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**The Legal Status of Kosovo from the point view of existing International Law**

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**DECLARATION**

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DEDICATION

I wholeheartedly dedicate this thesis to my parents and sisters.

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**ABSTRACT**

The journey leading to the self-proclaimed independence of Kosovo was long and not without obstacles. Since the eruption of the Kosovo war the great International Powers were not on the same wavelength as far as the future structure of the country was concerned. It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognized in international law and the law imposes no duty on any people not to secede. International law, then, does not foreclose on the possibility of secession, but it does provide a framework within which certain secessions are favoured or disfavoured depending on the facts. The legitimacy and legality secession would be achieved if the alleged people enjoys a constitutional status to secession or the alleged secession gains the consent of the government of the parent state which is representing the whole population of the State without distinction of any kind. Consequently, the unilateral secession of Kosovo from Serbia is illegal.

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**INTRODUCTION**:

Enshrined in Article 1 common to both UN Covenant on Economic, Social and Cultural Rights, and UN Covenant on Civil and Political Rights is the principle of self-determination stated as below:

***1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.***

***2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.***

***3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.***

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

State practice towards self-determination appears, but not limited, in areas such as the treaties making process, the subsequent Resolutions adopted by the General Assembly and the Security Council, practice of international organizations, national legislation, and, more importantly, actual implementation of the principle practised by states etc. Moreover, the consistency, generality, and the duration of such practice should be taken into account when considering whether the rule is able to categorize into customary law[[1]](#footnote-0).

Resolutions of the General Assembly and he Security Council are also the evidence of state practice towards self-determination. Self-determination in the UN Charter is not clearly defined then drawn critique upon it. However, like the other side of a coin, the unclear definition grants UN a large range to interpret it. The General Assembly and the Security Council had been adopted numerous resolutions concerning the principle of self-determination which can be regarded as a process of Charter interpretation[[2]](#footnote-1) .The most important instrument regards as the keystone of decolonization is the General Assembly Resolution 1514 (XV) titled as Declaration on the granting of independent to colonial countries and peoples. The Resolution stressed that:

 All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[[3]](#footnote-2)

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted without a vote on October 24, 1970 “can be regarded as constituting an authoritative interpretation of the seven Charter provisions it expounds”.[[4]](#footnote-3) The Declaration reconfirmed that all peoples have the right to self-determination without any external interference, and stressed that every state has the duty to respect this right in accordance with the provisions of the Charter. It acknowledged at the end of the Declaration that:

The principles of the Charter which are embodied in this Declaration constitute the basic principles of International law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of strict observance of these principles.[[5]](#footnote-4)

Judicial Decisions rendered by International Court of Justice confirmed the principle of self-determination is a norm of international law in series of cases. In particular, in Namibia Case in 1971[[6]](#footnote-5),the Court first indicated that, with the development of international law in the half-century, self-determination can not be ignored by the Court since it has been considered included into the *corpus iuris gentium*.[[7]](#footnote-6) The Court then addressed that:

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

This thesis takes a look at Kosovo and its secession in the particular context of International Law.

CHAPTER ONE (1)

1.1 The Social Structure of Kosovo:



 *Credit*: <https://www.deviantart.com/theweirdserb/art/Kosovo-Demographics-627192173>

Kosovo is multi-ethnic region, where Albanian, Serbian, and other small groups of peoples, such as Turks, Roma, Muslim (Bosniacs), etc. live together for generations. During the Kosovo War in 1999, over 700,000 ethnic Albanians and around 100,000 ethnic Serbs were forced out of the province to neighbouring Albania, Macedonia, Montenegro, Bosnia and Serbia[[8]](#footnote-7). After the United Nations took over administration of Kosovo following the war, the vast majority of the Albanian refugees returned. The non-Albanian population in Kosovo is now about half of its pre-war total. The largest concentration of Serbs in the province is in the north, but many remain in Kosovo Serb enclaves surrounded by Albanian-populated areas[[9]](#footnote-8). According to the World Bank Living Standards Measurement Study in 2001, around 88 % of the population is ethnic Albanians, Serb population accounted for 7 %, while other ethnic groups together were estimates about 5 % of the general population[[10]](#footnote-9).

According to a 2011 European Centre for Minority Issues data, this is the ethnic composition of Kosovo[[11]](#footnote-10):

* Albanians: 1,616,869 (92.9%)
* Serbs\*: 25,532 (1.5%)
* Bosniaks: 27,553 (1.6%)
* Turks: 18,738 (1.1%)
* Ashkali: 15,436 (0.9%)
* Egyptians: 11,524 (0.6%)
* Gorani: 10,265 (0.6%)
* Romani: 8,824 (0.5%)
* Other: 2352 (0.1%)
* Unspecified: 2752 (0.1%)

1.2 Incorporation of Kosovo as a territory of Serbia

Kosovo has been incorporated into Serbia during the first Balkan War in 1912. Then it has internationally recognized as a part of Serbia in subsequent Peace Treaties[[12]](#footnote-11). In 1918, it became a part of the Kingdom of the Serbs, Croats and Slovenes, which name was shortly changed as the Kingdom of Yugoslavia in 1929. Kosovo has been under substantial control of Serbia until 1999 except during the Second Word War. The partition of Yugoslavia by the Axis Powers from 1941 and 1945 awarded most of the territory to the Italian-occupied Greater Albania, and a smaller part of it to German-occupied Serbia and Greater Bulgaria. After the establishment of the Federal Yugoslavia, in 1946 Kosovo became a constituent autonomous region of the Republic of Serbia, which is one of the six Federal Republics of Yugoslavia, and then became an autonomous province, namely the Autonomous Province of Kosovo and Metohija, but it was believed with no factual autonomy. It was renamed the Socialist Autonomous Province of Kosovo in 1974 while it gained virtual self government granted by the 1974 constitution of Yugoslavia. In 1989, however, Serbia revoked the autonomous status of Kosovo via the amendment of its Constitution[[13]](#footnote-12).

1.3 Historical importance of Kosovo for Albanian and Serbs

Kosovo has been a territory disputed between Serbs and Albanians. Although it was in 1912 that Kosovo was incorporated in Serbia, the region of Kosovo has been under the control of Serbian State in ancient time. By 1190 Kosovo had become the administrative and cultural centre of the medieval Serbian state ruled by the powerful Nemanjic dynasty. This dynasty lasted 200 years and still today Kosovo is known by Serbians as "Old Serbia"[[14]](#footnote-13). "The Great Migration" was a displacement of the Serb population. As a result, the region of Kosovo became underpopulated and, attracted by available fertile land, was resettled by Albanians moving eastward from the hills of Albania. For Albanian kosovars, Kosovo has been their homeland for centuries as well. They claim to be direct descendants of the Illyrians, who were the earliest known inhabitants of Kosovo. However there is no verifiable historical evidence to prove such claim[[15]](#footnote-14). The majority of Albanians were Christians until 15th century. After the conquest of Islamic Ottoman Turks in 1459, Islamization occurred. Gradually Albanians and to a lesser extent Serbs became converted to Islam that there were two thirds of Albanians converted in 17th and 18th centuries[[16]](#footnote-15). Only with the increasing fear of Albanians being swallowed up by the Christian nations which intended to be established out of the dying Ottoman Empire did the Albanians begin to develop a nationalistic movement[[17]](#footnote-16). From then on, Albanians Kosovars fought for autonomy or independence from Ottoman Turks and afterwards from Serbia for nearly a century.

1.4 Ethnic conflicts in Kosovo

The most significant instance is the war in Bosnia and Herzegovina from 1992 to 1995 during the process of dissolution of Yugoslavia. There are long-standing ethnic and religious tensions in Kosovo as well. Conflicts in Serbia are mainly occurred in Kosovo between Serbs and Albanians. Two neighbouring Balkan peoples, the Serbs and Albanians, are weighted down with antagonisms which have been accumulating over the past three hundred years. The problem cannot simply be reduced to the legal constitutional status of the Autonomous Province of Kosovo nor to the position of the Yugoslav Albanians. On the contrary, it is far more a question of the survival and position of the entire Serbian nation - in Kosovo, in Yugoslavia, in the Balkans[[18]](#footnote-17). Conflicts between Serbs and Albanians in Kosovo broke out since 1980s. In 1981, due to high cost of living and privileges of party officials, riots erupted and then led to declaration of a state of emergency and repressive measures against Albanian population[[19]](#footnote-18). The intensified ethnic tension continues with the continuous economic difficulties which led to the rise of unemployment rate and currency devaluation. In 1988, with the proposal to amend the 1974 constitution, which contains a revocation of the autonomous status of Kosovo, Kosovar Albanian protested in Pristina, demanding the 1974 constitution be respected. The amendment of the constitution has been ratified in 1989, and then the ethnic tension increased. Serbs protested against the Kosovar Albanian’s separatist tendencies and on the other hand Kosovar Albanians took measures such as strike to reject the constitutional change. Aftermath, approximately 30 demonstrators were killed in street violence, and hundreds of Albanians has been arrested and/or held in custody. The conflicts in Kosovo draw the attention of international community after the break-up of former Yugoslavia in early 1990s. Reports were submitted by Special Rapporteurs and Representatives concerning the violations of human rights in former Yugoslavia in 1992, which explicitly indicated the situation of Kosovo at that time to be dangerous and expressed the possibility that ethnic cleansing would extend to Kosovo[[20]](#footnote-19).

1.5 The International Community’s Intervention

After the failure of diplomatic efforts in March, 1999, the crisis has been eventually internationalized by NATO’s intervention. A bombing was initiated by NATO to stop ethnic cleansing and the killing of Albanian Kosovars[[21]](#footnote-20). With the bombing which lasted 78 days, Yugoslav authority then agreed to accept and sign an agreement which was a compromise for both sides. For NATO Yugoslavia has agreed to "substantial" autonomy for Kosovo, withdrawal of all Serb military, police and paramilitary forces, return of all the refugees, and an international armed security presence in Kosovo with "substantial" NATO participation. On the other hand for Yugoslavia the agreement calls for respect of the territorial integrity of Yugoslavia, Kosovo remains in Yugoslavia, the agreement is under the authority of the Security Council of the United Nations not NATO, and calls for involvement of Russian troops in the peacekeeping forces. It is deemed that ethnic cleansing did occurred during the 78 days bombing that “over half of its ethnic Albanian population out of the territory in a matter of a few weeks, and transforming hundreds of thousands more into internally displaced people, seeking to survive in the forests and mountains of Kosovo”[[22]](#footnote-21).

General Assembly adopted a resolution concerning the situation of human rights in Kosovo in 2000 confirms the facts that there were grave violations of human rights in Kosovo that affected ethnic Albanians prior to the arrival of personnel of the United Nations Interim Administration Mission in Kosovo and troops of the international security presence. And also it stressed that the entire population of Kosovo has been affected by the conflict and called upon all parties in Kosovo to cooperate with the Mission in ensuring full respect for all human rights and fundamental freedoms and democratic norms in Kosovo[[23]](#footnote-22).

CHAPTER TWO (2) : THE UNILATERAL DECLARATION OF INDEPENDENCE OF KOSOVO

2.1 Declaration of Independence and Kosovo’s International Administration

The UN Security Council passed Resolution 1244, which announced the Council's decision to replace Federal Republic of Yugoslavia (FRY) authorities with the deployment of international civil and security presences in Kosovo, respectively the United Nations Interim Administration Mission in Kosovo (UNMIK) and the UN-mandated Kosovo Force (KFOR), a NATO US-led military mission. Furthermore, the Resolution gave effect to the Rambouillet Accords in that it called for 'meaningful self governance'[[24]](#footnote-23). Yet, the international community postponed making a final decision on Kosovo's status, "which had become the main bone of contention between the Serbian minority in Kosovo and the majority Kosovo Albanians"[[25]](#footnote-24).

During and after the war, the Serb population, which had lived throughout Kosovo, fled to Serbia, the northern municipalities of Leposavic, Zubin Potok and Zvecan and a part of the Mitrovica municipality north of the Ibar River, or into enclaves in Southern Kosovo. Discarding UNMIK, the government of Serbia and the Serb minority established their own parallel structures in northern Kosovo, reorganizing the remnants of the old regime, and directly linking them to Serbia's state structures. The Kosovo Serbs feared Albanian leadership, and therefore overwhelmingly cleaved to Serbia[[26]](#footnote-25).

Faced with this difficult political reality, UNMIK delayed transferring power to local institutions, did little to promote local ownership of Kosovo's reconstruction, and avoided to engage in a discussion on Kosovo's status in the first three years following the war[[27]](#footnote-26). This made UNMIK widely unpopular among the Kosovo Albanians, who scornfully referred to the UN mission as 'anmik', which means 'enemy' in Kosovo-Albanian[[28]](#footnote-27). The UN realized it did not have the capacity to remain responsible for Kosovo's administration forever, and a process was initiated in which parts of the authority were devolved to the newly established Provisional Institutions of Self-Government (PISG). Furthermore, the UN adopted a 'Standards before Status' policy in 2002, which outlined benchmarks that Kosovo had to achieve before a decision could be made on Kosovo's status[[29]](#footnote-28). The absence of a clear road map on the future status of Kosovo, however, "posed a virtually insurmountable obstacle in the efforts of the international administration to bring lasting peace and stability"[[30]](#footnote-29).

By the year of 2004, events on the ground, including violent anti-Serb riots in March, forced the international community to put the issue of Kosovo's status back on its agenda20. Following a report by UN envoy Kai Eide in 2005, which confirmed the unsustainability of the status quo, the UN organized indirect talks between Serbia and Kosovo in Vienna in February 2006. Matti Ahtisaari, the former Finnish president, was responsible for the mediation, and one year later, Ahtisaari presented his draft 'Comprehensive Status Proposal' (CSP) to both sides, in which he recommended conditional independence supervised by the international community for Kosovo21. Unsurprisingly, the Serbian representatives, who feared being associated with a process that would result in a loosening Serbian grip on Kosovo, rejected the CSP, and the international community had to accept that after Rambouillet, this process too had failed[[31]](#footnote-30). However, the US and several EU Member States hoped that the UN Security Council would nonetheless endorse the CSP with a new resolution that would supersede Resolution 1244. Due to the expected negative veto of Russia and China, however, these states finally decided to bypass the UN Security Council, and helped the Kosovo leadership to declare Kosovo an independent state on 17 February 200820,21.

**2.2 Belgrade-Pristina Dialogue**

After Kosovo had declared itself independent, Kosovo and Serbia's status dispute moved into the field of international law and diplomacy. Whilst the Kosovo leadership lobbied for the recognition of its independence from states and international organizations, the Serbian government did everything in her power to obstruct such recognitions[[32]](#footnote-31). That same year, the Serbian leadership was successful in convincing the United Nations General Assembly (UNGA) to request an advisory opinion of the International Court of Justice (ICJ) on whether Kosovo's declaration of independence violated international law24. On 22 July 2010, the ICJ delivered its opinion, and taking a very narrow view by focusing solely on the legality of the declaration rather than the legality of Kosovo's statehood, the ICJ found that Kosovo's declaration of independence “did not violate general international law, Security Council Resolution 1244 (1999) or the Constitutional Framework imposed by the United Nations Interim Administrative Mission in Kosovo (UNMIK)"25. In a response, the EU High Representative for Foreign Affairs and Security Policy/Commission Vice-President, Catherine Ashton, declared the EU's readiness to facilitate a dialogue between Pristina and Belgrade in order to establish good neighbourly relations between Kosovo and Serbia and to bring them both closer to the EU[[33]](#footnote-32). Yet, ignoring the EU's call for such a dialogue, Serbia submitted a draft resolution to the UN General Assembly, calling for new talks on Kosovo's status at the end of July[[34]](#footnote-33). Under considerable pressure of the EU, however, Serbia, 'co-sponsored' by the EU Member States, submitted a new draft resolution to the UNGA in September, in which Serbia now expressed its readiness to welcome an EU facilitated dialogue with Kosovo[[35]](#footnote-34). On 9 September 2010, the UNGA adopted the resolution, and welcomed the EU's readiness to facilitate a dialogue that "would help promote cooperation, achieve progress on the path to the European Union and improve the lives of the people"[[36]](#footnote-35).

 The Belgrade-Pristina Dialogue came after the international community had already made various attempts to broker a political deal between the representatives of Kosovo and Serbia, most notably at Rambouillet and Vienna. Although these negotiating processes had failed, the EU now hoped that the integration of the dialogue into Kosovo and Serbia's accession processes would make it a success24. In the end, the dialogue fell into two parts. In a first "technical round," which took place between March 2011 and May 2012, the European External Action Service (EEAS) Counsellor Robert Cooper was responsible for the mediation between Kosovo's delegation, which was headed by Deputy Prime Minister, Edita Tahiri, and the Serbian delegation, which was lead by the political director of Serbia's foreign ministry, Borko Stefanovic. In a so-called "political round", which started in October 2012 and is currently ongoing, High Representative Ashton mediated between the Prime Ministers of Serbia and Kosovo until March 2014, after which the dialogue temporarily halted. Following a break of a year, the "political round" resumed in February 2015, in which a new High Representative, Frederica Mogherini, was responsible for the mediation. Whereas in the first round "technical" issues regarding trade, regional representation and freedom of movement for the citizens of Kosovo and Serbia were discussed, the second round revolved around finding a suitable solution to the lack of integration of the Serb minority, in particular in the North, into Kosovo[[37]](#footnote-36) [[38]](#footnote-37). From the very beginning of the Belgrade-Pristina Dialogue it was clear the dialogue would be subject to a lot of controversy within Kosovo's political field. Just one day before the start of the dialogue, on 7 March 2011, a heated political debate in Kosovo's Assembly resulted in the postponing of a vote on two resolutions concerning "acceptable content of talks with Serbia", one of which was proposed by the PDK, and the other by Vetëvendosje. This was one of the first events at which the disagreement and contention between these two political parties with regard to the dialogue was so clearly evident. Despite of not having adopted a resolution, the dialogue commenced the next day in Brussels[[39]](#footnote-38). One day after the first round of talks, on 10 March, Kosovo's Assembly approved the resolution proposed by the PDK, which Vetëvendosje refused to sign32.

On 19 October 2012, under the auspices of Catherine Ashton, the first gathering of the political dialogue was established as the Prime Ministers of Serbia and Kosovo, Ivica Dačić and Hashim Thaçi, met in Brussels[[40]](#footnote-39). After ten rounds of talks, on 19 April 2013, Dačić and Thaçi reached "The First Agreement of Principles Governing the Normalization of Relations". In fifteen points, the agreement concerned the governance of the Serb-majority municipalities, and stipulated that they were now to be integrated in the institutional framework of Kosovo through the creation of an Association/Community18 of the ten Serb-majority municipalities in Kosovo[[41]](#footnote-40). Like in the previous two years, Vetëvendosje denounced the agreement, and heavily critiqued the Kosovo government for signing it. The opposition party organized a sitting protest in Pristina's city-centre, which finally turned violent as several activists clashed with the police[[42]](#footnote-41).

On 1 November 2014, Frederica Mogherini succeeded Catherine Ashton as the European Union’s High Representative (EEAS 2014). Having to prioritize the violent conflict in Ukraine and refugee crisis particularly in Greece, it took several months before Mogherini initiated a resumption of the high level dialogue with the Prime Ministers of Serbia and Kosovo; positions that were now fulfilled by the newly elected Aleksandar Vučić and Isa Mustafa. Finally, after a 10 months pause, the first meeting of was organized on 9 and 10 February 2015 in Brussels[[43]](#footnote-42). Six months later, on 25 August 2015, Vučić and Mustafa reached an agreement on the implementation of the Association/Community of Serb majority municipalities in Kosovo, commonly referred to as the "August Agreement". The agreement stipulated that the body would be given considerable autonomy and the ability to self-govern the Serb-majority municipalities (EEAS 2015).

**2.3 The stance of the International Community on the Independence Declaration**

The journey leading to the self-proclaimed independence of Kosovo was long and not without obstacles. Since the eruption of the Kosovo war the great International Powers were not on the same wavelength as far as the future structure of the country was concerned.

It took more than six years since the NATO intervention in Kosovo before real negotiations began to clarify Kosovo’s future. In 2006, at the headquarter of the mission in Vienna (UNOSEK; United Nations Office of the Special Envoy for Kosovo), the negotiation rounds between the two delegations of Pristina and Belgrade started.

***Serbia***: The position of the Government of Belgrade was for obvious reasons clear from the start; Serbia considers Kosovo as part of its national territory. But what was its attitude during international negotiations? At first, since the status of Kosovo was one of the first points of all international diplomatic agendas in 2004, Serbia was reticent about wanting to engage in an effective dialogue with the Pristina Government, but still tried in every way to impose its own Agenda in negotiations. However, Serbia failed to win the approval of the international community.[[44]](#footnote-43)

The second strategy that the Government of Belgrade implemented in the negotiations was the boycott; for example, by pushing the Serbian minority in Kosovo not to stand for election, with the strong support of the Orthodox Church, but thus worsening its international reputation even more.

When, in the second half of 2004 it was evident that they were heading towards a dangerous blind alley, finally, especially under pressure from the European Union, Belgrade began to cooperate. The approach was however very vague. Serbia's official policy towards Kosovo could be summarized in the formula "more than autonomy, less than independence". The then Prime Minister, Vojislav Koštunica, proposed to implement a particular type of State, in which Kosovo would have remained part of Serbia, but with a very high level of autonomy, thus creating an atypical state structure, but still acceptable following the end of Yugoslavia and consistent with the new state profiles emerged in the Balkans subsequent to this momentous event.

On March 4 of this year (2019), following the meeting between the President of the Italian Council Conte and President Vučić, the latter reiterated his willingness to resume negotiations with Kosovo only following the withdrawal of the tariff previously mentioned, and stressed how compromise is the only possible alternative to a disaster. President Aleksandar Vučić also wanted to make it clear, in an interview with ANSA, that Belgrade's approach to the problem is much more realistic than that of Pristina, and that Serbia is in favor of constructive dialogue to help stabilize the Balkan region. At the same time, it is clear that Belgrade will not recognize Kosovo as an independent State without receiving anything big in return.[[45]](#footnote-44) [[46]](#footnote-45)

***Albania***: *"Një Komb Një Qëndrim",* "One Nation, One Decision", this is the key slogan that allows a good starting point for interpreting Albania's initial position on the Kosovo issue. Albanian nationalism was born in fact following the two World Wars, when the Albanians, disappointed by the outcome of the two Peace Conferences (Versailles 1919, Paris 1946) began to harbor a feeling of national revenge fueled by frustration, and found their more concrete arguments on the principle of self-determination of peoples.

Unlike what was written more and more times by the international press, the Albanian nationalists were appealing to a different concept than to the “Greater Albania”; or rather to *ethnic Albania*. This concept, to which the Kosovar separatists also referred during the war, concerns the dream of Pan-Albania, that is to say the reunification under the same motherland of all the Albanian people to implement a prospect of national *Risorgimento*.

The nationalistic arguments are based on reasons similar to those pursued by the Serbs; historical origins, violence suffered, and suggestive images.[[47]](#footnote-46)

 The national territory that is claimed is the one referred to through a historical reconstruction; a connection between today's population and the population of that time. The problem in the case of the Balkans is that similar claims overlap on the same geographical area. As far as the sentiments of the population are concerned, however, from the vote carried out in 2005 in Kosovo, it emerged that if 90% of the Kosovo Albanians were in favor of independence, only 10% of them would have enjoyed the union with Albania[[48]](#footnote-47) which, however, as we can see from the statements of Martti Ahtisaari, the United Nations would never have supported.

***Other neighbouring nations:***

As for the policy of the other States in the Balkan region against Kosovo they have not always been clear, or consistent. For example, *Macedonia*, as well as other Countries in the area, had its primary interest in the question of Kosovo to be resolved, in order not to compromise the stability of the region and therefore slow down its integration into the European Union and NATO. Macedonia was initially, and only officially neutral, but, in reality, it was in favor of Serbia's position, due to the obvious links between Skopje and Belgrade.

Subsequently, however, when the preferences of the international community began to emerge, Macedonia changed its line, and started warmly to support a possible independence, favoring any kind of dialogue between Pristina and Belgrade, but always having as its first interest that of protecting its own territorial boundaries[[49]](#footnote-48). On October 9, 2008, Macedonia recognizes the independent State of Kosovo, which was welcomed with great joy by the Pristina Government and instead with a certain bitterness by Serbia, which invites Ambassador Aleksandar Vasilevski to leave the country. Serbia criticized that Macedonia's decision was inconsistent with the abstention, which occurred only a few hours earlier in the United Nations vote on Belgrade's request to bring the issue of Kosovo's independence before the International Court of Justice[[50]](#footnote-49).

*Montenegro*, which in relation to Kosovo has made so much talk about itself in recent years due to the border demarcation problem, solved only recently by an agreement ratified (at the fifth attempt) under a strong push by the EU and USA[[51]](#footnote-50), initially declared itself neutral in the conflict between Pristina and Belgrade. In fact, it considered the unresolved status of Kosovo in a way detached from its own. Although, at that time, both were formally under the sovereignty of Belgrade.

Montenegro initially feared that its independence from Serbia could be compromised by their explicit support for the independence of Kosovo[[52]](#footnote-51). On the contrary, in the days when the referendum for the independence of Montenegro was being voted, Kosovo, despite politicians stressing over and over again that the fate of the two countries was still separate, looked with great interest at the outcome of the votes.

As for *Bosnia and Herzegovina* we know that it is made up of two different constitutional entities; The Federation of Bosnia and Herzegovina and the Republika Srpska. The latter, born from the peace agreements, immediately refused to recognize the independence of Kosovo. Moreover, in the same public declaration of February 21, 2008, the Republika Srpska declared that if the majority of the European Union and the United Nations had ratified the self-declaration of independence of Kosovo, this would have been used as a precedent, and they would use it to hold a referendum on their autonomy and eventually to join with Serbia. This declaration was immediately condemned by the current president of the Federation of Bosnia and Herzegovina, who declared illegal the possibility of such a referendum, although he nevertheless pronounced himself contrary to the recognition of Kosovo as an independent State[[53]](#footnote-52).

***Russia***: Russia's position on the question of Kosovo's independence is perhaps the most interesting. During these two decades not only the Moscow Government has managed to maintain the same position on the issue, but also has managed to exploit Kosovo's independence as a precedent for its own favor; for example, concerning the case of Georgia in 2008 and in Crimea in 2014. Since the time of the NATO bombings, Russia had shown itself strongly opposed to an intervention by the international community against Yugoslavia[[54]](#footnote-53), so much so that the tension in particular with the United States had grown to levels that had not been reached since the Cold War[[55]](#footnote-54). This also represented the first great crisis in multilateralism since then.

 The Russian Permanent Representative to the United Nations, Vasily Nebenzya, specified in a Statement to the United Nations, that according to Russia the results obtained in Kosovo in the light of ten years of independence are been really scarce. In fact, the new independent State would not have demonstrated any kind of economic awakening and would still represent the most turbulent area in the Balkan region. In addition, he believes that the United Nations should not give up, indeed instead continue to closely monitor the territory, which in recent years has become a recruitment space for religious radicals[[56]](#footnote-55)

***European Union***: The European Union seems to have followed developments in the region with great interest since 1996, so much so that the Irish Presidency, at that time, in answering to a question posed by the European Parliament on the situation in Kosovo said that there were high risks of clashes between the two groups[[57]](#footnote-56).

The Kosovo War has been very important for the European Union because it has meant one of the first real community efforts in the field of international security. At the same time, under US pressure, Kosovo was also used as a test to reinvigorate the cooperation of Western powers in the NATO alliance. In particular, both independently, and inspired by the direction taken by the United Nations under the leadership of Secretary General Kofi Annan, the EU and US have moved to emphasize their moral obligation to intervene following a humanitarian disaster.

As far as the European Union was concerned, it was clear from the beginning that it could not handle a regional conflict of that scale, in fact, as is well known, the military operations began in a US-led NATO operational framework.

At the end of 2007, and at the end of the Troika intervention, the European Union reached an agreement at least on the fact that the establishment of a European mission in Kosovo was to be considered separately from the will or not of all Member States to recognize a possible declaration of independence of Kosovo, which by now seemed much more reality than utopia. Only 24 hours later Kosovo proclaimed itself an independent State, and the EU was again divided in this regard, so much so that in the end the Council of European Union decides to leave the freedom to each Member Country to make an autonomous decision on whether or not to recognize Kosovo.

Up to this days the European Community is divided on this front, and the fact that there are still some Countries that do not recognize its independence certainly creates some problems in proceeding with the integration process of the Balkan region in the Union; even if we know that until relations between Serbia and Kosovo have normalized, neither of them will have the consent to become a Member State, which makes this eventuality still far away.

**2.4 Kosovo’s chance in the European Union**

In February 2018 the European Union, through the Commission, demonstrated to the Countries of the Western Balkans that it was genuinely committed to the prospect of a European future for the region. In this regard, however, perhaps also to send a clear message to the political leaders of this specific geographical area, who in recent times to pursue their political goals have moved away from the process of Europeanisation, the Commission is addressing making it clear that they “*must leave no doubt as to their strategic orientation and commitment”[[58]](#footnote-57)*. For this reason, there is a need for strong institutional structures that respect the principles of the European acquis and combat corruption, particularly at the highest levels, ensuring transparency in areas where it is most prevalent, such as the management of public funds. As far as organized crime in the Western Balkans region is concerned, this is a huge problem, as there are powerful criminal organizations involved in illegal trafficking and money laundering. In this regard, there is a need for greater cooperation with international and European agencies such as "Europol".

Corruption in Kosovo is rampant and pervades many areas; from politics to business. According to the Corruption Perception Index 2018 of Transparency International, the European Union's Anti-Corruption Help-desk, Kosovo has a score of 43, on a scale where 0 represents the highest level of corruption, and 100 the highest level of transparency[[59]](#footnote-58). Clearly, the high poverty rate combined with the unemployment rate are nothing more than a point in favor of the spread of corruption and organized crime. It must be acknowledged, however, that in Kosovo in recent years there have been attempts to combat corruption, in particular to make the economic sector, and more generally the business sector, more permeable. From a legal point of view, a new civil code and a new penal code have been approved in this area. Although, it is imperative to create a legal framework that allows public officials and political representatives involved in corruption, and who use their influence to gain improperly, to be tried and punished appropriately. In general, in order to adapt to the standards required by the European Union for all its members, Kosovo must seek to create an all-encompassing strategy and increase the rule of law with laws that guarantee transparency and accountability in all those areas where there is now a lack of clear legislation and therefore it is easier to manipulate and corrupt[[60]](#footnote-59). For example, the rules concerning the financing of political parties, the management of polling stations, the conflict of interests, should be defined and, in addition, the law concerning the immunities of members of Parliament and Government should be clarified. In light of all this, it is possible to say that this is one of the most painful keys for Kosovo and one of the most difficult areas to manage, considering also that the departure conditions are quite disastrous.

Another essential point is that of *fundamental rights*. The European Union cannot accept countries in which certain freedoms are still violated. The Commission's commentary reiterates that freedom of expression is the basis of democracy; a country in which the media are not free is not a democratic country. For this reason, the European Union supports all those civil organizations that fight to defend this right and all the other fundamental rights, and that for this reason unfortunately sometimes are victims of intimidation.

The Governments of this region must try to carry out reforms against any kind of discrimination and guarantee equal rights for all. Over the past year, progress in increasing the protection of human rights has not been sufficient. This area needs to be analysed by taking note of several important aspects; first of all, in a context such as Kosovo is the treatment of ethnic minorities.

Other two criteria to which the Commission refers and which may be of interest in analysing Kosovo are the *economic criteria*, and the *good neighbourly relations criteria.* With regard to the first aspect, the Commission considers that Kosovo has made progress towards developing a market economy, which is essential if it is to consider becoming a potential EU candidate. However, the black market and the informal economy still remain serious burdens on the country. Furthermore, the labor market is still struggling to take off, and the unemployment rate is still very high, particularly for women and young, low-skilled workers; and let us remember that Kosovo is the country with the youngest population in Europe. All these young people, however, despite the fact that Kosovo is beginning to align itself with the standards of competitiveness typical of the European market, do not have the skills to be competitive enough on the labor market. Unfortunately, the economy is slowed down by a lack of infrastructure, particularly as regards the supply of electricity and the transport system, both by road and rail[[61]](#footnote-60). As regards bilateral trade relations with other countries, Kosovo has a high export rate, but this is not sufficient to avoid a trade deficit[[62]](#footnote-61).

* **CHAPTER THREE (3) : KOSOVO’S SECESSION FROM INTERNATIONAL LAW PERSPECTIVE**

It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognized in international law and the law imposes no duty on any people not to secede. International law, then, does not foreclose on the possibility of secession, but it does provide a framework within which certain secessions are favoured or disfavoured depending on the facts. The key, then, will be to assess whether or not, based on the facts, Kosovo meets the criteria for the legal privilege of secession.

 The concept of self-determination is actually comprised of two distinct subsidiary parts. The default rule is “internal self-determination,” which is essentially the protection of minority rights within a state. As long as a state provides a minority group the ability to speak their language, practice their culture in a meaningful way, and effectively participate in the political community, then that group is said to have internal self-determination. Secession, or “external self-determination,” is generally disfavoured as it would conflict with the territorial integrity of the pre-existing state, if that state did not accept the secession.[[63]](#footnote-62)

The Supreme Court of Canada grappled with questions of self-determination and secession in *re Secession of Quebec*. The Canadian court found that:

 *[t]he recognized sources of international law establish 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. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances…*

There are two holdings of the Kosovo Opinion, addressing two different forms of international law: general and *lex specialis*. The holding addressing general international law is “that general international law contains no applicable prohibition of declarations of independence.” This holding cannot be read as a determination that the declaration was legal. The second holding is broken into two sections. First, the holding investigates who authored the UDI and concludes that the authors were not the Assembly of Kosovo acting as a Provisional Institution. Second, as the authors were not governed by the *lex specialis* of SCR 1244 and the Constitutional Framework, the authors were in “accordance with international law.” The ICJ recognizes three broad fields of general international law under which a prohibition or a permission for unilateral declarations of independence may be found: historical state practice, the principle of territorial integrity, and the right to self-determination. The investigation into the first field did not lend itself to an answer; nineteenth and twentieth century state practice did not demonstrate a prohibition on declarations of independence. The ICJ acknowledges that historically, declarations of independence could result in a new state, but that on many occasions a new state did not develop in spite of the declaration. Despite this complex history, the ICJ notes that state “practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence.”[[64]](#footnote-63) The ICJ does not end the historical argument with a simple statement of customary law. Instead the ICJ recognizes that “the international law of self determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.” The principle of territorial integrity might be contrary to a permissive ruling on declarations of independence.[[65]](#footnote-64) The UN Charter, as well as several General Assembly resolutions and conferences, “enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States.”[[66]](#footnote-65) The ICJ considers the principle of territorial integrity an important part of the legal order. Its importance, however, is irrelevant to the ICJ’s consideration of the Kosovo case: the principle of territorial integrity only applies to state action vis-à-vis other states, and therefore is inapplicable in this case.

The ICJ does not explicitly consider whether the right to self-determination or remedial secession informs the question presented in the Kosovo Opinion. Because, as it argues, a unilateral declaration of independence may not “be in violation of international law without necessarily constituting the exercise of a right conferred by it,” the ICJ finds that there is no need to consider whether a right does exist. This argument is based on the Lotus presumption that whatever international law does not prohibit is *e contrario* allowed.[[67]](#footnote-66) The ICJ thus recognizes that unilateral declarations of independence are not *per se* illegal.

In all likelihood, Kosovo does not have a right to secede in classical international law for two reasons: one, the Kosovars are not a traditional “peoples” whose rights to external self-determination are protected by international law,[[68]](#footnote-67) and two, Kosovo does not possess the classical requirements for statehood.[[69]](#footnote-68) The term “people” traditionally describes particular and clearly defined groups: “citizens of a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, or an ethnic group.”[[70]](#footnote-69) The definition of who is a “people” is important because the UN Charter imparts a right to self-determination to “peoples,” and subsequent UN conventions support the conclusion that a right to self-determination belong to certain “peoples.”[[71]](#footnote-70)The vagueness of international law provides extensive rights to peoples, but not to similar collectivities that are not entitled to the title.[[72]](#footnote-71) Because the Kosovars have not definitively asserted the right to be considered a people and the default status of an undefined collectivity is not a people, the Kosovar community is not a “people” under international law. In order to determine whether Kosovo has reached or achieved full statehood, it must first be established that the international criteria for statehood must be met.[[73]](#footnote-72)

The requirement that a state must be completely separate from its parent before achieving sovereignty is the “unitary State theory,” and was endorsed by the ICJ in its predecessor form, the Permanent Court of International Justice (PCIJ), in the Lighthouses in Crete and Samos Case.[[74]](#footnote-73) The question presented to the PCIJ was whether the Ottoman Empire could enter into a concession agreement with a French company with regard to lighthouses situated on Crete and Samos, two islands that were formally part of the Ottoman Empire but were now functionally autonomous. The PCIJ found that only by a treaty of cession could Crete claim sovereignty:

Notwithstanding its autonomy, Crete had not ceased to be a part of the Ottoman Empire. Even though the Sultan had been obliged to accept important restrictions on the exercise of his rights to sovereignty in Crete, that sovereignty had not ceased to belong to him, however it might be qualified from a juridical point of view.

Applying the unitary state theory to Kosovo immediately prior to February 2008, the only conclusion that one can draw is that strong political links remained between the Provisional Institutions and the Special Representative. They shared political power.[[75]](#footnote-74) SCR 1244 is still in effect and the Special Representative still holds “considerable supervisory powers.” Therefore, sovereign power cannot devolve to the Assembly of Kosovo. Without other sources of law, the alternative explanation must be found in the *lex specialis* that governs the relationship between the two parties: SCR 1244 and the Constitutional Framework. The ICJ makes three explicit statements about SCR 1244 and the framework it creates. First, it was a crisis response and “must be understood as an exceptional measure aimed at addressing the crisis.” Second, SCR 1244 “was designed for humanitarian purposes; to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order.” Third, it “clearly established an interim regime; it cannot be understood as putting in place a permanent institutional framework.” Therefore, SCR 1244, the Constitutional Framework, and the powers of the Special Representative were exceptional, temporary, and humanitarian in purpose.

The modern understanding of international recognition of new states complicates Kosovar self-determination and secession, and the examination of this particular problem has been extensive.[[76]](#footnote-75) Because a new sovereign state may have to be recognized by pre-existing sovereign states prior to the full accession of a non-sovereign state to sovereignty, an explicit recognition of the Republic of Kosovo by the ICJ could not occur in the Kosovo case.

There are two broad and recognized theories of recognition in international law. The first, and most widely accepted, premise is known as the declaratory theory.[[77]](#footnote-76) The first major adoption of the declaratory theory was in the Tinoco Arbitration case. Article 3 of the Montevideo Convention partially codified the theory: “The political existence of a state is independent of recognition by other states.”[[78]](#footnote-77) Recognition becomes a discretionary and political act that is non-binding and without legal significance in the purely objective determination of whether a political entity is a sovereign state. Unsurprisingly, state practice complicates the theory: It is, however, difficult to maintain that an entity that has received recognition by none or a very few States, such as the Turkish Republic of Northern Cyprus or South Africa’s Bantustan States . . . can claim to be a State, as it cannot demonstrate its capacity to enter into relations with other States and thus from a functional point of view cannot be described as a State.[[79]](#footnote-78) Since the capacity to enter into relations with other states defines a state, other states’ cooperation in the formation of a new state is a necessary precondition to the new state’s full accession to sovereignty. The other major theory of recognition is the constitutive theory, which sourced the accession of a political entity to a sovereign state solely in the recognition, either express or implied, of other sovereign states.[[80]](#footnote-79) The question of how a state becomes a state is irrelevant; the only relevant question is whether that state is recognized. Lauterpacht was a proponent of the constitutive theory.[[81]](#footnote-80)

 **Kosovo’s Right to Self-Determination**

The right of peoples to self-determination is generally alleged having two aspects, namely the internal and external aspects, which are different modes of implementation of the right of self-determination[[82]](#footnote-81). From the traditional view, external self-determination are applied to decolonization regime and the foreign domination or occupation, beyond the regime of decolonization, the external self-determination also exists in practice, such as the dissolution of Former Yugoslavia, Czechoslovakia, and USSR. Internal self-determination is recognized as the requirements of full and effective participation by all groups in society within States.[[83]](#footnote-82) The contents of external and internal self-determination will be discussed respectively below.

(1) External Self-Determination

External self-determination may be exercised through the dissolution of a State, the union or merger of a state with another State and through secession. In the Friendly Relations Declaration, it provides that the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. In history, the exercise of external self-determination is confined in the context of decolonization process. With the emergence of increasing number of new independent Third World countries, self-determination was understood as the anti-colonial self-determination. For these States, self-determination mainly meant three things:

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

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

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

The principle of territorial integrity is referred in several relevant instruments concerning the right to self-determination, such as the Friendly Relations declaration, and the Helsinki Final Act, the 1993 Vienna Declaration and the Charter of Paris for a New Europe of 1990. As what have written down in the Friendly Relation Declaration, it has stressed the restriction that the right of peoples to self-determination enshrined in the Declaration can not be “construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” Moreover, Principle VI of the Declaration states that the territorial integrity and political independence of the States are inviolable. These two provisions therefore set a limit onto the right of external self-determination that the establishment of a sovereign and independent State may conferred with the respect of the principles of territorial integrity and sovereignty.

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

While self-determination also applied to Serbs and others who now found themselves as minorities in new states, this was a different kind of self-determination. It was not an entitlement to statehood, but instead self-determination in this context was reduced in content to human and minority rights, and to autonomous structures of governance in areas where Serbs constituted a local majority.[[84]](#footnote-83) In this respect, it seems that the Badinter Commission held the idea that the right to self-determination which leads to the establishment of statehood may not grant to minorities, but to the whole population of that State.

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

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

(2) Internal Self-Determination

Turning to the right of the peoples of Kosovo to self-determination, as what have been discussed, the peoples of Kosovo entails the right to self-determination, regardless of their ethnic or religious differences. However, the right to self-determination conferred to those people is restricted in the context of the internal self-determination.

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

It is also an ongoing right which processes a continuing character. Unlike the right to external self-determination which may expire once it exercised, under customary international law, “the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect.” The similar idea appeared in the early decades of 20th century, where Wilson put forward at the beginning. Wilsonian self-determination is self-government, consists the right of peoples to choose their own democratic government freely. However, as the fact that self-determination is more important in its external aspects for colonial people, the right to internal self-determination, namely the right freely to choose their form of government, their rulers, etc., was ignored at that time. However, the right to internal self-determination to some extent is more important than the external one.

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

By virtue of the principle of equal rights and self- determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. Referring to the reference of the Supreme Court of Canada in the case of Quebec, the Court addressed that:

The recognized sources of international law establish that the right to self-determination is normally fulfilled through internal self- determination- a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.”[[85]](#footnote-84)

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

In the Friendly Relations Declaration, it proclaims that a denial of fundamental human rights constitutes a violation of the principle of self determination, and is contrary to the UN Charter. In the Helsinki Final Act, the participating States affirmed “the importance of the elimination of any form of violation of this principle”. Moreover, the contents of the right of internal self-determination of indigenous peoples were incorporated in the Declaration on the rights of Indigenous Peoples that:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions[[86]](#footnote-85) and have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State[[87]](#footnote-86).

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

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

***Kosovo’s Admission to the United Nations***

As stipulated in Article 4 (1) of the UN Charter, “Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations”. In light of Kosovo’s satisfaction of the Montevideo Convention criteria for statehood, and provided Kosovo can demonstrate that it satisfies the requirements of Article 4 (1), Kosovo may qualify for admission to the UN.[[88]](#footnote-87) Hans Kelsen has argued that an entity which claims to be a State, but is not recognised as such by all UN members, can still be admitted to the UN since it is possible to interpret the decision of the General Assembly on whether to admit a new State, upon the recommendation of the Security Council required by Article 2 (4), as implied recognition by the UN members of the entity’s statehood.[[89]](#footnote-88) Kelsen’s view is supported by Israel’s admission to the UN in 1949, notwithstanding the objections raised by Arab States concerning the legitimacy of Israel’s creation. The real point of contention is whether the Security Council’s recommendation is subject to the veto of any permanent member of the Security Council. Article 27(2) of the Charter declares that “Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members”. However, Article 27(3) stipulates that “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members”. Therefore, it is important to establish whether a membership recommendation is to be construed as a ‘procedural matter’ or a ‘decision’ requiring the concurring vote of all permanent members. Academic opinion appears to endorse the view that the admission of a new member under Article 4 is to be regarded as a non-procedural decision, subject to the veto under Article 27(3).[[90]](#footnote-89) Accordingly, Russia could veto Kosovo’s future admission.

Henry Schermers and Niels Blokker maintain that such a resolution requires the explicit approval of the five permanent members or their abstention from voting.[[91]](#footnote-90) Since 1946, practice has been uniform confirming that an abstention by a permanent member is to be interpreted as a concurring vote (or at least not a negative vote).[[92]](#footnote-91) Indeed, Bangladesh’s admission into the UN in 1974 only occurred after China eventually abstained from voting.[[93]](#footnote-92)

Consequently, if Russia eventually abstains from voting in future years, then it is possible that Kosovo may be admitted to membership of the UN. Admission will be a significant step towards Kosovo’s progression into a *de jure* State.

**Opinion of the International Court of Justice(ICJ) on Kosovo**

Aftermath of Kosovo‟s declaration of independence led Serbia to request ICJ for an advisory opinion on legality of the declaration. The question they sought clarification on was: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

The final ICJ advisory opinion concluded that the declaration had not violated international law; however it was included only a brief mention of “self-determination”,[[94]](#footnote-93) despite the fact that most states arguing before the ICJ raised the question whether the concept of self-determination might apply to Kosovo. Interestingly, many scholars described case in sense of self-determination.[[95]](#footnote-94) It is needless to say that this advisory opinion had high stake for many other country than Serbia. Therefore, on the opposing side at the ICJ were states which worried about secessionist claims within their own borders. On the other side were Western states which recognized Kosovo, but states that at the same time play the key role in Kosovo administration.[[96]](#footnote-95) This sharp separation among the states turns the ICJ in the “conference” for legal as much as political debate.

The both side participants shared the assumptions on international meaning of self-determination, although they disagree on the concrete practical implementations. In this procedure there was a common assumption that in non-colonial context, self-determination should not be interpreted in sense of creating a new state. In other words, the primary way of realizing self-determination has to be as internal self-determination. The term internal self-determination is not originating from international law, but takes its roots in prominence in scholarship and appeared first after long time ago (it was already in case of Aland Islands in 1920) in 1990‟s. However in the ICJ process internal self-determination is differently expressed: right to participate (Albania), representative government (Netherlands), respect for human rights (Romania), territorial autonomy (Germany) and equality before law (Venezuela).198 However, all participants agree upon the idea that internal self-determination has priority before external self-determination in sense of statehood (external).

The final ICJ advisory opinion concluded that declaration had not violated international law; yet the Final ICJ advisory opinion claimed that the decision is concentrated on Kosovo‟s declaration of independence, not its statehood.[[97]](#footnote-96) In other words, the Court concluded that neither international nor laws applying to Kosovo had not prohibited declaration of independence therefore Kosovo did not violate international law. Nonetheless, the decision has (or will have) the two repercussions. First, the Court stated that self-determination is “a right to independence for the people of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation”[[98]](#footnote-97) and concluded that “A great many new States have come into existence as a result of the exercise of this right”.[[99]](#footnote-98) What is interesting here is that the Court did not mention any other way of realizing self-determination, but creating new states. Therefore, according to the Court, there is no such thing as internal self-determination – the concept of self-determination means independence. Second, the case of Kosovo was discussed in relevance to other case, hence Kosovo cannot be seen as sui generis case.[[100]](#footnote-99) But on the other hand, the Court did not indicate that Kosovo is not a legal precedent. However, the full implication of this case remains dubious: will any future self-determination necessarily lead to full independence? Does it mean “sovereign statehood for choose few and absolutely nothing for the rest”?[[101]](#footnote-100) Or is the case of Kosovo a precedent or a “Kosovo syndrome [is] an unconditional path to follow”? Is G. Tuathail right when he says that the NATO has opened the Pandora box (primarily for Cyprus, Georgia, Moldova, and Bosnia) with its “cynical conception of humanitarian intervention”?[[102]](#footnote-101)

**CONCLUSION:**

Kosovo’s case is somewhat complicated. The conflicts between Albanians and Serbs emerged for a long time, and both sides of the conflicts held non-negotiable positions that incompatible with each other deeply. Moreover, the involvement of the international community and the interim administration of the United Nations make the case being a case of international concerned. After all, the government of Kosovo announced the unilateral declaration of Independence. It was alleged that, the negotiation between the two representative governments is no longer to engage to a satisfying conclusion for both sides. And for the realization of the substantial self-government and development of Kosovo, the determination of the status of Kosovo should be taken, and therefore, the government of Kosovo declared independence unilaterally, based on the framework submitted to the Security Council by the Special Envoy which suggests the only option is to independence. However, by examining the alleged right of Kosovo people to external self-determination, it seems that the unilateral declaration of independence is illegal. First, the right to external self-determination is conferred to the whole population of Serbia, rather than Kosovo, since Kosovo is not a state or nation but an autonomous province within the territory of Serbia. Secondly, the long standing denial to fundamental human rights of Kosovar Albanians does not automatically amount to exercise external self-determination as the last resort. The conditions that there must be gross breaches of fundamental human rights, and an exclusion of the possibility to realize the right to self-determination within the existing states are not fulfilled since the government of Serbia has offered a higher level of autonomy to Kosovo in the process of negotiation, which was rejected by Kosovar Albanians. The legitimacy and legality secession would be achieved if the alleged people enjoys a constitutional status to secession or the alleged secession gains the consent of the government of the parent state which is representing the whole population of the State without distinction of any kind. Consequently, the unilateral secession of Kosovo from Serbia is illegal.

**REFERENCES:**

* League of Nations: the Case of Aaland Islands; 1920;
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