L.L.M. Thesis
International and European Law

The legal Status of Kosovo

Supervisors:

Prof. C. G. Roelofsen

Prof. T. D. Gill

Miao Zhang

Student Number: F064635

August，1st.2008

ABSTRACT

Kosovo has been claimed independence unilaterally on Feb.2008, which will never be admitted by Serbia as Serbia announced. This unilateral independence aroused attentions from international community in respect of the legal status of Kosovo. This thesis attempted, in the context of public international law, in particularly, the right of people to self-determination, to answer questions whether such independence is legal, and what consequences would this brought to etc. The author holds her opinion that, without consent from Serbia, and in absence of constitutional status of secession, the independence of Kosovo are not legal under contemporary regime of public international law and domestic law of Serbia. The author also concerns that this unlawful independence would has a chain-reacting on similar matters.

Key words

The right of people to self-determination; Unilateral Independence of Kosovo; Security Council Resolution 1244

Table of Contents:

1. Introduction: Does the case of Kosovo indeed fit into the recognized framework of self-determination?

With the full understanding of the development of the right of peoples to self-determination, it is easier to determine whether the case of Kosovo fits into the regime of self-determination. In order to do so it is better to have a look at the development of this concept at first.

1.1 The historical background of self-determination

The principle of self-determination firstly appeared to the world as a pure political term proclaimed in the revolutions occurred in the late eighteenth century in North America and European continent as well, which has been regarded as the root of today's legal rights of peoples to self-determination.

Further, during the earlier decades of the twentieth century, V. I. Lenin and W. Wilson both championed this principle much more clearly. However they have different contents and aims under the same term.

The principle of self-determination has been promoted by Lenin as a general criterion for the liberation of peoples. It is acknowledged that the right of self-determination in Soviet doctrine exists only for cases where it serves the cause of class conflict and so-called socialist justice; it is only a tactical means to serve the aims of world communism and not an end in itself[1]. In practice, Lenin had put socialism priorly when there was conflict between socialism and the principle of self-determination. He was forced to address the fact that the Peace Treaty Russia signed with Germany in 1918[2] which yielding Poland, Lithuania, part of Latvia, Estonia and Byelorussia to Germany would mean a betrayal of their peoples and would constitute an abandonment of the principle of self-determination.[3] At that time, the principle of self-determination was employed as a strategic tool for the class struggle.

Woodrow Wilson, the United States President at that time, developed the principle of self-determination based on Western democratic theory. The so-called Wilsonian self-determination is self-government, consists the right of peoples to choose their own democratic government freely. With the progress of the First World War,

[1] Daniel Thurer: Self-Determination; Encyclopedia of Public International Law, P.364 ; also see: David Raic: Statehood and the Law of Self-Determination: 2002, P.188; and, A.Cassese: Self-determination of Peoples; Cambridge Univ.Press; 1995, P.18-19;
[2] The Brest-Litovsk Treaty; March 3 1918;
[3] A. Cassese: Self-determination of Peoples; Cambridge Univ.Press; 1995, P18; (referred as Cassese below)

Wilsonian self-determination took on 'external' dimensions. Till 1914, Wilson linked the concept of democratic government to the future post-war Europe by stating that every people has a right to choose the sovereignty under which they shall live.[4] In Wilson's view, self-determination should not be the sole or even the paramount yardstick for settling colonial claims, but must be reconciled with the interests of colonial Powers.[5]

However, Wilsonian self-determination was not recognized by the League of Nations since it was not incorporated into the Covenant. "From the point of the view of positive international law, self-determination did not develop into a customary legal right which could be invoked by its holder vis-à-vis the parent State."[6] It was more likely a gift or a favor.[7] In 1920, the Aaland Islands case, which examined by a Commission of Jurists, confirmed that after the First Word War self-determination was not a part of the body of international legal norms.

Thus, during the League of Nations era, in practice, the principle of self-determination, although have been promoted zealously, was not able to be a rule of international customary law. It is a concept purely under modern politics, but with a very important position that impelled the principle of self-determination to develop into a rule of international law.

1.2 The framework of self-determination for decolonization

After the Second World War, when drafting the Charter of the United Nations, the principle of self-determination was finally included in the Charter by the insistence of USSR[8].

The term 'Self-determination' is incorporated into the UN Charter and is explicitly referred twice. The first is in Article 1 (2) which regards the principle of self-determination as one of the purposes of the United Nations that "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"[9].The second reference is Article 55 where Self-determination is used "to express the general aims of the United Nations in the fields of social and economic

[4] J.B.Scott(Ed.): President Wilson's Foreign Policy: Messages, Addresses, Papers, 1918,P193; quoted in: David Raic, Statehood and the Law of Self-Determination: 2002, P 178;
[5] Cassese, P.21;
[6] David Raic, Statehood and the Law of Self-Determination: 2002, P. 197; (referred as David Raic below)
[7] Ibid, p.197-198;
[8] See: David Raic, P.200 and Cassese, PP.37-43;
[9] Charter of the United Nations, http://www.un.org/aboutun/charter/index.html, last visited on 4,June,2008;

development and respect for human rights"[10]. Moreover, implicitly, it has been referred in Art. 73, which affirms that "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a scared trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories…"[11], and in Art. 76 (b), which stipulates that one of the purposes of trusteeship system is to promote progressive development of the inhabitants of the trust territories towards self-government or independence as may be appropriate to […] the freely expressed whishes of the peoples concerned […].[12]

It is observed that self-determination was referred as a principle rather than a legal right in the UN Charter. Despite that Article 73 and 76 (b) entail binding international obligations upon States, the principle of self-determination seems "to be too vague and also too complex to entail specific rights and obligations."[13] Furthermore, the fact that the UN Charter does not provide a precise definition of self-determination makes States unable positively to define self-determination. By contraries, it can be negatively inferred from the debate preceding the adoption of Article 1 (2).[14]

However, it is remarkable that the incorporation in a "conventional instrument establishing an international organization which would be open universal membership was a very important step in the evolution of self-determination into a positive right under international law."[15]

The principle of self-determination was also enshrined in Article 1 common to both UN Covenant on Economic, Social and Cultural Rights, and UN Covenant on Civil and Political Rights with the same words reads as:

---

[10] James Crawford: The Creation of States in International Law, (2nd Ed.), Oxford Univ. Press, 2006; P.112;
The article reads as: 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 United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[11] Cassese, p32;

[12] Ibid.

[13] Daniel Thurer: Self-Determination; Encyclopedia of Public International Law, P.365;

[14] Cassese, P.42;

[15] David Raic, P.200;

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

It can be seen that, with the raising number of States ratified to the UN Covenants, the Covenants has been strengthened gradually, in particular the Article 1 common to the Covenants. Moreover, with the increasing practice towards self-determination either States Parties or non-States Parties relying on Article 1 in international fora, Article 1 will play a more important role not only regards as a treaty provision, but more like a rule of customary law.

State practice towards self-determination appears, but not limited, in areas such as the treaties making process, the subsequent Resolutions adopted by the General Assembly and the Security Council, practice of international organizations, national legislation, and, more importantly, actual implementation of the principle practiced by states etc. Moreover, the consistency, generality, and the duration of such practice should be taken into account when considering whether the rule is able to categorize into customary law.[16]

As we discussed above that the incorporation of self-determination in multilateral treaties speed up the law-making process which makes self-determination a positive right under international law, it helps self-determination to be an existing rule of customary international law. Being a Member of the United Nations and/or being a State Party of the two Human Rights Covenants, a State is required to act in accordance with these treaties. That is to say, that State should act with the due observance of the provisions concerning self-determination. In addition, it shows the official attitude of that State towards self-determination is regarded as approval.

[16] See: general, Martin Dixon: Textbook on International Law, Oxford Univ.Press,2007; P.31-34;

Considering the fact that most of the states existing on earth are the Members of the United Nations and the contracting States of the Covenants is increasing rapidly[17], it can be concluded that most of the states of the world accept the idea that self-determination is a rule under international law and should be respected.

Resolutions of the General Assembly and he Security Council are also the evidence of state practice towards self-determination. Self-determination in the UN Charter is not clearly defined then drawn critique upon it. However, like the other side of a coin, the unclear definition grants UN a large range to interpret it. The General Assembly and the Security Council had been adopted numerous resolutions concerning the principle of self-determination which can be regarded as a process of Charter interpretation [18] .The most important instrument regards as the keystone of decolonization is the General Assembly Resolution 1514 (XV) titled as Declaration on the granting of independent to colonial countries and peoples. The Resolution stressed 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.[19]

This declaration has been regarded as constituting a binding interpretation of the Charter.[20] According to ICJ, the Declaration has been referred as an 'important stage 'in the development of international law regarding non-self-governing territories and as the 'basis for the process of decolonization.'[21]

Furthermore, Resolution 2625(XXV), namely The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted without a vote on October 24, 1970 "can be regarded as constituting an authoritative interpretation of the seven Charter provisions it expounds".[22] The Declaration reconfirmed that all peoples have the right to self-determination without any external interference, and stressed that

[17] There are 154 contracting States of the Covenant on Economic, Social and Cultural Rights, and 160 contracting parties of the Covenant on Civil and Political Rights. see: UN Treaty Collection http://untreaty.un.org, last visited on 8,June,2008;
[18] M.N.Shaw: International Law; Cambridge Univ. Press; 2003;P.228; For example, Assembly resolutions: 1755 (XVII); 2138 (XXI); 2151 (XXI); 2379 (XXIII); 2383 (XXIII) and Security Council resolutions 183 (1963); 301(1971); 377 (1975) and 384 (1975).
[19] UN Doc. A/RES/1514(XV) ; 14, Dec. 1960 ;
[20] Adopted on December 14, 1960 by United Nations General Assembly; UN Doc. A/RES/1514(XV);
[21] See: The Western Sahara case, ICJ reports, 1975, PP.12,31 and 32, 1959, pp.14,49;
[22] Ibid.

every state has the duty to respect this right in accordance with the provisions of the Charter. It acknowledged at the end of the Declaration that:

> The principles of the Charter which are embodied in this Declaration constitute the basic principles of International law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of strict observance of these principles.[23]

Then, by explicitly stating States have to observe the duty to respect the right of self-determination, it seems clarify the obligation of this principle upon member states. Although General Assembly is not a legislature thus has no capacity to impose new legal obligations on States[24], State practice will make the resolution has quasi-legislative effect.

However, without actual implementation, the provisions stipulated in above mentioned instruments would never be the evidence of the existence in customary international law. The most significant implementation of self-determination is the independence of colonial territories. Nearly 100 territories designated as colonial under Chapters XI and XII have become independent and have been admitted to the United Nations.[25] On the other hand, by freely determined their own political status etc. the peoples in other former colonial territories had chosen to be integrated in a state following an act of self-determination.[26] These practice shows that the right of the people in colonial territories to self-determination had been exercised by freely chosen their preferable international status.

---

[23] UN Doc. A/RES/2625(XXV) ;24,October,1970 ;

[24] James Crawford, the Creation of Statehood in International Law(2nd Ed.), Oxford Univ. Press, 2006;P113

[25] James Crawford: State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada concerning unilateral secession by Quebec; http://www.tamilnation.org/selfdetermination/97crawford.htm, last visited on 9 June, 2008;
These territories are: Algeria; Angola; Antigua and Barbuda; Bahamas; Bahrain; Barbados; Belize; Benin; Botswana; Brunei; Burkina Faso; Burma (Myanmar); Burundi; Cambodia; Cameroon; Cape Verde; Central African Republic; Chad; Comoros; Congo (Brazzaville); Cote d'Ivoire; Cyprus; Djibouti; Dominica; Equatorial Guinea; Federated States of Micronesia; Fiji; Gabon; Gambia; Ghana; Grenada; Guinea; Guinea-Bissau; Guyana; India; Indonesia; Jamaica; Jordan; Kenya; Kiribati; Kuwait; Laos; Lesotho; Liberia; Libya; Madagascar; Malaysia; Malawi; Maldives; Mali; Malta; Marshall Islands; Mauritania; Mauritius; Morocco; Mozambique; Namibia; Nauru; Niger; Nigeria; Oman; Pakistan; Palau; Papua New Guinea; Philippines; Qatar; Rwanda; St Christopher and Nevis; St Vincent and the Grenadines; Sao Tome and Principe; Seychelles; Sierra Leone; Solomon Islands; Somalia; Sri Lanka; Sudan; Surinam; Swaziland; Syria; Tanzania (formed by the union of Tanganyika and Zanzibar); Togo; Tonga; Trinidad and Tobago; Tunisia; Tuvalu; Uganda; United Arab Emirates; Vanuatu; Vietnam (formerly North & South Vietnam); Western Samoa; Yemen (formed by union of North and South Yemen); Zaire (formerly Congo (Kinshasa)); Zambia; Zimbabwe (92). Also see: Trust and Non-self-governing Territories: 1945-1999: http://www.un.org/Depts/dpi/decolonization/trust2.htm; last visited in June, 2008;

[26] These include Cocos (Keeling) Islands which integrated in Australia; Greenland integrated in Denmark; Northern Cameroons integrated in Nigeria; Northern Mariana Islands integrated in United States and Southern Cameroons integrated in Cameroun. Moreover, there are people in colonial territories who voted to remain dependent and continue to fall within Chapter XI of the Charter: for example, of Bermuda. Ibid.

The evidence of implementation also can be found in the practice of the United Nations in the process of decolonization. In order to ensure that self-determination in colonial territories were truly based on the freely expressed will of concerned peoples, the United Nations have taken measures i.e. organizing or supervising elections or plebiscites in those non-self-governing territories before their accession to independence or their association or integration with other countries[27].

As to the other element, namely *opinio juris*, according to ICJ, it may be realized from the attitude of the States towards certain General Assembly resolutions, particularly resolution 2625 (XXV).[28] Thus, we can infer that the principles embodied in the resolution 2625 (XXV) may all be understood as a general acceptance of the validity of those principles.

Judicial Decisions rendered by International Court of Justice confirmed the principle of self-determination is a norm of international law in series of cases.

In particular, in Namibia Case in 1971[29],the Court first indicated that, with the development of international law in the half-century, self-determination can not be ignored by the Court since it has been considered included into the *corpus iuris gentium*.[30] The Court then addressed that:

> As for the 'general practice' of States to which one traditionally refers when seeking to ascertain the emergency of customary law, it has, in the case of the right of peoples to self-determination, become so widespread as to be not merely 'general' but universal, since it has been enshrined in the Charter of the United Nations (Art. 1, para. 2, and Art. 55) and confirmed by the texts that have just been mentioned: pacts, declarations and resolutions, which, taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination.[31]

---

[27] For examples, the plebiscites or elections held in the British Togoland Trust Territory in 1956, French Togoland in 1958, the British Northern Cameroons in 1959 and the British Southern Cameroons in 1961, Rwanda-Urundi in 1961, Western Samoa in 1962, the Cook Islands In 1965, Equatorial Guinea in 1968, Papua-New Guinea in 1972, the New Zealand Territory of Niue in 1974, the Ellice Islands in 1974, the Northern Marianas in 1975, the French Comores Islands in 1974 and 1976, see: Supra note 3, p.76; and East Timor in 1999; On 5 May 1999, the governments of Indonesia and Portugal concluded an agreement concerning the question of East Timor which requested the Security Council to establish the United Nations Mission in East Timor in order to effectively carry out the popular consultation, which had been held under UN supervision on 30 August 1999; See: A/53/951-S/1999/513;

[28] ICJ: Judgment of the Case Concerning Military and Paramilitary Activities in and Against Nicaragua; Nicaragua v. United States of America, 1986 WL 522, 1986 I.C.J. 14, I.C.J., Jun 27, 1986 (NO. 70);Para.188;

[29] ICJ: Case concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276; Advisory Opinion, I. C. J. Reports 1971, pp. 31-32, paras. 52-53 ;

[30] I.C. J. Reports 1971, p. 31.

[31] Ibid.

The subsequent jurisprudence of the Court confirmed that the principle of self-determination of peoples "is one of the essential principles of contemporary international law"[32].

In the Advisory Opinion on West Sahara in 1975, the Court's act was in line with her previous position[33]. The Court indicated that in two cases the requirement of consulting the inhabitants of a given territory can be dispensed by stating that:

> The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.[34]

In the case concerning East Timor[35], both of the party of the case, namely Portugal and the Court expressly consent the right of People of East Timor to self-determination. Portugal requested the Court "to adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources"[36]. After carefully examination, at last the Court considered that East Timor remains a non-self-governing territory and deservers a right of self-determination at that time. It is notable that the court confirmed that the assertion of Portugal that the right of peoples to self-determination has an *erga omnes* character is irreproachable.

In the Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, the Court affirmed that the right of people to self-determination, recalling the provisions in relevant treaties, resolutions and the recognition by the Court herself, is a right erga omnes.[37]

It is notable to mention the reference of the Supreme Court of Canada[38]concerning the secession of Quebec, which indicates that:

---

[32]ICJ: Judgment of East Timor Case,1995 P.16
[33] ICJ: Advisory Opinion: Western Sahara, I. C. J. Reports 1975, pp. 31-33, paras. 54-59;
[34] Ibid. Para 59;
[35] Supra note 33
[36] Ibid.para.10; P8;
[37] ICJ: Advisory Opinion: Legal Consequences of the Construction of A Wall in The Occupied Palestinian Territory, 9 July 2004; p39; para.88;
[38] Supreme Court of Canada: Reference re Secession of Quebec, [1998] 2 S.C.R. 217

> The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law.[39]

Accordingly, with the numerous state practices and the jurisprudence of the Court, internationally and domestically, it can be concluded that the right of peoples to self-determination is existing as a rule of customary law. More precisely, it can be regarded as a permanent norm of international law[40].

1.3 Self-determination as a term of *Jus Cogens* under international law

Article 50 of the Vienna Convention of the Law of Treaties, entitled as Treaties conflicting with a peremptory norm of general international law (jus cogens), stipulates that:

> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[41]

Apparently, *jus cogens*, namely a peremptory norm of general international law, has a non-derogatory character that can only be modified by subsequent new peremptory. However, the Convention of the law of treaties does not enumerate or provide any example of peremptory norms of general international law. Considering there would be misunderstanding or may lead the norms involved out of the scope of the present article, the International Law Commission decided not to include any example but left the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.[42] Nevertheless, the Commission mentioned in the commentary some recommended examples, such as the principle of non-use of force, the prohibition of criminal act under international law, and trade in slaves, piracy or genocide, etc.[43]

---

[39] Ibid.P.66; para.114;
[40] See: International Law Commission, Draft Articles on the Law of Treaties with commentaries; 1966; Yearbook of the International Law Commission, 1966, vol. II.;P.247-248; and Dissenting Opinion of Judge Kreca in Case Concerning Application of Convention on Prevention and Punishment ;: para90; 1996 WL 943410 International Court of Justice;
[41] International Law Commission, Draft Articles on the Law of Treaties with commentaries; 1966; Yearbook of the International Law Commission, 1966, vol. II.;P.247;
[42] Ibid. P248;
[43] Ibid.

The right of peoples to self-determination was not referred as one of the recommended examples, but was referred as, according to other members' view, one of the other possible examples. In his dissenting opinion of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judge Kreca recognized the self-determination of peoples has the character of *jus cogens*, from which the admission of Bosnia and Herzegovina to the membership of the United Nations implied a derogation, therefore was legally impossible.

It is remarkable that with the rapid development, the right of peoples to self-determination now is one of the peremptory norms (*jus cogens*) of public international law. With the aforesaid state practices and carefully judgments of international tribunals, the right of peoples to self-determination can be regarded as has been accepted and recognized by the international community of states as a whole.

The exercise of the right to self-determination is confined in the regime of decolonization in this era. Although the Covenants confirmed not only the right to self-determination for decolonization, the state practices in that period are mainly focus on decolonization. For the reason that to respect the principle of sovereignty and territorial integrity, the application of self-determination is strictly limited in the context of decolonization.

1.4 Self-determination as an international legal principle in post-cold war era

In the late 1980s to early 1990s, the world has been changed since USSR itself had crumbled and the cold war then ended. The collapse of Soviet communism launched a new development of self-determination, which may apply to the status of Kosovo. It seems self-determination in this era has been applied beyond decolonization.

In the Helsinki Final Act of The Conference on Security and Co-operation in Europe in 1975, It stressed that self-determination has a continuing character that 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."[44] It is different

[44] The Conference on Security and Co-operation in Europe Final Act, 1975, Principle.VIII http://www.hri.org/docs/Helsinki75.html#H4.8 last visited on 15, June, 008;

by granting self-determination, especially external self-determination an ongoing character, which was believed to be expired once exercised in the process of decolonization.[45] Moreover, it shows the new trend that is emerging in the world community towards wider recognition of internal self-determination[46], while in the past self-determination was more concerned with strictly limited external self-determination, namely, decolonization. However, principle VIII excluded the right of national minorities to external self-determination.[47]

The most significant events of self-determination in the post-cold war era are the disintegration of USSR, Czechoslovakia and Former Yugoslavia. Comparing with the fact that the republics of USSR have reasonable legal grounds, either relied on the illegal annexation to USSR or acted in accordance with the Constitution, the achievement of independence by the Yugoslav Republics can be seen as a revolutionary process that has taken place beyond the regulation of the existing body of laws.[48] However, it must be born in mind that the disintegration of Former Yugoslavia is dissolution, but not regarded as those republics unilaterally seceded from the Federal.[49] Dissolution and secession are different from each other. Once the dissolution took place, there is no predecessor state continuing in existence whose consent to any new arrangements can be sought[50]. According to James Crawford, "the dissolution of a state may be initially triggered by the secession or attempted secession of one part of that state. If the process goes beyond that and involves a general withdrawal of all or most of the territories concerned, and no substantial central or federal component remains behind, it may be evident that the predecessor state as a whole has ceased to exist. As will be seen, this was the position taken by the international community in the cases of Yugoslavia and Czechoslovakia. Nonetheless even a successful unilateral secession of one part of a state will not normally produce that result. There is a strong presumption in favor of the continuity of states, and the normal situation is that the predecessor state will continue in existence and be recognized as such" [51].

Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, and Montenegro, former federal republics of Formal Yugoslavia desired independence from Former Yugoslavia

---

[45] Cassese, P.73;
[46] David Raic, pp.302;
[47] See: David Raic, pp.288-289;
[48] Ibid.p.270;
[49] Opinion 1 of the Arbitration Commission 31 I.L.M. 1488
[50] James Crawford: State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada concerning unilateral secession by Quebec; 1997; http://www.tamilnation.org/selfdetermination/97crawford.htm#part3, last visited in July 2008;
[51] Ibid.

whereas under international law they had no right to external self-determination. [52] However, these republics, deeming they fitted to, held independence referendums respectively in 1991. As a result of the vote in favor of the absolute majority they declared independence. European Community has established The Arbitration Commission of the Conference on Yugoslavia to provide legal advice to resolve the Yugoslavia crisis. According to the Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", the European Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination.[53] The guideline set conditions for recognition of these States such as "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;"[54] The new trend of self-determination towards the need of protection of minority rights appears in its Second Opinion issued in November 1991, the Commission considered that "Peremptory norms of international law require respect for the rights of minorities" and that "Individuals have the right to choose their ethnic, religious or language community; as a corollary, the Serb people should be allowed to choose their nationality."[55]

It is understood that there were no real change of the basic conception of self-determination in post-cold-war era and secession continues not to be recognized as a legal right of peoples under international law. However, there is an exception alleged that: "if a regime is guilty of serious violations of human rights directed against a people and threatening its existence or identity, in which cases a right of separation might be recognized as a means of last resort in order to safeguard basic standard of human rights"[56].

The case of Quebec, as the most recent jurisprudence clearly describes the latest development of self-determination. The Supreme Court of Canada, with carefully examination the right of self-determination, indicated that the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. On the other hand, it admitted that there are exceptional circumstances exist

[52] Cassese, P.269;
[53] European Community: Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" 31 I.L.M. 1485 November 1992;
[54] Ibid.
[55] Opinion 2 of the Arbitration Commission, 31 I.L.M. 1488
[56] Daniel Thurer: Self-Determination; Encyclopedia of Public International Law, P.371;

which may lead to external exercise of the right to self-determination which imply secession. Those are including:

a) The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power;
b) The case where a people is subject to alien subjugation, domination or exploitation outside a colonial context; and
c) When a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.

The third approach is highly advocated in academic literature as a re-evaluation of the right to self-determination[57]. However, the Court did not determine whether the third approach actually reflects an established international law standard.[58]

1.5 Whether Kosovo fits the framework of external self-determination?

From what we discussed above, the extreme circumstances which may trigger the exercise of the right to self-determination were explicitly stipulated in the Case of the secession of Quebec. In order to answer the question Whether Kosovo fits the framework of external self-determination[59], it is essential to examine the three extreme circumstances to determine whether it fits. Apparently, the people in Kosovo is not a colonial people, therefore the first circumstance is not applicable. Then, whether is it subject to alien subjection, domination or exploitation outside a colonial context? It is no doubt that the domination of Yugoslav government is not regarded as alien power, thus it is not applicable.

Turning to the third circumstance, namely the refusal to the exercise of internal self-determination may lead to external self-determination; it might be applicable to the people of Kosovo. According to the Vienna Declaration, the denial of the right of self-determination is a violation of human rights[60] which is contrary to the UN Charter. It is also stressed that the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. In the case of

[57] Marc Weller, The Crisis in Kosovo,1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities; Documents & Analysis Publishing Ltd.1999; P16;
[58] See: Supreme Court of Canada: Reference re Secession of Quebec, [1998] 2 S.C.R. 217; pp.104-105, Para.131-135;
[59] Internal self-determination is indisputably always applicable to the people of Kosovo, so here we only discuss external self-determination.
[60] World Conference on Human Rights, Vienna Declaration And Programme of Action, Vienna, 14-25 June 1993; UN A/CONF.157/23;

Loizidou v. Turkey in 1996 ruled by the European Court of Human Rights, Judge Wildhaber indicated a consensus that the right of external self-determination is a remedy of the violation of human rights:

> 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.[61]

In this regards, it seems that if there had been occurred abuses of human rights, then the people who had suffered the serious violation of human rights in Kosovo have the right to exercise external self-determination. However, it is still questionable since this standard has not been proved as an established standard of international law so far. Even it is a rule of international law, is there any limits on the exercise this kind of external self-determination which is the so called "last resort" for Albanian Kosovars to protect their fundamental human rights? Would the case of Kosovo really be the unique case that deserves independence unilaterally not being a precedent? This thesis is trying to find the answers of these questions.

2. Backgrounds – Kosovo/Yugoslavia as a special case

"Today Kosovo has become a general term denoting a complex problem in which history is being faced with our reality."[62] In order to understand the whole situation, it is essential to have an overview of the history of Kosovo and its relation with Yugoslavia.

2.1 Kosovo as an incorporated territory of Serbia

Kosovo has been incorporated into Serbia (The Kingdom of Servia) during the first Balkan War in 1912. Then it has internationally recognized as a part of Serbia in

[61] Concurring opinion of Mr Wildhaber, joined by Mr Ryssdal of the Case Lozidou V. Turkey, 1996;

[62] Dimitrije Bogdanovic : The Kosovo Question: Past and Present; 1985; Summary of a book by renowned Serbian historian, published by Serbian Academy of Sciences and Arts. http://www.kosovo.net/default3.html

subsequent Peace Treaties[63]. In 1918, it became a part of the Kingdom of the Serbs, Croats and Slovenes, which name was shortly changed as the Kingdom of Yugoslavia in 1929. Kosovo has been under substantial control of Serbia until 1999 except during the Second Word War. The partition of Yugoslavia by the Axis Powers from 1941 and 1945 awarded most of the territory to the Italian-occupied Greater Albania, and a smaller part of it to German-occupied Serbia and Greater Bulgaria. After the establishment of the Federal Yugoslavia, in 1946 Kosovo became a constituent autonomous region of the Republic of Serbia, which is one of the six Federal Republics of Yugoslavia, and then became an autonomous province, namely the Autonomous Province of Kosovo and Metohija, but it was believed with no factual autonomy. It was renamed the Socialist Autonomous Province of Kosovo in 1974 while it gained virtual self-government granted by the 1974 constitution of Yugoslavia. In 1989, however, Serbia revoked the autonomous status of Kosovo via the amendment of its Constitution.[64]

In 1990s, when the break-up of Yugoslavia occurred, Kosovo, as an autonomy province of Formal Yugoslavia, had declared Independence as well. However, the declaration of independence was ruled illegal by the Constitution Court of Serbia. And, in the meantime, the Arbitration Commission did not recommend the recognition of Kosovo while it made recommendation to recognize other four republics. As a result, the desire of Kosovo Albanians was not realized, and Kosovo remains to be an autonomy province of Yugoslavia after the dissolution[65]. The air strikes of NATO in 1999 which was launched with the claim "to stop ethnic cleansing and the killing of Albanian Kosovars" changed the situation that Yugoslavia has agreed to "substantial" autonomy for Kosovo, withdrawal of all Serb military, police and paramilitary forces, return of all the refugees, and an international armed security presence in Kosovo with "substantial" NATO participation.[66]

According to Annex 1 of the Security Council Resolution 1244, "A political process towards the establishment of an interim political framework agreement providing for a

[63]In Treaty of Peace between Greece, Bulgaria, Montenegro, Serbia on the one part and Turkey on the other part. (London) May 17/30, 1913, it stipulates that the Emperor of the Ottomans cedes to their Majesties the Allied Sovereigns all the territories of his Empire on the continent of Europe to the west of a line drawn from Enos on the Aegaean Sea to Midia on the Black Sea with the exception of Albania.(Article II), (http://www.zum.de/psm/div/tuerkei/mowat120.php, last visited in June, 2008)
And then in the Treaty of Friendship and Alliance between the Kindom of bulgaria and the Kindom of Serbia with the Secret Appendix 1912, the Secret Protocol between Greece, 1913 and Serbia and Treaty of Peace between Romania, Greece, Montenegro, Serbia and Bulgaria, 1913 the delimitation of frontiers between those states were settled. Snezana Trifunovska (Ed.): Yugoslavia Through Its Creation and Dissolution, Martinus Nijhoff Publishers, 1993; pp 114-120

[64] Marc Weller: The Crisis in Kosovo 1989-1999, From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities; Documents & Analysis Publishing Ltd. 1999; P16;

[65] Then of Serbia and Montenegro in 2003, and of Serbia in 2006.

[66] United Nations: Security Council Resolution 1244; S/RES/1244 (1999); 10 June 1999

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".[67] The principle of sovereignty and territorial integrity of the FRY was also confirmed in other Security Council's resolutions, namely 1160, 1199, 1203 (all from 1998) and 1239 from 1999.

With the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), Kosovo can be regarded as a non-self-governed territory since it is administrated by United Nations towards the objective of "substantial self-governing and meaningful self-determination"[68]. On the other hand, it remains a part of the territory that belongs to Serbia, since the principles of sovereignty and territorial integrity should be respected. The status of this special case will be dealt with in the third Chapter.

In February 2008 the government of Kosovo unilaterally declared independence which thereafter has been recognized by some other States. On contrast, Serbia protests its sovereignty over Kosovo and, together with Russia and several other States, denies recognizing Kosovo as an independent State.

2.2 The Demographics of Kosovo

Kosovo-Metohija is separated from neighbouring Albania by the mountain massif of Prokletije and is separated from Macedonia by Sar Planina mountain with two highest mountain peaks in Serbia: Djeravica and Crni Vrh. The province is made up of two regions which differ from each other in the soil content and climate and are divided by Cicavica and Crnoljevo mountains. The characteristic of the province is high population density and demographic variety with a pronounced domination of Albanian population.[69] Kosovo is multiethnic region, where Albanian, Serbian, and other small groups of peoples, such as Turks, Roma, Muslim (Bosniacs), etc. live together for generations.

In the end of 19th Century, the inhabitants of Kosovo were formed with Serbian, who was predominant in all cities as the majority, and Albanian, together with several settlements of Turks, Romas and Circassians, formed the minority.[70] However, in

[67] Ibid.
[68] Ibid.
[69] Basic Facts of Serbia : Kosovo-Metohija: Serbia Government; http://www.srbija.sr.gov.yu/pages/article.php?id=20619, last visited in June, 2008;
[70] ISBN 86-80029-29-7: Mirčeta Vemić: Ethnic Map of a Part of Ancient Serbia: According to the travel-record of Miloš S. Milojević 1871-1877, Belgrade, 2005

1906, the situation has changed that two thirds of the population in Kosovo was Albanian while one third was Serbian[71].

Such composition lasts until now, with slightly ascent or decline of the population of either Albanian or Serbs. In the early decades of 20th century, the population of Serbs in Kosovo has raised while the non-Serbs population has declined, but Albanian population was still in a predominant position. The percentage of non-slav population, including ethnic Albanians, Turks, Gypsies, etc, in Kosovo in 1939 was around 65.6%, the percentage of native Slavic population and the settlers (mostly Serbs) were 25.2% and 9.2% respectively, according to a census held by Yugoslav authority.[72]

After the Second World War, the authorities of Yugoslavia published a decree which forbidden Serb and Montenegrin setters who had been expelled during the war from returning to their abandoned estates as they were considered exponents of the inter-war "Greater Serbian hegemonistic policy".[73] On the contrary, a lenient attitude towards the ethnic Albanian minority was taken at that time. The ethnic Albanians settled in Kosovo by the Italians and Germans during the war were not expelled, moreover, the border of Yugoslavia was open to new immigrants from Albania until 1948[74] settling 100,000 of Albanians from Albania[75].

Subsequent censuses in 1953 and 1961 show that Albanian population has ascended from 65% to 67.1%, as of 120 000 people were increased from 524 559, while Serb population remained 23.5%, but the number has increased from 189 869 to 227 016.[76]

With the time passing by, in 1981 the inhabitants of Kosovo is increasing constantly, the population of Albanians became more than twice of the number in 1961, which amounts to 1 226 736, 77.42%, while the population of Serbs fell to 14.93%, which amounts to 236 525.[77]

During the Kosovo War in 1999, over 700,000 ethnic Albanians and around 100,000 ethnic Serbs were forced out of the province to neighboring Albania, Macedonia, Montenegro, Bosnia and Serbia[78]. After the United Nations took over administration

[71] H. N. Brailsford, Macedonia, Its Races and Their Future, London, 1906
[72] http://www.kosovo.net/histkim2.html last visited in June, 2008; B. Gligorijevic, op. cit., 187-191.
[73] Ibid. V. Djuretic, op. cit., pp. 326-335.
[74] Ibid.
[75] Serge Krizman, Maps of Yugoslavia at War, Washington 1943.
[76] Official Yugoslav censa results 1948-1981; http://www.kosovo.net/news/archive/2005/July_21/3.html; last visited in June, 2008;
[77] Ibid.
[78] OSCE: "Kosovo/Kosova As Seen As Told"; http://news.bbc.co.uk/2/hi/europe/336728.stm; last visited in June, 2008;

of Kosovo following the war, the vast majority of the Albanian refugees returned. The non-Albanian population in Kosovo is now about half of its pre-war total. The largest concentration of Serbs in the province is in the north, but many remain in Kosovo Serb enclaves surrounded by Albanian-populated areas.[79]

Armed conflicts, the migration of a high number of Serbs and members of other minorities in Kosovo, as well as the arrival of tens of thousands of Albanians from Albania have largely altered Kosovo-Metohija's ethnic composition[80]in the last two decades of 20th century. According to the World Bank Living Standards Measurement Study in 2001, around 88 % of the population is ethnic Albanians, Serb population accounted for 7 %, while other ethnic groups together were estimates about 5 % of the general population.[81]

It is interesting to note the composition of ethnic peoples within Serbia and Kosovo respectively. Within the territory Serbia, Serbs is the majority people who composing more than 82.9% of 10,159,046 people[82]. According to the census in 2002, the minorities' populations in Serbia (excluding Kosovo) are accounted for: 3.9% (Hungarian), 1.4% (Romany (Gypsy)), 1.1% (Yugoslavs), 1.8% (Bosniaks), 0.9% (Montenegrin), and 8% for others. Albanians is apparently one of the minorities groups of people within Serbia. It was accounted for 13.9% of Serbian population in 1981, and is around 10% of the Serbs' (2,126,708) in 2007[83], if including the population of Kosovo.

2.3 The historical importance of Kosovo for Albanian and Serbs

For generations, Kosovo has been a territory disputed between Serbs and Albanians. And just as Serbs and Albanians fight for it today, their respective historians have long quarreled over its "true" history.[84]

Kosovo is the most precious of Serb words[85]. The Serbs' emotional and spiritual attachment to Kosovo is comparable to that of Israel to Jews.[86] Although it was in

[79] http://www.kosovo.net/news/archive/2005/July_21/3.html; Visited in June, 2008;
[80] Serbia Government, basic facts: National Minorities; http://www.srbija.sr.gov.yu/pages/article.php?id=40, last visited in June, 2008;
[81] Kosovo State of the Environment Report: http://enrin.grida.no/htmls/kosovo/SoE/popullat.htm last visited in June, 2008; Other groups include Muslims (bosniacs).1.9 %, of Roma 1.7 % and Turks 1 %.
[82] CIA: The World Factbook: Serbia; https://www.cia.gov/library/publications/the-world-factbook/geos/rb.html Kosovo; https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html; last visited in June, 2008;
[83] CIA: The World Factbook: Kosovo; https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html; last visited in June, 2008;
[84] History of Kosovo: http://news.bbc.co.uk/1/hi/special_report/1998/kosovo/110492.stm; last visited in June, 2008;
[85] Matiya Bechkovich: Kosovo-the most precious Serb word; Valyevo:Biblioteka Glas Crkve, 1989, P.7-8;

1912 that Kosovo was incorporated in Serbia, the region of Kosovo has been under the control of Serbian State in ancient time.

By 1190 Kosovo had become the administrative and cultural center of the medieval Serbian state ruled by the powerful Nemanjic dynasty. This dynasty lasted 200 years and still today Kosovo is known by Serbians as "Old Serbia". There are many seminaries in the region of Kosovo where was the home of the Serbian Orthodox Church. In the late 17th century Serbs left Kosovo in large numbers as a result of military victories of the Ottoman Turks. This caused the Serbian "center of gravity" to move northward to the region of Belgrade where it has remained ever since. This displacement of the Serb population is known in history as "the great migration". As a result, the region of Kosovo became underpopulated and, attracted by available fertile land, was resettled by Albanians moving eastward from the hills of Albania.[87]

For Albanian kosovars, Kosovo has been their homeland for centuries as well. They claim to be direct descendants of the Illyrians, who were the earliest known inhabitants of Kosovo. However there is no verifiable historical evidence to prove such claim.[88] The majority of Albanians were Christians until 15th century. After the conquest of Islamic Ottoman Turks in 1459, Islamization occurred. Gradually Albanians and to a lesser extent Serbs became converted to Islam that there were two thirds of Albanians converted in 17th and 18th centuries[89]. Only with the increasing fear of Albanians being swallowed up by the Christian nations which intended to be established out of the dying Ottoman Empire did the Albanians begin to develop a nationalistic movement.[90] From then on, Albanians Kosovars fought for autonomy or independence from Ottoman Turks and afterwards from Serbia for nearly a century.

2.4 The conflicts between ethnic peoples in Kosovo

The population of Yugoslavia is diverse, in terms of national affiliation and religious affiliation. Before the break-up of the Socialist Federal Republic of Yugoslavia, there were Serbs, Bosniaks, Croats, Macedonians, Montenegrins, Slovenes, Yugoslavs, Hungarians, Albanians, Roma, Turks, Slovaks, Romanians, Bulgarians, Italians and other minorities resided in Yugoslavia. Of the many religions, such as: Islam, Catholicism, Judaism and Protestantism as well as various Orthodox faiths composed

---

Quoting from: Ana S. Trbovich: A Legal Geography of Yugoslavia's Disintegration; Oxford Univ. Press; 2008;
[86] Ibid.
[87] A Short History of Kosovo: http://lamar.colostate.edu/~grjan/kosovohistory.html; last visited in June 2008;
[88] Ana S. Trbovich, A Legal Geography of Yugoslavia's disintegration, Oxford Univ. Press, 2008; P.77;
[89] http://www.albanian.com/information/history/chronolo.html; last visited in June, 2008;
[90] See: C. and B. Jelavich, 223-224.

the religions of Yugoslavia. In such a multiethnic region where contains complicated ethnic composition, conflicts happen. Series of violent conflicts in this territory were taken place in the last decade of the 20th century between Serbs on the one side and Croats, Bosniaks or Albanians on the other mostly, but also between Bosniaks and Croats in Bosnia and Macedonians and Albanians in Macedonia. The conflicts had their roots in various underlying political, economic and cultural problems, as well as long-standing ethnic and religious tensions. The most significant instance is the war in Bosnia and Herzegovina from 1992 to 1995 during the process of dissolution of Yugoslavia.

2.4.1 The long-standing ethnic and religious tensions and the outbreak

There are long-standing ethnic and religious tensions in Kosovo as well. Conflicts in Serbia are mainly occurred in Kosovo between Serbs and Albanians. Two neighboring Balkan peoples, the Serbs and Albanians, are weighted down with antagonisms which have been accumulating over the past three hundred years. The problem cannot simply be reduced to the legal constitutional status of the Autonomous Province of Kosovo nor to the position of the Yugoslav Albanians. On the contrary, it is far more a question of the survival and position of the entire Serbian nation - in Kosovo, in Yugoslavia, in the Balkans.[91]

The process of ethnic cleansing of Serbs from Kosovo and Metohija has continued over the entire period of history, particularly during periods of occupation of Kosovo and Metohija by foreign conquerors.[92] According to the Memorandum prepared by the FRY on Kosovo and Metohija in 1998, Serbs "have been expelled by various methods, ranging from threats burning of homes, mass destruction of gravestones, blackmail, to murders and execution of entire Serb families. Attacks on historical and cultural monuments, their destruction or damage, was also part of the methods of Albanian separatists to arouse fear and to force Serbs out."[93] Well on the other hand Kosovar Albanians claimed that "the Albanians in Yugoslavia are a community with a long history of injustice"[94].

Conflicts between Serbs and Albanians in Kosovo broke out since 1980s. In 1981, due to high cost of living and privileges of party officials, riots erupted and then led to

[91] Dimitrije Bogdanovic : The Kosovo Question: Past and Present; 1985; Summary of a book by renowned Serbian historian, published by Serbian Academy of Sciences and Arts. http://www.kosovo.net/default3.html, last visited in June, 2008;
[92] Memorandum prepared by the FRY on Kosovo and Metohija, presented on 23, March 1998; The crisis in Kosovo:1989-1999; P.38
[93] Ibid.
[94] Government of Kosova: A Case for Independence, 31, sept.1998 The crisis in Kosovo 1989-1999 P43

declaration of a state of emergency and repressive measures against Albanian population.[95] The intensified ethnic tension continues with the continuous economic difficulties which led to the rise of unemployment rate and currency devaluation. In 1988, with the proposal to amend the 1974 constitution, which contains a revocation of the autonomous status of Kosovo, Kosovar Albanian protested in Pristina, demanding the 1974 constitution be respected[96]. The amendment of the constitution has been ratified in 1989, and then the ethnic tension increased. Serbs protested against the Kosovar Albanian's separatist tendencies and on the other hand Kosovar Albanians took measures such as strike to reject the constitutional change. Aftermath, approximately 30 demonstrators were killed in street violence, and hundreds of Albanians has been arrested and/or held in custody.

The conflicts in Kosovo draw the attention of international community after the break-up of former Yugoslavia in early 1990s. Reports were submitted by Special Rapporteurs and Representatives concerning the violations of human rights in former Yugoslavia in 1992, which explicitly indicated the situation of Kosovo at that time to be dangerous and expressed the possibility that ethnic cleansing would extend to Kosovo.[97] According to the other report in 1993[98], on the basis of gathered information, the special Rapporteur indicated that human rights situation in Kosovo has not improved. On the contrary, the police have intensified their repression of the Albanian population since 1990. The Albanians continue to be deprived of their basic rights, their education system has been largely destroyed, they are victims of dismissal for political reasons and they face a very difficult economic situation. However, it must be stressed that until now they have resisted peacefully.[99]

Since their declaration of Independence was ignored by the international community in 1991, and their wish that the issue would to be envisaged was still ignored in 1995 by the General Framework Agreement for Peace in Bosnia and Herzegovina, disappointed Albanian Kosovars started to abandon the tactics of non-violent resistance, which led gradually to the forming of the Kosovo Liberation Army (KLA), an extreme nationalism organization.[100] The tension between Albanians and Serbs became more intense.

---

[95] Marc Weller: The Crisis in Kosovo, 1989-1999; Documents& Analysis Publishing Ltd,1999; P15
[96] Ibid. P.16
[97] Report on the situation of human rights in the former Yugoslavia e/cn.4/1992/s-1/9 1992
[98] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992; E/CN.4/1993/50; 10 February 1993
[99] See: Ibid. para 153-171;
[100] Stefan Troebst, The Kosovo Conflict, 1999, SIPRI Yearbook P50; The Kosovo Conflict and International Law; xxxi;

From 1994 to 1999, there are several General Assembly resolutions of the United Nations concerning the situation of human rights in Kosovo from which we can see the development of the conflicts. Those resolutions affirmed the violation of human rights in Kosovo which had deteriorated after the submission of the Reports, and also enumerated the various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo and the continuing deterioration of the human rights situation in Kosovo.

The subsequent resolution in 1996 concerns the situation of human rights in Kosovo reaffirmed afore mentioned situation, and called for continue examination towards the human rights questions in Kosovo[101]. Grave human rights situation in Kosovo continued in 1997, and the General Assembly adopted resolution 52/139 calling for "full and immediate implementation" of the memorandum of understanding on the educational system in Kosovo, signed in 1996. It confirmed the violation of human rights committed by the government of FRY in that year, including "the use of force by Serbia police against peaceful Albanian student protesters of Kosovo, and the failure of the government to make reasonable accommodation to address the legitimate grievances of the students"[102] and expressed deeply concern about "all violations of human rights and fundamental freedoms in Kosovo, in particular the repression of the ethnic Albanian population and discrimination against it, as well as acts of violence in Kosovo".

The General Assembly then called upon the authorities of the FRY in that resolution to end all human rights violations against ethnic Albanians in Kosovo, and to respect the will of its inhabitants as the best means of preventing the escalation of the conflict there. The General Assembly urged the authorities of the Federal Republic of Yugoslavia to pursue constructive dialogue with the representatives of the ethnic Albanians of Kosovo.

Situation in Kosovo went worse and worse in next year. The tension between Serbs and Albanians had been intensified. There were "systematic terrorization of ethnic Albanians, as demonstrated in the many reports, inter alia, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of

[101] General Assembly: Situation of human rights in Kosovo A/RES/50/190; 6 March 1996
[102] General Assembly Resolution: Situation of human rights in Kosovo; A/RES/52/139 3 March 1998

the Federal Republic of Yugoslavia (Serbia and Montenegro) by the police and military"[103]. On the other hand, there were "reports of violence committed by armed ethnic Albanian groups against noncombatants and the illegal detention of individuals, primarily ethnic Serbs, by those groups."[104] In 1998, a major armed conflict erupted in central and western Kosovo between the KLA, regular units of the Yugoslav Army and regular Serbian police as well as three specialized police forces of the Public Security Service within the Ministry of the Interior of the Republic of Serbia.[105]

2.4.2. The positions of both sides of the conflicts

Both sides of the conflicts claimed their positions publicly in 1998, by both of the representative governments, stating their sound grounds.

The government of Kosova made its position for independence clearly for at least two reasons, one historical reason and one concerning the behavior of Serbian or Yugoslav authorities towards the Albanians.

The first element they proclaimed is the historical context of the collapse of the Ottoman Empire and the emergence of new Balkan nation states. According to the Government of Kosova, the incorporation of Kosovo into Serbia is by force and is the illegal annexation of Albanian territories[106]. They held that the Serbian conquests over their territory, where Albanians constituted the majority, was legitimized by the so called "power of disposition". The division of their territory led to the result that "one half of the Albanian population, who was deemed living on their own lands since times immemorial, was forced to remain within the experimental state of the southern Slavs"[107]. This was described as a massive injustice for the Albanians of Kosova. The circumstances under which the Albanians found themselves incorporated within the state of the Southern Slaves, according to the government of Kosova, may justify "their demand to improve their situation by either uniting with Albania, where they naturally belong, by asking for independence, or by becoming an equal partner in another form of a state organization"[108].

The second reason the government of Kosova alleged is the violation of human rights the Serbian or Yugoslav authorities towards the Albanians. As what was promised, the

[103] General Assembly Resolution: Situation of human rights in Kosovo; A/RES/53/164, 25 February 1999
[104] Ibid.
[105] Stefan Torebst, The Kosovo Conflict 1999; SIPRI Yearbook p.47;
[106] Government of Kosova: A case for Independence, 31, September, 1998; The Crisis in Kosovo,1989-1999; P44
[107]; Ibid. P.42
[108] Ibid.

Serbia/Yugoslav authorities has the obligation to protect the rights of Albanians, to allow them to preserve their cultural traditions, practice their religion, use their language and also receive education in their mother tongue etc. However, the government of Kosova regarded the Serbian authorities as a colonial power which continued their colonial policy towards Albanians for twenty years, and accused the refusal of the government of Serbia or Yugoslavia to grant full republic status upon Kosova. It failed to safeguard Kosova's legitimate political interests. By contrast, the basic rights of Albanians have been violated and have been documented by a number of renowned human rights organizations[109]. Further, they stressed that the region's economic interests is another element to justify the Kosovars' aspirations that "the people of Kosova were outraged that their land and resources were being exploited for the benefit primarily of Serbia and other parts of Yugoslavia"[110].
The government of Kosova claimed that they opted for a strategy of non-violet resistance. Even under the "intolerable" repression, "the Albanians remained calm and patient for almost a whole decade"[111], from 1992. Although their declaration of independence has been ignored in 1991, the government of Kosova believed that "the dissolution of the former Yugoslavia presents a good reason for the international community and the great powers of today to reconsider the decisions made concerning Kosova made both before and after World War I, as they have done in the cases of Slvenia, Coatia, Bosnia and Macedonia. "[112]

It was claimed that "if every measure for Kosova either imposed or advocated by the international community has failed, then surly the only solution is independence."[113] For defence, they stressed that the leadership of Kosova have nevertheless expressed willingness to engage in negotiations leading to a satisfactory solution of the problem.

Serbian authorities, on the other hand, pleaded that the alleged violation of human and minority rights were actually not violated. They employed, as the best proof, the fact that "many ethnic minorities live in the Republic of Serbia and the FRY without any problems and they enjoy all the advantages as well as equal treatment both as citizens and as members of their respective ethnic minorities"[114]. And they claimed that the Albanian ethnic minority in Kosovo and Metohija can be considered as an advantaged rather tan disadvantaged group.

---

[109] Ibid.
[110] Ibid. P43
[111] Ibid. P.43
[112] Ibid.
[113] Ibid. P44
[114] Memorandum Prepared by the FRY on Kosovo and Metohija, presented on 23, March 1998; The Crisis in Kosovo,1989-1999; P.40

Further they alleged that the new law on local self-government, which would "prevent overrule of any part of the population and guaranteeing equality in the decision-making on many issues relevant for the development and improvement of the quality of life of all the population regardless of their ethnic origin"[115] and pointed out that in fact a large number of persons belonging to the Albanian ethnic minority do not object to their status within Serbia and Yugoslavia, regardless where they live. They stressed that the rights of ownership, equal opportunities in employment, equality in the exercises of the rights related to health, education, culture, religion and the media, which are deemed violated in Kosovo by international community, are guaranteed in since full equality of citizens employed in the public and private sectors. For accuse of the revenge brought by polices, they claimed that the police merely performed their regular duties of maintaining the peace and public order. Then they showed their sincere will to have peaceful dialogue with representatives of the Albanian ethnic community who, however, did not show up in several occasions.

At last, Serbian authorities made it clear that the FRY opposes attempts at internationalizing the problem of Kosovo and Metohija and stressed that it would be interference in the internal affairs of Serbia and therefore unacceptable.

2.4.3 The intervention of the international community

Taking into account the said facts, the General Assembly adopted another resolution to call upon the government of Federal Republic of Yugoslavia to respect "all human rights and fundamental freedoms fully and to abide by democratic norms, especially in regard to respect for the principle of free and fair elections, the rule of law, the administration of justice, free and fair trials and the promotion and protection of free and independent media"; and to call upon both sides of the conflict, namely the Serbian authorities and the ethnic Albanian leadership in Kosovo "to condemn acts of terrorism, denounce and refrain from all acts of violence, encourage the pursuit of goals through peaceful means, and respect international humanitarian law and international human rights standards"; and to enter immediately into a meaningful dialogue to find out a peaceful settlement, namely a negotiated political settlement of the crisis with international involvement.

[115] Ibid.

After the failure of diplomatic efforts in March, 1999, the crisis has been eventually internationalized by NATO's intervention. A bombing was initiated by NATO to stop ethnic cleansing and the killing of Albanian Kosovars.[116] With the bombing which lasted 78 days, Yugoslav authority then agreed to accept and sign an agreement which was a compromise for both sides. For NATO Yugoslavia has agreed to "substantial" autonomy for Kosovo, withdrawal of all Serb military, police and paramilitary forces, return of all the refugees, and an international armed security presence in Kosovo with "substantial" NATO participation. On the other hand for Yugoslavia the agreement calls for respect of the territorial integrity of Yugoslavia, Kosovo remains in Yugoslavia, the agreement is under the authority of the Security Council of the United Nations not NATO, and calls for involvement of Russian troops in the peacekeeping forces.[117] It is deemed that ethnic cleansing did occurred during the 78 days bombing that "over half of its ethnic Albanian population out of the territory in a matter of a few weeks, and transforming hundreds of thousands more into internally displaced people, seeking to survive in the forests and mountains of Kosovo"[118].

General Assembly adopted a resolution concerning the situation of human rights in Kosovo in 2000 confirms the facts that there were grave violations of human rights in Kosovo that affected ethnic Albanians prior to the arrival of personnel of the United Nations Interim Administration Mission in Kosovo and troops of the international security presence.[119] And also it stressed that the entire population of Kosovo has been affected by the conflict and called upon all parties in Kosovo to cooperate with the Mission in ensuring full respect for all human rights and fundamental freedoms and democratic norms in Kosovo.[120]

2.4.5 The conflicts after the establishment of UNMIK

The conflicts were not end up after the UNMIK took over the administration of Kosovo. The massive presence of NATO, and the hesitant arrival of United Nations civilian administrators and police forces, could not prevent revenge attacks against the Serbs of Kosovo, most of whom fled.[121]

---

[116] A short history of Kosovo http://lamar.colostate.edu/~grjan/kosovohistory.html
[117] Ibid.
[118] The crisis in Kosovo:1989-1999 P.37; Also see: A Legal Geography of Yugoslavia's Disintegration P346
[119] Situation of human rights in Kosovo A/RES/54/183 29 February 2000
[120] Ibid.
[121] The crisis in Kosovo:1989-1999 P.37

Ethnic Albanian terrorists started to carry out terrorist attacks in the year following the ending of the war in Kosovo which destabilized the region. Although incursions were condemned by the UN Security Council, they continued.

When Federal Yugoslavia was replaced by Serbia and Montenegro in 2001, the new constitution has been drafted, with a provision states that Kosovo is and will remain part of Serbia. This was opposed by the parliament of Kosova which adopted a resolution rejecting proposals that Kosova will remain part of Serbia in 2002.[122]

Reported incidents of political or inter-ethnic violence were reduced in 2002 compared with the year before. However, the level of violence remains unacceptably high, particularly ethnically or politically based violence.[123] Numerous incidents against Serbs and non-Albanians happened in Kosovo, such as, according to the special Rapporteur, bombing of houses, murders, mob attacks, destruction of Serbian Orthodox Churches, etc. Attacks on UNMIK police occurred occasionally.[124] The report also pointed out that the situation in the city of Mitrovica in northern Kosovo remains problematic and tensions continue between the ethnic communities. There were problems of ethnic and political bias, local interference and intimidation which continue to undermine progress in Kosovo's courts. In view of the generalized climate of intimidation, violence and insecurity that prevails for ethnic Serbs and other ethnic minorities, together with the lack of sufficient financial and reconstruction aid for potential returnees, few displaced persons are able or willing to return to their homes from Serbia proper or Montenegro. What is more, the Special Rapporteur noted that the reported reduction in levels of violence against non-Albanians may indicate, inter alia, the high degree to which physical separation now exists between ethnic communities.[125]

In March 2004, there appeared violence directly sparked by a series of events in the days preceding the clashes which raised the level of the tension between Albanians and Serbs in Kosovo. The results of the violence were enumerated in the record of the 4942nd meeting of the Security Council, including death of civilians and police officers of the UNMIK, and burning and damaging of houses and vehicles as well.

Kosovo Serbs were suffered a lot after they returned home. It was reported to the Security Council that Albanian extremists took organized, widespread and targeted

[122] A short history of Kosovo http://lamar.colostate.edu/~grjan/kosovohistory.html; last visited in June, 2008;
[123] Economic and Social Council: Situation of human rights in parts of South-Eastern Europe; E/CN.4/2003/38; 21 January 2003
[124] Ibid.
[125] Ibid.

campaign against Kosovo Serbs, Roma and Ashkali communities, with the interest in deriving those non-Albanians from Kosovo. According to the report, "attacks on Kosovo Serbs occurred throughout Kosovo, in cities and small villages, where groups of Kosovo Serbs had recently returned and had planned to rebuild their lives in Kosovo. Properties were demolished, public facilities such as schools and health clinics were destroyed, communities were surrounded and threatened and residents were forced to leave their homes. Following their departure, their homes were burned to the ground."[126] It was deemed that the violence has completely reversed the returns process, which prior to the recent events had shown signs of limited but encouraging progress.

2.5 The negotiation and the unilateral declaration of Independence

Upon the request of the international community as a whole, peaceful negotiations concerning Kosovo's future status have been going on from November, 2005. However, after one year later, there was no substantial progress since the large extent of differences of opinion among Serbia and Kosovo. And the aim of concluding a satisfied agreement for concerned parties was failed. The UN Mediator Martti Ahtisaari concluded that "the parties were not able to reach an agreement on Kosovo's future status," and that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status was exhausted."[127] The simple reason for the failure is that both parties took extremely nonnegotiable position over the status issue whether for Kosovo to be independent sovereignty state or to remain to be an autonomous province which enjoys the highest and substantial autonomy. What is more, the other substantial issues, such as decentralization, community rights, the protection of cultural and religious heritage and economic matters, were not able to reach an agreeable conclusion as well since were conceptual differences, which "almost always related to the question of status", persisted.[128]

The special envoy Mr. Ahtisaari then proposed that the only viable option for Kosovo would be independence, to be supervised for an initial period by the international community. He pointed out that reintegration into Serbia is not possible, and the international administration is not sustainable after eight years for the reason that UNMIK has not been able to develop a viable economy. He then stressed that independence is the only option for a politically stable and economically viable

[126] Ibid.
[127] Report of the Special Envoy of the Secretary-General on Kosovo's future status, s/2007/168, March 26, 2007,2; quota from Legal geography of Yugoslavia 2008 P 412
[128] Ibid.

Kosovo. In conclusion of the report, the special envoy stated that "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts." However, there was no further action of the Security Council related to this report. On 3rd April 2007, a private meeting[129] was held by the Security Council to discuss this issue, but nothing issued after the meeting.

In July, after a UN resolution failed to win the support of Russia, the EU has called on Serbia and Kosovo to engage in new negotiations over the future status of Kosovo.[130] The new round of negotiation was supposed to last for another 120 days, with the involvement of international community. However, no outcome was made as well.

On 17th February 2008, the government of Kosovo unilaterally declared independence from Serbia. The government of Kosovo declared that:

> "We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of U.N. Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement."

According to the Declaration of Independence, the government of Kosovo confirmed the framework recommended by Mr. Ahtisaari in the said report, and declared that independence is the result of the negotiation, of which "no mutually acceptable status outcome was possible, in spite of the good-faith engagement of both sides' leaders" and for the aim to "give our people clarity about their future, move beyond the conflicts of the past and realize the full democratic potential of our society"[131].

This declaration was announced by the government of Serbia as null and void the day after the declaration, after the Constitutional Court of the Republic of Serbia deemed the act illegal arguing it was not in coordination with the UN Charter, the Constitution of Serbia, the Helsinki Final Act, UN Security Council Resolution 1244 (including the previous resolutions) and the Badinter Commission.[132] The government of Serbia claimed that the Autonomous Province of Kosovo and Metohija is an inalienable part

---

[129] The 5654th (closed) meeting of the Security Council Held in private at Headquarters, New York, on Tuesday, 3 April 2007, at 3.30 p.m.

[130] http://www.euractiv.com/en/enlargement/eu-pushes-negotiations-kosovo/article-165824, last visited in June, 2008;

[131] http://www.usatoday.com/news/world/2008-02-17-kosovo-independence-text_N.htm, last visited in June, 2008;

[132] Decision of the National Assembly of the Republic of Serbia regarding the Confirmation of the Decision of the Government of the Republic of Serbia regarding the Abolition of Illegal Acts of the Provisional Institutions of Self-Government in Kosovo and Metohia in regards to the unilateral Declaration of Independence; http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43159; last visited in June, 2008;

of a single and inseparable constitutional and legal state order of the Republic of Serbia based on the Constitution of the Republic of Serbia and the United Nations Charter. [133] The Serbian government then called on the international community to realize and to respect "the sovereignty and territorial integrity of the Republic of Serbia in accordance with international law, the United Nations Charter and Security Council Resolution 1244"[134].

The reactions of the international community towards the unilateral declaration of independence are different. Some states reacted quickly to recognize Kosovo as a sovereignty state, while some states refused to recognize. The five power States were standing opposed that United States, United Kingdom, and France act positively whereas Russia and China took negative views. Even within the EU, which always takes one common foreign policy, every State Member may decide for itself what line to adopt towards the new state. The majority of EU Members recognized the new state. On the other hand, with a fear that Kosovo could set a precedent for other regions and minorities striving for independence, countries include Spain, Rumania, Slovakia and Cyprus refused to grant recognition.

As of 21 May 2008, 42 foreign states grant recognition to Kosovo, and 28 states were denied to. Other 20 or so states have either expressed their concern while urging continued negotiations under the UN Resolution 1244 (Serbia vs. province of Serbia) or did so while suggesting that new negotiations be brokered to settle the issue once and for all without unilateral moves or ensuing violence.

3. Analysis --- the limits of self-determination

The special case of Kosovo is complicated because of its historical conflicts, the intervention of the international community, and the nonnegotiable positions the two parties hold and therefore the status of Kosovo now is not easy to conclude. Tying to analyze the legal status of Kosovo, it is essential to examine the following questions, i.e. whether the peoples in Kosovo enjoy the right to self-determination, whether the peoples in Kosovo also enjoy the right to unilaterally secede from Serbia, and whether the sovereignty can be obtained by the unilateral declaration of Independence of Kosovo. This chapter will examine the aforesaid questions and then goes to the conclusion of the legal status of Kosovo at the last chapter.

[133] Ibid.
[134] Ibid.

3.1 Do the peoples in Kosovo enjoy the right to self-determination under International Law: Case for minorities to self-determination?

All peoples have the right to self-determination. The right of peoples to self-determination has been incorporated in numerous international instruments, such as the Charter of the United Nations, the Covenants on Human Rights, the Helsinki Final Act, etc. and then has been affirmed as a term of jus cogens under general international law by international legal and domestic tribunals[135]. However, the definition of the term "people" is vague, since there were no explicitly provisions concerning the scope and application of self-determination in the Covenants or the UN Charter, etc. In following we will at first examine the definition of "people" in terms of these two aspects respectively to see if the peoples in Kosovo enjoy the right to self-determination.

3.1.1 The holders of the right to self-determination

At first, the holders of the right to self-determination are all peoples. The Preamble of the United Nations Charter starts with the words that "we the peoples are determined to eliminate the scourge of war", Article 1 common to the two Human Rights Covenants stipulates that "all peoples have the right of self-determination." However it does not mean every human being can exercise the right to self-determination individually because the right has a collective character[136] that can not entail to individuals. Therefore the peoples who are entitled to exercise the right to self-determination firstly must be groups of individuals. Moreover, it is remarkable that this right is conferred to groups of peoples rather than States, the basic unit of international law, which then take the responsibility to observe and promote the right of self-determination with respect to their own population.[137] The obligations of States will be discussed later.

According to Ian Brownlie, for the purpose of applying the principle of self-determination, there has been continuing doubt and difficulty over the definition of the term of "people". But he pointed out that "the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government

[135] International Law Commission, Draft Articles on the Law of Treaties with commentaries; 1966; Yearbook of the International Law Commission, 1966, vol. II.;P.247-248;
[136] See: James Crawford: The right of peoples: "Peoples' or 'Governments'; in The Rights of Peoples; Oxford University Press; 1988; P55-59;
[137] David Raic: P.292

under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination."[138]

The peoples who are under the colonial domination and the peoples who are under the oppression of foreign powers are acknowledged having the absolutely right to self-determination which generally leads to independence. It is not necessary to discuss these two situations since obviously peoples in Kosovo are neither under colonial domination nor under the oppression of foreign powers.

Beyond the context of decolonization, the term of people in the context of the right to self-determination are interpreted variously considering different criteria including territory, ethnic distinctions, and the percentage of the population. That is to say, the subjects of the right to self-determination are including[139]:

- the entire population of existing States;
- peoples as ethnic groups within a State; and
- minorities.

(1) The entire population of existing States

One of the widely accepted criteria for the definition of 'people' is the territorial criteria that a people is seen as the population or inhabitants of a defined territorial unit, irrespective of other identities and affiliations.[140] That is to say, the entire population of a state can be regarded as one single people, despite the distinctions among ethnic, religious, or languages.

The term 'all peoples' is used in Article 1 of the Covenant of Civil and Political Rights is understood as to include the entire population of States that is entitled to participate in the decision-making processes of that State as an exercise of self-government. They have the right to freely determine their political status[141], including its international status. In the process of preparatory works of the Covenants on Human Rights, it was suggested that the term "all people" means "peoples in all countries and territories, whether independent, trust or non-selfgoverning", "large compact groups", "ethnic, religious or linguistic minorities", or "racial units inhabiting well-defined territories" etc. However, it was thought, that the term

[138] Ian Brownlie: The rights of peoples in modern international law; in James Crawford (ed.): The Rights of Peoples; Oxford University Press, 1988; P 5;
[139] David Raic P.243;
[140] Peter Radan: The Break-up of Yugoslavia and International Law; Routledge, 2002; P10
[141] International Covenant on Civil and Political Rights; Article 1 (2);

'peoples' should be understood in its most general sense and that no definition was necessary.[142]

There is no rule of international law, including the principle territorial integrity, which prohibits the entire population of a State from dissolving the State and dividing its territory.[143] The case of the break-up of Former Yugoslavia is a good example of the exercise of the right to self-determination by the whole population in those former constituent Republics. By means of referendum, Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, and Montenegro declared independence respectively and subsequently have been recognized by the international community with the guarantee of those governments for the rights of ethnic and national groups and minorities.

The case of Bosnia-Herzegovina is rather complicated than other cases because the referendum was not involved the whole population of the Republic of which the attitude shows that only the whole population of one state have the right to self-determination to express their genuine wills via referendum. The Badinter Commission was of the opinion towards this fact is that the will of the peoples of Bosnia and Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established.[144] And the Commission held that the aforesaid opinion could be reviewed "if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of the SRBH without distinction, carried out under international supervision.[145]"

Therefore, in this respect, it seems that the multi-ethnic groups of people in Kosovo, in particular the majority, namely, Albanians may have the right to exercise their right to self-determination by virtue of expression of their genuine wills. However, Kosovo is a different case from the other former republics of Yugoslavia simply because it is not a constituent Republic but an autonomous province within the Republic of Serbia, which was one of the constituent republics of former Yugoslavia. On contrary, the right to self-determination in respect of the change of international status of Serbia

---

[142] UNDOC E/CN.4/SR.253, p.4 (GR); E/CN.4/SR.256, p.7 (YU); E/CN.4/SR.256, p.5 (IND); E/CN.4/SR.257, p.9 (RL); See also Bossuyt, M.J., Guide to The "Travaux Preparatories" of The International Convenant on Civil and Political Rights, 1987, Martinus Nijhoff Publishers, P 32. see: http://www.javier-leon-diaz.com/docs/Minority_Status1.htm, last visited in June, 2008;

[143] David Raic P.290

[144] Opinion No.4 on International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member States; 11, January 1992; Snezana Trifunovska(ed): Yugoslavia Through Documents from its creation to its dissolution; Martinus Nijhoff Publishers; 1993; P488

[145] Ibid.

should be exercised by the whole population of Serbia, including the Albanian Kosovars as well.

In sum, the right of self-determination should be exercised by the whole population of a state. And the eventual result of the exercise the right to self-determination would be based on the will of the majority in most cases, with due respects of the rights of minorities and ethnic groups. In this case, only the whole population of Serbia, but not of Kosovo has the right to decide the status of Serbia, including the change of territory, the granting of sovereignty, etc.

Despite the meaning of the entire population of existing states, the last two subjects of the right to self-determination are the ethnic groups within a State and minorities.

(2) Peoples as ethnic groups within a State

According to R. Higgins, "the term of 'people' means all the persons comprising distinctive groupings on the basis of race, ethnicity, and perhaps religion"[146]. According to the recommendations of the international experts on the concept of the right of people for UNESCO, the term people defined a group of persons, who regard themselves as a people and who enjoy 'some or all' of the following characteristics[147]:

- common historical tradition;
- racial or ethnic identity;
- cultural homogeneity;
- linguistic unity;
- religious or ideological affinity;
- territorial connection; or
- common economic life.

In addition to this objective criteria, there is a subjective criterion as well that there should be a belief of being a distinct people distinguishable from any other people inhabiting the globe, and the wish to be recognized as such, as well as the wish to maintain, strengthen, and develop the group's identity.[148]

[146] R.Higgins, Problems and Process, International and How We Use It, Oxford, Clarendon Press, 1994, P.124; also see: Peter Radan: The Break-up of Yugoslavia and International Law.P10

[147] Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO (1990); SNS-89/CONF.602/7), See Steven Wheatley: Democracy, Minorities and International Law; Cambridge Univ. press; 2005; P83;

[148] David Raic P.263;

In this regard, turning to examine the characteristic of both Albanian and Serb peoples, they are in fact different from each other. Each of them shares a common distinction among others. They have different religions that Albanians are mainly Muslim, and Serbs generally are orthodoxies. They have different languages that Albanian Kosovars are using Gheg[149] on the other hand Serbs are using Cyrillic. Moreover, the cultures of the two distinct groups are different from each other as well. In addition, they both fulfill the subjective criterion as we can see their struggles on preserving and developing their culture and identity. Thus, Albanians and Serbs can be regarded as two of the peoples of Serbia.

The principle V of the Friendly Relations Declaration states that:

> "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."[150]

Moreover, in the Vienna Declaration, it reaffirms the wording of the above paragraph, and then emphasizes that "sovereign and independent States are conducting themselves in compliance with the principle of equal rights and self-determination if they possess 'a Government representing the whole people belonging to the territory without distinction of any kind'."[151]

It means that distinct groups within a State also have a right to participate in the decision-making process of the State since it is prohibited on the prejudice of distinctions on the exercise of the right to self-determination. Thus, the discrimination of political status based on distinctions of groups of peoples imposed by the government of a State constitutes violations of the right of self-determination, for example, the policy of Apartheid by the white minority government of South Africa against the black majorities[152].

According to David Raic, who used the term subgroups to describe a portion of the whole population of a State, the fact that the right of self-determination must be interpreted in the light of the right of territorial integrity of States, in the sense that the possible means of exercising the right of self-determination are limited by the right of territorial integrity, must necessarily mean that subgroups within a State are envisaged

[149] http://www.omniglot.com/writing/albanian.htm, last visited in July, 2008;
[150] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with The Charter of The United Nations.
[151] David RaicP255
[152] Cassese P120-125

as holder of the right of self-determination.[153] He then use the case of Czechoslovakia which voluntarily dissolved and split up its territory as an example of the fact that under international law no prohibition exists for dissolve voluntarily and split up its territory to support his view.

The view that the term of people may indicate ethnic groups within a state was expressed by the Supreme Court of Canada in the case of Quebec. The Supreme Court observed 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."[154] The court noted that "Quebec population certainly shares many of the characteristics such as a common language and culture that would be considered in determining whether a specific group is a 'people' and do other groups within Quebec and/or Canada."[155]

In addition, in 2006, the United Nations Declaration on The Right of Indigenous Peoples confirmed the right of indigenous peoples to self-determination. It first confirmed the enjoyment of all human rights of indigenous peoples in article 1 of the declaration stating that:

> "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

And then in Article 3 it emphasizes that:

> "Indigenous 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."

---

[153] David Raic P.249
[154] Supreme Court of Canada: Reference re Secession of Quebec, [1998] 2 S.C.R. 217; para.124
[155] Ibid.pra.125

In this respect, at least the indigenous peoples which are certainly a portion of the whole population of one State have the right to self-determination, as it has been confirmed by the General Assembly of the United Nations. It was also alleged in the working Group on Indigenous Populations of the Commission on Human Rights that: "It would have been unnecessary to make such a qualification unless it was understood that the population of a State could consist of a number of 'peoples', each possessing the right of self-determination."[156]

Therefore, the peoples who share common characteristic with in a state also enjoy the right to self-determination. Accordingly, since both Albanian Kosovars and Serbs in Serbia are falling within the criteria of the term of People above, the Albanian Kosovar and Serbs in Serbia are absolutely entitled to exercise the right to self-determination as ethnic groups within Serbia.

(3) Minorities

Turning to the third category, namely, minorities, it is notable that the views towards whether minorities were the holders of the right to self-determination are controversy. Higgins believes minorities as such do not have a right to self-determination[157]. But this view was criticized as an outdated and unjust view[158]. And those critics agree that, in some circumstances, national groups or minorities should be granted the right to self-determination, including the right to secession.[159] According to Cassese, it is the contention that "any expansion in the scope of self-determination to include ethnic minority groups and others at present not entitled to claim self-determination must be accompanied by a broadening of the concept of self-determination itself"[160]. That is to say, minorities within a State have the right to self-determination, but subject to certain conditions[161].

In order to assess whether minorities are the holders of the right to self-determination, it is essential to distinguish the two groups of people at first. They both include a portion of the whole population of a State. And also they are distinctive from the other groups of people. In addition, persons belong to the same group are certainly sharing some characteristic in common. Minorities are included in the category of ethnic

[156] UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para.19; see also David Raic P.249
[157] R.Higgins, Problems and Process, International and How We Use It, Oxford, Clarendon Press, 1994, P.124; also see: Peter Radan: The Break-up of Yugoslavia and International Law.P10
[158] Peter Radan: The Break-up of Yugoslavia and International Law.P10-12
[159] Ibid.
[160] Cassese: p350
[161] Ibid.

groups since they are also distinctive from the majority in ethnic, culture, or languages, etc. Further more, minorities are more distinctive than ethnic groups because of its population are much lesser than majority ethnic groups in that State. That is to say, a minority people must be one of the ethnic groups in that State but not all the ethnic groups are minorities. This is usual in multi-ethnic States, for example, in China, Han people, who are the majority population, and the Hui people, who are religious Muslim, are both ethnic groups, but only Hui people is one of the minorities then enjoy more protections from the State.

From the view that minorities of a State are also ethnic groups, they are certainly having the right to self-determination. In Serbia, Serbs and Albanians are both ethnic groups, but only the Albanian people can be seen as a minority people within Serbia. Therefore, the Albanian Kosovars and Serbs are also the holders of the right to self-determination. But it is remarkable that there are several conditions upon the exercise of the right to self-determination for them.

Accordingly, by examining the three categories, the Albanian Kosovar people is entitled to be the subject of the right to self-determination, but it is also notable that the contents of the right are different among those three categories. The rights of ethnic groups and minorities to self-determination are limited in some aspects.

3.1.2 The right of peoples in Kosovo to self-determination

Common Article 1 of both UN Covenant on Economic, Social and Cultural Rights, and UN Covenant on Civil and Political Rights stipulates the content of the right of self-determination as following words:
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.

It shows that there are manifold meanings upon the principle of self-determination, such as: a right of expression of the popular will, a right not to be interfered by any

other States, a right to control natural wealth and resources, and a right of peoples in dependent territories to decide their own international status.[162]

The right of peoples to self-determination is generally alleged having two aspects, namely the internal and external aspects, which are different modes of implementation of the right of self-determination.[163] From the traditional view, external self-determination are applied to decolonization regime and the foreign domination or occupation, beyond the regime of decolonization, the external self-determination also exists in practice, such as the dissolution of Former Yugoslavia, Czechoslovakia, and USSR. Internal self-determination is recognized as the requirements of full and effective participation by all groups in society within States.[164] The contents of external and internal self-determination will be discussed respectively below.

(1) External Self-Determination

External self-determination may be exercised through the dissolution of a State, the union or merger of a state with another State and through secession.[165] In the Friendly Relations Declaration, it provides that 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 constitute modes of implementing the right of self-determination by that people.

In history, the exercise of external self-determination is confined in the context of decolonization process. With the emergence of increasing number of new independent Third World countries, self-determination was understood as the anti-colonial self-determination.[166] For these States, self-determination mainly meant three things:

- the fight against colonialism and racism;
- the struggle against the domination of any alien oppressor illegally occupying a territory; and
- the struggle against all manifestations of neocolonialism and in particular the exploitation by alien Powers of the natural resources of developing countries.[167]

---

[162] Cassese, pp 52-58;
[163] See: General, A.Cassese: Self-determination of Peoples; Cambridge Univ.Press; 1995; David Raic: Statehood and the Law of Self-Determination; 2002;
[164] Geoff Gilbert: Autonomy and Minority Groups: A Right In International Law? Cornell International Law Journal; Fall 2002; 35 Cornell Int'l L.J. 307;
[165] David Raic p.289
[166] See: Cassese P44;
[167] See: ibid., Pp.44-45;

In the post-cold war era, the external self-determination has been applied beyond decolonization. According to Cassese, self-determination has provided the legal tools for establishing the demands of the seceding peoples to achieve independent statehood.[168] The right to external self-determination has been conferred to the whole population of sovereign States. As mentioned above, the whole population of that State, without any ethnic or numerary distinction, can be regarded as a people to determine their own future such as establishing a sovereign and independent state, associating with another sovereign state. In practice, such right has been exercised in the case of Czechoslovakia, the two governments which representing the whole population of the two republics, finally concluded to separate into two independent States. And also in the dissolution of former Yugoslavia, which can be seen as "a revolutionary process that has taken place beyond the regulation of the existing body of laws"[169]. The peoples of former republics of former Yugoslavia expressed their will to establish a sovereign and independence by referendum, and then the results showed the majority of the population, i.e. more than 90%, agreed to do so.

The idea that the ethnic groups within a State or minorities in a State also enjoy the right to external self-determination is not acceptable because the principle of territorial integrity and sovereignty should be respected.

The principle of territorial integrity is referred in several relevant instruments concerning the right to self-determination, such as the Friendly Relations declaration, and the Helsinki Final Act, the 1993 Vienna Declaration and the Charter of Paris for a New Europe of 1990. As what have written down in the Friendly Relation Declaration, it has stressed the restriction that the right of peoples to self-determination enshrined in the Declaration can not be "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples 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." Moreover, Principle VI of the Declaration states that the territorial integrity and political independence of the States are inviolable. These two provisions therefore set a limit onto the right of external self-determination that the establishment of a sovereign and independent State may conferred with the respect of the principles of territorial integrity and sovereignty.

[168] Cassese, P.273
[169] Ibid. P.270

In practice, the claim from ethnic groups/minorities to independence was ignored in history as well. In the process of dissolution of Former Yugoslavia, there was a plebiscite held by the Serbian People of Bosnia and Herzegovina showing their will for a common Yugoslav State, and subsequently declared independence as a "Serbian Republic of Bosnia-Herzegovina". It was claimed that the mainly Serb inhabited areas of Croatia and Bosnia and Herzegovina should be entitled to secede from secession, as it were, and to constitute themselves as independent states. This argument was rejected by the Badinter Commission.

While self-determination also applied to Serbs and others who now found themselves as minorities in new states, this was a different kind of self-determination. It was not an entitlement to statehood, but instead self-determination in this context was reduced in content to human and minority rights, and to autonomous structures of governance in areas where Serbs constituted a local majority.[170] In this respect, it seems that the Badinter Commission held the idea that the right to self-determination which leads to the establishment of statehood may not grant to minorities, but to the whole population of that State.

However, there are some assertions that a right to external self-determination exists for ethnic groups who was blocked to exercise their right of internal self-determination as the last resort which would give rise to secession from the sovereign States. It is, however, disputed on the existence right of secession by a people forming a numerical minority within an existing State, except for those cases where a constitutional right to secession exists or where subsequent approval has been obtained by the former sovereign.[171] The issue whether the people of Kosovo process the right to unilateral secession will be discussed later.

In practice, the right for minorities to external self-determination was rejected as well. For instances, the case of Aaland Islands, the case of Quebec, and the case of Serbian people in Bosnia and Herzegovina, in all those cases the wishes to exercise the right to external self-determination has been rejected. In the case of Aaland Islands, the wish of the inhabitants of the Aaland Islands to reunion to Sweden was rejected by the League of Nations. Although at that time the principle of self-determination was not recognized as a principle of international law.

[170] See Opinion No.2 of the Badinter Arbitration Commission. The Cirsis in Kosovo,1989-1999 P27;
[171] David Raic P293

- The Case of Aaland Islands

Aaland Islands is an archipelago positioned in Baltic Sea, between eastern Sweden and southwestern Finland. It was not until 1809 that Aaland and Finland were relinquished to Russia from Sweden and thereafter incorporated together by Russia. Then, with the disintegration of Russian Empire in 1917, Aaland and Finland invoked the principle of self-determination respectively for different aspirations. Aaland wished to reunify with Sweden since the people of Aaland have spoken Swedish and had a culture that is similar to that in Sweden. On the other hand, Finland declared itself an independent republic in December of that year. Initially Aaland rejected the idea of being an autonomy region of Finland proposed by Finish Parliament. Sweden held the opinion that the principle of self-determination granted Aaland people the opportunity to hold a plebiscite to realize their will to reunify with Sweden, therefore Sweden presented the case to the Council of League of Nations for a solution. Finland, on the other hand, insisted that the Aaland Islands fell under Finish sovereignty after its independence and therefore, under international law, this case shall be dealt within the Finish domestic jurisdiction. In order to determine whether, under international law, the inhabitants of the Aaland Islands were free to secede from Finland and reunify with the Kingdom of Sweden, the Council of League of Nations appointed a commission of jurists in July 1920.

The report of the Commission of Jurists in 1920, concerning the question mentioned above, stated that:

> Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. 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 another method is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.[172]

From the report, it is clear that the Commission declined to recognize self-determination as a right under positive international law. Nevertheless, although the Commission admitted that, under positive international law, definitively constituted States have the exclusive right to grant or refuse the right of self-determination of certain population within its territory by plebiscite or other means, the commission did not considered new independent Finland Republic was

[172] Report of the Commission of Jurists, LNOJ, Spec. Supp., No.2,1920, PP.2-19 at P. 5;

"acquired the character of a definitively constituted State"[173], therefore this case fell within the jurisdiction of the League of Nations.

Since it was fallen within her jurisdiction, the Council of the League of Nations then appointed a Commission of Rapporteurs to recommend a programme of action. According to the report of this Commission, it is suggested that the Aaland Islands remain under the sovereignty of Finland, whereas the latter had to increase the guarantees granted to the Islands by the Autonomy Law of 7 May 1920[174]. The Commission considered the inhabitants of Aaland Islands as a 'minority' rather than a 'people'. The Commission then stressed that:

> "The separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[175]

Therefore, with the guarantee of the Finish government that granting the inhabitants of Aaland Islands a full range of autonomy, including preserving their Swedish culture, language, and demilitarization and neutralization. Then the sovereignty remain belongs to Finland.

- The Case of the Secession of Quebec

The case of the secession of Quebec is a typical case of the right of self-determination referred in numerous times for the reason that the Canadian Supreme Court carefully examines the existence of the right to unilateral secession of the people of Quebec deriving from Canadian Constitution and, more importantly, the right to self-determination, beyond the regime of decolonization. The Court ruled the following questions:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

---

[173] Ibid.
[174] Cassese, p. 29;
[175] Report of the Commission of Rapporteurs, LN Doc. B7.21/68/106,1921,P23;

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Regarding to the right of self-determination, the court firstly confirmed there is a right to self-determination for a portion of the population of a State, and then stressed that:

Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.

And then the Court pointed out that, since the people of Quebec do not fit into the three circumstances therefore they can only achieve the right to self-determination within Canada, which, according to the Court, has been achieved. Thus, it is clear from this reference that the ethnic groups/minorities are not entitled to exercise the right of external self-determination, such as unilateral secession, instead, they process the internal self-determination to access the decision-making process of the State. Moreover, the Court also stressed that there is no evidence of the establishment on the third circumstance that the ethnic groups/minorities of a State may exercise their right to external self-determination if the right of internal self-determination is not deprived and denied, in which situation such right of the Quebec people are in fact not denied, but protected by the government of Canada on the other hand.

- The Case of Katangese People's Congress V. Zaire

In its decision regarding Katangese People's Congress V. Zaire the African Commission on Human and People's Rights confirmed the exercise of the right to self-determination should in comply with the principle of territorial integrity and sovereign independence of States. The Katangese People's Congress claimed that Zaire denied the Katangese people its right of self-determination and claimed to secession. However, the African Commission rejected its claims but recognized that

Katangese people constituted a people for the purpose of self-determination. It pointed out that "self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity"[176]. The Commission then stressed that "Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire".

Therefore, we can see that, in nearly a century, the attitudes of the international community towards the assertion that minorities/ethnic groups, as well as the whole population of that State, are also entitled to external self-determination was negative. On the other hand, the right to self-determination of minorities/ethnic groups is confined in the context of internal self-determination.

(2) Internal Self-Determination

Turning to the right of the peoples of Kosovo to self-determination, as what have been discussed, the peoples of Kosovo entails the right to self-determination, regardless of their ethnic or religious differences. However, the right to self-determination conferred to those people is restricted in the context of the internal self-determination. The UN Resolution 1244 explicitly expresses the objective of the UN international administration of Kosovo is to …substantial self-government of the people of Kosovo. The answer to the question of whether substantial self-government means independence would be negative.

The right to self-determination can be realized within a State as well by the so called internal self-determination. "It means the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime- which is much more than choosing among what is on offer perhaps from one political or economic position only."[177] It is a right to participate. But the degree of the participation in the decision-making processes does not have to be the same in each and every situation; rather, it may vary according to the specific circumstance of the case.[178] The range is from direct participation in the central decision-making processes of the State, to federalism, and other forms of political autonomy[179].

[176] African Commission on Human and People's Rights, Communication 75/92; Katangese Peoples' Congress v. Zaire, Decision taken at its 16th Session, Banjul, The Gambia, 1994; see: David Raic P.256
[177] Cassese P101
[178] David Raic p.238
[179] Ibid. p239

It is also an ongoing right which processes a continuing character. Unlike the right to external self-determination which may expire once it exercised, under customary international law, "the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect."[180]

The similar idea appeared in the early decades of 20th century, where Wilson put forward at the beginning. Wilsonian self-determination is self-government, consists the right of peoples to choose their own democratic government freely. However, as the fact that self-determination is more important in its external aspects for colonial people, the right to internal self-determination, namely the right freely to choose their form of government, their rulers, etc.[181], was ignored at that time. However, the right to internal self-determination to some extent is more important than the external one.

The existence of right of internal self-determination is recognized in the Friendly Relations Declaration, and the Helsinki Final Act. Principle VIII of the Helsinki Final Act explicitly stressed the freedom of peoples to determine their internal political status 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.

Referring to the reference of the Supreme Court of Canada in the case of Quebec, the Court addressed that:

> The recognized sources of international law establish that the right to self-determination is normally fulfilled through internal self-determination- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[182]

Without any doubt, the whole population of a State has the right to internal self-determination, namely, the right to have a representative and democratic government.[183] Towards this right, the government of that State then bears the obligation to take positive action to facilitate realization of and respect for the right of

[180] Cassese P.101
[181] Cassese P74;
[182] Supreme Court of Canada: Reference re Secession of Quebec, [1998] 2 S.C.R. 217; para.124 para.126
[183] Cassese P.102

peoples to self-determination. In addition, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.[184]

In addition, numerous international instruments, state practices, jurisprudence show that minorities in a State enjoy, as well as the whole population of the State, the right to internal self-determination.

It was observed that paragraph 7 of Principle V of the Friendly Relations Declaration was intended to cover at least racially and ethnically distinct groups within existing States for the Purpose of internal self-determination. The wording "without distinction as to race, creed or colour" in that Declaration was deemed to include the whole population of a State, therefore, includes all groups of peoples without discrimination
It is strengthened by the text of the 1993 Vienna Declaration which emphasizes that sovereign and independent States are conducting themselves in compliance with the principle of equal rights and self-determination if they possess a government representing the whole people belonging to the territory without distinction of any kind.[185]

In the decision of Katanga Peoples' Congress V. Zaire mentioned above, the African Commission on Human and Peoples' Rights admitted that the Katangese people constitute a people for the purpose of self-determination whining the regime of internal self-determination. The Reference of the secession of Quebec also confirmed that the Quebecers, which are consisting to a portion of the population, enjoy the internal self-determination.

The minority rights are seen as individual rights that different from collective rights such as the rights to self-determination. However, it does not "exclude the possibility that the right is and can be exercised and –theoretically at least -claimed by individual members of a group on behalf of that group.[186]There is a link between the minority rights and the right of self-determination that the observance and realization of the right to internal self-determination from the State is a guarantee of the minority rights.

According to the Human Rights Committee, it observed from the common Article 1 of the Covenants of Human Rights that:

---

[184] Report of the Human Rights Committee; UN Doc A/39/40.1984.
[185] David Raic P.255
[186] Ibid. P259

> "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[187]

In the Friendly Relations Declaration, it proclaims that a denial of fundamental human rights constitutes a violation of the principle of self-determination, and is contrary to the UN Charter. In the Helsinki Final Act, the participating States affirmed "the importance of the elimination of any form of violation of this principle".

Moreover, the contents of the right of internal self-determination of indigenous peoples were incorporated in the Declaration on the rights of Indigenous Peoples that: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions[188]and have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State[189].

From this Declaration, it may conclude that the right of indigenous peoples to self-determination reflects that the internal aspect of the right to self-determination conferred to indigenous peoples, and may infer that, by stating that the indigenous peoples have the equal rights to all other peoples, the internal self-determination therefore applicable to all groups of peoples.

Accordingly, in general, the people in Kosovo, in particular Albanian Kosovars are not entitled to external self-determination but may express their will and achieve their internal self-determination within the framework of Serbia. The Albanian Kosovar people, as well as the Serbian population in Kosovo, enjoy the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and entitled to participate in the decision-making process of the government of Serbia. On the other hand, the government of Serbia takes its own responsibility to respect and promote the right of peoples to self-determination within its territory.

---

[187] David Raic p234 General Comment 12
[188] The General Assembly: Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples;
[189] The General Assembly: Article 5 of the United Nations Declaration on the Rights of Indigenous Peoples;

The arguments for the justification of the right to external self-determination and the unilateral declaration of independence of Kosovo may be that the whole population of Kosovo can be seen as a people who entitled to exercise the right to external self-determination right, as what were happened in the process of the dissolution of the Former Yugoslavia; the denial of fundamental human rights that conducted by Serbia Government in the past may give rise to secession; and the unique circumstances of Kosovo itself. In following these three arguments will be discussed.

3.2 The Unilateral declaration of Independence of Kosovo

After the NATO's bombing in 1999, the United Nations Interim Administration Mission in Kosovo has been established pursuing the objective of the Security Council Resolution 1244 to provide Kosovo with a "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."[190] After more than eight years administration, Kosovo's Provisional Institutions of Self Government were established and gained capacity to assume more responsibilities, UNMIK has moved back from an executive role to one of monitoring and support to local institutions. UNMIK, in its present form, is now into its final chapter before status resolution.[191]

While Kosovo is governed by the UNMIK, negotiations have been engaged between the Albanian Kosovar leaderships and the government of Serbia pursuing a final resolution concerning the status of Kosovo. The international community has been concerned with the negotiations. As what are mentioned in Chapter 2, after the failure of the negotiation and the negative attitude on the Report from the Special Envoy of the United Nations, the Kosovar Albanians, by their representative, declared independence to be an independent State on 17th February 2008. The declaration of Independence based on the report of the Special Envoy of the United Nations, in which the Special Envoy provides a framework for independence of Kosovo. However, since the declaration of independence was and is not recognized by Serbia, then the question of the legitimacy of the declaration of independence arises. The government of Kosovo alleged their legitimacy of independence since they have the right to self-determination, at least as the last resort of the denial of their fundamental human rights committed by Serbia government in the past.

[190] About UNMIK: http://www.unmikonline.org/intro.htm, last visited in July, 2008;
[191] Ibid.

3.2.1 The exercise of the right to self-determination by the whole population of a State

However, the question whether there entails a right to secession unilaterally to the people in Kosovo is not undisputable. Secession is the process by which a particular group seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state.[192] Positive international law neither prohibits nor allows secession; on the other hand all peoples have rights to determine their status, including freedom to determine their international status. Self-determination does not inherently lead to secession since, as discussed earlier there are two dimensions within the concept of self-determination, namely the external self-determination and internal self-determination. The exercise of external self-determination namely, the freedom to determine the international status, is only granted to the population of a State as a whole. By contrast, the fear of granting the right of external self-determination to a portion of population of a State appears for a long time. "If each ethnic group, each 'people', is entitled to its own state, then it is a recipe for virtually limitless upheaval, an exhortation to break apart the vast majority of existing states, given that most if not all began as empires and include a plurality of ethnic groups or peoples within their present boundaries."[193]

Take the case of Kosovo itself as an example. Kosovo had declared independence in 1990s, which was ruled illegal by the Constitutional Court of Serbia. Moreover, it was ignored by the international community at all since the Baditer Commission did not suggest the EU to recognize the Republic of Kosovo. The Badinter commission did not recognize the right of minorities to external self-determination through secession for the evidence that, as mentioned earlier, the recognition of the alleged independence of Serbian Bosnia-Herzegovina also has been rejected by that Commission.

It is argued that the people of Kosovo enjoy the right to external self-determination as same as the people of Former Republics of Former Yugoslavia which have successfully gained independence in 1990s. However, they are not under the same circumstances. The case of the dissolution of the Former Yugoslavia is based on the genuine wills of the whole population of the former republics. On the contrary,

---

[192] James Crawford, State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada concerning unilateral secession by Quebec;19 February 1997

[193] A. Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec, Westview Press, 1991; P2; also see: William R. Slomanson: Fundamental Perspectives on International Law, 5th Ed. Thomson Wadsworth, 2007; P.88;

Kosovo, the constituent autonomous province of the Republic of Serbia, is a part of Serbia, and then does not equate to a state, and therefore the whole population of Kosovo is a portion of the whole population of Serbia. Thus, if there would be a referendum held for the determination of the international status of Kosovo, rather the population of Kosovo, the whole population of Serbia should be included.

3.2.2 The exercise of External Self-Determination triggered by the denial of the exercise of Internal Self-determination as the last resort

Moreover, it is alleged that there is an exceptional circumstance, namely, the denial of the exercise of internal self-determination, would lead to external self-determination as the last resort. The Friendly Relations Declaration states that the denial of fundamental human rights constitutes a violation of the right to self-determination. And the government which does not act in compliance with the respect of fundamental human rights may strip its right of territorial integrity. However, this assertion is disputable.

According to the Canadian Supreme Court, the saving clause of the Friendly Relations Declaration was referred to a conclusion that there is no incompatibility between the maintenance of the territorial integrity of existing states and the right of a "people" to achieve a full measure of self-determination because "a state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity."[194] The wording of the saving clause of the Friendly Relations Declaration that the 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" and the wording of the Vienna Declaration that governments are required to 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[195].

This assertion seems logical, and is alleged that has been confirmed by the Canadian Supreme Court. However, in the reference of the Quebec Case, when the Court

[194] Supreme Court of Canada: Reference re Secession of Quebec, [1998] 2 S.C.R. 217; para.130
[195] Ibid. para. 134

referring to the circumstance of denial of fundamental human rights, it emphasized that "it remains unclear whether this third proposition actually reflects an established international law standard".[196]

It is also notable that there was a lack of consensus on the inclusion of paragraph 7 of the Friendly Relations Declaration, therefore can not simply concluded this declaration constitutes 'hard' international law[197]. In addition, there is no precedent of successful secession under this assertion. The case of the Katangese Peoples' Assembly v. Zaire shows that the assertion of denial of internal self-determination would give rise to external self-determination is not recognized, as least by the African Commission on Human and Peoples' Rights. What is more, the attitudes of the international community towards the situation of Chechnya are essential to address. Many governments have criticized the conduct of Russian forces in Chechnya on grounds of the use of disproportionate force, violations of international humanitarian law and breach of arms control agreements. But it has also been accepted that the conflict with Chechnya is an internal armed conflict, and that the principle of territorial integrity applies.[198] James Crawford then pointed out that even though other governments qualified the Chechens as a "people", and even though this people was subject to violations of human rights and humanitarian law on a large scale, the principle of territorial integrity was to be respected. The relations between the Russian Federation and Chechnya were, and remain, a matter for negotiation between them. They were not resolved by the latter's unilateral declaration of independence - or even, for that matter, its subsequent military successes[199].

Therefore, the assertion that the unilateral secession of Kosovo from Serbia would be justified by invoking the denial of fundamental human rights is doubtful since there is neither explicit, unanimous rule concerning referred assertion under international law nor successful state practice towards the referred assertion.

Alternatively, even there is an external right to self-determination exist as the last resort to secession, and then the question arises: how to define whether the alleged unilateral secession is the last resort?

---

[196] Ibid. para. 135.
[197] D.S.Smyrek: Internationally administered Territories-International Protectorates? Duncker& Humblot, 2006; P.208; also see: Quane, Leiden Journal of International Law, 13,2000, P220;
[198] James Crawford, State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada concerning unilateral secession by Quebec;19 February 1997
[199] Ibid.

According to Cassese, The implicitly grant of secession from the Friendly Relations Declaration must be construed strictly[200]. He suggested that unless the satisfaction of the following conditions, the denial of the basic right of representation does not give rise *per se* to the right of secession[201]. The conditions are including:

- The gross breaches of fundamental human rights, and
- The exclusion of any likelihood for a possible peaceful solution within the existing State structure.[202]

It is necessary to repeat what was stressed in the Aaland Islands Case by the Commission that:

> "The separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[203]

It shows that, for a long time, the international community acknowledged that the so called last resort have to be based on the fulfillment of aforesaid conditions.

Therefore, it can be concluded that the last resort for the denial of fundamental human rights to secession must be act when "the internal self-determination is absolutely beyond reach"[204]. Now turning to the case of Kosovo, obviously, in the process of negotiations between the government of Kosovo and Serbia, the Serbian government has provided a higher degree of autonomy to Kosovo while insisting the sovereign right of Kosovo, then is that still fall into the circumstance that the internal self-determination of the Kosovo peoples beyond reach? The answer would be no if there is an enforceable framework for the protection of the right to internal self-determination for the people in Kosovo to participate in the decision making process, and to preserve and develop their culture and languages, etc. In this sense, the unilateral declaration of Independence seems unreasonable.

The right to self-determination is not interested solely in independence, more essentially, is in the achievement of the realization of people's fundamental rights, and then to gain a substantial development both collectively and individually. Independence may not be the solely viable solution for Kosovo. If the government of Serbia provides a regime to grant meaningful substantial self-government to the

[200] Cassese P.119
[201] Ibid.
[202] Ibid.P.120
[203] Report of the Commission of Rapporteurs, LN Doc. B7.21/68/106,1921,P23;
[204] Ibid.

peoples in Kosovo, then the desire of the peoples, in particular the Albanians, to self-determination has been fulfilled, and then there is no ground for them to allege independence. According to his separate opinion in the case of West Sahara, Judge Dillard considered that "self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it"[205].

Moreover, it is alleged that secession may be justified if the people who claimed to independence has the constitutional right to secession, or if there were consent from the 'parent' state.[206] Examples for the constitutional secession are the former republics of USSR. Those republics declared, and subsequently achieved independence from USSR by invoking the constitutional right to self-determination. However, however, it is not the case because at first Kosovo is not a state or nation under international law and the constitution of Former Yugoslavia and Serbia. By examining the constitution of both Former Yugoslavia and Serbia, it is clearly that as an autonomous province within the republic of Serbia, Kosovo does not possess any constitutional right to secession. Then turning to the circumstance of the consent from the parent state, there are state practices under this circumstance, such as the separation of Singapore from Malaysia by a Separation agreement by which Singapore achieved its sovereignty and independence. On the contrary, the Declaration of Independence of Kosovo was protested by the government of Serbia which proclaimed that the government of Serbia will never recognize the independence of Kosovo. It is obviously that there will be no consent from the parent State in a foreseeable future, as what has been claimed by the government of Serbia. Thus, the justifications for the unilateral secession were not fulfilled for the case of Kosovo. Therefore the unilateral secession of Kosovo is illegal under international law so far.

3.2.3 Whether the sovereignty can be obtained by the unilateral Declaration of Independence of Kosovo

Sovereignty is the inviolable right of States. Internally, it is the supreme power of States to control over its domestic affairs. Because of the possession of sovereignty, States possess the right to control the land located within their territorial boundaries.[207] Externally, States are equal to each other that can not intervene in internal affairs of other States any more. Having been incorporated in the UN Charter,

[205] Separate opinion of Judge Dillard, Advisory opinion of Western Sahara; ICJ; 1974; P.115;
[206] David Raic, P.293
[207] William R. Slomanson: Fundamental Perspectives on International Law, 5th Ed. Thomson Wadsworth, 2007; P.268;

based on the principle of the sovereign equality, it is explicitly stressed that: "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"[208]. This is the exclusive right of a State not to be intervened, by other States or International Organizations, in its internal affairs, along with the reservation of certain limitations imposed by international law, such as non-use of force, etc.

A successful secession first involves a transfer of sovereign or supreme powers from one set of state institutions and office holders to another.[209] That is to say, the sovereignty of a new created State which was seceded from an existing State would not be regarded as a sovereign State unless the parent State transfer part of its sovereignty over the seceded territory to the new State. Generally, sovereignty is not able to be created on the sovereign territory where has been controlled over by an existing sovereign State. Therefore, secession from a sovereign State is impossible if there is no consent of sovereign transfer from the parent State.

Obviously, the answer to the question whether the unilateral declaration of independence leads to the establishment of statehood is negative since it is lack of the essential element of being a state.

It is argued that the administration of the UNMIK over Kosovo changed the situation that the territory of Kosovo became a trust territory that administered by the United Nations. Without the overall control of the territory of Kosovo, Serbia then transfer its sovereignty over Kosovo to the UNMIK. It is true that the administration has been executed by the UNMIK. However, the sovereignty has been reserved. One of the most basic attributes of territorial sovereignty is the ability to dispose of a territory. This power normally remains with the titular sovereign even if physical control is exercised by some other entity, unless otherwise expressly provided[210]. In the most concerned resolution 1244 of the Security Council, it is explicitly stated that, while providing for substantial self-government for Kosovo, the principle of sovereignty and territorial integrity of the FRY and other countries of the region shall be taken full account of. In this account, the territory of Kosovo is still under the sovereignty of Serbia. Thus, if Kosovo desires to secede from Serbia, it should first gain the consent

[208] Article 2 (4): Charter of the United Nations, http://www.un.org/aboutun/charter/index.html; last visited in July, 2008;
[209] Aleksandar Pavkovic with Peter Radan, Creating New States: Theory and practice of secession; Ashgate, 2007; P.10;
[210] Daniel S.Smyrek: Internationally Administered Territories- International Protectorates?; An Analysis of Sovereignty over Internationally Administered Territories with Special Reference to the Legal Status of Post-War Kosovo; Duncker & Humblot Berlin; 2006; P205;

of Serbia to transfer the sovereignty over Kosovo. The methods of the expression of the consent of Serbia may be the exercise of the self-determination by the whole population of Serbia, or by the government of Serbia who is the representative of the peoples of Serbia.

3.3 The role of the United Nations

It is necessary to discuss the role of the United Nations in the case of Kosovo. First of all, the United Nations is not able to grant any sovereignty upon Kosovo. The United Nations is established on the principle of sovereign equity which means States are equal and none of them has supreme power among each other. Thus, the United Nations does not possess the right to grant or deprive sovereignty to or from certain territories or States. On the contrary, together with the consent of the Serbian government, the Security Council Resolution 1244 forms the legal basis for the delegation of sovereign powers from FRY/Serbia to the international community.[211] Therefore, in any case, any decision about the final status of Kosovo taken without the consent of Serbia would constitute an infringement of Yugoslavia's sovereignty over Kosovo.[212] Moreover, the attitude of the United Nations towards secession is always in favor of the principle of sovereignty and territorial integrity of the parent States. In the case of Kosovo, as acting in line with other similar cases, the Security Council has insisted on a political solution on the basis of the sovereignty and territorial integrity of Serbia[213].

Article 2 (7) of the UN Charter states that the United Nations is not authorized to intervene domestic matters of any State. But there is a limitation that the United Nations has the right to take measures under Chapter VII, of which the provisions mainly concern the maintenance of international peace and security. After the NATO's bombing in 1999, the situation in Kosovo was regarded as a threat to international peace and security in the region defined by the Security Council in its Resolutions 1199 and 1203, therefore it fell within the jurisdiction of the United Nations to intervene in the crisis of Kosovo[214]. Some argue that the Security Council has the authority to change the final political status of a territory and, thus, to dispossess and covey title, if the Council determines that such action is necessary to

[211] Ibid.
[212] Ibid.
[213] Georg Nolte: Secession and external intervention; Marcelo G. Kohen(ed.): Secession: International Law Perspectives; Cambridge Univ. Press, 2006; P68-69;
[214] Article 39 of the UN Charter.

restore and maintain international peace and security[215]. However, it requires an express authorization by the Security Council even if this assumption were correct.[216]

The establishment of the UNMIK is the result of the intervention of the United Nations. It is "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, and which will provide transitional administration while establishing and overseeing the development of provisional democratic selfgoverning institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo" established by the Security Council Resolution 1244 in order to achieve the purpose of the United Nations, namely, the maintenance of international peace and security. It explicitly states that the aim of the UNMIK is to ensure that the people of Kosovo can enjoy *substantial autonomy within the FRY*. From the wording used in the Resolution, it is obvious that the Security Council is not aiming to provide anything other than autonomy to the people of Kosovo. What is more, taking into account of the drafting history of the Resolution 1244, it shows that the members of the Security Council apparently failed to recognize the existence of a right to self-determination and consequently full independence for the Kosovars[217].

Therefore, it can be concluded that the United Nations is not able to grant sovereignty to Kosovo without the consent of Serbia. In addition, the interim administration of the United Nations is not aim to provide a path to the independence of Kosovo, instead, it provides the people of Kosovo a substantial autonomy that people can live a normal life without violence.

3.4 the recognition from other States

Although there is no right, under the Constitution or at international law, for Kosovo to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession.[218] The subsequent recognition towards the Republic

[215] Daniel S.Smyrek: Internationally Administered Territories- International Protectorates?; An Analysis of Sovereignty over Internationally Administered Territories with Special Reference to the Legal Status of Post-War Kosovo; Duncker & Humblot Berlin; 2006, P205; Also see: Matheson, AJIL 95 (2001), P.85; van Staden/Vollaard, The Erosion of State Sovereignty: Towards a Post-territorial World? P182; negating such powers of the Secutity Council under reference to Article 2, paragraph 7 of the UN Charter: Irmscher, German Yearbook of International Law 44 (2001); P.364;
[216] Ibid. See: Reisman/Hakimi/Sloane, Procedures for Resolving the Kosovo Problem, P.3;
[217] Ibid. P.211-212;
[218] Reference of the secession of Quebec, para.155

of Kosovo after the declaration of Independence was processed quickly. In practice, since 1945, no State which has been created by unilateral secession has been admitted to the United Nations against the declared whishes of the government of the predecessor State[219]. Bangladesh, which has been seceded from Pakistan, gained its membership of the United Nations after the recognition of Pakistan[220]. Obviously, a new State may fully establish on the basis of the transfer of sovereign from the "parent" State, and the recognition of the international community or other States completes the whole creation of the new States.

The recognition of those other State is not constitute the essential element of the creation of a new state, but, instead, is a reflection of the consideration of those States on the legality and the legitimacy of the Secession. Moreover, the ultimate success of secession would be dependent on the recognition of the international community[221]. Nevertheless, even at last Kosovo gains the unanimous recognition and then successfully to be an independent sovereign State, the illegality of the unilateral secession would not be justified.

3.5 The unique case that is not a precedent?

According to the report of the Special Envoy, the case of Kosovo is unique therefore deserves a unique resolution, without any establishment of precedent to other unresolved conflicts. He suggested that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.[222] The reasons of the Special Envoy enlisted in his Report are including:

- A history of enmity and mistrust has long antagonized the relationship between Kosovo Albanians and Serbs;
- The establishment of the UNMIK pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo, and Albanians resist returning to the situation before 1999 under the rule of Serbs; and,
- Under the administration of the UNMIK, Kosovo is restricted to participate in the international institutions etc and therefore unable to effectively develop its economy.

[219] James Crawford: The Creation of Statehood in International Law; (2nd. Ed.) Oxford Univ.Press, 2006; P.390
[220] Ibid.
[221] Reference para.155
[222] Report of the Special Envoy of the Secretary-General on Kosovo's future status; S/2007/168; 26 March 2007;

Whether it is really a unique case and then may avoid being a precedent? There are numerous unsolved conflicts in the respect of unilateral secession, and each of them processes its own characteristic that different from the others. On the other hand, there are commons among those conflicts between one and another. The aforesaid unique situations can be found in other regions, such as the long hostilities between the legitimacy government and ethnic minorities and the gross violation of fundamental human rights and humanitarian law towards the civilian population of the concerned region, the lack of effective control of the conflict territory which under the administration of the United Nations, and the restriction on the participation of international relations, especially in the economic area[223].

In this case, if the right to secession granted to Kosovo, even proclaiming it is not a precedent, unavoidably, there still would be other cases following and invoking the unilateral secession of Kosovo to justify their independence. One thing lead to another, those subsequent would-be-independence situations would disorder the stabilization of the international community and the peace of the world. The Similar cases, such as the secession movement in Georgia would find the ground for their secession. According to the former President of Russia, if the Albanian-dominated province were given sovereignty, it would be difficult to explain to people in Georgia's breakaway regions of Abkhazia and South Ossetia why they could not secede from Georgia.[224] Therefore, the truth that the case of Kosovo constitutes a precedent would not be avoided by claiming it is a unique case that is not a precedent.

4. Conclusion

The fear of the destabilization on the order of the international community has been appeared in the period of the emergence of the right to self-determination. Consequently, the international community has set restrictions upon the exercise of the right to self-determination. In the 1960s, with the incorporation into the Covenants on Human Rights, the right of peoples to self-determination has been granted to the people who suffered colonial domination and who under the foreign oppression. With the development of the international law, especially the law of human rights, the right to self-determination has been linked to the protection of human rights, as a guarantee from the government representing the whole people belonging to the territory without distinction as to race, creed or colour. According to the Friendly Relations Declaration,

[223] See: Miodrag A. Jovanovic: Is Kosovo and Metohija Indeed a 'Unique Case'? This presentation was initially prepared for the international conference "Kosovo and Metohija as a Global Problem", which was organized from 15 to 18 November 2007 at the Law Faculty, University of Belgrade; http://www.kosovo-law.org/, last visited in July, 2008;

[224] Ana S. Trbovich: A Legal Geography of Yugoslavia's Disintegration, Oxford Univ. Press, 2008; P416;

a denial of fundamental human rights constitutes a violation of the right to self-determination. Portions of the whole population of a State, such as ethnic, religious or culture groups, indigenous peoples are alleged to the enjoyment of the right to self-determination. In this regards, the internal aspect of the right of self-determination became more important than the external one which has been regarded as the major aspect of the right to self-determination in the process of decolonization.

The internal self-determination provides those groups of peoples with the right to participate in the decision-making process, and the right to develop their own culture, and social status, etc. It does not give to a portion of the whole population a right to establish a new independent state or to merge into another sovereign state. On the other hand, the exercise of the right of external self-determination may give rise to secession since it is neither prohibited nor allowed under international law. Beyond the decolonization, such right may conferred to the whole population of the State, in addition, there is alleged that the denial to internal self-determination may leave a door open for external self-determination.

Moreover, the territorial integrity of States has been favored by international law. Correspondingly, the government of a state was entitled to oppose the unilateral secession of part of the state by all lawful means.[225]

The case of Kosovo, as discussed in Chapter 2, is rather complicated. The conflicts between Albanians and Serbs emerged for a long time, and both sides of the conflicts held nonnegotiable positions that incompatible with each other deeply. Moreover, the involvement of the international community and the interim administration of the United Nations make the case being a case of international concerned. After all, the government of Kosovo announced the unilateral declaration of Independence. It was alleged that, the negotiation between the two representative governments is no longer to engage to a satisfying conclusion for both sides. And for the realization of the substantial self-government and development of Kosovo, the determination of the status of Kosovo should be taken, and therefore, the government of Kosovo declared independence unilaterally, based on the framework submitted to the Security Council by the Special Envoy which suggests the only option is to independence.

[225] James Crawford, State Practice and International Law in Relation to Unilateral Secession: Report to Government of Canada concerning unilateral secession by Quebec;19 February 1997

However, by examining the alleged right of Kosovo people to external self-determination, it seems that the unilateral declaration of independence is illegal. First, the right to external self-determination is conferred to the whole population of Serbia, rather than Kosovo, since Kosovo is not a state or nation but an autonomous province within the territory of Serbia. Secondly, the long standing denial to fundamental human rights of Kosovar Albanians does not automatically amount to exercise external self-determination as the last resort. The conditions that there must be gross breaches of fundamental human rights, and an exclusion of the possibility to realize the right to self-determination within the existing states are not fulfilled since the government of Serbia has offered a higher level of autonomy to Kosovo in the process of negotiation, which was rejected by Kosovar Albanians. The legitimacy and legality secession would be achieved if the alleged people enjoys a constitutional status to secession or the alleged secession gains the consent of the government of the parent state which is representing the whole population of the State without distinction of any kind. Consequently, the unilateral secession of Kosovo from Serbia is illegal.

With the subsequent recognition of other States, it seems that the illegal secession leads to a *de facto* secession. Then there is the possibility for Kosovo to achieve the final success of secession if it is recognized by the international community, more or less unanimous. But the reality shows that the achievement of statehood of Kosovo will not be able in a foreseeable future. In addition, even if Kosovo achieved statehood, the unilateral secession from Serbia will never be justified by the subsequent achievement. In addition, without any further Resolution, together with the consent of Serbia, the Security Council Resolution 1244 which explicitly stresses the respect of the territorial integrity of Serbia is the very instrument to determine the status of Kosovo that it remains the part of Serbia so far.

Bibliography

Books:

1. M.N.Shaw: International Law (5th ed.); Cambridge Univ. Press; 2003;
2. A. Cassese: Self-determination of Peoples; Cambridge Univ. Press; 1995;
3. David Raic: Statehood and the Law of Self-determination: 2002
4. Daniel S. Smyrek: Internationally Administered Territories- International Protectorates? An Analysis of Sovereignty over Internationally Administered Territories with Special Reference to the Legal Status of Post-War Kosovo; Duncker & Humblot Berlin; 2006;
5. James Crawford: the Creation of States in International law (2nd ed.); Clarendon Press; 2006;
6. Marcelo G. Kohen (Ed.): Secession: International law Perspectives; Cambridge Univ. Press; 2006;
7. Peter Radan: The Break-up of Yugoslavia and International law; Routledge; 2002;
8. Aleksandar Pavkovic with Peter Radan: Creating New States: Theory and Practice of Secession; Ashgate; 2007;
9. James Crawford (ed.): The Rights of Peoples; Oxford Univ. Press, 1988;
10. Ana S. Trbovich : A Legal Geography of Yugoslavia's Disintegration ; Oxford Univ. Press, 2008;
11. Snezana Trifunovska (Ed.) Yugoslavia Through Documents From its creation to its dissolution. Martinus Nijhoff Publishers; 1994;
12. Marc Weller, The Crisis in Kosovo,1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities; Documents & Analysis Publishing Ltd.1999

Articles:

1. Triantafilou, Eparninontas E.: Matter of Law, Question of Policy: Kosovo's Current and Future Status under International Law; 5 Chi. J. Int'l L. 355 (2004-2005)
2. Kuci, Hajredin: Legal and Political Grounds for, and the Influence of the Actual Situation on, the Demand of the Albanians of Kosovo for Independence, The; 80 Chi.-Kent L. Rev. 331 (2005)
3. Charney, Jonathan I.: Self-Determination: Chechnya, Kosovo, and East Timor; 34 Vand. J. Transnatl. L. 455 (2001)

4. Zimmermann, Andreas; Stahn, Carsten: Yugoslav Territory, United Nations Trusteeship or Sovereign State - Reflections on the Current and Future Legal Status of Kosovo; 70 Nordic J. Int'l L. 423 (2001)
5. Helen Quane: Rights in conflict? The rationale and implications of using human rights in conflict prevention strategies; Virginia Journal of International Law Winter 2007
6. Korab R. Sejdiu: The Revival of a Forgotten Disputed: Deciding Kosova's Future; Rutgers Journal of Law & Urban Policy Fall, 2005
7. Henry H. Perritt, Jr.: Final Status For Kosovo; 20. Chicago-Kent Law Review 2005
8. Bartram S. Brown: Human Rights, Sovereignty, and The Final Status of Kosovo; Chicago-Kent Law Review 2005
9. Geoff Gilbert: Autonomy and Minority Groups: A Right In International Law?; Cornell International Law Journal Fall 2002
10. Graham, Lorie M.: Self-Determination for Indigenous Peoples after Kosovo: Translating Self-Determination into Practice and into Peace; 6 ILSA J. Int'l & Comp. L. 455 (1999-2000)
11. Epps, Valerie: Self-Dtermination after Kosovo and East Timor, 6 ILSA J. Int'l & Comp. L. 445 (1999-2000)

Cases:

1. League of Nations: the Case of Aaland Islands; 1920;
2. ICJ: Advisory Opinion: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 3. Resolution 276; 1970;
4. ICJ: Advisory Opinion: West Sahara; 1974;
5. ICJ: Case concerning East Timor, (Portugal V. Australia); 1995;
6. African Commission on Human and People's Rights: Decision on the case of Katangese People's Congress V. Zaire; 1994
7. Supreme Court of Canada: Reference re Secession of Quebec, [1998] 2 S.C.R. 217;