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FINAL REPORT

THE KOSOVO CRISIS IN AN INTERNATIONAL LAW PERSPECTIVE: SELF-DETERMINATION, TERRITORIAL INTEGRITY AND THE NATO INTERVENTION

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List of Abbreviations

AEL	Collective Courses of the Academy of European Law
AF	*Annuaire Francais de Droit International*
AFDI	*Annuaire Francais de Droit International*
AJICL	*African Journal of International and Comparative Law*
AM.J.INT.L.L	*American Journal of International Law*
ASDI	*Annuaire Suisse de Droit International*
AVR	*Archiv des Völkerrechts*
AYIL	*Australian Yearbook of International Law*
BYIL	*British Yearbook of International Law*
Case WRJIL	*Case Western Reserve Journal of International Law*
CSCE	Conference on security and Co-operation in Europe
CYIL	*Canadian Yearbook of International Law*
Dept. St. Bul.	*Department of State Bulletin*
EC	European Community
EU	European Union
EG	*Enciclopedia Giuridica*
EJIL	*European Journal of International Law*
Encyclopedia	R. Bernhard (ed.), Encyclopedia of Public International Law
Epc Bul.	*European Political Co-operation Bulletin*
FA	Foreign Affairs
GA	General Assembly
GAOR	General Assembly Official Records
GYIL	*German Yearbook of International Law*
HILJ	*Harvard International Law Journal*
HR	*Hague Recueil*
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
IJIL	*Indian Journal of International Law*
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Israel L. Rev.	*Israel Law Review*
IYHR	*Israel Yearbook of Human Rights*
Keesing's	*Keesing's Contemporary Archives, later Keesing's Record of World Events*
NATO	North Atlantic Treaty Organisation
NILR	*Netherlands International Law Review*
NYIL	*Netherlands Yearbook of International Law*
NYUJILP	*New York University Journal of International Law and Politics*
PASIL	*Proceedings of the American Society of International Law*
PYIL	*Palestinian Yearbook of International Law*
RBID	*Revue Belge de Droit International*
RDI	*Rivista di Diritto Internazionale*
RDILC	*Revue de droit international et de législation comparé*
RDP	*Revue de droit public*
Res.	Resolution
RGDIP	*Revue Générale de Droit International Public*

SAJIL	*South African Journal of International Law*
SC	Security Council
SCOR	Security Council Official Records
Stanford JIL	*Stanford Journal of International Law*
UN	United Nations
UNCIO	United Nations Conference on International Organisations
UNTS	United Nations Treaty Series
UN Ybk	*Yearbook of United Nations*
US Digest	*Digest of US Practice in International Law*
VJIL	*Virginia Journal of International Law*

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INTRODUCTION

For more than a decade ethnic conflicts and wars of secession have dominated politics and domestic life in the Western Balkans. The break out in fighting by the end of June 1991, with Yugoslav army troops moving in to prevent the secession in Slovenia, only foreshadowed what was to come – the bloody war in Bosnia & Herzegovina, the onslaught of policies of ethnic cleansing, the Serbian rampage through Albanian-inhabited Kosovo, the 78-day NATO air campaign against the Former Republic of Yugoslavia, and now a situation of instability and protracted violence in Macedonia. These events are indicative of both the fragile stability and present tension in the region.

Not surprisingly, issues of international humanitarian law, coupled with heated debates over the principles of State sovereignty and territorial integrity, have been at the top of international community's agenda for some time now. The Kosovo conflict, which culminated in an intensive NATO air campaign against a specific State, has triggered further international interest and attention. This is especially true with regard to topics such as the scope and consequences of self-determination and the wisdom and legality of external intervention to resolve internal conflict.

It is the tension between these very subjects that forms the basis for this article. Where, in fact, is the nexus between international law on State sovereignty and territorial integrity, on the use of force and on self-determination and human rights law generally? Because the Kosovo conflict, with its fast-approaching humanitarian catastrophe, replete with a record of human rights violations and calls for a right to self govern and determine, that resulted in an extraordinary display of the use of force to intervene, is such a prime illustration of the core issues in this tension between international laws and perspectives, it will be used throughout this article as a point of discussion and application for the international law perspectives being set forth.

For ease of discussion, this article has been divided into three principle sections: the law on self-determination; the nexus between self-determination and State sovereignty and territorial integrity; and the legality and wisdom of external intervention for humanitarian purposes. Section One addresses the development and codification of the law on self-determination, including the identification of the current status and role of self-determination in international law as well as discussion of what the right to self-determination entails and which group(s) may be considered recipients of this right.

Section Two discusses the relationship between secession ("external self-determination") and State sovereignty and territorial integrity. As such, this section of the article examines the Kosovo Albanian claim for self-determination and attempts to answer whether Kosovo Albanians have the legal right to freely determine the future political, economic, social and cultural development of Kosovo.

Following on this discussion, Section Three of this article focuses on the topic of intervention, presenting and critiquing the complex and sometimes contradictory international law and politics meant to answer this question: "Should external States or bodies intervene by means of military force in order to save the lives of persons in danger?" In answering this question, Section Three looks closely at the role of NATO in the Kosovo conflict and considers the relationship between law and morality in situations of humanitarian intervention.

I. THE DEVELOPMENT AND NATURE OF THE RIGHT TO SELF-DETERMINATION

Self-determination of peoples as a practice has its origins in the American and French Revolutions of the Eighteenth Century, developing naturally with the political, ethnic and linguistic demands of ethnic groups[1]. In fact, during the time of World War I, the concept of self-determination served as a major tool in the creation of individual nation-States out of the ruins of the Austro-Hungarian and Ottoman Empires. Yet, it was not until the adoption of the United Nations Charter ("the Charter") in June 1945 that the doctrine of self-determination was codified, or brought into the realm of positive international law.[2]

Fifty years after the adoption of the Charter, in the *Case Concerning East Timor,* the International Court of Justice ("ICJ") affirmed that:

[1] *See* Simpson, G.J., *The Diffusion of Sovereignty: Self -determination in the Post-colonial Age,* in 32 STANFORD JOURNAL OF INTERNATIONAL LAW,1996, 255 at 262.

[2] *See, e.g., Aaland Islands Case* (1920) LNOJ Special Supp No. 3 3,5, in which the international Commission of Jurists observed that the principle of self-determination, while currently garnering support in the division of European territories (such as Ireland's independence), had not yet attained the status of positive rule of international law. "The Commission further concluded that the principle [of self-determination] was essentially political and, thus could not be employed as justification of dismemberment of a clearly established state [Finland]." *See* discussion in C. Lloyd Brown-John, *Self-determination and Separation*, POLICY OPTIONS 40, 40 (Sept 1997). *See also* Brown, *Self-determination in Central Europe* 14 AMER. J. INT'L L. 235 (1920); P. Thornberry, *Self-determination, Minorities, Human Rights: A Review of International Instruments,* 38 I.C.L.Q. 871 (1989).

> [T]he principle of self-determination has been recognised by the United Nations Charter and in the jurisprudence of the Court … [and] is one of the essential principles of contemporary international law.[3]

The current section will highlight and describe the path that self determination[4] has passed through since 1945, including its place and status in international law, its nature and content, and the controversies among scholars over certain aspects of the principle, mainly deriving from its loose formulations in international acts.[5]

1.1. Self-determination in International Conventions

The nature and content of self-determination can be better understood by giving a brief overview of the main international acts that include and have fleshed out the concept of self-determination. For this purpose, the following acts, will be analysed: 1) the United Nations Charter; 2) the United Nations Covenants on Human Rights; 3) the Declaration on the Granting of Independence to Colonial Countries and Peoples; 4) the Declaration on Friendly Relations; 5) the Helsinki Final Act; and 6) the Charter of Paris and Document of Copenhagen.

1.1.1. The United Nations Charter

Although the United Nations (UN) Charter[6] ("the UN Charter") contains rather few references to "self-determination," it is, in fact, the Charter itself that is considered to have given expression to the doctrine of self-determination. The principle[7] of self-determination is expressly mentioned for the first time in Articles 1(2) and 55 of the UN Charter, notwithstanding several States' reluctance, criticism and/or doubt,[8] which

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[3] *See Case Concerning East Timor,* International Court of Justice Reports [hereinafter ICJ REPORTS] 102 (1995).

[4] Frequent reference will be made to the terms 'internal' and 'external' self-determination, which represent theoretical distinctions. 'Internal' self-determination 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, while 'external' self-determination implies the choice of the international status of the people and the territory where it lives. *See* A. CASSESE, SELF-DETERMINATION: A LEGAL REAPPRAISAL 72 & 101 (UK: Cambridge University Press, 1995) [hereinafter SELF-DETERMINATION: A LEGAL REAPPRAISAL].

[5] This analysis takes into account the sources of international law enumerated in Article 38 of the Statute of the ICJ.

[6] For the complete text of the UN Charter, *see* I. BROWNLIE (ED.), BASIC DOCUMENTS ON HUMAN RIGHTS 3 (Oxford: Clarendon Press, 3rd edition, 1992).

[7] The reference to self-determination as a principle or a right is done in accordance with the terminology used in the relevant instruments.

[8] Belgium, for example, was notably very critical. Its representative asserted that the provision referring to self-determination had been founded on 'confusion'. He further pointed out that 'one speaks generally of the equality of states not of peoples.' Similarly, Colombia expressed its concern as to whether the principle connotes the right of withdrawal or secession, and may,

primarily originated in fears that a provision on self-determination would foster civil strife and encourage secessionist movements.[9]

Article 1(2) provides that one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples".[10] Article 55 instructs the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples..."[11]

The framers of the Charter, thus, identified self-determination as one of the purposes, or *raisons d'être*, of the UN Organisation. Moreover, although they did not construct the Charter in a manner that would serve as an effective means for the use and expansion of the principle itself, they did identify self-determination as a major objective of the new world organisation.[12]

A subcommittee responsible for the consideration of the Dumbarton Oaks Proposals and Amendments presented by the various governments gave its interpretation of the principle of self-determination, identifying the following main points: a) free and genuine expression of the will of the peoples is an essential element of self-determination; b) the principles of equal rights of peoples and that of self-determination are two component elements or one norm; c) that norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace; d) the principle in question should be considered in relation to other provisions of the Charter; e) the principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose.[13]

The references to self- determination in Articles 1(2) and 55 of the Charter are complemented by Chapters XI and XII on non-self-governing territories, and the

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consequently, be regarded as tantamount to an approval of international anarchy. *See* UN Charter Debates, VI *UNCIO* 300, (May 15) at 20.

[9] *See discussion in* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 39. *See also id.* at 20.

[10] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, at art. 1(2) [hereinafter UN CHARTER].

[11] *Id.* at art. 55.

[12] *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 38.

[13] *See* UN Charter Debates, VI *UNCIO* 300, (May 15) at 703-4; According to a commentator, the reference to amalgamation can only be taken to mean the merger of two sovereign countries based on the same nationality. *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 42.

international trusteeship system,[14] neither of which contains an express reference to self-determination. Article 73 of Chapter XI of the UN Charter describes the development of self-government in non-self-governing territories as a "sacred trust". Article 76 of the Charter regarding the international trusteeship system provides for a progressive development in the Trust territories towards "self government or independence". It has been observed that Article 73 falls so short of what is today considered self-determination and that the provisions stipulated in Chapters XI and XII, particularly Article 73, support the thesis that Article 1(2) of the Charter represents a moderate version of self-determination.[15]

In sum, the Charter did little to develop the content of self-determination. Rather, its role has been to provide for the substratum for rights of peoples.[16] The reference to self-determination, as introduced for the first time into positive law by the Charter, was in the context of friendly relations among nations and in conjunction with "equal rights" of peoples. The Charter should, therefore, be read as contributing to the principle that "universal peace" is impossible without self-determination. The text outlines a comprehensive concept linking independent factors of security, stability and human rights.[17] However, the text as a whole is very much incomplete in terms of external or internal self-determination, referring only to a principle rather than a right. As one scholar remarks, the Charter "did not refer to the right of dependent peoples to be independent, or indeed, even to vote".[18] The following analysis of other international acts on self-determination is indicative that the wording used to design the principle in the Charter has been further enriched and its content broadly developed into a rule of customary law.

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[14] *See* Thornberry, P., *supra* note 1, at 871.

[15] *See* Higgins, R., PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, Clarendon Press, Oxford, 1994, at 112; *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 42.

[16] *See* Thornberry, P., *The Democratic or Internal Aspect of Self-determination*, in Tomuscat, C. (ed.) MODERN LAW OF SELF-DETERMINATION, Martinus Nijhoff Publishers, 1993, at 108.

[17] *See* Summary of Conclusions of the Prague Meeting of the OSCE Council, 30-31 January 1992, para.6; Thornberry, P., in Tomuschat, C., *id.* at 108.

[18] *See* Higgins, R., *Postmodern Tribalism and the Right to Secession, Comments*, in Broelman, C.,; Lefeber, R.; Zieck, M. (eds.), PEOPLES AND MINORITIES IN INTERNATIONAL LAW, 1993, at 29; Thornberry, P., in Tomuschat, C., *supra* note 16, at 108.

1.1.2. The United Nations Covenants on Human Rights

The UN Covenants on Human Rights – the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights[19] both include an article on self-determination, which is phrased with exactly the same wording. In 1950, pursuant to a General Assembly Resolution, the Commission on Human Rights was called upon by the Economic and Social Council of the United Nations "to study ways and means, which would ensure the right of peoples and nations to self-determination".[20] Two years later, the General Assembly decided that the Covenants on Human Rights should include an Article on the self-determination of peoples.[21]

1.1.2.2. An Interpretation of the Article on Self-Determination

Article 1 of both Covenants recognises and stipulates the content of the right to self-determination in the following terms:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. [22]

A first reading of the article makes it clear that it presents self-determination as a human right. An explanation of the meaning of this complex concept stipulated as a treaty-right, has been forwarded by the Human Rights Committee at its twenty first

[19] The UN Covenant on Civil and Political Rights (ICCPR) and the UN Covenant on Economic, Social and Cultural Rights (ECOSOC), Brownlie, I.(ed.), *supra* note 6 at 125 & 114.

[20] *General Assembly (G.A).Res.421, UN DOC. A/1775 (1950).*

[21] *G.A.Res.545, UN DOC. A/2119 (1951).* The Commission on Human Rights completed the drafting of two International Covenants[21] at its tenth session, held from February 23 to April 18, 1954. *See* Chen, Lung-Chu, *Self Determination as a Human Right*, in Reisman, M.W; Weston B.H., (eds.) TOWARD WORLD ORDER AND HUMAN DIGNITY, 1976, at 216.

[22] *See* Article 1 of the UN ICCPR and ECOSOC, *in* BROWNLIE, *supra* note 6, at 114 & 125.

session in General Comment 12.[23] Self-determination is defined "as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[24] It is placed "apart from and before all of the other rights" in the Covenants.[25] Furthermore, self-determination is defined as an inalienable right of all peoples and imposes corresponding obligations, and "the rights and ... obligations concerning its implementation are interrelated with other provisions and rules of international law".[26] The comments forwarded by the Human Rights Committee suggest that self-determination is both interrelated and serves as a prerequisite for the fulfilment of the range of human rights stipulated in the Covenants.

Furthermore, the right of self-determination in the Covenants is *universal*. The text and the *travaux* support the view that the Covenants reach beyond the colonial situation.[27] The wording of the first clause of Article 1(1) that all peoples have the right of self-determination affirms the universality of the right. The "General Comment" issued by the Human Rights Committee supports this fundamental assumption of Article 1:

> ...it imposes specific obligations on State Parties, not only in relation to their own peoples but vis-à-vis all peoples, which have not been able to exercise or have been deprived of the possibility of their right to self-determination.[28]

According to paragraph 1 of Article 1, all peoples are entitled *to freely determine their political status, and economic, social and cultural development.* In other words, every people or nation is free to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution, without the interference of other peoples or nations. Notwithstanding a proposal that the right of a people to determine its 'political status' should be written into the article to be included in the Covenant on the Civil and Political Rights, and similarly, the right to determine the economic, social and cultural status in the article to be included in the Covenant on Economic, Social and Cultural Rights,[29] it has been concluded that every people or nation is or should be an integrated entity. A people or nation that could not freely

[23] See the text of the General Comment in *UN DOC. CCPR/C/21/Add.3.*
[24] *See id.* at para. 1.
[25] *See id.*
[26] *See* id. at para. 2.
[27] Thornberry, P., *supra* note 1 at 867.
[28] *See* GENERAL COMMENT *supra* note 30.
[29] *UNDOC E/CN.4/SR.258, p.12 (GB)*

determine its political status could hardly determine its economic, social and cultural rights and vice versa.[30]

The choice of the word 'freely' is instructive and its meaning twofold.[31] First, Article 1(1) requires that the people choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves. In other words, the collective aspect of the right merely represents the aggregation of the right's individual components.[32] Only when individuals are afforded the civil and political rights [i.e. freedom of expression (Article 19), the right of peaceful assembly (Article 21), the right to freedom of association (Article 22), the right to vote (Article 25b), the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25a)] can it be said that the whole people enjoys the right of internal self determination.[33] Having stated the above, although Article 1 is couched in absolute terms, in that it does not include any escape clause, it is subject to the same limitations incorporated in the Covenants' other provisions.[34]

The second meaning of the word 'freely' in Article 1(1) is less explicit than the first one, requiring that a State's domestic political institutions must be free from outside interference.[35] It, therefore, prohibits States from meddling in the affairs of other contracting States in a manner that would seriously infringe upon the right of a State to freely determine its political, economic, social and cultural status.

The *right over natural wealth and resources* is another constituent element of the right to self-determination. According to Article 1(2) the right of self-determination includes the simple and elementary principles that a nation or people should be master of its own natural wealth or resources. This article consists of two parts. Under the first, all peoples, regardless of whether they live in a non-self-governing territory or in an independent State, are entitled to utilise their natural resources without them being

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[30] See Third Committee, 10th Session (1955): *UNDOC A/C.3/SR.645, 18 (CS); A/C.3/SR.647, 12 (GR).*

[31] *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 52.

[32] *See* Kolodner, E., *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-determination*, 27 NYU J. INT'L L. 159, 179 (1994), *commenting* on Cassese's attempt to clarify the content of self-determination.

[33] *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 52.

[34] Under Article 4 of the Covenant on Civil and Political Rights, Article 1 can be derogated in two ways: 1) directly, i.e., when a State explicitly declares under Article 4(3) that it intends to derogate from the provision on self-determination; and 2) indirectly, i.e., when a State avails itself of the right of derogation with regard to those provisions of the Covenant that expand upon self-determination – the articles on political freedoms, for instance. *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 53-4.

[35] *See id.* at 55.

exploited by others. The underlying aim of this provision stays in stressing the concept that the era of colonialism - economic as well as political - has come to an end.[36]

Under the second part of Article 1(2), the right of peoples to utilise natural resources is subject to obligations of economic co-operation and to other rules of international law. It must not be intended to frighten off foreign investment by a threat of expropriation or confiscation. Rather, as various delegations pointed out during the preparatory work of the Covenants, it is intended to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence.[37] This part of Article 1(2) is a reference to the well-known rule prohibiting the confiscation of property (including concessions) of foreigners, except for public purposes and on condition of payment of fair compensation within a reasonable time.[38]

The latter provisions seems to coincide with two articles, namely Article 47 of the Covenant on Civil and Political Rights and Article 25 of that of Economic, Social and Cultural Rights, which have the same wording: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources."[39] But, as one commentator suggests, any derogation from a well-entrenched norm of customary international law ought to have more solid foundations than one provision contradicted by another in the same documents.[40]

In its General Comment, the Human Rights Committee addressed the issue of the economic content of the right in Article 1(2), advising that States should indicate any factors or difficulties in the way of "free disposal" and to what extent it affects the enjoyment of other rights in the Covenant.[41]

Under Article 1(3), all State Parties, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, undertake *two sets of*

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[36] *See* Dinstein, Y., *Collective Human Rights of Peoples and Minorities,* 25 INT'L COMP. L. Q. 111, 111 (1976).

[37] See Third Committee, 9th Session (1954): *UNDOC A/C.3/SR.576. 7 (RCH); E/CN.4/SR.260, p.6 (RCH); E/CN.4/SR.261, p.6 (USA)*

[38] *See* Baxter S, *Responsibility of State for Injuries to the Economic Interests of Aliens,* 55 AMER. J. INT'L L. 553, 553-563.

[39] *See generally* Brownlie, I., PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 5th edition, Oxford, 1998 at 521-55.

[40] Dinstein, Y., *supra* note 36, at 111.

[41] See GENERAL COMMENT, *supra* note 30, para.5.

obligations: a) to 'promote the realisation of the right of self-determination in all their territories, and b) to 'respect the maintenance of that right in other States.[42]

The drafters of the Covenants imposed on contracting States the duty to implement the above obligations in 'conformity with the Charter'. The latter applies not only to the provisions of Chapter XI and XII or to Article 1, but also to the Charter as a whole.[43] Article 1(3) actually writes the principle of self-determination into the chapters governing dependent territories,[44] notwithstanding that self-determination is not specifically mentioned in Chapters XI and XII, and the obligations laid down in those chapters could be altered only by amending the Charter.

The adoption of the texts of the UN Covenants on Human Rights marked the next phase of legal development of the concept of self-determination from a legal obligation in the decolonisation area, to self-determination as a human rights, with two resolutions of the General Assembly[45] serving as a bridge.[46] From this time onwards there was repeated reference to self-determination in human rights terms.[47]

1.1.3. Declaration on the Granting of Independence to Colonial Countries and Peoples

The evolution of the right to self-determination culminated in the adoption by the UN General Assembly in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[48] The Declaration presents itself as an interpretation of the Charter and stresses independence within the colonial context, as the principal means through which self-determination is implemented. It proclaims solemnly 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations' and declares that 'all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their

[42] The original proposal laid down obligations only upon States that were responsible for the administration of the Non-Self-Governing and Trust Territories. Later the proposal was amended to include all states whether or not they were administering such territories. The obligation imposed on the administering powers of the non-self-governing and Trust territories is now almost completely outdated, because of the fact that almost all colonial people have achieved independence. See *UNDOC E/CN.4/SR.254, p.6-7 (AIWO); E/CN.4/SR.255, p.9 (F); E/CN.4/SR.257, p.4 (F)*.

[43] *UNDOC A/C.3/SR.668, 6 (ES).*

[44] *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 58.

[45] See G.A. Resolution 1514 (XV) or the Declaration on Granting Independence to Colonial Countries and Peoples, *UN DOC. A/4684 (1960)* and Resolution 1541 (XV) *UN DOC. A/4684 (1960)*

[46] *See* Higgins, R., *supra* note 15, at 114.

[47] *See* id. at 114-15.

[48] G.A. Res.1514, 15 UN GAOR, Supp.16, *UN Doc. A/4684(1960)* at 66

economic, social and cultural development.[49] The holder of the right to self-determination is considered to be the people, and the meaning of the word 'people' is conditioned by repeated reference to colonialism.[50] The Colonial Declaration is viewed by most of the African and Asian nations as a document only slightly less sacred than the Charter and as stating the law in relation to all colonial situations.[51]

1.1.4. The Declaration on Friendly Relations

Four years after the adoption of the Covenants on Human Rights, self-determination made its appearance in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter (hereinafter the Declaration on Friendly Relations).[52]

The process of reaching an agreed formulation of self-determination to be included in the Declaration, was not an easy one. In the initial phase, there were differences of opinion among those who accepted a right of self-determination of peoples and the duty of States to grant it, those who argued that under international law only States could have rights or be the beneficiaries of rights, [53] and others who supported the idea that the principle was universal, i.e. not limited exclusively to colonial situations.[54]

The Declaration contributed to the formation of a set of general rules concerning the right to self-determination. There was however a split among commentators with regard to the legal standing of the right as proclaimed in the Declaration.[55] It seems

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[49] *See id.* at preamble, para. 2.

[50] Thornberry, P., *supra* note 1, at 874-5.

[51] Rosenstock, *The Declaration on Principles of International Law*, 65 AMER. J. INT'L L. at 732, (1971).

[52] G.A.Res. *2625 (XXV)*, Oct. 24, 1970, U.N. General Assembly, 25th Sess., Doc. *A/RES/2625(XXV)*.

[53] *See* Rosenstock, *supra* note 51, at 730.

[54] *See id.*

[55] There was disagreement among Members of the UN as to whether the Declaration represents a mere recommendation or a statement of binding legal rules. According to one author, the truth would appear to lie somewhere between the two extremes, but closer to the latter. To this end, two points in particular are noteworthy: firstly, there is no difference in the UN practice between the terms 'declaration' and 'recommendation;' and, secondly, a Report of the Special Subcommittee IV/2 on the Interpretation of the Charter (13 UNCIO DOCS 831-2) limited to some extent the efficacy of efforts at interpretation of the Charter through means other than amendment. The principles involved, however, are acknowledged by all to be principles of the Charter. By accepting the respective texts, States have acknowledged that the principles represent their interpretations of the obligations of the Charter. *See* Articles 31; 33(1) and 33(3) of the Vienna Convention on the Law of the Treaties, *UN DOC. A/CONF.39/27(1969)*; *See also* Rosenstock, *supra* note 51, at 714-5.

In the *Nicaragua* case, the ICJ pointed out that:

> *[O]pinio juris* may, though with all due caution, be deduced *inter alia* from the attitude of States towards certain General Assembly resolutions, and

though that there is consensus about the binding character of those provisions on which a broad measure of substantial and unreserved agreement was provided.[56] These are 1) peoples under colonial or alien domination have a right to self-determination, i.e. to attain the status of sovereign states or any other political status freely determined by themselves; and 2) peoples under racist regimes have the right to internal and external self-determination either by achieving self-government or seceding from the racist state.[57] These provisions of the Declaration can be considered as codifying rules of customary international law.

A number of international law authorities have asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance deriving from an interpretation of paragraph 7 of the Declaration, which reads as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of self-determination and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or color.
>
> Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.[58]

Despite the formulation of this provision in the form of a saving clause, it connotes the recognition of the right to self-determination also to peoples within existing States, as well as the necessity for governments to represent the governed.[59] The latter outcome is reached by an *a contrario* reading of paragraph 7. It is therefore read

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> particularly Resolution 2625 (XXV) [on Friendly Relations]…The effect of consent of the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules by the resolution by themselves.

See ICJ Reports, 1986, at 99-100, para.# 188.

[56] *See* A. Cassese, *The Helsinki Declaration and Self-determination*, in Burgenthal, T., (ed.) HUMAN RIGHTS INTERNATIONAL LAW AND THE HELSINKI ACCORD 1977, p. 91-92. According to paragraph 4, the modes for implementing external self-determination encompass independence, free association or integration with an independent state, 'or the emergence into any other political status freely determined by people'.

[57] *See id.* at 92.

[58] *See* Declaration on Friendly Relations, *supra* note at para.# 7.

in light of the state's duty to promote respect for an observance of human rights and fundamental freedoms in accordance with paragraph 3. Thus, if peoples within existing States are treated in a grossly discriminatory fashion by an unrepresentative government, they can claim self-determination without concern that arguments about territorial integrity will defeat their claim.[60] The underlying rationale of the Saving Clause of the Declaration is that when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise this right by secession. In its decision on the question of the secession of Quebec, the Supreme Court of Canada asserted that the third circumstance where a right of secession might arise, "parallels the other two recognised situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated".[61]

Another interpretation of the Saving Clause points to its application only to peoples living under racist regimes, or under colonial or alien occupation.[62] This view is not only narrow in its interpretation of the Saving Clause (i.e. limiting the applicability of self-determination to historical situations such as colonisation and foreign occupation) but also contradictory to the meaning of the Declaration itself. As was previously mentioned, the Declaration implies the extension and applicability of the right to self-determination to peoples living within existing states and puts an emphasis on the necessity for governments to represent the governed. Therefore, such a narrow interpretation of the provision neuters the Clause to such an extent that it is meaningless and without legal weight.

The preceding analysis of the Declaration, and especially of the Saving Clause has asserted that the principle of national unity and territorial integrity may have to yield if the state concerned is not possessed of a government 'representing the whole people,'[63] and if a people is completely denied to effectively exercise its right to internal self-determination.

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[59] *See* Rosenstock, *The Declaration on Principles of International Law*, (1971) 65 AMER. J. INT'L L., at 732; Thornberry, P., in Tomuschat, C., *supra* note 16, at 115

[60] *See* Thornberry, P., *supra* note 1, at 876.

[61] *See* Judgment of the Supreme Court of Canada, concerning *Certain Questions Relating to the Secession of Quebec from Canada*, as set out in Order in Council P.C. 1996-1497, dated September 30, 1996, at para.#135.Also note that according to Article 38 of the Statute of the ICJ, the decisions of national courts are considered to be sources of international law.

[62] *See* Cassese, A., in Burgenthal, *supra* note 56, at 95 *et seq.*

[63] *See* Tomuschat,C., *Self-determination in a Post Colonial World*, in Tomuschat, C(ed.), *supra* note 16, at 9.

1.1.5. The Helsinki Final Act

The Final Act[64] of the Conference on Security and Co-operation in Europe adopted on 1 August 1975, embodied a Declaration on the Principles Concerning Mutual Relations of the participating States, which contains in its Principle VIII an explicit reference to internal and external self- determination:

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

Arguably, this formulation is construed to mean that the right to self-determination is a continuing right, not a right exercised, once and for all, at the time of independence.[65] As formulated by this provision, self-determination applies to all people. Pointing out the innovations that this text brings about, one commentator, is focused on the phrases on internal self determination and the commitment to a continuing role for the principle of self-determination.[66] He holds that, according to the interpretation given to the text as a whole, this internal situation does not address the situation of national minorities, because they are dealt with in another section of the Declaration. Thus, it 'means to refer only to groups characterised by the fact of living in sovereign countries and identifying with the population of these countries'.[67]

The novelty of the Helsinki Act, however, is its concern with *internal* self-determination. The wording agreed upon by 35 States embodies the idea that self-determination means the permanent possibility for a people to choose a new social or political regime, to adapt the social or political structure to meet new demands,[68] so that its voice be reflected in the policy of its government.

1.1.6. Charter of Paris and Document of Copenhagen

The Charter of Paris, which was adopted in November 1990 during a meeting of CSCE (today OSCE), references self-determination in a manner that narrows previous formulations and limits its content. The Charter reaffirms equal rights of peoples and

[64] The Helsinki Final Act does not have the status of a legally binding document.

[65] *See* Salmon, J., *Internal Aspects of the right to Self-determination*, in Tomuschat, C., *supra* note 14, at 268-269.

[66] *See* Cassese, A., in Burgenthal, *supra* note 56, at 95 *et seq*

[67] *See* Cassese, A., *Political Self-determination – Old Concepts, New Developments*, in Cassese, A. (ed.) UN LAW/FUNDAMENTAL RIGHTS, 1979, 95, at 151.

their right to self-determination in compliance with the UN Charter and other relevant norms of international law, comprising those relating to territorial integrity.

In the present document, the paragraph on self-determination is included in the Chapter on "Friendly Relations among Participating States" and not on the Chapter on "Human Dimension" which includes the most important commitments of the members of the organisation on the implementation of human rights and freedoms. The Chapter on Human Dimension of the Charter likewise the Helsinki Act, pays special attention to the rights of minorities, which are not included in the definition of self-determination. This interpretation is reinforced by the Document of Copenhagen, which does not include a section on self-determination. Thus, the references to self-determination in the OSCE acts are indicative of the linguistic limitations present in the human rights environment during the period following the fall of the iron curtain.

1.1.7. The Vienna Declaration

The *Vienna Declaration and Program of Action*[69] that was adopted in 1993, by the UN Conference on Human Rights, reconfirmed in its relevant part Article 1 of the UN Covenant on human rights. As other international acts providing for the right to self determination, the Vienna Declaration, after affirming the people's right to determine political, economic, social and cultural issues, states that such rights are not to be construed as 'authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'. However, the emphasis is put again on the government representing the whole people belonging to the territory without distinction.

1.3. The right to self-determination in the jurisprudence of the International Court of Justice

The International Court of Justice has recognised the principle of self-determination in a number of cases mainly within the decolonisation context. In its Advisory Opinion concerning *Namibia,*[70] it affirmed the right to self-determination as defined by the United Nations, declaring that "the subsequent development of international law in regard to non-self governing territories, as enshrined in the Charter of the United nations, made the principle of self-determination applicable to all of

[68] Cassese, A., in Burgenthal, *supra* note 56, at 103.
[69] *A/Conf. 157/24,* 25 June 1993
[70] ICJ Reports 1971, 31 at para.# 52.

them".[71] The Court attempted to broaden the existing interpretation and the impact of self-determination in its Advisory Opinion on *Western Sahara*. Referring to GA Resolution 1514 (XV), the Court found that: "The above provisions, in particular paragraph 2 [defining self-determination] requires a free and genuine expression on the will of the peoples concerned".[72]

It as apparent from the latter wording, that the Court held, that self-determination always entails 'the need to pay regard to the freely expressed will of the peoples, but that exceptionally this requirement can be and has been dispensed in two instances: when one is not faced with a 'people' proper, and when 'special circumstances' make a plebiscite or referendum unnecessary.[73] However the Court did not elaborate and specified what it meant by 'people' or by 'special circumstances'.

Notwithstanding the lack of the ICJ authoritative opinion on the terms set out above, as a commentator argues, the Court's interpretation is more in keeping with the general spirit and thrust of the principle of self-determination than the standards on the self-determination of colonial peoples that evolved in the 1960s.[74]

More recently, and as it is already mentioned above, in the *Case Concerning East Timor,* the Court stipulated that self-determination was one of the essential principles of contemporary international law".[75]

1.4. The content and nature of self-determination

After examining the place of self-determination in international law, it seems appropriate, also for drawing up a summary, to set out certain considerations concerning the content and nature of self-determination. The recognised sources of international law[76] uphold that the right to self-determination of a people 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. As such, the right to self-determination encompasses political, economic, social and cultural aspects, each of which are being closely and indissolubly linked. Being interdependent, each aspect may be fully realised through the complete recognition and implementation of the others.

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[71] See ICJ Advisory Opinion *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Report, 1971, 16, at para.# 31-32.

[72] *See* ICJ Reports 1975, 32, at. para.# 55.

[73] *id*., para.#59.

[74] *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 89.

[75] *See* ICJ Reports 1995, 90, at 102.

- *The political aspects* denote the idea that the right to self-determination includes the ability of a group to collectively determine its political destiny through democratic means. Accordingly, definitions of self-determination include the right of a "people organised in an established territory to determine its political destiny in a democratic fashion,[77] or the right "of people living within an independent and sovereign state to freely choose its own government, to adopt representatives institutions and to periodically…elect their representatives through a free procedure with freedom to choose among alternative candidates or parties,"[78] or "the right of all segments of a population to influence the constitutional and political structure of the system under which they live."[79]

  The formulation of self-determination set forth in many international instruments, such as the Human Rights Covenants and the Declaration on Friendly Relations, articulates the standard by which a State's behaviour should be judged. Thus, a state must be possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour.

- The *economic aspects* of the right to self-determination are first of all manifested, in the right of all peoples to determine, in freedom and sovereignty, the economic system or regime under which they are to live. Furthermore, from an economic standpoint, the right also involves the exercise of a permanent sovereignty over natural resources,[80] and covers problems raised by harmful activities that may be undertaken in this area by transnational or multinational enterprises. However, the safeguarding of two essential principles should be carried out: on the one hand the respect for the sovereignty to develop the national resources, and on the other the provision of adequate guarantees for the foreign investors.

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[76] The sources of international law enumerated in Article 38 of the Statute of the ICJ.

[77] *See* Franck, T.M., *The Emerging Right to Democratic Governance*, 86, AMER. J. INT'L L, 1992, at 52.

[78] *See* Eide, A., *Minority situations: In search for peaceful and Constructive Solution,* 66 NOTRE DAME LAW REVIEW, 1991, at 1335.

[79] *See* Buchheit, L.C., SECESSION: THE LEGITIMACY OF SELF-DETERMINATION, 1978, at 14.

[80] *See* Rosenberg, D., *Le Principe de la souverainete permanente sur les resources natureles: un droit a l'emancipation et une arme de liberalisation pour les peoples du tiers monde*, ANNUARE DU TIERS MONDE, Paris, Berger-Levrault, 1976 at 2.

- The *social aspects* connote the idea that every people have the right to choose and determine the social system under which it is to live. In particular, the latter aspects are related to the promotion of social justice, to which every people is entitled,[81] and in a broader sense, imply the effective enjoyment of social rights without discrimination.
- *The cultural aspects* relate to the establishment of a cultural regime or system, which constitutes a very important element of the right to self-determination of all peoples. It implies recognition of its right to regain, enjoy and enrich the cultural heritage, as well as the affirmation of the right of all its members to education and culture.[82]

A right to *external self-determination* arises in extreme cases and under carefully defined circumstances. It has been defined as in the following statement from the Declaration on Friendly Relations: 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 to self-determination by that people.[83]

Following the discussion on the status of self-determination in international law as well as it nature and content, it is adequate to analyse in turn who is entitled to this right. The focus will be placed on its holders, the definition of the term 'people', and the criteria that a group should meet in order to be considered as a people.

1.5. The holders of self-determination

The international acts quoted above grant the right to self-determination to 'peoples', and despite their large number, no precise meaning of the term "people" has been construed. Two possibilities have emerged - that 'peoples' means the entire people of a State, or that it means all persons comprising distinctive groupings on the basis of race, ethnicity and perhaps religion.[84]

In this regard, it appears relevant to refer to the Judgement of the Canadian Supreme Court on the secession of Quebec which attempted to ascertain the meaning of the term "people" for the purpose of the right to self-determination as follows:

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[81] *See* the Report of the Subcommission on Prevention of Discrimination and Protection of Minorities on its twenty-sixth session, E/CN.4/1128, at para.# 28.

[82] *See id. ;* also Espiell, H.G., *The Right to Self-determination: Implementation of United Nations Resolutions*, *E/CN.4/Sub.2/405/Rev.1*.

[83] *See* para.# 4 of the Declaration on Friendly Relations.

[84] *See* Higgins, R., *supra* note 15, at 124.

> " It is clear that a "people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population.[85]

Although the Court does not give a definition of the term" people", it authoritatively confirms that "people" could point to other groups of individuals other than the entirety population of a state. Subsequently, the Court forwards the reasons for its finding:

> 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 the existing states, and would frustrate its remedial purpose".[86]

Attempts to give a definition of the term people occurred in the process of the drafting of the UN Charter. Self-determination in the Charter attaches to "peoples". However, the *travaux preparatoires* of the San Francisco Conference point to an inconclusive discussion of the term 'peoples'. The UN Secretariat, in an attempt to interpret the term 'nation' and 'peoples', suggested that "the word 'nation' is broad...enough to include colonies, mandates, protectorates and quasi-States as well as States"; and, "...'nations' is used in the sense of all political entities, States and non-States, whereas 'peoples' refers to groups of human beings who may, or may not, comprise States or nations."[87]

Further attempts to define the meaning of the word "people" were made in the course of the preparatory works of the Covenants on Human Rights, where self-determination refers to "all people". To this end, it was suggested that this word mean "peoples in all countries and territories, whether independent, trust or non-self-governing", "large compact groups", "ethnic, religious or linguistic minorities", or "racial units inhabiting well-defined territories" etc. However, it was thought, that the

[85] *See* Judgment of the Supreme Court of Canada, *supra* note 66, at para.# 124.
[86] *Id.,* at para.# 124.
[87] *UNCIO DOCS, Vol.XVIII*, p.657-658.

term 'peoples' should be understood in its most general sense and that no definition was necessary.[88]

Indeed, it appears to be exceedingly difficult to define the term 'people'. It has been suggested that peoplehood must be seen as a contingent of two elements. The objective element is that there has to exist an ethnic group linked by common history. A random group of persons, lacking any common tradition, cannot be categorised as people. There is also a subjective basis to peoplehood for it is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind.[89] As Renan's famous reference defines it: there is a *"plebiscite de tous les jours,"* in regard to the will to live together and to continue common traditions.[90]

It is apparent that commentators have sought to meld the various definitions within the term "ethno-national" group, which is a politically self-conscious sub-national group that asserts plausible historical claims to a particular territory and shares racial, cultural, or historical characteristics that distinguish its members from the dominant population.[91] In short, in order for a group to be entitled to the right to self-determination, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.

Furthermore, as highlighted in various reports of the State parties to the Covenant on Civil and Political Rights, which describe their compliance with Article 1 on Self-determination, another requirement for a group to be entitled to the right of self-determination, is to demonstrate close connections to a particular territory.[92] Therefore it is to be demonstrated that the group claiming the right to self-determination has traditional connections with the territory. The practical implication of this requirement

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[88] *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 PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1987, Martinus Nijhoff Publishers, at 32.

[89] *See* Dinstein, Y., *supra* note 36, at 104.

[90] *See* Renan, *Qu'est-ce qu'une Nation?,* (1882)1 OUVRES COMPLETES 887, at 903-904.

[91] *See* Wippman,D., *Hearing Voices Within the State: Internal conflicts and the Claims of Ethno-national groups*, 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS, 1996, at 586.

[92] *See* Third Periodic Report of France to the Human Rights Committee, *UN DOC. CCPR/C/76/Add.7*, May 15, 1997, at para.# 6-17; also Fourth Periodic Report of the Russian Federation to the Human Rights Committee, *UN DOC.* CCPR/C/84/Add.2, February 22, 1995; Initial report of the United States of America to the Human Rights Committee, *UN DOC. CCPR/C/81/Add.4*, August 24, 1994, at para.# 30, whereby Native American Tribes are described as "unique aggregations possessing attributes of sovereignty over both their members and their territory."

is that there could be no effective right of self-determination without a place in which it can be exercised.

II. THE RIGHT TO SECEDE (EXTERNAL SELF-DETERMINATION) AND TERRITORIAL INTEGRITY

This section is comprised of three main subsections: discussion of the law on secession, or external self-determination; identification and discussion of State practices in cases where secessionist movements took place; and the situation of Kosovo in light of the law and State practice related to secession.

1. The Law on Secession and Territorial Integrity

As was addressed in the previous section, all peoples have an inherent right to self-determine. This right includes the determination by the people to freely determine their political status and pursue their economic, social, and cultural development. What is referred with the term external self-determination or secession, and how this "right" then translates into practical terms, however, is a much larger issue. In the discussion on the Declaration on Friendly Relations[93], it was mentioned that there are three situations under which a right of secession might arise. For the first two cases referencing to colonial situations and foreign occupations the outcome is easier, as there is broad consensus that secession right in those cases is customary law. While there is still disagreement on the interpretation of the Saving Clause of the Declaration on Friendly Relations. It was said that it includes that a right of secession is also recognised to a people whose right to internal self-determination has been thoroughly violated by a Government that does not represent the people.

While international law does not specifically grant component parts of sovereign States the legal right to secede unilaterally from their "parent" state, it also does not provide an explicit denial of such a right.[94] The reason for this is that international law places a great importance on the territorial integrity of nation States and, by and large, leaves the creation of a new State to the discretion of the domestic law of the exiting State of which the seceding entity presently forms part.[95] Concurrently, however, it is widely recognised that secession is one of the modes for implementing self-

[93] *See infra* the Discussion on the Declaration on Friendly Relations at Section I.
[94] *See* Judgment of the Supreme Court of Canada, *supra* note 66, at para. 112.
[95] *See* Jennings, R.Y., THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW, 1963, at 8-9.

determination.[96] It is, in fact, undeniable that in the face of a well-established international law right to self-determination, States, in certain circumstances, have an implied duty to recognise the legitimacy of a call for secession.[97]

The caveat is that international law presupposes that the right to self-determination will be exercised within the framework of existing sovereign States[98] and in accordance with the maintenance of the territorial integrity of those States. In fact, the UN Covenants on Human Rights both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing State, even without direct reference to the protection of territorial integrity.[99] International acts, such as the Declaration on Friendly Relations and the Vienna Declaration, state, immediately after affirming a peoples' right to determine its political, economic, social, and cultural status, that:

> [Such rights] are not to be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states conducting themselves in compliance with the principle of equal rights and self determination of peoples.[100]

International law scholars for their part, do not deny a right of secession completely, but emphasise the importance of the principle of territorial integrity,[101] which is held to constitute the rule, while the right of secession its exception. Territorial integrity, however, does not mean the lack of legal obligation. Rather, the internal and external status of States, though characterised by the principle of sovereignty, are determined by a multitude of rules of international law, which limit the discretion of States in both internal and external affairs.[102] Thus, the principle of sovereignty alone cannot be used as an argument against self-determination.[103]

Consequently, it could be argued that the maintenance of the territorial integrity of existing States and the right of a "people" to achieve a full measure of self-determination are not mutually exclusive. However, according to the Supreme Court of Canada, this is only true when the State in question governs in a manner representative

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[96] *See* Declaration on Friendly Relations, at para.# 4.
[97] *See* Judgment of the Supreme Court of Canada, *supra* note 66, at para.# 111.
[98] *Id*. at para.# 122.
[99] *Id*. at para.# 130.
[100] *See* for example para.# 7 of the Declaration on Friendly Relations.
[101] *See* Murswiek, *supra* note 14, at 25.
[102] *Id*.
[103] *Id*.

of the whole of the people or peoples resident within its territory, equally and without discrimination. As such, the manner of governing must respect the principles of self-determination as part of its own internal arrangements. Only when States are fully in compliance with these factors would they be considered entitled to the protection under international law of their territorial integrity.[104]

This being said, though, there are indeed certain circumstances in which a right of secession may arise. In addition to the traditionally accepted situations where a right to secession has been recognised – for peoples under colonial or alien domination or under racist regimes[105] – many international lawyers are now advocating that a people finding itself completely blocked from the meaningful *internal* exercise of its right to self determination are entitled, as a last resort, to exercise the right via *external* self-determination, or secession.[106] The roots for the third construction arguably rest in the formal and/or factual inability of a people to determine its economic, political, social and cultural status within the framework of an existing State.

The recent requirement of the Vienna Declaration according to which governments represent "the whole people belonging to the territory without distinction of any kind" lends credence to the assertion that such a complete blockage of the exercise of the right to self-determination (internally) may potentially give rise to an external exercise of that right, i.e. secession.[107] As the Canadian Supreme Court stated in the Case concerning the Secession of Quebec:

> [T]he international law right to self-determination generates at best, a right to self determination...where a people is oppressed... or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to the right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[108]

Despite this progressive jurisprudence, however, there is, in fact, little direct evidence that customary international law supports the right to secession.[109] Rather,

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[104] *See* Judgment of the Supreme Court of Canada , *supra* note 66, at para.# 130.
[105] *See infra* the discussion on the Declaration on Friendly Relations among States
[106] *See* Judgment of the Supreme Court of Canada, *supra* note 66, at par.134.
[107] *Id.*
[108] *See* Judgment of the Supreme Court of Canada, *supra* note 66, at par.138.
[109] *See* Eastwood, L.S., *Secession: State Practice and International Law after the dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. INT'L L. 299, at 300.

present-day scholars must look to State practices in the last decade, which seem to suggest the emergence of a recognisable right to secede in particular circumstances.[110]

The examples of forcible self-determination that were supported by the international community and various neighbouring States in the aftermath of the fall of the Soviet Union and Yugoslavia are particularly enlightening. In addition, the international response to secession efforts in the context of decolonisation in Eritrea and East Timor, and outside the context of decolonisation for instance in Former Soviet Union, and former Yugoslavia are noteworthy as they aid in setting forth the emerging customary law on the right to secession in pursuit of self-determination where such exercise is internally impossible. It should be noted, however, that the success of the claims for secession are in large part attributable to the international community's willingness to extend recognition to them. The remainder of this section will identify and discuss the secessionist movements in Eritrea, East Timor, USSR, and Yugoslavia, focusing on the patterns of State behaviour that may well be crystallising into customary international law.

2. Emerging State Practice in Cases of Secessionist Movement

2.1. The Case of Eritrea

The case of Eritrea is concerned with decolonisation, but it has a special nature so far as the State that has for a long time claimed territorial rights over it, Ethiopia, had itself been subjected to colonial rule by Italy[111] (Eritrea was an Italian colony). Ethiopia claimed that it had absolute legitimacy of Eritrea being an integral part of Ethiopia. Meanwhile, the Eritreans held that they were entitled to self-determination and that Ethiopia had ignored and actually denied that right.[112]

Between the eleventh and nineteenth centuries, Eritrea became a peripheral part of Ethiopia. It was occupied by Italy in 1885-9, and subsequently turned into an Italian colony pursuant to the Treaty of Uccialli of 1889, with Ethiopia. Therefore, by this Treaty, Ethiopia agreed to the acquisition of sovereignty by Italy over Eritrea. Thus the region became a colonial unit.[113] When Italian colonial rule came to an end, Great Britain administered Eritrea under a trusteeship, until 1952. The UN decided to separate the two issues that of the future of Eritrea and that of the independent status of

[110] *Id.*

[111] Ethiopia was a Member of the League of Nations. It was occupied by Italy between 1935-41

[112] *See* SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 218-222.

Abyssinia/Ethiopia. A UN General Assembly Resolution (Resolution 269 IV of 21 November 1949) set up a Commission responsible for the submission of proposals. The General Assembly did not envisage the holding of a referendum or a plebiscite to ascertain the wishes of the population. Consequently the Commission assessed "the political wishes of the parties and people "by collecting the views of "the principal political parties and associations" and "holding hearings of the local population".[114] Thus, it concluded that the majority of Eritreans favored political association with Ethiopia.[115] The way pursued by the Commission to assert the wishes of the Eritrean population remain questionable, and the latter consideration would have been different should a referendum have been held. It seems that political and strategic considerations prevailed over the right to self-determination, as the genuine and free expression of the will of a people.[116]

The General Assembly decided "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown".[117] The British administration of Eritrea ended in 1952, and at the same time the Federation was established. The Federation was however short-lived, for the Eritrean Assembly voted in November of 1962 for the incorporation of Eritrea into Ethiopia; Eritrea thus became a province of Ethiopia.

The Eritreans had since 1961 created a liberation movement, the Eritrean Liberation Front, that was followed in 1970s by another movement, and that were engaged in an armed struggle with the Ethiopian authorities.[118] Recently, following the collapse of the Mengitsu government, Eritreans acquired full control over Eritrea and, after a referendum in 1993, proclaimed their independence.

The right to self determination of the Eritrean people was not properly exercised when the Federation decided upon by the UN was established. Therefore, the Eritrean people could still claim the right to freely choose their future development.[119] Accordingly, a referendum was held under international scrutiny, and it really established the free and genuine will of Eritreans to become independent.[120]

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[113] *Id*. at 222.
[114] UN report of the United Nations Commission for Eritrea, 1950, *UN DOC. A/1285, 17 ff.*, at par. 106-31
[115] *Id*. 21, at 132-5.
[116] See SELF-DETERMINATION: A LEGAL REAPPRAISAL, *supra* note 4, at 58.
[117] *Id*.
[118] *Id.* at 220.
[119] *Id*. at 222.
[120] *Id*.

It is apparent from this case, that the Eritreans succeeded in their claims for independence for these reasons: 1) their liberation movements took over control of the Eritrean territory 2) their right to self-determination was not implemented because of the fault decision of the international Community to create a Federation. So, in this case, the claim of territorial integrity had to yield in favor of the right to self-determination.[121]

2.2. The case of East Timor

East Timor became a part of the international agenda in 1960 when the UN General Assembly added this territory to the list of Non-Self-Governing territories. Before that, East Timor was administered by Portugal. 14 years later, Portugal attempted to establish a provisional government and a popular assembly that would determine the status of East Timor. A civil war broke out between the supporters of independence and those who favoured integration with Indonesia. Portugal withdrew being unable to control the situation. Subsequently, Indonesia intervened by military means incorporated East Timor as its 27th province.[122] The United Nations never recognised the inclusion of East Timor in Indonesia, and both Security Council and the General Assembly demanded Indonesia to withdraw from East Timor.

In 1982, UN, Portugal and Indonesia started negotiations on the question of the status of East Timor. In 1998, Indonesia proposed a limited autonomy for East Timor within Indonesia. The discussions lead to the conclusion of an agreement between Indonesia and Portugal signed in New York in 5 May 1999. Both governments entrusted the UN Secretary General to initiate the process of popular consultations with the purpose of establishing the will of the East Timorese to accept or refuse the special autonomy offered to them within Indonesia. The Security Council decided for the creation of United Nations Administration Mission in East Timor (UNAMET) in 11 June 1999 to organise the consultation process and to monitor for a transitional period the implementation of the will of East Timor people. The voting which took place on 30 August 1999 resulted in 78,5% of the votes the refusal of the proposed autonomy and the initiation of a transitional process towards independence.[123] After the proclamation of the result of referendum, the police that was pro-integration and with the support of the Indonesia security forces, started a campaign of violence, and slander throughout the country. As a result many people were killed and 500,000 were displaced from their

[121] *Id.*
[122] For more information, *see* http://www.un.org/peace/etimor.
[123] *Id.*

homes, half of which were forcefully displaced from the territory. In response, the UNSC authorised the deployment of a multinational force (INTERFET) to restore peace and security in East Timor, as well as to support and protect UNAMET in carrying out its tasks. Indonesian authorities left from East Timor, and on 28 September 1999, Indonesia and Portugal agreed that the UN takes over authority over East Timor. On 25 October of the same year, the SC decided through Resolution 1272 (1999) to create the UN Transitional Administration in East Timor (UNTAET) with full responsibilities for the administration of the territory of East Timor.

2.3. Self-determination and dissolution in the USSR

After the Communist revolution of 1917, the Bolsheviks inherited a mosaic of an empire ruled over by the Romanovs, and which was facing the risk of disintegration into the constituent nationalities. Taking into account strong separatist tendencies of some nationalities, Lenin supported a strategy according to which, among other things, nationalities would not be subject to Russian domination, they would have autonomy, and they would have the right to secede should they so desire. The result was the establishment of a federal State with 15 union republics, 20 autonomous republics, 8 autonomous *oblasts*, and 10 national *oblasts.*[124]

The stipulation in the Soviet Constitution of the right to self-determination, which was mainly perceived as a right to secede, was meant to be a political tool to bring the nationalities into the union and not to provide the vehicle for secession[125] Notwithstanding this recognition, in practice, the right to self-determination as such did not exist. The establishment of a strict dictatorial system suppressed any discontent or resentment of non-Russian nationalities. However they preserved their ethnic identity.

The political reforms known as *glasnost* and *perestroika*, introduced by Gorbachev created an atmosphere of freedom that enhanced the demands of dozens of nationalities for self-determination. The general ethnic unrest exacerbated by economic decline provided an excellent basis for increased secessionist demands. The first act came from the Lithuanian Parliament in December 1989 with a unilateral declaration on independence. In April 1990, the Supreme Soviet passed a law providing for a waiting period of five years to secede from the federation.[126] Accordingly, the dissolution of

[124] *See* Blay, S., *Self-determination: A Reassessment in the Post Communist Area*, 22 DENV. J. INT'L L. & POL'Y, 1994, 275, at 285.

[125] The architects of the Soviet Union believed that a guarantee of secessionist self-determination would encourage the participation of separatist national groups in the union. *Id*.

[126] *See id.* at 288.

Soviet Union was unavoidable at some juncture. On September 17, 1991, the three Baltic States - Lithuania, Latvia, and Estonia were admitted as Members of the United Nations[127] In December of the same year, leaders of Russia, Ukraine and Belarus met in Minsk and proclaimed the establishment of the Commonwealth of Independent States (CIS). The dismemberment of USSR is a voluntary act that was completed with the conclusion in Alma Ata of a Protocol to the Minsk Agreement, whereby all the remaining republics except for Georgia joined the CIS.[128] The right to self-determination and admissibility in the UN of the former Soviet Republics, which became independent states, was never called into question.

The secession of the Baltic States differs from that of the other units of the UN. They existed as independent States before their illegitimate annexation by the Soviet Union. The refusal to recognise the Soviet annexation was based upon this illegitimacy. Therefore Western States had the legal justification to recognise the republics if they so choose. Notwithstanding the illegal basis of the annexation of the republics, the political realities before 1990 militated against their recognition.[129] It is true that even though recognition has judicial implications, it is essentially political in character. Undoubtedly, the three republics possessed the basic attributes of statehood: land, population and government, as well as the capacity to enter into international relations.[130] Three characteristics should be pointed out in this case: a) the parent state was either unwilling or unable to exercise or regain control over the seceding territories, b) a significant degree of independence and c) the absence of protest against recognition of states.[131]

While the other Soviet republics concluded the Minsk Agreement and the Alma Ata Protocol where they expressed the mutual agreement of the constituent republics to dismantle the union. The republics did not secede as such from the union, they voluntarily dissolved it. Arguably, before the conclusion of the Alma Ata Protocol, the conclusion of the Minsk agreement amounted to secession from the union. However, this is the reason that the international recognition for the CIS members came after the constitutional dissolution of USSR and the resignation of

[127] *GA Res. 46/4 UN GAOR*, 46th Sess., Supp. No.49, UN Doc.A/46/4 (1991).
[128] KEESING'S RECORD OF WORLD EVENTS, 1991, 38 at 654.
[129] Before the disintegration of USSR, the Baltic Republics lacked independence, both economically and practically. *See* BLAY, *supra* note 124, at 295.
[130] *Id*.
[131] *Id*.

Gorbachev.[132] The dissolution of the USSR was not opposed by the USSR government. After the dissolution, the status of the constituent republics was upgraded to independent entities, possessing the basic attributes of statehood.

2.4. The Case of Yugoslavia

The international response to the events in Yugoslavia consisting in the relatively prompt recognition of the former Yugoslav Republics by members of the international community, is particularly significant because it represents the first time that widespread international State practice has favoured secessionist movements still engaged in armed struggles for independence outside of the colonial context.[133]

It has been held that the Yugoslav crisis started in Kosovo,[134] and the abolition of its autonomy by the Serbian authorities was followed by other centralisation acts that aimed at restricting the powers of republics. The end of the Cold War created an incentive for the resurgence of separatist claims in the former Yugoslavia. The rejection by the central authority of Croatia's and Slovenia's demand for sovereignty within a loose Yugoslav confederation was followed by their demands for full-fledged independence.

The break out of fighting in Yugoslavia started by the end of June 1991 when federal troops moved against secessionists in Slovenia. The first reaction of the international community, and in particular of the EU, expressed support for the territorial integrity of Yugoslavia.[135]

The Security Council took a very strong position set out in a unanimous resolution,[136] which maintained that the continuation of the situation constituted a threat to international peace. This response of Security Council that falls under the scope of Article 39 of the Charter cleared the way for acting under Chapter VII. Thus, the international community has dealt the crisis in Yugoslavia, as if it were an international crisis. Apparently, the secessionists were being seen in a favourable light as it is confirmed by the EC original formula for the recognition of Croatia, Slovenia, Bosnia-Herzegovina, and Macedonia.[137] Subsequently, the formula was accepted by the EC, which accorded them recognition. The former Yugoslav Republics became also UN

[132] *Id.*
[133] *See* Eastwood, L.S. *supra* note 109 , at.322.
[134] *See* Malcolm, N., KOSOVO: A SHORT HISTORY, Macmillan, 1998 at i.
[135] *See* Security Council Provisional verbatim record of the 3009th meeting, at 27-88, 36-37.
[136] *S.C. Res.713, UN SCOR* 46th Sess. 3009th mtg. Supp., *UN Doc. S/713 (1991).*

Members.[138] On the other hand, the so-called Federal Republic of Yugoslavia was not recognised as a successor state to the former SFRY.

When defining the crisis in Yugoslavia as a threat to international peace and security, the Security Council relied, *inter alia*, on arguments, such as the heavy loss of human lives, hundreds of thousands of refugees as a consequence of the war, as well as the adverse consequences of the war on countries in the region. It is indisputable that a decisive factor in prompting the EC to recognise the new states stood in the imminent threat and instability to regional security.

The Arbitration Commission on the former Yugoslavia (the Badinter Commission), concluded in November 1991 that Yugoslavia was in a process of dissolution, and the former Yugoslav republics seeking independence were new States on the territory of the former SFRY.[139] The conditions for recognition were set out in the EC "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union".[140] Prior to recognition, each applicant was required to engage in commitments "to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims".[141] Furthermore, in Opinion no. 4 concerning the application of Bosnia-Herzegovina, the Badinter Commission used the language of self-determination, finding that the absence of a referendum expressing the will of the peoples of Bosnia-Herzegovina on its international status cannot be held to have been fully established, despite recognition.[142] The Arbitration Commission considered in its opinion no.3, the legal status of the *uti possidetis* doctrine,[143] holding that:

> [E]xcept where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows

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[137] *Guidelines on the Recognition of New States*, 31 INTERNATIONAL LEGAL MATERIALS (I.L.M.), 1992 at 1486.

[138] All of the former Yugoslavian Republics, with the exception of Macedonia (FYROM), became Members of UN on 26 May, 1992.

[139] *Opinions no.1*, and *no.9*, *supra* note 137 at 1497 & 1524.

[140] *Guidelines on the Recognition of New States*, *supra* note 137, at 1486.

[141] *Id.*

[142] *Opinion no.4*, *supra* note 137, at 1500.

[143] The *uti possidetis* doctrine generally is applicable for the delimitation of boundaries in order to upgrade them from administrative to international boundaries as the parties in the dispute legitimately posses the territory at the time of the dispute. The fundamental aim of the doctrine is to

from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*.[144]

The Commission then referenced the ICJ judgement in the Burkina Faso/Mali case, in which the Court strongly affirmed that the doctrine OF WHAT was a "rule of general scope " and a "general principle".[145]

As a consequence of the Badinter Commission decision, Kosovo's request for recognition as an independent republic was not considered. Arguably, this rejection is connected to the lack of the status of a Kosovo Republic, and it implicitly legitimised the *status quo* for Kosovo with the unilateral abolition of autonomous status in 1989.

Prior to 1989, there was a legal and factual similarity between Kosovo and the other Republics, deriving from the 1974 constitution. It was granted almost all the rights of a Republic. According to the constitution, 1) Kosovo was entitled to participate in the joint realisation of the interests of the federation; 2) like the other republics, it was responsible for implementing, enforcing, and amending the Yugoslav Constitution, as well as the ratification of international agreements and the formulation of Yugoslav foreign policy. Kosovo, was also directly represented in the federal bodies such as the federal Parliament, Presidency Cabinet, Federal Court and Federal Constitutional Court.[146] Being a constituent part of the federation, like the other republics, Kosovo was granted the right to have its own constitution, parliament and judiciary – including a constitutional court and supreme court, and to establish its own banking policy, within the common currency issue policy.[147] For these reasons the status of Kosovo, although technically not that of the republic, was very much similar to that.

In relation to the other Yugoslav republics the Badinter Commission asserted and concluded that, following the dissolution of the former Yugoslavia, the former "internal boundaries" between Croatia, Serbia and Bosnia Herzegovina possessed the status of international boundaries.[148] Hence, the Commission's decision upgraded the

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underline the principle of stability of state boundaries. This assertion is upheld by the ICJ in *Burkina Faso/Mali case*, ICJ Report, 1986, at 565.

[144] *Opinion no. 3*, *supra* note 137, at 1500.Outside the decolonization context, *uti possidetis* has played an important role in upgrading the borders of the former Soviet Republics into international ones. The same is true for the dissolution of Czechoslovakia.

[145] *See* ICJ Report 1986, at 565.

[146] *See* the 1974 Yugoslav Constitution, Art.s. 1, 2, 244, 276-79, 398-403, 271. 291, 292, 369-70, 375-381

[147] *Id*. Art. 260.

[148] *Opinion no.3*, *supra note* 137, at 1500.

administrative boundaries of the constituent entities of the former SFRY, (only the republics) into international ones.

Thus applied, the doctrine of *uti possidetis* provided and still provides a valid basis for declaring that the borders of Kosovo holding an international status would be exactly the same as the internal borders established by the 1946 and 1974 Yugoslav constitutions.

In view of the above reasons, all the conditions set out above by the Badinter Commission could have been successfully applied in the Kosovo case.

In sum, the above-mentioned case example suggest that the response of the international system against secessionist claims could consist of the following elements:

- A general right of secession is neither explicitly granted nor denied by the international system. Recognition by the international community to a secessionist territory government might occur if 1) that government has demonstrated effective continuous control over its territory 2) the government has made provision for accepting relevant international obligations, and 3) where it has taken constitutional steps to ensure the political autonomy for its minorities if they desire it.[149]
- Egregious and extended violence against secessionist forces is regarded as likely to give rise to a threat to international peace and security. This implies that, flows of refugees, loss of human lives, tempting potential external intervention, and disrupting international trade in essential goods and services, transforms a civil war from a domestic to an international level.[150]
- The new State created by secession is entitled to those boundaries that were administratively applicable to it prior to independence when it was a unit of a parent state(*uti possidetis iuris*).[151]

Nevertheless, that such a pattern of behaviour is developed and established, certainly, the conduct of the international community in relation to the structures created to respond to a crisis will need to be supportive and consistent. And to be effective, this

[149] Franck, T.M., *Post Modern Tribalism and the Right to Secession, in Peoples and Minorities in International Law* 3, at 5, in Broelman et al. (eds.) 1993, at 19-27.

[150] *Id*.

[151] It is obvious that this assessment reflects the responses of the international system to the crisis in Yugoslavia.

regime must be backed by the willingness to protect the entities that are created as a result of its operation.[152]

3. The Plight of Kosovo in Light of the International Law on Self-determination and Secession

From the Declaration of Independence of Kosovo in July 1990, and the popular referendum[153] in 1991 to confirm the Declaration, reference to self-determination has been continuously made to uphold the Kosovo Albanians claim for independence from Serbia. After having submitted some theoretical considerations of the right to self-determination, of the relationship between secession and territorial integrity, as well as having analysed the State practice with regard to secession, this subsection will highlight the plight of Kosovo Albanians in light of international law. The argument is focused on two main issues; the first is related to the contention that Kosovo Albanians are a people and therefore entitled to self-determination; the second is based on the idea that Kosovar Albanians are entitled to freely decide the status of Kosovo, or in other words to external self-determination on ground that their right to internal self determination has been entirely and thoroughly dishonoured by the central government of Yugoslavia.

3.1. Kosovo Albanians as Holders of Self-determination

The Kosovo Albanians make up 90 percent of the population of Kosovo and they have for centuries long maintained and cultivated distinct characteristics from other groups inhabiting the territory of the former Yugoslavia. They speak a common language (the Albanian language), have their culture and traditions, and share the same customs.

Many historians have asserted that the Kosovo Albanians, like other Albanians, descended from the Illyrians, who inhabited the region from the early part of the second century BC. In particular, it is believed that the Illyrian tribe, *Dardan*, lived in the present territory of Kosovo.[154] During the Ottoman occupation, Kosovo constituted a political administrative unit within the Empire, known as the Vilayet of Kosovo. Since

[152] Blay, S., *supra* note 124, at 314.

[153] It was held that 87 percent of voters took part and 99 percent voted in favor. Whether this referendum was a free and open plebiscite that generally meets with general international standards remains questionable so far as no independent body monitored the process of voting and counting the ballots. *See* Prifti, K. (ed.), THE TRUTH ON KOSOVO, Tirana, 1993, at 331-3.

[154] *See* Malcolm, N., *supra* note 134, at 31.

its incorporation within Yugoslavia in 1918, Kosovo has been recognised as a distinct geographical region with clearly defined borders. It has also been shown that since the creation of the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo has been regarded as a distinct region, and accordingly, it was granted autonomy within the framework of the SFRY, with its status being upgraded from an autonomous region to a province by the 1974 SFRY Constitution. Although Kosovo was not granted the same official status as the other Yugoslav republics, its borders were demarcated along historical lines, which is indicative of the acknowledgement of the historical unity of the Albanian people of Kosovo. Furthermore, the 1974 Yugoslav constitution stipulated that these borders could not be changed without approval by the parliament of Kosovo.[155]

The various pronouncements of the international community on the situation in Kosovo provide another factual basis for the claim that Kosovo Albanians constitute a group entitled to the right of self-determination. In this regard, in December 1992, the UN Human Rights Committee has chosen the language of self-determination in urging the Yugoslav government "to put an end to the repression of the Albanian population in the province of Kosovo and adopt all necessary measures to restore the former local self-government in the province".[156] The UN General Assembly, in March 1997, called upon Yugoslavia "to allow the establishment of genuine democratic institutions in Kosovo, including, the parliament and the judiciary, and respect the will of its inhabitants".[157] It is obvious from this formulation that the General Assembly demanded that the Kosovo Albanians be granted local autonomy rights typical of an internal right to self-determination. Similarly, one year later, the Security Council issued the same demand, calling for a "meaningful dialogue on political status issue", and showing its "support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration".[158] The latter was restated in the latest Security Council Resolution adopted in September 1998.[159] Security Council Resolution 1244 of June 1999 which established an UN civil administration in Kosovo -

[155] *See* 1974 Yugoslav Constitution, Art. 5.

[156] *Comments of the Human Rights Committee: Federal Republic of Yugoslavia (Serbia and Montenegro), UN Doc. CCPR/C/79/Add.16*, December 28, 1992, at para.8.

[157] *GA Res. 51/111*, March 5, 1997, para. 2(c).

[158] *See SC Res. 1160*, March 31, 1998, at para. 4 and 5.

[159] *See SC Press Release* SC/6577, 23 September 1998, at http://www.un.org/News/Press/dosc/1998/19980923.sc65777.html

UNMIK, assigned it *inter alia* with the task to bring Kosovo towards autonomy and self-governance within the framework of Yugoslavia.

Notwithstanding the application of the definition of peoples in this context, and the finding that the Kosovo Albanians are holders of the right to self-determination, it does not in itself connote the existence of a right to unilateral secession for the Albanian population in Kosovo. The following discussion will concentrate on an analysis of the right to self-determination of the Kosovo Albanians, and more specifically on the Kosovo Albanians claim for independence.

3.2. The right to external self-determination of Kosovo Albanians

It is already a matter of public knowledge, and is largely assumed that the Kosovo Albanians demand for full-fledged independence, reflects the will of the Kosovo people for the future of the status of Kosovo. In this regard, mention is often made to the 1991 referendum, where the Kosovo Albanians confirmed by an overwhelming majority the *Declaration of Independence* for Kosovo.

The international community has consistently been reluctant to support independence for Kosovo, mostly out of fear – according to the expressed reasons – that the backing of such secessionist claims would open a "Pandora's Box" of problems consisting in an overall process of disintegration and instability. However, should the latter be the overriding purpose behind this objection of the community to the independence of Kosovo, it still remains crucial to analyze the factual and legal arguments that characterize and give a distinct feature to the Kosovo case.

The following analysis will highlight the assertion that the Kosovo Albanians were entitled to the right of external self-determination prior to the beginning and during the NATO air campaign because of a complete denial of their right to internal self-determination, and the heavy oppression exercised upon them by the central Government. This oppression was so grave that the Alliance itself justified its military intervention to put an end to an imminent humanitarian catastrophe in order to stop a situation characterised by gross and systematic human rights violations.

3.2.1. Complete Denial of the Kosovo Albanians' right to internal self-determination

The Kosovo Albanians, most evidently after the abolition of Kosovo's autonomy, have undergone a continuous process of oppression by the Serbian

authorities, and were deprived and denied of any meaningful exercise of their right to internal self-determination commensurate with the relevant provisions of international conventions. The main features of the Serbian government policy pursued in Kosovo were: 1) a total blockage of the Kosovo Albanian people from a meaningful realisation of its political, economic, social and cultural development; 2) systematic discrimination and the commitment of gross human right violations; 3) the commitment of acts seriously attacking the physical existence and integrity of the Kosovo Albanian people especially after the Serbian forces' crackdowns in Kosovo from early spring 1998.

3.2.1.1. Kosovo Albanian people subject to systematic Serbian discrimination and manifest oppression

With the abolition of autonomy and the other actions that followed it, the Serbian regime definitively and unilaterally revoked all rights of the Kosovo Albanians recognised by the 1974 SFRY Constitution. Since 1989, the Serbian authorities had intervened in all-important spheres of life, in an attempt to 'Serbianize' Kosovo, and to reverse the process of 'Albanization' of Kosovo's society after 1974.

3.2.1.1.1. Denial of the political, economic, social and cultural development

The 1989 constitutional amendments to the 1974 constitution had the underlying purpose to reduce to nothing the status of the autonomous provinces as constitutive parts of the Federation. To achieve this goal, Serbia took full control over Kosovo's banking, judicial and educational systems as well as police. Albanian mass media were banned, Albanian language schools and university were closed for Albanian students, and more than 120 000 Albanians have been dismissed from their jobs. In the public domain and in state institutions the use of Albanian language was proscribed and civil and human rights were violated on a large scale and on a daily basis.[160] Hence, Kosovo, became the paradigm of a segregated society, where different ethnic groups lived entirely separated in 'parallel' societies, with as little contact as possible.[161] The Serbian regime systematically sharpened the division between Serbs and Albanians in Kosovo, and the situation there deteriorated rapidly, especially, at the beginning of 1990s where a state of emergency was proclaimed.[162]

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[160] *See* Duijzings, G., in Duijzings, G., Janjic, D., Maliqi, Sh.,(eds.), KOSOVO-KOSOVA: CONFRONTATION OR CO-EXISTENCE, University of Nijmegen, 1996, at xviii.

[161] *Id.*

[162] Formally, the state of emergency in Kosovo was based on a number of special laws: for instance, the Law on Activities of the Republican Authorities in Extraordinary circumstances, and in

Other new measures were introduced, the most important being provided by a Decree issued by the Serbian Assembly in March 1990 under the title "Program for the realisation of Peace and Prosperity in Kosovo" This laid down the creation of new municipalities for Serbs, the contracting of new investment in Serb-majority areas, the building of new houses for Serbs who returned to Kosovo, the introduction of family planning for Albanians, and the annulment, retrospectively of sales of property to Albanians by departing Serbs. Under Serbian laws passed in 1989, Albanians could buy or sell land only after obtaining a special permission from the authorities. Meanwhile, the Law on the Activities of Organs of the Republic in Exceptional Circumstances, passed on 26 June 1990, officially described as temporary measures, but which in fact remained permanent included the suppression of the Albanian language newspaper *Rilindja*, the closing of the Kosovo Academy of Arts and Sciences, and the dismissal of many thousands of state employees.[163]

A number of laws passed by the Serbian Assembly, which did not help correct the illegal practices and human right abuses of the police in Kosovo, made possible for instances changes in the competencies of the courts, and enabled direct political intervention in the internal organisations of the enterprises. Managers of enterprises and Albanian workers have been dismissed in huge numbers. Other legal regulation interfered with property relations always to the disadvantage of the Albanians.[164]

The educational system underwent radical changes due to its systematic dismantling by the Serbian regime, which resulted in denying access for Albanian student to academic studies. In 1990, the Serbian Parliament declared as void the education legislation passed by the pre-1989 Kosovo Parliament and implemented its own Serb-oriented, uniform educational program for all elementary and secondary schools in Serbia. Serbian officials cut off funding for and physically prevented student from attending those schools that chose not to follow the program.[165] Furthermore, the Serbian Parliament restricted Albanian secondary school enrolment to one-third of the eligible Albanian schoolchildren. Students were thus forced to resume secondary and college level classes in private homes, and to print their textbooks in secret.[166] Albanian

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the Law on Labor relations in Extraordinary Circumstances. *See* Vasilevic, V.A., *supra* note 160, at 87-88.

[163] *See* Rugova, LA QUESTION DU KOSOVO: ENTRETIENS AVEC MARIE FRANCOIS ALLAIN ET XAVIER GALMICHE, Paris, 1994, at 105-6.

[164] *See* Vasilijevic, V.A., *supra* note 160, at 88.

[165] *See* Humanitarian Law Center, Education of Kosovo Albanians, 24 SPOTLIGHT, 1998, at 3.

[166] *See* International Crisis Group Report, KOSOVO SPRING, March 20, 1998.

University professors in Prishtina were removed, simply because they were Albanians and were not to be trusted for that reason. The curricula of elementary and secondary schools have been adjusted to the Serbian program. A number of scientific institutions has been abolished or even deprived of their Albanian associates.[167]

Particularly grave was the situation with respect to health care, in which methods of ethnic cleansing have been applied as well, indicating a serious violation of the right to life, in addition to the infringement of other basic human rights.[168]

Inspired by Vaso Cubrilovic's extremist colonisation programs dating back in the 1920s and 30s, a renewed program of colonisation started in the summer of 1991 when a law was passed giving Serbs and Montenegrin who returned to Kosovo the right to 5 hectares of land, to be supplied free of charge out of municipal land-holdings. But the scheme met with little public interest.[169] In the meantime, the wars in Croatia and Bosnia created other potential colonists. It is estimated that by autumn 1994 roughly 6 000 Serbs from those countries have been sent to Kosovo by the Serbian authorities. By 1996, the official figure of Serb refugees in Kosovo had risen to 19 000.[170]

The lifting of Kosovo's autonomy in 1989 was followed by a series of systematic measures to undermine the economic viability of Kosovo. Accordingly, the introduction of the so-called "emergency measures" affected around 450 state-owned enterprises and other institutions in Kosovo. By replacing all Albanian staff by Serbian and Montenegrin personnel, Serbia managed to gain control over all aspects of Kosovo's economy. Furthermore, the Kosovar enterprises merged with Serbian companies and the acquisition of their shares was exclusively offered to Serbian and Montenegrins. Similarly, Kosovo's financial records and bank accounts were transferred to Serbia.[171] Over the past decade, under a deteriorating economic situation, Serbs replaced most Kosovo Albanians in public job, resulting in a very high unemployment rate for the Kosovo Albanians. Consequently, most Albanians relied on monetary support sent from relatives working abroad.[172]

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[167] *See* Vasilijevic,V., *supra* note 160, at 88.

[168] *Id.*

[169] Malcolm, N., *supra* note 134, at 352.

[170] Kosovo Communication, 17 Oct.1994, 15 August, 5 Sept 1995. 16 June 1996.

[171] Press Release of the Government of the Republic of Kosovo, *Kosovo: Facts and Dates*, 3/95.

[172] European Action Council for Peace in the Balkans and Public International Law and Policy Group of the Carnegie Endowment for International Peace, KOSOVO-FROM CRISIS TO PERMANENT SOLUTION, 1 November, 1997, at 6.

The obvious outcome of these "emergency measures" consisted in an overall worsening of the living conditions, well-being and in a steeper impoverishment of the Albanian population in Kosovo. As a result of this situation, since 1990, more than 400,000 Kosovo Albanians emigrated[173] to various countries.

3.2.1.1.2. Gross and massive human rights violations

Systematic persecution resulting in gross human rights violations has been a steady feature of the Serbian policy pursued in Kosovo. Major human rights abuses against ethnic Albanians by Serbian government officials include cases of disappearances, torture, arbitrary arrests and detentions, trials for political prisoners, deliberate and indiscriminate attacks on civilians, including women and children.[174]

The legal acts, mainly laws and "general decisions"(36 laws and 470 decisions) entered into force by the Serbian Parliament during the period 1990-1992 are indicative of intense attempts undertaken by the Serbian authorities to affect every aspect of the life of Kosovo Albanians with devastating consequences for their integrity, dignity and prosperity. They were preceded by the Program for Kosovo[175] that envisaged a series of discriminatory measures with its primary aim to force Albanians leave Kosovo, and on the other hand, to encourage Serbs and Montenegrins to install themselves in Kosovo. To summarise, these measures and the consequences thereto were the following:

- The Law on Job Relations in Special Circumstance, July 26, 1990 resulted in the subsequent expulsion of 150,000 Kosovo Albanians from their jobs, representing 80 percent of the employed Albanians in Kosovo;
- Renewed colonisation attempts consisting in providing farming land free of charge or favourable long-term loans for Serbs or other non-Albanians, were designed in the Law on Conditions, Manner and Procedure of Distribution of Farming Land, July 20, 1991;

[173] *Id.*

[174] International Helsinki Federation for Human Rights, *Human Rights in Albania, Belarus, Slovakia and the Federal Republic of Yugoslavia*, (July 1, 1998). According to a report of the Council for the Defense of Human Rights and Fundamental Freedoms (CDHRF), human rights abuses against ethnic Albanians included 35 cases of violent death, five of which resulted from police brutality; 5031 cases of ill-treatment or torture; 596 arbitrary arrests; 1288 persons summoned or taken to police stations for "informative talks"; 425 civilians' homes raided; and over 10 000 other cases of human rights abuses against Kosovo Albanians by Serbian police. Furthermore, in detention cases, law enforcement authorities frequently ill-treated detainees, hold them beyond the legal 72 hours without bringing formal charges, and deny detainees access to their lawyers.

[175] Program for Kosovo, OFFICIAL JOURNAL, no.15/90, March 30, 1990.

- The Law on Special Conditions for Real Estate Transfer, of April 18, 1998, effectively prohibited the selling of real estate and possession of property by Albanians;
- The banking system of Kosovo, the financial funds of the National Bank of Kosovo and of all commercial banks were completely undermined, and all Kosovo and municipality budget funds were usurped, as a consequence of the approval of the Law on Transmission of Financial Funds, of March 29, 1991;
- Notwithstanding the demographic make up of the Kosovo population (90 percent ethnic Albanians), the Albanian language was officially banned by the Law on the Official Use of Language and Scripts, July 27, 1991;
- Names of streets, squares, schools and cultural centres in Kosovo were changed to Serbian names, with the requirement that they be in Serbian and Cyrillic alphabet;[176]
- The Public Prosecutor of Kosovo was suspended, likewise the Supreme and municipal courts, Legal Office, and Provincial Secretariat of Internal Affairs. Subsequently, all ethnic Albanian judges, public prosecutors, lawyers, and police personnel were discharged and replaced by Serbs and Montenegrins;[177]
- Kosovo mass media consisting of Prishtina Radio and Television, six local radio stations, newspapers and magazines, was destroyed after placing it under total Serbian control.

These measures, coupled with the abolition of autonomy, had as their overriding purpose the complete exclusion of the Kosovo Albanians from the public life of Kosovo. This resulted in systematic oppression and gross discrimination and in the clear denial of the Kosovo Albanians right to internal self-determination.

3.2.1.1.3. The Kosovo Albanians as victims of attacks on their physical existence or integrity

From the end of February 1998 until the end of NATO air raids in June 1999, the world has been testimony of frequent and deliberate violence in Kosovo, whose principal victims were mainly civilians, predominantly ethnic Albanians. The first police operations undertaken at the beginning of the crisis and during the following four

[176] The Decision stipulating these changes is published in 12 subsequent issues of the OFFICIAL JOURNAL OF SERBIA, 1992.

[177] See Law on Abrogation of the Criminal Law, Law on Public Prosecutor, Law on Legal Office, Law on Internal Affairs.

weeks caused around 20,000 displaced ethnic Albanians that fled their homes terrified by the killings of some 80 people in the Serbian crackdown.[178]

The subsequent attacks launched by Serbian military, paramilitary and police forces included ever more blatant targeting of civilians and deliberate displacements brought about another large number of displaced people.[179] Furthermore, ethnic Albanian people have been victims of extra-judicial executions, "disappearances," the use of excessive force, torture, ill treatment, *incommunicado* detention and unfair trials.[180]

The Serbian authorities claim that they were only fighting terrorists and denied that they were perpetrating gross human rights violations, and deliberately displacing thousands upon thousand of Kosovo Albanians from their homes. On the other hand testimony, photographs and video tapes from journalists, human rights organisations and other observers tell a clear story of systematic destruction, not only of ethnic Albanians' houses, but also of the population's means of survival, hindering the return of the displaced and refugees.

The international community for its part, has consistently condemned in various statements the disproportionate and indiscriminate use of force by Belgrade, and simultaneously demanded the Serbian authorities to put an end to hostilities against civilians in Kosovo.

The beginning in March 1999 of a 78 days NATO air intervention against Yugoslavia marked a decisive action in the course of the attempts to solve out the ethnic conflict and put an end to human sufferance in Kosovo.

3.3. Some Concluding Remarks on the Right to Self-determination of Kosovar Albanians

The Kosovo Albanians as a group are entitled to the right to self-determination for the reason that they traditionally lived and continue to do so in a distinct territory with clearly defined borders. They have persistently cultivated and preserved their own ethnic identity through the development of their language, customs and traditions, and by practising their religion, in defiance of the systematic repression consistently exerted by the Serbian authorities.

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[178] *See* Amnesty International Report, A HUMAN RIGHTS CRISIS IN KOSOVO PROVINCE, Document Series B: Tragic events continue #4: *The Protection of Kosovo's displaced and refugees*, October 1998, EUR 70/73/98, referring to the figures coming from UNHCR.

[179] *Id.*

For almost a decade, the Kosovo Albanians truly believed and advocated for a peaceful solution of the crisis in conformity with their right to self-determination, while continuously and steadily being subject to Serbian authorities' ethnic oppression. The outbreak of the war in Kosovo completely destroyed this delusive equilibrium, and triggered the urgent need for a political settlement of the crisis.

The recent state practice has demonstrated and confirmed that peaceful changes of borders are already a possibility, such as the dissolution of Soviet Union, or Czechoslovakia. On the other hand, state practice has also recognised the legitimacy of secessionist movements performed through violent attempts to gain effective control over a territory, such as the cases of the secession of Eritrea from Ethiopia, the dissolution of Yugoslavia, and the relative success of the secessionist movement in Chechnya.

The fear that the recognition of a right to secession of Kosovo Albanians would open a Pandora's Box of problems related to other secessionist claims, could not be an argument *per se* against the Kosovo Albanians claim for independence. Each secessionist claim has its individuality and distinct features. Furthermore, the complete inconsistent state practice with regard to secession, even if the Kosovar Albanians claim is upheld and subsequently recognised, is genuinely not very encouraging. The support of the Kosovo Albanians right to self-determination, is relied upon the interpretation of the Saving Clause of the Declaration on Friendly Relations that, at a last resort, though debated, recognises a right to external self-determination if a people is completely denied from meaningfully exerting the right to self-determination internally. The exercise of the right to self-determination of the Kosovo Albanians grounds in the establishment of an occupation like situation in Kosovo featured by a long period of oppression by the Serbian regime. It encompassed the infliction of systematic and gross human rights violations against the ethnic Albanians, their complete expulsion from Kosovo's public life, the thorough frustration of their political, economic, social and cultural development. In addition, the attacks against their physical existence amounting to the performance of ethnic cleansing practices through indiscriminate and deliberate violence exerted by the Serb forces against ethnic Albanian civilians, that caused large number of victims and mass deportations. In view of the legal and factual analysis, the

[180] See Amnesty International Report, *supra* note 178.

Kosovo Albanians should be entitled to decide the status of Kosovo through the expression of their free and genuine will.

III. NATO AIR ATTACKS AGAINST YUGOSLAVIA: A QUESTION OF INTERVENTION

Should one intervene by means of military force to rescue people in danger? The dilemma over the value and legality of humanitarian intervention in the context of international law and politics has become again the topic of extraordinary attention and debate prior to and from the beginning of the 78-day NATO air attack against Yugoslavia in March 1999. Not only has this particular example of military intervention – an intervention deemed necessary because of overriding humanitarian purposes – re-ignited debate among international lawyers and politicians about the legality of such an attack, it has brought into question the future status of humanitarian intervention in general.

Further confounding this debate, the Independent International Commission on Kosovo[181] concluded in its report that the NATO intervention in Kosovo was "not legal but legitimate".[182] The Commission simultaneously noted that the intervention was illegal because it did not meet with procedural rules provided by the UN Charter and that the intervention was legitimate because prior to its occurence all necessary diplomatic means were utilized. Morever, the fact that the intervention marked for a major part of the Kosovo population the end of a long period of Serbian oppression legitimizes what would otherwise be considered an "illegal" military intervention.

Kosovo was, and is, a prime example of the tension between considerations based in *realpolitik* and those based in human rights standards. This tension is apparent in the contrasting opinions of jurists who support traditional international law, which places the nation-State at the forefront of all consideration, and those jurists who regard the place of individuals as increasingly important, perhaps even above the place of States. The central issue is that a balance must be struck among these contrasting perspectives, i.e., the principles of territorial integrity and non-intervention or the prohibition of the use of force as provided by the UN Charter versus the need for

[181] The Independent International Commission on Kosovo was created on the initiative of Swedish Prime Minister G. Persson. Justice R. Goldstone of South Africa and Mr. C. Tham, Secretary General of the Olof Palme International Center in Stockholm, act as a chairperson and co-chairperson of the Commission, respectively.

[182] *See* Independent International Commission on Kosovo, "The Kosovo Report". This report was presented to United Nations Secretary General Kofi Annan on October 23, 2000, at Web page address http://www.kosovocommission.org/reports.

effective protection and respect for human rights and freedoms that have been grossly and manifestly violated and maintenance of international peace and security on the other. NATO decision to intervene by means of military force against Yugoslavia apparently gave primacy to the remedy of large-scale violations of human rights.

While it is perhaps simple and undisputed to assert that ethnic cleansing and mass murders must be prohibited, it is extremely difficult to determine the way in which such prohibition should be achieved. For instance, how should the following questions be answered: Who should intervene?; With what authority may they intervene?; and What type and degree of force should be used?

The remainder of this article will address these issues in the context of two main topics: 1) the place of human rights in international law; and 2) the legality of the NATO intervention against Yugoslavia. In doing so, a summary presentation of the arguments for and against intervention will be submitted as well as a discussion of the morally based argument for humanitarian intervention. The final section of this article will address the issue of how the future status of humanitarian intervention in international law may be understood.

A brief outlook of the events that preceded and followed the NATO intervention[183]

The NATO air intervention,[184] which began in March 1999, marked the zenith of attempts undertaken by the international community to solve the ethnic conflict in Kosovo. At that time, the United Nations had been involved in attempts to mediate and reconcile the conflict in the former Yugoslavia for almost a decade – since the dissolution of the former Yugoslavia.[185]

The systematic and widespread oppression of human rights and freedoms of the Albanians in Kosovo and the indiscriminate violence against the civilian population carried out by the regime, which took alarming proportions in early spring 1998,[186]

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[183] This section will focus on some historical events that happened during 1998-1999 without elaborating at length the whole historical background concerning the Kosovo conflict. For more info *see generally* Malcolm, N, *supra* note 134; Independent International Commission on Kosovo, *supra note* 182.

[184] The term "intervention" means any coercive action undertaken to change the pattern of behaviour of the parties in a given State. The action might include the threat or the use of sanctions or the threat or the use of force. In this essay the term "intervention" implies use of military force unless otherwise specified.

[185] The UN has acted mainly through the Security Council (SC) acting in accordance with Chapter VII of the UN Charter. *See* SC Resolutions on Yugoslavia. Namely Resolutions on Bosnia: *Res. 713 (1991); Res. 757 (1992); Res. 787 (1992); Res. 816 (1993); Res. 820 (1993); Res. 836 (1993); Res. 1031 (1995); Res. 1088 (1996)*; and Resolutions on Kosovo: *Res. 1160 (1998).*

[186] *See infra* at Section II.

brought the Kosovo conflict to the top of the international community's agenda. In an effort to respond to an intensification in fighting and waves of displaced persons, the Security Council demanded in September 1998 that the Belgrade regime and the Albanian political leadership immediately take all necessary steps to improve the humanitarian situation and prevent what appeared to be an imminent humanitarian catastrophe.[187]

In Rambouillet near Paris, in February 1999, possible solutions to the crisis and means for ending the violence and events such as the massacre of Raçak were discussed. The refusal on the part of Serbian representatives to sign the document of peace drafted at these meetings, was followed by the initiation of a NATO air attack without prior authorisation of the Security Council. The 78-day attack[188] was followed by the approval of UN SC Resolution 1244 of June 1999. The Security Council acting in pursuance to the powers conferred upon it by Chapter VII of the UN Charter, authorized the creation of a military presence in Kosovo ("KFOR") and the establishment of a locally-based UN civil administration ("UNMIK").[189]

1. The status of human rights in international law: Sovereignty vis-à-vis human rights and fundamental freedoms

To understand the actual tension between the principles of State sovereignty and humanitarian intervention, one must be familiar with the developments of human rights in international law following the proclamation of the UN Charter.[190] The articles on human rights contained in the UN Charter paved the way for an innovative development of international law that places its focus on the individual rather than on the nation-state.

Human rights are considered to be an issue that falls *outside the exclusive jurisdiction* of the States. This is no longer a debatable issue, thus overcoming what is provided for in Article 2(7) of the UN Charter stipulating that 'nothing contained in the present Charter shall authorise the United Nations to intervene in matters, which are essentially within the domestic jurisdiction of any state...' This development has been ongoing on account of the moral, political and legal significance of human rights, and the support given by the UN Universal Declaration on Human Rights in 1948, and other international and regional treaties based on them. Furthermore, the UN International

[187] *See* SC Resolution 1160 (1998).
[188] For more information, *see* http://www.rferl.org/nca/special/nato-kosovo/.
[189] "UNMIK" is an acronym for the United Nation Mission In Kosovo.
[190] *See* Schachter, O., *United Nations Charter,* in Bernhardt, R. (ed.) EPIL 5 (1983),at 283.

Law Commission has specified in Article 19 (Part One) of the Draft Articles on the State Responsibility that an international crimes is a large-scale grave violation of an international obligation of crucial importance for the protection of human beings, such as the prohibition of slavery, genocide and Apartheid. Certain fundamental human rights such as the right to be free from torture are considered so vital that under no circumstances may States choose to derogate from their obligation to enforce that protection or individual right.[191]

The International Court of Justice ("ICJ") supports this interpretation of current international law. In fact, in the Barcelona Traction Case, the ICJ noted that the obligation to respect fundamental human rights should be seen as an obligation of general international law.[192]

To guarantee and protect fundamental rights and freedoms, international human rights treaties provide for specific protection mechanisms. However, a question arises as to whether State parties to these treaties could resort to other means for the protection of human rights constituting obligations *erga omnes*, other than the protection mechanisms provided by these treaties. There is no definitive response to this either by the International Court of Justice or the International Law Commission.[193] The protection mechanisms provided by these treaties have not proved very effective and, for the most part, remain at best recommendations for State Parties,[194] that being non-legally binding fail to affect the conduct of the perpetrator of grave and gross violations. It is obvious that the international protection of human rights at a universal level needs substantial improvement. Nowadays, however, there is no doubt that UN bodies address development of the UN practice, and especially, large-scale violations of human rights as matters of international concern. As will be highlighted in the next paragraphs, after the 90s, the Security Council has viewed gross and massive human rights violations to constitute threat or breach of international peace, thus considering those violations as valid grounds to authorise the use of force to change the pattern of conduct of a certain State.

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[191] Protection from torture could also be considered *jus cogens. See, e.g.,* discussion in Malanzuk, P., HUMANITARIAN INTERVENTION AND THE LEGITIMACY OF THE USE OF FORCE 13 (1993).

[192] *See, e.g., Case Concerning Barcelona Traction, Light and Power Company Limited*, ICJ REPORTS (1970).

[193] *See* Malanzuk, *supra* note 191.

[194] One exception to the mandatory character of the decisions taken by protection mechanisms is for the European Convention on Human Rights, where the European Court of Human Rights takes decisions that are binding on the parties of a case submitted to this Court.

2. The legality of the NATO intervention in Kosovo

It is largely assumed that NATO air intervention against Yugoslavia falls within the ambit of the doctrine of humanitarian intervention, as the Alliance itself declared to have intervened on the basis of overriding humanitarian purposes. It is defined that intervention on the ground of humanity is properly that which recognises the right of one state or group of states to exercise an international control by military force over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity.[195]

The starting point for the discussion of the legality of humanitarian intervention is Article 2(4) of the UN Charter. Article 2(4) states that the Members States should refrain from the threat or use of force. There are two specific circumstances as exceptions to this rule: Article 51 relating to self-defence if an armed attack occurs, and the provisions of Chapter VII (Articles 39-50 of the UN Charter) empowering the Security Council with authorising use of force to restore international peace and security (Article 42).

This is where international lawyers divide in their interpretation of the legality of humanitarian intervention. The key question that arises is whether unilateral or collective intervention for humanitarian purposes is *per se* violating of Article 2(4) of the UN Charter. In other words, can the UN Charter in its entirety be interpreted such that humanitarian intervention in contexts other than those two prescribed in Articles 51 and 42 may be seen as *legal*? It is this very question that lies at the core of the debate on humanitarian intervention.

Some scholars are against all forms of humanitarian intervention. They say that use of force stipulated in Article 51 and the provisions of Chapter VII of the UN Charter, as an exception to the rule of prohibition of the use of force, should be the principle guiding the UN Member States in their mutual relations. Others consider that humanitarian intervention is illegal but, in certain cases, it is morally justifiable. The opponents to humanitarian intervention sustain the idea that Article 2(4) cannot be interpreted that it allows this intervention, because *first,* this rule prohibits all cases involving the use of force (except for the two foregoing cases), and *secondly,* because

[195] *See* Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM.J.INT'L.L., 1973, 275 at 277.

permission that exception to the rule is employed, will pave the way for inadmissible abuse.[196] Several UN General Assembly resolutions have supported this argument.[197]

There are other authors[198] who advocate that humanitarian intervention is another exception to refraining from the use of force. Their argumentation is based on a teleological interpretation[199] of the Charter, State Practice and moral foundations of intervention on humanitarian grounds. The wording of Article 2(4) is thus interpreted within its context, and in view of the Charter's goal and purpose. It is clear enough that the use of force is forbidden when: 1) it is against the territorial integrity of a Member State; 2) violates its political independence; or 3) when the use of force runs contrary to the scope and purpose of the UN Charter. A genuine humanitarian intervention does not lead up to territorial invasion, or political submission.[200] Whereas promotion of human rights is one of the UN primary goals, which contribute to maintaining international peace and security in the system, created by the UN Charter.[201] Therefore, the use of force in restoring human rights that have been violated not only does not infringe the Charter, but serves as one of its main goals. An additional argument provided in support of humanitarian intervention is that there is a necessary relationship between the maintenance of peace and the respect for human rights.[202] Privations of human rights are

[196] The following authors generally object the doctrine on humanitarian intervention: Ronzitti, N., RESCUING NATIONALS ABROAD AND INTERVENTION ON GROUNDS OF HUMANITY, 1985, at 89-113, 108-110; Dinstein, Y., WAR, AGGRESSION AND SELF-DEFENSE, 1994, at 86-90; Akehurst, HUMANITARIAN INTERVENTION IN INTERVENTION IN WORLD POLITICS 1995, at 107-112; Brownlie, I., H*umanitarian intervention in law and civil war in the modern world*, in Moore J.N. (ed.), 1974, at 217.

[197] *See, e.g., G.A. Resolution 2625 (XXV) Declaration on the International Principles of International Law,* stipulating that no nation or group of nations have the entitlement of directly or indirectly interfering, on whatever grounds, *in* the internal and foreign affairs of a nation. *See* also, *Resolution 3314 (XXIX) 29 UN GAOR*, Supp. no. 31 142, UN Doc A/9631 (1975), Articles 1 and 5(1).*Definition of Aggression,* following its definition of 'aggression' as the use of armed force by a nation against the sovereignty, territorial integrity and political independence, sanctions that 'no justification of whatever nature, either political, economic, or military, can serve as a justification for aggression.

[198] Amongst humanitarian intervention advocates, who are in equally great numbers as humanitarian intervention opponents, are the following: Rawls, J., THE LAW OF THE PEOPLE, 1993, Walzer, M., JUST AND UNJUST WARS, 1977, at 101-108; Reisman, M., *Humanitarian Intervention and Fledging Democracies,* 18 FORDHAM INT'L L. J., 1995, p. 794; Lilich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternative in Law and Civil War in the Modern World, in* Moore, J.N., (ed.) 1974 at 229.

[199] Theological interpretation is the interpretation of an article of an international treaty not separately, but in the light of the treaty's goal and objective. See Articles 21 and 32 of the Vienna Convention on the Law of the Treaties in Harris D. J., CASES AND MATERIALS ON INTERNATIONAL LAW, 1973, at 582-583.

[200] *See* D'Amato, A., INTERNATIONAL LAW: PROCESS AND PROSPECTS, 1987, at 57-73.

[201] *See* Tesson, F., HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY, 2nd edition, 1997, at 151.

[202] *See* McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AMER. J. INT'L L. 1, 1998, at 15.

internationalised once evidence is produced that they are posing a threat to the peace. Since the breach of peace is a sufficient legal ground for intervention (the Security Council practice proves this), then by way of analogy, the serious deprivations of human rights should also make humanitarian intervention possible.[203] The *travaux preparatoire* of the Charter, for their part, do not shed much light on the question whether Article 2(4) absolutely forbids or accepts humanitarian intervention as an exception.[204] To conclude, the advocates of humanitarian intervention bolster the idea that the Charter permits the use of force under circumstances other than those provided for in Articles 51 and 42 of the Charter.

The State practice, despite policies otherwise declared, seems to be coherent with this view. Hence, in the course of the years, governments and lawyers have argued that the use of force is legal when it is intended for the protection and rescuing of their nationals abroad; the liberation of peoples from colonial regimes; the fight against terrorism, or the protection of individuals against grave and large-scale human rights violations.[205] Indeed, in the sixties and seventies interventions to liberate peoples from the colonial rule were largely supported by the UN General Assembly, although there were lawyers who did not agree to the legitimacy of the use of force in those cases.[206]

It is obvious thus that at the time of NATO intervention, it is yet disputed whether the Charter prohibits or permits unilateral humanitarian intervention. However, even the most creative of interpretations does not appear very persuasive of the contention that the Charter either explicitly or implicitly allows for such intervention on humanitarian grounds. Indeed, the Charter has created a system where the Security Council is empowered to authorise use of military force in case a threat or breach of international peace and security is observed. In turn, is given an overview of the role of the Security Council in pursuance of the powers conferred upon it by Chapter VII in correlation to interventions on humanitarian grounds.

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[203] *See* Tesson, F., *supra* note 201, at 152-153.

[204] *See* Lillich, *Intervention to Protect Human Rights,* 15 MCGILL, L. J., 1969, 205, at 207-210.

[205] *Id.* The idea is that force could be used for the protection of nationals abroad, or even of the citizens of another country whose life is under immediate threat, or who are taken hostage, although formally these cases are not accepted to be an exception to Article 2(4) of the Charter - although a great number of states have not openly denounced them, at least they have not opposed such acts. For more information *see* Ronzitti, R., *supra note* 196, at 76. This author provides the argument that a process is under way, which might lead up to the establishment of a new stipulation of customary law that consents to intervention for the protection of nationals abroad.

[206] *See UN GA Resolution 2625*, dated 25 October 1970.

2.1. The Collective System of the UN Charter: the Role of the Security Council

NATO combatants initiated the bombarding on 24 May 1999 without any explicit authorisation from the Security Council. By placing the Charter at the cornerstone of the argumentation on the legality of the launching of such an attack, this section tries to shed some light on the collective security system created by its founding fathers. Unlike in the system of the League of Nations,[207] the drafters of the Charter, through the drafting of Chapter VII, aimed to create a centralised system of collective security. The main responsibility for maintaining international peace and security was bestowed upon the Security Council. This body, hence, determines the existence of any threat to the peace, breach of the peace, or act of aggression, and makes recommendations, or decides what enforcement measures shall be taken in accordance with Article 41 (which do not involve the use of armed force), and Article 42 that provides for the undertaking of military action.[208] In the 1990s, the Security Council has increasingly considered internal conflicts and the large-scale human rights violations as legal grounds for international action.[209]

The Security Council may take enforcement measures without taking into account the general principle of non-interference in the internal affairs of a State when determining whether a particular situation or issue is a threat to international peace and security. However this function is subject to the power of veto that is granted to each of the SC permanent members.[210]

At this juncture, there is need to address certain questions: *Firstly, when does the Security Council authorise the use of force?* As previously highlighted, the Security Council has the power to take enforcement measures when it determines the existence of any threat to peace, breach of peace, or act of aggression. Reference is made to *international* peace and security, to maintain which use of force could be authorised in accordance with Article 42 of the Charter. In view of the legal framework provided by the Charter, an approach has been followed by the Security Council, especially after the end of the Cold War, to consider large-scale violations of human rights as a threat or

[207] The Covenant of the League of Nations provided for a decentralised system of collective security. It was principally up to the member states to start war or not, whereas the Council of the League of Nations could only make recommendations in terms of measures of a military character.

[208] *See* Art. 39 of the Charter. *See also* Frowein in B. Simma (ed.) THE CHARTER OF THE UNITED NATIONS, 1995, at 605 *et seq*.

[209] Oudraat, C. J., *Intervention in Internal Conflicts: Legal and Political Conundrums, a* contribution to Carnegie Endowment for International Peace, no. 15, August 2000, at 4.

breach of international peace and security.[211] Hence, in 1999 the idea that the Security Council could authorise the use of force on grounds of humanity was widely embraced. This is what the Security Council did in the case of Bosnia, Somalia, Haiti, and Rwanda. In a similar way, pursuant to Chapter VII, it consented to the peaceful missions in Kosovo, East Timor, and Sierra Leone. Despite this tendency, scepticism is encountered at to the fact that the Security Council should consider it its duty to intervene in order to stop cases of severe and massive violations or genocidal practices. This is so, although it is believed that economic sanctions, or threat to initiate criminal proceedings are not effective measures, or are weak mechanisms to put an end to the aforementioned atrocities.[212] It could thus be emphasised that the current security system on the basis of which the Security Council decides whether to use military force after determining that there is a threat or breach to the international peace and security, does not constitute sufficient ground for this body to act when the next atrocity is at the doorstep.[213] Obviously, the Charter does not provide for an answer to the question of how to remedy a situation where laws of humanity have been gravely violated by a certain State, and the Security Council does not view them as a threat or breach of international peace. Hence, the development of a legal framework to create substantive rules (criteria) for humanitarian intervention appears to be a step in the right direction. Furthermore these rules may possibly determine a direct link (cause-consequence) between large-scale and grave human rights violations and use of military force authorised by the Security Council.

Having explained above the relevance to the present case, a *second* question emerges: *Does humanitarian intervention without Security Council authorisation infringe the collective security system created by the UN Charter?* In this respect, the arguments focus on the issue of the legality of bypassing the Security Council for interventions on humanitarian grounds, if it seems impossible to obtain its clear and explicit authorisation for the use of force. Article 53 of the Charter appears to give an answer to the underlined question where it *inter alia* provides that no enforcement action shall be taken under regional agreements without the authorisation of the Security Council. Regardless of the debate whether NATO is a regional or international

[210] According to Article 23 of the UN Charter, there are five Permanent Member of the Security Council: United States of America, United Kingdom, China, France, and Russia.

[211] Malanzuk, P., *supra* note 191, at 14-5.

[212] *See* Art, J. R., *To What Ends Military Power,* in 4 INTERNATIONAL SECURITY, No. 4, 1980, at 6-7.

organisation, this Article indicates that, in the UN system, the founders of the Charter granted to the Security Council the central role of maintaining international peace and security. Nevertheless, there is no doubt that the writers of the UN Charter anticipated for a more active and effective role to be played by the Security Council to solve out conflict situations. Instead, by granting the permanent members the right of veto, they rendered the discharge of this function difficult in those cases when a consensus among the five could have not been reached.[214]

In face of this *prima facie* absolute monopoly of the Security Council to authorise use of force for humanitarian reasons, an additional question needs to be addressed: *Does this monopoly make the war more just*?

Those upholding the idea of the absolute monopoly of the Security Council believe that the legal situation changes when humanitarian intervention is authorised by the Security Council in accordance with the provisions provided in the Charter. The use of force by the UN through the Security Council is thus supposed to have greater legitimacy than intervention by a single State, because it represents a broader base of consensus. Others disapprove of this monopoly held by of the Security Council, and recognise it to be a right of regional agencies as well.[215] Support for multilateral intervention generates from the assessment that, if an enforcement action is authorised by a formal international process (for instance, voting in the Security Council) with a broad base of consensus, then this action acquires legitimacy, which it would otherwise lack if States were to intervene unilaterally.[216] Some of the Security Council permanent members like China and Russia and several developing countries argue that recognition of the unilateral right to intervene would allow and encourage interference in the internal affairs of States.[217]

However, as the advocates of unilateral intervention suggest, the fact that decisions to that end will be made in a collective way does not mean that these will be

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[213] *See* Oudraat, s*upra* note 209*,* at 7.

[214] Blokker, N., *Is the Authorization Authorized? Power and Practice of the UN Security Council to Authorize Use of Force by Coalitions of the Able and Willing*, 11 EJIL, No. 3.

[215] Farer, T. J., *An Inquiry into the Legitimacy of Humanitarian Intervention*, in Damrosch & Scheffler (eds.) LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, 1991, at 185, 191, 198-199. 1991).

[216] *See* Oudraat, s*upra* note 209, at 7 *et seq*.

[217] *Id*. at 6. The position adopted mainly of these two permanent members, in favour of the prevalence of the state sovereignty and maintenance of the *status quo,* is also related to the fact that in both these countries the greatest number of human rights violations are noticed. Russia is facing conflict with Chechnya, whereas China is facing internal human rights problems.

more legal decisions, or putting it in Walzer's terms, that the war will be more just war: 'more' means more *power,* and not necessarily more just.[218]

Is seems obvious that the Charter law with regard to use of force for humanitarian reasons is rather incomplete. It does not empower the Security Council with the specific power to take action to remedy severe, large-scale human rights violations. Therefore it can neither be said that the Security Council has absolute monopoly to authorise humanitarian intervention as such, not that recognising this kind of authority to intervene the war will be more just. It is apparent that the roots of this latter argument stem out from the ethical nature and moral foundation of humanitarian intervention, rather than on purely legalistic approach and on the formality of the procedure pursued to authorise the use of force. The upcoming section will highlight the ethical basis of humanitarian intervention by putting an emphasis on the inherent relation between law and morality as two sides of the same coin.

3. Law and morality: ethical basis of humanitarian intervention

Positive international law is rather incomplete; there is thus the possibility that it is interpreted in the light of moral principles.[219] Professor Fernando Tesson has put forward an interesting and well-argued analysis of the question of humanitarian intervention and the ethical basis underlying the international legal system. His main argument is that morality is not something separate from the law. Rather, moral and legal rules are constantly intertwined because they both promote the human aspiration to live in peace in a world society. As one scholar notes in his foreword to Tesson's book:

> Law floats upon a sea of morality, and even though the legal vessel is distinct from the waters in which it is immersed, one could not begin to explain the shape or purpose of the vessel without making any reference to water.[220]

Professor Tesson holds that an indispensable relation exists between law and morality and that moral considerations are a necessary component of legal reasoning.[221] International courts and lawyers have to decide whether to consider precedents, which seem to be genuine cases of humanitarian intervention, as having on their entirety given birth to a new exception to Article 2(4) of the UN Charter, or otherwise consider them as mere violations of this Article. That the first intellectual challenge is successful, it is

[218] *See* Walzer, M., JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, New York, Harper Torchbooks (1977), Preface.
[219] *See* Walzer, M., *id.*
[220] *See* the *Forward* by Anthony D'Amato, in Tesson, F., *supra* note 201, at ix.

indispensable to take into account that legal rules and principles on human rights, and the use of armed force are based on the most fundamental moral principles and norms, and that these are not mere technical or neutral rules.

Tesson supports the idea that political legitimacy has one meaning only, which applies both to internal and international relations. The *government is legitimate* in its internal and international relations if it succeeds in observing certain human rights standards. States are entitled to territorial integrity and political independence only if they are legitimate in terms of internal justice - when they protect and guarantee their citizens' rights.[222] Since the most important justification for the existence of a Government is the protection and guarantee of its citizens' natural rights, a Government committing substantial human rights violations betrays its *raison d'être,* thus compromising both its internal and external legitimacy.[223] The concept of political representation is completely the same both inside and outside State borders. Because protection of human rights is in the first instance the reason for the existence of the States, only the governments representing the people deserve protection under international law. Human rights violations by Governments are violations, which fail to respect individuals *par excellence.* There is something especially cunning in the institutionalisation of human rights violations by individuals who have acquired the monopoly to use force in a political community. These governments frustrate the victim's individual autonomy. They, likewise, do not respect the individual in a deeper sense: they fail to honour the purpose for their functioning - protection of and respect for each and everybody's rights. In this way, they betray their reason of existence as the country's leaders. A tyrant violates the victims' rights to a much greater extent than a criminal, because he employs means made available to him by his fellow citizens against themselves, and deprives them of their rights. These means do not involve the use of force only; they also involve institutional and ideological means such as legislation and propaganda.[224]

In addition, that intervention is justified it should be based on a *just cause*. The advocates of humanitarian intervention think that interruption of deliberate human

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[221] *See* Tesson, F., supra note 201, at 9-10.

[222] *See* Beitz, C., POLITICAL THEORY, at 81. On the Question of the Secession of Quebec the Supreme Court of Canada also adopts a similar way of reasoning. *See* Judgement of the Supreme Court of Canada *Concerning Certain Questions Relating to the Secession of Quebec from Canada*, Order in Council P.C. 1996-1997, 30 September 1996.

[223] *Id.* at 12-16.

[224] *See* Tesson, F., *supra* note 201, at 106.

rights violations is a just cause for war. It is also assessed that all just wars, including the self-defence motivated wars, are based on human rights protection.[225] Article 51 of the UN Charter, which recognises the right of self-defence if an armed attack occurs, is a firm illustration of the humanitarian grounds underlying international law. It is the duty of the governments to protect their citizens' rights. Thus, the use of force for self-defence means the use of force to protect human rights. In addition, the means adopted in just wars should as closely as possible is targeted against the oppressor, while ensuring maximum respect for individuals and avoiding their being used as a tool. Deliberate and non-discriminate killing of civilians is always reprehensible even though the war could be a just war. As a result, violence is morally justifiable if, and provided that, it is the only means to remedy human rights violations and liberal institutions.[226]

The main criticism of humanitarian intervention is the *threat of abuse and impartiality of those intervening.* However, this is more an empirical finding rather than a principled assessment. Part of the definition of humanitarian intervention is that it should closely aim at putting an end to human rights violations. The morality of humanitarian intervention need be considered in light of the evaluation that in a specific case those intervening have had the intention of putting an end to human rights violations. The advocates of non-intervention indicate that a government adopts an abusive approach if it has a hidden agenda - if the fundamental motives are egoistic. They thus describe interventions as abusive if they depict certain non-humanitarian reasons in the agenda[227] of the intervening State. However, it cannot be said that intervention has no moral basis if in its actions the government has in the meantime prompted by humanitarian reasons as well as by its own interests. The real test for intervention is whether it has put an end to human rights violations. Humanitarian intervention is thus justified not because it relies on clear motives, but because 'the different motives converge into a single course of action, which is likewise the course of action required by the victims of oppression.[228]

In sum, Tesson argues that morality in the context of humanitarian intervention relies on the following components:[229]

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[225] *Id.*
[226] *Id.* at 107-108.
[227] *Id.* at 111-112.
[228] *See* Walzer, M., *supra* note 218, at 105.
[229] For further information *see* Tesson, F., *supra* note 201, at Chapter VI.

a) From an ethical point of view, at both national and international levels, governments are mere agents for the people. As such, their international rights generate from the rights of individuals living in that country.

b) A justifiable intervention could go against dictators with the intention of putting an end to human rights violations.

c) Humanitarian intervention is regulated by striking a balance between the proportionality test and the remedy of human rights violations. Hence, the seriousness of reaction against human rights abuse should be proportional both to the severity of abuse[230] and the possibility of improving the situation.

d) The victims of oppression must welcome intervention.

In substantial parts, these arguments have at their basis the theory of just war eloquently elaborated by Michael Walzer.[231] This theory lays down the criteria legitimising intervention, which are also thought to be the cornerstone for promulgating positive law on humanitarian intervention.

4. The 'Just War' theory

The theory of "Just War"[232] encompasses ethical principles, most of which are included in a number of instruments such as the UN Charter, various Security Council resolutions, and the decisions of the International Court of Justice.[233] The theory underlines the idea that some wars could be justified. Whereas this consideration is widely recognised, the determination of the criteria that may justify a war has led to disagreements. Put in a nutshell, these criteria[234] are grouped in the following way:

- **The just cause (or motivation).** This criterion aims at limiting the leeway for the operation of admissible motives to start war, thus forcing decision

[230] The proportionality principles dictate that human rights violations are so serious that they justify external intervention. Quantitatively speaking, the condition for violations is that they should have been committed on a large scale, having not yet assumed genocide-like proportions. Qualitatively speaking, violations of the fundamental civil and political rights only justify humanitarian intervention. *Id.*, at 122-123.

[231] *See generally* Walzer, M., *supra* note 218.

[232] Different authors have contributed to the 'Just War' theory. See Walzer, M., *supra* note 221; Hallet, B., *Just War Criteria*, in Kurtz, L. (ed.): ENCYCLOPAEDIA OF VIOLENCE, PEACE AND CONFLICT, San Diego, Academic Press, 1999, vol. 2, at 283-293; Elstein, J. B. (ed.) JUST WAR THEORY, Oxford, Blackwell, 1992. The just war theory has two component parts one related to *jus ad bellum* and the other to *jus in bello.* This paper will mainly focus only on the aspects of the "Just War' theory concerning *jus ad bellum.*

[233] *See generally* Dienstein, Y., WAR, AGGRESSION AND SELF-DEFENSE, 2nd edition, Cambridge University Press, 1994.

[234] *See* Moller, B., *Kosovo and the Just War Tradition*, the paper prepared for to the Commission on Internal Conflicts was submitted to the 18th Conference of the International Peace Research Association, held in Tampere on 5-9 August 2000.

makers to specifically justify their actions. Determination of the just cause is a debated question, beginning with the views urging world revolution, self-determination, democracy, human rights, restoring of rights, or defence of the territorial integrity and sovereignty.[235]

- **The just authority** aims at determining the authority entitled to wage war, highlighting that not everyone has the right to start war.
- **The last resort** (*ultima ratio)* aims at preventing wars that can be avoided by other means. Nonetheless, the latter term bears several meanings: for instance, it refers to the lapse of time before involving the use of force. Or is there a 'last' logical resort, which makes it obligatory that all other ways should be considered before starting war, without determining the length of time for these actions. Economic sanctions or others are usually considered as a first possibility, but generally speaking they are not very effective, and it takes time to find out whether they fit the needs. They, likewise, give rise to serious ethical problems on account of the consequences they have for the peoples. It is hard to admit but, in certain cases, short-lived wars might cause less human suffering than a prolonged regime of sanctions.[236]
- The **proportionality** criterion serves as a security measure to prevent over-reaction. Not all violations or wrong actions are so serious as to justify the undertaking of military actions. Hence, the means employed to restore a right should be in proportion to the violation committed.
- There are other criteria like the one of the **possibility for success**, which is more difficult to implement.[237]

5. Is NATO intervention in Kosovo justified?

The human rights violations committed on a large scale in Kosovo provide an incontestable ground with reference to the humanitarian aspect of NATO's intervention. The Security Council itself foresaw the occurrence of a humanitarian catastrophe in its September 1998 Resolution. The mass population displacements in 1998 and the massacre of Raçak add further justification to the claim that the policy of ethnic

[235] *Id*., at 3.

[236] *Id*., *See* also Preeg, E. H., FEELING GOOD OR DOING GOOD WITH SANCTIONS. UNILATERAL ECONOMIC SANCTIONS AND THE US NATIONAL INTEREST, Washington D.C., CSIS Press, 1999; Mansfield, E. D., *International Institutions and Economic Sanctions*, 47 WORLD POLITICS, No. 4, 1995.

[237] *See* Moller, B., *supra* note 234, at 4.

cleansing was assuming alarming proportions. Some have argued that following the air strikes violations were indeed committed on a large scale, thus causing long columns of refugees to leave from home and many victims of indiscriminate violence. However a closer look into the events before and after the bombing make it clear that Serbs' attacks, intended partly to realise the scenario of ethnic cleansing and partly to use civilians as shields, were premeditated and intentional. The interval during which the Serbian forces attacks occurred, and the repetition of an identical pattern of conduct in almost each geographical area of Kosovo demonstrates that what happened there following NATO air raids was the finalisation of a plan thought out well in advance, and carried out at the right juncture.[238]

It is precisely these events, like the massacre in Srebrenica, which make humanitarian interventions critical. The challenge is particularly high on account of the breakthroughs in communication technology. Little could go unnoticed or avoid the scrutiny of public opinion. What is troubling, though is that in most cases people see, hear and do nothing. Perpetration of massacres goes on, and if a country has in its possession the means to stop them, it chooses that it has more important things and priorities to look after. And again the issue falls prey to *realpolitik*.

When NATO intervened in Kosovo, many international lawyers, but not only they, reinforced the idea that international law is of a dynamic nature. As is eloquently articulated by a scholar, some international lawyers are eager to consider rules as unchangeable. In their opinion, repeated violations of these rules reflect the reality, and at the end of the day, international law depends on the political power; and if there is a difference between the two (law and political power), of the two the political power will prevail. To those who look at law as a process, law is the result of the convergence of authority and control. If substantial disagreements exist for a period of time, the standards in question begin to lose their normative character. What is lost is the hope of the community claiming that requests concerning pattern of conduct reflect legal obligations. Hence, international law has a specific feature according to which violations of the rights could lead up to the formulation of new laws. It is not ruled out

[238] *See* Organisation for Security and Cooperation in Europe. 1999. KOSOVO/KOSOVA AS SEEN AS TOLD: AN ANALYSIS OF THE HUMAN RIGHTS FINDINGS OF THE OSCE KOSOVO VERIFICATION MISSION OCTOBER 1998 TO JUNE 1999. Warsaw, Poland: OSCE Office for Democratic Institutions and Human Rights; See also ABA/CEELI and American Association for the Advancement of Science, POLITICAL KILLINGS IN KOSOVA/KOSOVO, MARCH-JUNE 1999.

that new standards are created as a result of the violation of *lex lata.*[239] At this juncture, it is important to emphasise that time is ripe to set up a legal framework on humanitarian intervention capable of filling out the existing gap between legality and legitimacy.

5.1. Some proposals on the legal framework of humanitarian intervention

Different authors have come up with proposals, on the one hand, aiming at establishing written rules, which will determine the criteria to be met with so that humanitarian intervention is justified. These criteria basically comply with those of the just war theory elaborated earlier on: 1) the right authority; 2) the just cause (Is the cause legitimate?); 3) the just motive (Which are the motives to start war?); 4) the last resort (Have other means been considered?); 5) proportionality (Is the act of war proportional to the damage caused?); 6) a well-based hope of success (Is there a firmly grounded chance for a successful result?); 7) declaration of war.[240]

These proposals, on the other hand, aim at specifying the authority entitled to authorise and/or intervene to stop large-scale human rights violations in a given State. There are authors who adhere to new forms and ways for the interpretation of the articles of the UN Charter,[241] whereas others insist on decentralisation of intervention while laying emphasis on a State's right to intervene unilaterally.[242] The advocates of the idea that the UN Charter should be read in a new way and be amended suggest, among other things, that regional agencies should be recognised the right to authorise the use of force following the meeting of some conditions, mainly: 1) when the Security Council finds it impossible, or is not willing to take action; 2) when the Security Council has not in a clear-cut way denied the existence of a humanitarian crisis; and 3) when the regional agency in question operates in a predetermined institutional context in which it can authorise such an action.[243] The analogy with the 'Unity for Peace' Resolution, which entitles the General Assembly of the UN to recommend the use of armed force in the event that the Security Council is blocked, has been employed to

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[239] Higgings, R., *supra* note 15, at 19; Cassese, A., *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EJIL ,1999, at 30.
[240] *See* Smith, D., *Interventionist Dilemmas and Justice,* in McDermott, A.,(ed.), HUMANITARIAN FORCE*,* Prio Report no. 4.
[241] *See* Oudraat, *supra* note 209*,* at 7; Kuehne, W., *Humanitaere NATO-Einsaetze ohne mandat?* Ein Diskussionsbeitrag zur Fortenwicklung der UN-Charta, Ebenhausen: Stiftung Wissenschaft und Politik, AP3096, Maerz 1999.
[242] *See generally* Tesson, *supra* note 201*,* Walzer, *supra* note 218.
[243] *See* Oudraat, *supra* note 209*,* at 7-8.

support it. At a first glance, this proposal seems to delegate the issue from a global to a regional level. As previously mentioned, the fact that a decision will be made collectively does not mean that this decision will be more just.

In face of the Security Council's inefficiency to authorise intervention, mainly on account of lack of a voting by the five, a range of alternative solutions have been worked out. Hence, proposals are made to change the number of the permanent members, and admission of other new members, with the result of abolishing the right to absolute veto, and of introducing other more flexible forms of procedure.

It is very clear that a consensus on an international level should be reached so as to establish a legal framework on humanitarian intervention. A decision need to be taken before hand whether a right to intervention will be recognised equally to the United Nations, regional organisations or a group of states.[244] By way of winding up constructively, the Report of the Independent International Commission on Kosovo suggests that the UN General Assembly adopts a legal framework on humanitarian intervention in the form of a Declaration, and that the UN Charter is adapted to this Declaration, either through amendments or by making a case-by-case comparison in the Security Council.[245]

IV. CONCLUSIONS

Self-determination and humanitarian intervention, though appearing separate issues, have a nexus that is firstly related to their nature and content. As was elaborated upon in Section I of this article, self-determination is the right of a people to decide freely their political, economic, social and cultural status without outside interference. Moreover, the ability to so exercise this right is a pre-condition for complying with, respecting, and guaranteeing each of the political, civil, economic and cultural rights set forth directly or otherwise embodied in the Covenants on Human Rights. In addition, it was emphasised that where individuals within a society are by and large restricted from exercising or benefiting from basic human rights, a determination that the right to self-determination has not been respected will be made.

Humanitarian intervention, for its part, occurs when gross and wide spread violations of human rights, attacks to physical integrity, and life are so severe that

[244] *See also* for a sample Fenwick, D. T., *A Proposed Resolution Providing for the Authorization of Intervention by the United Nations, A Regional Organisation or a group of States in a State committing Gross Violations of Human Rights*, in 13 VJIL 1973, at 340.
[245] *See* Independent International Commission on Kosovo, *supra* note 1.

military intervention, as a means of last resort, is the only possibility to change the pattern of behaviour of the State that violates those rights. The aim, therefore, of humanitarian intervention is to stop these large-scale violations of human rights and, ultimately, to remedy the violation of the right to internal self-determination. The implicit idea behind accepting humanitarian intervention as a "remedy" is that it is intended to, and should, pave the way for durable solutions with regard to a full respect of the rights of a people living in a territory. What is critical in the face of an intervention is determining that the principle of territorial integrity has to yield in order to defend a set of values enshrined in human rights law. The main point here is how to reconcile all the concurring principles, and in order to make intervention successful in its ultimate goal.

Security Council Resolution 1244 seems to provide a balanced approach in that it both emphasised the validity of Yugoslavia's concern over its territorial integrity and established a UN protectorate in Kosovo, which thus undermines any sovereign right of the central government of Yugoslavia over the Kosovo territory. The UN practice, although in a decolonisation context – the latest being the case of East Timor – demonstrates that a temporary UN administration is substituted with a final solution determining the status of a specific territory. More importantly, the final status is typically determined by the exercise of the free will of the people, such as through a referendum.

Whether support for Kosovo's independence or for any referendum to determine its status will send the wrong message to other secessionist movements in the region and beyond will depend on what the message is. The international community can and should reject unilateral secessionist demands in those cases where democratic mechanisms – such as the presence of an independent and effective judiciary and a representative government – are available to ethnic groups to preserve and develop their distinct identity, commensurate with international norms. The present situation in Kosovo, however, is still far from being supportive of such an optimist evaluation. It is important not to forget that even more than a year later, the reality is that democratic structures in Serbia since the fall of Milosevic are yet nascent and fragile.

It is true that the end of NATO air attacks and the establishment of UNMIK have completely changed the situation in favour of the Kosovar Albanian. The local elections, which on one hand have enabled Kosovar Albanians to directly exercise some

degree of self-governance, and on the other have been rightly considered as a test of democracy, and the upcoming general elections in November this year, have and will pave the way towards democratisation of Kosovo. Recognising that these are cautious and steady steps contributing to the stabilisation in the region, it is nevertheless acknowledged that the Kosovo case requires a final solution. That the situation in Western Balkans is yet volatile and peace and stability remain desirable objectives is confirmed by the recent events in Macedonia, which have further postponed a solution for Kosovo, placing the task much further down on the international agenda. It is critical that international and national actors alike keep in mind that under no circumstances may permanent solutions and long lasting peace be achieved without addressing and facing the essential source of the conflict and instability. Without this perspective, the visionary and progressive approach to integrate the Balkans as a whole into the wealthy Europe through further democratisation, economic and political co-operation away from primitive nationalism appears a very challenging endeavour.

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