



**Remedial Secession under International law:
Analysis of Kosovo, Abkhazia and South Ossetia**

by Sopio Asatiani

LL.M. Human Rights Thesis
SUPERVISOR: Charlotte Steinorth
Central European University
1051 Budapest, Nador utca 9.
Hungary

EXECUTIVE SUMMARY

On 17 February, 2008 Kosovo declared its independence followed by the recognition from the UN member states. Even though the text of the declaration referred to “a special case”, the case renewed discussions on the principle of the remedial secession. The concept entailing belief that the oppressed people have right to resort to secession as the remedy of last resort. Within months after the Kosovo’s declaration of independence, the Russian federation recognized independence of Abkhazia and South Ossetia using the similar reasoning to that used in case of Kosovo.

The thesis intends to provide systematic analysis of the existent sources of the International law to deduct and assess the nature and legal value of the remedial secession as it stands nowadays. The answer to major research question is based on the outcome of theoretical and case-law analysis. Firstly, the remedial secession is deducted from the law on self-determination. Later on, the treaty law ground is explored for detection of the traced of remedial secession. Lastly, the state practice and *opinion juris* analysis is engaged to assess the existence of customary remedial secession.

The case studies of Kosovo, Abkhazia and South Ossetia suggested that despite the major advancement of the status of remedial secession, Kosovo still does not serve viable legal precedent capable of altering customary international law on territorial integrity with allowing remedial secession. Nevertheless case studies of Abkhazia and South Ossetia indicate towards the need for change in the existent legal uncertainty surrounding the remedial secession.

Overall, in relation with the primary research question the thesis will argue that the remedial secession is not yet established as principle of public international law.

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to my supervisor, Charlotte Steinorth for her kind cooperation and guidance throughout the writing process. The comments and expertise of Professor Steinorth were very valuable for my work.

I would also like to thank CEU Legal Studies department for granting me an opportunity to conduct the comprehensive research for my thesis at the Peace Palace Library.

Lastly, I would like to thank my family and friends for their continuous support and for the motivation I aspire from them to study and work more and aspire my goals.

Table of Contents

Introduction.....	3
Chapter I. Right to self-determination	5
Introduction.....	5
1. Colonial Context of Self-determination.....	6
2. Modern Developments in the law of self-determination.....	10
2.1 Development of Self-determination as a Universal right.....	11
2.2 Internal Self-determination	14
4. Territorial Integrity and Self-determination.....	18
5. Concluding Remarks.....	22
Introduction.....	24
1. Remedial Secession and treaty law	25
2.2 Declaration on Friendly Relations and <i>opinion juris</i>	38
Chapter III. Remedial Secession and case of Kosovo.....	42
Introduction.....	42
1. Historical Background of the conflict in Kosovo	43
1.1 NATO involvement in Kosovo	46
1.2 International Administration in Kosovo.....	47
2. ICJ Advisory Opinion on Kosovo.....	49
2.1 Separate Opinion of Judge Cançado Trindade.....	51
2.2 Separate Opinion of Judge Yusuf	52
2.3 Dissenting Opinion of Judge Koroma.....	53
3. ICJ State Submissions on Kosovo	54
3.1 Submissions Supporting the Remedial Secession.....	54
3.2 Submissions opposing remedial secession.....	59
Chapter IV. Influence of Kosovo on Abkhazia and South Ossetia.....	65
Introduction.....	65
1. Historical Context of Abkhazia.....	66
1.1 International response to the conflict	68
1.2 Russian Role in Abkhazia	71

- 2. Conflict in 2008 and Current Situation in Abkhazia..... 73
- 3. Historical Context of the Conflict in South Ossetia..... 75
 - 3.1 Rose Revolution and effects on conflict 78
 - 3.2 War in August 2008 79
- 4. Current Situation in South Ossetia..... 82
- 5. Legal Appraisal of the Conflict and Parallels 83

Introduction

The principle of territorial integrity and the sovereignty of states form foundations of the entire international legal system. However, the latest developments or the human rights approach towards the public international law does not and cannot simply leave it up to the states to entirely define fate of its inhabitants. What happens when state abuses, commits gross human rights violations targeting specific “people” within its territory? How could the “people” respond to ongoing oppression and denial of representation? The answer to these questions seems to lie in the concept of the “remedial secession.”¹

While the idea of the secession as the means of last resort seems to be moral and ethical corresponding to the needs of oppressed “people” the legal value of it remains controversial. The rule is derived from the law on self-determination, which by itself is subject to a dispute. The self-determination is no longer considered within limited colonial context but has attained the permanent character fulfilled through “people’s internal” exercise of “political, economic, social and cultural rights.”² Nevertheless, the “the external aspect” or the self-determination, implying the attainment of separation from the parent state, through remedial secession causes disagreement. Even though, approach seems to accommodate the ultimate need of oppressed people to remedy their condition, the notion unavoidably undermines the territorial integrity of a state in question.³

¹ Allen Buchanan, Justice, *Legitimacy and Self-Determination: Moral Foundations For International Law*, (Oxford University Press 2007), pp. 350-352

² Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, (Cambridge University Press 1999), p.110-111 (hereinafter: Cassese: Self-determination of peoples)

³ David Riach, *Statehood and the law of self-determination*, (Kluwer law International 2002), p.302

Therefore, the following questions will be raised within the scope of current thesis: What is the status of remedial secession under contemporary international law? Is the “remedial secession” sufficiently manifested within the practice or is only a scholarly theory? Is Declaration of Independence of Kosovo a credible example of remedial secession capable of setting legal precedent? Can the example of Kosovo be used vis-à-vis to Abkhazia and South Ossetia?

The thesis suggest that on the basis of existent sources of the international law the principle of remedial secession is neither established in treaty law nor formed as the principle of customary international law. However, there exists rigid grounds for future development of principle into the law, and the case studies indicate an ultimate need to have the principle formulated in order to avoid politically motivated legal interpretations.

Structure

The thesis is divided into four main chapters, introduction and conclusion. The first chapter sets ground for the detection of principle of the remedial secession from the law of self-determination, therefore comprehensive analysis of the development of the self-determination is provided. The Second chapter intends to trace the remedial secession within the treaty law and custom as it stood before the events occurring in Kosovo. The third chapter is dedicated to comprehensive historical and legal analysis of Kosovo in an attempt to determine its legal precedential value. The last chapter, engages into case study of Abkhazia and South Ossetia, draws possible parallels and differences with Kosovo and attempts to evaluate if the latter had any impact and what were the possible results for the law on the remedial secession.

“It will raise hopes which can never be realized. It will, I fear cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late...”

- **Robert Lansing**

Chapter I. Right to self-determination

Introduction

The principle of self-determination emerging through political philosophies of Woodrow Wilson and Lenin has come a long way of transformation from political into a legal concept forming part of international law. Nevertheless, the transformation only increased attention and debates surrounding the principle, its precise definition and scope of applicability. The concepts of liberty, democracy, equality allegedly related to self-determination, undeniably seemed irresistible to the “colonized peoples” and “nations,” on the other hand notion conflicting with long established state-centered system of International law could not have been accepted without objection.

Yet, United Nations era brought a new life to the principle of self-determination by incorporating it as one of the goals of the organization, in the context of establishing “friendly relations” and “equal rights of peoples.” Even though, the latter proclamation did not *per se* amount to formulation of new rule, the subsequent resolutions and practice established self-determination as a core legal principle.

Regardless, up until today the precise definition, context, modes of application and the resolution of clash with International legal norms is still lacking. The reason of the controversy the principle has caused from the earliest times of its evolution lies within the undeniable conflict

with such important principles as sovereignty and territorial integrity. In particular, external self-determination beyond “colonial” context, leading to secession of an entity, is the clear contradiction to principle of territorial inviolability. Nevertheless, even under “exceptional circumstances” as the “measure of last resort”, international law allegedly guarantees for right to remedial secession. The latter notion of remedial secession was actively advanced within Kosovo context and directly linked to the principle of external self-determination. The following chapter aims to provide comprehensive overview of the principle of self-determination in order to set stage for further analysis of remedial secession in subsequent chapters.

Thus, the Chapter will be divided into four sections first one will address the colonial context of self-determination and will analyze the process of its evolution as a legal right, the second section will revolve around the notions of internal and post-colonial aspects of self-determination, subsequent section will deal with the definition of “people” for the self-determination purposes and last section will explore the territorial integrity and external self-determination argument.

1. Colonial Context of Self-determination

The idea of self-determination or at least first shades of the concept is traced back in history to refer to events occurring as early as 18th century during American and French Revolutions, this early occurrences of the self-determination cannot be argued to have similar subject-matter as the current day legal principle, nevertheless the political aspect of it could be evidenced to be present.⁴

⁴ Cassese, *Self-determination of Peoples: A Legal Reappraisal*, p. 11

The later reoccurrence of the principle after the First World War is associated with Woodrow Wilson's "fourteen Point" speech addressed to the United States Congress.⁵ Wilsonian approach primarily focused on liberal and even democratic ideas of Government being based on "consent of the governed."⁶ Despite relatively moderate and reserved approach, the Wilsonian ideas were not received with enthusiasm, Robert Lansing legal advisor of the US State department even amounted the concept to mere idealism that will never be achieved and attempt to implement it will cause more damage than good.⁷

Therefore, despite efforts the principle of self-determination was not included in the League of Nations Covenant, supporting the view that international community does not perceive concept as legal principle.⁸ Interestingly enough, in Aaland Islanders case International Commission of Jurists and the Committee of Rapporteurs, even though denied right to secession, they did acknowledge Islander's entitlement to respect to their language, identity and offered a special regime of protection through autonomy.⁹ Thus, even in the absence of clear legal regulations the "people" were entitled to structure resembling what would currently labeled as internal self-preservation and determination. In addition, jurisdictional question in Aaland

⁵ as cited in Hurst Hannum, 'Rethinking of Self-determination', *Virginia Journal of International Law*, Vol. 34, No. 1, 1993, p. 3-4, (Hereinafter Hannum: Rethinking Self-Determination).

⁶ Peter Hilpold, 'The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography', *Austrian review of International and European law* 23-48, Vol. 11, January 2006, p. 32

⁷ Robert Lansing: *The Peace Negotiations*, (December 13, 2003 e-book) , Chapter VII available at: <http://www.gutenberg.org/cache/epub/10444/pg10444.html> (last visited on 10 August 2013)

⁸ Malchholm N. Shaw, *International Law*, (Cambridge University Press 6th ed., 2008,) pg. 251 (Hereinafter M. N. Shaw, International law)

⁹ Aaland Islands Question, *the Report by Commission of Raporteurs*, League of Nations Council Document B7 21/68/ 106, 1920 available at: <http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf> (last visited on 10 August 2013) James Crawford, 'The Right of Self-determination in International Law: Its Development and Future', (hereinafter Crawford: Self-determination development and Future) in (ed.) Philip Alston, *People's Right*, (Oxford University Press, Nov.2001) p.13

Island's opinion "recounts birth of alternative international law...competent to discuss the birth of states."¹⁰

Later on, the United Nations Charter, proclaimed principle of self-determination as a goal to be achieved within the context of "friendly relations" and "equal rights and self-determination of peoples".¹¹ Scholars generally consider that during the time of charter drafting the principle of self-determination, could not have creating legally binding obligations, since mere reference to political aim rarely establishes international legal norm.¹²

Regardless, reference to the principle in the UN charter did provide the ground for subsequent interpretation and gradual shift from political to legal right. In particular, within the context of decolonization the United Nations General Assembly adopted two relevant resolutions resolution no. 1514 (Granting of Independence to Colonial Countries and Peoples) and resolution no. 1541 set forth the principles to guide states in determining whether they should transmit information on non-self-governing territories.¹³

The declaration granting independence to colonial people was adopted without dissenting vote, and proclaimed that all peoples have right to self-determination.¹⁴ While the *rationale* of declaration in bringing "speed and unconditional end colonialism" is clear, the debate is revolved around usage of "all peoples" without specifying the criteria of peoplehood.

¹⁰ Nathaniel Berman, 'Sovereignty in Abeyance: Self-determination and International Law', (hereinafter Berman: Sovereignty in Abeyance) in (ed.) Robert McCorquodale, *Self-determination in International law*, (Ashgate/Dartmouth Publishing Company Ltd, 2000) p. 75

¹¹ Charter of the United Nations, 24 October 1945, 1 UNTS XVI Article 1(2)

¹² M.N. Shaw International Law, p. 252; Cassese: Self-Determination of peoples. 40;

¹³ G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp.No.16 at 66,67, U.N. Doc.A/L.323 (1960); G.A. res. 1541, U.N. GAOR, 15th Sess., Sup. No 16 at 29, U.N. Doc. A/4651 (1960)

¹⁴ *Ibid*, para.2

Despite the clear language of the resolutions to end the colonialism and prescription of principle of self-determination therein, some scholars questioned the law-creating powers of the General Assembly and treated the decolonization as mere political expediency which is “neither consistent nor uniform.”¹⁵ The major reason for the rejectionist theory is the fact that they approach international system as being composed of already established states and accordingly: “it is scarcely possible to refer to an entity unless it already is one, so that it makes little judicial sense to speak of a claim to become one...”¹⁶

Regardless, the overwhelming evidence indicates that the self-determination is indeed established principle in international law. First of all, then cumulative effect of two resolutions taken in conjunction with overwhelming support are capable of materializing *opinion juris*.¹⁷ Moreover, the legal value of self-determination within the colonial context and importance of Resolution No. 1514 as guiding source, was affirmed by the International Court of Justice in 1971 *Namibia* and 1975 *Western Sahara* cases.¹⁸

Overall, as it could be deduced from the discussion above, self-determination emerging through political idea, has gradually shifted into an established legal principle applying in practice with the aim of bringing “speedy” end to colonialism. Cumulative effect of the UN Charter, relevant resolutions and interpretative opinions provided by the ICJ, lead to conclusion

¹⁵ Rupert Emerson, ‘Self-determination’ p. 5, (hereinafter Emerson: Self-determination) in (ed.) Robert McCorquodale, *Self-determination in International law*, (Ashgate/Dartmouth Publishing Compan Ltd, 200)

¹⁶ Berman: Sovereignty in Abeyance, p.32

¹⁷ Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*,(Oxford University Press 1963) pp.101-102; Emerson: Self-determination, p.4; Ian Brownlie, *Principles of Public International Law*, 4th Edition, (Clarendon Press 1990), p.515

¹⁸ International Court of Justice, *Advisory Opinion No. 53, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, 31; International Court of Justice, *Advisory Opinion on Western Sahara*, 16 October 1975, paras. 54-73; Christine Griffioen, *Self-Determination as a Human right: The Emergency Exit of remedial Secession*, (Science Shop of Law, Economics and Governance, Utrecht University, August 2010), p.25

that the self-determination within “colonial” context is firmly established principles, causing far less controversy than modern day notion of self-determination.

2. Modern Developments in the law of self-determination

The aspirations to gain certain level of autonomy, self-identification or in most extreme cases secession actively started to emerge together with the end of colonialism and creation of new states. The latter process re-defined the need to have clear regulations on protection of one’s identity which triggered many legal scholars explore grounds for “re-thinking” “re-defining” “re-approaching” the existing concept of self-determination beyond colonial context.¹⁹

Therefore, the modern approach suggests that the principle of self-determination is not an exclusively colonial concept, but an “ongoing right”.²⁰ The contemporary view is to suggest that the principle implies right to representativeness, protection of one’s identity, culture and as a limited exceptional measure might involve secession.²¹ The numbers of scholars claim that outside colonial era, self-determination can be effectively used as a tool for establishing democratic and representative governance.²² Another school of thought, primarily concerned

¹⁹ Robert McCorquodale, ‘Self-determination: A human Rights Approach’,p.10 (Hereinafter McCorquodale: Self-determination Human Rights approach) in (ed.) Robert McCorquodale, *Self-determination in International law*, (Ashgate/Dartmouth Publishing Compan Ltd, 200); Dietrich Murswiek, ‘The Issue of a Right to Secession-Reconsidered’ (hereinafter Murswiek: right to secession reconsidered) in (ed.) Christian Tomuschat, *Modern Law of Self-determination*,(Martinus Nijhoff Publishers , 1993);

²⁰ Cassese: Self-Determination, pp. 101-102; David Raic, *Statehood and the Law of Self-Determination*, (Hereinafter: Raic: Self-Determination) (Kluwer Law International, The Hague, 2002,)p. 228

²¹ Christian Tomuschat: “ *Self-determination in a post-colonial world*” (in “Modern Law of Self-determination” ed. Christian Tomuschat, Springer 1993) p.2

²² Gerry J. Simpson, ‘The Diffusion of Sovereignty: Self-determination in Post-Colonial Age’ (Hereinafter, Simpson: Diffusion of Sovereignty) in (ed.) Robert McCorquodale, *Self-determination in International law*, (Ashgate/Dartmouth Publishing Compan Ltd, 200); p.615-616

with secession, develops and expands on the idea of external right to self-determination.²³ The latter points will be addressed separately in chapters to follow.

2.1 Development of Self-determination as a Universal right

The fundamental human rights covenants created during the decolonization, International Covenant on Civil and Political Rights (*Hereinafter ICCPR*) and International Covenant on Economic, Social and Cultural Rights (*hereinafter ICESCR*) both include identical wording regarding the principle of self-determination within Article 1:

“Article 1:

All Peoples have right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²⁴

Even though the definition of the scope of the right is still open to doubts and debates, the reference to “all peoples” and the legal value of the covenants as universally applicable documents suggest its application goes beyond the decolonization.²⁵ The overview of *travaux preparatoires* of the Covenants leads to a similar conclusion. In particular, the discussions on article 1 paragraph 1 were mainly divided between narrow and broad interpretation of the wording. The most of the delegations present supported the interpretation of self-determination beyond the colonial context.²⁶ The Colonial powers were especially concerned with the

²³ Lee C. Buchheit, *Secession: The Legitimacy of Self-determination*, (Yale University Press, 1978,) p.220-222

²⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Art.1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, Art.1.

²⁵ Riad: Self-Determination, p. 228

²⁶ Observations of Governments U.N. GAOR, 10th Session, U.N. Docs. A/2910/add.1-3 (1955)

application of self-determination, and maintained that not only it applied to colonies right to become independent but also right of groups within states to secede or separate.²⁷

The Government of India clearly expressed its disagreement with majority and made a reservation on Article 1 words, “self-determination” to apply only the peoples under foreign domination.²⁸ The Indian reservation was met by three severe objections by Netherlands, France and federal republic of Germany. The federal republic of Germany clarified that referral to “all peoples” in the text was a general acknowledgement, not limited to “foreign domination.”²⁹

Therefore, the argument can be made that since the efforts to emplace limitations on the scope of application of Article 1 failed, the provision should be interpreted within “ordinary meaning.”³⁰ In addition, “object and purpose” interpretation would also lead to conclude that the simultaneous inclusion of the provisions in two important human rights covenants cannot be limited to “colonial” category of people only.³¹ Lastly, unlike the first version which referred to past tense wording the adopted version states that “the peoples have the right to self-determination”, the usage of present tense was assumed: “to emphasize the fact that the right referred to is a permanent one.”³²

²⁷ U.N. Doc. A/2910/Add.1; U.N. GAOR 3d Comm., 6th Sess.,399th mtg, Agenda Item 29, para 4, U.N. Doc. A/C.3/SR 399 (1952); U.N. GAOR 3d Comm., 10th Sess., 643d mtg, Agenda Item 28, para 10 U.N. Doc. A/C.3/SR 643, 1955

²⁸ As cited in James Summers, *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations*, (Hereinafter: Summers: Peoples and International law)(Martinus Nijhoff Publishers: 2007) p.153

²⁹ *Ibid* at p. 236

³⁰ Allan Rosas, ‘Internal Self-Determination’ in (ed.)Christian Tomuschat, *Modern Law of Self-determination*,(Martinus Nijhoff Publishers , 1993), p.242

³¹ H. Quane, ‘The United Nations and the Evolving Right to Self-Determination’, *International and Comparative Law Quarterly*, Vol. 47 July 1998, pp.561-562

³² Cassese: Self-Determination, p. 54

The similar formulations of the right to self-determination are also enshrined in the provisions of other human rights instruments. The African Charter on Human Rights adopted in 1981, refers to self-determination in Article 19 and Article 20, the document puts additional emphasis on “unquestionable and inalienable right to self-determination.”³³

The support to “free will” of people to “determine without external interference, their political status and to pursue their economic, social and cultural development” also stems from General Assembly resolution No. 2627 on principles of International Law concerning Friendly relations and Cooperation among States. Another, important formulation of self-determination as a “right of peoples” is adopted by General Assembly resolution No. 2627, *hereinafter Friendly relations Declaration*).³⁴ Additional doubts as to the post-colonial applicability of the principle can be thought to be erased by Paragraph 7 of Principle V, clearly insisting on respect and applicability of the self-determination to groups of “people” within state.³⁵

Additionally, principle of self-determination is referred in regional instrument operating in Europe: the Conference on Security and Cooperation in Europe of 1975(Helsinki Declaration) includes the principle of “equal rights and self-determination of peoples.” The language of the principle is thought to be much more expansive than previous international pronouncements since it specifically refers to “all peoples” “always” have the right to external and internal self-determination.³⁶

³³ African Charter on Human and People’s Rights, O.A.U. Doc. CAB/LEG/67/3, adopted 27 June, 1981, art. 19 nd art.20.

³⁴ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970), Principle V para.1

³⁵ Ibid at Principle V para.7; Riad: Self-Determination, p. 250-255

³⁶ Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, principle VIII; Antonio Cassese: ‘Political Self-determination-Old Concepts and New Developments’ in ed. Antonio Cassese, *U.N law/ Fundamental Rights: two topics in International Law* 137, (Martinus Nijhoff Publishers 1979) p.152

Deriving from the abovementioned, the conclusion can be drawn that self-determination under its current development is articulated as a “right”, that is of “general application” rather than limited colonial context.³⁷ While it seems clear at this stage that the self-determination had achieved the status under international law, the scope of the right still remains to be disputed.

2.2 Internal Self-determination

The substantial number of legal scholars refer to “right to authentic self-government”³⁸, “democratic self-determination”³⁹ or simply a “democracy”⁴⁰ whenever assessing the scope and content of the right. The strong support of the firmly established internal right to self-determination derives from the wording of the Friendly Relations Declaration mentioned above, in conjunction with Helsinki Final act which directly refers to “internal” aspect. The latter document goes even further in correlating internal self-determination and democratic rule and establishes “continuous right to self-determination.”⁴¹

According to Crawford, the concept of democratic rights became ultimately important after 1989, the era which is marked as the third stage in the development of right to self-determination.⁴² Nevertheless, the right to participate in government is not a new concept under International Human rights law. It was enshrined in Article 21 of the UDHR and Article 25 of the ICCPR, guaranteeing representativeness and participation.

Even though, international law scholars differentiate between the forms that “internal self-determination takes” as a general rule it can be established to entail two fundamental rights: “the

³⁷ Crawford: Self-determination development and Future, *supra note 9*, at p 32; Hannum : Rethinking Self-determination, *supra note 2*, p.225

³⁸ Cassese, Self-determination of peoples, p.110-111

³⁹ Simpson: Diffusion of Sovereignty, p.608

⁴⁰ Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights*, (University of Pennsylvania Press 1996) p. 30

⁴¹ Cassese: Self-Determination of peoples, p. 286

⁴² Crawford: Self-determination development and Future, , p. 25

right to participate effectively in the political and economic life of one's country and the right to protect one's identity."⁴³ The requirement of representativeness does not imply only formal indications of existence of such right, but it is primarily concerned with substantive and effective participation in the formulation of national and local policy.⁴⁴ Additionally, a fair balance must be achieved ensuring the fair and proper treatment of minorities avoiding "abuse of dominant position."⁴⁵

In conclusion, it should also be emphasized that making self-determination a human right applicable within internal context gives opportunities to states to eliminate aggravation of situation into a conflict, by granting its minority's full and meaningful representation and on the other hand protects the aspirations of those groups to self-identify, protect culture and become actively involved in decision-making. Therefore, keeping self-determination within internal borders, rather than calling for secessionist movements, could in fact provide better protection and consolidation of competing interest of a state and "the peoples".

3. The problem of defining the people

The discussion about the right to self-determination is primarily a debate over the definition of "self." From the early stages of its development the concept has been criticized for lack of clarity, great deal of which concerns the precise identification of right holders. Indeed, Ivor

⁴³ Hannum: Rethinking Self-Determination, p.252; Thomas M. Franck, 'The Emerging Right to Democratic Governance', *86 American Journal of International Law* 46 1992

⁴⁴ Gregory H. Fox, 'The right to Political participation in International law', *17 Yale Journal of International Law* 539 (1992)

⁴⁵ McCorquodale: Self-determination Human Rights approach, p. 485

Jennings makes reasonable point when claiming that self-determination: “is in fact ridiculous because the people cannot decide until somebody decides who the people are.”⁴⁶

The United Nations practice regarding decolonization indicates that the preference was given to “territorial” definition of people, since the whole population of a territory achieved independence, within boundaries of former colonial state, and without any relevance given to “ethnic” composition of the state.⁴⁷ Nevertheless, the practice has not been uniform and consistent. The examples of division of northern and southern Cameroon, the former joining Nigeria and the latter to French Cameroon, or separation of Rwanda and Burundi were based on “ethnic” considerations.⁴⁸

Outside colonial context, several approaches towards definition of “people” can be traced. One approach adopted by Rosalyn Higgins refers to the unification of “peoples” in their entirety, implying the right holders are “the peoples of a state.”⁴⁹ However, adopting this principle would mean that the states are comprised of homogenous societies, which is hard to imagine in the era of globalization.

In addition, the Supreme Court of Canada also affirmed the position that term “people” should not be equated with entire “nation” by maintaining the following:

“The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of state’s population. To restrict the definition of the

⁴⁶ James Crawford, *The Creation of States in International Law*, (hereinafter Crawford: Creation of States) ,(Clarendon Press, Oxford, 2005) p.124

⁴⁷ Michla. Pomerance, *Self-Determination in Law and Practice, The New Doctrine in the United Nations*, (The Hague: Martinus Nijhoff Publishers 1982,) p. 18

⁴⁸ *Ibid* p.19

⁴⁹ Rosalyn Higgins, *Problems and Process, International Law and How we use it*, (hereinafter Higgins: Problems and Process) (Oxford University Press 1994), p.124

term to the population of existing states would render the granting of a right to self-determination largely duplicative.”⁵⁰

Another approach to “peoplehood” differentiates between “subjective” and “objective” elements.⁵¹ The subjective element concentrates upon the “common subjective attachment” expressed through self-consciousness of belonging to group.⁵² The objective criteria emphasize the external differences of the “people” from others.

The twofold test has been identified within the “Final Report and recommendations” of the 1989 UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. Whereby the criteria for “peoplehood” are identified in the common historical tradition, racial and ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and common economic life.⁵³

While the cumulative criteria mentioned above, might offer some relevant framework for assessment of “peoplehood”, determining in fact if particular group falls within the listed criteria remains controversial, especially considering that “peoples” is not a static notion it can change over the times, it can be formed and reformed. The approach also negatives the possibility of abuse of definition, by creating “people” for the purposes of attaining certain political or social aims.⁵⁴

It also remains challenging to draw a border line distinction between “minorities” and “peoples”, even though the minority rights are dealt separately under Article 27 of the

⁵⁰ Reference re Secession of Quebec, 2 S.C.R. 217, 20 August 1998, para. 124

⁵¹ Berman: Sovereignty in Abeyance, p.60

⁵² *Ibid* at p. 61

⁵³ UNESCO International Meeting of Experts on Further study of the rights of peoples, 22 February, 1990, available: <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf> (last visited on 10 August 2013)

⁵⁴ McCorquodale: Self-determination Human Rights approach, , p.487

Covenant.⁵⁵ The framework for assessment of “minority” and “people” is necessary to define who is entitled to self-determination, since in the present vacuum any group can assert being entitled to right to self-determination: movements of Kurds in Turkey, Chechens in the Russian federation all refer to the right as ground for their aspirations.

Overall, despite the certain limited general framework, which can easily be subject to scrutiny, the precise, conceptualized definition of “people” is still missing under current day international law. There is still not a clear borderline distinction drawn between “peoples” and “minorities.” Due to the foregoing reasons as Crawford correctly mentioned the issue of definition of right-holders still falls within the “political decisions” of the international community.⁵⁶

4. Territorial Integrity and Self-determination

Traditionally, principle of territorial integrity is one of the oldest and well-established principles of international law, even Article 10 of the Covenant of League of nations guaranteed respect for “territorial integrity” of the states. The fear and suspicion towards self-determination is understandable, considering that the International law is built upon a state-centered system and exercise of at least external aspect of self-determination clearly endangers state’s territorial integrity.⁵⁷

⁵⁵ Hurst Hannum, ‘The Concept and Definition of Minorities’, in(ed). Mark Weller *Universal Minority rights, A commentary on the Jurisprudence of International Courts and Treat Bodies*,(Oxford University Press 2007), p.71

⁵⁶ Crawford: *Creation of States* p.115

⁵⁷ Simpson: *Diffusion of Sovereignty*, p.283

In relation to secessionist movements and “absolutist” approach suggests that: “international community is not a suicide club” to undermine its own security by allowing right to secede.⁵⁸ Much more general sense the argument regarding the utmost relevance of the territorial integrity and conflict with self-determination is outlined by United Nations Secretary General, Boutros Boutros-Ghali in his report “Agenda for Peace”:

“If every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic wellbeing for all would become ever more difficult to achieve.”⁵⁹

Moreover, almost all international instruments addressing in one form or another right to self-determination, mirror the provisions for protection of territorial integrity.⁶⁰ The United Nations, charter recognizes both principles as key purposes of the organization.⁶¹ While secession is less debated within colonial context, the clear contradiction arises in post-colonial regime and the supporters of limiting self-determination to decolonization frequently refer to “territorial integrity” argument.

The authors rejecting development of principle of external self-determination generally favor internal approach.⁶² In addition, some even though not rejecting in its entirety the principle of external self-determination limit its application only to “racial groups.”⁶³

⁵⁸ James Castellino, ‘David Raic. Statehood and the Law of Self-Determination’, *European Journal of International Law*, Vol. 16, 2005, p. 792

⁵⁹ *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping*. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, para.17, available : http://www.unrol.org/files/A_47_277.pdf (last visited on 10 August 2013)

⁶⁰ G.A resolution 1514

⁶¹ UN Charter Article 1(2) and 2(4)

⁶² Hannum: Self-determination in twenty-first century, p. 61

⁶³ Antonio Cassese, *International Law*, 2nd edition, (Oxford University Press, Oxford, UK, 2005,) p. 61

Despite the preferential value it's goal "is to safeguard the interests of the peoples of the territory. The concept of territorial integrity is meaningful only so long as it continues to fulfill that purpose to all the sections of people."⁶⁴ Indeed, the presumption that continuous human rights violations and denial of internal aspects of self-determination can lead to an external right to self-determination was acknowledged by Canadian Supreme court as "exceptional" measure.⁶⁵

The Friendly Relations Declaration guarantees the territorial integrity only for states: "conducting themselves in compliance with the principle of equal rights and self-determination."⁶⁶ The provision, if read *a contrario* can be alleged to make the territorial integrity "rebuttable" notion.⁶⁷ The clause was reaffirmed by the United Nations World Conference on Human Rights, held in Vienna in 1993 with the provision mirroring the language of the friendly declaration.

In the line with abovementioned, number of international scholars believes that principle of territorial integrity is "eroding."⁶⁸ According to Simpson even this form of limited secession might be on the point of Crystallizing. In support of this position he refers to the UN sanctioned intervention on behalf of Kurds in 1991, even though the action was in clear breach of territorial integrity of Iraq, Security Council resolution no. 688 had a humanitarian aim of aiding Kurds who were subject to massive human rights violations.⁶⁹

The coordinated relation between self-determination and territorial integrity is supported by Murswiek, who does not exclude possibility of secession "if people in question have no other

⁶⁴ Umozurike as cited by Simpson *Diffusion of Sovereignty*, p. 613

⁶⁵ Reference re Secession of Quebec, para 138

⁶⁶ Friendly relations Declaration , Principle V, paragraph 7

⁶⁷ Simpson *Diffusion of Sovereignty*, p.613

⁶⁸ Simpson *Diffusion of Sovereignty*, p.615-616

⁶⁹ *Ibid* p. 614

chance of self-determination.”⁷⁰ According to him, secession might be a form of sanction for denial of granting internal right to self-determination. “Absolutist” approach towards the territorial integrity is also rejected by Buchanan who calls for “progressive” interpretation and asserts right to secession would be a remedy of last resort against those states that decline to act in accordance with international legal rules.⁷¹

Overall, as indicated above, outside the colonial context the notion of external right to self-determination comes into conflict with principle of territorial integrity. Even though, the latter principle has been conventionally thought to have a precedence over the right to self-determination, current developments in law and state practice indicate that, under specified circumstances of gross human rights violations and denial of internal self-determination right to seek a refuge outside the territorial boundaries of a given state.

⁷⁰ Murswiek: right to secession reconsidered, p. 38

⁷¹ Allen Buchanan, ‘Theories of Secession’, *Philosophy and Public Affairs* 26 no.1, 1997, p.50

5. Concluding Remarks

The aim of the present chapter was to outline the major aspects of the law on self-determination and to set out a framework for further analysis of the principle of remedial secession as being deduced from the right to external self-determination. The observance of the right to self-determination allows identification of three substantial stages of its development which have been separately addressed within the chapter.

First stage of development is traced back to the first part of the twentieth century within political perceptions of President Woodrow Wilson, incorporating the liberal idea of “let the people decide.” Despite its appeal the notion has remained as a political philosophy up until the proclamation of the principle within the United Nations Charter, which can mark the beginning of the subsequent stage of development of the concept.

Second stage of the self-determination concerns its decolonization aspect. Within ten years after the adoption of the UN Charter and inclusion of self-determination as an aim, the General Assembly initiated the procedures for ending colonialism. As a result of numerous resolutions directly referring to self-determination of “colonial people”, the principle has gradually transferred from political context into the “right” of colonial peoples.

Despite the fact that many have argued for limited interpretation of self-determination, confined within colonial borders, the post-cold war developments set the stage for renewed emphasis on self-determination, thus transforming it to the next stage of development. Inclusion of self-determination in two universally applicable human rights covenants indicates the establishment of the principle as a “right” which applies to “all peoples.”

As regards the beneficiaries of the right, the chapter emphasized the substantial difficulties faced by differential approaches towards the definition of “people” and specific challenges of delaminating border-line between “people” and “minorities”.

Lastly, while addressing the conflict between external self-determination and territorial integrity, the new shift towards “progressive” interpretation of the notion has been offered. Namely, the external self-determination expressed through a “remedial secession” which could be answer to the existing vacuum between on one hand customary norm of “territorial integrity” and on the other hand right of oppressed “people” to achieve external exercise of self-determination.

Chapter II. Status of remedial Secession under International law

Introduction

As outlined in the previous chapter the right to self-determination is one of the most fundamental norms of international law, which outside of the colonial context is primarily exercised internally. In contrast to the internal dimension, external self-determination causes great controversy among states, first of all because it naturally clashes with the established principles of sovereignty and territorial integrity of states that form part of international community, also fear of setting a disrupting precedents. Nevertheless, the theoretical background of “remedial secession” or “qualified right of secession” aims to provide *ultimumremedium* for those extreme circumstances, where the denial of the right to self-determination couples with serious injustices suffered by the people.⁷²

In order to deduct *lex lata* or *lex ferenda* status of remedial secession we must turn to the examination of existing sources of law. In this regard following chapter will be divided into two subsections, the first section will explore existing treaty law in search of an arguments for remedial secession, followed by the discussion of the existing state practice and legal commentaries. Since Kosovo’s declaration of independence is considered to be a turning point in the discussion, the following chapter will only analyze international law as it stood prior to the declaration; only after the theoretical framework is set Kosovo will be examined as a case of remedial secession and thus a potential legal precedent.

⁷²C. Ryngaert and C. Griffioen, ‘The relevance of the right to self-determination in Kosovo matter: in Partlian response to Agora Papaers,’ (2009) [Chinese Journal of International Law, Vol. 8, Issue 3, pp. 573-587, 2009](#) .

1. Remedial Secession and treaty law

A conventional law is one of the primary sources of international law, thus the search of a right of remedial secession should initiate exploring the two fundamental conventional documents incorporating right of “self-determination”: the United Nations Charter as well as two subsequent human rights covenants and their drafting history.

1.1 The United Nations Charter

The Dumbarton Oaks proposal which was the starting point for negotiations on the UN Charter did not include self-determination at all; it was added as part of “purposes” of the organization on the initiative of Soviet Union.⁷³ As a result, the principle enshrined in Articles 1 was proclaimed as the “*raison d’etre*” of the organization, and was repeated in Article 55 of the Charter.

The *travaux préparatoires* of the UN Charter points to an interesting discussion regarding the meaning of “equal right and self-determination.” As it was summarized by the special rapporteur:

“an essential element of the principle in question, is a free and genuine expression of the will of the peoples; and thus to avoid cases like those alleged by Germany and Italy, that the principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose.”⁷⁴

The number of states expressed criticism towards inclusion of people’s right to self-determination as basis for the friendly relations, however the amendments were rejected with the

⁷³James Summers, *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations*, (MartinusNijhoff Publishers: 2007) p.146

⁷⁴Umozurike Oji Umozurike, *Self-Determination in International Law*(Hamden CT: Archon Books 1972) p.46

argumentation that according to the paragraph 2 of the Article 1: “Equality of rights, therefore, extends in the Charter to states, nations and peoples.”⁷⁵ However, even those supporting broad interpretation seemed to limit the concept to national self-government, coupled with some states drastically opposing secession amounting it to an “international anarchy.”⁷⁶

The Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities summed up debate concerning secession and self-determination in a report stating following:

“The principle of equal rights and self-determination, as laid down in the *Charter of the United Nations*, does not grant an unlimited right of secession to populations living in the territory of an independent sovereign state, and such a right cannot be regarded as a provision of *lex lata*....The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories, and entities subjugated in violation of international law..”⁷⁷

Deriving from the abovementioned, one can conclude that it would be over-inclusive interpretation of the “self-determination” to directly deduct authorization of secession under the UN Charter. However, as suggested by Murswiek treaty interpretation cannot be limited only to *travaux préparatoires* but should include the subsequent practice.⁷⁸ Therefore, analysis of subsequent practice is needed to answer whether self-determination engages right to secession.

⁷⁵Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, (73, U.N. Doc. E/CN.4/sub/2/404/Rev.1) 1981, para 18

⁷⁶Summers, *Peoples and International law*, p. 151

⁷⁷ Special Rapporteur, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, p.10

⁷⁸ Dietrich Murswiek, ‘The Issue of a Right of Secession – Reconsidered’, in Christian Tomuschat ed., *Modern Law of Self-determination*, (Dordrecht: Nijhoff 1993), p.35

1.2 Common Article 1 of the ICCPR and ICESCR

The fundamental question to be asked within the scope of common article one is whether it entails right to unilateral secession. In this respect, since the textual interpretation cannot provide sufficient clarity reference could be made to *travaux preparatoire* of the Covenants raising discussion on two substantial issues.

First of all, during the drafting process states directly addressed issue of secession. For example, New Zealand argued that: "if self-determination was intended to be recognized as a right, the right should be commensurate with the principle and should include the right of secession."⁷⁹ The similar positions were voiced by Australia, the Netherlands and United Kingdom. The latter states believed that Article 1(1) of the covenants "confers the right of self-determination on 'all peoples,' and makes no distinction between colonial peoples and ethnic minorities within a state."⁸⁰

Even though, none of the formulations were adopted the initial drafts included "establishment of new state", "choosing form of government" or "seceding from a state".⁸¹ Clearly, abovementioned indicate that some states did express the support for secession; however, it was put in broadest and general terms, without any direct referral to the "right of secession." At the same time it could be argued that the member states did not intend to prohibit secession either. .⁸²

⁷⁹New Zealand: U.N. GAOR 3d Comm. 10th Sess. 649th mtg., Agenda Item 28, 19, U.N. Doc.

A/C.3/SR.649 (1955).

⁸⁰As cited in Pius L. Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law', (2002), 25 *Loy. L.A. Int'l & Comp. L. Rev.* 63, p. 84, 2002

⁸¹ M.J. Bossuyt, *Guide to the "TravauxPreparatoires" of the International Covenant on Civil and Political Rights*, (MartinusNijhoff Publishers, Dordrecht 1987), p.34

⁸²*Id* at pp.34-37

Secondly, the states debated whether “all people” implies in the covenants right of ethnic or minority groups or addressed all the people of a state as such. The proper definition essentially changes the results one could deduct from self-determination, since if “people” are to be defined broadly including “minorities” or ‘ethnic groups”, their political status determination might also lead to remedial secession. However drafting history could not allow for such over-inclusive interpretation simply due to non-agreement of the states it was established that “peoples” have to be interpreted in a “most general sense and that no definition was necessary.”⁸³

Additionally, respective covenants established two monitoring bodies Human Rights Committee and Committee on Economic, Social and Cultural Rights entrusted with functions of receiving state reports as well as producing general comments on provisions of the covenants.⁸⁴ Nevertheless, even the two committees were unable to provide more clarity. The general comments did not produce sufficient analysis of the principle, committee only drew “a distinction between the right to self-determination and the rights protected under article 27”⁸⁵ Nevertheless, committee in cases: *J.G. A. Diergaardt v. Namibia* and *Mahuika v. New Zealand* admitted relevance of Article 1 by stating following: “the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27”.⁸⁶ Thus, the above statement might suggest that committee does not exclude possibility of minorities qualifying as people.⁸⁷

⁸³*Id* at p.32

⁸⁴Articles: 40 of ICCPR and Article 16 of ICESCR

⁸⁵Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27) : 04/08/1994, CCPR/C/21/Rev.1/Add.5, para.3.1

⁸⁶*J.G. A. Diergaardt v. Namibia*, (Communication No. 760/1997), CCPR/C/69/D/760/1997, para.10.3; *ApiranaMahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000), para.9.2.

⁸⁷Summers, *Peoples and International Law*, supra note 14, at p. 174

Deriving from abovementioned, it can be concluded that international treaty law provides little if any support to the alleged existence of the right to unilateral (remedial) secession. Even though, the existent discussions indicate that secession never ceased to be important while elaborating self-determination, it would still be far stretched argument to claim that remedial secession is detected within the treaties explored above.

2. Remedial Secession rule of Customary International law?

The international treaty law does not create a binding rule of remedial secession, in fact it is even arguable whether parties as such had an intention to interpret self-determination so far as to involve the right of a territorial unit to unilaterally secede. Nevertheless, provided that there is nothing to suggest implicit or explicit prohibition of such occurrence, the room for further observance remains open.

International custom as enshrined in Article 38 (1) b is used as: “the evidence of a general practice accepted as law.”⁸⁸ The customary law unlike other sources of international law has several interesting features. First of all, custom creates higher threshold of compliance by its binding nature, even upon the parties not being member of a particular international treaty. Secondly, custom can clarify or elaborate certain rules that are included in treaty provisions.⁸⁹ Most importantly, custom can initiate or contribute development of particular international rule.⁹⁰

In order to support or oppose the customary nature of remedial secession, two conventional elements of international custom must be explored *id est* state practice (objective element) and

⁸⁸ Statute of the International Court of Justice, 18 April 1946.

⁸⁹ Malcolm D. Evans, *International Law*, Second ed. (Oxford: Oxford University Press, 2006) pp.121-122

⁹⁰ Theodor Meron, *The Humanization of International Law*, (Leiden/Boston MartinusNijhoff Publishers 2006) pp.357-358

opinion juris(subjective element).⁹¹ . According to the narrow interpretation of the concept the state practice is created by actions or omissions of state (physical acts).⁹² More inclusive interpretation suggests that state practice is not only limited to what states do, but extends to public verbal acts as well.⁹³

Nevertheless, the general search for state practice extends to assessment of judicial decisions,⁹⁴ diplomatic correspondence, national legislations, decisions of national courts, reactions on discussions at international organizations.⁹⁵ Even though manifestation of state practice needs sets uniformity,⁹⁶ extensiveness and time requirement,⁹⁷ the components are not axiomatic, since even passage of short time can be considered satisfactory, or instead of universal “general acceptance” deemed sufficient.⁹⁸

The subjective element or *opinion juris* refers to the states internal belief that the conduct at hand is legally obligatory.⁹⁹The latter element of custom can be deducted from official statements made by the “agents” of the State, the statements made at national as well as international level, governmental positions concerning treaties or resolutions or the reasoning used in national judgments.¹⁰⁰ Additionally, verbally expressed statements can simultaneously satisfy criteria for state practice and *opinion juris*, making it complicated to “disentangle the two

⁹¹ I. Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 2008) p.6

⁹²Anthony A. D’Amato, *The Concept of Custom in International Law*,(London: Cornell University Press, 1971) p. 89-90

⁹³Maurice H. Mendelson, ‘The Formation of Customary International Law’ 272 *Collected Courses of the Hague Academy of International Law (Recueil Des Cours)* 155, 1998, p. 204

⁹⁴International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ICJ reports 1986, para.190

⁹⁵Brownlie, *Principles of Public International Law*, p. 6-7

⁹⁶ International Court of Justice, *North Sea Continental Shelf(Federal republic of Germany /Denmark; federal republic of Germany v. Netherlands)*, Judgement, ICJ reports1969, para.74

⁹⁷ Mendelson, ‘The Formation of Customary International Law’, p. 209

⁹⁸ ICJ, *North Sea Continental Shelf*, para.74

⁹⁹ Shaw, *International Law*,p.70-80; Brownlie, *Principles of Public International Law*, p.6

¹⁰⁰Brownlie, *Principles of International law*, p. 7

elements.”¹⁰¹ Thus, it might be the case that no separate proof of *opinion juris* might be required if strong state practice exists or when the state practice is inconsistent subjective element might provide guidance on issue.¹⁰²

The contemporary developments in the international scholarly works suggest the shift or greater support for existence of *opinion juris* rather than state practice.¹⁰³ The proponents for the renewed approach frequently cite *Nicaragua case*, whereby, court stressed the importance of *opinion juris*, over inconsistency of state practice.¹⁰⁴ The latter approach is particularly relevant for the remedial secession, since opponents of the notion frequently refer to the inconsistent state practice as the indication of only theoretical relevance of the doctrine.

The following sections will analyze existent evidence from the contemporary point of view *id est*: without separately addressing state practice and *opinion juris* trying to locate strong support for remedial secession. As stated above, the examination of customary character of remedial secession will be divided within two important timelines, present chapter exploring practice that existed before Kosovo’s unilateral declaration and subsequent chapter dedicated to facts and legal analysis of post Kosovo state of International law.

2.1 Judicial Decisions as Evidence of State Practice

Even though Judicial decisions as such constitute a separate source of International law as envisaged under Article 38(1) d, for current purposes, the decisions could also serve a proof of an existing or shaping state practice regarding secession. Moreover, decisions expressed at

¹⁰¹ International Law Association, Committee on Formation of Customary International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, (London Conference, 2000) p.7

¹⁰² M. Dixon, *Textbook on International Law*, 6th ed. (Oxford: Oxford University Press, 2007) p. 35

¹⁰³ Meron, *The Humanization of International Law*, p.369; B. D. Leppard, *Customary International Law. A new Theory with Practical Applications*, (Cambridge: Cambridge University Press, 2010) p. 97-98

¹⁰⁴ ICJ, *Nicaragua case*, para. 184-186

regional or international level also provide relevant content on how does international community evaluate the concept of “remedial secession.” As noted by the International law commission “record of cumulative practice of such organizations may be regarded as evidence of customary international law.”¹⁰⁵

2.1.1 Aaland Islands Case

The *Aaland Islands* case concerned the dispute between Finland and Sweden over the archipelago largely inhabited by Swedish. In 1919, after the Finland declared its independent from Russian Empire, the plebiscite was held resulting in overwhelming majority of the Islands (96 per cent) supporting Swedish reunification. The proposals were rejected by Finland and leaders of separatist movement arrested, subsequently Great Britain intervened and brought the case before the League of Nations.¹⁰⁶

The two expert bodies created to give an advisory opinion gave similar assessment of right to self-determination and minority issues. Both concluded that the self-determination at that time did not form part of legal right under international law and that: “it was a principle of justice and of liberty, expressed by a vague and general formula which has given rise to most varied interpretations and differences of opinion.”¹⁰⁷

The Rapporteurs explicitly clarified that minorities could not secede by simply referring to their “wish” or “good pleasure, “which would lead to an establishment of “anarchy” within international community.¹⁰⁸ Regardless, Committee did express its awareness of minority

¹⁰⁵ Report of International law commission (ILC) : Ways and means for making the evidence of customary international law readily available, yearbook of the ILC, Volume 2, 1950

¹⁰⁶Summers: *Peoples and International Law*, p.279

¹⁰⁷Report of the International Committee of Rapporteurs, 16 April, 1921, LN Council Document B7/2I/68/106 [VII], para. 27

¹⁰⁸*Ibid* at paras.27-28

oppression, by establishing the possibility of secession. The report clarified that separation could be an option: “when the state lacks either the will or the power to enact and apply just and effective guarantees.”¹⁰⁹

Since the oppression was not established Autonomous settlement was suggested. The settlement was guaranteed by caveat, noting that in the case of failure from Finland to comply with the settlement provisions the interest of Aalanders would force committee to: “advise the separation of the islands from Finland, based on wishes of the inhabitants.”¹¹⁰

Overall, the Commission of Jurists and the Committee of Rapporteurs came to an agreement regarding the possibilities of secession, clarifying that the extreme oppression of sub-groups could lead to separation. The advisory opinion, even though denies value of legal concept of self-determination, closely resembles to what has since evolved as the doctrine of “remedial secession.” Therefore arguably, the opinion presents important state practice for the sake of assessment of remedial secession.

2.1.2 Secession of Quebec

The Canadian Supreme Court decision on case Reference re Secession of Quebec could also be viewed as a substantial source from which one could deduct a state practice. It is noteworthy, that the decision does not only endorse the assessment of post-colonial self-determination by a national court but also almost all noted international expert was invited to submit a written opinion and briefs on the case.

¹⁰⁹ *Ibid*, at para.28

¹¹⁰ *Ibid* para 32

The case before the Supreme Court concerns the alleged right of secession by Canadian region of Quebec, which is largely inhabited by French population, with a distinct language and culture. Three hypothetical questions were presented to the Court, however only the second question directly falls within the scope of current discussion, which was formulated as follows:

“Does international law give the National Assembly, legislature of government of Quebec the right to effect secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?”¹¹¹

While the Supreme Court findings have relevance for the doctrine of remedial secession, submitted legal opinions of international law scholars also provide additional ground for deeper observation and analysis and for this purpose will be separately addressed below.

a) *Legal Commentaries and Opinions*

As according to Malcolm n. Shaw, the principle of territorial integrity lies at the “heart” of international system. However, it is also cognizable that the obligation applies only to states and not to individuals or groups living within a certain state. Therefore, as the matter of law secession is neither recognized nor prohibited under international system and is absolutely neutral towards it.¹¹²

Moreover, while analyzing exceptional situations, Shaw refers to *a contrario* reading of Friendly Relation Declarations as indirect and subordinate, lacking substantial power to change existing legal order which does not allow for secession. Nevertheless, Shaw also admits that in

¹¹¹ Supreme Court of Canada, *Reference re Secession of Quebec*, 1998, 2 S.C.R.217

¹¹² Anne, F. Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned*, (The Hague, Kluwer International Law, 2000) p.135-136

the light of “truly exceptional” situations claim of secession may be made.¹¹³ As for the precise definition of the exceptional situation Shaw cites the characteristics provided by Cassese: “extreme and unremitting persecution and the lack of any reasonable prospect for peaceful challenge.”¹¹⁴

The report of professor George Ali-Saab gives a positive answer to the second question of the referral arguing that Quebec does have right to effect secession. The scholar is convinced that secession does not violate territorial integrity since the latter does not apply to individuals or groups. At the same time, prohibition of use of force is not violated unless third parties intervene or secession struggles are controlled or carried out by foreign elements. Therefore, the scholar concludes that international law recognizes an “effective state, independently of the process by which it came into existence”¹¹⁵

Thomas M. Franck in his report draws a fundamental distinction on the terminology. For him, the term “right” is not correctly applied with secession, since right also “implies legally enforceable entitlement”, he views secession more as a privilege. He goes further to claim that while the right of secession under international law might not exist, the latter “does not prohibit and thus permit secession.”¹¹⁶ Furthermore, the privilege is accumulated into a right, whenever the guarantees for proper realization of self-determination at local level are denied.

On the contrary, James Crawford in his submission denies existence of right to unilateral secession. First, Crawford makes a clear distinction between processes of dissolution that is not to be mistaken with unilateral secession. Secondly, through examining contemporary state

¹¹³ Ibid at p.138

¹¹⁴ Ibid

¹¹⁵ Ibid at p. 72-74

¹¹⁶ Ibid at p. 78-9

practice, he concludes that the right to unilateral secession is non-existent. Interestingly enough, Crawford's analysis of state practice also engages into discussions about Kosovo,¹¹⁷ which at that time was not recognized by any states. The latter fact, together with the analysis of Bangladesh, Republika Srpska, Chechnya and others leads Crawford to conclude that "there is a strong reluctance to support unilateral secession or separation" within international community.¹¹⁸

Overall, there seems to be an agreement among international scholars concerning neutrality of international law to regulate the issues relating to secession. However, there is a distinction on how scholars interpret neutrality. For example while for Franck agrees that Quebec could exercise privilege of secession, since it is not prohibited by international law, Crawford strongly disagrees with a proposition that non-prohibition can be interpreted as allowance of secession.

b) Supreme Court Decision

The Supreme Court of Canada while answering the second question, engaged into analysis of self-determination and its correlation with principles of secession and territorial integrity. At the outset, the Court attached great value to principle of self-determination, also adding emphasis on internal dimension of a right. The latter position according to the court is capable of accommodating safeguards for territorial integrity and stability of international relations among States.¹¹⁹

Nevertheless, the Court did raise the issues related to external aspect of self-determination which in "the most extreme of cases" might include right to secede. While the two

¹¹⁷ Ibid at p.54

¹¹⁸ Ibid at p. 60

¹¹⁹ Reference re Secession of Quebec, paras 126-127

grounds for external self-determination that is: colonial context and “alien subjugation,” were accepted by the court as undisputed, the third circumstance also fell into the courts attention. In this respect the court stated:

“Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession”¹²⁰

The above paragraph appears to indicate the courts acknowledgement of the existence of remedial secession, however following the recognition, the Court continued that “it remains unclear whether this third proposition actually reflects an established international law standard”, thus diminishing the value the paragraph could have had on the status of the principle. Moreover Jure Vidmar remarked, the comment made by the Court on remedial secession did not engage subject-matter at hand, it was not necessary for the decision, and thus is not binding.¹²¹

Overall, the decisions analyzed above indicate that there is a certain practice within national and international systems, whereby right to unilateral secession is acknowledged, however in order to meet the requirement of customary international law, mere mention or indirect referral is not enough. Thus, the practice could only be engaged in order to prove that the concept of remedial or qualified right to secession is not a novelty, but the ideas date back as early as Aasland Islands case and further acknowledged in subsequent decisions.

¹²⁰ Ibid para. 134

¹²¹ Jure Vidmar, ‘Remedial Secession in International Law: Theory and (Lack of) Practice’, (2010) St Anthony’s International Review 37, p. 38-39

2.2 Declaration on Friendly Relations and *opinion juris*

The adoption of the Declaration on friendly relations in 1970 marked yet another step in the development of the principle of self-determination.¹²² The declaration is essential due to several reasons. First of all, it elaborates on already existing legal principles derived from the UN Charter and is commonly viewed as “the most authoritative expression of the scope and meaning of the basic principles of international law.”¹²³ Secondly, unanimous adoption of the declaration arguably constitutes expression of *opinion juris* by states and is even classified as example of an “instant custom” by some scholars.¹²⁴

In this respect, paragraph 7 of the Principle V is of particular relevance for the present discussions, since it is considered to entail one of the strongest supports for the concept of remedial secession.¹²⁵ The provision guarantees territorial integrity for:

“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”¹²⁶

¹²² Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/8018 (1970)

¹²³ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ reports 1986, p.14 at paras. 188, 191

¹²⁴ Christine Griffioen, *Self-determination as a Human Right: The Emergency Exist of remedial Secession*, (Utrecht : Science Shop of Law, Economics and Governance, Utrecht University, 2010),p. 104; Frederic Kirgis, ‘The Degrees of Self-Determination in the United Nations Era’, 88 *American Journal of International Law*, 304, 1994 p. 306

¹²⁵ Cassese, *Self-determination of Peoples*, p. 118; Karen Knoop, *Diversity and Self-determination in International Law*,(hereinafter: Knoop: *Diversity and Self-Determination*) (Cambridge Studies in International and Comparative Law, 2008) pp. 74-77

¹²⁶ Friendly relations Declaration, Principle V, paragraph 7

If read *a contrario*, the part suggest that if state is not representative and fails to protect equal rights and self-determination, than the protection shield of territorial integrity is broken.¹²⁷ Even though, the paragraph, its object and precise meaning is still subject to a great debate among international law scholars, the referral to drafting history might shed some light into the dispute.

2.2.1 Drafting History and *Opinio Juris*

In 1963 the Special Committee on the instructions of general Assembly started working on formulation of seven legal principles for friendly relations, in compliance with the charter of the United Nations. The principle of self-determination was one point over which the consensus was hardest to reach, eventually leading to adoption of a “compromise version”.¹²⁸

The formulation of paragraph seven first appeared in the draft submission of the United States which provided as follows:

“The exercise of a sovereign and independent State possessing representative Government, effectively functioning as such to all distinct peoples within its territory is presumed to satisfy the principle of equal rights and self-determination as regards those people.”¹²⁹

The formulation of the text was later repeated in British draft, however, the British representative made it clear that the proposal did not “intend to encourage secession.”¹³⁰ The reaction that the drafts received from states was mixed, ranging from ones considering it as imposition of “political persuasions”,¹³¹ to Australia welcoming the text as balanced approach to

¹²⁷ John Dugard and David Raic, ‘The role of recognition in the law and practice of secession’, in M.G. Kohen (ed.), *Secession International Law Perspectives*, (Cambridge: Cambridge University Press 2006), pp. 103-104

¹²⁸ UK, A/AC.125/SR.114(1970) p.73 as cited in Summers, *Peoples and International Law*, p.215

¹²⁹ US, (A/AC.125/L.32),21 GAOR (1996), Annexes III, Agenda Item 87, (A/6230) para.459, as cited in Summers, *Peoples and International Law*, p.218

¹³⁰ UK, A/C.125/SR.69(1967)p.19, as cited in Summers, *Peoples and International Law*, p.218

¹³¹ Burma A/AC.125.SR68(1967)p.9, as cited in Summers, *Peoples and International Law*, p.219

self-determination¹³² and the Netherlands not excluding the possibility of secession if people were “being fundamentally discriminated against” within a state.¹³³ The amended formulation adopted the US and UK views of representative government, however added safeguards for territorial integrity within the text.¹³⁴

Thus, the consensus reached with respect to paragraph seven seemed to allocate interest of the main players. On the one hand, western approach to equate representative government with self-determination was safeguarded, and on the other hand, for the third world states the paragraph meant support for their fight against white minority rule.¹³⁵

In conclusion, as the drafting history indicates states even though quite cautious about the secessionist attempts, laid down criteria which could make principle of territorial integrity rebuttable notion. It would be exaggeration to claim that *opinion juris* supporting remedial secession was created with the adoption of the Friendly relations declaration. However, the ideas expressed by the states supports the claim that territorial integrity is not an absolute principle. The latter, is the strongest argument for the right to remedial secession analyzed so far, however still incapable of proving existence of customary rule to unilateral secession.

¹³² Australia, A/AC.125/SR.107(1969) p.75 as cited in Summers, *Peoples and International Law*, p.219

¹³³ Netherlands, A/AC.125/SR.107 (1969), p.85 Summers, *Peoples and International Law*, p.219

¹³⁴ Italy, A/AC.125/L.80,25 GOAR(1970), Supplement No.18 (A/8018), para 63, cited in Summers, *Peoples and International Law*, p. 220

¹³⁵ Summers, *Peoples and International Law*, p.221

3. Concluding Remarks

The current chapter intended to explore remedial secession within the scope of sources of international law and deduct its existence or traces of support in treaty and customary law. At the outset, the exploration of treaty basis of remedial secession led to conclusion that the principle cannot be assumed to constitute a treaty law. Namely, referral to “self-determination” within the UN Charter and human rights covenant is ambiguous and considering the time and events that led up to their adoption seems highly unlikely that states at that time intended to include secession as exceptional measure.

However, the exploration of customary basis of remedial secession as referred in domestic and regional case law does not exclude possibility of the existence of such right within very limited exceptional circumstances. Moreover, the referral to the drafting history of Friendly Relations Declaration indicates that states being aware of territorial integrity still made it subject to certain limitations that are existence of “representative government” and prohibition of “discrimination.”

Thus, answering the main question raised in the chapter, the status of remedial secession at the current stage supports allegation that it is “*lex ferenda*” and note yet formulated as “hard law.” However, events leading up to declaration of independence of Kosovo and subsequent recognitions and opinions expressed by states allegedly creates another ground to re-assess the status of remedial secession as it stands nowadays. Thus, the subsequent chapter will explore if Kosovo served as a precedent of remedial secession and what possible changes it might have caused for the right to remedial secession.

Chapter III. Remedial Secession and case of Kosovo

Introduction

On 17 February, 2008 Kosovo declared independence from Serbia by issuing a unilateral declaration of independence. Subsequent developments led the General Assembly to request an advisory opinion from the International Court of Justice. The question, as well as the opinion itself caused a great controversy and partial disappointment in scholars, hoping to obtain clarification from the ICJ on the principle of remedial secession. Regardless of its outcome, the entire process of Kosovo's emergence as an independent state recognized by 105 UN member states is essential.¹³⁶

The concept of remedial secession was controversial as it lacked substantial practice. The events leading up and surrounding Kosovo's unilateral declaration of independence opened a ground for new debates, concerning the precedential value of secession. If proved that the Kosovo is an "authoritative precedent" it can be concluded that it was capable of creating the change within customary international law.¹³⁷ Reliance on novel right is capable of modifying customary international law, provided that the principle is shared by another states.¹³⁸

Thus, the primary question raised in the chapter will be whether Kosovo is a legal precedent capable of modifying existing customary international law? In this respect particular focus will be on the state submission to the ICJ regarding Kosovo's declaration of independence. However, in order to have comprehensive outlook on the events occurring prior and after Kosovo's

¹³⁶ Who recognized Kosovo as an Independent state? Available at: <http://www.kosovothankyou.com/>

¹³⁷ Ioanna Cismas, 'Secession in Theory and Practise: The case of Kosovo and Beyond', *Goettingen Journal of International Law* 2(2010) 2, 531-587, p. 536

¹³⁸ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, ICJ reports 1986, para.109

declaration, the relevant part of the chapter will be dedicated to providing historical and legal context of the conflict.

1. Historical Background of the conflict in Kosovo

Determining historical truth of the conflict in Kosovo, is almost an utopian idea, since the parties to the conflict always have their side of historical truth radically different from each other. However, it would definitely go beyond the scope of our observations to engage into historical argumentations, therefore the chapter will only attempt to provide brief historical context that later played a role for the number of states to recognize Kosovo either as “*sui generis*” case or simply because they were convinced of existence of remedial secession.

In this regard, the starting point of the historians while reporting the timeline of events in Kosovo goes back as early as 1389, when the Serbian army was defeated by Ottoman Turks, who eventually took control of the territory.¹³⁹ At the same time Albanians view Kosovo as the source of their nationalism, where the League of Prizren was created to defend Albania and achieve autonomy within Ottoman Empire.¹⁴⁰

After the World War II, the Kingdom of Serbs, Croats and Slovenes was reconstructed into a socialist state, led by Josip Broz Tito, who proclaimed resistance against Nazism as an uniting elements of nations and nationalities.¹⁴¹ At the initial stage 1946 Yugoslav constitution established Kosovo as Autonomous Region within Serbia.¹⁴² However, in 1964 the status was

¹³⁹ Noel Malcolm, *Kosovo: A Short History* (London: MacMillan, 1998) p.196

¹⁴⁰ Miranda Vickers, *The Albanians: A Modern History* (I.B.Tauris, 1995) p. 30-31

¹⁴¹ James Summers ‘Kosovo: From Yugoslav Province to Disputed Independence’, in James Summers (ed) *Kosovo: A Precedent?: The Declaration of Independence, the Advisory Opinion, and Implications for Statehood, Self-Determination and Minority Rights*, (Martinus Nijhoff 2011) p.5

¹⁴² *Ibid* at p. 6

upgraded into an Autonomous Province, allowing later to establish legislative and judicial authority and representation in the federal parliament.

In response to ethnic tensions rising in Kosovo Albanians several other amendments were introduced which culminated into 1974 constitution, granting Kosovo the same rights as to other six republics, including administrative and economic powers.¹⁴³ However the crucial difference among republics and autonomous provinces lied in the clarification of the republics as “nations” capable of possibly exercising secession while “nationalities” did not enjoy the similar right.¹⁴⁴

After Tito’s death in 1980s the Albanians dissatisfaction with their status grew, finally culminated into open demands for Kosovo republic within Yugoslavia.¹⁴⁵ At the same time Serbs were claiming sufferings even amounting to: “physical, political, legal and cultural genocide.”¹⁴⁶ Meanwhile, Tito’s regime was replaced by Slobodan Milošević, gaining support through his mass mobilizing slogans demanding end of autonomous provinces within Serbia.¹⁴⁷ In 1989 Serbian Parliament introduced amendments to Serbian Constitution abolishing federal status of Kosovo and Vojvodina.¹⁴⁸ In response Kosovo held “underground referendum” and subsequently declared its independence on 22 September 1991.¹⁴⁹

¹⁴³ Ioanna Cismas, ‘Secession in Theory and Practise: The case of Kosovo and Beyond’, *Goettingen Journal of International Law* 2(2010) 2, p.557

¹⁴⁴ Sabrina P. Ramet, *Nationalism and Federalism in Yugoslavia, 1962-1991* (Bloomington:Indiana University Press, 1992) p. 20

¹⁴⁵ Malcolm, *Kosovo a Short History*, at p. 334-335

¹⁴⁶ Memorandum of the Serbian Academy of Scinces and Arts, 1986, available at: http://www.trepca.net/english/2006/serbian_memorandum_1986/serbia_memorandum_1986.html (last visited on 23 October 2013)

¹⁴⁷ Marc Weller ‘The Crisis in Kosovo 1989-1999’ (1999) *Centre of International Studies University of Cambridge International Documents and Analysis*, p.25

¹⁴⁸ *Ibid* at pp. 47-48

¹⁴⁹ Heike Krieger ‘The Kosovo Conflict and International Law: An analytical Documentation 1974-1999’ (2001) *Cambridge International Document Series 11*, xxxi, p. 2

Subsequent to the declaration a shadow government was established by the Democratic League of Kosovo (DLK) under the leadership of Ibrahim Rugova. The government was declared illegal by Serbia and the Arbitration Commission of the Conference on Yugoslavia did not consider Kosovo's request, since it only dealt with entities having republic status within SFRY.¹⁵⁰

As for the human rights situation, report of Human Rights Watch regarding the situation on 1990-1992 notes that: "Serbian government has blatantly and systematically violated the most basic tenets set forth in international human rights documents."¹⁵¹ The latter abuses led to creation of Kosovo Liberation Army (KLA), claiming responsibility for series of bomb attacks to achieve their goal.¹⁵² In March 1998 an armed rebellion was initiated in Kosovo, resulting in large areas of Kosovo becoming controlled by KLA. The Security Council responded to the situation by passing resolution 1169, condemning KLA as terrorist organization at the same time calling Yugoslav government to negotiate greater autonomy and meaningful self-administration for Kosovo.¹⁵³

Serbia responded to KLA acts by engaging into a swift counterattack, taking control over the territories at the same time Albanian civilians became primary casualties. Shortly after the counterattack estimated numbers of 200,000 ethnic Albanians were displaced.¹⁵⁴ Security

¹⁵⁰ Bartram S Brown 'Human Rights, Sovereignty, and the Final Status of Kosovo' (2005) 80 *Chicago-Kent Law Review* 235, p. 264

¹⁵¹ Human Rights Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992*, 1 October, 1992 available at: <http://www.hrw.org/legacy/reports/1992/yugoslavia/> (last visited on 23 October, 2013)

¹⁵² Ioanna Cismas, 'Secession in Theory and Practise: The case of Kosovo and Beyond', *Goettingen Journal of International Law* 2(2010) 2,

¹⁵³ Security Council Res. 1160, UN Doc. S/RES/1160 (31 March 1998) paras 3-5

¹⁵⁴ Tim Judah, *Kosovo: War and Revenge*, (New Haven: Yale University Press, 2000) p. 140-172

Council in response adopted number of resolutions calling for initiation of peaceful negotiations and ceasing armed confrontations.¹⁵⁵

Simultaneously the Contact Group representing the US, EU and Russia initiated the Rambouillet talks to achieve framework agreement among parties. While representatives of Kosovo signed an agreement on 18 March 1999, FRY refused to engage in it, meanwhile allegedly continuing ethnic cleansing of Albanians in Kosovo.¹⁵⁶ The latter resulted in NATO intervention in the conflict.

1.1 NATO involvement in Kosovo

NATO engaged in Operation Allied Force on 24 March 1999, after the failed attempts to break a peace agreement between parties. The official reasoning provided referred to: “the massive humanitarian catastrophe.”¹⁵⁷ The action was not authorized by the Security Council as enshrined in the UN Charter.¹⁵⁸ Given the absolute nature of prohibition of use of force within charter, the latter intervention still raises serious questions as to its legality.¹⁵⁹ Even though it clearly would go beyond the scope of current thesis to evaluate the legality of intervention in this conflict, one could raise question of whether if considered illegal the intervention can be interpreted as support toward secessionist movement by the member states of NATO.

¹⁵⁵ SC Res. 1199, UN Doc. S/RES/1199 (23 September 1998); SC Res. 1203, UN Doc. S/RES/1203 (24 October 1998)

¹⁵⁶ Alex J. Bellamy, *Kosovo and International Society* (Palgrave MacMillan, 2002) p. 120-155

¹⁵⁷ Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, ‘The Situation in and Around Kosovo’, 12 April 1999, para.2, available at: <http://www.nato.int/docu/pr/1999/p99-051e.htm> (last visited 23 October 2013)

¹⁵⁸ Bruno Simma, ‘NATO, the UN and the Use of Force : Legal Aspects,’ *European Journal of International Law* 10, 1999, p.18-22

¹⁵⁹ Thomas M. Franck, ‘Lessons of Kosovo’, *American Journal of International Law* 93, 1999, p.857-860; N.D. White, ‘The Legality of Bombing in the Name of Humanity’, *Journal of Conflict and Security Law* 5, 2000, pps 27-43

The intervention also left Security Council divided with some states arguing legality of the actions as an “exceptional measure to prevent an overwhelming humanitarian catastrophe,”¹⁶⁰ to some states explicitly condemning it as a violation of the UN Charter.¹⁶¹

1.2 International Administration in Kosovo

Kosovo conflict terminated with a peace agreement signed on 3 June 1999 and subsequent Security Council Resolution 1244 adopted on 10 June 1999.¹⁶² The resolution authorized the “international security presence’ in the region, with substantial NATO force participation under the UN mandate and unified command structure.¹⁶³ The security force was charged with duty to monitor demilitarization of KLA and withdrawal of Yugoslav military,¹⁶⁴ as well as securing environment for the return of refugees, delivery of humanitarian aid ensuring freedom of movement and secure civil presence in Kosovo.¹⁶⁵

In addition to security presence, the resolution also created the United Nations Mission in Kosovo (UNMIK) to provide interim administration “pending a final settlement, of substantial autonomy and self-government.”¹⁶⁶ The primary goal of UNMIK included at the initial stage providing institution-building and subsequently oversee and transfer authority from interim administration to “institutions established under political settlement.”¹⁶⁷ Secondly, it had a task to facilitate “political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords.”¹⁶⁸

¹⁶⁰ Summers ‘Kosovo: From Yugoslav Province to Disputed Independence’ p. 20

¹⁶¹ Russia, UN Doc. S/PV.3988, 23 March 1999

¹⁶² SC Res. 1244, UN Doc. S/Res/1244 (10 June 1999).

¹⁶³ Ibid at paras 7-9

¹⁶⁴ Ibidt at paras. 9 (d) and 9(e)

¹⁶⁵ Ibid at Paras 9(c),(g), (h).

¹⁶⁶ Ibid at Para 11(a)

¹⁶⁷ SC. Res.1244, para 11(f)

¹⁶⁸ Ibid at para. 11(3)

Regardless of overwhelming international presence and UNMIK efforts, the mission could not prevent ethnic tensions, which escalated in 2004, when ethnically motivated riots ended with the death of 19 people (11 Albanians and 8 Serbs), destruction of Serbian houses and orthodox churches.¹⁶⁹ Shortly after the incident the conclusions of Secretary-General appointed Rapporteur Kai Eide suggested gradual “exit strategy” for the UN forces and commencement of final status determination.¹⁷⁰

In 2007, another Secretary-General appointed Rapporteur Martti Ahtisaari presented before the Security Council the recommendation for Kosovo’s final status, which envisaged “independence, supervised by the international community.”¹⁷¹ The three substantial reasons for the given conclusion were outlined as follows: “history of enmity and mistrust”, followed by policies of oppression and discrimination of the Milošević regime;¹⁷² the reality that Serbia has not exercised any “governing authority” over Kosovo for the past eight years;¹⁷³ “overwhelming majority of the people of Kosovo” will not accept Serbian rule.¹⁷⁴ While the latter reasoning, closely related to the concept of “remedial secession”, Ahtisaari also refers to Kosovo as” a unique case that demand a unique solution”, further it notes that the proposal does not intend to “create a precedent for other unresolved conflicts.”¹⁷⁵

Regardless, of its “uniqueness” the proposed recommendations were not adopted by the Security Council rather with substantial efforts from Russian Federation ground for new

¹⁶⁹ Human Rights Watch, ‘Failure to protect: Anti-Minority Violence in Kosovo’, March 2004’ July 2004, p.16

¹⁷⁰ Kai Eide, Report on the Situation in Kosovo, UN Doc. S/2004/932, 30 November 2004, paras. 12-13; A comprehensive Review of the Situation in Kosovo, UN Doc. S/2005/635, 7 October 2005, para.62

¹⁷¹ Report of the Special Envoy of the Secretary-general on Kosovo’s future Status, S/2007/167, 26 March 2007, p.2

¹⁷² Ibid at para.6

¹⁷³ Ibid at para.7

¹⁷⁴ Ibid at para.7

¹⁷⁵ Ibid at para.15

negotiations was created. However, in 2007 after four months of intensive negotiations the troika (consisting of Russia, the US and EU) reported failure of the process.

Subsequently, Kosovo Assembly unilaterally declared Independence.¹⁷⁶ Interestingly enough the text of declaration did not directly refer to the principle of self-determination rather it only reflected the “will of people”.¹⁷⁷ It also proclaimed Kosovo as the “special case” not creating a precedent.¹⁷⁸

2. ICJ Advisory Opinion on Kosovo

The declaration of independence by Kosovo caused widespread recognition worldwide; including from the states of EU and the US, on the other hand Serbia considered declaration illegal and furthermore aimed to declare its inconsistency with international law by initiating advisory opinion proceedings through the General Assembly. The question submitted to the ICJ was formulated as follows:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”¹⁷⁹

In a great disappointment for many international law scholars and states, the ICJ decided to find a way around the issues of self-determination and remedial secession, by strictly limiting the scope of submitted question and providing its observations only on “whether or not the

¹⁷⁶ Full text of Kosovo Declaration of Independence, 17 February, 2008 available at: <http://news.bbc.co.uk/2/hi/europe/7249677.stm>

¹⁷⁷ Ibid at Article 1 of the Declaration

¹⁷⁸ Ibid at Preamble of the Declaration

¹⁷⁹ UN G.A. Resolution A/RES/63/3, 8 October 2008

declaration of independence is in accordance with international law”, without any value attached to the legal consequences of such action.¹⁸⁰

Nevertheless, the court did address several issues which have relevance for the remedial secession. First of all, answering the allegations of the UN member states the court denied that the illegality of unilateral declarations implicitly stemmed from territorial integrity of states.¹⁸¹ In this respect it confined the application of the principle of territorial integrity “to the sphere of relations between states.”¹⁸² While, the interpretation of principle provided by the ICJ does not explicitly legitimize non-state actors disregard of territorial integrity, it implicitly lifts obstacle that has been traditionally considered as one of the bars of remedial secession.¹⁸³

Secondly, as noted elsewhere in the thesis, international society has a practice of condemning unilateral declarations of independence once considered illegal, such was the case with Southern Rhodesia and Northern Cyprus. However, as noted by the ICJ illegality was: “connected with unlawful use of force or other egregious violations of norms of general international law.”¹⁸⁴ It is interesting because in an essence the ICJ denied existence of practice of declaring declarations illegal based on flaws within the laws of secession or self-determination.

Thirdly, regarding the highly controversial Security Council resolution no. 1244, the court removed grounds for referring to the resolution in an attempt to find support or rejection of Kosovo’s independence, since as according to the court, the object and purpose of the resolution

¹⁸⁰ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para.51, 56

¹⁸¹ Ibid at para.80

¹⁸² Ibid

¹⁸³ Simone F. van den Driest, *Remedial Secession: A right to External Self-Determination as a Remedy to Serious Injustices*, (School of Human Rights Research, Intersentia, April 9 2013), p. 146

¹⁸⁴ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para.81

was merely to establish “interim administration of Kosovo” without any status determination or engagement.¹⁸⁵

Lastly, the court did refer to the “remedial secession” by mentioning the “radically different views” the states presented in their submissions, moreover differences existed: “regarding whether international law provides for a right of remedial secession and if so in what circumstances.”¹⁸⁶ The latter controversy might be the reason the ICJ did not find itself bound to elaborate on the issue, which might also suggest that at this stage the law on remedial secession remains highly vulnerable and clearly only within the process of formation.

2.1 Separate Opinion of Judge Cançado Trindade

Although Judge Trindade did not explicitly address the issue of remedial secession, the approach suggested in his separate opinion closely resembles the elements of the qualified right to secession. He firmly asserted that the “territorial integrity” cannot be invoked to justify or commit “atrocities.”¹⁸⁷ Furthering the argument, the judge concluded that the Friendly Relations Declaration allowed people under systematic oppression to exercise self-determination: “beyond the traditional confines of the historical process of decolonization.”¹⁸⁸ According to Trindade the similar grounds for victimized people is enshrined in Vienna Declaration and Programme of Action.¹⁸⁹

Subsequently, as regards the territorial integrity, the judge argued that the principle can only be invoked by the states acting in accordance with the international law and where the “people”

¹⁸⁵ Ibid at para.99

¹⁸⁶ Ibid at para.81

¹⁸⁷ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge A.A Cançado Trindade, para. 176

¹⁸⁸ Ibidt at para. 184

¹⁸⁹ Ibid at paras. 177-181

are not oppressed and subjugated.¹⁹⁰ The judge concluded that entitlement for self-determination in such situations presents shift from privilege of “sovereignty” towards; “people-centered rights and accountability of territorial authorities.”¹⁹¹

2.2 Separate Opinion of Judge Yusuf

At the outset Judge Yusuf criticized the court for failing to address the question put before it for several reasons. First of all, the judge considered the court was obliged to consider the aim and claim of the unilateral declaration and differentiate between legal and illegal exercise of the right.¹⁹² Moreover, Judge Yusuf claimed that the court failed to contribute to provide better understanding of legal content of self-determination and thus created a restrictive approach that might be used by other secessionist groups.¹⁹³

As to the right to self-determination, the judge viewed it to apply beyond colonial phase, but within strictly limited context, since the existence of “general positive right” could not be assumed.¹⁹⁴ Nevertheless, judge completely embraced notion of qualified right to secession and maintained that:

“The right of peoples to self-determination may support a claim to separate statehood provided that it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context.”¹⁹⁵

¹⁹⁰ Ibid at para.208

¹⁹¹ Ibid at paras. 190-194; Evan M Brewer, ‘To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion’, *Vanderbilt Journal of Transnational Law*; Jan2012, Vol. 45 Issue 1, p.267

¹⁹² International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge Yusuf, para.5

¹⁹³ Ibid at para. 6; Simone F. van den Driest, *Remedial Secession*, p. 151

¹⁹⁴ Ibid at para.10

¹⁹⁵ Ibid at para.11

Regardless of abovementioned, the Judge did not engage into assessment of legality of Kosovo's actions, or whether the factual circumstances supported the existence of remedial secession in this particular case.

2.3 Dissenting Opinion of Judge Koroma

The Judge Koroma's dissenting opinion also criticized the court for avoiding to what seemed to him "a legal question requiring a legal response."¹⁹⁶ Nevertheless, the substance of the arguments presented by judge radically differs from positions adopted by Judge Yusuf and Judge Trinidad. First of all, Judge Koroma attached fundamental importance to the principle of "territorial integrity" and "sovereignty" as being the foundations of international legal order.¹⁹⁷ Judge Koroma, also referred to Friendly Relations Declaration, however only in order to cite the relevant parts referring to obligation of respect to "territorial integrity" omitting the saving clause part of the declaration.¹⁹⁸

Judge Koroma rejected existence of right to secession in any form for any ethnic, linguistic, or religious groups, unless the parent state consent is present and alleged that allowance of secession would set a dangerous precedent for other secessionist groups and in total would endanger international legal order.¹⁹⁹ With the ICJ refusal to discuss the legal matter in its substance, Judge Koroma expressed fear that the case of Kosovo would be used as "instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined."²⁰⁰

¹⁹⁶ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge Karoma, para.20

¹⁹⁷ Ibid at paras.21-25

¹⁹⁸ Ibid at para. 22; Simone F. van den Driest, *Remedial Secession*, p. 154

¹⁹⁹ Ibid at para.4

²⁰⁰ Ibid

3. ICJ State Submissions on Kosovo

Even though the ICJ advisory Opinion failed to provide expected clearance on the issue of remedial secession, the submissions made by the states during the proceedings provides useful insight. In particular, a number of states directly addressed and evaluated the principle of remedial secession as of general rule and within the context of Kosovo, therefore the argumentation employed is relevant for the present discussions. The submissions of states with respect to remedial secession could be grouped together for their support or direct rejection of the notion, even though few member states also articulated the “*sui generis*” argumentation, overall almost everyone mentioned the concept. Thus, the section below will be divided into two subsections, the first one addressing the selected state submissions supporting the concept and the second one presenting view of those against remedial secession.

3.1 Submissions Supporting the Remedial Secession

3.1.1 *Position of Kosovo*

Interestingly enough, the authors of the declaration of independence in their original text did not explicitly refer to the remedial secession; they rather referred to the “will of people” and explicitly stated the uniqueness of the situation in Kosovo, which shall not be expanded as creating a precedent.²⁰¹ However in the written submission the authors referred to the Friendly Relations Declaration “safeguard clause” to substantiate the claim that “independence may be an

²⁰¹ See Chapter III. Section 1.2

appropriate choice in the case where a State does not conduct itself in compliance with the principle of equal rights and self-determination of peoples.”²⁰²

Further, Kosovo’s representatives cite the decision on *Secession of Quebec*, to conclude that the law on self-determination generates independence for the groups “meaningful access to government.” The authors draw a link to the cited paragraph of the Canadian Supreme Court decision to the factual circumstances present in Kosovo to conclude that:

“...given the decade of deliberate exclusion from governing institutions and violation of basic human rights, culminating, in 1998-1999, in massive crimes against humanity and war crimes²⁷⁴, the people of Kosovo had the right to chose independence.”²⁰³

Lastly, the authors make an attempt to justify the unilateral secession by referring to the contemporary developments in International law. In particular, the authors refer to the “human centric” approach, whereby the international law is viewed as “*a droit des gens* – protecting the people, human beings, especially in the case where the State fails to do so.”²⁰⁴

Even though, the views presented by the authors of the unilateral declaration do not carry any weight as for the assessment of status of the remedial secession, they still remain relevant since they provide useful insight into the authors vision of the public international law and the arguments they refer to justify their secession.

²⁰² International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Contribution of the Authors of the Unilateral Declaration of Independence of Kosovo, 17 July 2009, para.4.39

²⁰³ Ibid at para. 4.40

²⁰⁴ Ibid at para. 4.41

3.1.2 *Position submitted by the Netherlands*

The views presented by the Netherlands are important for several reasons. First of all, the state engaged into novel argumentation while providing its strong support for the remedial secession. The Netherlands derived support for the remedial secession from the Articles on State Responsibility.²⁰⁵ According to submission, state denying the right to internal self-determination also violates a peremptory norm of international law, which according to Articles on State Responsibility results in consequences, one of which could be the right to remedial secession.²⁰⁶

Secondly, the Netherlands completely embraced the concept of the remedial secession and asserted that the “political self-determination” mentioned within two international covenants and subsequent Friendly Relations Declaration can evolve into external-right to self determination, as a measure of “*ultimum remedium*”.²⁰⁷

The position in a wider perspective corresponds to the view the Netherlands held over the years regarding the law of self-determination. In particular, the drafting history of 1966 Covenants also indicates the Netherlands’ strong position whenever, member states intended to limit the scope of principle of “self-determination”.²⁰⁸ Thus seen within the Kosovo context one can conclude that the Netherlands’ actions are motivated by the belief that they are legally binding (i.e constitute *opinio juris*)

²⁰⁵ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Comments of the Netherlands, 17 April 2009, para. 3.9

²⁰⁶ *Ibid* at paras.3.9-3.11

²⁰⁷ *Ibid* at para.3.6

²⁰⁸ *Ibid* at para.3.18, also see Chapter II

3.1.3 *Statement of federal Republic of Germany*

Germany also supports existence of the external self-determination outside the colonial context.²⁰⁹ The rationale behind the position is that the states could “easily oppress the minority, without any recourse being open to that minority.”²¹⁰ Thus, Germany views right to self-determination primarily as an internal right; however the concept leaves the possibility for minorities to remedy the severe violation of their collective right.²¹¹ In order to substantiate the “exceptional” right to secession, Germany refers to relevant provisions from the Friendly Relations Declaration and Helsinki Final Act.²¹²

Regardless, Germany explicitly limits the scope of the remedial secession to be applicable only in case of: “exceptionally severe and long-lasting refusal of internal self-determination” and secession being an ultimate remedy after other means has been exhausted.²¹³

Lastly, Germany also raised an interesting point regarding time-limitation of the remedial secession. According to the German position external self-determination is not for a “limitless future”, rather if repression ceases to exist and “circumstances show over a certain period of time that change for the better is permanent and reliable, the right to external self-determination may be said to have disappeared again.”²¹⁴

Despite abovementioned, while assessing the situation in Kosovo Germany employed argument of the “legacy of conflict” and that of “atrocities” committed in 1990s to justify

²⁰⁹ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of Germany, 15 April 2009, p. 33

²¹⁰ Ibid at p.34

²¹¹ Ibid

²¹² Ibid at p.33

²¹³ Ibid

²¹⁴ Ibid at p.36

secession. It seems to contradict the proposed “time-limitation” since current situation of Serbia is not at all subject to its observations, only the brief mention of the Constitution of Serbia within the context of its failure to provide “substantial autonomy to Kosovo.”²¹⁵ Moreover, Germany considered that the unilateral declaration after almost a decade of interim administration was still the only and the least means of resolving the conflict.²¹⁶

3.1.4 Written Statement by the Russian Federation

The position of the Russian Federation is particularly interesting considering that when assessing secessionist claims it has traditionally supported application of self-determination “only in the classical and narrowly defined circumstances of salt-water colonialism.”²¹⁷ The political ally of the Serbian government and the state that has been engaged into several secessionist battles of its own, faced with the concept of the remedial secession suggested that “safeguard clause” allows secession.²¹⁸

However, unlike other states Russia established a higher threshold of applicable circumstances engaging the right to secede. According to Russian position “outright attack by the parent state threatening the very existence of the people in question” triggers lawful secession.²¹⁹ Thus, unless the very “survival of people” is endangered the remedial secession does not apply, without any elaborations on denial of internal self-determination. Nevertheless, the Russia was

²¹⁵ Ibid

²¹⁶ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of Germany, 15 April 2009, p.36-37

²¹⁷ Mark Weller, ‘Self-Determination Conflicts: Recent Development’, *European Journal of International Law* 20 (2008) p.2

²¹⁸ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Statement of The Russian Federation, 16 April 2009, para.88

²¹⁹ Ibid

not convinced that the facts of the case at hand revealed correlation to the precondition necessary for the secession and therefore considered declaration of independence illegal.²²⁰

3.1.5 Other State submissions supporting remedial secession

In addition to the detailed positions of abovementioned participants, other states also expressed similar approach towards remedial secession. In particular in their written submissions Albania, Finland, Ireland, Poland and Switzerland all acknowledged existence of remedial secession with a slight difference as to the substance of the right.²²¹ Only, Slovenia did not explicitly refer to the remedial secession, rather the submission focused on making the “territorial integrity” rebuttable notion with respect to the right to self-determination.²²²

3.2 Submissions opposing remedial secession

3.2.1 Position of Serbia

Serbia’s position regarding the remedial secession is clearly unsurprising, considering the subject matter of the dispute. However it is important to observe the argumentative grounds Serbia invoked to justify its position. First of all, Serbia interpreted the “safeguard” clause as the guarantee for sovereignty and territorial integrity. Serbia argued that the purpose of paragraph 7 of the Friendly Relations Declaration was to emphasize in explicit form, that the territorial integrity was predominant to principle of equal rights and self-determination of peoples.²²³ Secondly, Serbia argued that neither the good faith application of the “safeguard clause” nor the

²²⁰ Ibid at para.99-104

²²¹ Simone F. van den Driest, *Remedial Secession*, p. 259

²²² International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Comments of Slovenia, 17 July 2009, para.8

²²³ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Comments of Serbia, 17 April 2009, para.593

intention of member states allows for *a contrario* reading. In particular, according to Serbia, the ordinary meaning given to the terms and wording of paragraph 7 as well as the purpose of the entire declaration only suggests the importance of territorial integrity.²²⁴ Moreover *a contrario* reading is regarded as “imaginary” and erroneous.²²⁵

Additionally, according to Serbia the *travaux preparatoires* the intention was exactly to protect states from secessionist movements by explicitly referring to respect towards state’s political unity and territorial sovereignty.²²⁶ Moreover, Serbia also analyzed the lack of any practice within international law that would support the existence of the remedial secession.²²⁷

Further Serbia argued that secession could not be the consequence of state failure to protect human rights. It suggested that international law only allows for two legal consequences of such conduct: one is “to put an end” to violations and second resorts to “reparations.” However, “remedial secession goes much further than requiring reparation. It is tantamount to imposing a type of sanction that is wholly outside the field of state responsibility for wrongful acts.”²²⁸ Overall, Serbia was convinced that those states arguing for “remedial secession” simply referred to the doctrine to justify the absence of any reasonable legal position in response to their behavior.²²⁹

²²⁴ Ibid at paras.601-602

²²⁵ Ibid at para. 605

²²⁶ Ibid at para.607

²²⁷ Ibid at para. 613

²²⁸ Ibid at para.628

²²⁹ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Comments of Serbia, 15 July 2009, para.312

3.2.2 *Written Comments of China*

In line with Serbian reasoning, China also strongly opposed the concept of remedial secession. First of all, it advanced argument that the international law specifically defined scope of self-determination to eliminate misinterpretations and according to Chinese view the principle entails only situations of colonial rule, foreign occupation, or where approved by the General Assembly, Security Council or International Court of Justice.²³⁰

Secondly, China was convinced that in order to justify the doctrine which contradicts such an essential principle as territorial integrity “there should have been positive and explicit provisions to that effect” and not a mere *a contrario* interpretation.²³¹ Moreover, China argued that neither “international legal bodies” nor the state practice or *opinion juris* adopts such interpretation of the “safeguard clause.”²³²

3.2.3 *Written Comments of Spain*

Spain in its written submission focused on analyzing treaty law and practice on territorial integrity, it did not at all refer to “remedial secession” rather denied existence of any form of secession under international law. Spain engages into contextual interpretation of *travaux preparatoires* of the Friendly Relations Declaration to argue that: “it cannot be concluded that respect for sovereignty and territorial integrity of States is subservient to the exercise of an alleged right to self-determination exercised via a unilateral act.”²³³

²³⁰ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Oral Statement of China, 7 December 2009, para.21

²³¹ Ibid at para. 25

²³² Ibid at para.26

²³³ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, Written Comments of Spain, 14 April 2009, paras. 20-21, 24

In order to emphasize absolute character of the territorial integrity Spain refers to other instruments such as Helsinki Final Act, Charter of Paris and the Treaty of the European Union.²³⁴ Furthermore, Spain argues that the theoretical framework of the territorial integrity is “unequivocally” supported by the substantial practice. In this respect, the reference is made to internal conflicts in Nagorno-Karabakh, Tajikistan and Georgia, where Security Council repeatedly expressed its full support of “territorial integrity” of engaged states.²³⁵ Thus Spain concludes that the even in case of serious armed conflicts the Security Council “repeatedly and constantly maintained a position of unequivocal support and respect for the sovereignty and integrity of the state.”²³⁶

3.2. 4 other positions expressed

In addition to the abovementioned, other states including Cyprus, Argentina, Venezuela and Azerbaijan expressed in explicit forms their opposition towards remedial secession.²³⁷ Another group of states including France, the United States, the UK, Burundi and the Czech republic while opposing existence of “general right to secession” advanced “neutrality” argument. The arguments emphasized the “sui generis” character of conflict in Kosovo.

Overall, states opposing the remedial secession advance two substantial arguments within their submissions. First, the states emphasized importance of the territorial integrity and sovereignty of states and its predominance over self-determination. Secondly, they argued of substantial absence of evidentiary proof of existence of the unilateral secession, classifying *a contrario* interpretation of the Friendly Relations Declaration as erroneous.

²³⁴ Ibid at para.26

²³⁵ Ibid at para. 33

²³⁶ Ibid at para.34

²³⁷ Simone F. van den Driest, *Remedial Secession*, pp. 261-270

4. Concluding Remarks

The current chapter intended to explore the conflict in Kosovo in its entirety including the historical and legal analysis in order to formulate a view regarding its precedential value. As can be concluded from above observations, Kosovo is the first example of secession satisfying the theoretical framework of proposed remedial secession. The primary argument of the critiques of the remedial secession was its lack of practice; therefore in this respect Kosovo undoubtedly brought changes.

First of all, in response to the unilateral declaration of independence, number of member states of the United Nations expressed their *opinion juris* supporting the concept of “remedial secession” and applying its criteria to Kosovo. Thus it could be established that for those member states remedial secession already forms part of international law.²³⁸ Secondly, background of oppression and gross human rights violations could allegedly satisfy the traditional criteria for the remedial secession and thus turn Kosovo into first clear example of physical state practice in context of remedial secession.

However, provided that remedial secession first of all challenges the long-established principles of territorial integrity and self-determination forming part of customary international law, it would not seem logical or justified to base the argument of Kosovo’s legal precedential value only on limited number of states expressly supporting such development. even the most liberal approach towards customary international law would not suggest creation of a new custom based on the several states strong support towards new rule.

²³⁸ List of States supporting Remedial Secession in their written submissions to ICJ: Albania, Finland, Germany, the Netherlands, Poland and Switzerland

Furthermore, the ICJ advisory proceedings contain number of state submissions, explicitly opposing such development.²³⁹ For these states, the remedial secession is based on “erroneous” and imaginary interpretation of safeguard clause, which as a consequence directly contradicts the very purpose of the friendly relations Declaration.

the ability to resolve the radically contradicting position was vested on the ICJ, however in a great disappointment to all the court chose not to engage into interpretative guide with respect to “self-determination.” Thus, instead of shedding more light the later statements of the ICJ will cause more controversy and confusion. In this respect the number of scholars rightly criticizes the ICJ for its incapacity to deal with the case and for turning a blind eye for existing problem.²⁴⁰

Thus as it stands currently, Kosovo fails to meet the criteria for creating legal precedent having value enough to establish customary international law given the conflicting views of states. However, it clearly is a starting point of physical practice which could possibly in the future crystallize into a new custom. Meanwhile, the absence of authoritative interpretation regarding remedial secession clearly affects other internal conflicts and in particular conflicts in Georgia. Therefore, the subsequent chapter will be dedicated to analysis of Georgian conflicts and how the precedence of Kosovo affected Abkhazia and South Ossetia in their plea for the independence and on their behalf did these secessions manage to reverse or support the cause for the remedial secession.

²³⁹ States Opposing remedial Secession in their written submission to ICJ: Argentina, Azerbaijan, China, Cyprus, Egypt, Romania, Serbia, Spain, Slovakia, Venezuela

²⁴⁰ T. Burry, ‘Kosovo Opinion and Secession: The Sounds of Silence and Missing Links’, *11 German Law Journal* 881, 2010; Hurst Hannum, ‘The Advisory opinion on Kosovo: An Opportunity Lost or a Poisoned Chalice Refused?’, *24 Leiden Journal of International Law* 155, 2011;

Chapter IV. Influence of Kosovo on Abkhazia and South Ossetia

Introduction

Within months after Kosovo declared its independence and most of the western states openly expressed their recognition; the Russian-Georgian conflict broke out resulting in Russia's recognition of Georgian regions of Abkhazia and South Ossetia as independent states. The outplay of the three cases is particularly important considering Russia's radical rejection of Kosovo as an example of "remedial secession."

The Russian position of the matter was clearly outlined by the Prime Minister of Russia at that time Vladimir Putin, while reacting to Kosovo's Declaration of independence he claimed following: "Other countries look after their interests. We consider it appropriate to look after our interests. We have done some homework and we know what we will do."²⁴¹ The latter is clearly a political message, entanglement of which does not seem complicated considering the subsequent events that taken place in Georgia. However interestingly enough while applying its "homework" into practice Russia relied on the precedent of Kosovo, and external component of self-determination.

Despite almost unilateral policy of non-recognition from international community, Russian context of external self-determination and precedent of Kosovo still remains relevant in relation to Abkhazia and South Ossetia. Thus, the following chapter will raise a question whether the facts of the three cases allow for drawing parallels, whether those parallels are sufficient and strong enough to trigger remedial secession. In addition it would be examined whether the endorsement of Abkhazian and South Ossetian declarations changed anything for the law of

²⁴¹ Vladimir Putin, quoted in Kosovo Breakaway Illegal, the Guardian, 15 February, 2008, available at: <http://www.theguardian.com/world/2008/feb/15/russia.kosovo> (last visited on 28 October, 2013)

remedial secession? More particularly could we refer to them as legitimate secessions capable of advancing law on remedial secession?

1. Historical Context of Abkhazia

Historically, Georgia has always been one of the most ethnically diverse states in the region of south Caucasus, what is current day Georgian state at various stages of its evolvement had been separated into small kingdoms and occasionally united into a bigger units.²⁴² In this context the history of Abkhazia replicates the timeline of development of other Georgian regions with periods of Byzantine rule, to forming part of united feudal Georgia and becoming part of Russian empire.²⁴³

However, Abkhaz and Georgian sources allege radically different view on traditional inhabitants of the region, with Abkhazians claiming their indigenous character and Georgians referring to the region as inhabited by Georgian tribes with spoken language being Georgian.²⁴⁴ Regardless, of the antiquity the ethnic composition of Abkhazia before the initiation of the conflict consisted of majority Georgian ethnics (45.68%), minority of Abkhaz consisting only 17.76 % , Armenian 14 % , Russians 14 % , Greeks 2% and other ethnic minorities.²⁴⁵

The timeline of conflict emerges shortly after the Georgian declaration of independence from Soviet Union on 9 April 1991. However, Abkhaz sources refer to the collective memory of

²⁴² Ronald Grigor Suny, *The making of Georgian Nation*, (Indiana University Press, 1994) , 2nd ed, pp.3-10

²⁴³ Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal*, (Kluwer Law International, the Hague, The Netherlands, 2001) p.8

²⁴⁴ Independent International Fact-Finding Mission on the Conflict in Georgia,(IIFFMCG) September 2009, volume II, pp. 66 available at: http://www.ceig.ch/pdf/IIFFMCG_Volume_II.pdf (last visited on 28 October, 2013)

²⁴⁵ Ivlian Khaindrava, 'The Conflict in Abkhazia and Possible Way of Resolving It', in Bruno Coppieters, David

Darchiashvili and Natella Akaba (eds), *Federal Practice: Exploring Alternatives for Georgia and Abkhazia*, (VUB University Press, Brussels, 2000) p.211

1930s as the initiation of disagreement, when Abkhazia's status of the union republic was reduced to the autonomous province within Georgian SSR by the USSR.²⁴⁶

The first bloodshed followed establishment of the branch of Tbilisi State University in Sukhumi, causing severe Abkhaz protest and resulting in dozen civilian deaths.²⁴⁷ The latter was followed by Abkhaz Supreme Council declaring sovereignty on 25 August 1990. However, the events further escalated when during all-union referendum in March 1991, Abkhazia (without ethnic Georgian's participation) advanced a new Union treaty with the aim to remain part of the Soviet Union.²⁴⁸

The union treaty caused further back and forth political confrontations between the central Government of Georgia and Abkhaz, finally resulting in outbreak of conflict on 14 August 1992, with Georgian armed forces entering in Abkhazia "ostensibly" to rescue thirteen government hostages and secure the rail line to Russia.²⁴⁹ Shortly after the first cease-fire agreement was signed by Georgian and Abkhaz sides with the participation of Russian federation. The agreement of 3 September 1992 provided for the withdrawal from Abkhazia all illegal armed groups, the reduction of Georgian military, at the same time the agreement recognized Georgia's territorial integrity.²⁵⁰ However, just after a month pro-Abkhaz forces with the support of volunteers from Russian federation launched attack against Georgian forces advancing their positions.²⁵¹

²⁴⁶ IIFMCG report, Volume II, p.67-70

²⁴⁷ Stuart J. Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War* (Cornell University Press, 2001) pp.102 -105

²⁴⁸ International Crisis Group, 'Abkhazia Today', Europe Report No. 176, 15 September 2005, p.5, available at: http://www.crisisgroup.org/~media/Files/europe/176_abkhazia_today.ashx (last visited on 28 October, 2013)

²⁴⁹ Ibid at p.5

²⁵⁰ Report of a UNPO Mission to Abkhazia, Georgia and Northern Caucasus, November 1992, p.12 available at: <http://www.unpo.org/downloads/AbkGeo1992Report.pdf> (last visited on 28 October, 2013)

²⁵¹ IIFMCG report Volume II, pp. 76-77

The second Russian mediated cease-fire agreement was signed on 27 July 1993 (The Sochi Agreement),²⁵² which was once again violated with Abkhaz troops opening “surprise offensive” attack on several cities, which resulted in establishment of their control over almost entire territory of Abkhazia.²⁵³

The final agreements were signed in April and later in May of 1994: a *Declaration of Measures for a Political Settlement of the Georgian/Abkhaz Conflict*, and *Agreement on a Cease-Fire and Separation of Forces*, parties guaranteed strict observance of the agreement and ensuring “safe and dignified” return of displaced people, at the same time 2000 members of peacekeeping forces, exclusively of Russian military were to monitor the compliance of the agreement.²⁵⁴ As a result of conflict over 10,000 civilians dies and more than 200, 000 ethnic Georgians were displaced from Abkhazia.²⁵⁵

1.1 International response to the conflict

The UN involvement in Georgian conflict initiated with appointment of Special Envoy tasked to ensure that parties supported peaceful resolution of the conflict.²⁵⁶ After a series of failed cease-fire agreements negotiated with Russian involvement, Security Council passed a resolution 858 establishing the United Nations Observer Mission in Georgia (UNOMIG) in August 1993.²⁵⁷ The original mandate of the UNOMIG was based upon the monitoring of the ceasefire agreement of 27 July 1993, however since the agreement failed to hold the role of the

²⁵² International Crisis Group, Europe report No. 176, p. 6

²⁵³ Ibid

²⁵⁴ Ibid p.p.6-7; Noelle M. Shanahan Cutts, ‘Enemies through the Gates: Russian Violations of International Law in The Georgia/Abkhaz Conflict’, *40 Case Western Reserve Journal of International Law* 281, 2007-2008, p. 5

²⁵⁵ Human Rights Watch, ‘Georgia/Abkhazia: Violations of the Laws of War and Russia’s Role in The Conflict’, Vol.7 No.7, March 1995, pp.5-6, available at: <http://www.hrw.org/sites/default/files/reports/georgia953.pdf> (last visited on 30 October, 2013)

²⁵⁶ United Nations Mission in Georgia (UNOMIG), Background information, available at: <http://www.un.org/en/peacekeeping/missions/past/unomig/background.html> (last visited on 30 October 2013)

²⁵⁷ Sec. Council Res. 858, 24 August 1993, S/RES/858

mission became somewhat blurred. At the same time, the Security Council unanimously adopted Res. 876, affirming Georgia's territorial integrity and condemning:

“the grave violation by the Abkhaz side of the Cease-fire Agreement of 27 July 1993 between the Republic of Georgia and forces in Abkhazia, and subsequent actions in violation of international humanitarian law .”²⁵⁸

The role of the United Nations within the conflict resolution has been actively downplayed by the Russian factor which by the time of active the UN involvement had not only assumed the role of mediator but also that of “active participant” in the conflict.²⁵⁹ The example of the latter attitude is the agreement which Russia facilitated with the Abkhaz and Georgian sides in May 1994, without consulting the UN. The agreement effectively placed the monitoring mission on Commonwealth of Independent States Peacekeeping Force (CISPKF), exclusively consisting of 2000 Russian military servants, leading to the role of UNOMIG being limited to small-scale monitoring activity with 136 military observers.²⁶⁰

Even though, the United Nations role as the mediator of the conflict was overshadowed by heavy Russian involvement in the process in 1999 the UN took a proactive measure with the preparation and adoption of “basic principles for the distribution of competences between Tbilisi and Sukhumi” or the “Boden Paper”.²⁶¹ The purpose of the paper was to present document as the basis for status negotiation, presenting the Group of Friend's (including Russia's) consensus on the issue. The document offered a federal solution, or the wide Abkhaz sovereignty inside

²⁵⁸ Sec. Council Res.876, 19 October 1993, para.2, S/RES/876 (1993)

²⁵⁹ Susan Stewart, ‘The Role of the United Nations in the Georgian-Abkhazian Conflict’, *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 2/2003, p.12; Also See detailed discussion on Russian Role in the conflict below

²⁶⁰ Sec. Council Res. 934, 30 June 1994, S/RES/934 (1994); Georgia UNOMIG background information, available at: <http://www.un.org/en/peacekeeping/missions/past/unomig/background.html> (last visited on 30 October, 2013)

²⁶¹ International Crisis Group, ‘Abkhazia: Ways Forward’, *Europe Report No. 179*, 18 January 2007, p.9 available at: http://www.crisisgroup.org/~media/files/europe/179_abkhazia_ways_forward.ashx (last visited on 5 November 2013)

Georgia with “federal agreement” and unamendable “constitutional” guarantees.²⁶² While Georgia endorsed the document, Abkhazia refused to consider it, despite attempts of Boden and his successor Heidi Tagliavini.²⁶³

Georgia on its own has undertaken initiatives for political settlement. In 2006 it presented “Road Map for a Comprehensive, Peaceful, Political Settlement of the Conflict in Abkhazia”, based on the principle of federalism it offered Abkhazia “wide internal sovereignty....The dignified representation of the Abkhaz in all branches of power in Georgia.”²⁶⁴ Moreover, the president of Georgia on simultaneous occasions offered: “greatest possible autonomy” to Abkhaz with creation of “new, joint-state model of ethnic and civil cooperation”.²⁶⁵ Regardless of attempts, since 1999, Abkhaz side has only considered options ultimately leading to its independence from Georgia.²⁶⁶

Overall, before the outbreak of hostilities in South Ossetia in 2008, the Security Council adopted 32 resolutions affirming the territorial integrity of Georgia and at the same time condemning parties for human rights violations and calling for peaceful resolution of the conflict. The Russian federation being the permanent member of the council never opposed and at some extent took an affirmative steps for the adoption for the resolutions, but the events occurring during the five day war, drastically changed its position regarding the “territorial integrity” of Georgia.

²⁶² Ibid

²⁶³ Oksana Antonenko, ‘Frozen Uncertainty: Russia and the Conflict over Abkhazia’, in Bruno Coppieters and Robert Legvold (eds.), *Statehood and Security: Georgia after the Rose Revolution*, (London: The MIT Press, 2005), pp.238-240

²⁶⁴ International Crisis Group, Abkhazia ways forward, Europe Rep. No 179, p.10

²⁶⁵ ‘Saakashvili Speaks about situation in Kodori’, Civil Georgia, 28 July 2006, available at: <http://www.civil.ge/eng/article.php?id=13198> (last visited on 6 November 2013)

²⁶⁶ International Crisis Group, Abkhazia ways forward, Europe Rep. No 179, p.11

1.2 Russian Role in Abkhazia

Russian federation played a key role in determining the course and a consequence of the conflict in Abkhazia, the role however was not only positive. While Russia formally recognized the “territorial integrity” of Georgia and emphasized its’ role as the mediator, through several cease-fire agreements, Russian weaponry “always found their way into Abkhaz hands.”²⁶⁷

Human Rights Watch, in its report issued in 1995 specifically addresses Russian involvement in the conflict.²⁶⁸ The report evaluating available evidence claims that Russia escalated human right abuses by making “available weapons to groups or individuals known or likely to use them to commit atrocities.”²⁶⁹ Moreover, the report concludes following:

“sudden presence of armor, tanks, and heavy artillery among the previously lightly armed Abkhaz in the fighting between October and December 1992 realistically leaves little room for any conclusion except that some parties, within the Russian forces decided to supply Abkhaz.”²⁷⁰

Moreover, allegedly Russian soldiers directly took part in attacks against Georgian targets, resulting in civilian deaths, when Russian planes air raided Sukhumi on February 20, 1993, even though defense ministry claimed that “Georgians are bombing themselves”, to Human Rights Watch, the weight of the evidence strongly indicated that the air raids were carried out by Russian forces.²⁷¹ Additionally, Georgia managed to down one of the aircrafts bombing

²⁶⁷ Human Rights Watch, Georgia/Abkhazia: Violations of the Laws of War and Russia’s Role in The Conflict’, Vol.7 No.7, March 1995, p.7, available at: <http://www.hrw.org/sites/default/files/reports/georgia953.pdf> (last visited on 30 October, 2013)

²⁶⁸ Ibid

²⁶⁹ Ibid at p.6

²⁷⁰ Ibid at p.32

²⁷¹ Ibid at p.38

Sukhumi, which according to examination of the United Nations military observer was a Russian aircraft with pilot being a major of Russian air force.²⁷²

Even if considered that the above actions were not attributable to the Russian Federation, the overwhelming evidence showing that Russian aircrafts targeted Georgian civilians during the conflict, at least undermines Russia's role as the mediator in the conflict and provides useful guidance on the evaluation of the latest good faith motives of recognition of Abkhazia.

Russia has provided substantial support for Abkhaz economy including the Russian rubles being the official currency used for trade and Russia providing support in the form of pensions and railway infrastructure.²⁷³ More importantly after the cease of hostilities Russia has been actively engaged in granting Russian citizenship to Abkhaz.²⁷⁴ Interestingly enough, in 2006 Russian parliament passed a resolution "authorizing Russian troops to serve anywhere in order to defend Russian citizens".²⁷⁵

The above occurrences led the Georgian Government even before the outbreak of hostilities in August 2008, to refer to Russian actions as an attempt to annex Abkhazia.²⁷⁶ Moreover, on 17 July 2006, Georgian parliament passed a resolution which called for:

"launch urgent procedures to immediately suspend the so-called peacekeeping operations in Abkhazia and in former South Ossetian Autonomous District; to cancel the relevant international agreements and international structures and to

²⁷² Thomas Goltz, 'Letter from Eurasia: The Hidden Russian Hand,' *Foreign Policy*, no. 92, Fall 1993, p.108

²⁷³ Bruno Coppieters, 'The Georgian-Abkhaz Conflict', *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2004, Chapter V, p. 6

²⁷⁴ International Crisis Group, Europe report No. 176, pp.9-10

²⁷⁵ As cited in Peter Roudik, 'Russian Federation: Legal Aspects of War in Georgia', August 2008, available at: <http://www.loc.gov/law/help/russian-georgia-war.php> (last visited on 5 November 2013)

²⁷⁶ International Crisis Group, Europe report No. 176, p. 8

immediately withdraw the peacekeeping forces of the Russian Federation from the territory of Georgia.”²⁷⁷

As a general rule, the operation of peacekeeping forces is dependent on the consent of all states involved.²⁷⁸ However, since the ceasefire agreement of 1994 did not specify the terms for withdrawal of the consent, Russia has never complied with the above resolution.

Overall, even before the outbreak of the conflict in 2008 leading to the Russian recognition of Abkhazia, the parties were at great disagreement of Russia’s role in the conflict, Georgians viewing it as an annexation and Russians claiming their a humanitarian and pacifying role. Nevertheless, regardless of the level of Russian involvement in the conflict, the responsibility of the major human rights violations is still incumbent upon the Georgian and Abkhaz sides.²⁷⁹ However, the Russian factor is relevant while considering the success of Abkhaz secession and whether it could be considered legitimate or standard setting for the law of remedial secession.

2. Conflict in 2008 and Current Situation in Abkhazia

The situation in Abkhazia gradually deteriorated following the timeline of intensified political confrontations between Russia and Georgia starting in 2006.²⁸⁰ The situation on the ground escalated in May 2008, when the Russian federation decided to send additional military forces to Abkhazia within the scope of peacekeeping mission, allegations were also made of the transfer of heavy artillery, moreover Russia sent 400 military men to “rehabilitate the local railway south of Sukhumi up to the town of Ochamchira”.²⁸¹ Georgian Government viewed

²⁷⁷ Resolution of the Georgian parliament on “Peacekeeping Forces Stationed in the Conflict Zones”, 17 July 2006, para.2, available at: <http://www.civil.ge/eng/article.php?id=13085> (last visited on 5 November 2013)

²⁷⁸ Yoram Dinstein, *War Aggression and Self-Defence*, 4th ed. (Cambridge University Press, 2005),p.309

²⁷⁹ Ibid at Human Rights Watch, Georgia/Abkhazia report of 1995, p. 2

²⁸⁰ IFFMCG report, Volume II, p.200

²⁸¹ Ibid at pp.201-202

presence of the military unit as the preparation for armed intervention.²⁸² Moreover, Georgian side argued that military reinforcement proved that the Russian federation was party to the conflict and could no longer serve as peacekeeping force.²⁸³

Outbreak of hostilities on 7-8 August 2008 in South Ossetia had a profound effect on Georgian Abkhaz conflict as well. According to the report of the Secretary-General, Abkhaz side began introducing heavy weapons into the restricted weapons zone from 8 of August 2008, the next day UNOMIG monitoring team was requested to leave the area and subsequently a series of bombardments was carried out in the upper Kodori Valley (the only part of Abkhazia controlled by Georgian government at that time), by 12 August Abkhaz side had control over Kodori, where Georgian population was forced to leave the area.²⁸⁴

In his speech of 26 August 2008, when announcing the recognition of Abkhazia and South Ossetia the President of Russia elaborated extensively on events occurring in South Ossetia and Georgian annexation of the region, with respect to Abkhazia the assessment was limited to the statement that : “the same fate lay in store for Abkhazia.”²⁸⁵ Moreover, even though Georgia did not engage into military confrontation in Abkhazia, the president considered that the August war “dashed all hopes for the peaceful coexistence.”²⁸⁶

²⁸² ‘Tbilisi Condemns Russian Railway Troops in Abkhazia’, Civil Georgia, 31 May, 2008, available at: <http://www.civil.ge/eng/article.php?id=18445&search=%22Tbilisi%20Condemns%20Russian%20%`Railway%2> (last visited on 7 November 2013)

²⁸³: Georgian MFA: Moscow Tries to Legalize ‘Ethnic Cleansing’ in Abkhazia’, Civil Georgia, 18 July 2008, available at: <http://www.civil.ge/eng/article.php?id=18813&search=peacekeeping;%20accessed%20on%2018.08.2009>. (last visited on 7 November 2013)

²⁸⁴ Security Council, ‘Report of the Secretary-General on the situation in Abkhazia, Georgia’, 3 October 2008, paras.9-10, S/2008/631

²⁸⁵ President Dmitry Medvedev, Statement, Aug. 26, 2008 available at: http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml (last visited on 7 November 2013)

²⁸⁶ Ibid

After the military conflict in 2008, the Russian influence over Abkhazia increased to a level that International Crisis Group published a report under the name of “Abkhazia: deepening the dependence.”²⁸⁷ The report talks about increased military and economic presence of Russia in the region. According to the latest there are roughly 5000 Russian military personnel in Abkhazia, Russia also built several military compounds and bases, along the administrative border line with Georgia.²⁸⁸ In addition to the military presence, Abkhazia is currently overwhelmingly dependent on Russian financial aid for budget and development funds.²⁸⁹

3. Historical Context of the Conflict in South Ossetia

Similarly to Abkhazia, the ethno-genesis of Ossetians causes controversy among Georgian and Ossetian sources. The South Ossetians regard themselves as the most ancient nations in Caucasus and indigenous to the north and south of Caucasus mountain range.²⁹⁰ While Georgian historians do not deny the existence of an Ossetian homeland, they place it exclusively to the north of the Caucasus and claim that Ossetians only started to migrate south a few centuries ago.²⁹¹

Regardless, the first clash between Ossetian and Georgian sides occurred shortly after Georgia gained its independence from Russian empire in 1918, when the South of Ossetia supported revolutionary Bolsheviks in Russia, the latter was viewed as treason by Georgian side

²⁸⁷ International Crisis Group, ‘Abkhazia :Deepening Dependence’, Europe Report 202, 26 February 2010, available at: http://www.crisisgroup.org/~media/Files/europe/202_abkhazia_deepening_dependence.ashx (last visited on 7 November 2013)

²⁸⁸ International Crisis Group, ‘Abkhazia: The long Road to Reconciliation’, Europe Report No.224, 10 April 2013, pp. 4-5, available at: <http://www.crisisgroup.org/~media/Files/europe/caucasus/georgia/224-abkhazia-the-long-road-to-reconciliation.ashx> (last visited on 7 November 2013)

²⁸⁹ Ibid at pp. 6-7

²⁹⁰ IIFMCG report, Volume II, p.69

²⁹¹ Helen Krag and Lars Funk, *The North Caucasus, Minorities at a Crossroads*, (Minority Rights Group International London, November 1994) available at: <http://www.minorityrights.org/4055/reports/the-north-caucasus-minorities-at-a-crossroads.html> (last visited on 7 November 2013)

and they asserted control over the region using military force, eventually after the Soviet invasion of Georgia in 1921, South Ossetia was granted status of an autonomous region (oblast) within Georgian SSR.²⁹² The status of the South Ossetia never changed during the Soviet Era.

However, as soon as independence movements in Georgia gained momentum the Ossetian nationalist movement also voiced wish to re-unite with north Ossetia. In 1989 they demanded change of the region's status to that of an Autonomous Republic, the Georgian government protested against Ossetian demand.²⁹³ Eventually, on 20 September 1990 South Ossetia unilaterally declared its independence from Georgian SSR. In response Georgian government abolished status of autonomous region of South Ossetia.²⁹⁴

The conflict took a violent turn from January 1991, resulting in both sides suffering military and civilian loss, the Soviet military of Interior were stationed in the region where allegations suggest that they took side of South Ossetians and after their removal left behind various weaponry.²⁹⁵ Heavy fighting broke out in April 1992 and lasted till June, as a result of several month of conflict 1,000 civilians died and 60,000 became internally displaced persons.²⁹⁶ The conflict ended with Agreement on Principles of a Settlement of Georgian-Ossetian Conflict, signed on 24 June 1992, the document inter alia established Joint Peacekeeping Forces (JPKF) consisting of representatives of Georgian, Russian (including North Ossetian) and South Ossetian forces with the key mandate of the force was to monitor ceasefire and guarantee

²⁹² IIFMCG report, Volume II, p. 70

²⁹³ Ibid at p. 71

²⁹⁴ Tamaz Diasamidze, Nana Chkoidze-Japaridze (eds), *Regional conflicts in Georgia - the Autonomous Oblast of South Ossetia, the Autonomous SS Republic of Abkhazia (1989-2002) : the collection of political-legal acts*, (Tbilisi Pub. House "GCI", 2003) pp. 32-39

²⁹⁵ Marietta König, 'The Georgian-South Ossetian Conflict', *OSCE Yearbook 2004*, Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), Baden-Baden 2005, p.241

²⁹⁶ *Ibid*

security.²⁹⁷ Even though the JPKF was supposed to act under unified command, the practice showed that the separate battalions operated independently loyal to their representative side.²⁹⁸

Following decade for South Ossetian conflict was peaceful and even included phases of effective developments. One of such events occurred under the aegis of the OSCE, when parties to the conflict adopted: the Memorandum on Measures of Providing Safety and Strengthening of Mutual Confidence. The memorandum among other things included reduction of the size of peacekeeping force, support to civil society initiatives, and continue negotiations aimed at political settlement.²⁹⁹

As a result of memorandum and within the scope of negotiating process the Expert group consisting of delegations from different sides was established. The group was very active during 1999-2003 when it held ten meetings. As the International Fact Finding mission concludes the period of 1996-1999 was the most progressive, when the element of trust was restored, the elements of shared vision were established.³⁰⁰ Nevertheless, together with the change of *de facto* government the political status negotiations deteriorated and by 2001 the status determination seemed less feasible.³⁰¹

The role of Russian Federation in South Ossetia while not being as substantial as in Abkhazia, remained still influential considering the fact that under Sochi Agreement Russia remained in charge of unified command the JPKF. The Georgian side accused Russia of

²⁹⁷ Agreement on Principles of Settlement of the Georgian-Ossetian Conflict, as in Tamaz Diasamidze, Nana Chkoidze-Japaridze (eds), *Regional conflicts in Georgia - the Autonomous Oblast of South Ossetia, the Autonomous SS Republic of Abkhazia (1989-2002) : the collection of political-legal acts*, (Tbilisi Pub. House "GCI", 2003) pp.93-94

²⁹⁸ Human Rights Watch, 'Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia', January 2009, p. 17

²⁹⁹ The Memorandum on Measures of Providing Safety and Strengthening of Mutual Confidence, available at: http://sojcc.ru/eng_news/271.html (last visited on 17 November, 2013)

³⁰⁰ IIFMCG report, Volume II, p.96

³⁰¹ Ibid at p.96-98

providing weaponry to secessionist movements during the conflict and granting permission 1000 Cossacks to fight alongside South Ossetian forces.³⁰² In addition, the region received substantial, Russian economic and financial support and by year of 2004 almost 90 per cent of population held Russian passports.³⁰³

3.1 Rose Revolution and effects on conflict

After the rose resolution, the new Georgian government made restoration of territorial integrity the primary aim of their administration. Georgia's negotiating position centered around the idea of territorial integrity, "everything else was negotiable."³⁰⁴

The conflict in South Ossetia intensified with Georgian government's decision to close down the wholesale market near Tskhinvali, a hub for goods smuggled from Russia that entered Georgia's internal markets without proper customs clearance.³⁰⁵

Following summer of 2004, Georgia proposed several conflict "settlement plans." First, on 21 September 2004, while addressing General Assembly, the President of Georgia proposed to set a stage for settlement with "broadest form of autonomy" and international guarantees.³⁰⁶ The second initiative was launched at the beginning of 2005, which offered refined version of previous settlement, *inter alia* providing broad autonomy or as the president referred to it : "

³⁰² International Crisis Group: 'Georgia avoiding war in South Ossetia', *Europe Report N 159*, 26 November, 2004, p.16 , available at: <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan019224.pdf> (last visited on 17 November 2013)

³⁰³ Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal*, (Kluwer Law International, the Hague, The Netherlands, 2001) p. 134 ; Christopher Waters, 'The Caucasus Conflict and The role of Law', in James Green and Christopher Waters (ed), *Conflict in the Caucasus: Implications for International Legal Order*, (London, Palgrave MacMillan, 2010) p. 11

³⁰⁴ IIFMCG report, Volume II, p.105

³⁰⁵ Human Rights Watch, 'Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia', January 2009, p.24

³⁰⁶ IIFMCG report, Volume II, p.109

even broader, in fact, than that accorded to the Republic of North Ossetia by Russian Federation.”³⁰⁷

Together with settlement proposals, in 2006 the Georgian government started to actively support alternative pro-Georgian administration in South Ossetia led by Dmitry Sanakoev.³⁰⁸

At the same time, on a negotiating level, Georgia called for increased involvement of the European Union, United States, and Organization for Security and Co-operation in Europe, which was met by protests from Russia and *de facto* South Ossetian administration.³⁰⁹ In the face of deteriorated Georgian –Russian relationships the level and intensity of skirmishes in South Ossetia also increased, continuing until August 2008.³¹⁰

3.2 War in August 2008

One of the highly debated questions in relation to activities taking place in August 2008 still relates to the question “who started war?” However, the answer depends on the timeframe one would be looking at, the skirmishes between sides started months before August 7 of 2008.³¹¹ The tensions between sides began to rise in mid June 2008, with explosions and mine incidents near ethnic Georgian villages.³¹²

Even though, Georgia always made allegations of Russian direct support to south Ossetian separatism, the events intensified on 8 July 2008, when four Russian military aircrafts entered

³⁰⁷ Address by Mikheil Saakashvili to the Council of Europe Parliamentary Assembly, 24-28 January 2005, p.4, available at: <http://www.coe.int/T/E/Com/Files/PA-Sessions/janv-2005/saakashvili.pdf> (last visited on 17 November 2013)

³⁰⁸ Civil Georgia, ‘Signs of status quo change in S. Ossetia’, 14 November, 2006, available at: <http://www.civil.ge/eng/article.php?id=14082> (last visited on 17 November, 2013)

³⁰⁹ Human Rights Watch, ‘Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia’, January 2009, pp.19-20

³¹⁰ Ibid at pp.20-22

³¹¹ Christopher Waters, ‘The Caucasus Conflict and The role of Law’, in James Green and Christopher Waters (ed), *Conflict in the Caucasus: Implications for International Legal Order*, (London, Palgrave MacMillan, 2010) pp.12-13

³¹² IIFMCG report, Volume II, p.204

Georgian airspace, which was considered by Georgia as “open aggression directed against the country” and violation of “sovereignty and territorial integrity”, as a result Georgia recalled its ambassador from Russia.³¹³ At the end of July, Georgian and South Ossetian sides accused each other for firing.

On 1 August 2008, several police officers were injured as a result of bombings directed against ethnic Georgian villages.³¹⁴ On the same day, sniper shot killed six South Ossetian police officers.³¹⁵ Fighting between sides intensified towards the end of August 6 and August 7. The Georgian authorities with regard to events of the day claim that they opened fire in response to sporadic violence from Ossetian forces directed at ethnic Georgian Villages, while Ossetia claims the intention was to regain control over South Ossetia.³¹⁶

Independent Fact-Finding Mission on the conflict in Georgia considers Georgian shelling of Tskhinvali and surrounding villages as the start of the war.³¹⁷ However, within the same paragraph commission acknowledges that the “violent conflict had already been going on before in South Ossetia”³¹⁸

Even if established that Georgia initiated the war with attack on Tskhinval the subsequent actions undertaken by Russian forces, involving attacks from air, land and sea, could not

³¹³ HRW, “Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia’, January 2009, p. 21; Statement of the Ministry of Foreign Affairs of Georgia, 8 July, 2008, available at: http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=6975; (last visited on 17 November 2013)

³¹⁴ Civil Georgia, ‘MIA: Five Policeman Injured in S. Ossetia Blast’, 1 August, 2008 available at: [http://www.civil.ge/eng/article.php?id=18868&search=%20\(accessed%20November%2012,%202008\).](http://www.civil.ge/eng/article.php?id=18868&search=%20(accessed%20November%2012,%202008).); (last visited on 17 November 2013)

³¹⁵ HRW, “Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia’, January 2009, p.22

³¹⁶ Ibid at p. 22; IIFFMCG report, Volume II, p. 208-209

³¹⁷ IIFFMCG report, Volume II, p.230

³¹⁸ *ibid*

legitimately meet the threshold of necessity and proportionality envisaged under the law on self-defence.³¹⁹

On 12 August 2008, The French President Sarkozy, acting as the Chair of European Union, broke a six-point agreement, which both Russian and Georgian sides signed. According to the agreement called for cessation of hostilities and the withdrawal of all forces to their pre-August 6 positions.³²⁰ Regardless of the latter, Russian forces occupied sections of Georgia, including undisputed Georgian territories until the end of August.³²¹ Moreover, the territories previously controlled by Georgia in South Ossetia were defined as “buffer zones.”³²²

As a result, Russian federation recognized independence of the regions on 26 August 2008, reasoning its decision on accusations that Georgia committed a „genocide” in August conflict with the objective to “annex South Ossetia” which reached a level when these regions could no longer be expected to remain parts of Georgia.³²³

³¹⁹ Christopher Waters, ‘The Caucasus Conflict and The role of Law’, in James Green and Christopher Waters (ed), *Conflict in the Caucasus: Implications for International Legal Order*, (London, Palgrave MacMillan, 2010) p.13; IIFMCG report, Volume II, p.217

³²⁰ The text of Six Point Agreement, available at: <http://www.ambafrance-us.org/spip.php?article1101> (last visited 17 November 2013)

³²¹ Thomas Hammarberg, Council of Europe Commissioner For Human Rights, ‘ Human Rights in Areas Affected by the South Ossetia Conflict, Special Mission to Georgia and Russian Federation,’ 8 September, 2008, paras. 2, 25, 89-92, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1338365&Site=CommDH> (last visited on 17 November, 2013)

³²² *Ibid*; IIFMCG report, Volume II, p. 219

³²³ President Dmitry Medvedev, Statement, Aug. 26, 2008 available at: http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml (last visited on 7 November 2013)

4. Current Situation in South Ossetia

Before the August 2008 conflict in South Ossetia, Georgian government had control over one-third of the territory.³²⁴ As a result of war, approximately 20 000 ethnic Georgians were displaced from the region and 14 000 ethnic Ossetians fled to Russia, however unlike Georgians they were able to return to their homes by the end of August.³²⁵ Moreover, situation in Akhalkgori which is a district not affected by conflict of 1992 and had been under Georgian administration till 2008, currently remains under Russian control, and predominantly Georgian population of the district have limit or no access to their property.³²⁶

After the recognition of the independence and establishment of diplomatic relations, Russia entered into military agreement with South Ossetia providing for establishment of four the Russian military bases across the region.³²⁷ In addition Russia staffs half of local government and donates almost entire budget to South Ossetia, at the same time it is also responsible for maintaining security and the Russian military administers border line with Georgia.³²⁸

At the same time it is quite unclear at this stage if South Ossetia prefers independence, shortly after Russian recognition the head of South Ossetian Government stated that: “Now we are an independent state, but we look forward to uniting with North Ossetia and joining the Russian

³²⁴ International Crisis Group, ‘Georgia’s South Ossetia Conflict: Make Haste Slowly’ Europe Report No. 183, 7 June 2007, Appendix C, p.28, available at: http://www.crisisgroup.org/~media/Files/europe/183_georgia_s_south_ossetia_conflict_make_haste_slowly.ashx (last visited on 17 November 2013)

³²⁵ International Crisis Group, ‘South Ossetia: The Burden of Recognition’, Europe Report No.205, 7 June 2010, p.3 available at: <http://www.crisisgroup.org/~media/Files/europe/205%20South%20Ossetia%20-%20The%20Burden%20of%20Recognition.ashx> (last visited on 17 November 2013)

³²⁶ Ibid at pp.3-4

³²⁷ Russian Military to Stay in Abkhazia and South Ossetia, 49 More years, 10 October 2011, available at: <http://www.eurasianet.org/node/64292> (last visited on 17 November 2013)

³²⁸ ICG, ‘South Ossetia Burden of Recognition’ Europe Report No.205, executive summary.

Federation.”³²⁹ Meanwhile, Russia continues to build a wire fence along the administrative border lines, in order to prevent movement of ethnic Georgian population, and fencing results in moving administrative border line deeper into Georgian-controlled areas.³³⁰

5. Legal Appraisal of the Conflict and Parallels

As outlined above, the secessionist claims of Abkhazia and South Ossetia are no less controversial than that of Kosovo. Clearly, the events occurring in Georgia months after Kosovo’s declaration of independence indicated that the latter is not restricted to the Yugoslav context; moreover restricting the applicability of secession to Kosovo would fundamentally weaken the argument of the remedial secession. Thus, in order to disentangle what happened in Georgia the following three questions need to be asked: what are the similarities between the cases? What are the fundamental differences? And what are the consequences for the law on the remedial secession?

First of all, all three regions had a similar claim to secession originating after the dissolution of Yugoslavia and the Soviet Union.³³¹ All regions faced rise of nationalism in the parent states, resulting in revocation of “autonomous republic” status for Kosovo and “autonomous province status for South Ossetia.”³³² Secondly, in all three cases the representatives allege of a fear of

³²⁹ Ibid at p. 13;

³³⁰ Civil Georgia, Installation of Fences in S. Ossetia Administrative Border, 27 May 2013, available at: <http://www.civil.ge/eng/article.php?id=26117> (last visited on 17 November 2013); EU high Representative Concerned about construction of fences along dividing line in Georgia, 3 October 2013, available at: <http://en.trend.az/regions/scaucasus/georgia/2197038.html> (last visited on 17 November 2013)

³³¹ Vakhtang Vakhtangidze, ‘The Impact of Kosovo: A Precedent for Secession in Georgia?’, in James Summers (ed) *Kosovo: A Precedent?: The Declaration of Independence, the Advisory Opinion, and Implications for Statehood, Self-Determination and Minority Rights*, (Martinus Nijhoff 2011) p.413

³³² See Chapter III, Section 1 Kosovo and Chapter IV Section 3 for South Ossetia

being forcibly united under “mono-ethnic” states allegedly denying their right to self-determination.³³³ Lastly, all exercised control over the territories for years.

Despite the similarities one could identify substantial differences between the cases as well. First of all it concerns the legal status that regions held before the commencement of the conflict. The Yugoslav constitution on 1974 provided for Kosovo’s status as of autonomous province, with the functions similar to that of six republics, including having executive, legislative branches and, certain degree of representation at the federal level.³³⁴ Neither Abkhazia nor South Ossetia was formally sovereign and the Soviet Constitution only recognized fifteen republics and their right to secede.³³⁵ Thus, Kosovo had higher level of self-administration than South Ossetia and Abkhazia. Secondly, while Kosovo Albanians constituted absolute majority, population in Abkhazia was predominantly Georgian (45 %) and in South Ossetia, Ossetians formed 66% of population. As a result of expulsion of ethnic Georgians demographic situation in both regions was forcibly altered.³³⁶

The most crucial difference, existent so far still related to the “gross and systematic” human rights violations. Allegations of Russian federation regarding the Georgian genocide of “south Ossetia” and the similar plan for Abkhazia, has not been thus far substantiated neither by the Independent Fact-finding mission nor any other objective observer involved in conflict

³³³ Unrepresented Nations and Peoples Organization International Conference, ‘Self-Determination in relation to Individual Human Rights, Democracy and Protection of Human Rights’, January 22-23 1993, Comments by Abkhazia, Kosovo and Ossetia, available at: <http://www.unpo.org/downloads/Self-determination%20conference%201993.pdf> (last visited on 17 November 2013)

³³⁴ Momčilo Pavlović, Kosovo Under Autonomy 1974-1990, *Institute for Historical Justice and Reconciliation, Scholars initiative report 2004*, p.16

³³⁵ Constitution of Soviet Union 1977, Article 72, available at: <http://www.constitution.org/cons/ussr77.txt> (last visited on 17 November 2013)

³³⁶ Human Rights Watch, ‘Georgia/Abkhazia: Violations of the Laws of War and Russia’s Role in The Conflict’, Vol.7 No.7, March 1995, pp 35-37

analysis.³³⁷ Quite to the contrary, a number of Security Council resolutions, human rights reports and declarations indicate “ethnic killings” and “ethnic cleanings” conducted against Georgians.³³⁸ Moreover, the remedial secession is seen as the last resort to end oppression. This element would be hard to prove in case of Abkhazia and South Ossetia, considering efforts of Georgian government to negotiate and offer “widest possible autonomous” settlement.

Thus, what we have witnessed in Abkhazia and South Ossetia is the confusing effects and impacts of Kosovo’s alleged remedial secession. The Russian President while referring to international legal documents stated that:

“Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments.”³³⁹

The fact that Russia in its reasoning referred to the Friendly Relations and allegations of oppression and genocide clearly resembles attempt to qualify secessions as legitimate exercise of remedial right. While, International Court of Justice did not provide any guidance on the legal framework of the remedial secession, it left room for states to provide politically motivated legal interpretations.

³³⁷ IIFFMCG report, Volume I, para. 27, available at: http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf (last visited on 17 November 2013); HRW, ‘Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia’, January 2009, pp.71-72

³³⁸ Security Council Resolutions 1036 (1996) and 1065(1996); IIFFMCG report, Volume I, para. 27; UN G.A. Res, *UN Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* : 13 October 2010, A/RES/64/296; Council of Europe Parliamentary Assembly, ‘Report on Conflicts in Transcaucasia’, ADOC7793, 10 April, 1997, para.20; Council of Europe Parliamentary Assembly, Resolution 1633, Consequences of War Between Georgia and Russia, 2008, para.13; Thomas Hammarberg, Council of Europe Commissioner For Human Rights, ‘Human Rights in Areas Affected by the South Ossetia Conflict, Special Mission to Georgia and Russian Federation,’ 8 September, 2008, paras. 89, 53-58

³³⁹ President Dmitry Medvedev, Statement, Aug. 26, 2008 available at: http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml (last visited on 7 November 2013)

Thus, the South Ossetian and Abkhazian examples only weakened the existent grounds for the crystallization of the remedial secession, providing more support for the preposition that the secession falls entirely under political and not the legal scope. However, at the same time, they also proved the necessity of providing authoritative guidance on the matter of unilateral secession, currently being placed somewhere in between political and legal speculations.

CONCLUSION

The aim of the present thesis was to examine and determine the legal value and current status of remedial secession under public international law. In this respect the primary question the thesis intended to answer was: whether the current day developments in public international law support the establishment of a right to remedial secession *lex lata* or *de lege ferenda*?

At the outset, in order to deduct the existence of remedial secession from the law of self-determination, chapter I explored the historical development of the principle. Initially emerging from the auspices of the political philosophy, the principle of self-determination managed to merge into the fundamental instruments of public international law. At the second, stage of development self-determination formed the basic ground for the plea of colonized people to achieve “speedy and unconditional end of colonialism.”³⁴⁰ Much of the controversy, however, surrounds post-colonial development of self-determination. The identical texts of the ICCPR and the ICESCR regarding the self-determination suggest that the idea of the right could not have been limited to that of colonialism and as subsequent analysis indicated; the internal aspect or the right to the representative government is inferred from the human rights covenants, and subsequent practice.³⁴¹ Nevertheless, at its latest stage of development the principle of self-determination was alleged to engage external element, which forms the basis for the remedial secession.

In order to assess whether the remedial secession finds its basis in the alleged external aspect of the law on self-determination, the systematic approach towards the sources of international law was adopted, implying interpretation of existent treaty law followed by examination of

³⁴⁰ G.A. Res. 1514, U.N. GAOR, 15th Sess., U.N. Doc. A/L.323 (1960), preamble;

³⁴¹ Hurst Hannum, ‘Rethinking of Self-determination’, *Virginia Journal of International Law*, Vol. 34, No. 1, 1993, pp.31-33; Thomas M. Franck, ‘The Emerging Right to Democratic Governance,’ *86 American Journal of International Law* 46 1992, pp.78-82

grounds for customary rule of the remedial secession. Neither the UN Charter nor the Human Rights Covenants make any direct or indirect referral to the right of secession. Even though, the external aspect of self-determination greatly depends on the interpretation and definition of the “people”, common article 1 and subsequent practice of Human Rights Committee provide little if any guidance on the matter. Thus, it was concluded that the existent treaty law could not legitimately be argued to include right to remedial secession, even though referral to *travaux preparatoire* proved that the issue of secession never ceased to be important while elaborating self-determination.³⁴²

Even though, the treaty grounds of the remedial secession seemed fragile, further section was devoted to observing the state practice and *opinion juris* in order to locate grounds for customary nature of the principle. In this respect the court decisions identified suggested an interesting turn in discussion, while the Canadian supreme court acknowledges that in response to denial of “internal self-determination” the right to “secession” might arise, it failed to identify whether such principle “reflects an established international law standard.”³⁴³ Thus, the court decisions, even though acknowledging the “remedial secession”, the mere indirect referral would not be enough to prove the existence of practice.

The subjective element of custom was assessed based on the Friendly Relations Declaration, due to its unanimous adoption certain scholars even regard it example of an “instant custom.”³⁴⁴ The analysis of *travaux preparatoires* suggest that while states did not *per se* agree on the establishment of the right to remedial secession within the scope of Principle V paragraph 7 of

³⁴² See Chapter II Section 1.2

³⁴³ Supreme Court of Canada, *Reference re Secession of Quebec*, 1998, 2 S.C.R.217, paras.126-127.

³⁴⁴ Christine Griffioen, *Self-determination as a Human Right: The Emergency Exist of remedial Secession*, (Utrecht : Science Shop of Law, Economics and Governance, Utrecht University, 2010),p. 104; Frederic Kirgis, ‘The Degrees of Self-Determination in the United Nations Era’, 88 *American Journal of International Law*, 304, 1994 p. 306

the declaration, the statements suggest that the notion of the territorial integrity is not an absolute.³⁴⁵ The latter, is the strongest argumentative basis for the evolvement of the remedial secession.

Thus, the status of the remedial secession before proceedings taking place in Kosovo could only be assessed as “*lex ferenda*” and not yet formulated as the part of “hard law.” However, the unilateral declaration of Kosovo sparked renewed discussions about its precedential value and the possibility of crystallizing the formulation of the law on remedial secession. The state submissions in front of the ICJ within the scope of the advisory proceedings provided interesting substance to the development of the law on remedial secession. Indeed, a number of states expressed their unequivocal acknowledgement of an established right to remedial secession. The reasoning was commonly grounded on a *contrario* reading of the Friendly relations Declaration, referral to international human rights covenants, *Aaland Island’s* and *Secession of Quebec* cases.³⁴⁶ However, at the same time the similar number of states opposed the existence of remedial secession, basing their view on traditional primacy of the principle of “territorial integrity” and pointing towards absence of strong evidentiary basis.³⁴⁷ Since, the International Court of Justice refused to shed more light on the matter, it could be concluded that strong convictions of number of states, even though important for initiating a change within customary international law is not sufficient to establish one.

Regardless, of its legal precedential value the case of Kosovo undeniably had an impact on Abkhazian and South Ossetian claims. Within months after the western world recognized the independence of Kosovo, military conflict in Georgia commenced as a result of which Russia

³⁴⁵ See Chapter II, Section 2.2

³⁴⁶ See Chapter III, Section 3.1

³⁴⁷ See Chapter III, Section 3.2

recognized two regions citing exactly similar grounds as those referred in Kosovo. Detailed analysis of conflicts in the region suggests that the parallels could be drawn between the cases, however, the number and substance of differences between them outweigh the similarities. Even though Russia made pledge of the remedial secession for South Ossetia and Abkhazia, the view is not shared by the overwhelming majority of the international community, however the disapproval is generally based on the preservation of territorial integrity of Georgia and rejection of Georgian “genocide” or gross human rights violations” of Abkhaz and South Ossetians.³⁴⁸ Thus, the impact Kosovo had on two Georgian regions is that of confusion, demonstrating that attitudes towards the legality of remedial secession are still undergoing a dynamic process. The Russian position towards Abkhaz and South-Ossetian, in particular, may be taken as an indication that States’ views on remedial secession are not fixed but subject to change. In the absence of any rigid definitions of the circumstances that could involve secession as only measure of last resort, states are left free to expand legal interpretations and qualifications according to their political will. The latter is clearly evidenced by the Russian behavior with respect to Abkhazia and South Ossetia.

As a result, the case studies of Abkhazia and South Ossetia could be assumed to diminish the legal value of the remedial secession, by clearly bringing political element into the plate, returns the remedial secession to the ambit of international politics towards which international law is absolutely neutral. However, by the same token it could be argued that the cases also demonstrate the ultimate need to regulate the secession and fasten the process of providing legal clearance on the matter that after Kosovo has long passed the scope of neutrality.

³⁴⁸ Chapter IV, Section 5

Thus, as it stands now, the remedial secession does not form part of customary international law; it is however at the stage of development and can no longer be ignored from the public international law perspective. The only feasible outcome in the future will be to establish rigid rules for the application of the principle of the remedial secession, in response to gross human right abuses and suffering of the “people” deprived right to internal self-determination. Otherwise, the current ambiguity will only create incentives to minorities throughout the world to seek the full independence, speculating on the law of remedial secession.

BOOKS

Alex J. Bellamy, *Kosovo and International Society*, Palgrave MacMillan, 2000.

Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations For International Law*, Oxford University Press 2007.

Anne, F. Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned*, The Hague, Kluwer International Law, 2000

Anthony A. D'Amato, *the Concept of Custom in International Law*, London: Cornell University Press, 1971

Antonio Cassese, *International Law*, 2nd edition, Oxford University Press, Oxford, UK, 2005.

Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, Cambridge University Press 1999.

Antonio Cassese, *U.N law/ Fundamental Rights: two topics in International Law* 137, Martinus Nijhoff Publishers 1979.

B. D. Lepard, *Customary International Law. A new Theory with Practical Applications*, Cambridge: Cambridge University Press, 2010.

Bruno Coppieters and Robert Legvold (eds.), *Statehood and Security: Georgia after the Rose Revolution*, London: The MIT Press, 2005.

Bruno Coppieters, David Darchiashvili and Natella Akaba (eds), *Federal Practice: Exploring Alternatives for Georgia and Abkhazia*, VUB University Press, Brussels, 2000.

Christian Tomuschat, *Modern Law of Self-determination*, Martinus Nijhoff Publishers, 1993.

David Riach, *Statehood and the law of self-determination*, Kluwer law International 2002.

Ian Brownlie, *Principles of Public International Law*, 4th Ed. Clarendon Press 1990.

Ian Brownlie, *Principles of Public International Law*, 7th Ed. Oxford University Press, 2008.

James Crawford, *The Creation of States in International law*, Clarendon Press, Oxford, 2005.

James Summers, *Kosovo: A Precedent?: The Declaration of Independence, the Advisory Opinion, and Implications for Statehood, Self-Determination and Minority Rights*, Martinus Nijhoff 2011.

James Summers, *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations*, MartinusNijhoff Publishers: 2007.

Karen Knoop, *Diversity and Self-determination in International Law*, Cambridge Studies in International and Comparative Law, 2008.

Lee C. Buchheit, *Secession: The Legitimacy of Self-determination*, Yale University Press, 1978.

M.J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht 1987.

Malcolm N. Shaw, *International Law*, Cambridge University Press 6th ed., 2008.

Malcolm D. Evans, *International Law*, 2nd ed., Oxford: Oxford University Press, 2006.

Mark Weller *Universal Minority rights, A commentary on the Jurisprudence of International Courts and Treat Bodies*, Oxford University Press 2007.

Martin Dixon, *Textbook on International Law*, 6th ed. Oxford: Oxford University Press, 2007.

Michla Pommerance, *Self-Determination in Law and Practice, The New Doctrine in the United Nations*, The Hague: Martinus Nijhoff Publishers 1982.

Miranda Vickers, *The Albanians: A Modern History*, I.B.Tauris, 1995.

Noel Malcolm, *Kosovo: A Short History*, London: MacMillan, 1998.

Philip Alston, *People's Right*, Oxford University Press, 2001.

Robert McCorquodale, *Self-determination in International law*, Ashgate/Dartmouth Publishing Company Ltd, 2000.

Ronald Grigor Suny, *The making of Georgian Nation*, 2nd ed, Indiana University Press, 1994.

Rosalyn Higgins, *Problems and Process, International law and How we use it*, Oxford University Press 1994.

Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford University Press 1963.

Sabrina P. Ramet, *Nationalism and Federalism in Yugoslavia, 1962-1991*, Bloomington: Indiana University Press, 1992.

Simone F. van den Driest, *Remedial Secession: A right to External Self-Determination as a Remedy to Serious Injustices*, School of Human Rights Research, Intersentia, April 9 2013.

Stuart J. Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War*, Cornell University Press, 2001.

Tamaz Diasamidze, Nana Chkoidze-Japaridze (eds), *Regional conflicts in Georgia - the Autonomous Oblast of South Ossetia, the Autonomous SS Republic of Abkhazia (1989-2002): the collection of political-legal acts*, Tbilisi Pub. House "GCI", 2003
James Green and Christopher Waters (ed), *Conflict in the Caucasus: Implications for International Legal Order*, London, Palgrave MacMillan, 2010.

Theodor Meron, *The Humanization of International Law*, Leiden/Boston MartinusNijhoff Publishers 2006.

Tim Judah, *Kosovo: War and Revenge*, New Haven: Yale University Press, 2000.

Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal*, Kluwer Law International, the Hague, The Netherlands, 2001.

U. O. Umozurike, *Self-Determination in International Law*, Hamden CT: Archon Books 1972.
Yoram Dinstein, *War Aggression and Self-Defence*, 4th ed. (Cambridge University Press, 2005),

JOURNAL ARTICLES

Thomas M. Franck, 'The Emerging Right to Democratic Governance,' *86 American Journal of International Law* 46 1992

Allen Buchanan, 'Theories of Secession', *Philosophy and Public Affairs* 26 no.1, 1997.

Bartram S Brown 'Human Rights, Sovereignty, and the Final Status of Kosovo' (2005) 80 *Chicago-Kent Law Review* 235.

Bruno Coppieters, 'The Georgian-Abkhaz Conflict', *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2004.

Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects,' *European Journal of International Law* 10, 1999.

C. Ryngaert and C. Griffioen, 'The relevance of the right to self-determination in Kosovo matter: in Partlian response to Agora Papaers,' (2009) *Chinese Journal of International Law*, Vol. 8, Issue 3, pp. 573-587, 2009 .

Christine Griffioen, 'Self-Determination as a Human right: The Emergency Exit of remedial Secession' *Science Shop of Law, Economics and Governance*, Utrecht University, August 2010.

Christine Griffioen, 'Self-determination as a Human Right: The Emergency Exist of remedial Secession' *Utrecht : Science Shop of Law, Economics and Governance, Utrecht University*, 2010.

Evan M Brewer, 'To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion', *Vanderbilt Journal of Transnational Law*, January 2012, Vol. 45 Issue 1.

Frederic Kirgis, 'The Degrees of Self-Determination in the United Nations Era', 88 *American Journal of International Law*, 304, 1994.

Frederic Kirgis, 'The Degrees of Self-Determination in the United Nations Era', 88 *American Journal of International Law*, 304, 1994.

Gregory H. Fox, 'The right to Political participation in International law', 17 *Yale Journal of International Law* 539, 1992.

H. Quane, 'The United Nations and the Evolving Right to Self-Determination', *International and Comparative Law Quarterly*, Vol. 47 July 1998.

Heike Krieger 'The Kosovo Conflict and International Law: An analytical Documentation 1974-1999' (2001) *Cambridge International Document Series 11*, xxxi.

Helen Krag and Lars Funk, *The North Caucasus, Minorities at a Crossroads*, (Minority Rights Group International London, November 1994 available at: <http://www.minorityrights.org/4055/reports/the-north-caucasus-minorities-at-a-crossroads.html>

Hurst Hannum, 'Rethinking of Self-determination', *Virginia Journal of International Law*, Vol. 34, No. 1, 1993

Hurst Hannum, 'Rethinking of Self-determination', *Virginia Journal of International Law*, Vol. 34, No. 1, 1993.

Hurst Hannum, 'The Advisory opinion on Kosovo: An Opportunity Lost or a Poisoned Chalice Refused?', 24 *Leiden Journal of International Law* 155, 2011.

Ioanna Cismas, 'Secession in Theory and Practise: The case of Kosovo and Beyond', *Goettingen Journal of International Law* 2(2010) 2

James Castellino, 'David Raic: Statehood and the Law of Self-Determination', *European Journal of International Law*, Vol. 16, 2005.

Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', (2010) *St Anthony's International Review* 37.

Marc Weller 'The Crisis in Kosovo 1989-1999' (1999) *Centre of International Studies University of Cambridge International Documents and Analysis*

Marietta König, 'The Georgian-South Ossetian Conflict', *OSCE Yearbook 2004*, Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), Baden-Baden 2005.

Maurice H. Mendelson, 'The Formation of Customary International Law' 272 *Collected Courses of the Hague Academy of International Law (Recueil Des Cours)* 155, 1998,

N.D. White, 'The Legality of Bombing in the Name of Humanity', *Journal of Conflict and Security Law* 5, 2000.

Noelle M. Shanahan Cutts, 'Enemies through the Gates: Russian Violations of International Law in The Georgia/Abkhaz Conflict', *40 Case Western Reserve Journal of International Law* 281, 2007-2008.

Peter Hilpold : 'The Right to Self-determination: Approaching an Elusive Concept through a Historic Iconography' *Austrian review of International and European law* 23-48, Vol. 11, No., January 2006

Pius L. Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law', (2002), *25 Loy. L.A. Int'l & Comp. L. Rev.* 63

Susan Stewart, 'The Role of the United Nations in the Georgian-Abkhazian Conflict', *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 2/2003.

T. Burry, 'Kosovo Opinion and Secession: The Sounds of Silence and Missing Links', *11 German Law Journal* 881, 2010.

Thomas Goltz, 'Letter from Eurasia: The Hidden Russian Hand,' *Foreign Policy*, no. 92, Fall 1993.

Thomas M. Franck, 'The Emerging Right to Democratic Governance', *86 American Journal of International Law* 46 1992

Thomas M. Franck, 'Lessons of Kosovo', *American Journal of International Law* 93, 1999.

JURISPRUDENCE OF COURTS

Aaland Islands Question, *the Report by Commission of Raporteurs*, League of Nations Council Document B7 21/68/ 106, 1920 available at: <http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf>

Written Submissions of States to the International Court of Justice within the Kosovo Proceedings:

Available: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>

Human Rights Committee, *J.G. A. Diergaardt v. Namibia*, Communication No. 760/1997, CCPR/C/69/D/760/1997.

Human Rights Committee, *ApiranaMahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000)

International Court of Justice, *Advisory Opinion No. 53, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971.

International Court of Justice, *Advisory Opinion on Western Sahara*, 16 October 1975

International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ICJ reports 1986,

International Court of Justice, *North Sea Continental Shelf (Federal republic of Germany /Denmark; federal republic of Germany v. Netherlands)*, Judgment, ICJ reports 1969

International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ reports 1986.

International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010

International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge A.A Cançado Trindade.

International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge Yusuf.

International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, Separate Opinion of Judge Koroma

Supreme Court of Canada, Reference re Secession of Quebec, 2 S.C.R. 217, 20 August 1998.

INTERNATIONAL AND REGIONAL CONVENTIONS

African Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3, adopted 27 June, 1981.

Charter of the United Nations, 24 October 1945, 1 UNTS XVI

Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

GENERAL ASSEMBLY AND SECURITY COUNCIL RESOLUTIONS

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970)

Declaration on the Granting of Independence to Colonial Countries and Peoples G.A. Res . 1514, U.N. GAOR, 15th Sess., Supp.No.16 at 66,67, U.N. Doc.A/L.323 (1960)

Principles which should guide members in determining whether or nor an obligation exists to transmit the information called for under Article 73e of the Charter, G.A. res. 1541, U.N. GAOR, 15th Sess., Sup. No 16 at 29, U.N. Doc. A/4651 (1960)

SC Res. 1199, UN Doc. S/RES/1199 (23 September 1998)

SC Res. 1203, UN Doc. S/RES/1203 (24 October 1998)

SC Res. 1244, UN Doc. S/Res/1244 (10 June 1999).

Sec. Council Res. 858, 24 August 1993, S/RES/858

Sec. Council Res.876, 19 October 1993, para.2, S/RES/876 (1993)

Sec. Council Res. 934, 30 June 1994, S/RES/934 (1994);

Security Council Res. 1160, UN Doc. S/RES/1160 (31 March 1998)

Security Council Resolutions 1036 (1996)

UN Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia , UN G.A. Res., 13 October 2010, A/RES/64/296

UN G.A. Resolution A/RES/63/3, 8 October 2008

REPORTS AND COMMENTS OF INTERNATIONAL ORGANIZATIONS

An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, available : http://www.unrol.org/files/A_47_277.pdf

Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, (73, U.N. Doc. E/CN.4/sub/2/404/Rev.1) 1981

Council of Europe Parliamentary Assembly, 'Report on Conflicts in Transcaucasia', ADOC7793, 10 April, 1997

Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27) : 04/08/1994, *CCPR/C/21/Rev.1/Add.5*

Human Rights Watch, Yugoslavia: Human Rights Abuses in Kosovo 1990-1992, 1 October, 1992 available at: <http://www.hrw.org/legacy/reports/1992/yugoslavia/>

Human Rights Watch, 'Failure to protect: Anti-Minority Violence in Kosovo', March 2004' July 2004.

Human Rights Watch, 'Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in The Conflict', Vol.7 No.7, March 1995, available at: <http://www.hrw.org/sites/default/files/reports/georgia953.pdf>

Human Rights Watch, 'Up In Flames: Humanitarian Law Violations and Civilian Victims in the conflict over South Ossetia' January 2009

Independent International Fact-Finding Mission on the Conflict in Georgia,(IIFFMCG) September 2009, volumes I and II available: <http://www.ceiig.ch/Report.html>

International Crisis Group, 'Abkhazia Today', Europe Report No. 176, 15 September 2005, available at: http://www.crisisgroup.org/~media/Files/europe/176_abkhazia_today.ashx

International Crisis Group, 'Abkhazia: Ways Forward', *Europe Report No. 179*, 18 Jan. 2007 available: http://www.crisisgroup.org/~media/files/europe/179_abkhazia_ways_forward.ashx

International Crisis Group, 'Abkhazia: Deepening Dependence', Europe Report 202, 26 February 2010, available at: http://www.crisisgroup.org/~media/Files/europe/202_abkhazia_deepening_dependence.ashx

International Crisis Group, 'Abkhazia: The long Road to Reconciliation', Europe Report No.224, 10 April 2013, available at:

<http://www.crisisgroup.org/~media/Files/europe/caucasus/georgia/224-abkhazia-the-long-road-to-reconciliation.ashx>

International Crisis Group: 'Georgia avoiding war in South Ossetia', *Europe Report N 159*, 26 November, 2004, available at: <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan019224.pdf>

International Crisis Group, 'Georgia's South Ossetia Conflict: Make Haste Slowly' *Europe Report No. 183*, 7 June 2007, available at: http://www.crisisgroup.org/~media/Files/europe/183_georgia_s_south_ossetia_conflict_make_haste_slowly.ashx

International Crisis Group, 'South Ossetia: The Burden of Recognition', *Europe Report No.205*, 7 June 2010, available at: <http://www.crisisgroup.org/~media/Files/europe/205%20South%20Ossetia%20-%20The%20Burden%20of%20Recognition.ashx>

International Law Association, Committee on Formation of Customary International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, (London Conference, 2000)

Kai Eide, Report on the Situation in Kosovo, UN Doc. S/2004/932, 30 November 2004

Report of International law commission (ILC) : Ways and means for making the evidence of customary international law readily available, yearbook of the ILC, Volume 2, 1950

Report of the International Committee of Rapporteurs, 16 April, 1921, LN Council Document B7/2I/68/106 [VII],

Report of the Special Envoy of the Secretary-general on Kosovo's future Status, S/2007/167, 26 March 2007

Report of a UNPO Mission to Abkhazia, Georgia and Northern Caucasus, November 1992, available at: <http://www.unpo.org/downloads/AbkGeo1992Report.pdf>

Security Council, 'Report of the Secretary-General on the situation in Abkhazia, Georgia', 3 October 2008, S/2008/631

Thomas Hammarberg, Council of Europe Commissioner For Human Rights, 'Human Rights in Areas Affected by the South Ossetia Conflict, Special Mission to Georgia and Russian Federation,' 8 September, 2008, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1338365&Site=CommDH>

UNESCO International Meeting of Experts on Further study of the rights of peoples, 22 February, 1990, available: <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

United Nations Mission in Georgia (UNOMIG), Background information, available at: <http://www.un.org/en/peacekeeping/missions/past/unomig/background.html>

Unrepresented Nations and Peoples Organization International Conference, 'Self-Determination in relation to Individual Human Rights, Democracy and Protection of Human Rights', January 22-23 1993, Comments by Abkhazia, Kosovo and Ossetia, available at: <http://www.unpo.org/downloads/Self-determination%20conference%201993.pdf>

OTHER SOURCES

Address by Mikheil Saakashvili to the Council of Europe Parliamentary Assembly, 24-28 January 2005, available at: <http://www.coe.int/T/E/Com/Files/PA-Sessions/janv-2005/saakashvili.pdf>

Civil Georgia, 'Saakashvili Speaks about situation in Kodori', 28 July 2006, available at: <http://www.civil.ge/eng/article.php?id=13198>

Civil Georgia, 'Signs of status quo change in S. Ossetia', 14 November, 2006, available at: <http://www.civil.ge/eng/article.php?id=14082>

Civil Georgia, 'MIA: Five Policeman Injured in S. Ossetia Blast', 1 August, 2008 available at: [http://www.civil.ge/eng/article.php?id=18868&search=%20\(accessed%20November%202012,%202008\)](http://www.civil.ge/eng/article.php?id=18868&search=%20(accessed%20November%202012,%202008))

Civil Georgia, 'Instalation of Fences in S. Ossetia Administrative Border' 27 May 2013, available at: <http://www.civil.ge/eng/article.php?id=26117>

Constitution of Soviet Union 1977, Article 72, available at: <http://www.constitution.org/cons/ussr77.txt>

EU high Representative Concerned about construction of fences along dividing line in Georgia, 3 October 2013, available at: <http://en.trend.az/regions/scaucasus/georgia/2197038.html>

Full text of Kosovo Declaration of Independence, 17 February, 2008 available at: <http://news.bbc.co.uk/2/hi/europe/7249677.stm>

Georgian MFA: Moscow Tries to Legalize 'Ethnic Cleansing' in Abkhazia', Civil Georgia, 18 July 2008, available at: <http://www.civil.ge/eng/article.php?id=18813&search=peacekeeping;%20accessed%20on%2018.08.2009>

Kosovo Breakaway Illegal, the Guardian, 15 February, 2008, available at: <http://www.theguardian.com/world/2008/feb/15/russia.kosovo>

Peter Roudik, 'Russian Federation: Legal Aspects of War in Georgia', August 2008, available at: <http://www.loc.gov/law/help/russian-georgia-war.php>

President Dmitry Medvedev, Statement, August 26, 2008 available at: http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml

Resolution of the Georgian parliament on "Peacekeeping Forces Stationed in the Conflict Zones", 17 July 2006, available at: <http://www.civil.ge/eng/article.php?id=13085>

Russian Military to Stay in Abkhazia and South Ossetia, 49 More years, 10 October 2011, available at: <http://www.eurasianet.org/node/64292>

Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, 'The Situation in and Around Kosovo', 12 April 1999, available at: <http://www.nato.int/docu/pr/1999/p99-051e.htm>

Statement of the Ministry of Foreign Affairs of Georgia, 8 July, 2008, available at: http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=6975

Tbilisi Condemns Russian Railway Troops in Abkhazia', Civil Georgia, 31 May, 2008, available at: <http://www.civil.ge/eng/article.php?id=18445&search=%22Tbilisi%20Condemns%20Russian%20Railway%2>

The Memorandum on Measures of Providing Safety and Strengthening of Mutual Confidence, available at: http://sojcc.ru/eng_news/271.html

The text of Six Point Agreement available at: <http://www.ambafrance-us.org/spip.php?article1101>