, Issue 2, February 29, 2008, accessed at <http://www.asil.org/insights/2008/02/insights080229.html> (last accessed 16 May 2008).

implicitly, underpin a majority, if not all, of the arguments most pertinent to the territories ongoing status.

Self-determination affords, in theory, its holders the right to ‘freely determine their political status and freely pursue their economic, social and cultural development.’<sup>3</sup> It was once famously described by Robert Lansing – Woodrow Wilson’s<sup>4</sup> Secretary of State – as a concept ‘loaded with dynamite’, and the ‘dream of an idealist’ which, he feared, might ‘cost thousands of lives.’<sup>5</sup> Some would suggest that Lansing has, through the passage of time, been proven correct. Others, however – including this writer – would submit that the principle – which has since become a right – has freed many from the shackles of colonisation, and that its continued application, in the post-colonial world, is a fundamental cog in the machinations of a world that has opened its eyes ever-wider to the human rights of its inhabitants and, most importantly, those that continue to suffer at the hands of oppressive and discriminatory regimes. Territorial integrity, on the other hand, is a right conferred upon states, to protect them from ‘any action which would dismember or impair, totally or in part’, their territorial integrity or political unity;<sup>6</sup> simply put, to maintain their existing international borders.

The two are clearly incompatible when construed in absolute terms and, as such, can be respectively relied upon by the warring parties, so that each are able to contest, by reference to one or the other, that their actions have been taken in accordance with the provisions of international law. The tension that this uncertainty has created has been blamed, in some circles, for the prevalence – particularly since the end of the Cold War – of secessionist movements, and their oft made demands for independence, and nothing short of it. These concerns are arguably valid as, unfortunately, in the eyes of many, very little at present apparently separates the most valid of claims from those without basis.

Suggestions of a compromise have long been made; the most common of which confers primacy upon – or, if you like, a presumption in favour of – the parent states right to territorial integrity, but makes it contingent upon their compliance with the principles of equal rights and self-determination and, as such, their possession of a government representing, without distinction, the whole people belonging to it. In the absence of such government, it is suggested, the presumption is displaced, and the peoples right to *internal* self-determination<sup>7</sup> morphs into one which can be exercised on an *external* basis. The logic underpinning this approach is, Cobban suggests:

that if we take the right of sovereignty on the one hand, and the right of secession on the other, as absolute rights, no solution is possible. Further, if we build only on sovereignty, we rule out any thought of self-determination, and erect a principle of tyranny without measure and without end, and if we confine ourselves to self-determination in the form of

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<sup>3</sup> See, for example, Para 2, General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>4</sup> One of the most influential exponents of it – see below at pp12-14.

<sup>5</sup> Lansing, R., ‘Self-Determination’, *Saturday Evening Post*, 9 April 1921, 6 at 101.

<sup>6</sup> See, for example, Para 7 of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*. G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV).

<sup>7</sup> Which, it is submitted, all ‘peoples’ possess – see below at chapters 5 and 6.

secessionism, we introduce a principle of hopeless anarchy into the social order. The only hope, it seems, must be in a combination of the two principles, allowing each to operate within its proper field, and recognising neither as an absolute right, superior to the rights of individuals, which are the true end of society.<sup>8</sup>

This approach endorses what is often referred to as a ‘remedial right’ to secession, which, some suggest,<sup>9</sup> has evolved – and possibly even crystallised – into a rule of customary international law. This right would allow those ‘people’ that have suffered ‘grievous wrongs at the hands of the parent State from which it wishes to secede’ – including the denial of their right to internal self-determination, and/or serious and widespread violations of their fundamental human rights – to break away, as a ‘last resort’ and in the absence of any further, ‘realistic and effective remedies for the peaceful settlement of the conflict.’<sup>10</sup> This thesis will submit that this right had, indeed, crystallised as a rule of customary international law at that time at which Kosovo’s PISG declared their independence and that, as a result, it – and also, therefore, third state recognition of it – conformed with the requirements of international law. If not, it is further submitted, it would be difficult to contest its non-existence in the wake of these events, and the international community’s relatively widespread condonation of them.

As is the case with so many other areas straddling legal and political bounds, this approach is not devoid of uncertainty. What constitutes ‘representation without distinction’, ‘oppression’ and ‘discrimination’ is, and always will be, a subjective and philosophical question to which, by definition, no certain answers can be finally given. It is submitted throughout this thesis, however, that these are necessary impediments which can, over time, be ‘ironed out’ as states, though their actions, impose increasingly definite parameters upon the right, and those cases in which it exists.

### THE SCOPE OF THIS THESIS

The existence or otherwise of this right is, however, not the only issue which must be concluded upon in determining whether or not the Kosovar Albanians were entitled, under international law, to secede from Serbia. In fact, it is, it would appear, the last of the hurdles that must be cleared, as a fall at those which precede it may preclude its relevance and, as such, render the argument as to whether the right exists – and is one possessed by the Kosovar Albanians – a moot one. As a result, this thesis will initially work through those other issues which, if not satisfied, may prematurely exclude the people of Kosovo from relying – in declaring their independence – upon their right to self-determination. Before conducting this analysis, however, the respective histories of self-determination, as a concept, and the territory of Kosovo, will be examined. This is a crucial first step as, without an understanding of them, one may not be able to fully grasp the tensions, and complexities, that lie beneath the surface of those issues, and the respective arguments mentioned above.

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<sup>8</sup> Cobban, A., *The Nation State and National Self-Determination* (London, Collins, 1969) at 138.

<sup>9</sup> See below at chapter 6.

<sup>10</sup> For a discussion of these requirements, see below at chapter 6.

The first chapter will outline the evolution of the principle of self-determination and, in particular, that which has occurred since the dawning of the twentieth century. A notable emphasis will also be placed upon those instruments of international law that have been adopted during the United Nations [“UN”] era. Finally, and very importantly, those changes that have occurred in the international arena and, in particular, the realm of self-determination, in the wake of the Cold War, will also be assessed. Some suggest that a ‘new openness to secession’<sup>11</sup> now exists, and it against this backdrop that Kosovo’s actions, and their consequences, must be assessed.

The second chapter then introduces – somewhat briefly given the turbulent and multifarious nature of it – the history of Kosovo. A brief introduction is given to the territories ‘roots’ but, in light of the uncertainty and contention that surrounds them, a greater emphasis is placed upon the regions tumultuous history since the advent of the Balkan Wars, the correspondent removal of Ottoman rule, and, in particular, those events that have transpired since the passing of Tito in 1980. The ‘re-surfacing’ of nationalist aspirations at this time was, in the opinion of many, the harbinger to the events that have since occurred, and the violence and oppression that the Kosovar Albanians have been subjected to during this period is, arguably, the basis upon which their claim may succeed.

With this introductory material in mind, the legal analysis will then be embarked upon. Chapter three deals with the first of those precipitate issues mentioned above – international personality and the generally accepted requirements for statehood. After outlining, momentarily, the incentives that the Kosovar Albanians may possess in attempting to create their own state, those requirements for statehood – as set out in the *Montevideo Convention on the Rights and Duties of States*<sup>12</sup> – will be discussed, and a conclusion reached upon whether or not Kosovo satisfies them. If they do not, it is suggested, the validity of their claim to self-determination is of no consequence as, regardless of its status, their claim to statehood should not succeed. In addition to these requirements, many commentators suggest that prospective states must also satisfy requirements pertaining to the protection of human rights, the observation of international law, and also a measure of democratic legitimacy.<sup>13</sup> Questions remain, however, as to whether these constitute requirements for statehood, or merely the attainment of recognition.

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<sup>11</sup> Kovács, M. M., ‘Standards of self-determination and standards of minority-rights in the post-communist era: a historical perspective’, *Nations and Nationalism* 9 (3), (2003), 433 at 434 – citing Hannum, H., ‘The specter of secession’, *Foreign Affairs* 77(2) (1998) 13, Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 327-365.

<sup>12</sup> Of 1933.

<sup>13</sup> See, for example, Murphy, S., ‘Democratic Legitimacy and the Recognition of States and Governments’, *International and Comparative Law Quarterly*, Vol. 48 No. 3, 545 at 545 – cited in Triggs, G., *International Law: Contemporary Principles and Practices* (New South Wales: LexisNexis Butterworths, 2006) at 157.

The submission is made that the nascent state of Kosovo does, indeed, satisfy those requirements set out in the *Montevideo Convention*; especially in light of the leniency with which borderline cases are so often assessed. The requirement pertaining to the protection of human rights is difficult to assess in advance, and although Kosovo's Prime-Minister – Hashim Thaçi – stressed, in the lead up to Kosovo's declaration of independence, the importance of them in post-independence Kosovo, time will be the only true judge of the conviction underpinning his rhetoric. Whether or not the Kosovar Albanians possess a valid right to self-determination is the subject of chapters five and six. If, however, the above submissions are accepted, the legality or otherwise of their claim to self-determination will likely mirror that attributable to their statehood in general, and the importance of the conclusion reached in those chapters can, therefore, obviously not be overstated.

The following chapter discusses the status and ramifications of United Nations Security Council resolution 1244 which, the respective parties variously contend, either permits or precludes independence as an option for the ongoing status of Kosovo. This resolution was adopted on 10 June 1999 – the date upon which NATO concluded their campaign of aerial bombardment within Yugoslavia – and dealt with issues pertaining to the territories administration under the UN, which commenced on this date. The resolution was, unfortunately, phrased in relatively vague terms and, as a result, the respective sides' have both been able to construe it as in support of their position. The question asked in this thesis is whether or not the resolution precluded independence as an option for the final status of Kosovo and, as such, whether the provisions of it were intended to preserve the territorial integrity of the FRY indefinitely, or only during that interim – and therefore temporary – period in which the territory was under the administration of the United Nations.

The submission is made that the resolution does not prohibit – nor, however, promote – Kosovo's declaration of independence.<sup>14</sup> The transient wording of it emphasises the temporary nature of its provisions, and those arrangements in existence as a result of them. It does not confer a right upon the Kosovar Albanians to declare their independence; however, by failing to exclude it as an option, it transfers the question of the declarations legality into the sphere of international law more generally. Supporting this conclusion is the relatively recently considered notion of 'earned sovereignty', or 'conditional independence', under which a sub-state entity – such as Kosovo – may become eligible for independence and international recognition upon their acquisition of 'sufficient sovereign authority and functions'.<sup>15</sup> As such, the question is then whether the same is true under the established guidelines of international law?

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<sup>14</sup> On this point, see Borgen, above n2.

<sup>15</sup> Williams, P., 'Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status', *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 387 at 388. Such functions include, *inter alia*, 'the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies' – see Williams, R., Scharf, M., Hooper, J., 'Resolving

The remainder of the thesis addresses this question – whether or not the Kosovar Albanians possessed, as a result of their right to self-determination, a valid claim to secede? This analysis will be divided into two, separate but necessarily interrelated, questions: in whom does the right to self-determination vest, and what actions does it allow its holders to take?

Chapter five will address the first of these matters – whether or not the Kosovar Albanians can, and do, constitute a ‘people’. The analysis conducted within this chapter will focus upon four subsidiary matters – does the term ‘people’ refer only to the entire population of a state or territory, or can it also include sub-state entities; what characteristics must groups possess before they can be characterised as a ‘people’; which ‘self’ is the relevant ‘people’ for the purposes of self-determination – and can there be more than one,<sup>16</sup> and; do groups that otherwise satisfy the suggested requirements of a ‘people’ lose this status by virtue of the fact that they are also a minority within the state from which they are attempting to secede? As a result of the conclusions reached upon these matters, the overarching submission will be made that the Kosovar Albanians can, and do, constitute a ‘people’. This might be characterised as the threshold step which a group must overcome before they are able to possess, and exercise, the right to self-determination, and its importance to the Kosovar Albanians claim can therefore not be overstated.

It is, however, far from a final conclusion. The question is then begged as to what this right entails – does it, for example, confer upon its holders a right to cultural, economic, and social respect; autonomy; independence; a combination of these; or something entirely different? Most specifically, in this case, does it confer upon the Kosovar Albanians<sup>17</sup> an ability to unilaterally secede? The submission will be made throughout this chapter that the Kosovar Albanians did, indeed, possess a ‘remedial right’ to secede at that time at which Kosovo’s PISG declared their independence from Serbia. This right, it is proposed, allows those minorities that have ‘suffered grievous wrongs at the hands of the parent State’, or have been denied their right to *internal* self-determination, to secede, as a ‘last resort’, from their parent state in accordance with their right to self-determination.

In addition, it will be finally contended, the circumstances surrounding Kosovo were such as to satisfy the requisite elements for the ‘remedial right’ to vest in the Kosovar Albanians – as the subject people – and, as such, to render their declaration of independence – and, vicariously therefore, the subsequent recognition of it by third states – a legal act under the principles of international law as they existed at that time.

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Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty’, *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 349 at 350.

<sup>16</sup> In other words, if many groups contained within a state satisfy the suggested requirements of a ‘people’, and there is some overlap between these groups, which one – or ones – possess the right to self-determination?

<sup>17</sup> Who, it is concluded in chapter 5, constitute a ‘people’ for the purposes of self-determination.

The consequences of an acceptance of this conclusion are significant and many – not only for the inhabitants of Kosovo, but also international law, international relations, and governance the world over. It will instil within leaders, and potential future leaders, the international community's ever-stronger abhorrence to oppressive and/or discriminatory regimes, and their attendant willingness to act in defence of fundamental human rights. It will, in addition, create some clarity in an area that has for so long had so little, but which now – as illustrated by recent events in Abkhazia and, in particular, South Ossetia, in Georgia – so desperately requires it. Without it, one fears, lives will be lost, as internal conflicts burgeon, not only in prevalence, but also scale, violence, and severity. This, it can be said with certainty, is an affliction that the world could do without.

## CHAPTER 1

### THE HISTORY AND EVOLUTION OF SELF-DETERMINATION UP UNTIL 1945

The proposition (to begin by using a perfectly neutral word) that every people should freely determine its own political status and freely pursue its economic, social, and cultural development has long been one of which poets have sung and for which patriots have been ready to lay down their lives.<sup>1</sup>

Unfortunately, then, the right underpinning it – of all peoples to self-determination – remains one of the most contentious and uncertain in international law. As has been said, both the meaning and the content of the right, ‘remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles.’<sup>2</sup>

The origins of self determination can be traced back to the 18<sup>th</sup> and 19<sup>th</sup> centuries in the United States and Western Europe, and the latter end of this period in Central and Eastern Europe.<sup>3</sup> The notions and motives colouring these developments differed quite dramatically, however, between the two geographical regions.<sup>4</sup> The evolution in the United States and Western Europe developed principally upon the political notions of popular sovereignty and representative government, while that in Central and Eastern Europe focused more particularly on the ethnically and culturally grounded nineteenth-century concept of nationalism.<sup>5</sup> Over time, the principle has been sculpted by both and, arguably, also refined by a series of events and actors, and the ever-evolving notion of the modern secular state and its attendant structure of international relations.

Through a discussion of these, this chapter will attempt to provide not only a ‘snapshot’ of the concept as it exists today, but also a study of its roots and evolution so that its magnitude and intricacies may be properly understood.

#### *Peace of Westphalia*

Although pre-dating recognition of the principle of self-determination, the first of these events was, arguably, the 1648 Peace of Westphalia, at which the modern state was created. This event marked the formal replacement, in Europe, of the ‘overarching but finally impotent Holy Roman Empire’ with ‘a system of interacting secular states’.<sup>6</sup>

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<sup>1</sup> Humphrey, John P., ‘Political and Related Rights,’ in Theodor Meron (ed.), 1 *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 2 vols. 1984) at 193.

<sup>2</sup> Hannum, H., *Autonomy, Sovereignty, and Self-Determination*, (Philadelphia: University of Pennsylvania Press, 1990) at 27.

<sup>3</sup> Musgrave, T., *Self Determination and National Minorities*, (Great Britain: Oxford University Press, 1997) at 2.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Cassese, A., *International Law in a Divided World*, (Oxford: Clarendon Press, 1986) at 34; cited in Lâm, M. C., *At The Edge of the State: Indigenous Peoples and Self-Determination*, (United States of America: Transnational Publishers, 2000) at 88.



While it is acknowledged that structured ‘inter-community relations’ existed before Westphalia, Cassese believes that they are discernible on several fronts. Firstly, the system preceding Westphalia did not contain centralised bureaucratic states, which had not yet evolved and, secondly, Westphalia formally removed the states from the ultimate authority of the Pope and bestowed upon them de facto freedom from the Holy Roman Emperor.<sup>7</sup> It therefore marked, in general terms, the creation of sovereign and independent states.<sup>8</sup>

Throughout the ensuing period – and up until the American and French revolutions respectively – the intellectual foundations of ‘modern-type self-determination’<sup>9</sup> were set, as the dual concepts of the nation state and individual human rights began to forge prominent positions in international society.<sup>10</sup> The eventual and inevitable collision of these concepts created the spark that ignited the principle of self-determination – a principle upon which the American and French revolutions were founded. It was in the legal documents accompanying these revolutions – the ‘Bill of Rights’ (1776) and the ‘Declaration of Man and Citizen’ (1789) respectively – that the principle initially found a legal voice, and it has since proven to be one of significant international consequence.<sup>11</sup>

#### *American and French Revolutions*

During the tyrannical ‘ancien regime’, the monarch had been equated with the state and had ruled absolutely over the entirety of domestic and international affairs.<sup>12</sup> Monarchs ruled in the name of God, and peoples, ‘as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance with the interests of the monarch.’<sup>13</sup> However the French Revolution marked the decline of such despotism and monarchic rule.<sup>14</sup> It declared that the divine right no longer served as the basis of legitimate rule and also that, under the principle of self-determination, all citizens were now equal before the law. As opposed to the earlier notion of ‘divine law’, every law now ‘stemmed from the will of the people which acted through the state and its organs.’<sup>15</sup>

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<sup>7</sup> Abu-Lughod, J.L., *Before European Hegemony: The World System A.D. 1250-1350* (New York: Oxford University Press, 1991); cited in Lãm, M. C., *At The Edge of the State: Indigenous Peoples and Self-Determination*, (United States of America: Transnational Publishers, 2000) at 88.

<sup>8</sup> Cassese, A., *International Law in a Divided World*, (Oxford: Clarendon Press, 1986) at 34-38.

<sup>9</sup> Hasani, E., *Self-Determination, Territorial Integrity and International Stability: The Case of Yugoslavia* (National Defence Academy, Institute for Peace Support and Conflict Management Vienna in cooperation with: PfP-Consortium of Defence Academies and Security Studies Institutes, Vienna and Prishtina, February 2003) at 59.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 60.

<sup>12</sup> Ibid.

<sup>13</sup> Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 11.

<sup>14</sup> Hasani, above n9, 61.

<sup>15</sup> Ibid.

The democratically idealistic principle of self-determination espoused by the Americans and French – in essence, ‘that the government be responsible to the people’<sup>16</sup> – proved troublesome, however, and was dubiously applied in its infancy. It was formally enshrined in France,<sup>17</sup> but only applied in practice when the outcome was legally favourable.<sup>18</sup> Under the guise of adherence to the principle of self-determination, for example, and following plebiscites that expressed the ‘populations’ express desire to unite with France’,<sup>19</sup> the French annexed the territory of Avignon in 1791, and that of Belgium and Palatinate in 1793. However the principle was not ‘uniformly applied’, and Plebiscites ‘were only valid if the vote was pro-French’.<sup>20</sup>

The principle, as constructed by the French, was also effectively redundant in the hands of peoples including colonies and minorities, as it only applied to the alteration of existing State borders, and it also failed to stipulate any right for a people to ‘internally’ self-determine, as it is now known – that is, to determine their own rulers.<sup>21</sup> However, as imperfect as they may have been, these French proclamations have proven to be some of the most important ever made in the ambit of international law. They represent the seeds from which the modern day right to self-determination – itself also obviously imperfect but invaluable – was able to grow.

### *Congress of Vienna*

The French Revolution and Napoleonic War – which established the notions of equality, democracy, law and nation – ended following Napoleons final defeat at Waterloo on the 18 June 1815, and the signing of the Second Treaty of Paris on the 20 November 1815. In the aftermath of Napoleonic France’s defeat, the Congress of Vienna was conducted with the ambition of settling issues and re-drawing the continent’s political map. The Congress adopted the concept of self-determination; not as an instrument to serve the wishes of national populations, however, but as one to manage power in the region. This represented a move away from the developing framework that had recently been fought for – based upon the ‘nationality’ principle – and, furthermore, a re-instatement of the ability to trade territories ‘for the sake of stability, notwithstanding the wishes of the population.’<sup>22</sup> Territories of sovereign states were, therefore, once again able to be ceded and partitioned without the need to consult the population concerned, and ‘attempts at secession were ruthlessly suppressed.’<sup>23</sup>

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<sup>16</sup> Cassese, above n13, 11.

<sup>17</sup> In Article 2 of Title XIII of the Draft Constitution, which was presented to the National Convention by Condorcet on 15 February 1793 – see Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 11

<sup>18</sup> Cassese, above n13, 12.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Hasani, above n9, 62.

<sup>23</sup> Ibid.

This regime existed until 1917-1918, however certain notable exceptions arose during this period, in which complete secession occurred or the people's will was respected – 'most notable were the cases of Greek and Belgian Independence, the 1840's revolutions, Italian plebiscites leading to Italy's unification and, finally, the German and Italian acts of unification.'<sup>24</sup> Despite these exceptions, however, the 'balance of power' approach remained in force throughout this era – predominantly as a purported safeguard against any further internal uprisings or revolutions – and the 'nationality principle' was, therefore, only able to prevail on certain, extremely seldom, politically convenient occasions.<sup>25</sup>

### *Eminent Opinions of the Early 20<sup>th</sup> Century*

The concept of self-determination awoke from its apparent slumber upon the arrival of the First World War and the Bolshevik Revolution, as identities of international power began to consider more thoroughly, and voice, their often conflicting opinions.

#### *Vladimir Lenin*

Of these, Vladimir Lenin was the 'first to insist, to the international community, that the right of self-determination be established as a general criterion for the liberation of peoples.'<sup>26</sup> However, and despite his characterising it as 'a means of realising the dream of worldwide socialism',<sup>27</sup> other Bolsheviks feared that the concept of self-determination may lead to the 'disintegration of the former Russian Empire'.<sup>28</sup> To allay their fears, Lenin drew the following analogy between self-determination and liberal divorce laws:

To accuse the supporters of freedom of self-determination, i.e. freedom to secede, of encouraging separatism, is as foolish and as hypocritical as accusing the advocates of freedom of divorce of encouraging the destruction of family ties... They believe that in actual fact freedom of divorce will not cause the disintegration of family ties but, on the contrary, will strengthen them on a democratic basis, which is the only possible and durable basis in civilized society.<sup>29</sup>

Despite his evidently strong support for the principle of self-determination, Lenin was, however, not without reservations as to its scope, and therefore placed upon his beliefs certain caveats. He believed that 'the attainment of independence by a nation was not to be regarded as the ultimate goal',<sup>30</sup> given the 'indisputable advantages' that he believed

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid 63

<sup>26</sup> Cassese, above n13, 14-15 – Cassese notes that, despite the fact that self-determination had been championed in a number of leftist party conventions, and a detailed pamphlet written on it by Joseph Stalin, Lenin remained the 'first forceful proponent of the concept at the international level'.

<sup>27</sup> Ibid 13.

<sup>28</sup> Musgrave, above n3, 19.

<sup>29</sup> Lenin, V. I., *The Right of Nations to Self Determination* (Moscow: Foreign Language Publishing House, 1950) at 54.

<sup>30</sup> Cassese, above n13, 17.

were bestowed upon the 'big States', and also the dangers that he believed 'separation, fragmentation and the formation of small States' embodied.<sup>31</sup>

It was, however, Lenin's subordination of self-determination to socialism that drew criticism and represented perhaps the ultimate flaw in his argument. He acknowledged widely the need to directly subordinate the struggle for self-determination to 'the revolutionary mass struggle for the overthrow of the bourgeois governments and the achievement of socialism'.<sup>32</sup> As a result, he attracted criticism – which mirrored, at a fundamental level, that which had been directed at eighteenth-century French politicians – for championing self-determination 'more to further his ideological and political objectives than to safeguard peoples'.<sup>33</sup>

Despite this subordination, and the attendant criticisms made of Lenin's arguments, the focus placed upon the right to self-determination by the Soviets had an enormous impact on both the foreign policy of existing States and the 'corpus of international law'.<sup>34</sup> As such, 'the attitude of the Bolsheviks did much to legitimise self-determination'.<sup>35</sup>

#### *Woodrow Wilson*

The concept of self-determination was also heavily influenced by US President Woodrow Wilson whose ideas, propounded during that period following the entry of the United States into the War in 1917, were pivotal in the principles evolution. As opposed to Vladimir Lenin – who viewed it as 'a means of realising the dream of worldwide socialism'<sup>36</sup> – Wilson considered the concept of self-determination to be 'the key to lasting peace in Europe'.<sup>37</sup> Wilson's ideas initially reflected the Western European understanding of self-determination, as bestowing upon the inhabitants of a State the ongoing right to determine their own government, including its form.<sup>38</sup> The right was, in his mind, therefore akin to one of democratic government and, as such, represented what is now commonly referred to as the right to 'internal' self-determination.

Wilson's initial, Western European centric, ideas of self-determination did not consider the 'Central European notion that nations must establish their own States'.<sup>39</sup> His thinking gradually shifted, however, as he came to better understand the 'nature of the demands being made by the various subject nationalities' that sought independence at the conclusion of the war – 'namely that each ethnic group should form its own nation state' – and, to appease them somewhat, his original call for self-government was modified to

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<sup>31</sup> Ibid.

<sup>32</sup> Lenin, V., *Theses on the Socialist Revolution and the Right of Nations to Self-Determination*, published in *Selected Works* in 1916, at 167.

<sup>33</sup> Cassese, above n13, 18.

<sup>34</sup> Ibid 19.

<sup>35</sup> Musgrave, above n3, 22.

<sup>36</sup> Cassese, above n13, 13.

<sup>37</sup> Ibid.

<sup>38</sup> Musgrave, above n3, 22.

<sup>39</sup> Ibid.

include them.<sup>40</sup> This gradual transition in the thinking of Wilson is evidenced by several of his famous Fourteen Points – which he delivered to a Joint Session of the Two Houses of the United States Congress on the 8 January 1918. Article XIII, for example, stated that:

An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.<sup>41</sup>

His speech to Congress one month later – on the 11 February 1918 – provides further evidence of the development in his thinking, particularly with regards to the nationality question. In this speech he stated, quite unequivocally, that:

Peoples are not to be handed about from one [sovereign] to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed by their own consent. Self-determination is not a mere phrase, it is an imperative principle of action which statesmen will henceforth ignore at their peril.<sup>42</sup>

This quote emphasises Wilson's acceptance of the concept of national self-determination, in addition to his original understanding of the concept as a right to determine one's own government. This evolution in his thinking, throughout the course of the United States involvement in the war, was also evident in his changing attitude towards the Austro-Hungarian territory – the dismemberment of which he eventually believed was inevitable, despite his statement upon the United States entry into the war that they had no interest in doing so.<sup>43</sup>

#### *Article XIV of Wilson's Fourteen Points*

Wilson was, in addition and as a result of his taking personal control of negotiations with the Germans during the latter stages of the war, one of the most influential leaders in the post-WWI creation of the League of Nations. It was, in fact, the final of his famous 'Fourteen Points' which prophesised that:

A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.<sup>44</sup>

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<sup>40</sup> Ibid 23.

<sup>41</sup> Wilson, W., 'President Wilson's Fourteen Points: A Program for Peace', delivered to a Joint Session of the Two Houses of the United States Congress, 8 January 1918.

<sup>42</sup> Temperley, H.W.V., *A History of the Peace Conference of Paris*, Vols. I and IV (London: Oxford University Press, 1920 and 1921) at 161.

<sup>43</sup> Musgrave, above n3, 24.

<sup>44</sup> Wilson, above n41.

However, and despite their importance, the 'Fourteen Points' attracted criticism not only from an international audience, but also some of the President's closest associates. Such detractors variously contended that his points were 'too loose and indeterminate', that they were 'advanced for foreign consumption, but were not intended to apply to the American scene', and that Wilson himself 'was not aware of the implications of his theory' as he 'naively underestimated the consequences that his ideas would produce on the world scene'.<sup>45</sup> In fact, Wilson's own Secretary of State, Robert Lansing, once stated that the concept of self-determination – which Wilson supported so ardently – was 'loaded with dynamite'.<sup>46</sup> He continued on in his summation of the principle, to suggest that:

It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist, who failed to realise the danger until too late.<sup>47</sup>

It was also suggested that Wilson 'did not, or rather was unable to, consistently pursue his ideas so as to have them accepted by other statesmen'.<sup>48</sup> The latter of these criticisms may explain, to some extent, the refusal of the US Congress to ratify the Treaty of Versailles<sup>49</sup> – an act which hamstrung somewhat the nascent League of Nations – and the fact that only four of Wilson's points were entirely adopted in the post-war reconstruction of Europe.

### *The League of Nations*

In fact, and despite Wilson's best attempts and intentions, there was no mention made of self-determination in the subsequently created Covenant of the League of Nations.<sup>50</sup> The

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<sup>45</sup> Cassese, above n13, 22-23.

<sup>46</sup> Lansing, R., 'Self-Determination', *Saturday Evening Post*, 9 April 1921, 6 at 101.

<sup>47</sup> Ibid.

<sup>48</sup> Cassese, above n13, 22-23.

<sup>49</sup> Although the Treaty of Versailles is most noted for the peace that it brought to the world, this was not the only consequence of international significance to emanate from its signing. The Treaty also approved the League of Nations Covenant – which was itself contained within Articles 1 to 26, of Part I, of the Treaty – and in doing so created the often criticised, yet vitally important, international organisation known as the League of Nations. The preamble to the Covenant asserted that the mission of the League was 'to promote international co-operation and to achieve international peace and security' but, despite some initial success – including an eventually peaceful resolution in the *Aaland Islands* case discussed below – the League was ultimately ineffective in preventing the military aggression that sparked WWII.

<sup>50</sup> Draft Article 3 contained Wilson's proposal, and suggested that the principle of self-determination be the basis for 'making any further territorial adjustments as might become necessary as a result of changes in social or political relationships.' It was, however, redrafted several times before its inclusion and, in its final form – which was renumbered Article 10 – all references to self-determination had been deleted. The final article also made no mention of territorial adjustments, and quite conversely emphasised 'respect for the territorial integrity and existing political independence of the Members of the League': see Musgrave, above n3, 30-1. Despite these failures Wilson was, however, rewarded for his efforts in the League's formation with the 1919 Nobel Peace Prize.

lack of support for the principles inclusion in this document stems from the fact that, despite the declared intention of the Allies to make self-determination ‘the guiding principle of the Peace Conference’ – at which the Treaty of Versailles, which contained the Covenant of the League of Nations, was signed – ‘it had never been their intention to apply [it] to their own peoples and territories.’<sup>51</sup>

Despite this, and the inherent weakness and inadequacies of the League – Benito Mussolini once famously stated that the League was ‘very well when sparrows shout, but no good at all when eagles fall out’ – its importance in the international arena cannot be underestimated. Quite probably of most significance for the development of self-determination was its creation of minority treaties which, some suggest, represented their ‘attempt to cope with the fact that ethnically homogenous states hardly ever existed before or after Westphalia.’<sup>52</sup> Despite their philanthropic appearance, however, these treaties were not the result of any apparent humanitarian concern, but rather the desire that colonial powers – particularly the British – harboured to protect their overseas dominions. This much is evidenced by the fact that those made to sign were ‘only those states that were defeated by the Allied Powers’ and, more specifically, that ‘the Third World was wholly excluded’ from participating.<sup>53</sup> The treaties therefore represented, more realistically, a compromise of sorts, borne out of their masterminds ‘fear that the uncorrected mistreatment of minorities in Europe would lead to renewed crises on that continent.’<sup>54</sup>

It has also been suggested that the treaties – which had been established to ensure that majorities did not attempt to assimilate, expel or exterminate their resident minorities – were, in addition to being ineffective, somewhat antagonistic, and a ‘goad which further aggravated the pre-existing tensions between majorities and minorities.’<sup>55</sup> In the tense period that followed their introduction, the impotence of the League of Nations became evident, and the world disintegrated into war for the second time in less than fifty years.

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<sup>51</sup> Ibid 30.

<sup>52</sup> Lâm, M. C., *At The Edge of the State: Indigenous Peoples and Self-Determination*, (United States of America: Transnational Publishers, 2000) at 92.

<sup>53</sup> Ibid 94.

<sup>54</sup> Ibid 94 – note, however, Bilder’s suggestion that the motives of the Allied Powers were not only fuelled by a fear of what a failure to act may mean for the continent, but also humanitarian concerns: Bilder, R. B., ‘Can Minority Treaties Work?’, 20 *Israel Yearbook on Human Rights* 71 (1990).

<sup>55</sup> Musgrave, above n3, 61.

*Aaland Islands case*<sup>56</sup>

The *Aaland Islands* dispute – which occurred in the wake of WWI – was ‘the first case in which the League of Nations had to consider an appeal to the principle of self-determination’, and is therefore of vital importance in an analysis of the evolution of the principle as it ‘demonstrated the attitude of the League towards self-determination’, and tested ‘its status in international law’.<sup>57</sup>

The report prepared by the Commission of Jurists confirmed that the principle of self-determination remained – despite its heightened profile in international circles and evolution during the war – one of little legal authority. In answering the question as to whether the ‘meaning of ‘self-determination’ implied the possibility of secession from an existing state’,<sup>58</sup> their report responded that:

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.

On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.<sup>59</sup>

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<sup>56</sup> The Aaland Islands are located in the Baltic Sea, at the mouth of the Gulf of Bothnia, which separates Sweden from Finland, and had been part of Sweden until they were ceded, together with Finland, to Russia in 1809. From this point on, they represented a part of the Grand Duchy of Finland, and remained under Russian rule until 1917. However, upon the Bolsheviks recognition of the Finnish Nationalists declaration of Finnish independence – on the 4<sup>th</sup> January 1918 – the inhabitants of the Aaland Islands also voiced their desire to annex themselves to Sweden under the principle of self-determination. A Commission of three jurists was therefore appointed by the Council of the League of Nations to determine whether the inhabitants of the Aaland Islands – which had a population of approximately 25,000 in 1920, 97 per cent of which were Swedish – were free to secede from Finland to join the Kingdom of Sweden – see Musgrave, above n3, 32-33 – referring to Barros, J., *The Aaland Islands Question* (New Haven: Yale University Press, 1968) at 244; Brown, P. M., ‘The Aaland Islands Question’ (1921) 15 *American Journal of International Law* 268 at 268; Gregory, CN, ‘The Neutralisation of the Aaland Islands’ (1923) 17 *American Journal of International Law* 63 at 66: see also Cassese, above n13, 27 (including citation 46).

<sup>57</sup> Musgrave, above n3, 32.

<sup>58</sup> Hannum, above n2, 29.

<sup>59</sup> *Report of the International Commission of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations Off. J., Spec. Supp. No. 3 (Oct 1920) at 5.



The Commission of Jurists therefore concluded – in agreement with the Finnish position – that it pertained ‘exclusively to the sovereignty of any definitively constituted State to grant to, or withhold from, a fraction of its population the right of deciding its own political destiny by means of a plebiscite, or in any other way’.<sup>60</sup> Their report was, however, not fatal to the claim of the Aaland Islanders, as it also concluded that Finland – itself only recently removed from Russian control – had ‘not yet acquired the character of a definitively constituted State’.<sup>61</sup> If it had, the matter would have remained within the domestic jurisdiction of Finland but, as it did not, the conclusion was that self-determination did ‘have a role to play in the resolution of the dispute.’<sup>62</sup>

A Commission of Rapporteurs was subsequently appointed by the Council ‘to study the problem and make recommendations for its solution.’<sup>63</sup> They determined, in contrast to the initial commission, that Finland – including the Aaland Islands – had become a fully constituted independent state upon its declaration of independence in 1917, and that the issue was therefore a domestic one. This conclusion necessarily disallowed any role for self-determination, and their musings on the concept were therefore relatively redundant in terms of consequence. They did, however, offer some insight into the status of the principle at this point in time.

After re-considering the question as to whether the definition of self-determination incorporated a right of secession from an existing state, the commission of Rapporteurs concurred with that answer given in the initial Report. They concluded that self-determination was ‘a principle of justice and of liberty, expressed by a vague and general formula which [had] given rise to the most varied interpretations and difference of opinion’,<sup>64</sup> and that it was therefore ‘not a part of international law, and should not normally play a role in the determination of sovereignty over certain territory.’<sup>65</sup> In forming their conclusion, the commission also decided that ‘the Aaland Islanders, unlike the Finns, were not a ‘people’, but simply a ‘minority’’,<sup>66</sup> and that minorities could not be

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<sup>60</sup> ‘Preliminary Observations by the Finnish Minister on the Report of the Committee of Jurists’, *Report of the International Commission of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations Off. J., Spec. Supp. No. 3 (Oct 1920) January/February 1921 at 66.

<sup>61</sup> *Report of the International Commission of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations Off. J., Spec. Supp. No. 3 (Oct 1920) at 14 – see also the discussion in chapter 3 regarding the requirement that a prospective State have some identifiable organised political institution with some effective power and control over their defined territory and population.

<sup>62</sup> Crawford, J., *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979) at 85-86.

<sup>63</sup> Musgrave, above n3, 35.

<sup>64</sup> The Aaland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 27.

<sup>65</sup> Musgrave, above n3, 35.

<sup>66</sup> *Ibid* 36.

viewed ‘in the same manner or on the same footing as a people as a whole’.<sup>67</sup> In light of this, the commission further questioned whether it was:

possible to admit as an absolute rule that a minority of the population of a State, which is definitively constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence?<sup>68</sup>

Their response asserted that:

The answer can only be in the negative. To concede to minorities, either of language or of religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life, it would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity.<sup>69</sup>

With that in mind, however, the respective commissions both also considered the impact that oppression on the party attempting to invoke their right of self-determination might have.<sup>70</sup> The Commission of Jurists, after raising the issue, withheld an opinion upon

whether a manifest and continued abuse of sovereign power, to the detriment of the population of a State, would...give to an international dispute...such a character that its object should be considered as one...which is not confined to the domestic jurisdiction of the State concerned.<sup>71</sup>

The Commission of Rapporteurs were, conversely, far more definitive on the issue, suggesting that ‘oppression would be a factor in allowing a minority to separate itself from one state and seek union with another state.’<sup>72</sup> They clarified that this action could only be utilised as a ‘last resort’, however, ‘when the state lacks either the will or the power to enact and apply just and effective guarantees’ with regards to the minorities religious, linguistic, and social freedoms.<sup>73</sup> This conclusion was again somewhat

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<sup>67</sup> The Aaland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 28.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> See chapter 6 for further discussion on this point.

<sup>71</sup> *Report of the International Commission of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations Off. J., Spec. Supp. No. 3 (Oct 1920) at 5.

<sup>72</sup> Musgrave, above n3, 36 – commenting upon: The Aaland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 28. For further discussion on this point, see chapter 6.

<sup>73</sup> The Aaland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 28 – see also chapter 6 for further discussion on this point.

redundant, however, as the Aaland Islanders, ‘unlike the Finns, had not suffered’ any such oppression.<sup>74</sup>

In general terms, the respective reports, prepared by the commissions, evidence the fact that, in 1919-20, ‘self-determination was not part of positive international law.’<sup>75</sup> Despite its above discussed progression, self-determination at this point in history therefore ‘had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers.’<sup>76</sup> The reports were, however, significant for reasons beyond the fact that they provided a ‘photograph’ of the law as it existed at the time. They also recognised and discussed two issues – the protection of minorities and the impact of oppression<sup>77</sup> – ‘that the world community could and indeed did follow – at least to some extent – in subsequent years.’<sup>78</sup>

### SELF-DETERMINATION AND TREATY LAW

Upon the ending of WWII, the League of Nations was dismantled and replaced by the United Nations. Under the reign of the latter organisation, the status of self-determination has changed dramatically. It has been the subject of a number of important international instruments – including the United Nations Charter and the two International Human Rights Covenants<sup>79</sup> – General Assembly resolutions, and cases before the International Court of Justice. As Musgrave states, it has ‘therefore developed since 1945, from an essentially political concept into a legal right.’<sup>80</sup>

#### *The United Nations Charter*

Despite the relatively few mentions that it makes of the principle, the United Nations Charter (‘the UN Charter’) is ‘considered to have given expression to the doctrine of self-determination.’<sup>81</sup> Its inclusion was not without reservation, however, as a number of states expressed fears that it would, *inter alia*, ‘foster civil strife and encourage secessionist movements.’<sup>82</sup> In spite of this resistance, and following much debate, the

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<sup>74</sup> Musgrave, above n3, 36 – in support of this conclusion, the commission also noted the substantial guarantees that Finland had offered the Aaland Islanders – in the form of the Law of Autonomy of 7 May 1920 – in order to appease their concerns of a ‘gradual denationalisation’ and ‘Finnish domination’: see *The Aaland Islands Question, Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 26.

<sup>75</sup> Cassese, above n13, 29-30.

<sup>76</sup> Hannum, above n2, 28.

<sup>77</sup> See chapters 5 and 6 for further discussion of these issues.

<sup>78</sup> Cassese, above n13, 30.

<sup>79</sup> International Covenant on Economic, Social and Cultural Rights (1976) 993 UNTS 3; International Covenant on Civil and Political Rights (1976) 999 UNTS 171.

<sup>80</sup> Musgrave, above n3, 62.

<sup>81</sup> Kumbaro, D., ‘The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention’, 16 June 2001, accessed at <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> (last accessed 11th April 2008) at 9.

<sup>82</sup> Cassese, above n13, 39.

principle was, however, finally included in Article 1(2) of the Charter – which stated that one of the purposes of the United Nations was ‘to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’ – and Article 55 – which requires that the UN promote higher standards of living, solutions of international economic, social health and cultural problems, and universal respect for human rights ‘with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples’.

The framers of the Charter thus ‘identified self-determination as one of the purposes, or *raison d’être*, of the UN Organisation.’<sup>83</sup> They failed, however, in the construction of it, to provide any effective means by which the principle itself could be expanded upon or employed and, as such, severely hindered the development of its content. The Charter is, as a whole, therefore ‘very much incomplete’ with regards to both internal and external self-determination.<sup>84</sup>

Those factors that inhibited the provisions of the Charter dealing with the concept of self-determination were many and varied. The Preamble to the Charter<sup>85</sup> affords us some insight, however, into those that weighed most heavily upon the minds of its framers. It evidences, for example, the trepidation that existed within the international community of an outbreak of further wars, but also the continued faith that they possessed in the role of fundamental human rights in the context of international relations. Although concerns remain, the possibility of such an outbreak has diminished greatly since this time<sup>86</sup> and, in particular, since the end of the ‘Cold War’<sup>87</sup> nearly two decades ago. In addition – and in response to what Baslar describes as a 20<sup>th</sup> century landscape punctuated by ‘the Russian Revolution, World Wars I and II, the rise of the Nazi and Fascist dictatorships and the deliberate repudiation of all norms of morality and culture by powerful industrialized

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<sup>83</sup> Kumbaro, above n81, 10.

<sup>84</sup> Ibid 11.

<sup>85</sup> Which states that:

‘WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,  
AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.’

<sup>86</sup> Bearing in mind that the Charter was entered into upon the cessation of WWII, which was – as the Preamble suggests – the second that this generation had endured in their lifetime.

<sup>87</sup> See the discussion of self-determination in the aftermath of the Cold War below at pp29-30.

states’<sup>88</sup> – there would also appear to have been a ‘re-examination and resurgence of the principles of natural law.’<sup>89</sup> As such, the emphasis placed on fundamental human rights and the ‘dignity and worth of the human person’ in international legal forums has increased significantly in those decades since the inception of the Charter and, it is often suggested, this trend is set to continue in the years to come.<sup>90</sup>

These changes have, it could be argued, necessitated a ‘rethinking’ of the meaning of self-determination in that period anterior to the adoption of the United Nations Charter and, as a result, very few concepts have developed as rapidly as it during this time.<sup>91</sup> Evidence of this rethinking can, it is suggested, be found in subsequent international acts – discussed below – which have ‘broadly developed’ the content of the principle into what some now consider to be a rule of customary international law.<sup>92</sup>

#### *Declaration on the Granting of Independence to Colonial Countries and Peoples*

In 1960, the UN General Assembly adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.<sup>93</sup> The Declaration solemnly proclaimed ‘the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations’<sup>94</sup>, and stated that:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.<sup>95</sup>

It stated, in addition, that:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>96</sup>

The Declaration did, however, place a caveat on the right by reaffirming that:

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<sup>88</sup> Baslar, K., *The Concept of the Common Heritage of Mankind in International Law*, (The Hague: Kluwer Law International, 1998) at 11

<sup>89</sup> Ibid.

<sup>90</sup> Dixon, for example, suggests that ‘those rules of international law having a more “moral” or humanistic content, such as self-determination, non-racial discrimination and prohibition of force, are likely to rise in importance in questions concerning jurisdiction and title to territory in the years to come’ – see Dixon, M., *Textbook on International Law* (6<sup>th</sup> Ed.), (United States: Oxford University Press, 2007) at 167

<sup>91</sup> Horowitz, Donald L., ‘The Cracked Foundations of the Right to Secede’, *Journal of Democracy*, Volume 14, Number 2, April 2003, 5-17 at 7

<sup>92</sup> See, for example, Kumbaro, above n81, 11.

<sup>93</sup> Adopted by General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>94</sup> See Preamble, General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>95</sup> See Para 1, General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>96</sup> See Para 2, General Assembly Resolution 1514 (XV) of 14 December 1960.

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.<sup>97</sup>

Despite its relative absence of application in the resolution of Kosovo's claim, the passing of time has demonstrated, unambiguously, the importance of this document in the evolution of the concept of self-determination. As has been stated, the 'process of decolonisation, during the course of which virtually all colonies gained independence from colonial powers,'<sup>98</sup> left no doubt that a new era of self-determination through decolonisation had arrived.<sup>99</sup> It is worth noting, however, the limits that were once again placed upon the scope of the principles application; foremost of which was the tendency to restrict the pool of possible claimants to those peoples suffering under what was colloquially referred to as 'salt-water colonialism'.<sup>100</sup> In addition, those newly formed states – which had gained their independence as a result of the process of decolonisation – were as intent on maintaining their sovereignty and territorial integrity as their already existing counterparts had been before them, and, as such, they willingly supported efforts to preclude secession beyond the context of decolonisation.<sup>101</sup> As Brown concludes, 'this effectively prevented invocation of the principle against the territorial integrity, or other sovereignty-based interests, of the new states emerging from decolonisation.'<sup>102</sup>

Matters have, however, moved on since the adoption of this resolution, and 'state practice has re-shaped the principle of self-determination to meet the new circumstances of the postcolonial world.'<sup>103</sup> The new question, in the eyes of many, is, therefore,

whether self-determination beyond the colonial context refers only to internal self-determination for the people of a state in the form of political participation rights, or to autonomy regimes for minority peoples within a state, or, more radically, to a right of secession in certain circumstances?<sup>104</sup>

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<sup>97</sup> See Para 6, General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>98</sup> According to the United Nations Department of Public Information, *Historical Background on Decolonization*, accessed at <http://www.un.org/Depts/dpi/decolonization/history.htm> (last accessed 27 June 2008): when the United Nations was established in 1945, 750 million people - almost a third of the world's population - lived in Non-Self Governing Territories. Since then, more than 80 former colonies have gained their independence and, today, only 16 Non-Self-Governing Territories remain, in which fewer than 2 million people live.

<sup>99</sup> Brown, B. S., 'Human Rights, Sovereignty, and the Final Status of Kosovo', *Chicago-Kent Law Review*, Volume 80, 2005, 235 at 246.

<sup>100</sup> 'Salt-water colonialism' refers to the relationship between a colonial power and its overseas colonies. Brown, B. S., 'Human Rights, Sovereignty, and the Final Status of Kosovo', *Chicago-Kent Law Review*, Volume 80, 2005, 235 at 246– citing Ngugi, J., 'The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa, 20 *WIS. INT'L L.J.* 297 at 304.

<sup>101</sup> Brown, above n99, 246-7.

<sup>102</sup> Ibid 247.

<sup>103</sup> Dixon, above n90, 165.

<sup>104</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., *Public International Law: An Australian Perspective* (2<sup>nd</sup> Ed.), (South Melbourne: Oxford University Press, 2006) at 266.

### *The United Nations Covenants on Human Rights*

The adoption of the United Nations Covenants on Human Rights – the *Covenant on Economic, Social and Cultural Rights*<sup>105</sup>, and the *Covenant on Civil and Political Rights*<sup>106</sup> – punctuated the ‘next phase’ in the development of the concept of self-determination, ‘from a legal obligation in the decolonisation area, to self determination as a human right’.<sup>107</sup>

The two Covenants contain identically worded articles on self-determination. Article 1 of the respective Covenants states that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The relevance and importance of the concept of self-determination in the realm of human rights was further explained in General Comment 12, delivered by the United Nations Human Rights Committee at its twenty-first session.<sup>108</sup> It clarified that, in their opinion, the right of self-determination was:

Of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Article 1 apart from and before all of the other rights in the two Covenants.<sup>109</sup>

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<sup>105</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, in accordance with article 27.

<sup>106</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976, in accordance with Article 49.

<sup>107</sup> Kumbaro, above n81, 16.

<sup>108</sup> Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

<sup>109</sup> See Para 1, Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

The Committee further described the right to self-determination as ‘an inalienable right of all peoples’,<sup>110</sup> by virtue of which they freely ‘determine their political status and freely pursue their economic, social and cultural development’,<sup>111</sup> and clarified that it, ‘and the corresponding obligations concerning its implementation’, were ‘interrelated with other provisions of the Covenant and rules of international law.’<sup>112</sup>

### *The Declaration on Friendly Relations*

The *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*<sup>113</sup>, which was adopted four years after the above discussed Covenants on Human Rights, again made mention of self-determination. The Special Committee, vested with the responsibility of constructing the Declaration, recognised in the initial paragraph on this principle that it was a universal right, possessed by peoples, which every state had the duty to respect.<sup>114</sup> The importance of these proclamations cannot be overstated, as they evidence, when compared to those positions taken in 1964, the significant progress that international law had made – many states had, for the first time, recognised self-determination as a right. That said, however, the establishment of a universally accepted formulation of it was – unsurprisingly given the complex nature of it – an extraordinarily difficult task.<sup>115</sup> Rosenstock cites, in particular, the initial split

between those who accepted a right of self-determination of peoples and the duty of states to grant it, and those who argued that under international law only states could have rights or be the beneficiaries of rights. There were those who argued that the principle was universal in its application and those who sought to limit its application to colonial situations of the salt-water variety.<sup>116</sup>

In spite of these rifts, the Declaration successfully aided the establishment of a ‘set of general rules concerning the right to self-determination.’<sup>117</sup> Of particular interest to those seeking independence for Kosovo is the *saving clause* which, as Cassese notes, ‘some

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<sup>110</sup> See Para 2, Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

<sup>111</sup> See Para 2, Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

<sup>112</sup> See Para 2, Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

<sup>113</sup> G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV).

<sup>114</sup> Rosenstock, R., ‘The Declaration of Principles of International Law Concerning Friendly Relations: A Survey’, *The American Journal of International Law*, Vol. 65, No. 4, (Oct., 1971), 713 at 731.

<sup>115</sup> Ibid 730-1.

<sup>116</sup> Ibid 730.

<sup>117</sup> Kumbaro, above n81, 17.



commentators have overlooked or played down’ despite ‘its great importance.’<sup>118</sup> The clause reads as follows:

Nothing in the foregoing paragraph [proclaiming the principle of self-determination] 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.*<sup>119</sup>

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.<sup>120</sup>

As a result of its wording, this clause has often been interpreted as grounding a right to unilateral secession when the government of the parent state does, in fact, fail to comply with the mentioned requirement that they ‘represent the whole people belonging to the territory without distinction as to race, creed or colour.’ It therefore represents one of the bases upon which those in favour of Kosovo’s Declaration of Independence attempt to justify its legality and, for this reason, the saving clause and its various interpretations will be discussed in greater detail below, in chapters 5 and 6.<sup>121</sup>

The importance of this Declaration was not, however, limited to the assistance that it offered to those attempting to justify an act of unilateral secession. It also – as the *Declaration on the Granting of Independence to Colonial Countries and Peoples* had done some years earlier for colonial claims – elaborated upon the modes by which a people may implement their claim to self-determination; explaining that it may involve either the

establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.<sup>122</sup>

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<sup>118</sup> Cassese, above n13, 111.

<sup>119</sup> Emphasis added.

<sup>120</sup> See Para 7 of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*. G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV).

<sup>121</sup> With regards to the arguments concerning the possible interpretations of the saving clause, see also the *Vienna Declaration and Programme of Action*, and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, mentioned below at p27-28, and the discussion regarding them at Chapters 5 and 6.

<sup>122</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*. G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV).

### *The Helsinki Final Act*<sup>123</sup>

Again of great interest to the debate regarding the legality of Kosovo's Declaration of Independence, the *Final Act of the Conference on Security and Co-operation in Europe* ('*Helsinki Final Act*')<sup>124</sup> – the final act of the Conference on Security and Co-operation in Europe, held in Helsinki, Finland, between July and August 1975 – was adopted on the 1 August 1975, and was signed by 35 countries. It embodied a *Declaration on the Principles Concerning Mutual Relations of the participating States* enumerating ten points, Principle VIII of which explicitly referred to internal and external self-determination. It read as follows:

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.<sup>125</sup>

However, in addition to the mention made of it in the above Principle, territorial integrity was also the subject of its own Principle – Principle IV – and the underlying theme of another – Principle I. The former stated, *inter alia*, that:

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.<sup>126</sup>

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<sup>123</sup> It must be noted that the Helsinki Final Act does not have the status of a legally binding document – it provides, in its third last paragraph, that: 'The Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Art. 102 of the Charter of the United Nations...'

<sup>124</sup> 1 August 1975, accessed at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) (last accessed 8 July 2008).

<sup>125</sup> See Principle VIII, *Helsinki Final Act*, 1 August 1975, accessed at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) (last accessed 8 July 2008).

<sup>126</sup> See Principle IV, *Helsinki Final Act*, 1 August 1975, accessed at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) (last accessed 8 July 2008).

While the latter asserted that:

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.<sup>127</sup>

Those contesting the legality of Kosovo's Declaration cite this Act and, in particular, these principles – which espouse the importance of a States territorial integrity – as one of their key arguments, suggesting that they are clearly incompatible with an act of unilateral secession. As with the *Declaration on Friendly Relations* above, this Act will therefore be discussed in greater detail below, in chapters 5 and 6.

#### *Subsequent Agreements*

Several more detailed formulations of the Helsinki Declaration were agreed upon, by its signatory states, in conferences subsequently held by them. The *Copenhagen Document*<sup>128</sup> – adopted on the 29 June 1990 – did not include an explicit section on self-determination, however the ensuing *Charter of Paris for a New Europe*<sup>129</sup> – adopted on the 21 November 1990 – reaffirmed

the equal rights of peoples and their right to self- determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.<sup>130</sup>

In addition, the *Vienna Declaration and Programme of Action*<sup>131</sup> – adopted by the World Conference on Human Rights on the 25 June 1993 – and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*<sup>132</sup> – adopted by the UN General

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<sup>127</sup> See Principle I, *Helsinki Final Act*, 1 August 1975.

<sup>128</sup> *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 June 1990.

<sup>129</sup> It should be noted that the Charter of Paris – like the Helsinki Final Act – states that it is 'not eligible for registration under Art. 102 of the Charter of the United Nations', and that it therefore also does not have the status of a legally binding instrument.

<sup>130</sup> *Charter of Paris for a New Europe*, 21 November 1990 at 5.

<sup>131</sup> A/Conf. 157/24. 25 June 1993.

<sup>132</sup> G.A. res. 50/6, 49 U.N. GAOR Supp. (no. 49) at 13, U.N. Doc. A/RES/50/49 (1995).

Assembly on the 24 October 1995 – both made mention of a peoples right of self-determination. The former made mention of the *Declaration on Friendly Relations*, and echoed the requirement contained within it that, in order to be afforded the right of territorial integrity, a states government represent the ‘whole people belonging to the territory without distinction of any kind.’<sup>133</sup> The latter did likewise, again making a states ability to rely upon a right of territorial integrity contingent upon their possessing a government ‘representing the whole people belonging to the territory without distinction of any kind.’<sup>134</sup>

It is important to note, at this point, the slight variation in the wording adopted by these two, more recent, documents – which refer to a distinction ‘of any kind’ – as compared to the earlier *Declaration on Friendly Relations* – which refers to a distinction ‘as to race, creed or colour’. As with the *Declaration on Friendly Relations* discussed above, these documents therefore represent one of the bases upon which those in favour of Kosovo’s declaration of independence attempt to justify their unilateral secession. Their importance and interpretation will also, therefore, be discussed more completely in chapters 5 and 6.

#### JURISPRUDENCE OF THE ICJ

The principle of self-determination has also been broached by the International Court of Justice (‘ICJ’) on a number of occasions.<sup>135</sup> However, as Trbovic quite correctly reminds us, the advisory opinions offered up by it between 1960 and 1990 ‘should be read in the context of decolonisation and Cold War politics.’<sup>136</sup> Their decisions in, for example, the Namibia Advisory Opinion,<sup>137</sup> and the Western Sahara Advisory Opinion<sup>138</sup> – which each classified self-determination a right, as opposed to a political principle – were made with regards to issues concerning Non-Self Governing Territories (‘NSGT’s’), and their application should therefore be accordingly confined.<sup>139</sup>

No such caveats can, however, apparently be placed on those decisions made by the ICJ in subsequent times. Importantly then, during this period, the ICJ have labelled the principle of self-determination ‘one of the essential principles of contemporary international law’<sup>140</sup> and, furthermore, a right which has attained the status of *erga*

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<sup>133</sup> Emphasis added.

<sup>134</sup> Emphasis added.

<sup>135</sup> For a good summary of the decisions of the International Court of Justice, see: Musgrave, above n3, 77-90.

<sup>136</sup> Trbovic, A., *A Legal Geography of Yugoslavia’s Disintegration*, (New York: Oxford University Press, 2008) at 26.

<sup>137</sup> Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970).

<sup>138</sup> *Western Sahara Case* (1975) I.C.J. 6.

<sup>139</sup> Trbovic, above n136, 26.

<sup>140</sup> *Case Concerning East Timor (Portugal v Australia)* 1995 ICJ Rep 90 at 102.

omnes.<sup>141</sup> In the *Case Concerning East Timor (Portugal v Australia)*, for example, the Court stated that:

Portugal's assertion that the right of people's to self-determination, as it evolved from the Charter and from the United Nations practice, has an erga omnes character, is irreproachable.<sup>142</sup>

Today, it would therefore appear that self-determination is a 'well-established principle of customary international law'<sup>143</sup> and, furthermore, that it 'may well be a rule of *jus cogens*'.<sup>144</sup>

### SELF-DETERMINATION IN THE POST-COLD WAR ERA

As Donald Horowitz explains, the cessation of the Cold War was feted with:

a concatenation of events – the reunification of Germany, the dissolution of the Soviet Union (and various sub-secessions in Georgia, Moldova, and Azerbaijan), Yugoslavia, and Czechoslovakia, the secession of Eritrea from Ethiopia and of the former Somaliland from Somalia, and finally the de-facto detachment of Kosovo from Serbia – [which] combined in the course of a decade to render boundaries much less stable and to encourage territorially separate groups to consider the possibility of secession.<sup>145</sup>

These events were accompanied, he suggests, by a rethinking – on the part of international lawyers and philosophers – of the meaning of self-determination. Their doing so, he contends, unsettled 'the former understandings that had discouraged secession and international support for it.'<sup>146</sup> A 'new international order' has, it could be said, emerged in the Cold War's wake, in which peace threatening conflicts more often arise out of intra-state breakdowns – and the power struggles and friction that inevitably follow – than inter-state battles.<sup>147</sup>

The concept of self-determination that arose out of the rubble that was the Soviet Union, the former Yugoslavia and – more broadly – the Cold War, 'confronted the international community with the need to rethink the conflict between secessionist self-determination and the territorial integrity of states.'<sup>148</sup> The removal of the diplomatic and security

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<sup>141</sup> *Palestinian Wall Advisory Opinion* 2004 ICJ Rep para. 88, *Case Concerning East Timor (Portugal v Australia)* 1995 ICJ Rep 90 at 102.

<sup>142</sup> *Case Concerning East Timor (Portugal v Australia)* 1995 ICJ Rep 90 at 102.

<sup>143</sup> Dixon, above n90, 164.

<sup>144</sup> Ibid.

<sup>145</sup> Horowitz, above n91, 7.

<sup>146</sup> Ibid.

<sup>147</sup> Radan, P. *Break-Up of Yugoslavia and International Law*, (London: Routledge, 2001) at 1–citing G.A.Craig and A.L.George, *Force and Statecraft: Diplomatic Problems of Our Time*, 3<sup>rd</sup> edition, (New York: New York University Press, 1995) at 46; Hannum, H. 'Specter of Secession, Responding to Claims for Ethnic Self-Determination', *Foreign Affairs*, 1998, Vol 77, No.2 at 13.

<sup>148</sup> Kovács, M. M., 'Standards of self-determination and standards of minority-rights in the post-communist era: a historical perspective', *Nations and Nationalism* 9 (3), (2003) 433 at 433. See

constraints that characterised the duration of the Cold War encouraged more ‘proactivity’ than was commonly the case and, as such, more new norms and rules to address these conflicting claims were produced in the decade of its ending than any for some time.<sup>149</sup>

As a result of these developments, a number of commentators opine that the right of self-determination has, in recent times, evolved to encompass non-colonial situations which may even include, in exceptional circumstances,<sup>150</sup> a right of secession.<sup>151</sup>

## CONCLUSION

A peoples right to self-determination remains one of the most contentious and uncertain in international law. It has, since its inception, underpinned revolutions, ideologies, international agreements and the demarcation of international bounds, yet the meaning and content of it remain undesirably ‘vague and imprecise’.<sup>152</sup> Its evolution has been heavily influenced by a number of actors, events, theories concerning international relations, and political beliefs – particularly, in its formative years, those emanating out of the United States and Europe. Since the inception of the UN, however, it has become somewhat synonymous with the concept of de-colonisation, prompting some to question its role – and, for that matter, continued existence – in the wake of this phenomenon.

A new international order has, however, emerged out of the rubble of the Cold War, within which self-determination remains an essential cog. Peace threatening conflicts are increasingly internal, and those constraints that defined the Cold War period have been removed. The scope of the right of self-determination has been re-assessed in light of these changes, prompting many to opine that it now not only remains in existence, but also grounds – in certain, exceptional circumstances – a people’s right to secede. ‘Scholars of international law have’, it could be said, ‘come to exhibit a new openness to secession’,<sup>153</sup> and it is against this background that the final status of Kosovo must now be determined.

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also Brown, B. S., ‘Human Rights, Sovereignty, and the Final Status of Kosovo’, *Chicago-Kent Law Review*, Volume 80, 2005, 235 at 247

<sup>149</sup> Kovács, above n148, 433 – citing Horowitz, D., ‘Self-determination’ in Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997) 421.

<sup>150</sup> These developments, and the circumstances in which the right may arise, are discussed in detail below in chapter 6.

<sup>151</sup> Kovács, above n148, 433 – see also, for example, Orentlicher, D. F., ‘The imprint of Kosovo on international law’, *ILSA Journal of International & Comparative Law*, Vol. 6, 1999-2000, 541, Nanda, V. P., ‘Revisiting self-determination as an international law concept: a major challenge in the post-Cold War era’, *ILSA Journal of International & Comparative Law*, Vol. 3, 1996-1997, 443, *Reference re Secession of Quebec*, 2 Can. S.C.R. 217 (1998).

<sup>152</sup> Hannum, above n2, 27.

<sup>153</sup> Kovács, above n148, 434 – citing Hannum, H., ‘The specter of secession’, *Foreign Affairs* 77(2) (1998) 13; Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 327-365.

## CHAPTER 2

Ballads and legends have, for many centuries now, maintained stories and myths concerning the origins of Kosovo.<sup>1</sup> Their prominence heightened, however, as the Serb

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<sup>1</sup> The following – entitled ‘The Downfall of the Serbian Empire’ – is but one example. It is taken from Pennington, A., Levi, P. (eds.), *Marko the Prince: Serbo-Croat Heroic Songs*, (London: Palgrave Macmillan, 1984) at 17-18. It refers to the decision made by Lazar to engage in the Battle of Kosovo – see discussion below at pp34-35. By doing so, the ballad suggests, he chose the kingdom of heaven (and the notions of truth, honour, and the ‘everlasting’) over the kingdom of earth (and the riches that it entailed if he were to submit and become a vassal of the Ottoman Sultan Murad):

‘Flying Hawk, grey bird,  
out of the holy place, out of Jerusalem,  
holding a swallow, holding a bird,  
that it Elijah, holy one;  
holding no swallow, no bird,  
but writing from the Mother of God  
to the Emperor at Kosovo.  
He drops that writing on his knee,  
it is speaking to the Emperor:  
‘Lazar, glorious Emperor,  
Which is the empire of your choice?  
Is it the empire of heaven?  
Is it the empire of the earth?  
If it is the empire of the earth,  
Saddle horses and tighten girth-straps,  
And, fighting men, buckle on swords,  
Attack the Turks,  
And all the Turkish army shall die.  
But of the empire of heaven  
weave a church on Kosovo,  
build its foundations not with marble stones,  
build it with pure silk and with crimson cloth,  
take the Sacrament, marshal the men,  
they shall die,  
and you shall die among them as they die.’  
And when the Emperor heard those words,  
He considered and thought,  
‘King God, what shall I do, how shall I do it?  
What is the empire of my choice?  
Is it the empire of heaven?  
Is it the empire of the earth?  
And if I shall choose the empire,  
and choose the empire of the earth,  
the empire of earth is brief,  
heaven is everlasting.’  
And the Emperor chose the empire of heaven  
Above the empire of the earth.’

and Albanian national movements began – in the late nineteenth century – to place an ever-greater emphasis upon them.<sup>2</sup> There are, unsurprisingly, major differences in the narratives of the respective parties; differences which, it would seem, flow predominantly out of the uncertainty that exists with regards to the origins of the territories inhabitants. As Malcolm suggests:

We should never forget that all individual ancestries are mixed – especially in this part of Europe. When a Serb today reads about the arrival of the early Serbs, he may not be wrong to suppose that he is reading about his ancestors; but he cannot be right to imagine that all his ancestors were in that population. The equivalent is true for the Albanians, and indeed for every other ethnic group in the Balkans.<sup>3</sup>

As such, a majority of the evidence with regards to that period pre-dating medieval Kosovo is, some would argue, speculative and of little probity in the debate. As Judah surmises:

The classical Serbian view holds that the people who lived in Kosovo were overwhelmingly Serb until barely a few generations back...On the other hand, Albanian historians have always claimed the right of ‘first possession’. They argue that their ancestors, the ancient Illyrians and Dardanians, lived here long before the Slav invasions of the sixth and seventh centuries. In fact, the truth is unclear.<sup>4</sup>

Despite the uncertainty surrounding its origins, the territories history becomes somewhat more certain during the middle ages when, during the Nemanjic dynasty, the ‘first identifiably Serbian kingdom began to be fashioned.’<sup>5</sup> In 1219, Rastko – the third son of the founder of the dynasty, Stefan Nemanja – was able to secure from the ‘then enfeebled Byzantine emperor and the Orthodox patriarch, autocephalous status’ – autonomy within the Orthodox church – ‘for what was then to become, in effect, the Serbian national church.’<sup>6</sup> As Judah submits, these actions meant that, ‘at least until 1355, the dynasty’s power was supported by two pillars – the state and the church’ – and, when the Serbian nobility was removed as a result of the subsequent Ottoman attacks, the church remained and with it the sentiment that Serbia, like Christ, would be resurrected.<sup>7</sup> It was, in fact, the church which maintained this belief through their canonisation of Nemanjic monarchs and, ‘for hundred of years, the Serbian peasant went to church and in his mind the very idea of Christianity, resurrection and ‘Serbdom’ blended together.’<sup>8</sup>

Despite this episode, however, the question remained as to who actually lived in Kosovo during the reign of the Serbian kings? Serbian historians contend that it was only Serbs – citing their churches as proof – and Albanians, unsurprisingly, assert that it was quite the

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<sup>2</sup> Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (New York: Oxford University Press, 2000) at 33.

<sup>3</sup> Ibid 22.

<sup>4</sup> Judah, T., *Kosovo: War and Revenge* (New Haven: Yale University Press, 2000) at 2.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid 3.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.



opposite. British historian Noel Malcolm believes that people of other ethnicities – such as Vlachs and Albanians – also inhabited medieval Serbia. He suggests that, as some Vlachs began to drift into town life in the territory, that ‘they became assimilated to the Serb population and ceased sooner or later to be described as Vlachs.’<sup>9</sup> He then, quite logically, states that this ‘prompts the question of whether the same process was happening to Albanians – and, if so, to what extent’?<sup>10</sup> ‘If Albanians began to live like Serbs’, he pondered, ‘perhaps after some time they would cease to be described as ‘Albanians’ in the official documents.’<sup>11</sup> He does point out in rebuttal, however, that making such assertions based solely on the fact that Albanian fathers had been recorded as having given their sons Serbian names is fraught with danger. Names, he notes – ‘which are all the evidence we have – are not very reliable guides to ethnic identity.’<sup>12</sup> In conclusion, Malcolm stated that:

Whatever quantity of assimilation was involved, it worked: many of the people who underwent this process must have lost the Albanian language and become Serbs. The idea that the great mass of the Kosovo population, behind the cover of their Serbian orthodox names, were Albanians who continued to speak Albanian, is simply not credible. If that were true, then the names of most of the towns and villages in Kosovo would have been Albanian; whereas in fact the great majority of them are Slav. Albanians have certainly had a continuous presence in this region. But all the evidence suggests that they were only a minority in medieval Kosovo.<sup>13</sup>

As mentioned at the outset, however, such arguments regarding original and early inhabitation lay somewhat dormant for centuries – as the two parties interacted amicably, and even fought alongside one another – before their re-emergence, through the narratives of Serb and Albanian national movements, in the late nineteenth-century. These narratives were not, however, merely concerned with this period of time and have been heavily sculpted by events that have occurred since.

### *Battle of Kosovo*

Some historians consider the earlier Turkish victory at the river Marica, in 1371, to have been more consequential than the subsequent Battle of Kosovo, and that which ‘opened the way to the overall Ottoman conquest of the Balkans.’<sup>14</sup> It is the story of the Battle of Kosovo, however, which resonates most loudly in Serbian minds. So important is it to them that, some 600 years after its waging, it remains a ‘totem or talisman’ of their collective identity.<sup>15</sup>

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<sup>9</sup> Malcolm, N., *Kosovo: A Short History* (London: Papermac, 1998) at 55.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid 56 – noting the work of Serbian scholar Stojan Stanojevic, as elucidated in: Stanojevic, S., ‘Licna imena I narodnost u Srbiji srednjega veka’, *Juznoslovenski filolog*, Vol. 8 (1928-9), at 151-4.

<sup>13</sup> Malcolm, above n9, 56-7.

<sup>14</sup> Ibid 58 – citing Emmert, T.A., *Serbian Golgotha: Kosovo*, 1389 (New York: East European Monographs, 1990) at 25-6 (discussing the views of Jirecek and Ostrogorsky).

<sup>15</sup> Malcolm, above n9, 58.

According to the Serbian epics, the Ottoman Sultan Murad summoned the Serbian Prince Lazar to do battle after he refused to submit and, as such, become his vassal.<sup>16</sup> The subsequent Battle of Kosovo took place in Kosovo Polje – the ‘Field of Blackbirds’ – on the 28 June 1389. Upon arrival, the Ottomans were confronted by an army which, although Serbian, also comprised Hungarian, Bulgarian, Bosnian, and Albanian soldiers – the latter of which were close allies with the Serbs at this time. The leaders of both armies were killed during the battle, along with approximately 30,000 of their respective troops. The death of Murad was seriously problematic for the Ottomans, as it created a crisis in their leadership which prevented his successor, Bayezid, from continuing the offensive and forced him to withdraw his remaining troops.<sup>17</sup>

The first battle was therefore somewhat inconclusive and, in 1448, a ‘second Battle of Kosovo’ took place. In this, the forces of Hungarian Noble Janos Hunyadi were overcome by the Ottoman Turks – now lead by Murad II – who, by 1455 and 1459 respectively, had incorporated the entireties of Kosovo and Serbia into their ever-expanding empire.<sup>18</sup> This, Malcolm states, ‘was the final extinction of the medieval Serbian state.’<sup>19</sup>

Despite this defeat, many Serbians perceive, to this day, Kosovo as being ‘the holy place of the Serb nation’ and, as a result of the resistance that they offered against the Ottomans in these battles, particularly the first, an essential element of their collective being. The territory was, however, ultimately claimed by the Ottomans and, under their reign, its ethnic composition altered considerably.

### *Ottoman Rule*

As a result of the Ottoman Empire’s religious – as opposed to nationalistic – structure, and the wars between Austria and the Ottoman Empire that originated in the latter part of the 17<sup>th</sup> Century, a large number of Serbians from Kosovo migrated north during the 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>20</sup> These migrations dramatically altered the ethnic balance in Kosovo – Albanians ‘were an insignificant minority in Kosovo’ before 1690, and ‘only after the exodus of the Serbs did Albanians come flooding in to fill the vacuum they had left.’<sup>21</sup> According to Malcolm, the significance of the migration extends beyond mere

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<sup>16</sup> Judah, above n4, 4.

<sup>17</sup> Savich, C. K., ‘The Kosovo Crisis: Origins and History’, (2000) accessed at [http://www.snd-us.com/history/savich\\_kosovo-origins.htm](http://www.snd-us.com/history/savich_kosovo-origins.htm) (last accessed 2 April 2008).

<sup>18</sup> Ibid.

<sup>19</sup> Malcolm, above n9, 92.

<sup>20</sup> Savich, above n17.

<sup>21</sup> The Austrians had claimed Kosovo in the autumn of 1689, and established Austrian control over the whole area. However, following their defeat at the hands of the Ottoman and Tatar army the following year, the Austrians were forced to retreat northwards. A number of Serb refugees followed them and, according to Malcolm, as many as 37,000 families embarked upon the ‘Great Migration’ that ensued. Estimates on the number of people that migrated vary, but ‘have ranged as high as 400,000 people, or between 400,000 and 500,000, or 500,000 “if not more”’: see Malcolm, above n9, 139-40.

‘demographic arithmetic’, however, in that it also represents ‘an essential element of Serbian national-religious mythology.’<sup>22</sup> As he acknowledges:

Serbian Orthodox writers have often compared the defeat of the Serbs at Kosovo in 1389 to the crucifixion of Christ. There is a three-part theological parallel at work in the Serbian national myth; the second phase, corresponding to Christ’s death and burial, is the withdrawal of the Serbian people from Kosovo in the *Velika Seoba* [‘Great Migration’], and the third phase, corresponding to the resurrection, is the reconquest of Kosovo by Serbian forces in 1912.<sup>23</sup>

### *Balkan Wars*

Kosovo remained a part of the Ottoman Empire until 1912, at which point Serbia & Montenegro was able to regain control of it during the Balkan Wars. This was not the only event of significance to Kosovo that occurred in this year, however. Following the period known in Albanian history as the *Rilindje kombetare* – the ‘national rebirth’ or ‘national renaissance’ – it was also the year in which an independent Albanian state was declared.<sup>24</sup> Significantly, much of the work and many of the events that precipitated this event occurred not within the eventual borders of the Albanian state which it created, but in Kosovo, ‘whose history therefore has a peculiar importance for all Albanians.’<sup>25</sup>

As mentioned, however, Kosovo again became a part of Serbia following the First Balkan War of 1912 – in which the Serbian and Montenegrin forces defeated the Ottoman Turks – and, at this point, Serbians still considered Kosovo to be a part of Old Serbia.<sup>26</sup> Conversely, Albanians viewed it as the birthplace of their nascent state – the nationalist goals from which it evolved having been announced by the ‘League of Prizren’<sup>27</sup> – and, in the wake of the Ottoman Turks five-century occupation, the territories ethnic composition had altered so that they were now the largest ethnic group residing within it.<sup>28</sup> ‘Serbian and Albanian nationalist claims and aspirations thus clashed over Kosovo, which for both acquired an ideological or nationalist dimension’ and, when ethnic Albanians attempted to retain the control of the region that they had acquired under Ottoman rule, ‘conflict and ethnic tension were inevitable.’<sup>29</sup>

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<sup>22</sup> Ibid 140.

<sup>23</sup> Ibid 140 – Malcolm also points out that Albanian historians have, in recent years, suggested a different interpretation of the events that occurred in the 1689-1690 period. Their interpretation includes the suggestion that the number of Serbs that actually migrated was ‘not very large’, and ‘certainly not large enough to have a major effect on the demographic balance in Kosovo’.

<sup>24</sup> Ibid 217.

<sup>25</sup> Ibid.

<sup>26</sup> This view was based predominantly on the presence of over 1,300 Serbian Orthodox churches, and the essential role that the Battle of Kosovo served in their ‘epic poetry, folklore, and nationalism.’: see Savich, above n17.

<sup>27</sup> Prizren is a town in southern Kosovo.

<sup>28</sup> Savich, above n17.

<sup>29</sup> Ibid.

### *The World Wars*

Serbia again lost control of the territory of Kosovo during the First World War but, because of its perceived importance to the Serbian Kingdom, it was incorporated into the new Yugoslav state – officially called ‘The Kingdom of Serbs, Croats and Slovenes’ – when it was proclaimed on the 1 December 1918. Serbia represented the dominant element in this newly formed state, ‘not only because of its size and its victorious army, but also because the ruler of Serbia...became king of the new state’.<sup>30</sup>

Their sovereignty was, however, to again prove somewhat fleeting. Following the outbreak of the Second World War, the Yugoslav government joined – albeit with some reservations – the Axis Pact. As a result, and on the following day, they were overthrown by a popular coup in Belgrade, and Hitler responded with an immediate invasion. In the struggle that ensued, the Yugoslav army made a series of errors<sup>31</sup> and, as a result, the entirety of Kosovo was taken in exactly one week.<sup>32</sup> In the partition of Kosovo that followed its conquest, a majority of the territory was awarded to Albania – which was, ‘in theory, a separate kingdom that just happened to be ruled by the King of Italy’ – however a smaller section was also awarded to Bulgaria, and the small German-occupied portion ‘remained part of the rump Serbian state’.<sup>33</sup>

During this period of occupation, Albanians sought revenge on the regions Serbs and, in particular, those that had settled in Kosovo during the inter-war years.<sup>34</sup> The actual number killed in, or expelled from, Kosovo remains highly contentious, however estimates regarding the number that fled or were expelled range from 30,000 to 100,000, and that were killed from 3,000 to 10,000.<sup>35</sup>

### *The End of WWII*

When the Socialist Federal Republic of Yugoslavia was established at the end of World War II, Kosovo was made an autonomous region of Serbia. In fact, according to reports, Tito even went so far as to state, in 1946, that:

Kosovo and the other Albanian regions belong to Albania and we shall return them to you, but not now because the Great Serb reaction would not accept such a thing.<sup>36</sup>

However, as a result of the fact that debates were conducted in private, Kosovars remained unaware of their politicians intentions, and this therefore represented, from

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<sup>30</sup> Malcolm, above n9, 264.

<sup>31</sup> As Malcolm states, their ‘sluggishness on the ground was matched by stupidity at the headquarters’ – see *ibid* 290.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* 292.

<sup>34</sup> Judah, above n4, 27.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* 31 – citing Vickers, M., *The Albanians: A Modern History* (London: I.B. Tauris, 1995) at 165, citing *Zeri I Popullit*, 17 May 1981.

their perspective, a highly uncertain time.<sup>37</sup> The extent of the autonomy enjoyed by Kosovars varied considerably during the decades that followed, with the 1950s and early 1960s representing, 'from the Albanian point of view, the nadir of the whole period of Tito's rule.'<sup>38</sup> In Malcolm's opinion, the turnaround came in 1966, when Tito extended his desire for national self-direction and decentralization to also include the autonomous provinces.<sup>39</sup> Various concessions to the Albanians followed. Most important of these was Amendment XVIII to the 1963 Constitution, which 'defined the autonomous provinces as 'socio-political communities' – the same term that was used in the definition of the republics – and stated that they would carry out all the tasks of a republic apart from those tasks which were of concern to the republic of Serbia as a whole.'<sup>40</sup> From this point on, Kosovar Albanians set their sights on what they regarded 'to be the natural next step – a Kosovo Republic.'<sup>41</sup>

### *Nationalist Aspirations*

As Malcolm states:

...the call for a republic had already been made, at least rhetorically and by implication, when the senior Communist Mehmet Hoxha asked in April 1968: 'Why do 370,000 Montenegrins have their own republic, while 1.2 million Albanians do not even have total autonomy?'<sup>42</sup>

A wave of pro-independence, Albanian nationalism ensued, and cries of 'Kosovo – republic!' rang out on 27 November 1968, when hundreds of demonstrators took to the streets of Pristina.<sup>43</sup> Kosovar Albanians were afforded a range of 'privileges' in the period that followed, including, for example, 'the right to fly, as their own 'national' emblem, the Albanian flag'.<sup>44</sup> In addition, and as Malcolm states:

If 1963 was the nadir of Albanian national interests in Titoist Kosovo, then 1974 was the zenith, at least where matters of constitutional theory were concerned. The new Yugoslav constitution of 1974 – which would remain in force until the final break-up of Yugoslavia – gave the autonomous provinces of Kosovo and Vojvodina a status equivalent in most ways to that of the six republics themselves...<sup>45</sup>

However, for both theoretical and political reasons, the final step was never taken of 'promoting' these 'autonomous provinces' into republics.<sup>46</sup> Importantly, while the status

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<sup>37</sup> Ibid.

<sup>38</sup> Malcolm, above n9, 323.

<sup>39</sup> Ibid 324.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid 325.

<sup>42</sup> Ibid – citing Saliu, *Lindja*, at 52-5, and Rajovic, *Autonomija*, at 292-4 (amendments); L. Cohen, *Socialist Pyramid*, at 356 (Hoxha).

<sup>43</sup> Malcolm, above n9, 325.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 327.

<sup>46</sup> Ibid.

of the former was somewhat akin to that of the latter – ‘as an autonomous province, Kosovo had its own administration, assembly, and judiciary, and it was a member of both Serbian institutions and federal institutions’<sup>47</sup> – autonomous provinces did not possess a right to secede from the federation and – as opposed to the republics – were also not viewed as the bearers of Yugoslav sovereignty.<sup>48</sup>

This difference was explained by the fact that the Albanians, like the Hungarians of Vojvodina, were classified as a nationality (*narodnost*) rather than a nation (*narod*). Supposedly this was because their nation had a homeland elsewhere. Nations had the right to their own republic but nationalities did not.<sup>49</sup>

### *The Death of Tito in 1980*

A wave of austerity and political uncertainty gripped the whole of Yugoslavia in the aftermath of Tito’s death, and the economic gap between Kosovo – which ‘had always been the poorest region of Yugoslavia’<sup>50</sup> – and the rest of Yugoslavia widened significantly during this period.<sup>51</sup> Kosovo’s Gross Social Product (GSP) per capita fell from 29% of the Yugoslav average in 1980 to a mere 22% by 1990,<sup>52</sup> and unemployment in the province increased from 27.6% to 40.8% during the same interval.<sup>53</sup>

The reasons for the ‘widening’ are many, however it would appear to have been a combination of the nationalistic tensions that simmered in the region, and the economic problems that had engulfed it, which placed the greatest pressure on the fiscal policies emanating from Belgrade. Those residing in Serbia and the other northern republics harboured an ever-growing antipathy to the taxation levied upon them ‘to support the development of Kosovo’,<sup>54</sup> and debates regarding the distribution of resources, and nationalism, became somewhat conflated.<sup>55</sup> As a result, the relatively minor nationalistic and economic gulfs that existed between the Albanian and Serbian communities at the

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<sup>47</sup> Independent International Commission on Kosovo, above n2, 35-36.

<sup>48</sup> Ibid 36.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 37.

<sup>51</sup> Pashko suggests that economic differences between the regions of the Former Yugoslavia ‘had existed since the formation of the Federation.’ He points out, however, that ‘the gap between Kosovo and the other parts of the FR Yugoslavia widened during the sixties and seventies’, and again in the aftermath of the ‘long period of sequential economic crises of the 1980s and 1990-1995’, which affected the region of Kosovo most severely: see Pashko, G., ‘Kosovo: Facing Dramatic Economic Crisis’, in Veremis, T., Kofos, E. (eds), *Kosovo. Avoiding Another Balkan War* (Athens: ELIAMEP, 1998) at 339.

<sup>52</sup> It had equated to 44% of the Yugoslav average in 1952: see *ibid* 348.

<sup>53</sup> Ibid 349.

<sup>54</sup> Independent International Commission on Kosovo, above n2, 37.

<sup>55</sup> See Pashko, above n51, 333 – Pashko also cites the central governments attempts to distribute their huge foreign debt – which the IMF stated was \$16b in 1990 – between the republics as a factor encouraging the latter to ‘go it alone’. This sentiment was amplified, he suggests, by the fact that the Federation only retained a mere 22.5% of this debt liability.

start of the decade widened greatly during the 1980s with, it would appear, a certain degree of correlation.

Albanians took to the streets in protest, arguably not as an attempt to further their nationalist aspirations but, rather, as a result of their 'resentment that nationalities...were somehow inferior to nations'.<sup>56</sup> As Kadare states, however, their 'demonstrations were quelled with exemplary savagery.'<sup>57</sup> Further fuelling this conflict was the change in Kosovo's demographics that had occurred in the preceding two decades. As a result of the 'very high birth rate of Albanians' and the 'outmigration of Serbs and Montenegrins', the proportion of Albanians in the population of Kosovo rose from 67% in 1961, to 78% in 1981.<sup>58</sup> Those Serbs that remained, and who 'were often of an older generation', feared 'physical violence and damage to their property' and 'experienced institutional and ideological discrimination.'<sup>59</sup> As a result of these conditions, Serb intellectuals began openly publishing 'nationalist tracts' from the mid-1980s and, in a similar vein, also began to 'discuss the 'genocide' of Serbs in Kosovo.'<sup>60</sup>

*Slobodan Milosevic*

It was against this background of rising Serbian nationalism that then deputy-president of the Serbian Party, Slobodan Milosevic, became an overnight hero. His rise began at a meeting in Fushe Kosove/Kosovo Polje, on the 24 April 1987, at which fighting broke out between Serbs and the police. In response, Milosevic famously uttered to his Serb compatriots, that 'no one should dare to beat you', and continued on, delivering an address upon 'the sacred rights of Serbs.'<sup>61</sup> Via his exploitation of this issue, Milosevic successfully transformed himself into a 'national' leader which allowed him to takeover – almost without opposition – the Communist Party machine.<sup>62</sup> The intentions of Milosevic were clear, and resonated throughout a number of speeches that he delivered in the years that followed. He declared, for example, at a rally in Belgrade in November 1988, attended by 350,000 people,<sup>63</sup> that:

Every nation has a love, which eternally warms its heart. For Serbia, it is Kosovo.<sup>64</sup>

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<sup>56</sup> Independent International Commission on Kosovo, above n2, 36.

<sup>57</sup> Kadare, I., 'The Question of Kosovo', contained in Elsie, R. (ed), *Kosovo: In the Heart of the Powder Keg* (Boulder: East European Monographs, 1997) at 239. 'Police and military units and even the newly created territorial defense units were brought to Kosovo from all over Yugoslavia and a state of emergency was declared. Hundreds of people were arrested, tried, and imprisoned' – see *ibid*.

<sup>58</sup> *Ibid* 38.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid* 39.

<sup>61</sup> *Ibid* 40.

<sup>62</sup> Malcolm, above n9, 342.

<sup>63</sup> Independent International Commission on Kosovo, above n2, 41.

<sup>64</sup> Malcolm, above n9, 343 – citing Magas, B., *The Destruction of Yugoslavia: Tracking the Break-Up 1980-92* (USA: Verso Press, 1993), at 208-9; *Times*, 19. Nov 1988; Silber, L., and Little, A., *The Death of Yugoslavia*, (2<sup>nd</sup> Ed) (London: Penguin Books, 1996), at 62-3.

In June of 1989, on the 600<sup>th</sup> anniversary of the Battle of Kosovo, Milosevic again re-enforced his message, and prophetically foreshadowed what was to come, with the statement to over one million onlookers that:

Six centuries later, again, we are in battles and quarrels. They are not armed battles although such things cannot be excluded.<sup>65</sup>

The central government subsequently took a series of steps<sup>66</sup> which culminated, finally, in their July 1990 revocation of Kosovo's autonomy,<sup>67</sup> and dissolution of their Assembly.<sup>68</sup> This act effectively 'signalled the end of the 1974 Constitution, and, according to some, the dissolution of Yugoslavia.'<sup>69</sup>

Milosevic – having gained significant power, and in keeping with the new wave of nationalism that had conferred it upon him – subsequently adopted an 'extreme Serbian nationalist agenda.'<sup>70</sup> Having successfully revoked Kosovo's autonomy, Belgrade adopted a number of policies which were aimed, quite pointedly, at altering the regions ethnic composition and, some suggest, 'creating an apartheid-like society.'<sup>71</sup> As was to be expected, the implementation of these policies necessarily generated an increase in the human rights abuses suffered by those non-Serbian inhabitants of it.<sup>72</sup>

#### *The Response of the Kosovar Albanians*

The Independent International Commission on Kosovo noted the expectation held by many – especially Kosovar Albanians – that, at this point in time, a war in Yugoslavia

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<sup>65</sup> Quoted in Independent International Commission on Kosovo, above n2, 40.

<sup>66</sup> Including, in 1989, the Serbian assembly taking more direct control over Kosovo's security, judiciary, finance, and social planning.

<sup>67</sup> Independent International Commission on Kosovo, above n2, 41.

<sup>68</sup> Despite provisions in the 1974 Constitution which required Assembly consent for its own dissolution. Under the Constitution, as it existed at that time, Serbia could propose amendments, but they had to be accepted by The Kosovo assembly if they were to be implemented. Despite protests from the Albanian population, the provincial assembly of Kosovo met, on the 23<sup>rd</sup> March 1989, in what Malcolm termed 'unusual circumstances'. With a number of tanks and armoured cars in attendance, along with members of the security police and Communist party functionaries from Serbia – some of whom even took part in the voting – the constitutional amendments were passed, 'although without the two-thirds majority normally required for such changes.' As Malcolm explains: 'the final conformation of the amendments was then voted through in an unusually festive session of the Serbian assembly in Belgrade on 28 March: Kosovo's "autonomy" was now reduced to a mere token.'; see Malcolm, above n9, 344 – citing von Kohl, C., & W. Libal, *Kosovo: gordischer Knoten des Balkan* (Vienna, 1992) at 116; Gashi, A. A., *The Denial of Human and National Rights of Albanians in Kosova* (New York, 1992) at 102-3.

<sup>69</sup> Independent International Commission on Kosovo, above n2, 41.

<sup>70</sup> Ibid I.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 41 – making reference to the International Helsinki Federation for Human Rights, IHF Special Report: *The Past 10 Years in Kosovo: Autonomy, Colonization, Genocide*, July 1999



would begin in Kosovo.<sup>73</sup> They submit, however, two explanations for the failure of such expectations to eventuate – one internal, and the other external. From an external perspective, they suggest, Milosevic was preoccupied with ‘the developments elsewhere in Yugoslavia, especially in Slovenia and Croatia’.<sup>74</sup> More importantly, however, the Kosovar Albanians had adopted an internal strategy of non-violence – something ‘that was quite contradictory to Kosovar Albanian traditions.’<sup>75</sup>

In keeping with their strategy of passive resistance, on the 2 July 1990, 114 of the 123 Albanian members of the provincial assembly met ‘on the street outside the locked-up assembly building, and passed a resolution declaring Kosovo ‘an equal and independent entity within the framework of the Yugoslav federation’’.<sup>76</sup> A number of the Albanian delegates met again – in the town of Kacanik, on the 7 September – and agreed, under clandestine conditions, on the proclamation of a constitutional law for a ‘Republic of Kosovo’.<sup>77</sup> However, in the wake of Slovenia and Croatia’s respective declarations of independence in June 1991, their demand for a republic was ‘upgraded’ to a demand for independence.<sup>78</sup>

Despite the fact that their demands fell on deaf ears internationally,<sup>79</sup> a referendum on the question of Kosovo’s independence was subsequently held, in which ‘it is said that 87% of voters took part, including some minorities, and the vote was 99% in favour.’<sup>80</sup> In a further act of defiance, Kosovo-wide elections were subsequently held on the 24 May 1992, ‘using private houses as polling-stations under the noses of the Serbian authorities, to create a new republican assembly and government.’<sup>81</sup>

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<sup>73</sup> Independent International Commission on Kosovo, above n2, 42.

<sup>74</sup> Ibid 43.

<sup>75</sup> Ibid. On their approach, Ibrahim Rugova – a prominent leader of the Albanian movement – commented that: ‘the Serbs only wait for a pretext to attack the Albanian population and wipe it out. We believe that it is better to do nothing and stay alive than be massacred’ – see Judah, T., ‘Kosovo’s Road to War’, *Survival*, Summer 1999, at 120

<sup>76</sup> Malcolm, above n9, 346; see also Independent International Commission on Kosovo, above n2, 346.

<sup>77</sup> A document which contained provisions for a new assembly and an elected presidency of the republic – see Malcolm, above n9, 347.

<sup>78</sup> Independent International Commission on Kosovo, above n2, 44.

<sup>79</sup> Kosovo’s claim to self-determination was, at this time, strongly rejected by the international community – Albania was the only state to confer recognition: see: Goodwin, M., ‘From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis Upon the Doctrines of International Law’, *German Law Journal*, Vol. 08, No. 01 (2007), 1 at 5.

<sup>80</sup> Independent International Commission on Kosovo, above n2, 44.

<sup>81</sup> Malcolm, above n9, 347 – citing Rugova, I., *La Question du Kosovo: entretiens avec Marie-Francoise Allain et Xavier Galmiche* (Paris, 1994) at 107-8; Judah, T., *The Serbs: History, Myth and the Destruction of Yugoslavia* (Yale University Press, New Haven, 1997) at 331-2; *Daily Telegraph*, 25 May 1992.

### *The LDK and their Parallel State*

The League for a Democratic Kosovo (LDK) – which had been officially founded in 1989<sup>82</sup> – was the ‘dominant political organisation’ of the time, and grew quickly throughout 1990 and 1991, to claim ‘700,000 members by the spring of 1991.’<sup>83</sup> This organisation developed a ‘historically unique parallel state apparatus’, which levied ‘voluntary’ taxes on all Kosovar Albanians, and used the proceeds to fund a parallel education system, ‘sports, some cultural activities, the LDK administration and some health care.’<sup>84</sup> The ultimate goal of the LDK was independence for Kosovo.<sup>85</sup> Their strategy for attaining it involved influencing the international community and denying the legitimacy of Belgrade institutions. The latter function they intended to perform not only through their parallel system, but also the boycotting of elections.<sup>86</sup>

As time wore on, however, the parallel system began to wear down the Kosovar Albanians, who had perhaps underestimated the toll that maintaining it over many years would take. Maliqi, for example, stated that, by 1996, the conflict had:

turned into a kind of intense war of nerves, in which one side stops at nothing, committing the most brutal violations of human rights and civil liberties, completely ignoring the protests of the international organisations which for a while kept monitoring teams in Kosovo, while the other side bottles up its humiliation, despair, fury, rage and hatred – but for how long before it explodes?<sup>87</sup>

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<sup>82</sup> Malcolm, above n9, 348.

<sup>83</sup> Independent International Commission on Kosovo, above n2, 45.

<sup>84</sup> Ibid 46.

<sup>85</sup> As a result of this, and despite their achievements, and relatively sophisticated structure, the LDK has, at times, been criticised for its ‘combination of excessively passive tactics and maximalist political demands (nothing less than independence), and for its refusal to seek accommodation with Belgrade.’ Their leader, Ibrahim Rugova was also criticised for his failure to take advantage of the opportunity created when Milan Panic became Prime Minister of Serbia in July 1992. Panic allegedly offered Rugova ‘restoration of self-rule for the Kosovar Albanians, the re-admittance of Albanian students to Pristina University, the reinstatement of Albanian professors, freedom for the Albanian press, and free elections’ in return for his support in the presidential elections of 1992. The agreement never materialised, however, and Panic was subsequently defeated in the December 1992 elections by Milosevic. Some suggest that Rugova’s –and therefore the Albanians – support may have made a difference: see Independent International Commission on Kosovo, above n2, 48; Troebst, S., *Conflict in Kosovo: Failure of Prevention, an Analytical Documentation*, European Centre for Minority Issues, (Flemburg, 1999) at 27.

<sup>86</sup> Independent International Commission on Kosovo, above n2, 48.

<sup>87</sup> Maliqi, S., *Kosova: Separate World – Reflections and Analysis 1989-1998* (Prishtina: Dukagjini Publishing House, 1998) – cited in Independent International Commission on Kosovo, above n2, 49.

### *The Emergence of the KLA*

Some would suggest that the ‘explosion’ referred to by Maliqi above, coincided with the signing of the Dayton Agreement in November 1995. It made no mention of Kosovo, and it therefore appeared to the Kosovar Albanians that their strategy of passive resistance had failed. Rugova was again criticised for ‘excessive passivity’,<sup>88</sup> and many concluded from the Agreement that ‘international attention [could] only be obtained by war.’<sup>89</sup> It was during this period that an organisation known as the Kosovo Liberation Army (“KLA”) rose to prominence. When they first emerged in 1996 – after claiming responsibility for the killing of a Serb policeman during the previous year – many Albanians believed that the attacks were mere provocations, concocted by central authorities in support of their own ends.<sup>90</sup> The KLA have been described as ‘woefully unprepared for war’ and, some suggest, it is therefore quite probable that they developed the ‘deliberate strategy of provoking an international intervention.’<sup>91</sup>

However, up until the collapse of the Albanian state system and institutions in 1997, ‘active armed resistance groups in Kosovo were very small and without permanent bases in the province’.<sup>92</sup> The mentioned collapse changed this though, and allowed the KLA to loot Albanian Army and Interior Ministry warehouses and depots, and to ‘organise training facilities in northern Albania near the borders with Kosovo.’<sup>93</sup> The KLA were subsequently labeled a ‘terrorist organisation’ by the Serbian government, and the ‘already pervasive police harassment increased’.<sup>94</sup> Tensions rose to another level, however, after the Serbian police killed Adem Jashari – ‘a local strongman in Prekazi/Prekaze, who had joined the KLA’<sup>95</sup> – on the 28 February 1998. The victim’s extended family – which numbered 58 – were killed during the police assault, and village militias from all over Kosovo prepared to defend their territory.<sup>96</sup> This, according to the Independent International Commission on Kosovo, ‘was the beginning of the war.’<sup>97</sup>

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<sup>88</sup> Independent International Commission on Kosovo, above n2, 50.

<sup>89</sup> Quoted in Caplan, R., ‘International Diplomacy and the Crisis in Kosovo’, *International Affairs*, Volume 74, no. 4, October 1998, at 752.

<sup>90</sup> Independent International Commission on Kosovo, above n2, 51.

<sup>91</sup> Ibid 52.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> As a result, the ‘Serbian government proclaimed the KLA [to be] a terrorist organisation’, and ‘the already pervasive police harassment increased’ – The Humanitarian Law Centre (HLC) documented a number of cases concerning police mistreatment of ethnic Albanians – including arbitrary arrest, detention, physical abuse, illegal searches, and extra-judicial killing – and a number of other human rights organisations corroborated the prevalence of extensive beatings, including the use of electric shocks – see *ibid* 53.

<sup>95</sup> Ibid 55.

<sup>96</sup> Judah, above n4, 140; Independent International Commission on Kosovo, above n2, 55.

<sup>97</sup> Independent International Commission on Kosovo, above n2, 55.

*Internal Conflict (February 1998 – March 1999)*

Despite the escalating violence, the Yugoslav government continually asserted that the conflict – which they considered to be an internal one – was under control.<sup>98</sup> As such, Milosevic continually affirmed the resolute opposition of the Federal Republic of Yugoslavia to the attempts that had been made, in his opinion, to ‘internationalise’ the ‘internal problems of another country.’<sup>99</sup>

Indeed, and as evidenced by the results of a national referendum – conducted on the 24 April 1998 – regarding whether or not international mediation on the crisis should be accepted, such perceptions extended well beyond the officialdom of the FRY. Despite a low turnout, an overwhelming majority of 95% rejected such mediation, demonstrating the support that Milosevic had garnered for his ‘increasingly chauvinistic policies toward the Albanian majority population in Kosovo’.<sup>100</sup>

As a result, and in the face of ‘a rapidly expanding KLA presence’, the Yugoslav forces subsequently entered Kosovo ‘with massive reinforcements and started a large-scale operation coordinated with police and paramilitary units.’<sup>101</sup> The number of attacks on civilians by all parties to the conflict increased during this period, however the ‘notable’ increase in abuses perpetrated by the KLA ‘was far outstripped by the rise in [those] perpetrated by FRY security and paramilitary forces.’<sup>102</sup> In fact, the violence in the area escalated to such an extent, and the damage resulting from the sustained Yugoslav attacks became so severe, that the president of the UN Security Council was compelled to call for an immediate cease-fire by the end of August 1998.<sup>103</sup> In addition, and as a result of their grave concern at the ‘intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army’, the UN Security Council subsequently adopted Resolution 1199 – on the 23 September 1998 – which demanded a ceasefire and ordered the ‘withdrawal of security units used for civilian repression’.<sup>104</sup>

Soon after – on the 13 October 1998 – NATO authorised potential air strikes<sup>105</sup> and, as a result, Milosevic entered into an agreement with US Special Envoy Richard Holbrooke – acting on behalf of the Contact Group<sup>106</sup> – regarding the demands contained within

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<sup>98</sup> Ibid 69.

<sup>99</sup> Ibid 69 – citing the Yugoslav news agency, *Tanjug*.

<sup>100</sup> Independent International Commission on Kosovo, above n2, 71.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 72.

<sup>103</sup> Ibid 74 – citing a statement by the president of the Security Council, Aug. 24, 1998, S/PRST/1998/25

<sup>104</sup> UN Security Council Resolution 1199, UN SCOR, UN Doc. S/RES1199 (1998)

<sup>105</sup> If security forces were not withdrawn from Kosovo within 96 hours – see Independent International Commission on Kosovo, above n2, 76.

<sup>106</sup> The Contact Group is composed of United States, United Kingdom, France, Germany, Italy, and Russia

Resolution 1199.<sup>107</sup> This agreement was subsequently affirmed by the UN Security Council – on the 24 October 1998 – in the form of Resolution 1203, which provided for the deployment of an OSCE Verification Mission in Kosovo and the withdrawal of Yugoslav troops.<sup>108</sup>

As required by the agreement, Serbia initially withdrew its forces,<sup>109</sup> however the KLA exploited the situation, renewing military action and taking up positions ‘vacated by the redeployed Serbian forces.’<sup>110</sup> In response, Belgrade renewed its counter-insurgency efforts, and strategically placed battalion size units both around and within Kosovo’s borders.<sup>111</sup> NATO subsequently condemned the actions of both parties,<sup>112</sup> and it became clear that the Milosevic-Holbrooke agreement ‘was no longer in a position to address necessary peacekeeping issues.’<sup>113</sup>

### *The Racak Incident*

In what was one of the bloodiest single episodes in the events that led up to the Kosovo War, 45 ethnic Albanians were subsequently slain in the village of Racak/Racak in an assault by Yugoslav forces, on 15 January 1999.<sup>114</sup> Despite claims from Serb authorities that this was ‘simply an action against the KLA’,<sup>115</sup> in which no civilians had been killed, the OSCE-KVM team which investigated the site of the massacre the following day found ‘evidence of arbitrary detentions, extra-judicial killings, and mutilation of unarmed civilians.’<sup>116</sup> In Robertson’s opinion, ‘it was this atrocity more than anything else which

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<sup>107</sup> Independent International Commission on Kosovo, above n2, 76.

<sup>108</sup> SC Resolution 1203, UN SCOR, UN Doc. S/RES1203 (1998)

<sup>109</sup> See the Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, UN Doc. S/1998/1068, Nov. 12, 1998

<sup>110</sup> Independent International Commission on Kosovo, above n2, 78.

<sup>111</sup> Ibid 79.

<sup>112</sup> See Weller, M., *The Crisis in Kosovo 1989-1999: From the Dissolution of Yugoslavia to the Rambouillet and the Outbreak of Hostilities*, Vol. 1, Cambridge University Press, 1999, at 286 – Weller asserts that both sides were criticised for the failure to comply fully with the requirements set out in SCR 1160, 1199 and 1203.

<sup>113</sup> Independent International Commission on Kosovo, above n2, 80.

<sup>114</sup> It should be noted, however, that certain parties have expressed their doubts as to the ‘authenticity’ of this massacre. Trbovich, for example, refers to it as an ‘alleged massacre’, which was ‘not corroborated by international forensic experts.’: see Trbovich, A., *A Legal Geography of Yugoslavia’s Disintegration*, Oxford University Press, New York, 2008 at 339 – including note 195 which refers to articles also questioning the authenticity of the massacre and suggesting that it may have been a set-up mounted by the KLA before investigators arrived at the scene, including: Christophe Chatelot, ‘Were the dead in Racak really massacred in cold blood?’ *Le Monde*, January 21, 1999; Paul Watson, ‘Cloud of Controversy Obscures Truth About Kosovo Killings’, *Los Angeles Times*, January 23, 1999 at 4

<sup>115</sup> Office of the Prosecutor, Press Release, CC/PIU/379-E, 20 January 1999.

<sup>116</sup> Organisation for Security and Cooperation in Europe (OSCE), ‘Kosovo/Kosova As Seen and Told’, 1999, at 354 – cited in Independent International Commission on Kosovo, above n2, 81 – one must again bear in mind, however, the doubts that certain commentators have expressed as to the ‘authenticity’ of this massacre: see n114 above.

convinced the US administration that NATO must meet force with force.’<sup>117</sup> As Robertson further points out, however:

In the end, what tipped NATO into an enforcement action which the Security Council itself would not take was that the killings and deportations were part of a carefully premeditated plan to ‘ethnically cleanse’ the province of its 1.7 million Albanians by persecuting them so severely that most would flee, thereby creating a refugee crisis for neighbouring states.<sup>118</sup>

Contact Group members subsequently organised peace negotiations – to be held in Rambouillet, France, from 6 February 1999 – however no plan acceptable to both the FRY and Kosovo could be brokered.<sup>119</sup> During a second round of talks, in Paris, a proposal was tabled which the Kosovar Albanian delegation signed; however the FRY/Serb delegation did not, and the negotiations failed.<sup>120</sup>

### *The Kosovo War*

NATO began their bombing campaign on the 24 March 1999 – one day after the government of Yugoslavia had declared a state of emergency.<sup>121</sup> Their hope, and assumption, was that ‘a relatively short bombing campaign would persuade Milosevic to come back to sign the Rambouillet agreement.’<sup>122</sup> However the war ‘quickly took a direction that surprised and shocked the world’, as the FRY military and paramilitary forces ‘launched a vicious campaign against the Kosovar Albanian population.’<sup>123</sup> As the Independent International Commission on Kosovo states:

There is widespread agreement that FRY forces were engaged in a well-planned campaign of terror and expulsion of the Kosovar Albanians. This campaign is most frequently described as one of ‘ethnic cleansing’, intended to drive many, if not all, Kosovar Albanians from Kosovo, destroy the foundations of their society, and prevent them from returning.<sup>124</sup>

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<sup>117</sup> Robertson, G., *Crimes Against Humanity* (Australia: Penguin Books, 2006) at 479 – citing Gellman, B., ‘The Path to Crisis: How the US and Its Allies Went to War’, *Washington Post* (18 April 1999).

<sup>118</sup> Robertson, above n117, 479-80.

<sup>119</sup> Independent International Commission on Kosovo, above n2, 82.

<sup>120</sup> Ibid – it should, however, be noted that the Rambouillet accord was variously criticised for being a take it or leave it ultimatum, absent of any true negotiation, which no sovereign, independent state could have signed: see, for example, the discussion of Herring, E., ‘From Rambouillet to the Kosovo accords: NATO’s war against Serbia and its aftermath’, *The International Journal of Human Rights* 4:3, 2000, at 225-228.

<sup>121</sup> Independent International Commission on Kosovo, above n2, 85.

<sup>122</sup> Ibid – citing House of Commons, Select Committee on Foreign Affairs, Fourth Report; Roberts, A., ‘NATO’s Humanitarian War Over Kosovo’, *Survival*, Vol. 41, No. 3, Autumn 1999.

<sup>123</sup> Independent International Commission on Kosovo, above n2, 88.

<sup>124</sup> Ibid – citing Organisation for Security and Cooperation in Europe (OSCE), ‘Kosovo/Kosova As Seen and Told’, 1999, at viii; US State Department, ‘Ethnic Cleansing in Kosovo: An Accounting’, Washington, DC, 1999.

In pursuance of a diplomatic solution, the German government introduced a plan which foresaw a greater role in the process for the United Nations. This plan was subsequently considered, and followed to some extent, in a seven-point peace plan which Russia and the G7 countries agreed upon. A proposal based upon these principles was subsequently brought to Belgrade by the EU envoy Martti Ahtisaari and Russian envoy Viktor Chernomyrdin, which the Yugoslav government accepted on 1 June 1999.<sup>125</sup> The Serb parliament formally approved a peace plan based on these principles on 3<sup>rd</sup> June 1999 and, following delays 'caused by difficulties working out a technical agreement', NATO suspended its air attacks on 10 June.<sup>126</sup>

The campaign had lasted 78 days. In that time, more than one million Kosovar Albanians became refugees,<sup>127</sup> 'around 10,000 lost their lives',<sup>128</sup> and many others were 'wounded, raped or assaulted in other ways.'<sup>129</sup>

### *Kosovo under United Nations Administration*

On the same day that the bombings ended, the UN Security Council passed Resolution 1244,<sup>130</sup> which authorised the establishment of an international security presence in Kosovo, and an interim administration which, it was said, would 'provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.'<sup>131</sup> Many of the statements contained within the Resolution were made 'pending a final settlement'<sup>132</sup> and, although no timeline was

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<sup>125</sup> Independent International Commission on Kosovo, above n2, 95-6.

<sup>126</sup> Ibid 96.

<sup>127</sup> Ibid 90 – suggests that 'during the course of the NATO air campaign, approximately 863,000 civilians sought or were forced into refuge outside of Kosovo', and that 'an estimated additional 590,000 were internally displaced.'

<sup>128</sup> 'Kosovo's Killing Fields – a myth?' *Mail and Guardian*, August 25 to 31, 2000 – suggests that exhumations conducted by the ICTY had located, up until this point in time, 2788 bodies from 345 mass gravesites; however the Independent International Commission on Kosovo states that 'instances of individual murder were not included in this forensic assessment', and that their findings 'place the number of killings in the neighbourhood of 10,000, with the vast majority of the victims being Kosovar Albanians': see Independent International Commission on Kosovo, above n2, 91.

<sup>129</sup> Independent International Commission on Kosovo, above n2, 97.

<sup>130</sup> The Status and Ramifications of UNSC Resolution 1244 are discussed in detail below at chapter 4.

<sup>131</sup> SC Resolution 1244, UN. SCOR, UN. Doc. S/RES1244 (1999) – the Resolution also, inter alia, requested that the Secretary-General appoint 'a Special Representative to control the implementation of the international civil presence', and to coordinate its efforts with those of the 'international security presence to ensure that both...operate towards the same goals and in a mutually supportive manner' (para.5); called for the demilitarisation of the KLA (para.9(b)); and the establishment of 'a secure environment in which refugees and displaced persons can return home in safety...' (para.9(c)).

<sup>132</sup> See the discussion below, at chapter 4, for a more detailed discussion upon the ramifications of this.

specified, it was an asserted responsibility of the international civil presence to facilitate ‘a political process designed to determine Kosovo’s future status’.<sup>133</sup>

The matter of fact tone of the Resolution belies, however, the practical complexities that accompanied its implementation, and the legal uncertainty that it has left in its wake. From a practical perspective, the Kosovo International Security Force (“KFOR”) was ‘evidently unable, during the early days of its deployment’, to avert the Albanian ‘revenge attacks’ targeting Serbian Kosovars and ‘suspected Roma collaborators’.<sup>134</sup> In addition the United Nations Mission in Kosovo (“UNMIK”) ‘was slow to arrive and make its presence felt...and was frequently criticised for its initial activity’,<sup>135</sup> while Moscow accused Bernard Kouchner – the man appointed, on 2 July 1999, to be the UN Special Representative – and the UN authorities in Kosovo ‘of constantly and conscientiously violating Resolution 1244’.<sup>136</sup>

Therefore, and despite some progress,<sup>137</sup> tension and violence continued to plague the territory. As UN Secretary-General Kofi Annan stated – nearly one year after the NATO bombing campaign was brought to an end: ‘The general security situation in Kosovo has not changed significantly...Members of minority communities [continue] to be victims of intimidation, assaults and threats throughout Kosovo’.<sup>138</sup> In his opinion, ‘the overall security situation’, at this time, therefore remained ‘fragile’.<sup>139</sup>

Such tensions remained and – in what was clearly one of the most significant challenges put to both UNMIK and the Provisional Institutions of Self-Government (PISG)<sup>140</sup> during their tenure – boiled over in a series of ‘violent events’ between the 15 and 19 March,

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<sup>133</sup> See para.11(e) SC Resolution 1244, UN. SCOR, UN. Doc. S/RES1244 (1999).

<sup>134</sup> Independent International Commission on Kosovo, above n2, 104-105.

<sup>135</sup> Ibid 107.

<sup>136</sup> Ibid 103.

<sup>137</sup> The achievements made were elucidated in the following documents: Special Representative Bernard Kouchner, ‘UNMIK Marks Six Months in Kosovo’, press briefing, December 13, 1999, accessed at <http://www.unmikonline.org/srsg/pbrief12-99.htm> (last accessed 4 July 2008); and the Report of the Secretary-General on UNMIK, June 6, 2000, UN Doc. S/2000/538, accessed at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/463/39/PDF/N0046339.pdf?OpenElement> (last accessed 4 July 2008).

<sup>138</sup> Report of the Secretary-General on the United Nations Interim Administration in Kosovo, June 6, 2000, at 4.

<sup>139</sup> Ibid 1 – he continued on to state that: ‘the harassment and intimidation of non-Albanian communities continued at unacceptable levels and underscored the tremendous complexity faced in building coexistence and tolerance.’

<sup>140</sup> The Provisional Institutions of Self-Government were established under the Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK Reg. 2001/9, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001), accessed at [http://www.unmikonline.org/pub/misc/FrameworkPocket\\_ENG\\_Dec2002.pdf](http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf) (last accessed 7 July 2008) – which established a framework facilitating the transfer of certain responsibilities from UNMIK to the PISG, resulting in a system under which both policy is made by both – for further discussion see Knoll, B. ‘Legitimacy and UN-Administration of Territory’, *German Law Journal* Vol. 08, No. 01 (2007) 39.



2004.<sup>141</sup> In the opinion of de Vrieze, it was the happening of two separate incidents – a drive-by shooting which wounded a Kosovo Serb resident of Caglavica, and the drowning, on the same evening, of three Kosovar Albanian boys in the Ibar River, in the village of Cabra, whom broadcasters claimed had been attempting to escape from Serbs – which ‘ignited’ the three days of rioting.<sup>142</sup> The violence left 19 dead and over 900 injured, and drove ‘more than 3,000 people from their homes.’<sup>143</sup> As always, the reasons for the violence were ‘diverse and complex’;<sup>144</sup> however the ‘ever present question of Kosovo’s final status’ remained one of the most antagonising.<sup>145</sup>

### *The ‘Ahtisaari Plan’*

Exercising the powers with which they had been vested, UNMIK set eight standards – concerning, respectively: democratic governance, the rule of law, freedom of movement, rights of ethnic communities, property rights, economy, cultural heritage, and dialogue – which the provisional authorities, to whom power was incrementally conferred, had to meet.<sup>146</sup> However, and despite the fact that none of the above standards had been attained,<sup>147</sup> the Security Council decided – after having received advice from Ambassador Kai Eide that this was an appropriate time to do so – that a political process should be launched, with the objective of determining the future status of Kosovo, ‘as foreseen in Security Council resolution 1244.’<sup>148</sup>

The Council subsequently – on 10 November 2005 – endorsed the selection of Martti Ahtisaari as the Secretary-General’s Special Envoy for the future status process for Kosovo,<sup>149</sup> and – on 14 November 2005 – he was officially appointed and immediately started consultations.<sup>150</sup> After a mediation process that lasted nearly fifteen months, Ahtisaari unveiled – on 2 February 2007 – the *Comprehensive Proposal for the Kosovo*

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<sup>141</sup> de Vrieze, F., ‘Kosovo after the March 2004 Crisis’, *Helsinki Monitor* 15 (2004) 147 at 147

<sup>142</sup> Ibid 148.

<sup>143</sup> Ibid 147.

<sup>144</sup> Ibid 150 – for a brief summary of the most important, see the summary of de Vrieze at 150-151.

<sup>145</sup> Ibid 150.

<sup>146</sup> D’Aspremont, J., ‘Regulating Statehood: The Kosovo Status Settlement’, *Leiden Journal of International Law*, 20 (2007) 649 at 650 – citing UNMIK, ‘Standards for Kosovo’, presented by the Special Representative of the Secretary-General on 10 December 2003, available at [http://www.unmikonline.org/standards/docs/leaflet\\_stand\\_eng.pdf](http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf) (last accessed 4 July 2008); and the recommendation of the Secretary-General to the Security Council of 17 November 2004, UN Doc. S/2004/932 (2004), annex II, accessed at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/632/22/PDF/N0463222.pdf?OpenElement> (last accessed 4 July 2008).

<sup>147</sup> D’Aspremont, above n146, 650.

<sup>148</sup> Statement by the President of the Security Council, 24 October 2005, UN Doc. S/PRST/2005/51 (2005) at 1-2.

<sup>149</sup> See UN Doc. S/2005/709 (2005).

<sup>150</sup> D’Aspremont, above n146, 650.

*Status Settlement* (“the Ahtisaari Plan”).<sup>151</sup> The Plan recommends that Kosovo become independent – under the supervision of the international community – on the basis that reintegration into Serbia is not a viable option, and that the continued international administration is also not sustainable.<sup>152</sup>

This proposal was inevitably welcomed by an ‘uproar’ of opposition from Serbia and Russia and, as a result, the Special Envoy embarked upon a ‘last ditch and ultimate round of talks’.<sup>153</sup> As a result however, of the ‘inevitable impossibility’ that the parties should fashion some sort of agreement, the Special Envoy concluded that no breakthrough had occurred and that ‘all avenues had been exhausted.’<sup>154</sup> The comprehensive proposal and report were subsequently submitted to the Secretary-General who, fully supporting both, then officially delivered them – on 26 March 2007 – to the UN Security Council members.<sup>155</sup>

As expected, however, Russia threatened to exercise their veto, and the draft resolution was subsequently withdrawn – on 20 July 2007 – from UN Security Council debate.<sup>156</sup> In yet another effort to revive the mediation process, the ‘Troika’<sup>157</sup> oversaw negotiations – from August to December 2007 – between the Government of Serbia and the Kosovar Albanians.<sup>158</sup> Their efforts were once again futile, however, and the Troika reported to the Secretary-General – on 10 December 2007 – that: ‘the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.’<sup>159</sup>

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<sup>151</sup> The official ‘comprehensive proposal’ is an addendum to the Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168/Add.I (2007).

<sup>152</sup> See the Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, UN Doc. S/2007/168 (2007).

<sup>153</sup> D’Aspremont, above n146, 651.

<sup>154</sup> Ibid – citing the conclusions of the Vienna high-level meeting, 10 March 2007, UN Doc. UNOSEK/PR/19 (2007); and the Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, annexed to the letter of the Secretary-General addressed to the President of the Security Council of 26 March 2007, UN Doc. S/2007/168 (2007), Paras. 1-2.

<sup>155</sup> See Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168 (2007).

<sup>156</sup> ‘Ahtisaari Plan “Closed Chapter” – Russia’s UN Ambassador’, *Russian News and Information Agency Novosti*, 20 July 2007, accessed at <http://en.rian.ru/world/20070720/69379634.html> (last accessed 4 July 2008).

<sup>157</sup> Made up of the EU, Russia, and the U.S.

<sup>158</sup> Borgen, C.J., ‘Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition’, *The American Society of International Law Insight*, Volume 12, Issue 2, February 29, 2008, accessed at <http://www.asil.org/insights/2008/02/insights080229.html> (last accessed 16 May 2008).

<sup>159</sup> See the Report of the EU/U.S./Russia Troika on Kosovo, December 4, 2007, accessed at <http://www.ico-kos.org/pdf/Report%20of%20the%20EU-US-Russia%20Troika%20on%20Kosovo.pdf> (last accessed 4 July 2008).

### *Kosovo's Declaration of Independence*

The stalemate which ensued – between Serbia, the Kosovar Albanians, and their respective allies – was eventually broken when, on the 17 February, 2008, the Parliament of Kosovo issued a statement declaring it to be ‘an independent and sovereign state.’<sup>160</sup> The declaration was described as being ‘in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement’,<sup>161</sup> and welcomed ‘the international community’s continued support of [their] democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244.’<sup>162</sup>

### *The International Reaction*

Serbia reacted swiftly to the declaration, charging Kosovo’s Albanian Leadership with treason for proclaiming the province to be independent,<sup>163</sup> threatening to withdraw their ambassadors from any country that recognised the unilateral declaration,<sup>164</sup> and promising ‘to use all peaceful means within its power to restore its territorial integrity.’<sup>165</sup> Serbia and their allies – including, most importantly, Russia – contend that Serbia, as a sovereign state, ‘has not agreed to independence for Kosovo, that there is no Security Council resolution authorising the detachment of Kosovo from Serbia and that, therefore, its independence is illegal.’<sup>166</sup> In reaction to the disregard that he believes the international community has shown for the principle that borders should only be changed by agreement, Russian Foreign Minister Sergei Lavrov stated that:

We are speaking here about the subversion of all the foundations of international law, about the subversion of those principles which, at huge effort, and at the cost of Europe's pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence.

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<sup>160</sup> See the Kosovo Declaration of Independence, 17 February 2008, accessed at <http://www.assembly-kosova.org/?krye=news&newsid=1635&faq=1&lang=en> (last accessed 4 July 2008); Prime Minister’s Speech on Independence Day, 17 February 2008, accessed at <http://www.assembly-kosova.org/?krye=news&newsid=1639&faq=1&lang=en> (last accessed 4 July 2008) – the ‘Parliament approved the declaration 109-0. Eleven ethnic minority deputies, including Serbs, were absent’; see ‘World Reaction : Russia Condemns Declaration’, *International Herald Tribune*, February 17 2008, accessed at <http://www.ihf.com/articles/2008/02/17/europe/17reax2.php> (last accessed 4 July 2008).

<sup>161</sup> See Para. 1, Kosovo Declaration of Independence, above n160.

<sup>162</sup> See Para. 5, *ibid*.

<sup>163</sup> ‘Serbia Charges Kosovo Leaders With Treason’, *Reuters*, 18 February 2008, accessed at <http://www.reuters.com/article/newsOne/idUSHAM84253620080218> (last accessed 4 July 2008).

<sup>164</sup> ‘Serbia Tipped to Recall Ambassador’, *The Sydney Morning Herald*, 19 February 2008, accessed at <http://news.smh.com.au/national/serbia-tipped-to-recall-ambassador-20080219-1svc.html> (last accessed 4 July 2008).

<sup>165</sup> ‘“False State” Kosovo Declares Independence’, *Russia Today*, 18 February 2008, accessed at <http://www.russiatoday.ru/news/news/21037> (last accessed 4 July 2008).

<sup>166</sup> Paul Reynolds, ‘Legal Furore Over Kosovo Recognition’, *BBC News*, 16 February 2008, accessed at <http://news.bbc.co.uk/2/hi/europe/7244538.stm> (last accessed 4 July 2008).

We are speaking about a subversion of those principles on which the Organisation for Security and Co-operation in Europe rests, those [principles] laid down in the fundamental documents of the UN.<sup>167</sup>

Those condemning the declaration further assert that it violates ‘the essential principles of the UN charter’,<sup>168</sup> and ‘all previous agreements, including United Nations Security Council Resolution 1244.’<sup>169</sup> So long as the latter remains in force, argues Russia’s UN Ambassador, Vitaly Churkin, ‘it is not obvious at all what could possibly be the legal basis for even considering the recognition of this unilateral declaration of independence.’<sup>170</sup> As a result, he submits, the ‘declaration should be disregarded by the international community, and should be declared null and void by the head of the UNMIK mission’.<sup>171</sup>

Conversely, however, Kosovo and its allies – including, most importantly, the United States, the United Kingdom, and France – believe that the declaration is in conformity with both international law and the provisions of Resolution 1244. John Sawers – the United Kingdom’s Ambassador to the UN – has, as such, stated that, in his governments’ opinion: ‘there is nothing in 1244 that rules out [the] recognition of an independent Kosovo. The provision in 1244 that the territorial integrity of the former Republic of Yugoslavia should be respected applied to the interim period, which is now come to an end.’<sup>172</sup> As, in their eyes, there is also no prohibition, under international law, against secession, they contend that the declaration is, in fact, legal.

As of 12 May 2009, 58 of the 192 United Nations member states had recognised the Republic of Kosovo.<sup>173</sup>

## CONCLUSION

Kosovo’s recent declaration of independence marks but one more chapter in what has undoubtedly been one of the world’s most turbulent, bloody and multifarious histories. The origins of its inhabitants remain unclear, and arguments surrounding them will undoubtedly linger for generations to come. The tension and bloodshed that have plagued the region are, however, eerily certain. Many Serbians continue to perceive Kosovo as

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<sup>167</sup> Ibid.

<sup>168</sup> ‘Serbia’s Parliament Rejects United Nations Plan For Kosovo’, *Associated Press*, 14 February 2008, accessed at <http://www.globalpolicy.org/security/issues/kosovo1/2007/0214rejects.htm> (last accessed 4 July 2008).

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> ‘Who Recognised Kosova as an Independent State?’ Accessed at <http://www.kosovothankyou.com/> (last accessed 12 May 2009) – 3 of the 5 UNSC Permanent Member States, 22 of the 27 European Union (EU) Member States, 24 of the 28 NATO Member States, 33 of the 47 Council of Europe Member States, 35 of the OSCE Member States, 11 of the 57 OIC Member States, and 7 of the 7 G7 Member Countries, had formally recognised Kosovo as of this date.

being 'the holy place of the Serb nation' and, as a result of the resistance that they offered against the Ottoman Turks in the 1389 Battle of Kosovo, an integral element of their collective being. It has, however, changed hands at regular intervals since this battle, perpetuating a cycle of revenge and repression, and fuelling tensions both within and beyond the territories nascent international borders.

These tensions remained somewhat in check under the guidance of Tito, as privileges passed to the regions Albanian inhabitants. However the final step of promoting the Yugoslav states autonomous provinces – such as Kosovo – into fully fledged republics never occurred, and they therefore lacked the one right they so mightily craved – that to secede. In the wake of Tito's death, tensions boiled over and protests and violence ensued. It was against this background that Slobodan Milosevic rose to power and, under his rule, Kosovo's autonomy was gradually revoked.

The Kosovar Albanians, in response, established a 'parallel state', however its impact was questioned after the Dayton Agreement – signed in November 1995 – failed to mention Kosovo's status. In the wake of its perceived failure, the KLA emerged, and conflict inevitably followed. The region descended into conflict and, following massive bloodshed, NATO intervened in early 1999, and the territory was subsequently placed under the administration of the UN.

Nearly 9 years after the happening of this event, and in the wake of endless negotiations, the stalemate was broken when the Parliament of Kosovo issued a statement declaring it to be 'an independent and sovereign state.'<sup>174</sup> Much debate has ensued regarding the legality of this act – and the concomitant ability of third states to acknowledge it – however, as mentioned, 58 of the 192 United Nations member states had – as of 12 May 2008 – recognised the Republic of Kosovo.<sup>175</sup>

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<sup>174</sup> See the Kosovo Declaration of Independence, above n160; Prime Minister's Speech on Independence Day, above n160 – the 'Parliament approved the declaration 109-0. Eleven ethnic minority deputies, including Serbs, were absent'; see 'World Reaction : Russia Condemns Declaration', *International Herald Tribune*, February 17 2008, accessed at <http://www.iht.com/articles/2008/02/17/europe/17reax2.php> (last accessed 4 July 2008).

<sup>175</sup> 'Who Recognised Kosova as an Independent State?', above n173.

## CHAPTER 3

### INTERNATIONAL PERSONALITY

Many states have been created throughout the course of history, and a number have also lapsed.<sup>1</sup> The law as it pertains to these events has not, however, been clarified to any great extent and, as a result, the issues underpinning them remain contentious and legally complex. They have, without prejudice, triggered a number of the world's most notable and bloody conflicts and scarred regions the world over.

From the aspiring states' perspective, statehood under international law is a precious and, some may argue, occasionally priceless accolade to which a number of incentives attach. Such entities often covet the autonomy and freedom that it affords them, and the emphasis that it places upon their people's historical solidarity. They also often crave, however, to a greater or lesser extent, the rights – although occasionally challenged in contemporary international law – and the international presence that sovereignty bestows upon them. As McCorquodale acknowledges:

Even though many states face poverty, lack of physical resources, internal armed conflict, and economic dependency, the international privileges that come with statehood make becoming a state enormously alluring for many entities.<sup>2</sup>

All states are, for example, afforded, without discrimination, equality among their peers under the *UN Charter* – Article 2(1) states that the UN 'is based on the principle of sovereign equality of all its members' – and the *1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*. The latter affirms that:

All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic social, political or other nature.

As a result of this sovereign equality, the Declaration then asserts:

- (a) States are juridically equal;
- (b) Each state enjoys the rights inherent in full sovereignty;
- (c) Each state has the duty to respect the personality of other states;
- (d) The territorial integrity and political independence of the state are inviolable;
- (e) Each state has the right freely to choose and develop its political, social, economic and cultural systems;

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<sup>1</sup> There were about 50 acknowledged states in existence at the beginning of the twentieth century, and nearly two hundred by the beginning of the twenty-first century: Blay, S., Piotrowicz, R. & Tsamenyi, M., *Public International Law: An Australian Perspective* (2<sup>nd</sup> Ed.), (South Melbourne: Oxford University Press, 2006) at 184.

<sup>2</sup> Ibid 185.

- (f) Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.<sup>3</sup>

The allure of statehood to prospective states – especially those that have endured oppression or alien subjugation – is therefore obvious. The patriotism that it instills in some is so strong that they are willing to give their lives for the cause. Ironically then, it is this same notion of statehood that most often prevents them from attaining it themselves. That is, each of the sovereign rights set out above diminishes to some extent those rights conferred on other – state and non-state – entities, and the most severely hindered are, obviously, those with no rights of their own. This group is, quite possibly, under international law, those minority peoples seeking secession outside of the framework of de-colonisation, as they have very little, if any, independent status within international forums.

In light of the ‘increased interdependence’ of states and contemporary globalisation, the ‘omnipotence of the state’ has, however, been diminished somewhat, and those rights that were once considered absolute have been questioned.<sup>4</sup> Nevertheless, a state ‘remains the most powerful entity in the international legal system.’<sup>5</sup>

#### REQUIREMENTS FOR STATEHOOD

Although it is asked somewhat infrequently in the wake of de-colonisation, the question regarding whether or not a purported state is ‘eligible’ for recognition is one answered by reference to international law.<sup>6</sup> It is unfortunate, then, that ‘there is no accepted legal definition of statehood’.<sup>7</sup> Acting somewhat as a proxy, the *Montevideo Convention on the Rights and Duties of States 1933* is, however, commonly acknowledged as containing the classical elements of statehood. Article 1 of this Convention suggests that, ‘the state as a person of international law should possess the following qualifications’:

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

A number of commentators suggest, however, that these requirements are no longer exhaustive. They are often criticised for focusing merely on the effectiveness of the aspiring state and, as such, ignoring those factors of a more political or moral ilk –

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<sup>3</sup> GA Resolution 2625, UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> Plen. Mtg., 121, UN Doc A/8082 (1971).

<sup>4</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 149.

<sup>5</sup> Ibid 185.

<sup>6</sup> Triggs, G., *International Law: Contemporary Principles and Practices* (New South Wales: LexisNexis Butterworths, 2006) at 149.

<sup>7</sup> Ibid – citing Crawford, J., ‘The Criteria for Statehood in International Law’, *The British Yearbook of International Law*, Vol. 48, 1976-7, at 93.

particularly, it is suggested, when independence is achieved in accordance with its recipients right to self-determination.<sup>8</sup> Others also suggest that the criteria fail to:

take into account the contemporary concerns of many states that, as preconditions to recognition, a new state should protect human rights, observe international law and, possibly also demonstrate a measure of 'democratic legitimacy'.<sup>9</sup>

The applicability of these measures will also therefore be discussed in the following sections.

### AN APPLICATION OF THESE REQUIREMENTS

State practice in the application of these elements illustrates the flexibility and, some might say, leniency with which borderline cases are quite often assessed – particularly, as is discussed below, with regards to the requirement that the state possess a government with some effective power and control. In addition, Triggs suggests, any 'formalistic approach to statehood' that traditionally existed would appear to have been moderated somewhat by contemporary factors, including the right – advocated in this thesis – to self-determination in a non-decolonisation sense.<sup>10</sup> Nevertheless, an overwhelming majority of states undoubtedly satisfy the above mentioned requirements, and an analysis and application of them is an important step in determining the validity of an individual claim – particularly when, as with Kosovo, the suggestion is made that it may be a *sui generis* case.

#### *Permanent Population*

A permanent population is one of the requirements for an entity claiming statehood; however examples such as Nauru, Tuvalu and San Marino – with populations of 12,000, 10,000 and 25,000 respectively – evidence the reality that the actual size of the population is irrelevant.<sup>11</sup> In fact, bearing in mind the above discussion regarding the unbiased equality of all states, these are theoretically legal equivalents of behemoth states such as China, Russia, the United States and India. In addition, the

permanency of a population tends to be assumed, even though some of the population may be nomadic and others may be forced to move from the territory, as seen in the vast number of refugees across the world.<sup>12</sup>

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<sup>8</sup> See, for example: Harris, D. J., *Cases and Materials on International Law*, (London: Sweet & Maxwell, 1998) at 102 – citing the *Southern Rhodesia* case and the *Transkei* case as examples.

<sup>9</sup> Murphy, S., 'Democratic Legitimacy and the Recognition of States and Governments', *International and Comparative Law Quarterly*, Vol. 48 No. 3, 545 at 545 – cited in Triggs, G., above n6, 157.

<sup>10</sup> Triggs, G., above n6, 150– see also the discussion below, at Chapter 6.

<sup>11</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 186; Triggs, G., above n6, 150.

<sup>12</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 186.



As discussed above, the composition of Kosovo's population has changed dramatically over time. Upon their declaration of independence, however, Kosovo's population numbered approximately 2 million.<sup>13</sup> In terms of composition, 88% of these inhabitants were Kosovar Albanian, 6% Kosovar Serb, and 3% Bosniak – the remainder representing smaller Roma and Turk minorities.<sup>14</sup> Therefore, bearing in mind the above mentioned assumption – that the permanency of a population is assumed, and not annulled by the forced emigration of refugees from it<sup>15</sup> – Kosovo would certainly satisfy the requirement of a 'permanent population'.

### *Defined Territory*

A geographically defined territory is 'integral to the idea of the state',<sup>16</sup> and an essential demarcation of the states sovereign jurisdiction. The importance of this designation is reflected in Article 2(4) of the Charter of the United Nations – which compels states to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state' – and the jurisprudence of the International Court of Justice – which opined in the *Corfu Channel (United Kingdom v Albania) (Merits)* case that 'respect for territorial sovereignty is an essential foundation of international relations'.<sup>17</sup>

As with the population of the state, there is no lower limit with regards to the size of the state, and 'the territory need only be defined to the extent that there is some coherent and consistent land area, as the fact that the territorial borders of a state are in dispute or not delimited does not automatically' preclude an entity from satisfying this criterion.<sup>18</sup> In fact, as Harris acknowledges, 'there is ample evidence in state practice and in judicial and arbitral decisions to show that to be a state it is not necessary for an entity to have exactly defined or undisputed boundaries, either at the time that it comes into being or subsequently.'<sup>19</sup> This position has been affirmed by various international tribunals, including the German-Polish Mixed Arbitral Tribunal – which stated that, 'in order to say that a State exists and can be recognised as such...it is enough that...[its] territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited'<sup>20</sup> – and the International Court of Justice – which observed that

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<sup>13</sup> There has, however, 'been no census since 1981 [though] so the true value is unknown': see United Kingdom Department for Economic Development Kosovo Factsheet: Last Updated February 2008, accessed at <http://www.dfid.gov.uk/Pubs/files/kosovo-factsheet.pdf> (last accessed 1 July 2008) at 1.

<sup>14</sup> Comments of Alice Lacourt, 'Kosovo: International Law and Recognition – A Summary of the Chatham House International Law Discussion Group Meeting Held on 22 April 2008', *Chatham House*, 2008, accessed at [http://www.chathamhouse.org.uk/files/11547\\_il220408.pdf](http://www.chathamhouse.org.uk/files/11547_il220408.pdf) (last accessed 1 July 2008) at 4.

<sup>15</sup> Menon, P. K., *The Law of Recognition in International Law: Basic Principles* (New York: Edwin Mellen Press, 1994) at 33.

<sup>16</sup> Triggs, G., above n6, 151.

<sup>17</sup> *Corfu Channel (United Kingdom v Albania) (Merits)* case ICJ Reports 1949, 4 at 35.

<sup>18</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 187.

<sup>19</sup> Harris, D. J., above n8, 103.

<sup>20</sup> *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 A.D. 11 at 15.

there is...no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.<sup>21</sup>

In its declaration of independence,<sup>22</sup> the Republic of Kosovo Assembly affirmed that: 'Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan,'<sup>23</sup> which in turn states that:

The territory of Kosovo shall be defined by the frontiers of the Socialist Autonomous Province of Kosovo within the Socialist Federal Republic of Yugoslavia as these frontiers stood on 31 December 1988, except as amended by the border demarcation agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia on 23 February 2001.<sup>24</sup>

Article 3.3 then continues on to state that:

Kosovo shall engage with the former Yugoslav Republic of Macedonia to establish a joint technical commission within 120 days of the entry into force of this Settlement to physically demarcate the border and address other issues arising from the implementation of the 2001 agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia.<sup>25</sup>

The existence of the demarcation dispute with Macedonia is, in light of the above discussed standards, clearly not fatal to Kosovo's claim, and a solution to the dispute – which concerns a border spanning approximately 150km<sup>26</sup> – is already being brokered.<sup>27</sup> Given the level of certainty that is necessary to satisfy this requirement,<sup>28</sup> it is therefore clear that Kosovo is in possession of a 'geographically defined territory', and that it thus satisfies this requirement.<sup>29</sup>

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<sup>21</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* cases ICJ Reports 1969, 3 at 32.

<sup>22</sup> Republic of Kosovo Assembly, *Kosovo Declaration of Independence*, 17 February 2008, accessed at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (last accessed 2 July 2008).

<sup>23</sup> See Paragraph 8, Republic of Kosovo Assembly, *Kosovo Declaration of Independence*, 17 February 2008, accessed at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (last accessed 2 July 2008).

<sup>24</sup> See Article 3.2 of Annex VIII, Report of the 'Ahtisaari Plan'.

<sup>25</sup> See Article 3.3 of Annex VIII, Report of the 'Ahtisaari Plan'.

<sup>26</sup> AOL Australia News, 'Macedonia, Kosovo Plant Border Marker in Start of Demarcation Process', 1 July 2008, accessed at <http://www.aol.com.au/news/story/Macedonia-Kosovo-plant-border-marker-in-start-of-demarcation-process/656351/index.html> (last accessed 2 July 2008).

<sup>27</sup> Reports state that the demarcation process began on Monday 1 July 2008: see *ibid*.

<sup>28</sup> See the discussion above, relating to notes 18-21.

<sup>29</sup> There are, of course, ancillary arguments regarding whether or not the administrative borders of Kosovo should have become its international borders. The accepted position seems to be that they should have, as a result of the application of *uti possidetis* – a principle originally applied in Latin America in the early nineteenth century, under which the administrative borders of the colonial territory became the international borders of the newly founded state upon decolonisation

## *Government*

The requirement that an alleged state have some ‘identifiable organised political institution that has some effective power and control over the defined territory and permanent population’<sup>30</sup> is relatively simple to comprehend, yet somewhat more difficult to apply. Such difficulties were evidenced and discussed in the *Aaland Islands* case – outlined above<sup>31</sup> – in which the International Committee of Jurists was required to determine the date at which the Finnish government became effective – and Finland therefore a ‘definitively constituted sovereign state’ – in that period anterior to the Russian Revolution.

In that instance, Finland had existed as a part of the Russian Empire until the newly formed Soviet Government proclaimed the right of the Russian Empires peoples to self-determination, and the Finnish Diet declared – on 4 December 1917 – its independence.<sup>32</sup> The Soviet Government recognised the Declaration of Independence but certain factions within Finland opposed it. Forming part of this opposition was a section of the Finnish Army who remained loyal to the previous Russian regime and, as such, rejected the notion of independence. An outbreak of violence ensued and, as a result, the government of the nascent state relied, for some time, on the assistance of Soviet troops to maintain order within their bounds.<sup>33</sup>

With respect to this situation, and the notions of ‘independence’ and ‘government’ as requirements of statehood, the above mentioned International Committee of Jurists stated in their Report that:

In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war between the inhabitants and between the Red and White Finnish troops. It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a

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(for further discussion, see n75 in chapter 5, below) – as well as recent state practice. For a critique of this approach, however, see Radan, P., ‘Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission’, *Melbourne University Law Review*, Vol. 24, (2000), 50; Radan, P., ‘Yugoslavia’s Internal Borders as International Borders: A Question of Appropriateness’, *East European Quarterly*, Vol.33, No.2, 137 at, in particular, 147-51; Ratner, S.R., ‘Drawing a Better Line: *Uti Possidetis* and the Borders of New States’, *American Journal of International Law*, Vol.90, (1996) 590.

<sup>30</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 187.

<sup>31</sup> See pp16-19.

<sup>32</sup> Harris, D. J., above n8, 103.

<sup>33</sup> Ibid.

stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without assistance of foreign troops. It would appear that it was in May 1918, that the civil war ended and that the foreign troops began to leave the country, so that from that time onwards, it was possible to re-establish order and normal political and social life, little by little.<sup>34</sup>

Numerous examples in world history re-iterate, however, the flexibility with which this requirement has been applied – particularly in more recent years. An analysis of these examples would suggest that a lack of strict conformity with this requirement will not, in all cases, be necessarily fatal. A greater emphasis is often placed, in modern cases, upon the ‘form and constitutional validity of the government’, and it would also appear that ‘less rigorous standards of effective government are required when the new state has been created in conformity with the principle of self-determination.’<sup>35</sup>

In April of 1992, for example, many states recognised the existence of Bosnia-Herzegovina as an independent state, despite the absence of governmental control over both the territory and military of it, and the constant calls from its President for international assistance in the preservation of it.<sup>36</sup> More extremely, Somalia was even able to retain its international statehood despite a complete absence of government as a result of the civil war that ravaged the region throughout the final decade of the twenty-first century. The catalyst for this conflict was the overthrowing of President Barre’s government by guerillas in 1991. The conflict subsequently flourished ‘between rival clan-based militias with different territorial bases’ and, despite the dearth of international recognition of it, Somaliland declared its independence from the state in 1991.<sup>37</sup> An interim government was then established – as a result of the Djibouti Conference of interested states and parties – which, unfortunately, was also unable to gain ‘effective control of Mogadishu, the capital, or the country at large.’<sup>38</sup> UN forces were subsequently deployed, but also failed in their efforts to pacify the situation. Most importantly, however – and despite an absence of recognition for the interim government as the government of Somalia by Hobhouse J in *Republic of Somalia v Woodhouse Drake & Carey Suisse S.A.*<sup>39</sup> – the continuing existence of Somalia, as a sovereign state, was never questioned.

A similar approach has been adopted with regards to those states that have been occupied by another during armed international conflicts<sup>40</sup> – the occupation of Kuwait by Iraq, for

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<sup>34</sup> *Report of the International Commission of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations Off. J., Spec. Supp. No. 3 (Oct 1920) at 8-9.

<sup>35</sup> Triggs, G., above n6, 153.

<sup>36</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 187.

<sup>37</sup> Harris, D.J., above n8, 104.

<sup>38</sup> *Ibid* – discussing *Republic of Somalia v Woodhouse Drake & Carey Suisse S.A.* [1993] Q.B. 54; Queen’s Bench Division.

<sup>39</sup> *Republic of Somalia v Woodhouse Drake & Carey Suisse S.A.* [1993] Q.B. 54; Queen’s Bench Division.

<sup>40</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 188.

example, which ‘had no legal effect on the statehood of the occupied country’<sup>41</sup> – and situations in which the government has been exiled, ‘such as during the Second World War.’<sup>42</sup>

The presence and role of the United Nations<sup>43</sup> in Kosovo may be viewed by some as an impediment to Kosovo’s ability to satisfy this requirement, however the contention is made that it is not. The presence of international entities, to perform those tasks set out in UNSC Resolution 1244 and the Ahtisaari Plan, did not necessarily preclude the presence of an effective government during their tenure. Quite conversely – and as discussed in the following chapter – a devolution of control was envisaged under which Kosovo’s Provisional Institutions of Self-Government [“PISG”] would become ever-more independent. Nascent states often possess relatively weak governments and, as such, Kosovo’s requests for international support – as foreseen under the Ahtisaari Plan – might merely be indicative of their commitment to the democratic and multiethnic goals that it set, as opposed to an ‘unreadiness’ for independence. As already mentioned, post-independence support is not an uncommon occurrence, particularly in more recent times. In addition to Bosnia-Herzegovina, East Timor and Cambodia both received – and continue to receive – assistance in the preservation of their States, and the control of their respective governments over them.<sup>44</sup>

In light of these arguments and, again, the above discussed flexibility with which these requirements have been applied in the past, a case can undoubtedly be made for Kosovo’s satisfaction of this requirement. Prime Minister Hashim Thaçi heads up the Government of the Republic of Kosovo and has, in his cabinet, ministers from many of the states constituent minorities – including Serbs, Bosniaks, and Turks. The Government exercises executive authority in Kosovo and – by comparison to some of those cases mentioned above – would appear sufficient for the satisfaction of this requirement.<sup>45</sup>

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<sup>41</sup> Triggs, G., above n6, 152 – citing UNSC Resolution 662, UN Doc S/RES/662 (1990) which ‘demanded the withdrawal of Iraq’ and called ‘on all states and international organisations not to recognise the purported annexation’.

<sup>42</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 188.

<sup>43</sup> See the discussion above at pp48-51.

<sup>44</sup> On this point, see also the comments of Alice Lacourt, above n14, 5.

<sup>45</sup> D’Aspremont also concludes that ‘the institutions that are designed by the Status Settlement will be endowed with the *effectivité* that is required for Kosovo to qualify as a state’: D’Aspremont, J., ‘Regulating Statehood: The Kosovo Status Settlement’, *Leiden Journal of International Law*, 20 (2007) 649 at 654 – he bases his argument on the fact that ‘Kosovo will be entirely self-governed and any link with foreign states (especially Serbia) will remain severed (Art. I.I), ...its government will be independent and take all its decisions without any interference (Art.5 of Annex I), ...it will have its own police, security forces, and intelligence agency [which,] provided they are multi-ethnic...will be under the exclusive control of the government of Kosovo (Annex VIII)’, and the fact that ‘Kosovo will assume full ownership of, and responsibility and accountability for, its airspace (Art. 7 of Annex VIII).’ (at 645-655) In D’Aspremont’s opinion, ‘if the foregoing are realized in fact, there will be little doubt that the government machinery of Kosovo will enjoy a wide *internal effectivité* despite the continued international presence...’ (at 655) D’Aspremont also acknowledges the international presence in Kosovo but, like Lacourt, does not believe this will be a problem because, in his opinion, ‘the various bodies involved

### *Capacity to enter into relations with other states*

In the *SS Wimbledon* case, the Permanent Court of Justice characterised ‘the right of entering into international engagements’ as ‘an attribute of State sovereignty’.<sup>46</sup> To possess the capacity to enter into legal relations with other international entities, however, a prospective state must initially obtain legal independence from the authority of other states.<sup>47</sup> Such ‘independence’ was defined – in the *Customs Regime Between Germany and Austria (Advisory Opinion)* case – as ‘really no more than the normal condition of States according to international law’.<sup>48</sup> Elaborating somewhat, the decision went on to suggest that ‘it may also be described as sovereignty (*suprema potestas*), or, external sovereignty, by which is meant that the State has over it no other authority than that of international law’.<sup>49</sup> As such, the Court concluded:

restrictions upon a State’s liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.<sup>50</sup>

Article I.5 of the ‘Ahtisaari Plan’<sup>51</sup> states that: ‘Kosovo shall have the right to negotiate and conclude international agreements and the right to seek membership in international organizations.’ The only caveat that is placed on this right is contained within Article I.8 of the same document, which clarifies that: ‘Kosovo shall have no territorial claims against, and shall seek no union with, any State or part of any State.’ As D’Aspremont contends, however, it is unlikely ‘that this provision will have any effect in practice and that the future entity will feel bridled by such a limitation.’<sup>52</sup> Indeed, this restriction would appear to be akin to those referred to in the *Customs Regime Between Germany and Austria (Advisory Opinion)* case above. It does not place the prospective State – Kosovo – under the legal authority of another State, and is therefore unlikely to preclude it from being characterised as an independent State under international law. As a result, Kosovo would appear to be capable of entering into relations with other States and, as a result, to have satisfied this requirement.

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will...no longer exert any administrative powers, since these will be bestowed on the government of Kosovo.’ (at 656) ‘In particular’, he submits, ‘the responsibilities of the International Civilian Representative [in Kosovo] will not exceed those of the Office of the High Representative in Bosnia and Herzegovina, whose statehood is no longer contested.’ (at 656).

<sup>46</sup> *SS Wimbledon* case [1923] PCIJ (ser A) No 1 at 25.

<sup>47</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 188.

<sup>48</sup> *Customs Regime Between Germany and Austria (Advisory Opinion)* case [1931] PCIJ (ser A/B) No 41, 57-8.

<sup>49</sup> *Customs Regime Between Germany and Austria (Advisory Opinion)* case [1931] PCIJ (ser A/B) No 41, 57-8.

<sup>50</sup> *Customs Regime Between Germany and Austria (Advisory Opinion)* case [1931] PCIJ (ser A/B) No 41, 57-8.

<sup>51</sup> See discussion above at pp50-51.

<sup>52</sup> D’Aspremont, J., above n45, 657.

### *Human Rights and Self-Determination*

As Dugard points out, the *Montevideo Convention* of 1933 ‘belongs to an era in which notions of self-determination and human rights were virtually unknown to international law.’<sup>53</sup> In light of the heightened importance of these concepts in more recent times, it has therefore been suggested that an entity should, before its claim for statehood is approved, satisfy the international standards and expectations that exist with regards to these concepts.<sup>54</sup> It has, on the other hand, also been suggested, however, that these are only relevant insofar as the recognition, as opposed to the statehood, of a particular entity is concerned.<sup>55</sup> If this was the case, satisfaction of them would only be necessary for attainment of the former, and not the latter. The problem with this approach, it is submitted, is that, by creating a gulf between those requirements for recognition and statehood, entities will exist which, while having satisfied the requirements for the latter, will not theoretically be recognised by existing states. These quasi-states would then be left in a state of limbo – especially under the declaratory theory of recognition<sup>56</sup> – in that they would contemporaneously be both a state, and not a state. It would, as a result, be far more certain – and, therefore, more desirable – if the requirements were almost identical, and that human rights and self-determination were included as the fifth and sixth requirements. The extent to which the requirements contained within the *Montevideo Convention* have been accepted, as well as the practical and cultural difficulties that would undoubtedly accompany any attempts to enforce – against both prospective and existing states – human rights standards as an element of statehood, mean that these changes are, if they were ever to occur, undoubtedly some time off.

As undesirable as it may be, the above mentioned suggestion – that these elements are required solely for recognition – may, at this point in time, therefore hold some truth. As such, the following section – which discusses the extent to which Kosovo has, or has not, satisfied these requirements – should be read with the above in mind.

### *Self-Determination*

Many maintain that the right of self-determination has become ‘an additional criterion that entities must show has been exercised in accordance with international law in order

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<sup>53</sup> Dugard, J., *Recognition and the United Nations*, (Cambridge: Grotius Publications Limited, 1987) at 127.

<sup>54</sup> Dugard, J., Raic, D., ‘The role of recognition in the law and practice of secession’, contained within Kohen, Marcelo G. (Ed.), *Secession: International Law Perspectives*, (Cambridge: Cambridge University Press, 2006) at 96 – these authors support their position by reference to the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union which was issued by the European Community in 1991, ‘and later extended Yugoslavia, which sought to make recognition of States dependent on compliance with international norms relating to self-determination, respect for human rights and the protection of minorities.’

<sup>55</sup> Grant, T.D., *The Recognition of States: Law and Practice in Debate and Evolution* (Westport: Praeger, 1999) at 11-12.

<sup>56</sup> See below at pp136-137.

for an entity to become a state.<sup>57</sup> The logic underpinning this argument contends that, because, ‘in many instances, the exercise of the right will either create a state or it will be a determinant in the creation of a state’, it is imperative that those proposing their independence – if their claim is to be successful – show that it ‘has been exercised in accordance with international law’.<sup>58</sup> Unfortunately, whether or not the right has in fact been ‘exercised in accordance with international law’ is – as evidenced by the volume of analysis below<sup>59</sup> – often a very complex question to which no simple answer exists.

Kosovo is no exception. The legality of their claim to self-determination is discussed at length in chapters five and six, and it would therefore be untimely to conclude at this interval upon whether they have indeed satisfied this requirement. If the above analysis is accepted, however, and the opinion is adopted that Kosovo has, indeed, satisfied the remaining requirements of Statehood, the legality or otherwise of their claim to self-determination will apparently then largely dictate that attributable to their statehood in general.

With this in mind, the importance of the conclusion reached in those chapters can, obviously, not be overstated.

### *Human Rights*

It is also quite difficult to quantify, in advance,<sup>60</sup> the potential states prospects of success in respecting, and protecting, the human rights of its inhabitants and, in particular, those minorities that will remain in the territory. Kosovo’s Prime-Minister, Hashim Thaçi, stressed, in the lead up to Kosovo’s declaration of independence, that minority rights would be protected in an independent Kosovo. He also pointed out – in his speech declaring independence – that his government would adhere strictly to the Ahtisaari Plan, which included a number of key guarantees and special protections for the territories minorities. At the same time, he declared Kosovo to be a ‘state of all its citizens’, in which ‘intimidation, discrimination’ and ‘unequal treatment’ were unwelcome, and from which discrimination would be ‘stamped out’ by the states institutions.<sup>61</sup>

The real question is, however, not of the governments’ words but of their actions and, as such, time will be the only true judge of the conviction underpinning Thaçi’s speech.

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<sup>57</sup> Blay, S., Piotrowicz, R. & Tsamenyi, M., above n1, 190.

<sup>58</sup> Ibid.

<sup>59</sup> See, in particular, the discussion in chapters 5 and 6.

<sup>60</sup> If one is assessing whether or not an entity has satisfied the requirements for statehood, the determination of whether or not they have sufficiently respected, and will continue to respect, their inhabitant’s human rights would have to be made before it becomes an existing state. This, by definition, must occur in advance.

<sup>61</sup> See ‘Prime Minister’s Speech on Independence Day’, 17 February 2008, accessed at <http://www.assembly-kosova.org/?krye=news&newsid=1639&lang=en> (last accessed on 14 November 2008).



## CONCLUSION

The attainment of Statehood, with its attendant set of incentives and rights, is a prize over which many wars have historically been waged. Unfortunately, the passage of time has not clarified, to any great degree, the law as it pertains to this event and, as a result, confusion and violence persist. Although ‘there is no accepted legal definition of statehood’,<sup>62</sup> the *Montevideo Convention on the Rights and Duties of States 1933* is commonly acknowledged as containing the classical elements of statehood – a permanent population, a defined territory, government, and the capacity to enter into relations with other states. In addition to these requirements, however, many commentators suggest that prospective states must also satisfy requirements pertaining to the protection of human rights, the observation of international law, and also a measure of democratic legitimacy,<sup>63</sup> however questions remain as to whether these are requirements for statehood, or merely the attainment of recognition.

The submission was made in this chapter that the nascent state of Kosovo does, indeed, satisfy those requirements set out in the *Montevideo Convention*; especially in light of the leniency with which borderline cases are so often assessed. The requirement pertaining to the protection of human rights is difficult to assess in advance, however Kosovo’s Prime-Minister – Hashim Thaçi – stressed, in the lead up to Kosovo’s declaration of independence, the importance of minority rights in post-independence Kosovo. As mentioned, however, the real question is not of the governments’ words but of their actions and, as such, time will be the only true judge of the conviction underpinning Thaçi’s rhetoric.

Whether or not the Kosovar Albanians possess a valid right to self-determination is also a very complex question to which no simple answer exists. The legality of Kosovo’s claim to self-determination is discussed at length in chapters five and six, and it would therefore be untimely to conclude at this interval upon whether they have indeed satisfied this requirement. If, however, the above analysis is accepted, the legality or otherwise of their claim to self-determination will likely mirror that attributable to their statehood in general, and the importance of the conclusion reached in those chapters can, therefore, obviously not be overstated.

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<sup>62</sup> Triggs, G., above n6, 149 – citing Crawford, J., ‘The Criteria for Statehood in International Law’, *The British Yearbook of International Law*, Vol. 48, 1976-7, at 93.

<sup>63</sup> See, for example, Murphy, S., ‘Democratic Legitimacy and the Recognition of States and Governments’, *International and Comparative Law Quarterly*, Vol. 48 No. 3, 545 at 545 – cited in Triggs, G., above n6, 157.

## CHAPTER 4

### THE STATUS AND RAMIFICATIONS OF UNSC RESOLUTION 1244

The United Nations Security Council adopted resolution 1244 on 10 June 1999<sup>1</sup> – the date upon which NATO concluded their campaign of aerial bombardment. It authorised the establishment of an international security presence in Kosovo, and an interim administration which, it was said, would ‘provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions’, pending the final settlement of a political process designed to determine Kosovo’s future status.<sup>2</sup>

The UN operated on the understanding that resolution 1244 remained in force despite Kosovo’s declaration of independence, and justified – for some time – the continued presence of UNMIK in the territory on this basis.<sup>3</sup> However considerable debate has ensued between the respective parties to the dispute as to what effect the resolution has on the Kosovar Albanians ability to claim independence. Upon analysis, it becomes patently evident that the disagreements are borne out of the somewhat ambiguous drafting of the resolution – which was, it would seem, a necessary consequence of the compromise that the resolution sought to broker – and, as a result, the arguments put forward by the parties are respectively centred upon opinions regarding interpretation.

#### *The Crux of the Respective Arguments*

The primary arguments of those contending that resolution 1244 does, in fact, legally prohibit the Kosovar Albanians declaration of independence are considerably simpler than those which they oppose. They assert, *inter alia*, that the references made within the resolution to the maintenance of the FRY’s<sup>4</sup> ‘sovereignty and territorial integrity’ remain in operation unless and until the Security Council adopts any further, amending, resolutions; that the resolution itself does not give the people of Kosovo the authority to declare their independence; and that there has been no subsequent Security Council resolution authorising such action. In their opinion, Serbia – as a sovereign state – therefore retains the right to determine, by agreement with the people of Kosovo, if and when they are able to secede and claim independence.<sup>5</sup> In the absence of such events, they contend, there is no justification under international law for Kosovo’s actions, and they should therefore be disregarded by the international community.

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<sup>1</sup> See pp48-50.

<sup>2</sup> SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>3</sup> Report of Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN. Doc. S/2008/211 (28 March 2008).

<sup>4</sup> And, therefore, Serbia as the successor state of the FRY.

<sup>5</sup> Reynolds, P., ‘Legal Furore over Kosovo Recognition’, *BBC News*, 16 February 2008, accessed at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7244538.stm> (last accessed 19 May 2008).

Conversely however, it has been suggested that, as the resolution does not rule out independence as an option, it neither debars the people of Kosovo from realising their independence, nor hinders their attempts to do so in any way. Advocates of this approach emphasise the fact that those elements of the resolution dealing with the final status process are silent as to the outcome, and also the notion that acting to implement Kosovo's independence is more compatible with the intentions of the resolution 'than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable.'<sup>6</sup> In support of their position, they contend that the preamble – which reaffirms 'the commitment of all Member States to the sovereignty and territorial integrity' of the FRY – is not legally binding, or, alternatively, that it must be construed in the context of the interim mandate that the Security Council bestowed upon UNMIK – that is, that the 'UN presence was not of itself intended to affect Kosovo's status as part of Serbia.'<sup>7</sup> In a similar manner, it is claimed that the references to 'sovereignty and territorial integrity' contained within the binding determinations are made only with reference to that transitional, and therefore temporary, period during which Kosovo remained under the administration of the UN.

The ramifications for Kosovo of an acceptance, on the part of the international community, of either position can obviously not be overstated. In a nutshell, acceptance of the former theoretically eliminates independence as an option for Kosovo. Acceptance of the latter, on the other hand – while not conferring upon them the *right* to secede – would render the legality of their independence a question to be answered under the established guidelines of international law. As a result of the consequence that attaches to an acceptance of either, the remainder of this chapter will be dedicated to a more intimate analysis of the arguments proffered by the respective parties.

#### *An Analysis of the Respective Arguments*

The arguments of the respective parties are centred, in general terms, upon four primary issues. They are:

1. The status, and legal ramifications, of the various references made within the resolution to the 'sovereignty and territorial integrity' of the parent state, and the 'substantial autonomy' and 'self-government' to be enjoyed by the people of Kosovo.
2. Whether, in interpreting the resolution, one should search for implications beyond the 'four corners' of the document – including, specifically, the ramifications of the resolutions failure to explicitly grant the people of Kosovo the right to claim independence?

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<sup>6</sup> Ibid - citing the European Document drawn up, in compliance with EU procedures, to justify their mission to Kosovo.

<sup>7</sup> Comments of Alice Lacourt, Chatham House, 'Kosovo: International Law and Recognition – A Summary of the Chatham House International Law Discussion Group Meeting Held on 22 April 2008', *Discussion Group Summary*, 2008, accessed at [http://www.chathamhouse.org.uk/files/11547\\_il220408.pdf](http://www.chathamhouse.org.uk/files/11547_il220408.pdf) (last accessed on 1 July 2008) at 6.

3. Whether a further Security Council resolution is required before Kosovo is legitimately able to declare their independence?
4. Whether, regardless of the status of the resolution, an agreement between the parent and seceding state is required before such an act can be legally performed, and independence therefore attained?

In the interests of clarity, the following analysis will be structured along similar lines. It will consider, chronologically, each of the above mentioned arguments – bearing in mind the various degrees of overlap that exist – from the perspectives of both factions. Finally, and following an analysis of the relative strengths of the respective arguments, a conclusion will be drawn with regards to the effect that the resolution has on the Kosovar Albanians ability to claim independence whilst it remains in effect.

1. *The status, and legal ramifications, of the various references made within the resolution to the ‘sovereignty and territorial integrity’ of the parent state, and the ‘substantial autonomy’ and ‘self-government’ to be enjoyed by the people of Kosovo.*

In the opinion of those that oppose independence, the language employed throughout Resolution 1244 – specifically that which promotes the ‘sovereignty and territorial integrity’ of Serbia<sup>8</sup> – explicitly eliminates it as an option for Kosovo. Their argument assumes<sup>9</sup> that such references – made variously throughout the preamble, the binding determinations, and the two annexes<sup>10</sup> – confine the outcome of the ‘final settlement’, in that it can confer no more than ‘substantial autonomy’ upon the people of Kosovo. The resolution therefore creates, in their eyes, a ceiling, or upper limit, with regards to the degree of autonomy that the final settlement can bestow upon the people of Kosovo.

Of the references that they rely upon, those contained within the binding determinations are of the greatest legal authority. These provisions, inter alia:

[Authorise] the Secretary-General, with the assistance of relevant international organisations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia [“FRY”], and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;<sup>11</sup> [and]

[Decide] that the main responsibilities of the international civil presence will include:

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<sup>8</sup> As the legal successor to the Federal Republic of Yugoslavia.

<sup>9</sup> For an analysis of the countervailing position with regards to this assumption, see the discussion below at pp71-74.

<sup>10</sup> As set out and discussed in the following paragraphs.

<sup>11</sup> Paragraph 10, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

- (a) 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 (S/1999/648); ...
- (c) Organising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; ...
- (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648); [and]
- (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement<sup>12</sup>

In addition, the binding determinations decide:

that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2<sup>13</sup>

As such, they incorporate into their realm the contents of the respective annexes, which themselves require the establishment of an interim administration for Kosovo 'to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo'<sup>14</sup> and:

... under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration is to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.<sup>15</sup>

Furthermore, the annexes respectively require the implementation of:

A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarisation of the KLA;<sup>16</sup>

Finally, and despite its somewhat limited legal authority, the preamble also reaffirms:

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<sup>12</sup> Paragraph 11, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>13</sup> Paragraph 1, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>14</sup> Annex 1, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>15</sup> Paragraph 5, Annex 2, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>16</sup> Annex 1, and Paragraph 8, Annex 2, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

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,<sup>17</sup> [and]

the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo.<sup>18</sup>

According to the aforementioned members of the international community – who suggest that independence contravenes the resolution – the above mentioned references pertain to the final status of Kosovo.<sup>19</sup> In the absence of any further Security Council resolutions, they suggest, the agents conducting the political process regarding the final status of the territory are thus precluded from proposing independence as a solution.<sup>20</sup> It is, in their opinion, an alternative which the resolution renders unavailable.

In rebuttal, however, several arguments have been advanced with regards to the purpose and mandate of the resolution in a general sense, and also, more specifically, the context within which each of the individual references must be construed.

The European Union, for example, interprets the references made in the preamble ‘to Kosovo being part of the Federal Republic of Yugoslavia and to the ‘territorial integrity’ of Yugoslavia as being non-binding.’<sup>21</sup> Alternatively, it has been suggested, these references must be construed in light of the interim mandate that the Security Council was – via the resolution – bestowing upon UNMIK. The purpose of the preamble was, it would appear, not to limit any final determination on the territories status but, rather, to confirm that the UN’s presence did not, in and of itself, remove Kosovo from Serbian hands.<sup>22</sup> Neither, however, did the resolution therefore preserve, in any indefinite sense, Serbian sovereignty over Kosovo.<sup>23</sup> It merely froze, it would seem, the *status quo* as it pertained to these matters until the territories final status was determined.

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<sup>17</sup> Preamble, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>18</sup> Preamble, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>19</sup> See, for example, Embassy of the Russian Federation in the United Kingdom, ‘Legal Aspects of the UN SC Resolution 1244 on Kosovo’, *Press Release #12*, 19 December 2007, accessed at <http://www.great-britain.mid.ru/pressrel/pres07-12.htm> (last accessed 8 July 2008); Bolton, John R. ‘The United Nations and Kosovo’s Independence’, *American Enterprise Institute for Public Policy Research*, 12 March 2008, accessed at [http://www.aei.org/include/pub\\_print.asp?pubID=27632](http://www.aei.org/include/pub_print.asp?pubID=27632) (last accessed 23 June 2008).

<sup>20</sup> See, for example, Embassy of the Russian Federation in the United Kingdom, ‘Legal Aspects of the UN SC Resolution 1244 on Kosovo’, *Press Release #12*, 19 December 2007, accessed at <http://www.great-britain.mid.ru/pressrel/pres07-12.htm> (last accessed 8 July 2008); Bolton, J.R. ‘The United Nations and Kosovo’s Independence’, *American Enterprise Institute for Public Policy Research*, 12 March 2008, accessed at [http://www.aei.org/include/pub\\_print.asp?pubID=27632](http://www.aei.org/include/pub_print.asp?pubID=27632) (last accessed 23 June 2008)

<sup>21</sup> Reynolds, P., above n5.

<sup>22</sup> Comments of Alice Lacourt, above n7, 6.

<sup>23</sup> Comments of Paul Williams, International Law Professor at the American University in Washington DC – quoted in: ‘International Law Experts Debate Kosovo Independence Legality’, *New Kosova Report*, 15 April 2008, accessed at

In addition, Williams points out, these preambular references to the sovereignty and territorial integrity of the FRY were ‘conditioned by the Helsinki Final Act and Annex 2’ of the resolution.<sup>24</sup> In his opinion:

The Helsinki Final Act provides for the equal recognition of a state’s right to sovereignty and territorial integrity, and of a minority peoples’ right to self-determination. Annex 2 expressly places the respect for the sovereignty and territorial integrity of the FRY within the context of the ‘interim political framework agreement providing for substantial self-government for Kosovo,’ and also noted the necessity of taking full account of the Rambouillet Accords.<sup>25</sup>

As Williams further points out:

The Rambouillet Accords, also in the preamble, ‘recalled’ the commitment of the international community to the sovereignty and territorial integrity of the FRY. The Accords...then went on to provide for the near total exclusion of FRY sovereignty over Kosovo and for the creation of a mechanism to determine final status in three years.<sup>26</sup>

As he concludes:

The preamble of Resolution 1244 therefore cannot reasonably be perceived to prevent the international community from moving forward with a process for resolving Kosovo’s final status.<sup>27</sup>

In addition, a prudent analysis and interpretation of the binding determinations would suggest that they also refer only to that interim period during which Kosovo was administered by the UN. Paragraph 10, for example, authorises the Secretary-General ‘to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia...’<sup>28</sup> A vigilant reading of this provision would suggest that the people of Kosovo are only ‘limited’ to ‘substantial autonomy within the Federal Republic of Yugoslavia’ so long as the interim administration referred to remains in place.

Similarly, Paragraph 11(a) decides that one of the main responsibilities of the international civil presence will be to promote ‘the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo’.<sup>29</sup> Again, apposite interpretation would suggest that the ‘substantial autonomy and self-government’ to be

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<http://www.newkosovareport.com/20080415875/Views-and-Analysis/International-law-experts-debate-Kosovo-independence-legality.html> (last accessed 8 June 2008).

<sup>24</sup> Williams, P., ‘Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo’s Final Status’, *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 387 at 408.

<sup>25</sup> Ibid 408-409.

<sup>26</sup> Ibid 409.

<sup>27</sup> Ibid.

<sup>28</sup> Paragraph 10, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>29</sup> Paragraph 11(a), SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

established in Kosovo is not determinative of the final status, but that it remains in place only until a 'final settlement' is reached.<sup>30</sup> Paragraph 11(c) also refers to the 'development of provisional institutions for democratic and autonomous self government pending a political settlement'.<sup>31</sup> For similar reasons to those just discussed, the institutions referred to – under which the people of Kosovo are able to enjoy 'democratic and autonomous self-government' – are apparently merely provisional, and their powers again limited only until that time at which a 'political settlement' is brokered. Such an interpretation is, it is submitted, further supported by Paragraph 11(f) – which states that the authority of these 'provisional institutions' will be transferred to those 'institutions established under a political settlement' – as the resolution places no parameters upon the status that the people of Kosovo can enjoy under the latter.

Similar arguments can also be applied to those references contained within the respective annexes, upon which Serbia and Russia also rely. Annex 1 and Annex 2 contain, *inter alia*, almost identical requests for 'the establishment of an interim political framework agreement providing for substantial self-government for Kosovo,' and 'taking full account of the...principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia'.<sup>32</sup> Again, a thorough reading of these provisions would suggest that the agreement will only govern the political framework in the interim, and that the 'substantial self-government' provided for in the agreement would therefore have a similar tenure.

In addition, Annex 2 calls for the 'establishment of an interim administration for Kosovo...under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia'.<sup>33</sup> The wording of this provision is very similar to that employed in Paragraph 10 – see above<sup>34</sup> – and it would therefore be trite to repeat the argument concerning its interpretation.<sup>35</sup> Suffice to state that, like its counterparts in the binding determinations, this reference would only appear to 'limit' the people of Kosovo to 'substantial autonomy within the Federal Republic of Yugoslavia' so long as the interim administration referred to remains in place.

In light of the preceding analysis, the suggestion is made that the binding references made within the resolution – and vicariously, therefore, the resolution as their sum total –

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<sup>30</sup> The questions then arise: who bears the onus of brokering this settlement, and who must agree upon it? Unfortunately, the drafters of the Resolution have not elaborated upon the details of the 'final settlement', or the form that it is to take. The Resolution therefore appears to have left these questions unanswered, apparently with the intention of allowing the international community to determine its form at a later date. As has been stated: 'The problem is that although the resolution called for a "political solution to the Kosovo crisis", it did not specify what that solution should be.' – see Reynolds, P., above n5. The Resolutions silence upon the form that the final status was to take is discussed in greater detail below: see pp74-76.

<sup>31</sup> Paragraph 11(c), SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>32</sup> See Annex 1, and Annex 2, para. 8, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>33</sup> Annex 2, para. 5, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

<sup>34</sup> At p72.

<sup>35</sup> See above at p72.



refer only to the interim period during which the people of Kosovo remain under the administration of the United Nations.<sup>36</sup> As Williams states:

In instances where the Security Council referenced the relationship between the sovereignty and territorial integrity of the FRY and Kosovo, it did so only in the context of the interim period prior to a resolution of the final status of Kosovo, and never in perpetuity.<sup>37</sup>

In addition, the adoption of this opinion would add credence to the suggestion, made above, that the references contained within the preamble be interpreted in light of the interim mandate that the Security Council was giving to UNMIK. Finally, it would also allow the conclusion to be drawn that the resolution neither confers a right upon, nor precludes the ability of, the Kosovar Albanians to claim their independence. As a result, the legality of their independence would therefore remain a question of international law in the more general sense.

2. *Whether, in interpreting the resolution, one should search for implications beyond the 'four corners' of the document – including, specifically, the ramifications of the resolutions failure to explicitly grant the people of Kosovo the right to claim independence?*

The legal opinion drawn up by the European Union 'argues that independence for Kosovo is within the spirit of 1244, if not strictly within the letter.'<sup>38</sup> They justify their suggestion on the basis that: 'acting to implement the final status outcome in such a situation is more compatible with the intentions of 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable.'<sup>39</sup> Their approach will, they propose, 'enable, rather than frustrate, the conclusion of the final status process envisaged in resolution 1244'.<sup>40</sup>

According to Serbia and Russia, however, it can also be implied from Resolution 1244 that the final status of Kosovo should 'be one of only autonomy (as opposed to sovereignty)',<sup>41</sup> as the implication can be drawn, in their opinion, from the references

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<sup>36</sup> As John Sawers – the United Kingdom's Ambassador to the UN – opines: 'there is nothing in 1244 that rules out [the] recognition of an independent Kosovo. The provision in 1244 that the territorial integrity of the former Republic of Yugoslavia should be respected applied to the interim period, which is now come to an end' – see "'False State" Kosovo Declares Independence', *Russia Today*, 18 February 2008, accessed at <http://www.russiatoday.ru/news/news/21037> (last accessed 4 July 2008).

<sup>37</sup> Williams, P., above n24, 406.

<sup>38</sup> Reynolds, P., above n5.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Borgen, C., 'International Law and Kosovo's Independence: Assessing Resolution 1244', *Opinio Juris*, 19 February 2008, accessed at [http://www.opiniojuris.org/posts/chain\\_1203466666.shtml](http://www.opiniojuris.org/posts/chain_1203466666.shtml) (last accessed 16 May 2008).

discussed above,<sup>42</sup> that Resolution 1244 ‘blocks independence.’<sup>43</sup> As Borgen points out, however, such an interpretation is – as with the interpretation proffered by the EU above – ‘not within the letter of the Resolution.’<sup>44</sup>

Implications have also been drawn by both sides regarding the resolution’s silence upon the final status that the territory is to assume, and ‘the political process’ by which it is to be determined. Serbia and Russia point out ‘that 1244 itself gives no authority for independence.’<sup>45</sup> As such, they suggest, it was, and remains, an unavailable option. Such a conclusion is clearly based upon an assumption that independence could only be realised if it had been authorised by the resolution, and presupposes that any actions not explicitly allowed for by the resolution must necessarily then be disallowed.

Conversely, however, the European Union has assumed quite the opposite – that any actions not explicitly disallowed by the resolution must necessarily then be allowed. They base their assumption upon the fact that Resolution 1244 ‘envisaged a final status process and did not constrain or pre-determine its outcome.’<sup>46</sup> As such, they suggest, independence remained an option within the portfolio available to those agents conducting the political process to determine the final status and, vicariously therefore, the people of Kosovo. Advocates of this approach also often emphasise the fact that those elements of the resolution dealing with the final status process are silent as to the outcome.<sup>47</sup>

Efforts have been made to conclude the political process envisioned in resolution 1244<sup>48</sup> – culminating in the submission of the ‘Ahtisaari Plan’ to the United Nations Security Council – and the recommendation has been made that Kosovo receive ‘conditional independence’.<sup>49</sup> As the resolution itself is silent as to the outcome of the process, it is difficult to understand how the conclusion that was reached could be incompatible with its provisions – how can it go beyond parameters that were never set?<sup>50</sup>

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<sup>42</sup> Including, in particular, that contained within paragraph 10, authorising the establishment of ‘an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia...’ – see paragraph 10, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES1244 (1999).

<sup>43</sup> Reynolds, P., above n5.

<sup>44</sup> Borgen, C., above n41.

<sup>45</sup> Reynolds, P., above n5.

<sup>46</sup> Ibid.

<sup>47</sup> See, for example, the comments of Alice Lacourt, above n7, 6.

<sup>48</sup> See above at pp48-51, however, for an analysis of the frustrations that it encountered.

<sup>49</sup> See the ‘Ahtisaari Plan’.

<sup>50</sup> Serbia and Russia may submit that parameters were indeed set – by, for example, the wording of the resolution as discussed above (see pp68-75) – which limited the conclusions that could be drawn by the agents conducting the political process. As discussed above – see pp68-74 – they may submit that the references made to the ‘sovereignty and territorial integrity’ of the parent state, and the ‘substantial autonomy’ and ‘self-government’ to be enjoyed by the people of Kosovo, placed a cap upon the measure of status that the process could confer. For those reasons discussed above – see pp68-75 – it is submitted that such an interpretation is incorrect and that, as

In attempting to evaluate these arguments, however, it must be remembered that the parties' respective positions merely represent 'two sides of the interpretative coin', or differing opinions upon the principles of interpretation to be employed. In addition, they both rely upon 'implications' and 'assumptions' in arriving at their respective conclusions and, as a result, their aspersions are, it would seem, of little probative value or assistance in determining the status of Resolution 1244. In the interests of completeness, however, they cannot be ignored.

3. *Whether a further Security Council resolution is required before Kosovo is legitimately able to declare their independence?*

In addition, Serbia and Russia contend, Kosovo's declaration of independence remains illegal unless and until the Security Council adopts a resolution authorising its detachment from Serbia.<sup>51</sup> John Bolton also, for example, suggests that 'the declaration is not only unauthorised, but flatly contrary to...Security Council Resolution 1244 of 1999.'<sup>52</sup> In his opinion, 'while Resolution 1244 undoubtedly contemplates that Kosovo's status could change, its sponsors intended for that to occur under Security Council auspices, which it did not.'<sup>53</sup> 'Effectively, therefore,' he concludes, 'the Security Council, having once defined Kosovo's status, now lacks the ability to change it.'<sup>54</sup>

It remains difficult, however, to ascertain where in the resolution the above suggested limitations are contained. Some may suggest that the often used phrase, 'pending a final settlement', necessitates a further Security Council resolution. This would, however, appear to be incorrect, given that the resolution does not clarify – nor even allude to the possibility – that the eventually realised 'final settlement' be determined, or even approved, by the Security Council of the UN. As already mentioned,<sup>55</sup> the drafters of the Resolution did not elaborate upon the details of the 'final settlement', nor the form that it was to take, and the conclusion that its validity is contingent upon the approval of the Security Council is therefore a dubious one.

Alternatively, it may be suggested that paragraph 5 of Annex 2 – which requires the 'establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations'<sup>56</sup> – creates the requirement that Security Council approval be obtained.

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these statements are made only with reference to that transitional, and therefore temporary, period during which Kosovo is under the administration of the UN, they have no bearing upon the outcome of the political process.

<sup>51</sup> Reynolds, P., above n5.

<sup>52</sup> Bolton, John R. 'The United Nations and Kosovo's Independence', *American Enterprise Institute for Public Policy Research*, 12 March 2008, accessed at [http://www.aei.org/include/pub\\_print.asp?pubID=27632](http://www.aei.org/include/pub_print.asp?pubID=27632) (last accessed 23 June 2008).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> See pp74-76 above.

<sup>56</sup> Paragraph 5, Annex 2, SC Resolution 1244, UN. SCOR, UN. Doc. S/RES/1244 (1999).

However, for similar reasons to those already discussed,<sup>57</sup> this reference would appear only to require that the establishment of the *interim* administration be decided upon by the Security Council. As such, it would have no bearing upon the form of Kosovo's final status, nor the process by which it is determined.

In further assessing the proposition that an additional Security Council resolution is required before independence becomes an option, the traditional role of the Council in the creation of states must also be clarified. While a Security Council resolution endorsing the conclusions of the 'Ahtisaari Plan' would have been beneficial, its approval has never been required for a prospective state to declare its independence in the past. The Security Council has, on the other hand, on numerous occasions, conferred a duty on member states *not* to recognise aspiring states – consider, for example, the Turkish Republic of Northern Cyprus, South Africa's Bantustan States, Katanga, and Rhodesia<sup>58</sup> – however this has not occurred in the present case. As such, and in the absence of any intimation from the resolution itself that Security Council approval is necessary, it would not appear as though a further resolution is required before Kosovo is legitimately able to declare its independence.

4. *Whether, regardless of the status of the resolution, an agreement between the parent and seceding state is required before such an act can be legally performed, and independence therefore attained?*

Kohen asserts that 'a strict notion of secession' is characterised primarily by a 'lack of consent' on the part of the parent state.<sup>59</sup> 'At the same time', he reminds us:

[T]his factor explains why secession is so controversial in international law. On the one hand, the absence of agreement is a source of dispute between the new and the 'parent' State. On the other hand, for want of consent of the latter, the newly formed entity has to find a legal justification for its creation elsewhere. Conversely, the parent State will presumably attest that this justification does not exist in international law and that, on the contrary, the international legal order protects itself against attempts to dismantle it, such as those processes constituting secession.<sup>60</sup>

His words ring true in the present case. An agreed settlement would undeniably have been the idyllic conclusion, however the chances of it materialising were clearly negligible; Kosovo would accept nothing less than independence, and that was obviously an outcome that Serbia would never concede. So what is Kosovo's legal justification which eliminates the need for Serbian consent? And on what grounds does Serbia attest that it does not exist?

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<sup>57</sup> See the discussion regarding the interpretation of UNSC Resolution 1244 above at pp68-76.

<sup>58</sup> For a discussion of these see Dugard, J., *Recognition and the United Nations*, (Cambridge: Grotius Publications Limited, 1987) at 86-111.

<sup>59</sup> Kohen, Marcelo G. (Ed.), *Secession: International Law Perspectives*, (Cambridge: Cambridge University Press, 2006) at 3.

<sup>60</sup> *Ibid.*

To answer the latter question first, Serbia contends that it, as ‘the sovereign state, has not agreed to independence for Kosovo’<sup>61</sup> and that, until such time as it does, the declaration by Kosovo remains an illegal act. In addition, they suggest that Resolution 1244 – and, in particular, its reaffirmation in the preamble of the ‘commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia’ – also prohibits ‘the secession of Kosovo without the agreement of Serbia’.<sup>62</sup> Their argument is, therefore, somewhat double-barreled, in that they suggest that consent is required under both Resolution 1244, and the framework of international law more generally.

In response, however, Kosovo submit that it is required under neither. Resolution 1244 does not explicitly – nor, it would appear, implicitly – require that Kosovo garner the consent of Serbia before declaring their independence. As Williams states: ‘If we make a thorough analysis of the UN Resolution 1244, it does not state that the Former Federal Republic of Yugoslavia has to be asked or decide over the future status of Kosovo on whether it will be independent or not’.<sup>63</sup>

With regards to the Serbian argument suggesting that the preamble – by affirming Member States commitment to the sovereignty and territorial integrity of the FRY – implicitly requires that their consent be attained, the above mentioned arguments regarding the mandate of the resolution<sup>64</sup> must once again be cited. In particular, and in accordance with the above mentioned suggestion that the preamble be construed in light of the interim mandate that UNMIK were given, it is again suggested that these references do not pertain to the final status of Kosovo, and that they therefore cannot implicitly require that Serbia’s consent be attained with regards to it. As such, it is submitted, the resolution neither explicitly nor implicitly requires that Kosovo attain the consent of Serbia before declaring their independence.

As mentioned above, however, Serbia also asserts that their consent is required under the framework of international law more generally. Without disparaging the desirability of an agreement being reached, this argument would also appear to be bereft of any substantial basis. As Kohen acknowledged, ‘a strict notion of secession’ is characterised primarily by a ‘lack of consent’ on the part of the parent state.<sup>65</sup> If this definition is accepted, the Serbians argument that secession without their consent is illegal necessarily implies that secession itself is, *per se*, illegal.

As is submitted in chapter six, external self-determination is available in the absence of the parent state’s consent; albeit only in certain, exceptional circumstances.<sup>66</sup> So long as

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<sup>61</sup> Reynolds, P., above n5.

<sup>62</sup> Borgen, C., above n41.

<sup>63</sup> Comments of Paul Williams, above n23.

<sup>64</sup> See the discussion regarding the mandate of Resolution 1244 above at pp68-74.

<sup>65</sup> Kohen, Marcelo G. (Ed.), above n59, 3.

<sup>66</sup> As observed in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para138: ‘In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful

Kosovo constitutes such an ‘exceptional circumstance’,<sup>67</sup> and despite the desirability of it being attained, it is submitted that Kosovo, in declaring their independence, need not obtain the consent of Serbia, under either Resolution 1244, or the framework of international law more generally. To state otherwise – i.e. that there can be ‘no separation unless the parent State agrees’<sup>68</sup> – is ‘tantamount to invoking a general prohibition of secession in international law’,<sup>69</sup> which is quite clearly not the case.

#### ‘EARNED SOVEREIGNTY’

Another suggestion, supporting the above reached conclusion, is that Resolution 1244 facilitates the concept of ‘earned sovereignty’, or conditional independence,<sup>70</sup> – a ‘conflict-resolution approach [which] essentially seeks to resolve the centuries-old tension between self-determination and sovereignty by managing the devolution of sovereign authority and functions from a state to a sub-state entity.’<sup>71</sup> Under this approach, the sub-state entity may become eligible for independence and international recognition upon their acquisition of ‘sufficient sovereign authority and functions’.<sup>72</sup> As Williams asserts:

Resolution 1244 essentially follows the basic themes of earned sovereignty articulated in the 1998 [Public International Law & Policy Group] proposal and the Rambouillet Accords in that it displaces Yugoslav sovereignty, creates mechanisms for establishing democratic self-government and the protection of minority rights, and mandates the resolution of Kosovo’s final status. Resolution 1244, however, creates a substantial addition to the approach by providing for the exercise of sovereign functions by the United Nations.<sup>73</sup>

International lawyers traditionally adhered to the notion that ‘sovereignty either is or is not’,<sup>74</sup> and that, as Lee states, ‘it cannot be partial.’<sup>75</sup> Adherence to this notion has,

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access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.’ The last mentioned of these exceptions is, however, of great and continued contention. For a more thorough examination of it, see below at chapter 6.

<sup>67</sup> Whether or not it does is the focus of chapter 6 of this thesis.

<sup>68</sup> Kohen, Marcelo G. (Ed.), above n59, 20.

<sup>69</sup> Ibid.

<sup>70</sup> Note that these terms are somewhat interchangeable – the concept has variously been referred to as intermediate sovereignty, conditional independence, and earned sovereignty.

<sup>71</sup> Williams, P., above n24, 388.

<sup>72</sup> Ibid. Such functions include, *inter alia*, ‘the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies’ – see Williams, R., Scharf, M., Hooper, J., ‘Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty’, *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 349 at 350.

<sup>73</sup> Williams, P., above n24, 407-408.

<sup>74</sup> Stephen Leacock, quoted in Field, G., *Political Theory*, (London: Methuen, 1956) at 60.

however, necessitated the undesirable adoption, by international powers, of ‘a series of extreme positions’ with regards to recent conflicts.<sup>76</sup> In response to this problem, it has been suggested, international lawyers must ‘adopt a new view of sovereignty existing as a spectrum’, under which ‘a range of intermediate sovereign statuses’ may exist.<sup>77</sup>

Indeed, an analysis of recent state practice would suggest that such a view may have already been adopted. Despite its relatively nascent status,<sup>78</sup> Hooper and Williams have identified a number of situations – in addition to Kosovo – in which the international community has already adopted this approach. These include the Israeli-Palestinian Roadmap, the Machakos Protocol,<sup>79</sup> the UN sponsored Baker Peace Plan,<sup>80</sup> the Union Treaty between Serbia and Montenegro, the Good Friday Accords,<sup>81</sup> UN Security Council Resolution 1272,<sup>82</sup> the Comprehensive Agreement for Bougainville, and the above mentioned Dayton Accords.<sup>83</sup>

With regards to Kosovo, however, ‘intermediate sovereignty’ was first suggested by the Public International Law & Policy Group (PILPG) in 1998,<sup>84</sup> in the months immediately preceding the failure of the ‘stability through accommodation’<sup>85</sup> approach which prevailed at the time. As a result, the Interim Agreement for Peace and Self-Government

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<sup>75</sup> Lee, S., ‘A Puzzle of Sovereignty’, *California Western International Law Journal*, Vol. 27:2, Spring 1997, 241 at 242.

<sup>76</sup> In particular, he suggests that ‘the collective inability of the Western powers to see beyond the statist/secessionist models was partly responsible for the collapse of Bosnia and the war in Krajina’ – see Simpson, G., ‘The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age’, *Stanford Journal of International Law*, Vol. 32, 1996, 255 at 282 – citing Hannum, H., ‘Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?’, *Transnational Law & Contemporary Problems*, Vol. 3, Spring 1993, 57 at 58.

<sup>77</sup> Scharf, M., ‘Earned Sovereignty: Juridical Underpinnings’, *Denver Journal of International Law*, Vol. 31:3, 2003, 373 at 374.

<sup>78</sup> Despite some uncertainty as to its origins, Hooper and Williams suggest that the approach was borne out of the crisis in the former Yugoslavia in the early 1990’s. It was the international community’s poor handling of this event, they suggest, which ‘highlighted the need to develop a new conflict resolution approach to resolving sovereignty-based conflict’: see Hooper, J., Williams, P., ‘Earned Sovereignty: The Political Dimension’, *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 355 at 358.

<sup>79</sup> Which seeks a resolution between the Northern and Southern forces in the Sudanese conflict.

<sup>80</sup> Which seeks a resolution to the Western Sahara conflict.

<sup>81</sup> Which seeks a resolution to the Northern Ireland conflict.

<sup>82</sup> Under which the UN and East Timor shared sovereignty of the latter, in the aftermath of its rejection of autonomy within Indonesia.

<sup>83</sup> Which brought an end to the Bosnian conflict – see above at pp43-44. See Hooper, J., Williams, P., above n78, 358-360, for a summary of these situations.

<sup>84</sup> See Public International Law & Policy Group for the International Crisis Group, *Intermediate Sovereignty as a Basis for Resolving the Kosovo Crisis*, 1998, accessed at [http://www.crisisgroup.org/library/documents/report\\_archive/A400171\\_09111998.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400171_09111998.pdf) (last accessed 22 July 2008).

<sup>85</sup> Which Williams states: ‘entailed supporting Serbian sovereign control over Kosovo while attempting to persuade the Serbian regime to halt its atrocities against the people of Kosovo’ – see Williams, P., above n24, 391 (including, in particular, n12).

in Kosovo, brokered in the subsequent Rambouillet negotiations,<sup>86</sup> ‘embodied many of the core elements of earned sovereignty’<sup>87</sup> which, as mentioned, were then also contained in the subsequently adopted UNSC Resolution 1244.<sup>88</sup>

In addition, and as a result of the resolutions inherent ambiguities concerning the timeframe under which sovereign authority and its associated functions would be transferred, the Goldstone Commission also subsequently recommended that a policy of ‘earned sovereignty’ be adopted.<sup>89</sup> The Commission reiterated their recommendation – in more detail – in the wake of Milosevic’s departure.<sup>90</sup> As a result, and ‘under increasing international pressure to adopt a clear approach for resolving the crisis over Kosovo’s final status, the Special Representative of the Secretary-General [“SRSG”] adopted a strategy referred to as ‘standards before status’.<sup>91</sup> As Williams’s states, this approach:

While ostensibly rejecting conditional independence...contains most of the basic elements of earned sovereignty. It calls for the measured devolution of sovereign authority and functions to Kosovar institutions as they demonstrate capacity to operate effectively and meet select criteria. However, the approach also suspends any discussion of final status until after certain standards are met. At its essence, the standards before status approach simply suspends the political discussion over final status and sets in motion the construction of Kosovar institutions which will likely ensure an independent Kosovo.<sup>92</sup>

Nevertheless, the core concept remained, and adds credence to the suggestion that Resolution 1244 does not, in fact, prevent the secession of Kosovo. Indeed, its purpose given this approach was, arguably, quite the opposite. As Williams asserts:

Resolution 1244 significantly, and likely irreversibly, altered sovereign control over Kosovo. By displacing Yugoslav sovereign control and replacing it with an interim U.N. administration mandated to build Kosovar institutions capable of providing for democratic self-government, it created a situation where the chances of Kosovo returning to Yugoslav or Serbian sovereign control are quite slim.<sup>93</sup>

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<sup>86</sup> Mentioned at pp47-48 above.

<sup>87</sup> Williams, P., above n24, 391.

<sup>88</sup> Ibid 392.

<sup>89</sup> Although they termed it ‘conditional independence’ – see Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (New York: Oxford University Press, 2000).

<sup>90</sup> As a result of their fears regarding the possible stagnation of the process, given the pressure that was being placed on the EU ‘to reign in the devolution of sovereign authority and functions to Kosovo in an effort to promote perceived democratic reform in Serbia proper’ – see Williams, P., above n24, 393.

<sup>91</sup> Ibid 394 – citing Press Release, United Nations Mission in Kosovo, Address to Security Council by Michael Steiner, Special Representative of the Secretary General, Doc. No. UNMIK/PR/792, (30 July 2002), accessed at <http://www.unmikonline.org/press/2002/pressr/pr792.htm> (last accessed 22 July 2008).

<sup>92</sup> Williams, P., above n24, 394.

<sup>93</sup> Ibid 407.



## CONCLUSION

UNSC resolution 1244 was adopted on 10 June 1999, the date upon which NATO concluded their campaign of aerial bombardment against the FRY. Considerable debate has since taken place with regards to what effect the resolution has on the Kosovar Albanians ability to claim independence and, following their recent declaration, both sides have once again relied upon it in proclaiming, respectively, the legitimacy or illegality of this contentious act. Upon analysis, it becomes patently evident that the warring parties' respective arguments are borne out of the somewhat ambiguous drafting of the resolution – which was, it would seem, a necessary consequence of the compromise that the resolution sought to broker.

The submission was made in this chapter that resolution 1244 does not prohibit – nor, however, promote – Kosovo's declaration of independence.<sup>94</sup> The transient wording of it emphasises the temporary nature of its provisions, and those arrangements in existence as a result of them. This is not to suggest that the resolution confers a right upon the Kosovar Albanians to declare their independence, or that it renders legal those actions that they have taken. It does not. However, by failing to exclude it as an option, it transfers the question of the declarations legality into the sphere of international law more generally. Supporting this conclusion is the relatively recently considered notion of 'earned sovereignty', or 'conditional independence', under which a sub-state entity – such as Kosovo – may become eligible for independence and international recognition upon their acquisition of 'sufficient sovereign authority and functions'.<sup>95</sup>

If, as is submitted, independence is not then precluded under Resolution 1244 – and is, conversely, supported by the evolving notion of 'earned sovereignty' or 'conditional independence' – the question becomes whether the same is true under the established guidelines of international law. This will be the focus of the remainder of this thesis.

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<sup>94</sup> On this point, see Borgen, C.J., 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition', *The American Society of International Law Insight*, Volume 12, Issue 2, 29 February 2008, accessed at <http://www.asil.org/insights/2008/02/insights080229.html> (last accessed 16 May 2008).

<sup>95</sup> Williams, P., above n24, 388. Such functions include, *inter alia*, 'the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies' – see Williams, R., Scharf, M., Hooper, J., 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty', *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 349 at 350.

## CHAPTER 5

### ARE THE KOSOVAR ALBANIANS A 'PEOPLE'?

An analysis of the right to self-determination can be divided into two, separate but necessarily interrelated, issues: in whom does the right to self-determination vest, and what actions does it allow its holders to take? As alluded to in the judgment of the Supreme Court of Canada in the *Re Secession of Quebec* case,<sup>1</sup> the former of these issues can be characterised as the threshold step which a group must overcome before they are able to possess, and exercise, the right to self-determination. This chapter will therefore assess whether or not the Kosovar Albanians can, and do, constitute a 'people'. The proposal will be made that they do and, with this in mind, the following chapter will subsequently discuss the scope of the right as it pertains to them, to determine whether or not it allows their unilateral secession.

The following discussion attempts to justify that the Kosovar Albanians do, indeed, constitute a 'people', by drawing conclusions upon four subsidiary matters: does the term 'people' refer only to the entire population of a state or territory, or can it also include sub-state entities; what characteristics must groups possess before they can be characterised as a 'people'; which 'self' is the relevant 'people' for the purposes of self-determination – and can there be more than one,<sup>2</sup> and; do groups that otherwise satisfy the suggested requirements of a 'people' lose this status by virtue of the fact that they are also a minority within the state from which they are attempting to secede?

Before delving into these questions, however, some introduction will be given to the history of, and confusion surrounding, the term 'people'.

#### *What are a 'People'?*

The international instruments and resolutions adopted during the lifetime of the United Nations<sup>3</sup> clarify, unambiguously, that the right of self-determination is one which vests in a 'people'. *Who* the people actually are remains, however, one of the most contentious questions in international legal circles. As Sir Ivor Jennings famously remarked over fifty years ago:

On the surface [the doctrine of self-determination] seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.<sup>4</sup>

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<sup>1</sup> Quoted below – see n5.

<sup>2</sup> In other words, if many groups contained within a state satisfy the suggested requirements of a 'people', and there is some overlap between these groups, which one – or ones – possess the right to self-determine?

<sup>3</sup> See the discussion of these instruments above at pp19-28.

<sup>4</sup> Sir Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1958) at 56.

Clearly, Jennings words carry as much truth today as they did when first spoken. As the Canadian Supreme Court stated in *Re Secession of Quebec*:

International law grants the right to self-determination to 'peoples'. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of 'peoples', the result has been that the precise meaning of the term 'people' remains somewhat uncertain.<sup>5</sup>

Indeed, many would suggest that the vaguest aspect of the right of self-determination is to whom it actually applies.<sup>6</sup> Robert Lansing – the US Secretary of State under Woodrow Wilson – first elucidated upon his concerns regarding the definitional uncertainties inherent in the principle of self-determination, in 1921. He questioned:

When the President talks of 'self-determination', what unit has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability...<sup>7</sup>

Nearly ninety years later, his fears would not appear to have been placated, as academics and jurists remain unable to definitively address his concerns. Since then, a number of definitions of the term 'people' have emerged and – depending upon the circumstances of the particular case, and the prevailing political concerns at the time – been variously applied. In Musgrave's opinion, the most eminent of these were: Kelsen's definition, which equated the term 'peoples' with that of 'states'; the decolonisation definition,<sup>8</sup> the representative government definition;<sup>9</sup> and the ethnic definition.<sup>10</sup>

The definitions that continue to garner support can, however, be broadly characterised as falling under one of two heads: 'that 'peoples' means the entire people of a state, or that 'peoples' means all persons comprising distinctive groupings on the basis of race, ethnicity, and perhaps religion.'<sup>11</sup> As the following discussion will obviate, however, neither of these has been universally accepted.

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<sup>5</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para123.

<sup>6</sup> See, for example: Brown, B. S., 'Human Rights, Sovereignty, and the Final Status of Kosovo', *Chicago-Kent Law Review*, Volume 80, 2005, 235 at 248.

<sup>7</sup> Lansing, R., 'Self-Determination', *Saturday Evening Post*, 9 April 1921, 6 at 7.

<sup>8</sup> Which suggests that the term 'people' 'be defined solely within the context of decolonization' so that it 'can only mean the population of a non-self-governing territory': see Musgrave, T., *Self Determination and National Minorities*, (Great Britain: Oxford University Press, 1997) at 149.

<sup>9</sup> This theory suggests that self-determination 'is an ongoing and universal right whereby the population of a given territorial unit exercises popular sovereignty in the choice of its government.' As such, the 'people' 'is defined as the entire population of a territorial unit, which includes both non-self-governing territories and independent states.': see Musgrave, T., above n8, 151.

<sup>10</sup> Under which ethnic groups may constitute a people: see *ibid* at 154-167. For a more detailed elaboration upon the above mentioned definitions see *ibid* at 148-167.

<sup>11</sup> Higgins, R., *Problems & Process: International Law and How We Use it* (Oxford: Clarendon Press, 1994) at 124.

The fears perpetuating this uncertainty are highly correlated with those concerning secession more generally.<sup>12</sup> On one hand, for example, it is suggested that a restrictive definition of a ‘people’ would render the concept of self-determination one of little practical value – particularly as the age of decolonisation draws to a close.<sup>13</sup> On the other, however, the argument is proffered that self-determination, ‘when applied broadly to every conceivable group and subgroup’,<sup>14</sup> poses a significant threat to international peace and stability. As Boutros Boutros-Ghali stated – during his reign as the Secretary-General of the United Nations:

The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed Statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.<sup>15</sup>

### *The Territorial Aspect of a ‘People’*

As a result of the concerns alluded to by Boutros-Ghali, the prevailing view for much, if not all, of the United Nations Era, has been that the term ‘people’ refers to ‘the population of an independent state or colonial entity.’<sup>16</sup> However, as is discussed in greater detail below,<sup>17</sup> this definition has not been universally accepted,<sup>18</sup> and it is suggested that this definition is no longer the most appropriate. The fears underpinning it incorrectly assume that the right to self-determination is one which necessarily ‘authorises minorities to break away.’<sup>19</sup> As such, and in the opinion of those that endorse this restrictive definition, an acceptance, on the part of the international community, of a more liberal definition – under which many more groups would be considered a ‘people’ – would result in an ‘avalanche’ of secessions.

As mentioned, however, the definition equating a people with the population of an independent state or colonial entity has not been universally accepted and, especially in recent years, the alternative – under which sub-state groups can constitute a people – has gained much support. This shift is of obvious importance to the Kosovar Albanians, whose claim would be invalid under the former, as opposed to the latter. The following argument advocates the emerging supremacy of the alternative definition, and suggests

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<sup>12</sup> Consider, for example, those of Brown (n14) and Boutros-Ghali (n15) mentioned below.

<sup>13</sup> See Stavenhagen, R., ‘Self-Determination: Right or Demon?’ in Clark, D., Williamson, R. (eds.), *Self-Determination: International Perspectives* (Great Britain: Macmillan Press, 1996) at 6.

<sup>14</sup> Brown, B. S., above n6, 249.

<sup>15</sup> Boutros Boutros-Ghali, *An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, U.N. Doc. A/47/277-S/24111, (1992) at Para 17.

<sup>16</sup> Pavković, A., Radan, P., *Creating New States: Theory and Practice of Secession* (England: Ashgate, 2007) at 233.

<sup>17</sup> See discussion beginning at next paragraph.

<sup>18</sup> Pavković, A., Radan, P., above n16, 234.

<sup>19</sup> Higgins, R., above n11, 124.

that, under international law, racial, ethnic, and perhaps religious groups – in possession of the necessary characteristics – can now constitute a people.

This suggestion is founded upon the proposition that a majority, if not all, of the claims that would be recognised – under what is an ostensibly more liberal definition – could be satisfied without any impairment of the parent states territorial integrity. That is, so long as the parent state is possessed of a government representing the whole people belonging to it without discrimination.<sup>20</sup> Given that this is the case, the people residing within it have had their right to self-determination respected, and the state remains entitled to its territorial integrity. It is therefore only in the rarest of circumstances – in which the state's government is discriminatory – that the 'peoples' call for external self-determination – in the form of secession – could gain any significant traction.<sup>21</sup>

The number and volume of voices supporting this proposition have steadily increased over recent years; however its origins can be traced back as far as the Commission of Rapporteurs decision in the *Aaland Islands* case.<sup>22</sup> Since then, it has sporadically re-emerged – in, for example, the International Commission of Jurists report on East Pakistan<sup>23</sup> – but, in light of the tensions underpinning Cold War-era relations, and the stability that they afforded international boundaries, it garnered very little support. Upon the ending of the Cold War, however, things changed. International borders were no longer considered sacrosanct, and the traditional supremacy of sovereign, over individual, rights was questioned.<sup>24</sup> Against this background, many have re-examined the role of self-determination, and concluded that a 'people' may now, more appropriately, include sub-state entities such as those mentioned above.

Academics and jurists have advanced a number of justifications for this proposition; most of which are based upon an interpretation of the relevant international agreements,<sup>25</sup> and/or the approach of the international community to a given set of circumstances.<sup>26</sup> In addition to outlining these justifications, the following discussion will offer suggestions as to the appropriate parameters of a 'people' in contemporary international law.

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<sup>20</sup> See chapter 6 for elaboration upon, and justification of, this point.

<sup>21</sup> It is therefore suggested that a general presumption exists in favour of territorial integrity, vis-à-vis self-determination. As such, the latter is, by default, to be exercised internally and with respect to the parent states' territorial integrity. The circumstances under which this presumption is rebutted – and external self-determination therefore permitted – are outlined and discussed in greater detail below. These suggestions, and the exceptions to them, are discussed in greater detail below, in chapter 6.

<sup>22</sup> For a discussion of this case, and the comments of the Commission of Rapporteurs, see above at pp16-19.

<sup>23</sup> See below at p119.

<sup>24</sup> On the changing nature of sovereignty, see, for example: Maogoto, J.N., 'A People Betrayed – The Darfur Crisis and International Law: Rethinking Westphalian Sovereignty in the 21<sup>st</sup> Century', *Bond Law Review*, Vol. 19, No. 2, (2007), 102-123.

<sup>25</sup> For a detailed discussion of these, see below at pp121-130.

<sup>26</sup> For a detailed discussion of these, see below at pp131-135.

### *The Parameters of a 'People'*

It is not suggested that the population of an independent state or colonial entity cannot also be a 'people'. They can.<sup>27</sup> Despite their relative scarcity, some existing States do represent 'nation-states' in the true sense. According to a 1971 survey, twelve (9.1%) of the 132 entities considered to be States at that point in time were indeed true nation states. Of the remainder, twenty-five (18.9%) contained a nation/potential nation which accounted for more than 90% of the population, but also contained an important minority; another twenty-five contained a nation representing between 75-89% of the states population; 31 (29.5%) had an ethnic group constituting between 50 and 74% of the population; and 39 (29.5%) were states within which the largest nation/potential nation constituted less than half of its population. As such, even if a 'people' were defined, more liberally, as being synonymous with a 'nation' – as many suggest it should – the entire population of a state could still, on occasion, represent the relevant 'people'. It is also submitted below that, depending upon the mode by which they wish to exercise their right to self-determination, the relevant 'people' may indeed be the entire population of an existing state, despite the fact that it includes many sub-groups which might contemporaneously be considered a 'people' in their own right.

On these occasions, the 'people' can obviously not secede from themselves but, should they express a desire to freely associate or integrate with an independent State, or emerge into any other political status, the appropriate 'people' may – dependant upon their characteristics – indeed be the entire population of the territory. It is, however, suggested that a 'people' need not be defined as such in all cases and that, under certain circumstances, sub-state entities may also constitute a 'people'. As mentioned above, a number of justifications have been tendered in support of this approach.

Many propose – under what is generally classified the 'romantic' theory – that nations<sup>28</sup> are entitled to govern themselves and that they are, therefore, entitled to independence and their own states.<sup>29</sup> This approach – which underpinned the thinking of many of the pioneers of self-determination<sup>30</sup> – was, however, shunned in the aftermath of WWII, and Hitler's genocidal campaign in the name of the German *Volk*.<sup>31</sup> As a result of this, and the above mentioned fears<sup>32</sup> that the alteration of borders could result in 'fratricidal

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<sup>27</sup> Connor, W., *Ethnonationalism: The Quest for Understanding*, (Pinceton: Princeton University Press, 1994) at 96.

<sup>28</sup> Radan states that: 'In the romantic theory of self-determination the nation is briefly defined as a group linked by a common history and culture and bound to a national ideal that the nation should be autonomous, united and distinct in its recognised homeland.' – see Radan, P., *The Break-Up of Yugoslavia and International Law*, (London: Routledge, 2002) at 12.

<sup>29</sup> This approach garners some support from the fact that, albeit infrequently, the 'term people was also used as a synonym of "nation" or "nationality"' during the nineteenth and early twentieth centuries: see Musgrave, T., above n8, 154.

<sup>30</sup> Including, for example, Vladimir Lenin, whose approach is discussed above at pp11-12.

<sup>31</sup> Radan, P., above n28, 18.

<sup>32</sup> See above at p85.

strife', the alternative 'classical' theory of self-determination was primarily employed – under the auspices of *uti possidetis*<sup>33</sup> – throughout the ensuing period of decolonisation.<sup>34</sup>

As opposed to its death, however, many would suggest that this period was one of mere hibernation for the 'romantic' theory, which lay dormant – with some notable exceptions<sup>35</sup> – until its awakening upon the ending of the Cold War. Its re-emergence, since then, has been well documented – primarily, and unfortunately, in the context of separatism, campaigns of internal oppression, and 'bloody wars of secession'.<sup>36</sup>

Indeed, a majority of the claims to self-determination that exist in the world today employ the romantic theory of the nation as a people. Given this, and whilst acknowledging the possibility that the importance of national citizenship – and, as a result, the concept of the nation-state – may be eroded 'by the development of forms of supranational and subnational citizenship',<sup>37</sup> commentators such as Brubaker suggest that, at least for 'the foreseeable future', the 'nation-state and national citizenship will remain very much – perhaps too much – with us.'<sup>38</sup>

As such, the nation – as a concept – constitutes an integral element of the debate surrounding the definition of a people. After all, an acceptance of either theory – 'classical' or 'romantic' – will profoundly effect one's conclusion upon whether or not a sub-state entity – be it a nation or other – has the right to secede, under any circumstances, from an internationally recognised state.<sup>39</sup> The conclusion drawn is, however, again subjective, and based predominantly upon one's definition of, and attitude towards, nations. As such, the proposal that nations are entitled to their own states is more properly viewed as an ideological foundation upon which a nation – and other, similar, sub-state entities – *should* be a people. To determine whether or not they *are* – in a legal sense – an analysis of the international instruments employing the term, and the subsequent practice of states, must be conducted.

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<sup>33</sup> A principle originally applied in Latin America in the early nineteenth century, under which the administrative borders of the colonial territory became the international borders of the newly founded state upon decolonisation. For further discussion, see n75 below.

<sup>34</sup> Radan, P., above n28, 18.

<sup>35</sup> Including the creation of the states of Israel and Bangladesh. Radan cites these examples as evidence of the fact 'that oppression and victimisation of a nation could [still] lead to the establishment of a state' – see *ibid* 20-1.

<sup>36</sup> Müllerson, R, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London: Routledge, 1994) at 12

<sup>37</sup> Brubaker suggests that, 'in the postnational Europe of the future, the decisive instances of belonging, the decisive sites of citizenship, might be Europe as a whole on the one hand and individual regions and municipalities on the other' – see Brubaker, R., *Citizenship and Nationhood in France and Germany*, (Cambridge: Harvard University Press, 1992) at 187

<sup>38</sup> *Ibid* – Brubaker cites, in support of his statement, the disintegration of Yugoslavia and the Soviet Union into nation-states, the recreation of a powerful German nation in the heart of Europe, and the revival of nationhood as a political theme throughout Western Europe

<sup>39</sup> Given that a state cannot secede from itself, secession under the former would be a 'logical impossibility': see Radan, P., above n28, 20.

### *A 'People' under the Instruments of International Law*

The *Charter of the United Nations*<sup>40</sup> was the first international legal instrument to link the concepts of 'self-determination' and a 'people'.<sup>41</sup> Unfortunately then, the Charter provides no definition for the term 'people', and none becomes apparent, even in the aftermath of an application of the principles of treaty interpretation as set out in the *Vienna Convention on the Law of Treaties*.<sup>42</sup>

The Charter did, however, employ a combination of the terms 'nations' and 'peoples' – which had, up until this time, been used interchangeably to describe 'ethnic' groups – in Article 2(1) and, as a result of the confusion that this caused, some discussion of the terms respective meanings was entered into at the time. As was inevitable, however – given the various strategic and political interests of the parties in attendance – the opinions proffered varied considerably, and therefore cast little, if any, light upon the proper definition of a 'people'. The Belgian delegate, for example, contended that a 'people', in the context of Article 1(2), referred to 'national groups which do not identify themselves with the population of a state'.<sup>43</sup> Conversely, however, the French delegation objected – at the Coordination Committee stage – to the inclusion of the term 'nations' in Article 1(2), on the basis that its use, in conjunction with that of 'peoples', inferred a right of secession.<sup>44</sup>

The use of the two terms was subsequently justified on the basis that 'some parties to the Charter...would not be states in the strict sense of the word'<sup>45</sup> but, in light of the ambiguity that remained, some clarification was requested from the UN Secretariat. They were of the opinion that few difficulties were posed by this juxtaposition, 'since 'nations' [was] used in the sense of all political entities, states and non-states, whereas 'peoples' [referred] to groups of human beings who may, *or may not*, comprise states or nations'.<sup>46</sup>

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<sup>40</sup> As discussed and outlined above at p19-21.

<sup>41</sup> See Article 1(2) – which states that one of the purposes of the UN is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace' – and Article 55 – which sets out the manner in which the UN will achieve its goal of 'peaceful and friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples' – of the UN Charter.

<sup>42</sup> UN Doc A/Conf 39/27 (1969) – in particular Articles 31(1), 31(3)(b), and 32(a): see Radan, P., *The Break-Up of Yugoslavia and International Law*, (London: Routledge, 2002) at 31.

<sup>43</sup> *United Nations Documents of the Conference on International Organisation*, 18 Vols, San Francisco, 1945-1952, Vol. VI, at 296.

<sup>44</sup> Musgrave, T., above n8, 155.

<sup>45</sup> *Ibid.*

<sup>46</sup> Emphasis added. *United Nations Documents of the Conference on International Organisation*, 18 Vols, San Francisco, 1945-1952, Vol. XVIII, at 657.



Reading too far into the *travaux préparatoires* is, however, fraught with danger. Both factions<sup>47</sup> can support their arguments, to some extent, by reference to particular passages and statements contained within them,<sup>48</sup> and the sensible conclusion would therefore appear to be that no authoritative interpretation of the term ‘people’ can be deduced; either from them, or the Charter.<sup>49</sup> Indeed, and as alluded to in the report of the Committee I/1,<sup>50</sup> this may have even been the intention of the Charters drafters. The Rapporteur stated that, in light of the situation as it existed at the time, the Commission was unable to ‘attain complete amplification, clarification and precision’ in the drafting of the Charters preamble.<sup>51</sup> Such clarity and precision, they feared, ‘may have lead to undue rigidity.’<sup>52</sup> As a result, Quane suggests – quite plausibly – that ‘the ambiguity surrounding the meaning of certain terms was deliberate to enable the Charter to adapt to changing conditions.’<sup>53</sup> If this is, indeed, the case, the definition of a ‘people’ garnered from subsequent agreements and practice is, necessarily and importantly, in compliance with the provisions of the Charter.

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The UN Charter also implored – via the provisions contained within Chapters XI and XII of it – the need for self-government to be established in those colonial territories that remained under the administration of UN members. In doing so, it provided the catalyst for the wave of decolonisation that liberalised these territories in the decades that followed. Central to this process was the *Declaration on the Granting of Independence*

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<sup>47</sup> Those arguing, on one hand, that a ‘people’ is the entire population of a state and, on the other, those suggesting that a ‘people’ can be something less.

<sup>48</sup> For a discussion of these arguments see Quane, H., ‘The United Nations and the Evolving Right to Self-Determination’, *International and Comparative Law Quarterly*, Vol. 47, 1998, 537 at 539-547; Radan, P., above n28, 30-37; Musgrave, T., above n8, 154-158.

<sup>49</sup> In interpreting the *travaux préparatoires*, Musgrave also suggests that we consider the relatively nascent General Assembly’s practice of using the term ‘people’ to describe an ethnic group, with little thought for the concept of territorial integrity. The reason that they did so, he suggests, was the pragmatic approach that they had initially adopted with regards to the territorial integrity of non-self-governing entities. When stability was threatened by ethnic tensions, the General Assembly quite happily divided territories into separate political entities along ethnic lines. As examples, Musgrave cites the partition of the Palestine mandate into Jewish and Arab states, the 1958 division of the trust territory of the British Cameroons between Nigeria and the Republic of the Cameroons, and the partition of the trust territory of Ruanda-Urundi into the separate states of Rwanda and Burundi. In his opinion, this approach ended, however, with the adoption of Resolution 1514(XV) in 1960 – see Musgrave, T., above n8, 157-160.

<sup>50</sup> Which was vested with the responsibility of drafting the Preamble to and the Purposes and Principles of the Charter: see Quane, H., ‘The United Nations and the Evolving Right to Self-Determination’, *International and Comparative Law Quarterly*, Vol. 47, 1998, 537 at 541.

<sup>51</sup> *United Nations Documents of the Conference on International Organisation*, 18 Vols, San Francisco, 1945-1952, Vol. VI, at 700.

<sup>52</sup> *United Nations Documents of the Conference on International Organisation*, 18 Vols, San Francisco, 1945-1952, Vol. VI, at 700.

<sup>53</sup> Quane, H., above n50, 542.

to *Colonial Countries and Peoples*,<sup>54</sup> which the UN General Assembly adopted in 1960. As a result of its two most oft quoted paragraphs,<sup>55</sup> Resolution 1514 (XV) has had a profound effect on the development of self-determination as a legal right. As will be discussed, however, its role in the clarification of a 'people' has not been so weighty and, as such, its content has arguably caused as much definitional uncertainty as it has resolved.

As discussed above,<sup>56</sup> paragraph 2 of Resolution 1514 (XV) declared that: 'All peoples have the right to self-determination' and that, 'by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'<sup>57</sup> Paragraph 6 of the same document placed, however, a caveat of sorts on this proclamation. It stated that: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'<sup>58</sup>

In light of the debate that has occurred in the wake of this resolution, two ambiguities, in particular, have become apparent. The first concerns the ramifications of the right being conferred upon 'all peoples'. Does this, for example, suggest that the right is to apply universally – and, therefore, beyond the realm of decolonisation – or does the resolution only pertain to those colonial territories that remained under the administration of UN members? The second concerns the implications of the caveat contained in paragraph 6, regarding the maintenance of the country's territorial integrity. Does it, for example, infer that a 'people' is to be construed as the entire population of the territory? Or is its implication quite the opposite, in that it recognises the possibility that a territory will be comprised, on occasion, of more than one 'peoples'?

With regards to the former of these concerns, some have adopted the position that the phrase 'all peoples' does not intimate that the right is to be applied universally.<sup>59</sup> One such advocate of this interpretation – Helen Quane – suggests that, in light of the overall context of the resolution, and the emphasis placed on decolonisation by those speaking at the debate on the resolution, the phrase merely refers to 'the inhabitants of NSGTs<sup>60</sup> and Trust Territories'.<sup>61</sup> This conclusion is in keeping with 'the apparent universality of the provision', Quane contends, as the right had already been exercised by 'peoples' in existing States, and the phrase therefore merely acknowledged the right of colonial peoples to do the same.

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<sup>54</sup> Adopted by General Assembly Resolution 1514 (XV) of 14 December 1960 – for a discussion of this instrument, see above at pp21-23.

<sup>55</sup> Paragraphs 2 and 6 – which are discussed in greater detail below.

<sup>56</sup> See pp21-23.

<sup>57</sup> See Para 2, General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>58</sup> See Para 6, General Assembly Resolution 1514 (XV) of 14 December 1960.

<sup>59</sup> See, for example, Quane, H., above n50, 548-9.

<sup>60</sup> Non-self-governing territories.

<sup>61</sup> See Quane, H., above n50, 548.

These arguments are not, however, accepted. Alternatively, the suggestion is made that, although certain paragraphs of the resolution pertain solely to the issue of de-colonisation, others within it quite clearly apply in a general sense. As such, the statement that ‘all peoples’ retain the right to self-determination may be viewed as the basis, or general rule, upon which the ancillary declarations – calling for an end to colonialism – are based. Certain paragraphs can, therefore, be viewed as applying only to colonial territories, but this in no way limits the applicability of the right in the broader sense. This approach would also explain the focus placed upon decolonisation in the debate on the resolution. The resolution primarily addressed the nature of those rights possessed by ‘peoples’ residing in colonial territories, which themselves stem from the right of ‘all peoples’ to self-determination. It is therefore unsurprising that the majority of discussion at the debate on the resolution centred upon the right in this context.

In addition, the suggestion has been made – as a result of Article XX of the Helsinki Final Act<sup>62</sup> – that the right to self-determination is one to be exercised on an ongoing, or perpetual, basis. As such, Quane’s assertion that those ‘peoples’ within existing states had already exercised their right – so that the resolution could only apply to those ‘peoples’ within colonial territories – is surely incorrect. The resolution may, more properly, be construed as an affirmation that the right is one which vests equally, and without discrimination, in ‘all peoples’, irrespective of whether they reside in colonial territories, existing states, or any other political entities.<sup>63</sup>

Possibly more important,<sup>64</sup> however, are those concerns regarding the implications of the caveat contained in paragraph 6, and its relationship with the right of ‘all peoples’ to self-determination. Musgrave suggests that, as a result of paragraph 6, ethnic groups were

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<sup>62</sup> Which stated, *inter alia*, that: ‘By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development’ – see *The Helsinki Final Act*, 1 August 1975.

<sup>63</sup> As discussed above, in chapter 1, subsequent agreements – referring to self-determination in a general, rather than de-colonisation, sense – also employed the phrase ‘all peoples’. This fact would also lend support to the conclusion suggested herein.

<sup>64</sup> The conclusion that the reference made – in Resolution 1514 (XV) – to ‘all peoples’ was not to apply universally would not, it is suggested, in any way limit the definition of a ‘people’ or the groups that may be labeled as such. The phrase has been adopted in a number of subsequent resolutions – as discussed in chapter 1 – and the suggestion is therefore made that, in contemporary international law, all peoples possess the right to self-determination. Dr. Sam Blay acknowledges the controversy that exists in international law regarding the status of self-determination in the post-colonial era. He identifies two distinct schools of thought; one suggesting that ‘self-determination is applicable only to colonial situations’ so that the ‘constituent parts of the state do not individually possess the right’, and the other that self-determination is a right which vests in *all peoples* so that any distinct group can, under the right circumstances, constitute a people – see Blay, S., ‘Self-Determination: A Reassessment in the Post-Communist Era’, *Denver Journal of International Law and Policy*, Vol. 22, 1994, 275 at 275-278 including n4. This thesis adopts the latter position.

unable to ‘freely determine their political status’.<sup>65</sup> As paragraph 2 entitles ‘peoples’ to do so, he concludes, ethnic groups could no longer be considered as such.<sup>66</sup> Several arguments can, however, be raised in opposition to this conclusion.

The first re-iterates the distinction that exists between internal and external self-determination.<sup>67</sup> Remembering that a ‘people’ can exercise their right to self-determination internally and, therefore, in compliance with the requirements of paragraph 6, it is suggested that ethnic groups need not be necessarily precluded from the definition of a ‘people’ on this basis. Rather, and in light of this distinction, it is suggested that paragraph 6 merely provides further evidence of the general presumption that exists in favour of a states territorial integrity *vis-à-vis* its resident ‘peoples’ right to self-determination.<sup>68</sup>

In addition, the caveat contained in paragraph 6 could also be construed – some suggest<sup>69</sup> – as an admission that these colonial territories were comprised of a number of peoples. After all, if they were not, an insistence on the maintenance of the former colonial territories territorial integrity would – for the reasons given in the *Re Secession of Quebec case*<sup>70</sup> – be obviously unnecessary. In support of this position, Radan suggests that the requirement contained within paragraph 6 was a knee-jerk reaction, on the part of the UN members and drafters of the Declaration, to the ‘bloodshed and dislocation that had occurred in the decolonisation of British India’.<sup>71</sup> It was, as such, included, he suggests, to limit the expectations of those peoples striving for their own nation-states – during the process of decolonisation – ‘where national boundaries did not correspond to colonial boundaries’, and to prevent the ‘war and suffering’ that they feared would most probably emanate from their existence.<sup>72</sup> Such fears are, obviously, based upon a belief that colonial territories could – in opposition to those interpretations outlined above<sup>73</sup> – contain a number of peoples, and the incorporation of paragraph 6 could, therefore, quite correctly be construed as the drafter’s recognition of this fact – as opposed to an attempt to equate a ‘people’ with the population of a state.<sup>74</sup>

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<sup>65</sup> Musgrave, T., above n8, 158.

<sup>66</sup> Ibid – others suggesting that, as a result of paragraph 6, a ‘people’ must refer to the entirety of a states population include: Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 72-3; Ofuatey-Kodjoe, W., ‘Self-Determination’ in Schachter, O., Joyner, C., (eds), *United Nations Legal Order*, Volume 1, (Cambridge: Cambridge University Press, 1995) at 358

<sup>67</sup> For further elaboration upon this distinction, see chapter 6.

<sup>68</sup> As is discussed in chapter 6, this presumption is not absolute and, in extreme enough circumstances, can be rebutted.

<sup>69</sup> See, for example, Radan, P., above n28, 38-9.

<sup>70</sup> See n161 below.

<sup>71</sup> Radan, P., above n28, 39.

<sup>72</sup> As a result, he suggests, ‘the Declaration’s provisions on continued territorial integrity simply meant that former multi-national colonial territories became multi-national states’ – see *ibid*.

<sup>73</sup> See, for example, those mentioned in n66.

<sup>74</sup> Further support for this conclusion can be found in the provisions of General Assembly Resolution 1541(XV) – which was adopted on the following day, the 15 December 1960 – which

Depending upon one's perspective, some support for this conclusion can also be garnered from the manner in which states applied the principle of self-determination throughout the course of the decolonisation process. Most of the states created under the auspices of decolonisation retained those borders – under an altered version of *uti possidetis juris*<sup>75</sup> – that demarcated the disappearing colonial territory; however a small number did not.<sup>76</sup> As a result, some suggest that state practice evidences a general trend under which self-determination was exercised by the entire inhabitants of the colonial territory who were, therefore, the relevant 'people'.<sup>77</sup> This trend, they suggest, reflected the position of the United Nations, and precluded sub-state entities from being characterised as a 'people'.<sup>78</sup>

As mentioned, however, there were also a number – albeit limited – of cases, the existence of which, it is suggested, would lend support to an alternative interpretation under which a sub-state entity could, indeed, constitute a 'people'. Those submitting that a 'people' are, in fact, the entire population of a territory suggest that these cases merely exhibit a preparedness, on the part of the UN, to occasionally depart from the above mentioned trend, when 'the wishes of the peoples concerned' demand that this be done.<sup>79</sup> As opposed to 'exceptions' to a 'general trend', however, it is submitted that these cases form an integral part of the 'general trend', which actually acknowledges that sub-state entities can be a 'people'. The retention of existing borders was, it is contended, the result of the supremacy conferred upon territorial integrity – as established under paragraph 6 of Resolution 1514(XV) – as opposed to an acceptance, on the part of the international community, that a 'people' was the entirety of a territory's population.

Those cases in which the new state assumed altered borders can therefore be viewed – as opposed to 'exceptions' – as a guide to those circumstances under which the general rule can be waived. This interpretation would support the above made propositions; that a sub-state entity can be a 'people', and also that a majority of these claims can be satisfied internally and, therefore, in compliance with the requirement that the territorial integrity of the existing state be maintained.

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refer, on numerous occasions, to 'peoples' 'in the form of one territory and its "peoples"': see Radan, P., above n28, 40 – referring, in particular, to Principles VII, VIII, and IX.

<sup>75</sup> A principle originally applied in Latin America in the early nineteenth century, under which the administrative borders of the colonial territory became the international borders of the newly founded state upon decolonisation. The manner in which this principle has subsequently been applied – particularly to non-decolonisation cases – has, however, often been criticised in recent times. See, for example, Radan, P., 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission', *Melbourne University Law Review*, Vol. 24, (2000), 50; Radan, P., 'Yugoslavia's Internal Borders as International Borders: A Question of Appropriateness', *East European Quarterly*, Vol.33, No.2, 137 at, in particular, 147-51; Ratner, S.R., 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', *American Journal of International Law*, Vol.90, (1996) 590.

<sup>76</sup> Consider, for example, the cases of Morocco, Somalia, India, Palestine, Ruanda-Urundi, the British Cameroons, and the secession of Sudan from Mali after the latter was formed out of a union between French Sudan and Senegal

<sup>77</sup> See, for example, Quane, H., above n50, 551-2.

<sup>78</sup> See, for example, *ibid* 552.

<sup>79</sup> See, for example, *ibid*.

However, in light of the respective resolutions focus on decolonisation, these observations are, arguably, of limited applicability to ‘peoples’ ‘within the metropolitan territory of sovereign and independent States’ in the post-colonial era.<sup>80</sup> Those instruments espousing the right must be read in this context, and the practice of states also evaluated with this in mind. The weight attributable to those cases in which borders were altered during the process of decolonisation is, therefore, admittedly questionable, and the rules extrapolated from them of little application in the modern era. As a result, the definition of a ‘people’ in contemporary international law should, more appropriately, be ascertained from those instruments – discussed below – which have been adopted, and applied, in more recent times.

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The first such instruments were the respective *United Nations Covenants on Human Rights*,<sup>81</sup> the first articles<sup>82</sup> of which, it has been said, expressed ‘the contemporary position in international law on the right of peoples to self-determination’.<sup>83</sup> Unfortunately then, these documents again failed – in the same manner as their predecessors did – to define the crucial concept of a ‘people’. Some guidance can, however, be gleaned from the contents of the covenants, and the manner in which they were applied.

An analysis of Article 1(3)<sup>84</sup> would, for example, confirm the above made suggestion that the inhabitants of trust and non-self-governing territories can constitute a ‘people’.<sup>85</sup> In addition, the wording of this article<sup>86</sup> establishes, unambiguously, the universal nature of the right to self-determination and, therefore, its applicability to non-colonial situations.<sup>87</sup>

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<sup>80</sup> As Wheatley states, ‘the resolutions make a clear distinction between colonial-type territories and the metropolitan territory’ – see Wheatley, S., *Democracy, Minorities and International Law*, (Cambridge: Cambridge University Press, 2005) at 74.

<sup>81</sup> Discussed above at pp23-24.

<sup>82</sup> Article 1(1) of the respective covenants states: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

<sup>83</sup> Wheatley, S., above n80, 79.

<sup>84</sup> Which states that: ‘The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.’

<sup>85</sup> Wheatley, S., above n80, 79.

<sup>86</sup> In particular, the use of the word ‘including’, which would suggest that the Article applies to *all* states – as opposed to only those administering trust and non-self-governing-territories.

<sup>87</sup> See, for example, Quane, H., above n50, 559; Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 48-52. This position was also supported by the Human Rights Committee, who stated that the obligations under Article 1 ‘exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all State parties to the Covenant should take positive action to facilitate realization of and request for the right of peoples to self-determination’: see General Comment 12, paragraph 6, the Human Rights Committee, adopted by the Committee at

Beyond these developments, however, little would appear to have been clarified with regards to which particular groups – in both the colonial and non-colonial sense – could be classified as a ‘people’. The respective factions maintained the positions that they held before the Covenants were adopted<sup>88</sup> and, as a result, it is suggested that the covenants did little to clarify, or develop, the meaning of a ‘people’.

The same cannot be said, however, for the subsequently adopted *Declaration on Friendly Relations*,<sup>89</sup> which had a profound effect on not only the scope, but also the content, of the right in the post-colonial era. Despite the inclusion of provisions stressing its importance in the context of decolonisation,<sup>90</sup> the Declaration clearly broadened the mandate of self-determination to include non-colonial situations.<sup>91</sup> The ‘saving clause’,<sup>92</sup> in particular, has been cited by many as endorsing – under the right circumstances – the

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its 516<sup>th</sup> meeting, on 12 April 1984 – reprinted in Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: Engel, 1993) at 856-7. This clarification is important given the above expressed doubts – see pp91-92 – upon whether or not the right applied beyond colonial situations. Radan also cites the unification of the Federal Republic of Germany and the former German Democratic Republic – neither of which was, at the time, a colonial entity – as an example confirming the universality of the right – see Radan, P., above n28, 45-46.

<sup>88</sup> That a ‘people’ only included the population of a State or colonial territory or, alternatively, that it could include sub-state groups.

<sup>89</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*, G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV). For a discussion on the declaration, see above at pp24-26.

<sup>90</sup> The Declaration states, for example – within the Article entitled ‘The principle of equal rights and self-determination of peoples’ – that ‘Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- a To promote friendly relations and co-operation among States; and
- b To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.’

<sup>91</sup> Castellino, J., ‘Order and Justice: National Minorities and the Right to Secession’, *International Journal on Minority and Group Rights*, Vol. 6, 1999, 389 at 393 – citing Gros-Espiell, H., ‘Self-Determination & *Jus Cogens*’, in Cassese, A., (ed.) *UN Law/Fundamental Rights: Two Topics in International Law* (1979).

<sup>92</sup> The term ‘Saving Clause’ refers to paragraph seven of the declarations section entitled ‘The principle of equal rights and self-determination of peoples’ – it states that ‘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.’

unilateral secession of a sub-state entity.<sup>93</sup> In addition, it is suggested, the clause also provides some clarification with regards to the circumstances under which such secessions could occur,<sup>94</sup> and also the definition of a ‘people’.

In the current discussion, the latter of these legacies is clearly of most import. Significantly, the Declaration again confers the right to self-determination upon ‘all peoples’. As opposed to the above discussed Resolution 1514 (XV)<sup>95</sup> – in which, some have suggested, the term ‘all peoples’ merely referred to the populations of colonial territories – the ‘ordinary meaning, context and drafting history [of the *Declaration on Friendly Relations*] suggest that the right applies universally.’<sup>96</sup> Of greater consequence, however, is the wording of the ‘saving clause’ which, it is suggested, implies that a segment of a states population may, indeed, secede. It states that:

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.

A cursory reading of the paragraph obviates that a ‘state’s territorial integrity is assured only under certain conditions.’<sup>97</sup> These conditions require that the state’s government represent, in a non-discriminatory manner, *all* of its inhabitant peoples. An inability on the government’s part to do so would, it therefore appears, legitimate the secession of the ‘people’ that have been discriminated against.<sup>98</sup>

Taking into account its placement at the beginning of the paragraph, there is clearly a presumption – in favour of the state – that territorial integrity should prevail, or be protected.<sup>99</sup> However, in light of the remainder of the paragraph, this presumption appears to be rebuttable if, and when, the state is not possessed of a government representing the whole people.<sup>100</sup> An ‘absence of such government’ would, therefore, clearly open up ‘the possibility of secession’ which, by definition, ‘is exercised by only

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<sup>93</sup> For a discussion on this aspect of the clause, see below at pp121-124.

<sup>94</sup> For a discussion of these circumstances, see below at pp113-114.

<sup>95</sup> Resolution 1514(XV).

<sup>96</sup> Quane, H., ‘A Right to Self-Determination for the Kosovo Albanians?’, *Leiden Journal of International Law*, Vol. 13, 2000, 219 at 222-223.

<sup>97</sup> Radan, P., above n28, 52.

<sup>98</sup> From another perspective, the passage can be viewed as a signal that ‘the “national unity” of a state is earned by its government, and is not a *fait accompli*’ – see Ratner, S., ‘Drawing a better line: *uti possidetis* and the borders of new states’, *American Journal of International Law*, Vol. 90, 1996, 590 at 611.

<sup>99</sup> See Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 112, 118-119.

<sup>100</sup> As it is then also not conducting itself in compliance with the principle of equal rights and self-determination.



one segment of the population.’<sup>101</sup> As Quane concludes, this would suggest that, under the *Declaration on Friendly Relations*:

a group which is not synonymous with the entire population of the state may be regarded as a people with a right to self-determination.<sup>102</sup>

A similar conclusion was reached by an International Commission of Jurists in its 1972 study on *The Events in East Pakistan*. After establishing that the ‘saving clause’ did, in fact, confer primacy upon the principle of territorial integrity, it stated that, in their opinion:

this principle is subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive.<sup>103</sup>

This statement clearly supports the above suggested interpretation of the ‘saving clause’ and, more importantly in terms of the present discussion, suggests that a state can comprise many constituent peoples.

Whether or not this exception does indeed exist under international law is, however, the subject of chapter 6.<sup>104</sup> Without prejudicing or pre-empting the nature of that chapter’s content, the following discussion will assume that it does. The question is then begged: which sub-state groups obtain the benefit of the exception? Racial groups? Religious groups? Ethnic groups? Political groups?

#### *The Common Characteristics of a ‘People’*

The Saving Clause contained within the *Declaration on Friendly Relations* ostensibly forbids government discrimination ‘as to race, creed or colour.’ As such, commentators such as Cassese contend, it is only groups defined by, and discriminated against on the basis of, these characteristics that can be considered a ‘people’.<sup>105</sup> Given that, in his opinion, ‘‘race’ and ‘colour’ express an identical concept’, these characteristics can

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<sup>101</sup> Quane, H., above n96, 223.

<sup>102</sup> Ibid. Emphasis added.

<sup>103</sup> International Commission of Jurists, ‘East Pakistan Staff Study’, *The Review*, no. 8, 1972, at 46.

<sup>104</sup> The legal status of this particular paragraph has been the focus of much debate. As Quane states: ‘The drafting history reveals that there was a lack of consensus on the inclusion of this paragraph which suggests that it does not represent a codification of international law but at most an attempt to progressively develop the law. The extent to which there is a legal right to self-determination in the circumstances outlined in paragraph seven depends on whether subsequent state practice complies with this provision.’ – see Quane, H., above n96, 223. Such state practice will be analysed in chapter 6, to determine whether or not this paragraph has attained the status of customary international law.

<sup>105</sup> See Cassese, A., above n99, 112-120.

actually be narrowed down to include only ‘race’ and ‘creed’.<sup>106</sup> As such, he concludes, ‘*linguistic or national groups do not have a concomitant right.*’<sup>107</sup>

However, the phrase ‘as to race, creed, or colour’ has been replaced, in the subsequently adopted *Vienna Declaration and Programme of Action*,<sup>108</sup> and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*,<sup>109</sup> by the expression ‘of any kind’. As such, the limitations upon the types of groups that can constitute a people – espoused by Cassese above – have arguably been removed. The respective documents each contain a paragraph re-iterating, in almost identical terms,<sup>110</sup> the contents of the ‘saving clause’ outlined above. The critical difference between the *Declaration on Friendly Relations* and the subsequently adopted instruments is, therefore, the qualifications that are respectively placed upon the type of representative government that must be present. The former precludes discrimination on the grounds of ‘race, creed, or colour’, whereas the latter prohibits discrimination ‘of any kind’. As such, Cassese’s doubts are apparently removed and, Radan therefore suggests, ‘any group within an unrepresentative or discriminatory state has the right to secede.’<sup>111</sup>

However critics and sceptics would, quite rightly, point out the impracticalities and risks associated with broadening the definition of a ‘people’ to include *all* of the groups that reside within a state. Despite the assertion that nearly all of their claims will be satisfied on an internal basis, the parameters must be set more tightly to ensure that the definition – and therefore the principle – remains workable.

However, and having said that, it must again be remembered that the number of ‘peoples’ potentially able to secede is confined on several other fronts. They must, for example, satisfy the general requirements of statehood and, therefore, occupy and control a clearly defined parcel of territory.<sup>112</sup> In addition, the government’s discrimination – which confers upon them the right to external self-determination – must be based upon one of the groups common characteristics, otherwise that group and the one claiming to be a ‘people’ will not be identical – individual members of the group characterised as a ‘people’ may not have been discriminated against, and those individuals discriminated

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<sup>106</sup> Cassese further contends that ‘creed’ should also be ‘interpreted strictly’, so that it also only covers ‘religious beliefs’: see *ibid* 112–113.

<sup>107</sup> *Ibid* 114. Radan disagrees with Cassese’s interpretation, however, suggesting that ‘creed’ and ‘religious beliefs’ are not necessarily interchangeable and that, even if they are, ‘religious beliefs’ should be given a broader meaning. In addition, he suggests that the words ‘race’ and ‘colour’ are not a pleonasm and that, at the time that the document was adopted, the term ‘race’ was often used interchangeably with ‘nation’. Different national groups were often referred to as being of different ‘races’ despite the fact they may have been the same ‘colour’: see Radan, P., above n28, 58.

<sup>108</sup> A/Conf. 157/24. 25 June 1993.

<sup>109</sup> G.A. res. 50/6, 49 U.N. GAOR Supp. (no. 49) at 13, U.N. Doc. A/RES/50/49 (1995).

<sup>110</sup> The paragraphs are identical from the phrase, ‘be construed as’, contained in the saving clause above.

<sup>111</sup> Radan, P., above n28, 63 – citing Sharma, S.P., *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff Publishers, 1997) at 226.

<sup>112</sup> See above at chapter 3.

against may not be a part of the group characterised as a ‘people’. Finally, state practice – which is discussed in greater detail in chapter 6 – demonstrates the significant height at which the bar has been set, with regards to the type and level of oppression that must exist before that groups right to self-determination allows them to exercise it on an external, as opposed to internal, basis.

As an example, concerns exist that a more broadly defined ‘people’ could encompass groups such as political factions, unimpressed by the decisions being made by their central, democratically elected government. However, bearing in mind the above suggested limitations, this is clearly not the case. The supporters of the party will often be interspersed throughout the state and, more importantly, the *bona fide* actions of a government will *clearly* fall short of the threshold that has, and is, developing in line with state practice.

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Having said that, some clarification of the terms meaning – as opposed to the vague, groups ‘of any kind’ definition – is obviously desirable, if not always necessary.<sup>113</sup> Thankfully then, a common thread can be drawn from those definitions that envision a ‘people’ as being something other than the residents of an existing state. Under these definitions, a people would apparently have to possess both objective and subjective characteristics.<sup>114</sup>

The International Commission of Jurists that investigated the events in East Pakistan, for example, concluded that the inhabitants of that territory did, by 1970, constitute a distinct ‘people’.<sup>115</sup> In reaching this conclusion, they offered the following with regards to the meaning of a ‘people’:

If we look at the human communities recognised as peoples, we find that their members have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be:

- Historical
- Racial or ethnic
- Cultural or linguistic
- Religious or ideological
- Geographical or territorial
- Economic
- Quantitative

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<sup>113</sup> It is suggested that certain groups will, on occasion, indisputably constitute a ‘people’. The parameters, and definition of, a ‘people’ are therefore only contested and debated in tougher, more ambiguous cases.

<sup>114</sup> See Dinstein, Y, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25 *International and Comparative Law Quarterly* 102 at 104; Musgrave, T., above n8, 160-1.

<sup>115</sup> International Commission of Jurists ‘East Pakistan Staff Study’ (1972) 49 – cited in Musgrave, above n8, 161.

This list, which is far from exhaustive, suggests that none of the elements concerned is, by itself, either essential or sufficiently conclusive to prove that a particular group constitutes a people...

...we have to realise that our composite portrait lacks one essential and indeed indispensable characteristic – a characteristic which is not physical but rather ideological and historical: a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist.<sup>116</sup>

Two decades later, similar conclusions were drawn by a meeting of experts, held by UNESCO, on the further study of the rights of peoples. These experts identified the following characteristics as being ‘amongst those mentioned as inherent in a description (but not a definition) of a ‘people’’:<sup>117</sup>

1. a group of individual human beings who enjoy some or all of the following common features:
  - (a) common historical tradition;
  - (b) racial or ethnic identity;
  - (c) cultural homogeneity ;
  - (d) linguistic unity;
  - (e) religious or ideological affinity;
  - (f) territorial connection;
  - (g) common economic life;
2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;
3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
4. the group must have institutions or other means of expressing its common characteristics and will for identity.<sup>118</sup>

In this vein – and in light of the above made suggestions pertaining to those international instruments which adopt the term ‘peoples’ – it is suggested that groups possessing such characteristics should – in addition to the entire population of states – be regarded as ‘peoples’ for the purposes of self-determination under international law.

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<sup>116</sup> International Commission of Jurists ‘East Pakistan Staff Study’ (1972) 47 – cited in Musgrave, above n8, 161-2.

<sup>117</sup> United Nations Educational, Scientific and Cultural Organization, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, *Final Report and Recommendations*, Document No. SHS-89/CONF.602/7, Paris, 27-30 November 1989 at 7.

<sup>118</sup> United Nations Educational, Scientific and Cultural Organization, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, *Final Report and Recommendations*, Document No. SHS-89/CONF.602/7, Paris, 27-30 November 1989 at 7-8.

In support of this proposition, it must be pointed out that not all – and, arguably, very few – ethnic groups contained within a state will satisfy these requirements. Many are disseminated throughout the territory of the state, and therefore do not satisfy the requirement that they be territorially connected.<sup>119</sup> As such, and because the definition only covers those groups that occupy a contiguous territory and share a common economic life, they would not constitute a ‘people’. The ancillary requirement that they also hold some common history would, in reality, necessitate that the group have occupied the territory which they claim, and have shared a common economic life, for some time. As such, the number of groups in a position to satisfy the mentioned requirements is relatively easily estimated.

In addition, and as already mentioned on several occasions, the majority, if not all, of these groups claims will be satisfied on an internal basis; and the threat posed to international peace and stability is therefore not as grave as some would have us believe.

#### DO THE KOSOVAR ALBANIANS SATISFY THESE REQUIREMENTS?

As already discussed above, the inhabitants of Kosovo – or at least the Kosovar Albanians – possess a relatively significant common historical tradition, the turbulence of which has undoubtedly solidified their connection as a group. In addition, they also possess a strong ethnic identity, cultural homogeneity, and linguistic unity, and have also shared a religious and ideological affinity since the arrival of the Ottomans. Significantly, there is very little commonality between Kosovar Albanians and Serbs with respect to these characteristics.<sup>120</sup> In fact, it is as a result of a number of these differences that tensions have traditionally arisen.

Despite some conjecture regarding migration into and out of the territory, the current Kosovar Albanians also undoubtedly possess a strong territorial connection to the region which they have claimed,<sup>121</sup> and have – particularly since the establishment, by the LDK, of their parallel state – shared a common economic life. As a group, they also indisputably possess the subjective mindset – which many suggest a ‘people’ must – that they are indeed a group. As such, they would appear to satisfy the above mentioned requirements of a ‘people’.

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<sup>119</sup> This factor is not only a requirement under the definition of a ‘people’, but also a requirement of statehood under international law more generally – see chapter 3. As such, it precludes them from external self-determination, and therefore secession, on numerous fronts. Their failure to satisfy the definition of a ‘people’ also precludes them obtaining the right to internal self-determination, but does not necessarily preclude their characterisation as a minority, and the group may therefore still be afforded those rights to which minorities are entitled.

<sup>120</sup> That is, they disagree on the territory’s history, possess different ethnic identities and cultures, speak different languages, and possess separate and distinct religious and ideological belief systems. In addition, they quite obviously both regard themselves – on a subjective basis – as distinct groups, and possess a subjective consciousness that each represent a distinct ‘people’.

<sup>121</sup> Some may contend whether this connection is present in the northern, Serb occupied, regions of the territory.

### *Which 'Self' is the 'People'?*

It is evident that a given individual could be the member of multiple groups, each of which satisfies the above mentioned requirements. As such, it must therefore be ascertained which of these 'selves' constitutes the 'people' for the purposes of self-determination. The importance of this distinction is underlined by Hannum's observation that:

the assertion by one 'self' of political auto-determination almost necessarily entails the denial of auto-determination to another 'self' which may be either greater or smaller; as is the case with minorities, selves can never be wholly eliminated.<sup>122</sup>

He cites the following practical – and not at all uncommon – situation in support of his statement:

Within the two islands of Ireland and the United Kingdom, for example, the relevant 'self' might be both islands taken together, despite their ethnic mix of English, Scots, Welsh, and Irish; each island separately, despite the mix of the first three in Great Britain and of Irish and Scots in Ireland; the two existing states; or each ethnic/geographic group, which would include at least the four separate entities of England, Scotland, Wales, and Ireland, with from zero to two additional groups (Irish Catholics and 'British' Protestants) in Northern Ireland.<sup>123</sup>

The similarities between this situation and that which exists in the Balkans are striking. Depending upon the view one takes, the relevant 'self' in the latter could, similarly, be those nations that inhabit the region;<sup>124</sup> the populations of internationally recognised states;<sup>125</sup> or each ethnic/geographic group contained within them.<sup>126</sup> These distinctions are,

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<sup>122</sup> Hannum, H., *Autonomy, Sovereignty, and Self-Determination*, (Philadelphia: University of Pennsylvania Press, 1990) at 31.

<sup>123</sup> Ibid.

<sup>124</sup> Under this view Albanians and Serbs would each be considered a separate and distinct 'people', however the Albanians that reside in Albania and those that reside in Kosovo would not – they would be considered one 'people'.

<sup>125</sup> Under this view the residents of each internationally recognised state would – regardless of their underlying nationalities – constitute the respective 'peoples'. As such, the entire populations of Romania, Greece, Turkey, Serbia, Bulgaria, Albania, Croatia, Bosnia-Herzegovina, Slovenia, Macedonia, and Montenegro would each constitute a separate 'people'. However, based upon the state of affairs as they existed at the time that Kosovo declared their independence, the Kosovar Albanians – and, for the same reasons, the Serbian enclaves in both Bosnia and Croatia – would not. Although, if this definition were accepted, then the inhabitants of Kosovo could never have been a people, and therefore characterised their secession as an exercise of their right to self-determination. They could therefore never have become an independent state and, as a result, a people. As such, independence would logically, and eternally, remain out of their reach.

<sup>126</sup> Under this view both the Kosovar Albanians, and Bosnian and Croatian Serbs, would constitute 'peoples', distinct and separate from those inhabiting the territories of Albania and Serbia respectively. Although they do not occupy a defined territory, a significant proportion of the world's Roma also reside in Central and Eastern Europe.

however, far from clear. In light of the regions history, divisions could also, arguably, be formed along religious lines<sup>127</sup> and, not so long ago, it could quite easily have been argued that the inhabitants of the FRY, despite their above mentioned differences, were indeed a single ‘people’. As Hannum surmises, ‘everyone belongs to many different groups at the same time’,<sup>128</sup> and the pertinent question is, therefore, which of these groups constitute a ‘people’?

This thesis submits that it need not only be one. It is, rather, suggested that a number of these groups can – assuming that they each satisfy the above mentioned requirements – simultaneously constitute a ‘people’, and that an individual can, therefore, be a member of a number of ‘peoples’ at any one time. They may, for example, and depending upon their state of mind, be both a Quebecois and Canadian, a member of the Scottish and United Kingdom peoples, or an Irish Catholic and Irishman. Membership of one group need not exclude them from the other, nor detract from their subjective mindset regarding their membership. Given that a majority, if not all, of these sub-state entities will only ever be entitled to internal self-determination, it is also suggested that the problems some may contend will result from this interpretation are easily overcome.

When the respective ‘peoples’ are only entitled to *internal*, as opposed to *external*, self-determination, the distinction between the respective ‘selves’ is not of comparable consequence. The characterisation of groups as ‘peoples’ will only require that the central government govern without discrimination, so that each of them is afforded its right to internal self-determination. They are, effectively, entitled to little more than they would be as a minority.<sup>129</sup>

It is, therefore, only really when the ‘people’ are entitled to *external* self-determination that the distinction is of any great importance. After all, this characterisation will ascertain which individuals – the will of whom will determine the manner in which the right to self-determination will be exercised – constitute, in the collective, the mentioned ‘people’ and also, therefore, the territory in which it is to be exercised, and any potential right to secession realised.<sup>130</sup>

If, for example, a plebiscite was held with regards to the parent state’s association or integration with another independent State, all of its inhabitants would be one of the ‘people’ and entitled to vote. This does not then necessarily exclude them as a member of any other sub-state entity otherwise representing a people. If this was the case – that the parent state is, in fact, a ‘people’, and that individuals can only constitute a member of any one such group at any given time – then a ‘people’ could indeed only be the entire

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<sup>127</sup> Distinctions could, for example, be drawn between the followers of the regions various religions. The principal religions in the Balkans are Christianity – both Eastern Orthodox and Roman Catholic – and Islam.

<sup>128</sup> Hannum, H., above n122, 31.

<sup>129</sup> See the discussion below at pp106-110, regarding the distinction between ‘peoples’ and ‘minorities’, and the rights that attach to each.

<sup>130</sup> For further discussion on this point, see chapter 6 below.

population of the state, and secession would necessarily be impossible. As it is submitted that this is not the case, the proposal is made that such logic is flawed.

The problems that some may associate with this interpretation are, again, limited by the relatively restricted circumstances under which a sub-state entity can secede. As discussed above,<sup>131</sup> each of these ‘peoples’ will only be entitled to *internal* self-determination, unless and until they are oppressed and/or discriminated against by the states government. If and when such discrimination occurs, all of the individuals in possession of the necessary objective *and* subjective characteristics will form a part of the group which, as a collective, possesses the right to externally self-determine.

In addition – and as also discussed above<sup>132</sup> – the government’s discrimination must be based upon one of the groups common characteristics, and the ‘self’ that constitutes the ‘people’ for the purposes of external self-determination will, therefore, generally be ascertained with relative ease. In light of the height at which the bar has been set with regards to the level of discrimination that is required to ground a right to external self-determination, the nature of, and reasons for, the discrimination are – in those cases in which the right has been recognised – generally blatantly obvious, whether or not they are verbally acknowledged.

Kosovo is a prime example. The discrimination, oppression, and campaign of violence that the Yugoslav government conducted against its Albanian residents, were all motivated by ethnic ‘hatred’. As such, ethnicity is the common factor which – because of its status as the factor underpinning the government’s campaign – must bind the individuals constituting the group attempting to secede. As suggested above – and as will often be the case when the discrimination is severe enough to ground a right to external self-determination – the group constituting the ‘people’ is therefore easily ascertained. It is the Kosovar Albanians.

*Are the Kosovar Albanians a Minority, and is this a Problem?*

Some states contend that – given the number of sub-state entities around the globe that would satisfy it – a more ‘lenient’ definition of a ‘people’ is both impractical and unworkable. As already discussed, if each of these entities were to be afforded the right to *external* self-determination, the number of states could increase exponentially. To limit this threat, many<sup>133</sup> therefore suggest that minorities and nationalities – as opposed to nations – be excluded from the definition of a ‘people’, irrespective of whether or not they satisfy the above mentioned requirements.<sup>134</sup>

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<sup>131</sup> See pp104-105.

<sup>132</sup> See p100.

<sup>133</sup> See, as an example, those comments cited below at pp108-109 – in particular those made by Higgins (see n147 below).

<sup>134</sup> See the proposed definition on pp100-102.



The conclusions drawn on these issues are of obvious importance to the Kosovar Albanians, as they represent not only a minority<sup>135</sup> within Serbia, but also, some would suggest, an 'Albanian ethnic enclave, rather than a nation unto themselves.'<sup>136</sup>

*What is a Minority?*

In a definition which Musgrave states 'has obtained wide currency'<sup>137</sup>, Capotorti describes a minority as:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>138</sup>

In addition to supporting the conclusion that minorities are to be ascertained, numerically, by reference to the population of a state as a whole, this definition would also suggest that, to be considered a 'minority', a group must possess certain common characteristics of an objective nature, along with a 'subjective element of awareness...of [their] own distinct identity, and a desire...to preserve that identity.'<sup>139</sup> Reiterating the definitional confusion then, is the fact that – although the term 'minority' is, as opposed to 'nation', to be assessed on a comparative basis<sup>140</sup> – these features 'are precisely those which define a nation',<sup>141</sup> and also those which the above suggested definition contends should be present in a 'people'.

So, do the Kosovar Albanians satisfy these requirements – are they a minority? It is submitted that they are. If the population of Serbia is, indeed, the appropriate numerical reference against which the status of its constituent groups are to be assessed, then the Kosovar Albanians are most certainly a numerically inferior group. As is evidenced from

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<sup>135</sup> Under the definition provided below – see n138 and accompanying text.

<sup>136</sup> Borgen, C.J., 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition', *The American Society of International Law Insight*, Volume 12, Issue 2, February 29, 2008, accessed at <http://www.asil.org/insights/2008/02/insights080229.html> (last accessed 16 May 2008). In fact, it was, in essence, this distinction – Kosovo and Vojvodina were labeled 'autonomous provinces' under the Yugoslav constitution of 1974, rather than 'republics', on the basis that the later were for 'nations' as opposed to 'nationalities' – that underpinned the Kosovar Albanians inability to secede along with the other territories of the FRY. As Pavković and Radan point out, the Badinter Commission decided that only 'the whole populations of federal units (republics) and not any of its segments or minorities have the right of self-determination': see Pavković, A., Radan, P., above n16, 162.

<sup>137</sup> Musgrave, T., above n8, 169.

<sup>138</sup> Capotorti, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (UN Study E/CN.4/Sub.2/384/Rev.1) (New York: United Nations, 1979) at 96.

<sup>139</sup> Musgrave, T., above n8, 169.

<sup>140</sup> Crawford, J., 'The Rights of Peoples: "Peoples" or "Governments"?' 55 in Crawford, J. (ed.) *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 60-61.

<sup>141</sup> Musgrave, T., above n8, 169.

the events of the recent past, it is equally certain that they are in a non-dominant position. The Kosovar Albanians, as members of the group are – or at least were – nationals of Serbia and, as already discussed in some detail,<sup>142</sup> possess ‘ethnic, religious or linguistic characteristics differing from those of the rest of the population’, and also show ‘a sense of solidarity, directed towards preserving their culture, traditions, religion or language.’<sup>143</sup>

### *Can Minorities Secede?*

Having ascertained that the Kosovar Albanians are, indeed, a minority, the pertinent question is obviously then whether or not these groups are a ‘people’ for the purposes of self-determination?<sup>144</sup> If they *are not*, then the above mentioned confusion regarding the definition of a ‘minority’ – and its apparent similarities with that of a ‘people’ – could be seriously problematic. It would, in practical terms, effectively preclude secession, as such an act could only be effected by ‘majorities’. As these majorities would rarely, if ever, want to relinquish territory – and therefore power – secessions would logically never occur. This formulation would also, rationally, allow central governments to conduct discriminatory campaigns – such as that which occurred in Kosovo – without consequence, and with relative impunity.

As a result, the proposal that minorities *not* be allowed to secede – which effectively equates a ‘people’ with the population of a state or territory – has been criticised as outdated and encouraging of oppressive and despotic regimes. McCorquodale, for example, suggests that a

restriction on the definition of ‘peoples’ to include only all the inhabitants in a State would tend to legitimate an oppressive government operating within...unjust State boundaries and create disruption and conflict in the international community.<sup>145</sup>

‘This approach’, he further suggests,

also upholds the perpetual power of a State at the expense of the rights of the inhabitants, which is contrary to the clear development of the right of self-determination and international law generally.<sup>146</sup>

The suggested interpretation – under which minorities can, indeed, secede – is therefore, arguably, preferable, as it not only discourages these regimes, but conversely offers them an incentive to rule fairly, and without discrimination, by conditioning their territorial integrity upon their doing so.

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<sup>142</sup> See pp102-103 above.

<sup>143</sup> As required under the above mentioned definition of Capotorti: Capotorti, F., above n138, 96.

<sup>144</sup> If they are, the above arguments are obviously accepted, since both states and sub-state entities may then be afforded the right to self-determination.

<sup>145</sup> McCorquodale, R., ‘Self-Determination: A Human Rights Approach’, *International and Comparative Law Quarterly*, 1994, Vol.43, at 868.

<sup>146</sup> Ibid. See also, Oko, O., ‘Partition or Perish: Restoring Social Equilibrium in Nigeria Through Reconfiguration’, *Indiana International and Comparative Law Review*, 1998, Vol.8, at 370-1.

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Despite these arguments, some suggest that minorities cannot be a ‘people’, citing, in support of their position, the fact that certain instruments contain separate provisions which respectively deal with ‘peoples’ and ‘minorities’. As a result, they suggest, ‘minorities’ are endowed with their own distinct rights, and cannot therefore also constitute a ‘people’. In Rosalyn Higgins opinion, for example:

The emphasis in all the relevant instruments, and in the state practice (by which I mean statements, declarations, positions taken) on the importance of territorial integrity, means that ‘peoples’ is to be understood in the sense of all the peoples of a given territory. Of course, all members of distinct minority groups are part of the peoples of the territory. In that sense they too, as individuals, are the holders of the right of self-determination. But minorities as such do not have a right of self-determination. That means, in effect, that they have no right to secession, to independence, or to join with comparable groups in other states.<sup>147</sup>

In her opinion, minorities were ‘to be protected through the guarantee of human rights that every individual is entitled to...and, more particularly, through the provision of minority rights.’<sup>148</sup> Müllerson concurs to some extent, suggesting that, in the post-colonial era, state practice would imply that ‘peoples’ are the ‘populations of independent states’, and that minorities are therefore but a sub-set of such ‘peoples’.<sup>149</sup> He was, however, far less certain with regards to who the minorities actually are, philosophizing that:

One may say that while there is more or less a clear distinction between the rights of peoples and the rights of minorities, it is impossible to make such a distinction between peoples and minorities themselves.<sup>150</sup>

Over time, many have adopted a similar position to that elucidated by Higgins above. Their approach has, however, been questioned by a number of prominent commentators and jurists – especially in recent times. In keeping with this evolving sentiment – and also to overcome the confusion alluded to by Müllerson above<sup>151</sup> – it is suggested that minorities, which also satisfy the above mentioned requirements of a ‘people’, can secede in the same manner – and under the same, certain extreme circumstances<sup>152</sup> – as any other ‘people’ can.

Those contending that minorities are precluded from also being characterised as a people, often justify their position by reference to those provisions of international instruments –

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<sup>147</sup> Higgins, R., above n11, 124.

<sup>148</sup> Ibid.

<sup>149</sup> Müllerson, R, above n36, 74-75.

<sup>150</sup> Ibid 74.

<sup>151</sup> Regarding the distinction between, and definitional uncertainty regarding, ‘minorities’ and ‘peoples’ – see n150 above.

<sup>152</sup> Discussed in chapter 6.

such as Article 27 of the *Covenant on Civil and Political Rights*,<sup>153</sup> and Principle VII of the *Helsinki Final Act* – which respectively confer rights upon the individual members of minorities.<sup>154</sup> Their argument is, effectively, that these provisions, and those which confer upon ‘peoples’ the right to self-determination – respectively, Article 1 of the *Civil Rights Covenant*, and Principle VIII of the *Helsinki Final Act* – are mutually exclusive. Their logic is that, since these instruments discuss the rights of minorities without reference to any right to self-determination, that none must exist. It is again contended, however, that such logic is flawed. As Radan points out:

Article 27 has nothing to do with the rights of minority *groups*. It is concerned with the rights of *individuals* who are members of minority groups. It is invalid reasoning to assert that because Article 27 does not positively confer rights on minority groups, such groups have no rights and therefore are not a peoples for the purposes of Article 1.<sup>155</sup>

It is subsequently submitted that, for identical reasons, the arguments proffered in respect of Principles VII and VIII of the *Helsinki Final Act* are equally unsustainable.<sup>156</sup>

As such, it is suggested that not all minorities are peoples, nor are all peoples minorities. Some minorities will, however, be peoples, and some peoples minorities.<sup>157</sup> Therefore, some groups will be protected exclusively by those provisions that pertain to minorities, others by the rights conferred upon a people, and some – which constitute both a people and minority – will be afforded the rights available to both.<sup>158</sup> In light of the above arguments – concerning the *Civil Rights Covenant* and *Helsinki Final Act* – it is apparent that this distinction is quite practical, as the rights pertaining to minorities are conferred upon the individuals and those concerning peoples upon the group as a whole. In addition and as already mentioned, this interpretation would, as opposed to encouraging

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<sup>153</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.

<sup>154</sup> See, for example, Cassese, A., above n99, 61-2, 283, 289; Franck, T.M., ‘Postmodern Tribalism and the Right to Secession’, in Brölmann, C., Lefeber, R., Zieck, M., (eds.), *Peoples and Minorities in International Law*, (Dordrecht: Martinus Nijhoff Publishers, 1993) at 8, 10; Castellino, J., *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity*, (The Hague: Martinus Nijhoff Publishers, 2000) at 64-8.

<sup>155</sup> Emphasis added. Radan, P., above n28, 49 – further arguments supporting his position can be found at 50.

<sup>156</sup> For further discussion on this point, see *ibid* 64-5.

<sup>157</sup> As Raič also points out, “‘minorities’, like ‘peoples’, are not static concepts. Minorities, like peoples, are formed and dissolved (through, for instance, voluntary assimilation) according to the wishes of their members, and if not a people at present, a “minority” may become or may be regarded as a people in the future’: Raič, D., *Statehood and the Law of Self-Determination*, (The Hague: Kluwer Law International, 2002) at 269-70.

<sup>158</sup> See, for example, the comments of Raič, who suggests that ‘an ethnic group which is numerically inferior to the rest of the population of the State of residence, is either a national/ethnic minority *or* – if the group possesses a collective individuality – a people. In the latter case the group may be qualified as a ‘minority-people’, which means that the group and its members enjoy minority rights in addition to the right of internal self-determination’: *Ibid* 269.

secession, reinforce the rights of minorities, and the parent state's obligation to govern for all.

This conclusion – that a minority can, indeed, be a people and therefore secede – is also supported by those events that have already occurred in the Balkan region. Albanians – or Kosovar Albanians – are, and were, far more numerous in the parent state than Macedonians, Slovenians, and Montenegrins were, and each of these groups was able to realise their independence.<sup>159</sup> As such, it is suggested that the Kosovar Albanians can, indeed, retain their status as a people, despite the fact that they may simultaneously be characterised as a minority within the state from which they wish to secede.

## CONCLUSION

The overarching conclusion that can be drawn from the above arguments is that the Kosovar Albanians do, indeed, constitute a 'people' for the purposes of self-determination. This conclusion can be garnered from those positions adopted with regards to the four 'subsidiary matters' outlined in the introduction to this chapter: does the term 'people' refer only to the entire population of a state or territory, or can it also include sub-state entities; what characteristics must groups possess before they can be characterised as a 'people'; which 'self' is the relevant 'people' for the purposes of self-determination – and can there be more than one,<sup>160</sup> and; do groups that otherwise satisfy the suggested requirements of a 'people' lose this status by virtue of the fact that they are also a minority within the state from which they are attempting to secede?

With regards to the first of these, it was suggested that the term 'peoples' does not refer only to the entire population of a state or territory but, alternatively, that it can also include sub-state entities. A similar conclusion was reached by the Supreme Court of Canada, in the *Re Secession of Quebec* case, in which it was stated that:

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<sup>159</sup> This argument remains relevant despite the obvious differences that exist between these cases – particularly, Montenegro, the process of secession for whom was regulated by the Constitutional Charter of Serbia and Montenegro, which was adopted on the 4 July, 2003, by both Councils of the Federal Assembly of the Federal Republic of Yugoslavia. With respect to Macedonia and Slovenia, some may argue that the Socialist Republic of Yugoslavia was in a state of dissolution and that, therefore, no precedent with regards to secession was created. It is submitted that this is, however, inaccurate. Several commentators acknowledge the 'incorrectness of a strict distinction between dissolution and secession': see *ibid* at 359 – Raic also cites the advisory opinions of the Arbitration Commission, and the proclamations of independence of both Croatia and Slovenia, in support of his position. In his opinion, the declarations of independence by these entities were unilateral secessions which, 'in combination with other factors, led to the dissolution of the SFRY': see *ibid* 359-61. See also the comments of Shaw: '[w]hether the federation dissolves into two or more states also brings into focus the doctrine of self-determination in the form of secession. Such a dissolution may be the result of an amicable and constitutional agreement or may occur pursuant to a forceful exercise of secession': Shaw, M.N., *International Law*, 2<sup>nd</sup> Ed., (Cambridge, Cambridge University Press, 1986) at 139.

<sup>160</sup> In other words, if many groups contained within a state satisfy the suggested requirements of a 'people', and there is some overlap between these groups, which one – or ones – possess the right to self-determine?

It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.<sup>161</sup>

It was, furthermore, suggested that the Kosovar Albanians possess both the *objective* and *subjective* characteristics that many – including this writer – propose that they must if they are to be considered a 'people' for the purposes of self-determination. In addition, it was suggested that many groups residing within a particular state can – as was the case in the former Yugoslavia – constitute a 'people', but that a majority, if not all, of these claims can be satisfied on an *internal*, as opposed to *external*, basis. Having said that, however, the point was also made that, when many 'peoples' reside within a given territory, it must be ascertained which possesses the right – should it ever arise – to externally self-determine, since the exercise of it by one group necessarily limits the ability of any other to do the same. Again, in this case, it was concluded that the group in possession of the right – should it exist<sup>162</sup> – was the Kosovar Albanians.

Finally, the argument was proffered that minorities – and therefore the Kosovar Albanians – do not forfeit their status as a 'people', by simple virtue of their also being characterised as a minority. This conclusion – which has, over time, been greatly debated – has obtained much 'scholarly support'<sup>163</sup> and, more importantly, it is suggested, reinforces the rights of minorities, and the parent state's obligation to govern for all, at the expense of oppressive and despotic regimes.

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<sup>161</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para124.

<sup>162</sup> For a discussion upon whether or not it does, see chapter 6.

<sup>163</sup> See Radan, P., above n28, 49 – citing, *inter alia*, Kiwanuka, R.N., 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', *American Journal of International Law*, Vol.82, 1988, at 92-4; Murswiek, D., 'The Issue of a Right to Secession – Reconsidered', in Tomuschat, C., (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff Publishers, 1993) at 37, Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl am Rhein: N P Engel, 1993) at 856-7; Brownlie, I., 'International Law at the Fiftieth Anniversary of the United Nations, General Course on Public International Law', *Recueil De Cour*, Vol.255, 1995 at 62; Wright, J., 'Minority Groups, Autonomy and Self-Determination', *Oxford Journal of Legal Studies*, Vol.19, 1999, at 625-8.

## CHAPTER 6

### THE SCOPE OF THE RIGHT TO SELF-DETERMINATION

Establishing that a group are a 'people', and therefore entitled to self-determination, is, quite clearly, only a preliminary conclusion. It must then be ascertained what exactly this right allows them to do. Does it confer upon them, for example, a right to cultural, economic, and social respect; autonomy; independence; a combination of these; or something entirely different? This question represents, if you like, the second of the two, separate but necessarily interrelated issues, identified in the previous chapter as the cornerstones of an analysis of self-determination as a concept of international law. They were: in whom does the right to self-determination vest, and what actions does it allow its holders to take?

Having concluded, in that chapter, upon the former of these matters, this chapter will address the latter and, in particular, whether or not the right confers upon the Kosovar Albanians<sup>1</sup> an ability to unilaterally secede? The submission will be made that it does, or, alternatively, that the recognition of Kosovo's independence – by a large bloc of the international community – crystallizes, or brings into being, a concomitant right. Before reaching this conclusion, however, the modal alternatives by which a 'people' in possession of the right to *external* self-determination are able to realise it, will be discussed, and it will be ascertained which 'peoples', in particular, are to be afforded this right to *external* – as opposed to *internal* – self-determination. A particular focus will be placed, in this discussion, upon whether this group includes 'peoples' that have – like the Kosovar Albanians – been severely discriminated against or oppressed by the central government of the parent state.

Finally, the concepts of recognition and effectivity will also be discussed, to ascertain whether or not Kosovo's declaration of independence was legal at the time that it was announced, creates an attendant 'right' for 'peoples' that subsequently find themselves in a similar situation, or is truly a *sui generis* case.

#### *Modes of Implementation*

United Nations General Assembly resolutions 1541 and 2625 each articulate the modes by which a 'people' can implement their right to external self-determination, in the rare circumstances that they should possess one. Although those contained within the former were specific to acts of de-colonisation,<sup>2</sup> those within the latter were 'placed in the

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<sup>1</sup> Who, it was concluded in chapter 5, constitute a 'people' for the purposes of self-determination.

<sup>2</sup> See Principle VI of the Annex, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, G.A.Res. 1541 (XV), Dec 15, 1960, which states that: 'A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- i) Emergence as a sovereign independent State;
- ii) Free association with an independent State; or

explicit context of ‘self-determination’,<sup>3</sup> to ensure their relevance in the post-colonial world. They elucidate that a ‘people’, in possession of the right to external self-determination, may realise it by either:

- i) The establishment of a sovereign and independent State;
- ii) The free association or integration with an independent State; or
- iii) The emergence into any other political status freely determined by a people.<sup>4</sup>

In the case of Kosovo, the ‘people’ have purported to exercise their right to external self-determination<sup>5</sup> by the ‘establishment of a sovereign and independent State.’ Their legal ability to do so has, however, been widely debated. The contention that has arisen has centred upon two particular issues; the fact that they are a sub-state entity – and a minority at that – and that their attempt at independence has been made in spite of deafening Serbian protests.

### *Secession and Consent*

When a ‘people’ representing the entire population of a state exercise their right to self-determination, they necessarily do so with the parent states’ consent – the two are one and the same. Similarly, a portion of a state can exercise its right to self-determination by any of the above mentioned means, without any hindrance, in the event that their actions are sanctioned by the parent state. In both of these situations, the changes flowing from the ‘peoples’ acts of external self-determination have been consented to by the parent state, and are therefore legally allowed. As such, borders can be changed, states created, dissolved, enlarged or reduced.

As alluded to, however, the situation is far more complicated when – as has occurred in this case – the ‘people’ seeking external self-determination has not been able to attain the parent states approval. Assuming, from the last chapter, that a portion of a states population can be a people, the question then becomes: under what circumstances can they exercise their right to self-determination on an external basis, and can they ever do so in the absence of the parent states approval?

### *Secession without Consent*

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iii) Integration with an independent State.’

<sup>3</sup> Pomerance, M., *Self-Determination in Law and Practice: The New Doctrine in the United Nations*, (The Hague: Martinus Nijhoff Publishers, 1982) at 24.

<sup>4</sup> See the provisions dealing with self-determination in *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*, G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25th Sess., Doc. A/RES/2625(XXV). The International Court of Justice endorsed these alternatives in the *Western Sahara* case, but emphasised that self-determination was concerned, at its core, with the means, as opposed to the ends, of its realisation. It also highlighted ‘the need to pay regard to the freely expressed will of peoples’: see *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p.12 at para.59 – see also paras.57-58 See also Pomerance, M., above n3, 24-5.

<sup>5</sup> For a discussion on whether or not this actually exists see below at pp118-136.



State practice and United Nations resolutions evidence the existence of two, relatively non-contentious situations in which a ‘people’ can exercise their right to self-determination on an external basis, regardless of their parent states wishes: when the ‘peoples’ are ‘colonial peoples’, or ‘subject to foreign occupation.’<sup>6</sup> These circumstances were first expounded, somewhat hazily, in General Assembly resolution 1514 (XV), and Article 1 of the respective *United Nations Covenants on Human Rights*.<sup>7</sup> They were, however, subsequently clarified in the *Declaration on Friendly Relations*,<sup>8</sup> which reiterated the need ‘to bring a speedy end to colonialism’, and confirmed that the ‘subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle’ of self-determination.<sup>9</sup>

More contentious, however, is the above mentioned<sup>10</sup> right of a ‘people’ to external self-determination in the aftermath of a campaign of discrimination and oppression against them by their central government. Under these circumstances, the government quite clearly fails to represent the whole people belonging to it – as required under the provisions of resolution 2625 (XXV) – and, as such, vicariously contravenes the principle of equal rights and self-determination upon which their right to territorial integrity is – according to the same resolution – contingent. In this situation, many suggest,<sup>11</sup> the ‘people’ have been denied their right to *internal* self-determination, and are therefore entitled, as a remedy of sorts, and as a ‘last resort’, to exercise it on an *external* basis.

It is this proposition upon which the Kosovar Albanians rely, and its often questioned status and development, as an accepted norm of international law, is therefore of crucial importance to their claim. In *Re Secession of Quebec*, the Supreme Court of Canada concluded that ‘it remains unclear whether this...proposition actually reflects an established international law standard’.<sup>12</sup> The following discussion will therefore question whether or not it does, by analysing the development of it, and the way in which international customary law is formed – particularly within the realm of self-determination.

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<sup>6</sup> See Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, (Great Britain: Cambridge University Press, 1995) at 90.

<sup>7</sup> For a discussion of these, and the relevant provisions, see above at pp23-24

<sup>8</sup> G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV) – for a discussion of this, see above at pp24-26.

<sup>9</sup> See the provisions regarding ‘The Principle of Equal Rights and Self-Determination of Peoples’.

<sup>10</sup> See the comments relating to n5, above.

<sup>11</sup> For a summary of these, see the discussion on the development of this ‘right’, below at pp118-136.

<sup>12</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para.135.

## HOW DOES CUSTOMARY INTERNATIONAL LAW DEVELOP?

Article 38.1(b) of the *Statute of the International Court of Justice*<sup>13</sup> includes, as a source of international law, ‘international custom, as evidence of a general practice accepted as law’.<sup>14</sup> Unlike treaties, which are the result of a ‘deliberate lawmaking process’,<sup>15</sup> customary rules are generally borne out of a more ‘unconscious and unintentional’ course of action<sup>16</sup> – generally taken by States ‘to safeguard some economic, social, or political interests’<sup>17</sup> – and may, therefore, be viewed as a by-product of States’ ‘conduct in international relations.’<sup>18</sup>

The two elements that generally fashion customary rules can, however, be derived from the wording of Article 38.1(b): an ‘established, widespread, and consistent practice on the part of States’ (*usus* or *diuturnitas*);<sup>19</sup> and a belief that this practice reflects, or is required under law (*opinio juris*), or is, alternatively, ‘required by social, economic, or political exigencies (*opinio necessitatis*).’<sup>20</sup>

### *The Evolution of Customary Rules on Self-Determination*

An interesting observation can, however, be made with regards to the evolution of customary international law concerning self-determination and, in particular, the respective roles that *usus* and *opinio juris* have played in it. As Cassese points out, the two – which, in combination, establish the parameters of the customary rules – have ‘not played the role that can be discerned in other – less political and more technical – areas of international relations.’<sup>21</sup> As he explains:

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<sup>13</sup> These sources were also listed in Article 38 of the *Statute of the Permanent Court of International Justice*, which corresponds to Article 38 of the *Statute of the International Court of Justice* as set out below – see n14.

<sup>14</sup> Article 38, in its entirety, provides that:

- 1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply,
  - (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
  - (b) International custom, as evidence of a general practice accepted as law;
  - (c) The general principles of law recognised by civilized nations;
  - (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.
- 2) This provisions shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

<sup>15</sup> Cassese, A., *International Law* (2<sup>nd</sup> ed.), (United States, Oxford University Press, 2005) at 156.

<sup>16</sup> Kelsen, H., *Principles of International Law*, (New York: Rinehart & Company, 1952) at 307-8.

<sup>17</sup> Cassese, A., above n15, 156.

<sup>18</sup> *Ibid.*

<sup>19</sup> Thirlway, H., ‘The Sources of International Law’, in Evans, M. (ed.), *International Law* (2<sup>nd</sup> ed.), (United States: Oxford University Press, 2006) at 122.

<sup>20</sup> Cassese, A., above n15, 156.

<sup>21</sup> Cassese, A., above n6, 69.

In these other areas, the first element that normally emerges is the repetition of conduct by an increasing number of States, accompanied at some stage by the belief that this conduct is not only dictated by practical (economic, military, political) reasons, but is also imposed by some sort of legal command. By contrast, in the case of self-determination – as in similar highly sensitive areas fraught with ideological and political dissension – the first push to the emergence of general standards has been given by the *political will* of the majority of Member States of the UN, which has then coalesced in the form of General Assembly resolutions.<sup>22</sup>

A similar sentiment has been echoed by the International Court of Justice on more than one occasion. In its decision in the *Republic of Nicaragua v The United States of America* case,<sup>23</sup> for example, the Court avowed that:

*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitudes of States towards certain General Assembly resolutions, and particularly resolution 2625 (XV)...The effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.<sup>24</sup>

The ICJ reiterated this position, a decade later, in an Advisory Opinion that they delivered on the *Legality of the threat or use of nuclear weapons*. In that decision, the Court noted that:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*...or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.<sup>25</sup>

As a result, it has been suggested, particular emphasis must be placed upon documents such as the *Declaration Granting Independence to Colonial Countries and Peoples* and the *Declaration on Friendly Relations*,<sup>26</sup> the latter of which, Cassese declares, was ‘instrumental in crystallizing a growing consensus concerning the extension of self-determination’ to areas other than those concerning non-self-governing peoples.<sup>27</sup>

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<sup>22</sup> Ibid. Cassese continues on to state that, although these resolutions do not constitute, in a strict sense, either *opinio juris* or *usus*, they ‘constitute the major factor triggering (a) the taking of a legal stand by many Member States of the UN (which thereby express their legal view on the matter) and (b) the gradual adoption by these States of attitudes consistent with the resolutions.’

<sup>23</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, ICJ Reports 1986.

<sup>24</sup> ICJ Reports 1986, 99-100, para. 188.

<sup>25</sup> ICJ Reports, 1996, para. 70.

<sup>26</sup> For a discussion of this Declaration, see above at pp21-23.

<sup>27</sup> Cassese, A., above n6, 70. Cassese also highlights the importance of the *Declaration Granting Independence to Colonial Countries and Peoples* – for a discussion of this, see above at pp21-23 – in transforming the ‘principle’ of self-determination into a legal right.

So, with this distinction in mind, the question must then be considered: does customary international law permit the unilateral secession of ethnic minorities and, if so, under what circumstances does it do so? By reference to the practice of States, judicial decisions and opinions, instruments of international law, doctrine and legal writings, the following section will attempt to address this question.

#### JUDICIAL DECISIONS AND OPINIONS

Support for a qualified right of secession for oppressed or discriminated against ‘peoples’ can be found in a number of decisions which, although spanning the better part of a century, have become more frequent and prominent in recent times.

The first of these were, respectively, given by the Commission of Jurists and Commission of Rapporteurs in the *Aaland Islands* case.<sup>28</sup> The two concluded that no general right of secession existed in favour of groups – including minorities – which constitute a fraction of a States population, however the Commission of Rapporteurs hinted – with some vision – that one may if the party attempting to invoke it had been oppressed. This, they suggested, would be a relevant factor in the determination of a minority’s ability to secede,<sup>29</sup> as a ‘last resort when the state lacks either the will or the power to enact and apply just and effective guarantees’ with regards to the minorities religious, linguistic, and social freedoms<sup>30</sup>

As already discussed, the issue then lay dormant – outside of decolonisation – for the best part of the ensuing half-century, before arising again as East Pakistan became Bangladesh. There exists, however, one crucial difference between these events and those that occurred in the Aaland Islands; the Aaland Islanders had not been oppressed. The East Pakistanis, in contrast, suffered immeasurably at the hands of the West Pakistani army. Precipitating these events was the obtainment, by the Awami League – a nationalist organisation based in East Pakistan – of an outright majority in the Pakistani parliament in the elections of 1971. Unsurprisingly, this ‘provoked a crisis’ within that country and, in response, its President Yahya Khan ‘indefinitely postponed’ the convening of the Assembly.<sup>31</sup> Violent demonstrations ensued in East Pakistan, and the West Pakistan centric military responded with ‘a policy of widespread and brutal suppression’ throughout that territory.<sup>32</sup> As a result, on the 10 April 1971, the Awami

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<sup>28</sup> For a summary and discussion of this case, and the decisions of the respective Commissions, see above at pp16-19.

<sup>29</sup> Musgrave, T., *Self Determination and National Minorities*, (Great Britain: Oxford University Press, 1997) at 36 – commenting upon: The Aaland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 28 – see also pp16-19 for further discussion on this point.

<sup>30</sup> The Aaland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) at 28 – see also pp16-19 for further discussion on this point.

<sup>31</sup> Musgrave, T., *Self Determination and National Minorities*, (Great Britain: Oxford University Press, 1997) at 190.

<sup>32</sup> *Ibid.*

League – now exiled in India – declared the independence of ‘Bangladesh’, which was – upon the signing of a peace accord between India and Pakistan at the conclusion of the Bangladesh Liberation War – widely recognised by the international community and accepted into the United Nations.<sup>33</sup>

Underpinning the international community’s eventual acceptance of Bangladesh’s secession, Buchheit suggests, was the ‘enormous savagery of the West Pakistani army’s conduct’.<sup>34</sup> The International Commission of Jurists made similar aspersions in their 1972 study on *The Events in East Pakistan*, reiterating that a states territorial integrity is – although afforded a presumption of primacy – ‘subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction.’<sup>35</sup> If, they submitted, one of their constituent peoples ‘is denied equal rights and is discriminated against...their full right of self-determination will revive.’<sup>36</sup>

### *Decisions and Opinions in the Post-Cold War Era*

The changes that occurred in global relations upon the cessation of the Cold War brought the issue, once again, to the forefront of international law. One example, in which mention was made of the emerging right, and its evolution, was the judicial decision of the African Commission on Human and Peoples’ Rights in *Katangese Peoples’ Congress v Zaire*.<sup>37</sup> The Commission affirmed that self-determination applied in this case, but also emphasised the diversity of modes by which it can be realised; including ‘independence, self-government, federalism, confederalism, unitarism, or any other form of relations that accords with the wishes of the people, but fully cognizant of other recognised principles such as sovereignty and territorial integrity.’<sup>38</sup> More importantly, however, they also endorsed – albeit in a backhanded fashion – the argument proposed in this chapter, when they opined that:

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<sup>33</sup> Under GA Resolution 3203 (XXIX) of 17 September, 1974 – see *ibid* 191.

<sup>34</sup> Buchheit, L., *Secession: The Legitimacy of Self-Determination*, (London: Yale University Press, 1978) at 212-3 – Buchheit suggests that the ‘Pakistani excesses...added the final element to an otherwise good case for secessionist legitimacy’ and overrode, in the in international community’s mind, ‘other considerations such as the prospects for the economic of the new entity...or the presence of “trapped minorities” within the seceding province’ – at 213.

<sup>35</sup> International Commission of Jurists, ‘East Pakistan Staff Study’, *The Review*, no. 8, 1972, at 46.

<sup>36</sup> *Ibid*.

<sup>37</sup> African Commission on Human and Peoples’ Rights, Communication 75/92, *Katangese Peoples’ Congress v Zaire*; Decision taken at its 16th Session, Banjul, The Gambia, 1994 – this case resulted from a communication submitted by the President of the Katangese Peoples’ Congress, requesting that the Commission recognise the Katangese Peoples’ Congress as a liberation movement, and the right of the Katangese people to achieve independence from Zaire.

<sup>38</sup> African Commission on Human and Peoples’ Rights, Communication 75/92, *Katangese Peoples’ Congress v Zaire*; Decision taken at its 16th Session, Banjul, The Gambia, 1994 at para. 26.

The Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>39</sup>

Implicit in this statement is the suggestion that a states territorial integrity may be called into question, and a people afforded the right to secession, when the former perpetrates proven violations of human rights against the latter, or denies them the right to participate in government. A similar sentiment underpinned the decision of the European Court of Human Rights in the 1996 case of *Loizidou v Turkey*.<sup>40</sup> In that judgment, the Court again observed that:

Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.<sup>41</sup>

Most recently, the Supreme Court of Canada also passed comment on the issue in its judgment in the *Re Secession of Quebec* case. Having established that minorities could, indeed, constitute a people,<sup>42</sup> the Court went on to assess the scope of this right. After outlining the two 'clear cases' in which international law allowed the right to be exercised externally – colonial peoples under the rule of an 'imperial' power, and peoples 'subject to alien subjugation, domination or exploitation outside a colonial context',<sup>43</sup> – the Court noted a third circumstance under which 'a number of commentators' have asserted it may also arise:

Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.

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<sup>39</sup> African Commission on Human and Peoples' Rights, Communication 75/92, *Katangese Peoples' Congress v Zaire*; Decision taken at its 16th Session, Banjul, The Gambia, 1994 at paras. 27-28.

<sup>40</sup> *Loizidou v Turkey* (Merits), European Court of Human Rights, 18 December 1996 – in this case, Mrs. Loizidou complained about her arrest and detention by Turkish soldiers, and the refusal of access to her property.

<sup>41</sup> See the concurring opinion of Judge Wildhaber, joined by Judge Ryssdal in *Loizidou v Turkey* (Merits), European Court of Human Rights, 18 December 1996, (1997) 18 *Human Rights Law Journal* 50 at 59.

<sup>42</sup> See n161, above.

<sup>43</sup> See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at paras.132-133.

The *Vienna Declaration* requirement that governments represent ‘the whole people belonging to the territory without distinction of any kind’ adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.<sup>44</sup>

‘Clearly’, the Court continued, ‘such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated.’<sup>45</sup> Summarising its findings, the Court concluded that:

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.<sup>46</sup>

As can be seen, these decisions all endorse, to a greater or lesser extent, the sentiment that, while the parent states territorial integrity retains primacy, it may be called into question and overridden by a people’s right to self-determination, in the event that they have been oppressed, discriminated against, and/or subjected to human rights violations and – also, and as a result – therefore denied their right to internal self-determination.

## INSTRUMENTS OF INTERNATIONAL LAW

A cursory overview of those instruments of international law most pertinent to the establishment and evolution of the right of self-determination was given in Chapter 1. This section will reiterate, however, briefly and by reference to that chapter, those that have been most influential in extending the right beyond the realm of decolonisation and, arguably, into that of oppression and discrimination. It must be prefaced, though, with the observation that unilateral secession is neither *explicitly* permitted nor prohibited in these instruments. As such, Crawford has suggested, ‘secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.’<sup>47</sup> Nevertheless, some implicit guidance can be garnered from, in particular, the *Declaration on Friendly Relations*,<sup>48</sup> the *Vienna Declaration and*

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<sup>44</sup> See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at paras.134.

<sup>45</sup> See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at paras.135 – see also the discussion below, at pp129-130, regarding the alternative – but similar – argument that discriminated against or oppressed peoples residing within a sovereign state should be afforded the right to secession due to their ‘quasi-colonial’ status.

<sup>46</sup> See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at paras.138 – it should be noted, however, that the Court did not feel the need to conclude upon the status of this ‘third circumstance’, as it was ‘manifestly inapplicable to Quebec under existing conditions.’

<sup>47</sup> Crawford, J., *The Creation of States in International Law* (2<sup>nd</sup> Ed.), (Oxford: Clarendon Press, 2006) at 390.

<sup>48</sup> G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV).

*Programme of Action*,<sup>49</sup> and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*.<sup>50</sup> As a result of these instruments, and the state practice and commentary that has occurred in that period anterior to their adoption – and in opposition to Crawford’s submission – this thesis proposes that secession may – under those circumstances mentioned below<sup>51</sup> – be legal, as a result of the evolution, and existence, of what is commonly referred to in academic writings as a ‘limited’, ‘qualified’, or ‘remedial’ right of secession.

The *Declaration on Friendly Relations* was clearly the most important and ground-breaking of these – it has been referred to as ‘the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity’<sup>52</sup> – and will therefore be the focus of much of this section. The relevant provisions of the latter two instruments – the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* – effectively echoed those contained within the earlier Declaration, with the exception of one significant phrase;<sup>53</sup> the consequence of which cannot – for those reasons discussed below<sup>54</sup> – be underestimated.

Paragraph 7 of Principle V of the *Declaration on Friendly Relations* – also referred to as the ‘saving clause’ – states, after reaffirming the right of all peoples to self-determination, that:

Nothing in the foregoing paragraph shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>55</sup>

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<sup>49</sup> A/Conf. 157/24. 25 June 1993.

<sup>50</sup> G.A. res. 50/6, 49 U.N. GAOR Supp. (no. 49) at 13, U.N. Doc. A/RES/50/49 (1995) – for a discussion of this, and the above two instruments, see above at pp24-28.

<sup>51</sup> See p130-131 below.

<sup>52</sup> International Commission of Jurists, *East Pakistan Staff Study*, International Commission of Jurists Review, Vol. 8, 1972, 23 at 44.

<sup>53</sup> They changed the phrase ‘without distinction as to race, creed or colour’ at the end of the Saving Clause – see below at pp124-125 – to ‘without distinction of any kind’, arguably broadening the scope of the right – if one exists – to include groups defined by characteristics other than race and religion. This is of paramount importance for the Kosovar Albanians who, most would agree, are an ethnically defined group.

<sup>54</sup> See the discussion at pp124-125.

<sup>55</sup> Emphasis added – see Para 7 of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter*. G.A.Res. 2625 (XXV), Oct. 24, 1970, U.N. General Assembly, 25<sup>th</sup> Sess., Doc. A/RES/2625(XXV). It also required that ‘every state...refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country’ – for a discussion of the application of this principle, see below at pp137-138 (with regards to the intervention of, and assistance offered by, third states to secessionist movements), and pp136-137 (with regards to the recognition of the prospective state by third states).



Again, this clause does not explicitly permit secession, and the suggestion could therefore be made that it remains neutral upon the legality of such an act. Conversely, however, the proposal could be made – as it is in this thesis – that, upon a reverse reading of it, the clause quite clearly, albeit implicitly, endorses the unilateral secession of particular groups under certain – and, history would suggest, rare – circumstances. Cassese is one that endorses – although somewhat warily – this approach, when he suggests that a:

close analysis of both the text of the Declaration and the preparatory work warrants the contention that secession is not ruled out but may be permitted only when very stringent requirements have been met.<sup>56</sup>

These ‘stringent requirements’, alluded to by Cassese, will – it has been variously suggested – be satisfied by either a gross and systematic denial of the claimant people’s fundamental rights, or a refusal – on the part of the central authorities – to grant them participatory rights.<sup>57</sup> Under these circumstances, it is submitted – and so long as it is evident that a peaceful settlement cannot be reached within the existing State framework – secession becomes a viable option.<sup>58</sup>

Support for this proposition – that the saving clause does, indeed, legitimate secession – can also be found in the discussions – conducted by the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation Among States – leading to the adoption of the Declaration.<sup>59</sup> Two ‘diametrically opposed positions’ became evident throughout the course of these proceedings.<sup>60</sup> Some states, for example, contested that minority-peoples were not entitled to secede as a result of the right of self-determination,<sup>61</sup> whereas others<sup>62</sup> preferred a far more liberal interpretation, under which

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<sup>56</sup> Cassese, A., above n6, 118 – he goes on to state (at 118-119) that: ‘The basis for this conclusion is that in the ‘saving clause’ under discussion, the reference to the requirement of not disrupting the territorial integrity of States was placed at the beginning, in order to underscore that territorial integrity should be the paramount value for States to respect. However, since the possibility of impairment is *not totally excluded*, it is logically admitted.’ Cassese further supports this conclusion by reference to comments made by the representative of South Africa – in the Sixth Committee of the General Assembly after the Declaration had been adopted – regarding the risk that the Declaration posed to the maintenance of states territorial integrity. His assertions went unchallenged, allowing the inference to be made that these states agreed that secession was allowed for.

<sup>57</sup> See, for example, *ibid* 119-20; International Commission of Jurists, *East Pakistan Staff Study*, International Commission of Jurists Review, Vol. 8, 1972, 23 at 45-6.

<sup>58</sup> See, for example, Cassese, A., above n6, 119-20; International Commission of Jurists, *East Pakistan Staff Study*, International Commission of Jurists Review, Vol. 8, 1972, 23 at 45-6.

<sup>59</sup> These sessions were held between 1966 and 1970.

<sup>60</sup> Raič, D., *Statehood and the Law of Self-Determination*, (The Hague: Kluwer Law International, 2002) at 319

<sup>61</sup> The representative of the United Kingdom, for example, believed that the language of the Charter, as it pertained to the principle of equal rights and self-determination, did not contain anything that would ‘support the claim that part of a sovereign independent State was entitled to secede.’ – see UN Doc. A/AC.125/SR.69, 4 December, 1967, at 19. It should be noted, however, that the United Kingdom were also of the opinion that, if a right to self-determination did, indeed, exists – they were still doubtful of this in the 1960’s – then it could be ‘held to authorize the

a right of secession would exist at all times.<sup>63</sup> Neither proposition was, however, sufficiently popular to be included in the Declaration and, as a result, a compromise of sorts was proposed, under which secession became permissible if, in the ‘opinion of the world community’, a certain State had failed to respect the ‘basic human rights and fundamental freedoms...*vis-à-vis* one of the peoples living within its territory’.<sup>64</sup> ‘So long as adequate provision was made against abuse’, it was suggested, this would free the mentioned people from the shackles of discrimination and, therefore, ‘serve the cause of justice.’<sup>65</sup>

In line with this proposition, and in light of the various other proposals made in the Special Committee, the reasonable conclusion would appear to be that the *Declaration on Friendly Relations* engenders ‘a *qualified* right of secession within the framework of the legality of inter-State conduct.’<sup>66</sup> ‘In effect’, Raič concludes, ‘this means that the justifiability of any attempt at secession by a people is made dependant on the legitimacy and conduct of the government of the parent State’.<sup>67</sup>

### *Subsequent Instruments*

As pointed out in the previous chapter, however, the *Declaration on Friendly Relations* only requires that state governments not discriminate with respect to ‘race, creed or colour’. Importantly then, two subsequent documents – the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* – reiterate the provisions of the *Declaration on Friendly Relations*, but make one – apparently minor, but consequentially significant – amendment.

Both of these instruments, again, reaffirmed the right of all peoples to self-determination and, in almost identical words to the *Declaration on Friendly Relations*, placed a caveat of sorts on their statement. It read as follows:

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

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secession of a province or other part of the territory of a sovereign and independent state’ – see UN Doc. A/5725/Add. 4, 22 September, 1964, at 74.

<sup>62</sup> ‘Most notably those of the communist bloc’ – see Raič, D., above n60, 320.

<sup>63</sup> Ibid – Raič sites, as examples, UN Docs. A/AC.125/SR.106, 5 November, 1969, at 62 (Soviet Union), and A/AC.125/SR.40, 27 July, 1966, at 10 (Yugoslavia).

<sup>64</sup> It was most elaborately explained by the representative of the Netherlands – see UN Doc. A/AC.125/SR.107, 5 November, 1969, at 85-6 – however support for it can be found in the wording of the submissions made by the representatives of Kenya – see UN Doc. A/AC.125/SR.69, 4 December, 1967, at 22-3 – and the United States – see UN Doc. A/AC.125/SR.44, 27 July, 1966, at para. 12. For a discussion of these, see *ibid* 320 (including note 52).

<sup>65</sup> See the comments made by the representative of the Netherlands in UN Doc. A/AC.125/SR.107, 5 November, 1969, at 85-6.

<sup>66</sup> Raič, D., above n60, 320-1.

<sup>67</sup> Ibid 321.

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*.<sup>68</sup>

As stated, the provisions of these two, subsequent documents, and that contained within the *Declaration on Friendly Relations* are almost identical, with the exception of the concluding phrase. It is suggested that this amendment – which replaces the qualification ‘as to race, creed or colour’ with ‘of any kind’ – removes whatever limitations arose out of the *Declaration on Friendly Relations* with regards to the characteristics that a group must possess before being afforded the benefit of its contents and that, as a result, its principles now apply to peoples ‘of any kind’. As such, it is submitted, any people – also in possession of the already discussed requirements of statehood<sup>69</sup> – would be permitted, under these provisions, to declare their independence when the government of their parent state fails to satisfy the requirement contained within them that they conduct themselves ‘in compliance with the principle of equal rights and self-determination of peoples’ by ‘representing the whole people belonging to the territory without distinction of any kind.’

#### *Helsinki Final Act*

Finally, those opposing the legality of Kosovo’s declaration often also refer to the provisions of the *Helsinki Final Act*<sup>70</sup> and, in particular, Principle IV – entitled ‘Territorial integrity of States’ – which asserts that the participating States ‘will respect the territorial integrity of each of the participating States’, and will, accordingly, ‘refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity...of any participating State’. In addition, however, the Act also requires, under Article VIII – which pertains to the ‘Equal rights and self-determination of peoples’ – that these same States ‘respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.’

Again, therefore, and as in so many other international instruments concerning these ostensibly incompatible rights, an apparent conflict exists. Employing the approach discussed throughout this thesis, however, this may not be the case. So long as a State is in possession of a non-discriminatory government, and therefore respects its peoples right to self-determination, third states are able to concurrently satisfy their obligations under both of these principles. It is only when one does not, that a potential conflict is encountered and – in accordance with the wording of the respective provisions – the purposes and principles of the UN Charter, and the relevant norms of international law, must be considered.

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<sup>68</sup> Emphasis added. See Article 1, *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, G.A. res. 50/6, 49 U.N. GAOR Supp. (no. 49) at 13, U.N. Doc. A/RES/50/49 (1995); Article 2, *Vienna Declaration and Programme of Action*, A/Conf. 157/24. 25 June 1993.

<sup>69</sup> See above at chapter 3.

<sup>70</sup> *Final Act of the Conference on Security and Co-operation in Europe*, 1 August 1975, accessed at [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) (last accessed 8 July 2008).

When considering the purposes and principles of the UN Charter, however, one must bear in mind the reticence of its framers – in light of the situation as it existed at the time, and for fear of the ‘undue rigidity’ that may have ensued – to elucidate, with any degree of clarity, many of the terms and provisions within it; as Quane opines, ‘the ambiguity surrounding the meaning of certain terms was deliberate to enable the Charter to adapt to changing conditions.’<sup>71</sup> As a result of this, the references made in the Charter to self-determination, and territorial integrity, were of a relatively vague nature and, as such, it is proposed, the purposes and principles of the Charter are broad enough to encompass the evolution of them – and also, therefore, the relationship that exists between them – which has occurred in the intervening period.

Such an argument is, it is further submitted, also supported by the requirement – under Article VIII of the *Helsinki Final Act* – that the ‘relevant norms of international law, including those relating to territorial integrity of States’, be considered. As is the subject of this chapter, the submission is made that one of these ‘norms’ would remove a states ability to rely upon its territorial integrity – and the concomitant requirement that third states not take any action directed at dismembering or impairing it – when, as a result of its oppression, discrimination or abuse of them, it fails to observe any of its resident peoples right to internal self-determination. As a result, and under these circumstances, it is suggested, those secessionist groups and third states are able to take actions in support of secession that are in conformity – and therefore not inconsistent – with the ‘purposes and principles’ of the UN Charter, and the ‘relevant norms of international law’.

Additional arguments could also be proffered that the *Helsinki Final Act* – along with most other international instruments – only applies to ‘international actors’ and that it is, therefore, of no relevance to the actions taken by minorities *within* a state. Whilst acknowledging the accuracy of this proposition, the point must also be made that this does not ‘immunise’ the actions of third states – including intervention and, arguably, recognition<sup>72</sup> – which remain under the regulation of such instruments. As such, it is important to ascertain whether or not these states are able, under international law, to take any actions and, if so, which. In general terms, and upon the above logic, it is suggested that third states can – in addition to the group itself – take actions that would dismember or impair the parent states territorial integrity – so long as they are taken in accordance with the remaining requirements of international law – in those circumstances under which, for the reasons outlined in this chapter, a certain people is denied its right to internal self-determination.<sup>73</sup>

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<sup>71</sup> Quane, H., ‘The United Nations and the Evolving Right to Self-Determination’, *International and Comparative Law Quarterly*, Vol. 47, 1998, 537 at 542.

<sup>72</sup> Whether recognition constitutes intervention depends upon whether one accepts the ‘constitutive’ or ‘declaratory’ theory – see below at pp136-137.

<sup>73</sup> The act of recognition, for example, is dealt with in more detail later in this chapter – see pp136-137 – and arguments pertaining to the legal use of force will almost inevitably materialise when third states employ it in support of the secessionists’ aspirations. Irrespective of whether or not the supported ‘people’ possess a right to external self-determination, these actions must still be taken in accordance with the remaining requirements of international law.

## DOCTRINE

A large, and ever growing, number of academic commentators<sup>74</sup> have also recognised and endorsed – to various degrees – the evolution and existence of a ‘limited’ or ‘conditional’ right to external self-determination. Hugo Grotius was one of the first to do so, when he mused that a portion of a State’s population could not withdraw from it unilaterally, ‘unless it is evident that it cannot save itself in any other way.’<sup>75</sup> Many have, since then, articulated similar arguments, based predominantly upon one or many of the following bases: survival – as per Grotius – discrimination, oppression, and/or abuse. It is not necessary to explore each of these in great depth for the present purposes; a cursory overview of the most important, and the themes that have generally underpinned their creation and evolution – particularly in recent years – will suffice.

A majority of the arguments proffered in recent years in favour of an oppressed or discriminated against minority’s right to secede have been made by reference to the provisions of the *Declaration on Friendly Relations* and, in particular, a ‘reverse reading’ of Paragraph 7 of Principle 5 – also referred to as the ‘saving clause’.<sup>76</sup> The ‘very essence of Paragraph 7’, Radan and Pavković point out:

is that a state’s territorial integrity is assured only under certain circumstances. These conditions require that state to conduct itself in a manner that does not result in certain groups within it being subjected to particular forms of discrimination. If groups are subjected to such discrimination they are entitled to secede.<sup>77</sup>

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<sup>74</sup> Although far from exhaustive, see, for example: Orentlicher, D., ‘The Imprint of Kosovo on International Law’, *ILSA Journal of International and Comparative Law*, Vol. 6, (2000), 541 at 541; Crawford, J., ‘The Right of Self-Determination in International Law: Its Development and Future’, in Alston, P. (Ed.), *Peoples Rights* (Oxford: Oxford University Press, 2001) at 64-5; Epps, V., ‘Self-Determination After Kosovo and East Timor’, *ILSA Journal of International and Comparative Law*, Vol.6, (2000), 445 at 449; Knop, K., *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 74; Kumbaro, D., ‘The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention’, 16 June 2001, accessed at <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> (last accessed 11 April 2008) at 29; Nanda, V.P., ‘Self-Determination and Secession Under International Law’, *Denver Journal of International Law and Policy*, Vol.29, No.4, (2001), 305 at 310; Cassese, A., above n6, 118; McCorquodale, R., ‘Self-Determination: A Human Rights Approach’, *International and Comparative Law Quarterly*, Vol.43, Issue 4, (1994), 857 at 879-80; Kamenu, O.S., ‘Secession and the Right of Self-Determination: An OAU Dilemma’, (1974) 12 *Journal of Modern African Studies*, 355 at 360-2; Orentlicher, D., ‘Separation Anxiety: international responses to ethno-separatist claims’, (1998), 23 *Yale Journal of International Law*, 1 at 48-50; Suzuki, E., ‘Self-Determination and World Public Order: Community Response to Territorial Separation’, (1976), 16 *Virginia Journal of International Law*, 779 at 807; Nanda, V.P., ‘Self-Determination Under International Law: Validity of Claims to Secede’, (1981), 13 *Case Western Reserve Journal of International Law*, 257 at 269-70, 277-9.

<sup>75</sup> Grotius, H., *De Jure Bellis Ac Pacis Libri Tres* (1646), II, c. VI, para. 4.

<sup>76</sup> For a discussion of this, see above at pp24-26, and pp121-124.

<sup>77</sup> Pavković, A., Radan, P., *Creating New States: Theory and Practice of Secession* (England: Ashgate, 2007) at 235.

Buchheit also staunchly supports a ‘peoples’ right to ‘remedial’ secession. He cites the ability of ‘the totality of the citizens of a State’ to overthrow their government ‘when it becomes insupportable’, and suggests that minorities should – similarly, and upon the following logic – be capable of removing themselves ‘from a regime which is particularly burdensome to them’:<sup>78</sup>

When the tyranny is universal, one speaks of the government being attacked; when the oppression is discriminatory, it is the State – meaning the territorial integrity of the State – which suffers the assault. In both instances, the secessionist would argue, the underlying principle is the same. This image of the State as a privileged but not unassailable entity has apparently now been accepted by the international community.<sup>79</sup>

As such, he suggests, the international community has accepted that, ‘in cases of extreme oppression’, secession remains a viable option.<sup>80</sup> More specifically, he proposes, a scheme exists under which:

...corresponding to the various degrees of oppression inflicted upon a particular group by its governing State, international law recognises a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the *ultimate remedy*. At a certain point, the severity of a State’s treatment of its minorities becomes a matter of international concern... [which] may finally involve an international legitimization of a right to secessionist self-determination as a self-help remedy by the aggrieved group (which seems to have been the approach of the General Assembly in its 1970 declaration).<sup>81</sup>

As already mentioned, this approach – or slight variations of it<sup>82</sup> – has been widely accepted within the international legal community.<sup>83</sup> The general proposition

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<sup>78</sup> Buchheit, L., above n34, 220-21 – Buchheit states that: ‘The nature of modern governmental authority is that it can, in principle, be altered or dissolved if it becomes an insupportable burden on those governed. Recognizing the prevalence of these sentiments, the law of nations has carefully avoided being put in a position of guaranteeing the integrity of incumbent governors against the revolutionary demands of their own people. A ruler might be entitled (under the broad legal doctrine of noninterference) not to have his position subverted by other States for their own ends, but he must manage his relationship with his own constituents without the support of international law. From this sound tradition, the secessionist must make one crucial leap. If international law makes no objection to the totality of the citizens of a State overthrowing their government when it becomes insupportable, why should it object to a segment of the population attempting to remove themselves from a regime which is particularly burdensome to them? Indeed, because the minority has no right to replace the government of the whole State (which might, after all, be acceptable to the majority), it must have recourse to neutralizing only that portion of the government’s power directed at them – and that may entail separating themselves physically from the State.’

<sup>79</sup> Ibid 221.

<sup>80</sup> Ibid 222.

<sup>81</sup> Ibid.

<sup>82</sup> See, for example, the discussion below – at pp129-130 – of this right as an extension of the right of colonial peoples to externally self determine.

<sup>83</sup> See n74 above.

underpinning the majority of them is that ‘there may well be situations in which a minority people may have a right to secession tenable in law and politics due to their demonstrable inability to achieve established rights of self-determination guaranteed by law’,<sup>84</sup> however some have articulated it in a slightly different – and, some would suggest, less sound<sup>85</sup> – fashion than those commentators above. Interestingly, for example, some justify their doing so on the basis that the oppression and discrimination committed by the central government creates a situation that could be referred to as ‘internal colonisation’. Whilst submitting that such situations are ‘very much the exception’, Crawford – for example – contends that:

...there remains the possibility that a particular people may be treated systematically by the central government in such a way as to become, in effect, non-self-governing with respect to the rest of the state. By analogy with GA Resolution 1541 (XV), Principle IV, if they are arbitrarily placed in a position or status of subordination, the question of external self-determination is surely raised. Measures grossly discriminating against the people of a territory on grounds of their ethnic origin or cultural distinctiveness may effectively single out and thereby define the territory concerned as non-self-governing according to existing criteria, reinforcing or even constituting the case for external self-determination by the people of that territory.<sup>86</sup>

A similar notion was expounded by Héctor Gros Espiell – the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities – in a report submitted by him regarding the right of peoples to self-determination. The report focused predominantly upon the right as it pertained to those under colonial and alien domination, however he did mention – briefly, and in passing – that it may also apply to those seeking secession from existing States. If, he suggested, ‘beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated.’<sup>87</sup> The *Declaration on Friendly Relations*, he pointed out, ‘uses particularly apt language in spelling out this idea’.<sup>88</sup>

Further support for this notion – which resembles very closely that of the ‘qualified’ right of secession for severely oppressed peoples – can be found in the comments of Franck, who submits that, when a minority

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<sup>84</sup> Franck, T.M., ‘Opinion Directed at Question 2 of the Reference’, in Bayefsky, A.F., *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000) at 79, para. 2.13.

<sup>85</sup> See, for example, the comments of Raič, regarding the ‘artificiality’ of some of these approaches, in Raič, D., above n60, 328.

<sup>86</sup> Crawford, J., ‘The Right of Self-Determination in International Law: Its Development and Future’, in Alston, P., (ed.), *Peoples Rights*, (Oxford: Oxford University Press, 2001) at 65-5.

<sup>87</sup> Gros Espiell, H., *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN doc. E/CN.4/Sub.2/405/Rev.1, 1980, p.10, para.60.

<sup>88</sup> Ibid.

within a sovereign state – especially if it occupies a discrete territory within that state – [is] persistently and egregiously denied political and social equality and the opportunity to retain its cultural identity...it is conceivable that international law will define such repression...as coming within a somewhat stretched definition of colonialism. Such repression, even by an independent state not normally thought to be ‘imperial’ would then give rise to a right of ‘decolonization’.<sup>89</sup>

Franck did, however – during his tenure as *amicus curiae* in *Re Secession of Quebec* – broaden his approach somewhat, acknowledging that the right of all peoples to self-determination – as conferred under Article 1 of the respective *United Nations Covenants on Human Rights*<sup>90</sup> – ‘although not normally tantamount to a right to secession’, may afford, ‘in special circumstances of oppression...a remedial right to secede with the help of the international system.’<sup>91</sup>

#### THE STATUS AND ELEMENTS OF THE PROPOSED CUSTOMARY RULE

As such, it is suggested, support for a ‘remedial’ or ‘qualified’ right of secession is not only substantial, but also increasingly prevalent. Its existence has apparently been accepted, to various degrees, in each of the above mentioned areas – judicial decisions and opinions, instruments of international law, and doctrine – and, it is further submitted, its elucidation in each of these has become gradually more forthright and direct. In light of this, Raič suggests, there is ‘general agreement on the constitutive parameters’ of the right, which can – in a nutshell – be abridged into the following synopsis:

(a) there must be a people which, though forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within an identifiable part of the territory of that State;

(b) the people in question must have suffered grievous wrongs at the hands of the parent State from which it wishes to secede (*carence de souveraineté*), consisting of either

(i) a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination), and/or

(ii) serious and widespread violations of the fundamental human rights of the members of that people; and

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<sup>89</sup> Franck, T.M., ‘Postmodern Tribalism and the Right to Secession’, in Brölmann, C., Lefeber, R. & Zieck, M., (Eds.), *Peoples and Minorities in International Law* (The Hague: Martinus Nijhoff, 1993), 3 at 13-14.

<sup>90</sup> For a discussion of these, see above at pp23-24.

<sup>91</sup> See Franck, T.M., ‘Opinion Directed at Question 2 of the Reference’, in Bayefsky, A.F., above n84, 79, para. 2.13 – Franck points out, as an example, the rights conferred upon ethnic, religious or linguistic minorities under Article 27 of the *Covenant on Civil and Political Rights*, and the fact that, when ‘these rights are grossly denied, the international legal and political system may actually intervene to help the oppressed population achieve its legal rights through secession or an enforced change in their governance.’



(c) there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.<sup>92</sup>

One aspect of this ‘summary’ which has not yet been stressed, but which is of the utmost importance, is the requirement that secession only be considered as a ‘last resort’ – or, in other words, when there exists no other ‘realistic and effective’ alternatives.<sup>93</sup> This element is crucial, not only in assessing the legitimacy of those claims made to independence, but also as a safeguard against the ‘premature’ recognition of prospective states when other alternatives – under which the territorial integrity of the parent state could be maintained – remain viable, and also, therefore, the threat of ‘infinite secession’ – fears of which were discussed above.<sup>94</sup>

### *State Practice*

The final, equally crucial, phase of this analysis is to determine whether or not state practice supports or jettisons the existence of this right. As was mentioned at the outset, the presence of *opinio juris* or state practice is relatively meaningless in the absence of the other – the two are contemporaneously necessary in the creation of a rule of customary international law. Having said that, however, and before the landscape of state practice is assessed, it is important to point out, once again, the slightly varied role that the two play in the formation of customary law in the realm of self-determination<sup>95</sup> – as one commentator has pointed out, in ‘the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule.’<sup>96</sup>

With this in mind, the following section will seek to demonstrate that – through both recognition *and* non-recognition – the practice of states can, in many cases, be characterised as conforming with the above discussed *opinio juris*, and that, in light of the manner in which customary law in this area is formed, the relationship between the two is arguably sufficient to have established the above mentioned rule permitting secession, as a last resort, in the wake of serious violations of a peoples fundamental human rights, or their right to internal self-determination. In doing so, however, and as a result of the

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<sup>92</sup> See Raič, D., above n60, 332.

<sup>93</sup> Nanda has also emphasised the importance of this requirement, reiterating ‘that claims to secession must only be considered as a last resort when it is clear that ethnic groups cannot live together and it is equally clear that the group claiming secession makes a compelling case because of its perceived deprivation of human rights within the larger community’ – see Nanda, V., ‘Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era’, *International Law Students Association Journal of International and Comparative Law*, Vol. 3, (1997), 443 at 452.

<sup>94</sup> See, for example, the comments cited above at p85.

<sup>95</sup> For a discussion of this, see above at pp116-118.

<sup>96</sup> Kirgis, Jr., F.L., ‘The Degrees of Self-Determination in the United Nations Era’, *The American Journal of International Law*, Vol. 88, No. 2 (1994), 304 at 306. See also Kirgis, Jr., F.L., ‘Custom on a Sliding Scale’, *The American Journal of International Law*, Vol. 81, No. 1, (1987), 146 at 149.

many factors that influence the recognition or non-recognition of any given claim,<sup>97</sup> it must also be borne in mind that ‘the mere fact of a successful secession is not as such conclusive evidence of its legality, any more than its failure is in itself conclusive evidence with respect to its illegality.’<sup>98</sup> Irrespective, a number of trends can, it is submitted, be deduced from state practice which would lend support to the existence – or emerging existence – of the aforementioned right.

Bangladesh<sup>99</sup> is the most often cited, and most generally accepted, example of ‘remedial’ secession.<sup>100</sup> All of the requisite elements – outlined above<sup>101</sup> – were evident; the Bengalis – who, it is submitted, were a ‘people’ in the legal sense – represented a majority within the territorial bounds of East Pakistan, were denied their right to internal self-determination, were subjected to manifest and commonly documented atrocities at the hands of the Pakistani Army, and had attempted – in good faith – to attain their right to self-determination on an internal basis, before resorting, in the last instance and after having frustrated all other alternatives, to self-determination in the external sense.<sup>102</sup> In addition, and relatively importantly, Raič suggests that ‘the extreme amount of suffering of the Bengalis...played a significant role in the international community’s evaluation of the legitimacy’ of their claim.<sup>103</sup> Although not all academics concur that this was the sole, or even determinative, factor underpinning the widespread recognition of Bangladesh,<sup>104</sup> it is clearly a case which supports – or, at least, does not conflict with – the existence of a ‘remedial’ right of secession.

Other cases supporting the existence of a ‘remedial’ right to secession are, it must be said, more equivocal. The ‘extreme reluctance of States to recognize or accept unilateral secession outside the colonial context’<sup>105</sup> may, however, merely indicate the ‘exceptionality’ of circumstances in which a right to remedial secession will be

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<sup>97</sup> For a discussion of the concept of recognition, and the role that it plays, see below at pp136-137.

<sup>98</sup> Raič, D., above n60, 333.

<sup>99</sup> For the facts of this case, see above at pp118-119.

<sup>100</sup> See, for example, Musgrave, T., above n31, 191; Scharf, M., ‘Earned Sovereignty: Juridical Underpinnings’, *Denver Journal of International Law*, Vol. 31, (2003), 373 at 383; Dugard, J., Raič, D., ‘The role of recognition in the law and practice of secession’, in Kohen, Marcelo G. (Ed.), *Secession: International Law Perspectives*, (Cambridge: Cambridge University Press, 2006) at 120.

<sup>101</sup> See pp130-131.

<sup>102</sup> For a more complete discussion, see Raič, D., above n60, 335-342.

<sup>103</sup> Ibid 341.

<sup>104</sup> Many point out the role that India played, and the vested interest that they possessed, and also the many other politico-legal factors which dictate the recognition, or non-recognition, of a particular prospective states claim to statehood. Crawford, for example, surmises that ‘different views can be held as to whether in the circumstances of 1970, the people of East Bengal had a right of self-determination, whether this was a case of ‘remedial secession’ or whether the acceptance of its secession following the withdrawal of the Pakistan Army after the ceasefire of 16 December 1971 merely produced a *fait accompli*, which in the circumstances other States had no alternative but to accept.’ – see Crawford, J., above n47, 393.

<sup>105</sup> Ibid 415.

recognised – or, if you like, the ‘height at which the bar has been set’<sup>106</sup> – as opposed to an outright rejection, on their part, of its existence. As was pointed out in the above discussion,<sup>107</sup> a number of judicial decisions and opinions articulated that the relevant ‘people’ in certain cases did not possess the right to secede; not because no such right could possibly exist under international law, but because the requisite level of discrimination or abuse was not present in those particular cases. These decisions are, of course, those of international judicial bodies and do not, therefore, constitute state practice in any way. The logic underpinning them is, however, arguably indicative of that adopted by States in their determination of whether or not to recognise a particular claim. As such, it is submitted, the dearth of cases in which existing States have expressly recognised another on the basis of a ‘remedial’ right to secession is, again, not indicative of its non-existence, but rather their reticence to do so in any but the rarest of cases – in which all of the above mentioned requirements<sup>108</sup> have been satisfied.

That is not to say that the right has not played a part in other secessions, however. A number of academics have endorsed its applicability in other cases which – most often as a result of negotiations, the political nature of State creation, and concessions on the part of failing parent states – have eventually been justified on other grounds. Raič, for example, suggests that Croatia possessed – when it reasserted its declaration of independence on the 8 October 1991 – a ‘qualified’ right of unilateral secession.<sup>109</sup> He argues that the secessions of Croatia and Slovenia were the harbinger for the subsequent dissolution of the SFRY, as opposed to a result of it<sup>110</sup> and, as such, he suggests, ‘the break-up of Yugoslavia took place against the background of an applicable right of self-determination under international law. This was not only the view of academics and of the Badinter Arbitration Commission’, he asserts, ‘but also of the international community.’<sup>111</sup> Some also cite the UN-sanctioned intervention,<sup>112</sup> and *de facto* intermediate sovereignty bestowed upon the Kurds of northern Iraq, as a result of the ‘massive human rights deprivations’ that they suffered at the hands of the Iraqi government as ‘another development that lends credence to the idea that a new post-colonial right to remedial secession may be on the point of crystallizing’.<sup>113</sup>

The international community’s recognition of these claims – particularly those of Bangladesh and Croatia – is, in effect, Raič suggests, ‘a mere confirmation of the

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<sup>106</sup> See, for example, the comments in Goodwin, M., ‘From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis Upon the Doctrines of International Law’, *German Law Journal*, Vol. 08, No. 01 (2007), 1 at 5.

<sup>107</sup> See above at pp118-121.

<sup>108</sup> See pp130-131.

<sup>109</sup> See Raič, D., above n60, 342-362 and, in particular, at 362.

<sup>110</sup> Ibid 356-361.

<sup>111</sup> Ibid 356.

<sup>112</sup> In May 1991.

<sup>113</sup> Scharf, M., ‘Earned Sovereignty: Juridical Underpinnings’, *Denver Journal of International Law*, Vol. 31, (2003), 373 at 383; see also Orentlicher, D., ‘Separation Anxiety: international responses to ethno-separatist claims’, (1998), 23 *Yale Journal of International Law*, 1 at 49.

prevailing doctrine of a qualified right of secession because ...in both cases secession was used as an *ultimum remedium*.<sup>114</sup>

### *The Consistency of Non-Recognition*

Much can also be derived, however, from those instances in which the international community withheld recognition, and the factors which differentiate them from those in which recognition was, indeed, conferred. The non-recognition of Chechnya is, for example, often cited as an indication of the international community's purported lack of support for a right of 'remedial' secession; the suggestion being that – in light of the atrocities that occurred within it – if they are reticent to recognise it, they are unlikely to recognise any such claims.

Some might suggest that 'power politics', and nothing else, underpinned the recognition of Kosovo, and non-recognition of Chechnya; however subtle, but legally consequential, differences can also be drawn between these cases, and those others in which recognition was readily conferred. Charney, for example, cites the FRY's pre-emptive actions 'to eliminate the autonomy' of the Kosovar Albanians,<sup>115</sup> the 'draconian' measures that ensued, the fact that the Kosovar Albanians attempted 'all peaceful means at their disposal to seek an accommodation' – and which were, themselves, only rewarded with 'greater suppression by the Serbs in control of the FRY' – as circumstances of Kosovo's case for which no equivalents can be found in the circumstances of Chechnya.<sup>116</sup>

In contrast, he suggests, 'Chechnya's path to the declaration of independence' was one 'devoid of any efforts aimed at some negotiated accommodation', and underpinned by a government which had 'failed to build any viable institutions of an independent state, and instead turned to criminal sources of support' during the period of *de facto* secession that they enjoyed in the power vacuum that was created upon the collapse of the Soviet Union.<sup>117</sup> These factors may also be indicative, he suggests, of a divide between the Chechen regime and the 'popular will of the Chechen people',<sup>118</sup> which – in light of the unified and peaceful action taken by the Kosovar Albanians, particularly before the formation of the KLA, 'to preserve their self-determination' – clearly did not exist in the case of Kosovo.<sup>119</sup>

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<sup>114</sup> Raič, D., above n60, 362-3. Raič also cites the absence of an effective government in these States – particularly Croatia – at the time of their respective recognitions – which were, importantly, both considered lawful - as evidence that they were not merely recognised as a *fait accompli*, as Crawford suggested was the case. Cf. Raič, D., above n60, 363, with Crawford, J., above n47, 393. This fact would also appear to re-enforce the statements made above, with regards to the leniency with which the requirement of effective control will often be applied to States emanating out of a right to self-determination – see above at pp60-62.

<sup>115</sup> Including the removal of the autonomy granted to them in the constitution of 1974 – see above at pp40-41.

<sup>116</sup> Charney, J.I., 'Self-Determination: Chechnya, Kosovo, and East Timor', *Vanderbilt Journal of Transnational Law*, Vol. 34, (2001), 455 at 460-2.

<sup>117</sup> Ibid 462-3.

<sup>118</sup> Ibid 461.

<sup>119</sup> Ibid 463. See also Raič, D., above n60, 376.

As such, it could be argued, the non-recognition of Chechnya merely re-enforces the importance placed, by the international community, upon the requirement that ‘there be no (further) realistic and effective remedies for the peaceful settlement of the conflict’. This is not to belittle the disproportionate force subsequently employed by the Russian military – which was widely condemned<sup>120</sup> – to quash the secessionist’s demands. The consensus would, however, appear to have been that, as a result of the illegitimacy of the Chechen claim, the Russians did indeed possess the right to defend its territorial integrity.<sup>121</sup> The abuses that occurred as a result of this campaign may have *subsequently* grounded a remedial right to secede, however this would also have been limited by the Khasavyurt Accord – which suspended secession, as an option for the Chechens, for a five year period which did not end until the 31 December 2001<sup>122</sup> – and again, after that, the almost absolute refusal on the part of the Chechen authorities to negotiate with Russia.<sup>123</sup>

Similar arguments could be advanced with regards to the attempted secession of Serb Krajina, from Croatia, in the immediate aftermath of the latter’s attainment of independent statehood. The principle of *uti possidetis* was ostensibly adopted by the Badinter Commission to prevent any alteration in the post-independence borders of Croatia and, therefore, the secession of Serb Krajina. It could also, however, be contended that, to possess the right of remedial secession, the minority must suffer oppression, discrimination, or human rights abuses at the hands of the parent state which, in this case, did not exist until shortly before Serb Krajina declared their independence. In addition, some further suggest that the actions subsequently taken by the Croatian government were not sufficiently grave enough as to ground a right to secession<sup>124</sup> and, possibly most importantly, that the Serbs did not undertake any efforts ‘to find a solution for the conflict by peaceful means’.<sup>125</sup>

#### REMEDIAL SECESSION AND POST-COLD-WAR DEVELOPMENTS

The developments and changes – and the concomitant state practice – that have occurred in the post-Cold-War era must also be taken into account in the determination of whether or not a peoples right to remedial secession has crystallised as a customary rule of international law. A cursory overview of the landscape would suggest that international borders have lost, somewhat, their sacrosanct status, and that the balance that exists – in terms of relative importance – between human and sovereign rights has continued to

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<sup>120</sup> See, for example, European Parliament of the EC, Resolution on the War in Chechnya, 7 October, 1999; Commission on Human Rights, Resolution 2000/58, UN. Doc. E/CN.4/Res/2000/58, 5 April, 2000; Amnesty International, *Brief Summary of Concerns About Human Rights Violations in the Chechen Republic*, Country Report, 5 June, 1996.

<sup>121</sup> Raič, D., above n60, 375.

<sup>122</sup> For a discussion of this, see: Atrokov, W.T., ‘The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis’, *Cornell International Law Journal*, Vol. 32, 1999, 367 at 376-81.

<sup>123</sup> Raič, D., above n60, 377-8.

<sup>124</sup> Ibid 393.

<sup>125</sup> Ibid.

weight itself towards the former.<sup>126</sup> This much is evidenced by the growing acceptance, on the part of the international community, of concepts such as humanitarian intervention and the ‘Responsibility to Protect’,<sup>127</sup> which both diminish – to varied, but relatively large degrees – the ability of States to hide behind a veil of ‘sovereignty’ in the event that they are unable, or unwilling, to protect the interests of their respective citizens.<sup>128</sup>

While these developments pertain primarily to the use of force by third states to prevent, or end, humanitarian atrocities, the logic underpinning them – and the international community’s overwhelming acceptance of them<sup>129</sup> – is not irrelevant to self-determination. It is indicative of the shifting balance, in post-Cold-War times – between individual and sovereign rights – that has driven the evolution, and ever-growing acceptance of the remedial right of secession. As one academic notes, the ‘trend of the post-Cold War era’ has been to make ‘separation based on self-determination claims easier’ than it had traditionally been.<sup>130</sup>

## RECOGNITION AND EFFECTIVITY

In terms of state practice, we are then faced with Kosovo’s declaration of independence, and its subsequent recognition by a significant portion of the world’s existing states. Before concluding, however, upon whether these actions were taken in accordance with, or contravention of, international law, some preliminary observations must be made with regards to the concepts of recognition and effectivity, and their roles in the formation of customary international law.

### *Recognition*

An ‘underlying conflict’ remains ‘over the nature of recognition’.<sup>131</sup> Some endorse the constitutive theory – which suggests that ‘the rights and duties pertaining to statehood derive from recognition by other States’<sup>132</sup> – while others prefer the declaratory theory – under which the existence of the new state is merely declared, so that recognition remains

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<sup>126</sup> See, for example, Müllerson, R, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London: Routledge, 1994) at 10-13.

<sup>127</sup> For a comprehensive discussion of this concept, see Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, (Washington: Brookings Institute, 2008).

<sup>128</sup> On the changing nature of sovereignty, see, for example: Maogoto, J.N., ‘A People Betrayed – The Darfur Crisis and International Law: Rethinking Westphalian Sovereignty in the 21<sup>st</sup> Century’, *Bond Law Review*, Vol. 19, No. 2, (2007), 102-123.

<sup>129</sup> As evidenced by the decision of the World Summit, in 2005, to unanimously embrace the concept – see Evans, G., above n127, 43-50. A primary driver in the adoption of the concept by the World Summit, was its inclusion in then UN Secretary-General Kofi Annan’s own report – see Annan, K., *In Larger Freedom: Toward Development, Security and Human Rights for All*, A/59/2005 (United Nations, 2005), particularly at para. 135 and annex, recommendation 7(b).

<sup>130</sup> Kovács, M., ‘Standards of self-determination and standards of minority-rights in the post-communist era: a historical perspective’, *Nations and Nationalism*, Vol.9, Issue 3, (2003), 433 at 448.

<sup>131</sup> Crawford, J., above n47, 19.

<sup>132</sup> *Ibid* 4.

‘a political act, which is, in principle, independent of the existence of the new State as a subject of international law’.<sup>133</sup> Irrespective, however, of the theory adopted, it is submitted that recognition must still be given in accordance with legal principles. As such, it is suggested, an existing state is only justified, *legally*, in recognising a claimant state if it fulfils the factual requirements – including, in those cases in which statehood is claimed as a result of it, a valid claim to *external* self-determination – of statehood.<sup>134</sup>

It is also submitted, however, that no duty is created, upon existing states, to recognise all of those potential states that satisfy these requirements.<sup>135</sup> Recognition is a quasi-political act which – although given in accordance with the above mentioned legal requirements – therefore vests, in existing states, a not insignificant degree of discretion.<sup>136</sup> As such, and once the prospective state has fulfilled the necessary legal requirements,<sup>137</sup> existing states are – at their discretion – able to *legally* recognise, or not recognise, that particular claim. Recognition of an entity as a state before it fulfils these requirements<sup>138</sup> is, however, *illegal* and could, as a result, constitute an illegal intervention and a breach of the many provisions insisting that existing states not take ‘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’.<sup>139</sup>

### *The Legality of Intervention*

In addition to premature recognition, existing states can, possibly, also *illegally* intervene by assisting – usually with military force – the efforts of a secessionist group to obtain their independence. As already alluded to, these acts would, indeed, appear to be *illegal* in the event that they are taken to support a group which does not possess a valid claim to *external* self-determination. When, then, can such actions be taken *legally*?

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<sup>133</sup> Ibid 22 – citing Chen, T.C., *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States* (London: Stevens, 1951).

<sup>134</sup> For a similar position, see: Radan, P. *Break-Up of Yugoslavia and International Law*, (London: Routledge, 2001) at 21-2.

<sup>135</sup> For an argument supporting this position, see: Raič, D., above n60, 428-9.

<sup>136</sup> See Rich, R., ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union – Symposium: Recent Developments in the Practice of State Recognition’, *European Journal of International Law*, Vol.4, (1993), 36 at 36 – Rich states that: ‘In coming to a full circle, recent recognition practice has defeated arguments that there is a legal duty to extend recognition to an entity bearing the marks of statehood. Recognition of states is today more of an optional and discretionary political act than was thought to be the case only a year ago.’

<sup>137</sup> Bearing in mind, however, the leniency with which some of them are applied – see Chapter 3.

<sup>138</sup> Again, bearing in mind the leniency with which some of these requirements – particularly that of effective control on the part of the central government – have been applied, especially in recent times: see chapter 3.

<sup>139</sup> See, for example, the ‘saving clause’ contained within the *Declaration on Friendly Relations* – discussed above at pp24-26.

It is submitted that at least three justifications for it exist. The first, and arguably most significant, again stems from the 'saving clause' contained within the *Declaration on Friendly Relations*, which apparently only precludes third states from taking actions which would 'dismember or impair' the territorial integrity of the those 'parent states' which are 'conducting themselves in compliance with the principle of equal rights and self-determination of peoples', and which are 'thus possessed of a government representing the whole people belonging to the territory without distinction'. As Raič states, in those instances in which the parent state does not conduct itself in compliance with its resident peoples right to self-determination – and so long as it was in accordance with the other principles contained within the Declaration – it might be argued:

*a contrario* that third States would be entitled to support a people which attempts to secede even if such support would eventually lead to the infringement of the territorial integrity of the target State.<sup>140</sup>

It could, therefore, be argued that the justifiability of intervention – by third states – is determinable by the justifiability of the secession which it supports and that, as such, the 'saving clause' places a caveat – of sorts – on the remainder of Principle V of the *Declaration of Friendly Relations*. It has, alternatively, also been suggested that a valid 'right of external self-determination' confers, upon those people possessing it, 'an exclusive right or title to govern the relevant territory' which often – if it is also accepted that recognition is 'essentially declaratory in nature' – pre-dates the recognition of it.<sup>141</sup> As such, 'the parent State has lost its title with respect to the relevant territory and thus can no longer legitimately claim respect for the principle of non-intervention in relation to third States' actions regarding the seceding entity.'<sup>142</sup>

Some would also suggest that, if the declaratory theory of recognition were adopted, the act of recognition could not of itself constitute intervention, since its giving does not create the State, but merely declares its existence. As such, the act of recognition is not one which impairs the territorial integrity of an existing state and can, therefore, not constitute an illegal intervention or interference. This exception would, however, not immunise other actions taken at the time – such as the giving of military assistance – from being characterised as such.

### *Effectivity*

Whether or not it is given in accordance with existing principles of international law, it can, however, also be observed that recognition is essential if a prospective state is to function and operate effectively in the international arena. A state that declares its independence in accordance with international law will be rendered relatively impotent in the absence of international recognition, just as a state that is widely recognised in spite of its ostensibly illegal declaration of independence will not. As the Supreme Court of Canada stated in its decision in *Re Secession of Quebec*:

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<sup>140</sup> Raič, D., above n60, 317-8.

<sup>141</sup> Ibid 364.

<sup>142</sup> Ibid.



Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be-state in the international community depends, as a practical matter, upon recognition by other states.<sup>143</sup>

The sentiment espoused in this statement must not, however, be construed as suggesting that factual realities can, in any way, retrospectively legalise their own creation. As the Court went on to point out, ‘international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a ‘legal’ right to secede in the first place.’<sup>144</sup> Reiterating the crucial distinction that exists between ‘the right of a peoples to act, and their power to do so’ – the former is recognised in law, whereas the latter ‘is not necessarily given status as a right’ – the Court also opined that:

The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation.<sup>145</sup>

Put differently, it may be true that ‘successful revolution begets its own legality’,<sup>146</sup> however – and as was pointed out in *Re Secession of Quebec* – this presupposes that legality *follows*, as opposed to *precedes*, the successful revolution.<sup>147</sup> Thus, while subsequent revolutions of the same ilk may be conducted legally, this could not be taken to mean that which was initially accomplished ‘was achieved under colour of a legal right.’<sup>148</sup> To argue otherwise is to suggest that ‘the law may be broken as long as it can be broken successfully’,<sup>149</sup> or that ‘a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place.’<sup>150</sup>

Legal consequences most certainly can, however, ‘flow from political facts’,<sup>151</sup> and international law ‘may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation.’<sup>152</sup> The recognition of a particular claim – by a substantial portion of the international community – may therefore mold, or dictate, those situations in which a right to external self-determination exists and, as a result, the legality of those claims made in the future out of similar circumstance.

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<sup>143</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 142.

<sup>144</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 142.

<sup>145</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 106.

<sup>146</sup> deSmith, S.A., ‘Constitutional Lawyers in Revolutionary Situations’, *Western Ontario Law Review*, Vol. 7, (1968), 93 at 96.

<sup>147</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 144.

<sup>148</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 144.

<sup>149</sup> Which, the Court pointed out, is ‘contrary to the rule of law, and must be rejected’ – see *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 108.

<sup>150</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 146.

<sup>151</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 142.

<sup>152</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 141.

As such, whether or not Kosovo comes, or has come, to be accepted as a factual and, therefore, legal reality in the international community will not impact upon the legality of Kosovo's declaration at the time that it was made. It may – and it probably will – have a profound effect on the crystallisation of the customary rule of international law permitting peoples that also meet the above mentioned requirements<sup>153</sup> to secede, but will not retrospectively legalise the actions of Kosovo's Provisional Institutions of Self Government in declaring their independence, nor those of third states that assisted them. The legality or otherwise of these acts must be determined by reference to the law as it stood at that point in time and, for this reason, the assessment of the legality of these actions – conducted in the following section – will only take into account that state practice that had occurred up until that time at which the mentioned acts were performed. If, however, the conclusion is reached that Kosovo's declaration of independence was, indeed, illegal at the time at which it was made – and also, therefore, the act of recognition of it by those third states that did so – then that state practice which accompanied it will most probably be critical in the determination of future claims.

#### THE REMEDIAL RIGHT TO SECEDE: ITS STATUS AND APPLICATION TO KOSOVO

Two fundamental questions must be answered in ascertaining whether Kosovo's declaration of independence was made in accordance with an existing right, or whether, alternatively, it merely represented another step in the process of its crystallisation. The first is whether, at the time at which Kosovo's PISG declared their independence, the above discussed right – allowing them to secede – actually existed under international law? If it did, the second is then whether the circumstances of Kosovo were such as to afford this right to the people that resided within it? If, however, the first of these questions was answered in the negative, the second question becomes redundant, and must be replaced with that asking whether, as a result of the international community's relatively widespread recognition of it, Kosovo's declaration of independence has crystallised such a right into being?

##### *Did the Right Exist at the Time of Kosovo's Declaration?*

Whether or not a rule of customary international law exists is, obviously, a highly subjective question which is, as such, very difficult to definitively answer. When, for example, does the *usus* and *opinio juris* attributable to a particular rule become sufficient enough that one can confidently proclaim its existence?

It is, however, submitted that a right – commonly referred to as a 'remedial right' – did, in fact, exist at the time of Kosovo's declaration, under which a 'people', that have suffered grievous wrongs at the hands of the parent State – including the denial of their right to internal self-determination, and/or serious and widespread violations of their fundamental human rights – may secede, as a 'last resort' and in the absence of any further, 'realistic and effective remedies for the peaceful settlement of the conflict.'<sup>154</sup>

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<sup>153</sup> See above at pp130-131.

<sup>154</sup> For a summary of these requirements, see above at pp130-131.

Much support can be found for this conclusion – in the form of judicial decisions and opinions, instruments of international law, doctrine and legal writings – which is also, it is further submitted, not inconsistent with the practice of states – when analysed from the above perspective<sup>155</sup> – in recent times. This conclusion also takes into account the observations of commentators regarding the manner in which customary rules of international law are formed in the realm of self-determination – in particular, the unique roles played by *usus* and *opinio juris* – and, in particular, the fact that, in ‘the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule.’<sup>156</sup>

### *Is Such a Right Applicable to the People of Kosovo?*

It is further submitted that the circumstances surrounding Kosovo satisfy the mentioned requirements – as set out above<sup>157</sup> – of the ‘remedial’ right to secede. It was established, in the previous chapter, that the Kosovar Albanians are, indeed, a ‘people’ for the purposes of self-determination which, although forming a numerical minority in relation to the rest of the population of Serbia, represent a clear majority within Kosovo’s territorial bounds. In addition, they have quite evidently been substantially abused at the hands of, or with the complicity of, the government of their parent state. They had, for some time – stretching back until well before the war in Kosovo broke out – been subjected to increasingly oppressive and discriminatory measures and, as time wore on, were also increasingly victimised by the Yugoslav forces, who committed against them serious and widespread – and extensively documented – fundamental human rights violations. As Robertson surmised:

On 23 March<sup>158</sup> NATO reported to the UN (and its figures have never been doubted) that 100,000 Kosovars had been forced from their homes in the previous three months, and that the number was increasing – evidence that the plan for mass deportation was underway. Although killings were not central to it (the goal was ‘depopulation, not extermination’), this purpose would none the less amount to a ‘crime against humanity’ as defined by Article 7(I)(d) of the Rome Statute. It was a widespread and systematic attack directed as a matter of government policy against an ethnic group, and it took the form both of *persecution* on racial and cultural grounds and of *forcible transfer of population* (defined in Article 7 as ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present’).<sup>159</sup>

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<sup>155</sup> See the analysis of state practice at pp131-136.

<sup>156</sup> Kirgis, Jr., F.L., ‘The Degrees of Self-Determination in the United Nations Era’, *The American Journal of International Law*, Vol. 88, No. 2 (1994), 304 at 306. See also Kirgis, Jr., F.L., ‘Custom on a Sliding Scale’, *The American Journal of International Law*, Vol. 81, No. 1, (1987), 146 at 149.

<sup>157</sup> See pp130-131.

<sup>158</sup> Just before NATO intervened.

<sup>159</sup> Robertson, G., *Crimes Against Humanity* (Australia: Penguin Books, 2006) at 480.

Primarily as a result of this, Marti Ahtisaari concluded – in the *Comprehensive Proposal for the Kosovo Status Settlement*<sup>160</sup> – that reintegration into Serbia was not, given the circumstances of the situation, a viable option for Kosovo’s final status.<sup>161</sup> To have recommended the alternative, it is suggested, would have been – to borrow and change the context of a metaphor coined by Robertson – ‘akin to leaving the fox in charge of the hen house with a reminder of its duties towards the chickens.’<sup>162</sup>

Finally and, possibly, most importantly, the Kosovar Albanians had apparently frustrated all of the realistic and effective remedies available to them for the peaceful settlement of the conflict.<sup>163</sup> Marti Ahtisaari – the Secretary-General’s Special Envoy for the future status process for Kosovo – concluded as such – that ‘all avenues had been exhausted’ – as a result of the failure of the ‘17 rounds of direct talks and 26 expert missions to Belgrade and Pristina’ that he had carried out,<sup>164</sup> as did the ‘Troika’,<sup>165</sup> which also oversaw – from August to December, 2007 – futile negotiations between the Government of Serbia and the Kosovar Albanians.<sup>166</sup>

As a result of this, it is suggested, a right of ‘remedial secession’ – as set out above – does, indeed, exist under international law and, furthermore, was one possessed by the people of Kosovo at the time that their PISG declared its independence from Serbia. As such, recognition of it became a viable, and legal, option for existing states, whose actions, as such, did not constitute an unlawful intervention or, therefore, a contravention of international law. On the contrary, their recognition of Kosovo’s claim is, it is

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<sup>160</sup> The official ‘comprehensive proposal’ is an addendum to the Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168/Add.I (2007).

<sup>161</sup> See the Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, UN Doc. S/2007/168 (2007).

<sup>162</sup> Robertson, G., above n159, 166.

<sup>163</sup> Bearing in mind, however, the suggestions made by some commentators – particularly those that advocate the primacy of state sovereignty – that the requirements set out in the Rambouillet Accords could never have been accepted by the Yugoslav government – see, for example, the comments of former US Secretary of State, Henry Kissinger, that ‘Rambouillet was not a negotiation--as is often claimed--but an ultimatum’: Kissinger, H.A., ‘New World Disorder: The Ill-Considered War in Kosovo has Undermined Relations with China and Russia and Put NATO at Risk’, *Newsweek*, May 31, 1999, accessed at <http://www.newsweek.com/id/88424/page/1>, last accessed 6 November, 2008, at 2.

<sup>164</sup> D’Aspremont, J., ‘Regulating Statehood: The Kosovo Status Settlement’, *Leiden Journal of International Law*, 20 (2007) 649 at 651 – citing the conclusions of the Vienna high-level meeting, 10 March 2007, UN Doc. UNOSEK/PR/19 (2007); and the Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, annexed to the letter of the Secretary-General addressed to the President of the Security Council of 26 March 2007, UN Doc. S/2007/168 (2007), Paras. 1-2

<sup>165</sup> Made up of the EU, Russia, and the U.S.

<sup>166</sup> See the Report of the EU/U.S./Russia Troika on Kosovo, December 4, 2007, accessed at <http://www.ico-kos.org/pdf/Report%20of%20the%20EU-US-Russia%20Troika%20on%20Kosovo.pdf> (last accessed 4 July 2008). For some background discussion on all of these failed negotiations, see above at pp50-51.

contended, further evidence of the existence of a remedial right of secession and, as such, represents a mere solidification of it.

*Does a Remedial Right of Secession Exist in the Aftermath of Kosovo's Recognition?*

This is a somewhat moot question given the above made contention that it, in fact, already existed at the time of Kosovo's declaration of independence. Given, however, the difficulties – alluded to above – in ascertaining when, exactly, a rule of customary law crystallises into being, it is one which warrants some brief comment.

Adopting similar logic to that underpinning the above made submission – that the international community's relatively widespread recognition of Kosovo's declaration of independence solidifies the existence of the right – it could, alternatively, be argued that the right did not exist at the time of Kosovo's declaration of independence, but that the international community's acceptance of it brought, or crystallised, it into being.<sup>167</sup> The conclusion that one reaches on this point depends, principally, upon the extent to which they suggest the law had developed when Kosovo's declaration occurred.

Remembering again the subjectivity that taints any conclusion concerning the extent of the rights evolution, this – somewhat philosophical – point need not be elaborated upon in this thesis. Save to say that, if such a right did not exist at the time of Kosovo's declaration, it almost certainly must in its aftermath. Kosovo's declaration of independence in 1991 was expressly refused, yet that in 2008 widely accepted – what, in this period, has changed? The answer to this question can, without doubt, only be found in the bloody, Milosevic written, pages of the regions recent history.

## CONCLUSION

It has been said that a static law, 'like water in a pond', must inevitably 'stagnate until it grows noisome'.<sup>168</sup> With this in mind, the International Court of Justice has emphasised the 'continuous evolution of international law', and the relevance of this trend in determining the law applicable to any given case.<sup>169</sup> In this somewhat fluid environment, very few concepts have evolved as readily, or as extensively, in recent years as that of self-determination. In light of this, it is obviously very difficult to define – or 'photograph' – where exactly the law as it pertains to self-determination sits at any given point in time and, therefore, what options it bestows upon its holders. A degree of uncertainty will, however, inevitably accompany the development of any law;

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<sup>167</sup> See, for example, the comments of Quane, who questions the likelihood of a 'remedial right' of secession existing under international law, but who suggests, alternatively, that it may be 'an evolving principle of international law in which case state practice in Kosovo may contribute to its further evolution': Quane, H., 'A Right to Self-Determination for the Kosovo Albanians?', *Leiden Journal of International Law*, Vol. 13, 2000, 219 at 224.

<sup>168</sup> De Waart, P.J.I.M., Peters, P., Denters, E., (Eds.), *International Law and Development* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 10.

<sup>169</sup> *Barcelona Traction Case, ICJ Reports*, 1970 at 33.

particularly in areas – such as this – in which cases, in the factual sense, are so inexorably unique.

The suggestion was made in this chapter that a ‘remedial right’ to secede did, indeed, exist at that time at which Kosovo’s PISG declared their independence from Serbia. In accordance with this right, it was suggested, those minorities that had ‘suffered grievous wrongs at the hands of the parent State’, or had been denied their right to *internal* self-determination, could, as a ‘last resort’, secede from their parent state in accordance with their right to self-determination. In addition, it was contended, the circumstances surrounding Kosovo were such as to satisfy the requisite elements for the ‘remedial right’ to vest in the Kosovar Albanians – as the subject people – and, as such, to render their declaration of independence – and, vicariously therefore, the subsequent recognition of it by third states – a legal act under the principles of international law as they existed at that time. The relatively widespread recognition of their declaration is, it was submitted, additional evidence of this fact, and further solidifies the existence of this right as a rule of customary international law. In the alternative, it was also suggested that those who doubted the existence of the right prior to the events surrounding Kosovo’s attainment of independence must surely question, in its aftermath, whether or not this remains the case.

Irrespective, however, of whether or not Kosovo’s declaration of independence was made in accordance with an existing right of international law, or merely represented another step in the crystallisation of it, it offers – as a case study – an invaluable insight into the height at which the bar has been set with regards to the requisite level of discrimination or oppression that must exist before the right in fact vests. Its lofty elevation may, to some, be worrisome – after all, one life lost is surely one too many – but it may also be a necessary compromise to alleviate the concerns of those suggesting that an acceptance of it will inevitably result in ‘infinite’ secessions on a global scale.

## CONCLUSION

The law as it pertains to self-determination has, since its inception, continually developed, but has seldom been faced with the same case twice. Many have, as a result, labeled those cases in which it applied ‘exceptions’, in an attempt to prevent the formation of any general rules which, if misapplied, may encourage separatism and, as such, create – as opposed to stifle – internal conflict. Such logic presupposes, however, that separatists would not act without legal justification and, also, that an absence of law is preferable to the existence of one which is anything less than certain. This thesis does not concur.

It is out of this uncertainty – concerning, in particular, the relationship between a States right to territorial integrity and a people’s right to self-determination – that many of the world’s most bloody conflicts have been borne, and out of the failure to resolve it that so many remain with us. One of the most often suggested, and ardently supported solutions – and the one proposed in this thesis – is a compromise most often referred to as a people’s right to remedial secession. Despite the connotation that the right initially vests in a people, and therefore acts to the detriment of the State, it actually confers primacy upon a States right to their territorial integrity. This right only lapses, and the peoples right to self-determination – in the external sense – therefore only vests, in the event that the central government has failed to observe its resident peoples right to internal self-determination.

This right – which, as alluded to, vests only in the aftermath of certain specific circumstances – would therefore offer separatists and governments alike an incentive to avoid violence and engage with the other by making their respective rights to self-determination and territorial integrity contingent upon it. Although it would be naïve to expect all parties to all conflicts to consider it in this manner – just as it is to expect that international law is observed by every State in every case – the prevention of but one conflict, and the saving of but one life, is surely a sufficient prize.

As a result of the proposal, made in this thesis, that this right had crystallised as a rule of customary international law, and other subsidiary determinations, it was finally submitted that Kosovo’s declaration of independence was, indeed, legal under the provisions of international law as they stood in the early stages of 2008. These subsidiary determinations were that such an outcome was not precluded under the provisions of UNSC resolution 1244, and that the nascent state also satisfied the generally accepted – and also evolving – requirements for Statehood. The most significant and consequential aspect of this conclusion is, however, its acceptance of the right to remedial secession, and the emphasis that it places upon its evolution in recent years.

The development of the right to self-determination has been substantial under the guidance of the United Nations. Its advancement in the wake of the Cold War’s ending has, however, been unparalleled. This period has also seen an ever-increasing emphasis placed upon human rights – in both the domestic and international arenas – and the international community’s concomitant right, or duty, to protect them in an occasionally

proactive fashion. The transformation and acceptance of a peoples' right to self-determination may, for example, and although it has occurred over a relatively protracted period of time, be analogous to that which has accompanied the pronouncement of the 'responsibility to protect'.<sup>170</sup> Both doctrines encapsulate the notion that States retain primary responsibility for the welfare and rights of their respective inhabitants, but also the reminder that it may pass – in those instances in which States are unable or unwilling to fulfill it – to the international community.

It is against this post-Cold War background of political and legal advancements that the legality of Kosovo's declaration of independence – and vicariously, therefore, the state of the law at that time at which it was made – must be determined.

### THE LEGALITY OF KOSOVO'S CLAIM

This thesis submits that Kosovo's declaration of independence was, and is, legal under the framework and provisions of international law. This conclusion is based upon the subsidiary propositions that UNSC resolution 1244 – while not, in and of itself, providing a justification for it – did not preclude it; that Kosovo, as defined within their declaration of independence, satisfied the generally accepted requirements of Statehood; that the Kosovar Albanians were a 'people' in possession of the right to self-determination, and; that, as a result of the Serbian Governments actions over the preceding decades, this right conferred upon them the ability to declare themselves – in spite of the Serbian States right to territorial integrity, and passionate protests – an independent State.

With regards to the first of these propositions, the submission was made that resolution 1244 does not prohibit – nor, however, promote – Kosovo's declaration of independence.<sup>171</sup> The transient wording of it emphasises, it was suggested, the temporary nature of its provisions and, therefore, those arrangements in existence as a result of them. Although not conferring upon the Kosovar Albanians a right to declare their independence, it failed to exclude it as an option, and therefore transferred the question of the declarations legality into the sphere of international law in the more general sense. This conclusion is in accordance with the relatively recently considered notion of 'earned sovereignty', or 'conditional independence', under which a sub-state entity – such as Kosovo – may become eligible for independence and international recognition upon their acquisition of 'sufficient sovereign authority and functions'.<sup>172</sup> As a result, it was

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<sup>170</sup> See discussion at pp135-136.

<sup>171</sup> On this point, see Borgen, C.J., 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition', *The American Society of International Law Insight*, Volume 12, Issue 2, February 29, 2008, accessed at <http://www.asil.org/insights/2008/02/insights080229.html> (last accessed 16 May 2008).

<sup>172</sup> Williams, P., 'Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status', *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 387 at 388. Such functions include, *inter alia*, 'the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies' – see Williams, R., Scharf, M., Hooper, J., 'Resolving



concluded, the pertinent question is then whether the same is true under the established guidelines of international law?

The first point to be pondered in response to this question is whether Kosovo, as defined in their declaration of independence, satisfies the generally accepted requirements of Statehood? The submission was made that the nascent state does, indeed, satisfy those requirements set out in the *Montevideo Convention* – especially in light of the leniency with which borderline cases are so often assessed. In light of the heightened importance of human rights and self-determination in more recent times, it has, however, also been suggested that an entity should, before its claim for statehood is approved, satisfy the international standards and expectations that exist with regards to these concepts.<sup>173</sup>

That pertaining to the protection of human rights is, however, difficult to assess in advance and, although Kosovo's Prime-Minister – Hashim Thaçi – stressed, in the lead up to Kosovo's declaration of independence, the importance of them in an independent Kosovo, time will be the only true judge of the conviction underpinning his rhetoric.

If these propositions are accepted, the focus then moves on to the Kosovar Albanians right to self-determination and, in particular, whether they possessed one and, if so, what exactly it allowed them to do? The first of these analyses – concerning whether or not the Kosovar Albanians can, and do, constitute a 'people' – focused upon four subsidiary matters: does the term 'people' refer only to the entire population of a state or territory, or can it also include sub-state entities; what characteristics must groups possess before they can be characterised as a 'people'; which 'self' is the relevant 'people' for the purposes of self-determination – and can there be more than one,<sup>174</sup> and; do groups that otherwise satisfy the suggested requirements of a 'people' lose this status by virtue of the fact that they are also a minority within the state from which they are attempting to secede? As a result of the conclusions reached upon these matters, the overarching submission was made that the Kosovar Albanians can, and do, constitute a 'people'.

The question is then begged as to what this right entails – does it, for example, confer upon its holders a right to cultural, economic, and social respect; autonomy; independence; a combination of these; or something entirely different? Most specifically,

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Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty', *Denver Journal of International Law & Policy*, Vol. 31:3, 2003, 349 at 350.

<sup>173</sup> Dugard, J., Raic, D., 'The role of recognition in the law and practice of secession', contained within Kohen, Marcelo G. (Ed.), *Secession: International Law Perspectives*, (Cambridge: Cambridge University Press, 2006) at 96 – these authors support their position by reference to the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union which was issued by the European Community in 1991, 'and later extended Yugoslavia, which sought to make recognition of States dependent on compliance with international norms relating to self-determination, respect for human rights and the protection of minorities.'

<sup>174</sup> In other words, if many groups contained within a state satisfy the suggested requirements of a 'people', and there is some overlap between these groups, which one – or ones – possess the right to self-determine?

in this case, does it confer upon the Kosovar Albanians<sup>175</sup> an ability to unilaterally secede? The submission was made within this thesis that the Kosovar Albanians did, indeed, possess what is most commonly referred to as a 'remedial right' to secede at that time at which Kosovo's PISG declared their independence from Serbia and that, in accordance with this right, their declaration of independence – and also, therefore, third state recognition of it – was legal under the provisions of international law as they existed at that time.

#### THE CONSEQUENCES OF AN ACCEPTANCE OF A 'REMEDIAL RIGHT' TO SECESSION

This 'remedial right' to secession which, some<sup>176</sup> suggest, has evolved – and possibly even crystallised – into a rule of customary international law, allows those 'people' that have suffered 'grievous wrongs at the hands of the parent State from which it wishes to secede' – including the denial of their right to internal self-determination, and/or serious and widespread violations of their fundamental human rights – to break away, as a 'last resort' and in the absence of any further, 'realistic and effective remedies for the peaceful settlement of the conflict.'<sup>177</sup>

It confers primacy upon – or, if you like, a presumption in favour of – the parent states right to territorial integrity, but makes it contingent upon their compliance with the principles of equal rights and self-determination and, as such, their possession of a government representing, without distinction, the whole people belonging to it. In the absence of such government, it is suggested, the presumption is displaced, and the peoples right to *internal* self-determination<sup>178</sup> morphs into one which can be exercised on an *external* basis.

The benefits attributable to recognising the existence of this right cannot be overstated. It will, possibly, instill in those leaders of oppressive and/or discriminatory regimes the reality – emerging in various forms throughout international law – that the international community is watching, and is willing to take action to prevent the fundamental human rights of its citizens from being abused. Given, for example, those events that have recently transpired in the regions of Abkhazia and, in particular, South Ossetia, in Georgia, and the Tamil region of northern Sri Lanka, it has become increasingly evident that a degree of certainty is urgently required – in what is an undesirably fluid area of law – to prevent a 'thawing' of frozen territorial conflicts the world over. By recognising the existence of this right, and placing parameters on the actions that both parent and third states can undertake in these situations, it is hoped, some of the many lives lost as a result of them may be saved.

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<sup>175</sup> Who, it was concluded in chapter 5, constitute a 'people' for the purposes of self-determination.

<sup>176</sup> Including this writer – see chapter 6.

<sup>177</sup> For a summary of these requirements, see above at ppp130-131.

<sup>178</sup> Which, it is submitted, all 'peoples' possess – see above at chapters 5 and 6.

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